



Date and Time: Thursday, November 9, 2023 4:20:00 PM CST

Job Number: 210088808

## Documents (100)

### 1. [United States v. International Boxing Club, 348 U.S. 236](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

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### 2. [INTERNATIONAL BOXING CLUB OF NEW YORK, INC. v. UNITED STATES, 358 U.S. 242](#)

**Client/Matter:** -None-

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**Search Type:** Natural Language

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### 3. [UNITED STATES v. RCA, 358 U.S. 334](#)

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### 4. [Minneapolis & S. L. R. Co. v. United States, 361 U.S. 173](#)

**Client/Matter:** -None-

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### 5. [United States v. Parke, 362 U.S. 29](#)

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**Search Type:** Natural Language

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6. [Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458](#)

**Client/Matter:** -None-

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7. [International Brotherhood of Teamsters, etc. v. Oliver, 362 U.S. 605](#)

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8. [United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316](#)

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9. [California v. Federal Power Comm'n, 369 U.S. 482](#)

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10. [United States v. Loew's, 371 U.S. 38](#)

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<b>11. <u>White Motor Co. v. United States, 372 U.S. 253</u></b>	
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Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court
<b>12. <u>United States v. Philadelphia Nat'l Bank, 374 U.S. 321</u></b>	
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Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court
<b>13. <u>United States v. First Nat'l Bank &amp; Trust Co., 376 U.S. 665</u></b>	
<b>Client/Matter:</b> -None-	
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<b>14. <u>United States v. Continental Can Co., 378 U.S. 441</u></b>	
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<b>15. <u>United States v. Boston &amp; M. R.R., 380 U.S. 157</u></b>	
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16. [Columbia Artists Management v. United States, 381 U.S. 348](#)

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17. [Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311](#)

**Client/Matter:** -None-

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18. [FTC v. Borden Co., 383 U.S. 637](#)

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19. [United States v. General Motors Corp., 384 U.S. 127](#)

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20. [United States v. Von's Grocery Co., 384 U.S. 270](#)

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21. [FTC v. Brown Shoe Co., 384 U.S. 316](#)



**Client/Matter:** -None-

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22. [FTC v. Dean Foods Co., 384 U.S. 597](#)

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23. [Denver & R. G. W. R. Co. v. United States, 387 U.S. 485](#)

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24. [Kaplan v. Lehman Bros., 389 U.S. 954](#)

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25. [United States v. Third Nat'l Bank, 390 U.S. 171](#)

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26. [Perma Life Mufflers v. International Parts Corp., 392 U.S. 134](#)

**Client/Matter:** -None-

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27. [Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481](#)

**Client/Matter:** -None-

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28. [Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100](#)

**Client/Matter:** -None-

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29. [Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321](#)

**Client/Matter:** -None-

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30. [FTC v. Sperry & Hutchinson Co., 405 U.S. 233](#)

**Client/Matter:** -None-

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31. [United States v. Topco Assocs., 405 U.S. 596](#)

**Client/Matter:** -None-

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32. <a href="#"><u>Flood v. Kuhn, 407 U.S. 258</u></a>	
<b>Client/Matter:</b> -None-	
<b>Search Terms:</b> "antitrust law"	
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33. <a href="#"><u>Tidewater Oil Co. v. United States, 409 U.S. 151</u></a>	
<b>Client/Matter:</b> -None-	
<b>Search Terms:</b> "antitrust law"	
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34. <a href="#"><u>United States v. Glaxo Group, Ltd., 410 U.S. 52</u></a>	
<b>Client/Matter:</b> -None-	
<b>Search Terms:</b> "antitrust law"	
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35. <a href="#"><u>United States v. Falstaff Brewing Corp., 410 U.S. 526</u></a>	
<b>Client/Matter:</b> -None-	
<b>Search Terms:</b> "antitrust law"	
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36. <a href="#"><u>Missouri Portland Cement Co. v. Cargill, Inc., 418 U.S. 919</u></a>	
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37. [GULF OIL CORP. v. COPP](#), 419 U.S. 186

**Client/Matter:** -None-

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38. [Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100](#), 421 U.S. 616

**Client/Matter:** -None-

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39. [United States v. Citizens & Southern Nat'l Bank](#), 422 U.S. 86

**Client/Matter:** -None-

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40. [Cantor v. Detroit Edison Co.](#), 428 U.S. 579

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41. [United States Steel Corp. v. Fortner Enterprises, Inc.](#), 429 U.S. 610

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42. [Cont'l T.V. v. GTE Sylvania](#), 433 U.S. 36



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43. [Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623](#)

**Client/Matter:** -None-

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44. [Pfizer, Inc. v. Gov't of India, 434 U.S. 308](#)

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45. [Lafayette v. La. Power & Light Co., 435 U.S. 389](#)

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46. [National Soc. of Professional Engineers v. United States, 435 U.S. 679](#)

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47. [St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531](#)

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**Search Type:** Natural Language

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48. [United States v. United States Gypsum Co., 438 U.S. 422](#)

**Client/Matter:** -None-

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49. [Great Atlantic & Pacific Tea Co. v. Federal Trade Comm'n, 440 U.S. 69](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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50. [Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205](#)

**Client/Matter:** -None-

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51. [Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1](#)

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52. [Reiter v. Sonotone Corp., 442 U.S. 330](#)

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53. <a href="#"><u>J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557</u></a>	
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54. <a href="#"><u>H. A. Artists &amp; Assocs. v. Actors' Equity Ass'n, 451 U.S. 704</u></a>	
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55. <a href="#"><u>Tex. Indus. v. Radcliff Materials, 451 U.S. 630</u></a>	
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56. <a href="#"><u>Nat'l Gerimedical Hosp. &amp; Gerontology Ctr. v. Blue Cross, 452 U.S. 378</u></a>	
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57. <a href="#"><u>Am. Soc'y of Mech. Eng'Rs v. Hydrolevel Corp., 456 U.S. 556</u></a>	
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58. [Ariz. v. Maricopa County Medical Soc., 457 U.S. 332](#)

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59. [Blue Shield of Va. v. McCready, 457 U.S. 465](#)

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60. [Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119](#)

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61. [Associated General Contractors v. Cal. State Council of Carpenters, 459 U.S. 519](#)

**Client/Matter:** -None-

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62. [Ashley v. Jackson, 464 U.S. 900](#)

**Client/Matter:** -None-

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63. [Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2](#)



**Client/Matter:** -None-

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64. [Hoover v. Ronwin, 466 U.S. 558](#)

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65. [Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752](#)

**Client/Matter:** -None-

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66. [National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85](#)

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Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

67. [Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373](#)

**Client/Matter:** -None-

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Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

68. [Hallie v. Eau Claire, 471 U.S. 34](#)

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69. [Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48](#)

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70. [Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284](#)

**Client/Matter:** -None-

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Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

71. [Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585](#)

**Client/Matter:** -None-

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72. [Data General Corp. v. Digidyne Corp., 473 U.S. 908](#)

**Client/Matter:** -None-

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Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

73. [Sedima v. Imrex Co., 473 U.S. 479](#)

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<b>74. <a href="#">Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614</a></b>	
<b>Client/Matter:</b> -None-	
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Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court
<b>75. <a href="#">Fisher v. Berkeley, 475 U.S. 260</a></b>	
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Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court
<b>76. <a href="#">Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574</a></b>	
<b>Client/Matter:</b> -None-	
<b>Search Terms:</b> "antitrust law"	
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Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court
<b>77. <a href="#">FTC v. Indiana Federation of Dentists, 476 U.S. 447</a></b>	
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Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court
<b>78. <a href="#">Anderson v. Liberty Lobby, Inc., 477 U.S. 242</a></b>	
<b>Client/Matter:</b> -None-	
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79. [Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104](#)

**Client/Matter:** -None-

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80. [324 Liquor Corp. v. Duffy, 479 U.S. 335](#)

**Client/Matter:** -None-

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81. [Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717](#)

**Client/Matter:** -None-

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82. [Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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83. [Christianson v. Colt Indus. Operating Corp., 486 U.S. 800](#)

**Client/Matter:** -None-

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**Search Type:** Natural Language

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84. [California v. ARC America Corp., 490 U.S. 93](#)



**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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85. [Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257](#)

**Client/Matter:** -None-

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86. [California v. American Stores Co., 492 U.S. 1301](#)

**Client/Matter:** -None-

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87. [FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411](#)

**Client/Matter:** -None-

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88. [Tafflin v. Levitt, 493 U.S. 455](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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89. [Cal. v. Am. Stores Co., 495 U.S. 271](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"



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90. [Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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91. [Texaco, Inc. v. Hasbrouck, 496 U.S. 543](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

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Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

92. [Kansas v. Utilicorp United, Inc., 497 U.S. 199](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

**Search Type:** Natural Language

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Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

93. [Norfolk & W. R. Co. v. Am. Train Dispatchers' Ass'n, 499 U.S. 117](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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94. [City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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<b>95. <i>Summit Health v. Pinhas</i>, 500 U.S. 322</b>	
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Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court
<b>96. <i>Eastman Kodak Co. v. Image Tech. Servs.</i>, 504 U.S. 451</b>	
<b>Client/Matter:</b> -None-	
<b>Search Terms:</b> "antitrust law"	
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Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court
<b>97. <i>FTC v. Ticor Title Ins. Co.</i>, 504 U.S. 621</b>	
<b>Client/Matter:</b> -None-	
<b>Search Terms:</b> "antitrust law"	
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<b>Content Type</b>	<b>Narrowed by</b>
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court
<b>98. <i>Spectrum Sports v. McQuillan</i>, 506 U.S. 447</b>	
<b>Client/Matter:</b> -None-	
<b>Search Terms:</b> "antitrust law"	
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<b>99. <i>Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.</i>, 508 U.S. 49</b>	
<b>Client/Matter:</b> -None-	
<b>Search Terms:</b> "antitrust law"	
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Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

100. [Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209](#)

**Client/Matter:** -None-

**Search Terms:** "antitrust law"

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Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas &

Topics: Antitrust & Trade Law; Court: Supreme Court





## **United States v. International Boxing Club**

Supreme Court of the United States

November 10, 1954, Argued ; January 31, 1955, Decided

No. 53

**Reporter**

348 U.S. 236 \*; 75 S. Ct. 259 \*\*; 99 L. Ed. 290 \*\*\*; 1955 U.S. LEXIS 1544 \*\*\*\*; 1955 Trade Cas. (CCH) P67,941

UNITED STATES v. INTERNATIONAL BOXING CLUB OF NEW YORK, INC. ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

**Disposition:** Reversed.

## **Core Terms**

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contests, Baseball, boxing, promoters, championship, commerce, rights, exhibition, television, motion picture, exemption, sport, interstate, negotiate, boxers, radio, heavyweight, broadcast, bout, anti trust law, Sherman Act, Sherman Law, allegations, enterprises, arrange, fight, radio and television, exclusive right, sale of tickets, stare decisis

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

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

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

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

See [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > Regulated Industries > Sports > Baseball

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

### **HN3** [down] Sports, Baseball

A boxing match, like the showing of a motion picture, or the performance of a vaudeville act, or the performance of a legitimate stage attraction, is of course a local affair. But that fact alone does not bar application of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), to a business based on the promotion of such matches, if the business is itself engaged in interstate commerce or if the business imposes illegal restraints on interstate commerce.

Antitrust & Trade Law > Regulated Industries > Sports > Baseball

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

### **HN4** [down] Sports, Baseball

Businesses are not exempted from the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), merely because of the circumstance that they are also based on the performance of local exhibitions.

## **Lawyers' Edition Display**

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### **Summary**

The government instituted a civil anti-trust action against the defendants, who were engaged in the business of promoting professional championship boxing contests on a multistate basis. The complaint alleged that over 25 per cent of the revenue from championship boxing was derived from interstate operations through the sale of radio, television, and motion picture rights. The District Court dismissed the complaint on the authority of [Federal Baseball Club v. National League \(1922\) 259 US 200, 66 L ed 898, 42 S Ct 465, 26 ALR 357](#), followed in [Toolson v. New York Yankees, Inc. \(1953\) 346 US 356, 98 L ed 64, 74 S Ct 78](#), which held that the business of professional baseball is not interstate trade or commerce within the scope of the Sherman Anti-trust Act.

The Supreme Court reversed by a six-to-two decision. In an opinion by Warren, Ch. J., the decision was rested on the ground that defendants' business constituted interstate commerce within the meaning of the Sherman Act, and that the cases cited above were limited to the business of baseball.

Burton and Reed, JJ., joined the opinion of the Court, retaining the views expressed in their dissent in the Toolson Case.

Frankfurter, J., with the concurrence of Minton, J., dissented in reliance upon the Federal Baseball Club Case and the Toolson Case, there being no distinction between baseball and boxing.

Minton, J., in a separate dissenting opinion, also expressed the view that boxing is not trade or commerce.

## **Headnotes**

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PLEADING §104 > dismissal -- admissions. -- > Headnote:

[LEdHN\[1\]](#) [down] [1]

On dismissal of a complaint by the District Court, the allegations in the complaint must be taken as true.

RESTRAINTS OF TRADE AND MONOPOLIES §11 > interstate commerce -- boxing contests. -- > Headnote:  
[LEdHN\[2\]](#) [2]

The promotion of professional championship boxing contests on a multistate basis, coupled with the sale of rights to televise, broadcast, and film the contests for interstate transmission, constitutes "trade and commerce among the several States" within the meaning of the Sherman Act.

RESTRAINTS OF TRADE AND MONOPOLIES §23 > interstate commerce -- boxing contests. -- > Headnote:  
[LEdHN\[3\]](#) [3]

The fact that a boxing match is a local affair does not, of itself, bar application of the Sherman Anti-trust Act to a business based on the promotion of such matches if the business is itself engaged in interstate commerce or if the business imposes illegal restraints on interstate commerce.

COURTS §141 > anti-trust laws -- functions of courts. -- > Headnote:  
[LEdHN\[4\]](#) [4]

Whether an exemption from the anti-trust acts should be granted is a question for Congress, and not the Supreme Court, to resolve.

## Syllabus

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In a civil antitrust action brought by the Government to restrain alleged violations of [§§ 1](#) and [2](#) of the Sherman Act, the complaint alleged, *inter alia*, that the defendants are engaged in the business of promoting professional championship boxing contests on a multistate basis and selling rights to televise, broadcast and film such contests for interstate transmission; that their receipts from the sale of television, radio and motion picture rights represent over 25% of their total revenue and in some instances exceed the revenue from the sale of admission tickets; and that the defendants have restrained and monopolized trade and commerce through a conspiracy to exclude competition in their line of business. *Held:* The complaint states a cause of action, and the Government is entitled to an opportunity to prove its allegations. Pp. 237-245.

(a) As described in the complaint, defendants' business of promoting professional championship boxing contests on a multistate basis and selling rights to televise, broadcast [\\*\\*\\*\\*2](#) and film such contests for interstate transmission constitutes "trade or commerce among the several States" within the meaning of the Sherman Act. Pp. 240-243.

(b) That a boxing match is "a local affair" does not alone bar application of the Sherman Act to a business based on the promotion of such matches, if the business is itself engaged in interstate commerce or if the business imposes illegal restraints on interstate commerce. P. 241.

(c) [Federal Baseball Club v. National League, 259 U.S. 200](#), and [Toolson v. New York Yankees, 346 U.S. 356](#), did not immunize from application of the Sherman Act all businesses based on professional sports. Pp. 241-243.

348 U.S. 236, \*236; 75 S. Ct. 259, \*\*259; 99 L. Ed. 290, \*\*\*290; 1955 U.S. LEXIS 1544, \*\*\*\*2

(d) Whether such a broad exemption should be granted is an issue to be resolved by Congress, not this Court. Pp. 243-245.

**Counsel:** Philip Elman argued the cause for the United States. With him on the brief were Solicitor General Sobeloff, Assistant Attorney General Barnes and Daniel M. Friedman.

Manuel Lee Robbins, Special Assistant Attorney General of New York, argued the cause for the New York State Athletic Commission, as amicus curiae, urging reversal. With him on the brief was [\*\*\*\*3] Nathaniel L. Goldstein, Attorney General, for the State of New York and the New York State Athletic Commission, as amici curiae.

Whitney North Seymour and Charles H. Watson argued the cause for appellees. On the brief were Mr. Seymour, Benjamin C. Milner and Armand F. Macmanus for the International Boxing Club of New York, Inc. et al., and Mr. Watson for the International Boxing Club, Inc. et al., appellees.

**Judges:** Warren, Black, Reed, Frankfurter, Douglas, Burton, Clark, Minton, Harlan

**Opinion by:** WARREN

## Opinion

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[\*237] [\*\*259] [\*\*\*293] MR. CHIEF JUSTICE **WARREN** delivered the opinion of the Court.

This is a civil antitrust action brought by the Government in the United States District Court for the Southern District of New York. The defendants -- three corporations and two individuals -- are engaged in the business of promoting professional championship boxing contests.<sup>1</sup> The Government's complaint [\*\*260] charges that the defendants, in the course of this business, have violated §§ 1 and 2 [\*238] of the Sherman Act.<sup>2</sup> [\*\*\*5] After this Court's decision in *Toolson v. New York Yankees*, 346 U.S. 356, the defendants moved to dismiss the complaint. [\*\*\*4] The District Court granted the motion in reliance upon the *Toolson* decision and *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200.<sup>3</sup> The case, together with *United States v. Shubert, ante*, p. 222, is here on direct appeal under the Expediting Act, 15 U. S. C. § 29.

The Government's complaint alleges that promoters of professional championship boxing contests

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<sup>1</sup> The corporate defendants are International Boxing Club of New York, Inc., International Boxing Club, and Madison Square Garden Corporation. The individual defendants are James D. Norris and Arthur M. Wirtz. The individual defendants, together with Madison Square Garden Corporation, own 80% of the stock of International Boxing Club of New York, Inc., and International Boxing Club. The nature of the business involved is described in an appendix to this opinion.

<sup>2</sup> 15 U. S. C. §§ 1 and 2. These sections provide:

**HN1** [↑] "§ 1. . . . Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor . . . ."

**HN2** [↑] "§ 2. . . . Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ."

Section 4 confers jurisdiction on the district courts "to prevent and restrain violations of sections 1-7 of this title" in equity proceedings instituted under the direction of the Attorney General.

<sup>3</sup> The District Court's opinion was oral and not transcribed. All the parties agree, however, that the dismissal was based on *Federal Baseball* and *Toolson*.

"make a substantial utilization of the channels of interstate trade and commerce to:

"(a) negotiate contracts with boxers, advertising agencies, seconds, referees, judges, announcers, and other personnel living in states other than those in which the promoters reside;

"(b) arrange and maintain training quarters in states other than those in which the promoters reside;

[\*239] "(c) lease suitable arenas, and arrange other details for boxing contests, particularly when the contests are held in states other than those in which the promoters reside;

"(d) sell tickets to contests across state lines;

"(e) negotiate for the sale of and sell rights to make and distribute motion pictures of boxing contests to the 18,000 theatres in the United States;

"(f) negotiate for the sale of and sell rights to broadcast and telecast boxing [\*\*\*\*6] contests to homes through more than 3,000 radio stations and 100 television stations in the United States; and

"(g) negotiate for the sale of and [\*294] sell rights to telecast boxing contests to some 200 motion picture theatres in various states of the United States for display by large-screen television."

The promoter's receipts from the sale of television, radio, and motion picture rights to championship matches, according to the complaint, represent on the average over 25% of the promoter's total revenue and in some instances exceed the revenue derived from the sale of admission tickets.<sup>4</sup> The complaint alleges that the defendants have restrained [\*261] and monopolized this trade and commerce -- "the promotion, exhibition, broadcasting, telecasting, and motion picture production and distribution of professional championship boxing contests in the United States" -- through a conspiracy to exclude competition in their line of business. The conspiracy, it is claimed, began in 1949 with an agreement among the defendants and Joe Louis, then heavyweight champion of the world, that Louis would resign his title, that he would procure exclusive [\*240] rights to the [\*240] services of the four leading title contenders in a series of elimination contests which would result in the recognition of a new heavyweight champion, that he would also obtain exclusive rights to broadcast, televise, and film these contests, and that he would assign all such exclusive rights to the defendants. The defendants have allegedly sought to maintain and effectuate this conspiracy by the following means: by eliminating the "leading competing promoter" of championship matches; by acquiring the exclusive right to promote professional boxing contests in all the "principal arenas" where championship matches can be successfully presented; and by requiring each title contender to agree, as a condition of fighting for the championship, that if he wins he would, for a period of three (and sometimes five) years, take part only in title contests promoted by the defendants. As a consequence of these acts, the complaint alleges, the defendants have promoted, or participated in the promotion of, all but two of the 21 championship matches held in the United States between June 1949 and the filing of the complaint in March 1952.

[\*\*\*\*8] LEdHN[1][↑] [1]LEdHN[2][↑] [2]These allegations must of course be taken as true at this stage of the proceeding. And the defendants do not deny that the allegations state a cause of action if their business is subject to the Sherman Act. The question thus presented is whether the defendants' business as described in the complaint -- the promotion of professional championship boxing contests on a multistate basis, coupled with the sale of rights to televise, broadcast, and film the contests for interstate transmission -- constitutes "trade or commerce among the several States" within the meaning of the Sherman Act.

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<sup>4</sup> The complaint further alleges that "With the progressive and continuing expansion of television facilities, the proportion of the promoter's total revenue derived from television, radio and motion pictures, has been on an ascending curve . . . ."

LEdHN[3][] [3]The question is perhaps a novel one in that this Court has never before considered the antitrust status of the boxing business. Yet, if it were not for *Federal Baseball* and *Toolson*, we think that it would be too clear for dispute [\*241] that the Government's allegations bring the defendants within the scope of the Act. HN3[] [\*\*\*\*9] A boxing match -- like the showing of a motion picture (United States v. Crescent Amusement Co., 323 U.S. 173, 183) or the performance of a vaudeville act (Hart v. B. F. Keith Vaudeville Exchange, 262 U.S. 271) or the performance of a legitimate stage attraction (United States v. Shubert, ante, p. [\*\*\*295] 222) -- "is of course a local affair." But that fact alone does not bar application of the Sherman Act to a business based on the promotion of such matches, if the business is itself engaged in interstate commerce or if the business imposes illegal restraints on interstate commerce. Apart from *Federal Baseball* and *Toolson*, it would be sufficient, we believe, to rest on the allegation that over 25% of the revenue from championship boxing is derived from interstate operations through the sale of radio, television, and motion picture rights.<sup>5</sup> Compare United States v. Yellow Cab Co., 332 U.S. 218, 225-226; Times-Picayune Co. v. United States, 345 U.S. 594, 602, n. 11; Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 227-235; [\*\*\*\*10] United States v. Frankfort Distilleries, 324 U.S. 293, 297-298; United States v. Women's Sportswear Mfrs. Assn., 336 U.S. 460, 464; United States v. Employing Plasterers Assn., 347 U.S. 186, 189; and cases collected in the *Shubert* opinion. See also Currin v. Wallace, 306 U.S. 1, 10; Wickard v. Filburn, 317 U.S. 111, 127-128.

Notwithstanding these decisions, the defendants contend that they are exempt from the Sherman Act under the rule of *stare decisis*. They, like the defendants in the *Shubert* [\*\*\*\*11] case, base this contention on *Federal Baseball* and *Toolson*. But they would be content with a more [\*242] restrictive interpretation of *Federal Baseball* and *Toolson* than the defendants in the *Shubert* case. The *Shubert* defendants argue that *Federal Baseball* and *Toolson* immunized all businesses built around the live presentation of local exhibitions. The defendants in the instant case argue that *Federal Baseball* and *Toolson* immunized only such businesses as involve exhibitions of an athletic nature. We cannot accept either argument.

For the reasons stated in the *Toolson* opinion and restated in *United States v. Shubert*, ante, p. 222, *Toolson* neither overruled *Federal Baseball* nor necessarily reaffirmed all that was said in *Federal Baseball*. Instead, "without re-examination of the underlying issues," the Court adhered to *Federal Baseball* "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." 346 U.S., at 357. We have held today in the *Shubert* case that *Toolson* is not authority for exempting [\*\*\*\*12] other HN4[] businesses merely because of the circumstance that they are also based on the performance of local exhibitions. That ruling is fully applicable here.

LEdHN[4][] [4]Moreover, none of the factors underlying the *Toolson* decision are present in the instant case. At the time the Government's complaint was filed, no court had ever held that the boxing business was not subject to the antitrust laws.<sup>6</sup> Indeed, this Court's decision in the *Hart* case, [\*\*\*296] less than a year after the *Federal Baseball* decision, clearly established that *Federal Baseball* could not be relied upon as a basis of exemption for other segments of the entertainment business, athletic or otherwise. Surely there is [\*243] nothing in the Holmes opinion in the *Hart* case to suggest, even remotely, that the Court was drawing a line between athletic and nonathletic entertainment. Nor do we see the relevance of such a distinction for the purpose of determining what constitutes "trade or commerce among the several States." The [\*\*\*\*13] controlling consideration in *Federal Baseball* and *Hart* was, instead, a very practical one -- the degree of interstate activity involved in the particular business under review. It follows that *stare decisis* cannot help the defendants here; for, contrary to their argument, *Federal Baseball* did not hold that all businesses based on professional sports were outside the scope of the antitrust laws. The issue confronting us is, therefore, not whether a previously granted exemption should continue,

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<sup>5</sup> All three media are concededly engaged in interstate commerce. E. g., Federal Radio Comm'n v. Nelson Bros. Co., 289 U.S. 266, 279 (radio); Dumont Laboratories v. Carroll, 184 F.2d 153, 154 (C. A. 3d Cir.), cert. denied, 340 U.S. 929 (television); United States v. Paramount Pictures, 334 U.S. 131 (motion pictures).

<sup>6</sup> Shall v. Henry, 211 F.2d 226 (C. A. 7th Cir.), was decided subsequent to the decision below. So also was Peller v. International Boxing Club, unreported, Civil 52 C 813, April 23, 1954 (D. C. N. D. Ill.). The unreported decision (D. C. N. D. Ill.) which *Shall v. Henry* affirmed was decided prior to the decision below but after the filing of the Government's complaint.

but whether an exemption [\*\*263] should be granted in the first instance. And that issue is for Congress to resolve, not this Court. See *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 561.

[\*\*\*\*14] The issue was, in fact, before Congress only recently. In 1951, four identical bills were introduced in Congress -- three in the House and one in the Senate -- forbidding the application of the antitrust laws "to organized professional sports enterprises or to acts in the conduct of such enterprises." <sup>7</sup> [\*\*\*\*16] Extensive hearings on the three House bills were conducted by the Subcommittee on Study of Monopoly Power of the Committee on the Judiciary; no hearings were held on the Senate bill. <sup>8</sup> At the conclusion [\*244] of its hearings, the House Subcommittee unanimously declared its opposition to the four bills. Its report states:<sup>9</sup>

"The requested exemption would extend to all professional sports enterprises and to all acts in the conduct of such enterprises. The law would no longer require competition in any facet of business activity of any sport enterprise. Thus *the sale of radio and television rights, the management of stadia*, the purchase and sale of advertising, the concession industry, and many other business activities, as well as the aspects of baseball which are solely related to the promotion of competition on the playing field, would be immune and untouchable. [\*\*\*\*15] *Such a broad exemption could not be granted without substantially repealing the antitrust laws.*" (Italics added.)

With respect to baseball, the Subcommittee recommended a postponement of any legislation until the status of *Federal Baseball* was clarified in the courts.<sup>10</sup> No further action was taken on any of the bills; Congress thus left intact the then-existing coverage of the antitrust laws. Yet the defendants in the instant case are now asking this [\*\*\*297] Court for precisely the same exemption which enactment of those bills would have afforded. Their remedy, if they are entitled to one, lies in further resort to Congress, as we have already stated. For we agree that "Such a broad exemption could not be granted without substantially repealing the antitrust laws."

As in the *Shubert* case, we are concerned here only with the sufficiency of the Government's complaint. We hold [\*245] that the complaint states a cause of action and that the Government is entitled to an opportunity to prove its allegations. The judgment of the court below is

*Reversed.*

MR. JUSTICE BURTON, retaining the views expressed in his dissent in the *Toolson* case, 346 U.S. 356, 357, joins the opinion [\*\*\*17] and judgment of the Court in this case. MR. JUSTICE REED joins in this concurrence.

[For dissenting opinion of MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE MINTON, see *post*, p. 248.]

[For dissenting opinion of MR. JUSTICE MINTON, see *post*, p. 251.]

#### [\*\*264] APPENDIX TO OPINION OF THE COURT.

The complaint describes the "Nature of Trade and Commerce Involved" as follows:

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<sup>7</sup> H. R. 4229, 4230, 4231, and S. 1526, 82d Cong., 1st Sess. These bills were introduced "by friends of baseball because they feared that the continued existence of organized baseball as America's national pastime was in substantial danger by the threat of impending litigation." H. R. Rep. No. 2002, 82d Cong., 2d Sess., p. 1.

<sup>8</sup> The House hearings were stated to be on "the problem of whether or not organized baseball should be exempted from the operation of the antitrust laws." Hearings on "Organized Baseball" before the House Subcommittee on Study of Monopoly Power of the Committee on the Judiciary, 82d Cong., 1st Sess., p. 1.

<sup>9</sup> H. R. Rep. No. 2002 (entitled "Organized Baseball"), 82d Cong., 2d Sess., p. 230. Between the hearings and the report, the Subcommittee on Study of Monopoly Power was reconstituted as the Antitrust Subcommittee. The report was submitted directly to the full House pursuant to H. Res. 95, 82d Cong., 1st Sess.

<sup>10</sup> *Id.* at 134-136, 231-232.

10. Boxers usually compete in amateur tournaments as a preliminary to becoming professionals. As amateurs they receive no pay and box under the sponsorship of local independent boxing clubs, associations or other organizations. When they become professionals, they contract to box an opponent on a per bout basis for local promoters and receive a fee. If their skill as professional boxers results in an increasing willingness of the public to pay to view their contests, they can demand higher fees and a greater percentage of receipts from the sale of tickets and other rights. If their skill increases, they engage in preliminary and other bouts throughout the United States and eventually participate in major bouts. The fee for a major bout is usually a sum guaranteed by the promoter or a predetermined [\*\*\*\*18] percentage of the net receipts from the sale of tickets and motion picture, radio and television rights.

11. The most lucrative asset to a professional boxer is recognition and designation by the various state athletic [\*246] commissions and others as "world champion" in the division in which he competes. These divisions are:

flyweight	112 lbs.
bantamweight	118 "
featherweight	126 "
lightweight	135 "
welterweight	147 "
middleweight	160 "
light heavyweight	175 "
heavyweight	All above 175 lbs.

A "world champion" gains his title by defeating the existing champion or by eliminating all contenders, and remains world champion in his division until he is, in turn, defeated by a contender or resigns the title. Such a title affords to its holder financial returns from personal appearances and exhibitions throughout the United States, from endorsements and other activities, as well as a greater percentage of the receipts from his bouts. The promotion of professional championship boxing contests is also more lucrative than the promotion of other boxing contests.

12. Of the various "world championships," the heavyweight division is the most important [\*\*\*\*19] to boxers and promoters, as it returns the greatest financial benefits. The flyweight and bantamweight divisions are not of substantial importance in the United States because very few American boxers are of such light weights. No championship contest has been held in the flyweight division in the United States since 1935; none in the bantamweight division since 1947.

13. The promotion of professional championship boxing contests, in [\*\*\*298] which the winners achieve "world champion" titles, includes negotiating and executing contracts with boxers for the main and preliminary bouts, arranging and maintaining training quarters, leasing suitable arenas, such as stadia or ball parks where substantial numbers of the public may be seated to view the contest, negotiating and executing contracts for the employment of matchmakers, advertising agencies, press agents, seconds, referees, judges, announcers and other personnel; organizing, assembling, and arranging other details necessary to the [\*247] exhibition of the contests; selling tickets and rights to make motion pictures of the contests and to distribute them throughout the United States and in foreign countries; and selling [\*\*\*\*20] rights to transmit the contests by radio or television throughout the United States and foreign countries.

14. Promoters of professional championship boxing contests make a substantial utilization of the channels of interstate trade and commerce to:

- (a) negotiate contracts with boxers, advertising agencies, seconds, referees, [\*\*265] judges, announcers, and other personnel living in states other than those in which the promoters reside;
- (b) arrange and maintain training quarters in states other than those in which the promoters reside;
- (c) lease suitable arenas, and arrange other details for boxing contests, particularly when the contests are held in states other than those in which the promoters reside;
- (d) sell tickets to contests across state lines;

(e) negotiate for the sale of and sell rights to make and distribute motion pictures of boxing contests to the 18,000 theatres in the United States;

(f) negotiate for the sale of and sell rights to broadcast and telecast boxing contests to homes through more than 3,000 radio stations and 100 television stations in the United States; and

(g) negotiate for the sale of and sell rights to telecast boxing contests to some 200 [\*\*\*\*21] motion picture theatres in various states of the United States for display by large-screen television.

15. Motion picture films of professional championship boxing contests are distributed and exhibited in theatres throughout the United States and in foreign countries. Similarly, radio and television broadcasts of such contests are transmitted throughout the United States and radio broadcasts of them are also transmitted to foreign countries.

16. The 21 major professional championship boxing contests promoted in the United States since June 1949 [\*248] have produced a gross income from admissions and the sale of motion picture, radio and television rights of approximately \$ 4,500,000.00. The total such gross income for all professional boxing contests in the United States during this period, including the championship contests, has been approximately \$ 15,000,000.00.

16 (a). A promoter of a professional championship fight usually derives substantially all of his revenue from two sources: (a) sale of tickets of admission and (b) sale of rights to telecast, broadcast and produce and distribute motion pictures of the fight. In such fights, sale of television, radio and motion [\*\*\*\*22] picture rights account for a substantial proportion of the promoter's total revenue. Since 1949 sale of these rights has represented, on the average, over 25% of the total revenue derived from championship fights, and has exceeded, in some instances, the revenue received from sale of tickets of admission. With the progressive and continuing expansion of television facilities, the proportion of the promoter's total revenue derived from television, radio and motion pictures, has been on an ascending curve, in relation to revenue derived from sale of tickets of [\*\*\*299] admission. In the Marciano-Walcott heavyweight championship fight of May 15, 1953, at Chicago, Illinois, promoted by defendants IBC (N. Y.), IBC (Ill.), James D. Norris and Arthur M. Wirtz, the promoters' receipts from sale of tickets of admission were, after federal admission taxes, \$ 253,462.37, while their television, radio and motion picture revenue was approximately \$ 300,000.

**Dissent by:** FRANKFURTER; MINTON

## Dissent

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MR. JUSTICE **FRANKFURTER**, with whom MR. JUSTICE **MINTON** joins, dissenting.

It would baffle the subtlest ingenuity to find a single differentiating factor between other sporting exhibitions, whether boxing [\*\*\*\*23] or football or tennis, and baseball insofar as the conduct of the sport is relevant to the criteria or considerations by which the Sherman Law becomes applicable to a "trade or commerce." § 1, 26 Stat. 209, 15 U. S. C. § 1. Indeed, the interstate aspects of baseball [\*249] and the extent of the exploitation of baseball through mass media are far more extensive than [\*\*266] is true of boxing. \* If the intrinsic applicability of the Sherman Law were the issue, no attempt would be made to differentiate the two sports.

In 1922, the Court found commercialized baseball outside the scope of the Sherman Law. Federal Baseball Club v. National League, 259 U.S. 200. Last Term the Court refused to re-examine "the underlying issues" of this adjudication and adhered [\*\*\*\*24] to it. Toolson v. New York Yankees, Inc., 346 U.S. 356. What were the "underlying issues"? They were the constituents of baseball in relation to the Sherman Law. By adhering to that decision, the Court refused to depart from a judgment necessarily based on these constituent elements. To my

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\* This opinion is concerned only with the sport as such, and not with the arrangements by which mass media show or report bouts. Such arrangements clearly are beyond the scope of the *Toolson* case, *infra*.

understanding, that is what is meant by "without re-examination of the underlying issues." The Court decided as it did in the *Toolson* case as an application of the doctrine of *stare decisis*. That doctrine is not, to be sure, an imprisonment of reason. But neither is it a whimsy. It can hardly be that this Court gave a preferred position to baseball because it is the great American sport. I do not suppose that the Court would treat the national anthem differently from other songs if the nature of a song became relevant to adjudication. If *stare decisis* be one aspect of law, as it is, to disregard it in identic situations is mere caprice.

Congress, on the other hand, may yield to sentiment and be capricious, subject only to due process. As a matter of fact, one of the explicit factors that led to the result in *Toolson* was the recognition of congressional [\*\*\*\*25] refusal to upset [\*250] the *Federal Baseball* decision. But as the Government with commendable candor recognizes, Congress was not asked to avert the threat of litigation against baseball by providing a specific exemption of that sport from the provisions of the Sherman Law. The sponsors of this relief did not ask immunity for baseball as such. The "legislation" to which reference was made in the *Toolson* case consisted of bills which sought exemption for "organized professional sports enterprises [and] acts in the conduct of such enterprises." (H. R. 4229, 4230, 4231, and S. 1526, 82d Cong., 1st Sess.) Since, in the light of all the circumstances, *Federal Baseball* was left undisturbed by *Toolson*, I cannot bring myself to construe the respect that was thus accorded to *stare decisis* to be narrower than that all situations identic with what was passed on in the *Federal Baseball* case should be covered by it. I cannot translate even the narrowest conception of *stare decisis* into the equivalent of [\*\*\*300] writing into the Sherman Law an exemption of baseball to the exclusion of every other sport different not one legal jot or tittle from it.

Between [\*\*\*\*26] them, this case and *Shubert* illustrate that nice but rational distinctions are inevitable in adjudication. I agree with the Court's opinion in *Shubert* for precisely the reason that constrains me to dissent in this case. Within a year after *Federal Baseball* the Court, again unanimously and through the same writer, found that a bill against the show business based on the Sherman Law was not so frivolous as to call for dismissal. [Hart v. B. F. Keith Vaudeville Exchange, 262 U.S. 271](#). For more than 30 years, therefore, these two decisions stood as the law. The *Shubert* case plainly falls within the adjudication of *Hart*. By the same process of reasoning, boxing falls within *Federal Baseball*, which this Court revitalized in *Toolson* despite all the new factors on which the dissent in *Toolson* relied.

[\*251] [\*267] Whatever unsavory elements there be in boxing contests is quite beside the mark. The States to which these exhibitions are distasteful are possessed of the honorable and effective remedy of self-help. They need not sanction pugilistic exhibitions, or may sanction them only under conditions that safeguard their [\*\*\*\*27] notions of the public welfare.

MR. JUSTICE MINTON, dissenting.

To make a case under the Sherman Act, two things among others are essential: (1) there must be trade or commerce; (2) such trade or commerce must be among the States.

In the *Federal Baseball* case, [259 U.S. 200](#), this Court held that baseball was not trade or commerce. It said, "personal effort, not related to production, is not a subject of commerce," and since the baseball game was an exhibition wholly intrastate, there could be no trade or commerce among the States. [259 U.S. 200, 209](#).

In the *Baseball* case, this Court held that traveling from State to State to play the game and all the details of arrangements were incident to the exhibition. In [Toolson v. New York Yankees, 346 U.S. 356](#), we did not overrule the *Federal Baseball* decision; in fact, we reaffirmed the holding of that case.

When boxers travel from State to State, carrying their shorts and fancy dressing robes in a ditty bag in order to participate in a boxing bout, which is wholly intrastate, it is now held by this Court that the boxing bout becomes interstate commerce. What this Court held [\*\*\*\*28] in the *Federal Baseball* case to be incident to the exhibition now becomes more important than the exhibition. This is as fine an example of the tail wagging the dog as can be conjured up.

[\*252] We are not dealing here with the question of whether the appellees have restrained trade in or monopolized the radio and television industries. That is a separate consideration. What others do with pictures they are allowed to take of a wholly local spectacle or exhibition by thereafter using the channels of interstate commerce to exhibit them does not make a package deal. The appellees have nothing to do with the transmission of sound or the pictures. Because these incidents are not directly involved, no effort was made to bring the radio and television companies and the sponsors into the case.

The Court says: "The conspiracy, it is claimed, began in 1949 with an agreement among the defendants and Joe Louis, then heavyweight champion of the world, that Louis would resign his title, . . . procure exclusive rights to the services of the four leading title contenders in a series of elimination contests which would result in the recognition of a new heavyweight champion, . . . [\*\*\*\*29] and . . . [\*\*\*301] assign all such exclusive rights to the defendants." Of course, there was at the time only one champion, Joe Louis. He had a monopoly on that, and while he got it by competition, he did not get it in trade or commerce. I do not suppose that Joe Louis had to go back into the ring and be walloped to a knockout or a decision before he could surrender his championship. And if he arranged with four other fellows to fight it out in elimination contests for the championship and no one else was restrained from doing the same, it is difficult for me to see how there was any conspiracy. If other promoters wanted to start an elimination contest, they were free to do so. Whether they received public acceptance depended upon something other than trade or commerce. What does a boxer or athlete have for sale but "personal effort, not related to production," which, as Justice Holmes said, is not commerce? Such services they may contract about free from any control of the Sherman Act. Suppose the [\*253] appellee did, as the Court states, control what the parties called all but two of twenty-one [\*\*268] championship contests, what trade or commerce have they restrained?

[\*\*\*\*30] As I see it, boxing is not trade or commerce. There can be no monopoly or restraint of nonexistent commerce or trade. Whether Congress can control baseball and boxing I need not speculate. What I am saying is that Congress has not attempted to do so. If there is a conspiracy, it is not one to control commerce between the States.

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## **INTERNATIONAL BOXING CLUB OF NEW YORK, INC. v. UNITED STATES**

Supreme Court of the United States

November 13, 1958, Argued ; January 12, 1959, Decided

No. 18

### **Reporter**

358 U.S. 242 \*; 79 S. Ct. 245 \*\*; 3 L. Ed. 2d 270 \*\*\*; 1959 U.S. LEXIS 1930 \*\*\*\*; 1959 Trade Cas. (CCH) P69,231

INTERNATIONAL BOXING CLUB OF NEW YORK, INC., ET AL. v. UNITED STATES

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

**Disposition:** [150 F.Supp. 397](#), affirmed.

## **Core Terms**

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championship, boxing, contests, decree, promotion, Square, divestiture, conspiracy, stock, antitrust, Stadium, arenas, fights, staged, dissolution, professional boxing, Sherman Act, broadcasting, monopoly, rights, lease, trial court, trusteeship, provisions, television, effective, five-year, commerce, contracts, ownership

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

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

Commodities reasonably interchangeable by consumers for the same purposes make up that part of the trade or commerce, monopolization of which may be illegal.

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

Antitrust & Trade Law > Sherman Act > General Overview

### **HN2 [] Regulated Practices, Market Definition**

The market will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced: Price, use and qualities considered.

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

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Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN3\*\*](#) Regulated Practices, Market Definition

A determination of the part of the trade or commerce encompassed by the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), involves distinctions in degree as well as distinctions in kind. One prime example of this is the application of the Act to trade or commerce in a localized geographical area.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

### [\*\*HN4\*\*](#) Antitrust & Trade Law, Sherman Act

The framing of antitrust decrees should take place in the district rather than in appellate courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case. The decree should (1) put an end to the combination or conspiracy when that is itself the violation; (2) deprive antitrust defendants of the benefits of their conspiracy; and (3) break up or render impotent the monopoly power which violates the Sherman Act, [15 U.S.C.S. § 1 et seq.](#).

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

### [\*\*HN5\*\*](#) Antitrust & Trade Law, Sherman Act

The relief granted by a trial court in an antitrust case and brought to the Supreme Court on direct appeal, thus bypassing the usual appellate review, has always had the most careful scrutiny of the Court.

Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN6\*\*](#) Antitrust & Trade Law, Sherman Act

It is antitrust policy to decree dissolution where the creation of the combination is itself the violation.

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN7\*\*](#) Sherman Act, Remedies

Sometimes relief, to be effective, must go beyond the narrow limits of the proven violation.

## **Lawyers' Edition Display**

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## Summary

The present action was instituted in the United States District Court for the Southern District of New York by the government under the Sherman Anti- Trust Act against the defendants, who were engaged in the business of promoting professional boxing contests on a multistate basis. Originally, the District Court dismissed the complaint on the ground that the business of professional boxing is not interstate trade or commerce within the scope of the act. However, on appeal the United States Supreme Court reversed ([348 US 236, 99 L ed 290, 75 S Ct 259](#)), reaching a contrary conclusion and holding that the complaint stated a cause of action under the act. After a trial the District Court held that the government was entitled to relief by appropriate decree. ([150 F Supp 397; 171 F Supp 841.](#)) The decree, in addition to granting appropriate injunctive relief, ordered the individual defendants to divest themselves, within a 5-year period, of all stock owned by them in a corporation (Madison Square Garden); ordered the dissolution of two boxing clubs formed pursuant to, and as a means to effectuate, the conspiracy charged; ordered the defendants to lease buildings of corporations controlled by them to qualified promoters of championship contests, the matter, in the event the terms of a lease could not be agreed upon, to be submitted to the District Court; and prohibited exclusive contracts applying to all professional boxing contests and not merely to championship contests.

On appeal, the United States Supreme Court affirmed the judgment below. In an opinion by Clark, J., expressing the views of five members of the Court, it was held that the findings of the District Court were not clearly erroneous, that in view of the court's former holdings on the sufficiency of the complaint the judgment on the merits was properly entered, and that, in framing the decree, the court below, as to the relief granted, did not exceed the limits of allowable discretion.

Harlan, J., with the concurrence of Frankfurter and Whittaker, JJ., dissented in part, disapproving those parts of the decree below which ordered the divestiture of the stockholdings of the individual defendants and the dissolution of the corporations controlled by them.

Frankfurter, J., in a separate opinion, explained why he joined the dissent written by Mr. Justice Harlan.

Stewart, J., did not participate.

## Headnotes

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §73 > decree -- scope. -- > Headnote:  
[LEdHN1](#) [1]

The District Court does not exceed the limits of allowable discretion in framing, in a suit under the Sherman Anti-Trust Act, a decree that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §19 > relevant market. -- > Headnote:  
[LEdHN2](#) [2]

In testing for the relevant market in cases arising under the Sherman Anti-Trust Act, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that part of the trade or commerce monopolization of which may be illegal.

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §19 > extent of market. -- > Headnote:  
[LEdHN\[3\]](#) [3]

Although the "market" which one must study to determine when a producer has a monopoly power will vary with the part of commerce under consideration, the tests are constant, "market" being composed of products that have reasonable interchangeability--price, use, and qualities considered--for the purposes for which they are produced.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §68 > findings -- boxing contests. --  
> Headnote:  
[LEdHN\[4\]](#) [4]

A general finding of the District Court, in a civil anti-trust action instituted by the government against the promoters of professional boxing contests, that there exists a separate, identifiable market for championship boxing contests, and the court's conclusion that nonchampionship fights are not reasonably interchangeable for the same purpose as championship contests, is not "clearly erroneous," within the meaning of [Rule 52\(a\) of the Federal Rules of Civil Procedure](#) (providing that findings of fact shall not be set aside unless clearly erroneous), where the general finding is supported by appropriate detailed findings.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §19 > extent -- local area. -- > Headnote:  
[LEdHN\[5\]](#) [5]

A determination of the "part of the trade or commerce" encompassed by the Sherman Anti-Trust Act involves distinctions in degree as well as distinctions in kind, one prime example being the application of the act to trade or commerce in a localized geographical area.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §19 > relevant market -- boxing contests. --  
> Headnote:  
[LEdHN\[6\]](#) [6]

Championship boxing, being the "cream" of the boxing business, is a sufficiently separate part of the trade or commerce to constitute the relevant market for purposes of the Sherman Anti-Trust Act.

APPEAL §1304 > burden of proof -- findings -- anti-trust action -- boxing contests. -- > Headnote:  
[LEdHN\[7\]](#) [7]

After the United States Supreme Court held that the complaint in an anti- trust action instituted by the government against the promoters of professional boxing contests stated a cause of action, and the District Court, upon a subsequent trial, found the allegations in the complaint to have been proven, the defendants, upon appeal from an

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adverse decree of the District Court, have the burden of showing that its findings, or at least the basic ones, are "clearly erroneous" within the meaning of [Rule 52\(a\) of the Federal Rules of Civil Procedure](#), providing that findings of fact shall not be set aside unless clearly erroneous, and where the defendants have not been able to meet that burden the District Court's decree entered on the merits, adjudging them to have violated the Sherman Act, must be affirmed.

APPEAL §1663 > relief -- anti-trust action. -- > Headnote:

[LEdHN\[8\]](#) [8]

In approaching the question of relief in an anti-trust action, the United States Supreme Court, on direct appeal from a judgment of a District Court, does not sit as a trial court.

APPEAL §1670 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §73 > framing of decrees in anti-trust suit -- discretion of District Court. -- > Headnote:

[LEdHN\[9\]](#) [9]

The framing of decrees in anti-trust suits should take place in the District Courts, which are invested with large discretion to model their judgments to fit the exigencies of the particular case, rather than in an appellate court.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §75 > decree -- scope. -- > Headnote:

[LEdHN\[10\]](#) [10]

A decree in favor of the government in an anti-trust action based on unlawful monopoly should (1) put an end to the combination or conspiracy when that is itself the violation; (2) deprive the defendants of the benefits of their conspiracy; and (3) break up or render impotent the monopoly power which violates the act.

APPEAL §1340 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §73 > relief -- review. --

> Headnote:

[LEdHN\[11\]](#) [11]

The relief granted by a trial court in an anti-trust case brought to the United States Supreme Court on direct appeal will be given the most careful scrutiny of the Supreme Court to make certain that justice has been done.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §78 > order -- divestiture of stock -- boxing contests. -- > Headnote:

[LEdHN\[12A\]](#) [12A] [LEdHN\[12B\]](#) [12B]

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An order directing the individual defendants in an action brought by the government against promoters of professional boxing contests to divest themselves, within a 5-year period, of stock owned by them in a corporation (Madison Square Garden) does not exceed the limits of allowable discretion of the District Court, where the stock, though not acquired pursuant to the conspiracy charged in the complaint and not the fruit of the conspiracy, may be utilized as part of the conspiracy to effect its ends; it is immaterial that the stock was not proven to be the lever by which the corporation was persuaded to join the conspiracy, that the sale of the stock, made in the manner outlined in the decree, would result in great loss to the defendants, and that the defendants were not permitted by the decree to exercise an option, as proposed by them, of a choice between Madison Square Garden and another corporation, the Chicago Stadium, both of which they still controlled.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §15 > knowledge of illegality -- prior proceedings -- boxing contests. -- > Headnote:

[LEdHN\[13\]](#) [13]

It is reasonable to assume that the defendants in an anti-trust action instituted by the government against them, who were engaged in the business of promoting professional boxing contests, knew the illegality under the Sherman Anti-Trust Act of their conduct continued after the United States Supreme Court, on the government's appeal from an adverse decision, had held that their business constituted interstate commerce within the meaning of the act, where no denial was made by them on that appeal of the sufficiency of the government's complaint.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §79 > relief -- corporations -- common control.

-- > Headnote:

[LEdHN\[14\]](#) [14]

Common control of corporations being one of the instruments in bringing about unity of purpose and unity of action and in making a conspiracy to violate the Sherman Anti-Trust Act effective, the proclivity of the past, on the part of the defendants, to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future, since, if that affiliation continues, there may be tempting opportunity to act in combination.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §79 > dissolution of combination. --

> Headnote:

[LEdHN\[15\]](#) [15]

It is anti-trust policy to decree dissolution of a combination where the creation of the combination is itself the violation of the anti-trust laws.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §79 > decree -- dissolution -- boxing clubs. --

> Headnote:

[LEdHN\[16\]](#) [16]

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Even though a decree in favor of the government in an action under the Sherman Anti-Trust Act against promoters of professional boxing contests leaves the parent corporations of boxing clubs free to organize new corporations to handle their respective boxing promotions, the dissolution of the boxing clubs does not exceed the limits of the District Court's allowable discretion, where the boxing clubs were formed pursuant to, and were the means used to effectuate, the conspiracy charged in the complaint and their continued operation under the old charters might lead to a situation nominis umbra not conducive to the elimination of the old illegal practices.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §75 > decree -- leasing to others -- boxing clubs. -- > Headnote:

[LEdHN\[17\]](#) [17]

In framing a decree in favor of the government in its action under the Sherman Anti-Trust Act against promoters of professional boxing contests, the District Court does not exceed the limits of its allowable discretion by ordering defendants to lease buildings of corporations controlled by them to qualified promoters of championship contests and by providing that in the event the terms of the lease cannot be agreed upon the matter should be submitted to the court.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §75 > decree -- exclusive contracts -- boxing clubs. -- > Headnote:

[LEdHN\[18\]](#) [18]

The prohibition, in a decree in favor of the government in its action under the Sherman Anti-Trust Act against promoters of professional boxing contests, against exclusive contracts applying to all professional boxing contests, does not exceed the District Court's allowable discretion, even though the prohibition goes beyond the "relevant market" considered for purposes of determining violations of the act, such market being limited to professional championship boxing contests.

APPEAL §1400 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §75 > decree -- extent -- review. -- > Headnote:

[LEdHN\[19\]](#) [19]

Relief in an anti-trust action, to be effective, must sometimes go beyond the narrow limits of the proven violation; when this sort of relief is granted, the Supreme Court of the United States, on appeal, will be especially wary lest the trial court overstep the correspondingly narrower limits of its discretion.

## Syllabus

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1. The Government's civil complaint charging appellants with a combination and conspiracy in unreasonable restraint of trade and commerce among the States in the promotion, broadcasting and televising of professional world championship boxing contests, as well as a conspiracy to monopolize and monopolization of the same, in violation of [§§ 1](#) and [2](#) of the Sherman Act, was sustained by this Court as stating a cause of action, and the case was remanded for trial on the merits. [348 U.S. 236](#). After a trial, the District Court, in an opinion incorporating

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detailed findings of fact and conclusions of law based on the principles laid down by this Court, found that the allegations of the complaint had been sustained, and adjudged that appellants had violated §§ 1 and 2 of the Sherman Act. *Held:* The District Court's findings are not clearly erroneous, and its judgment on the merits is affirmed. Pp. 244-252.

(a) The District Court's finding that the relevant [\*\*\*\*\*2] market was the promotion of *championship* boxing contests, in contrast to *all* professional boxing contests, was not clearly erroneous and it is sustained. Pp. 249-252.

2. After further hearings on the nature and extent of the relief necessary to protect the public interest, the District Court entered a final judgment dissolving the two international boxing clubs, directing the individual appellants to divest themselves of their stock in Madison Square Garden and granting injunctive relief designed to open up the market in the business of promoting professional world championship boxing matches. *Held:* The relief granted was not beyond the allowable discretion of the District Court and its judgment is affirmed. Pp. 253-263.

(a) At the time of the final decree, the Joe Louis agreements had lapsed; the exclusive-contract practice had been abandoned at least temporarily; the leases on Yankee Stadium, the Polo Grounds and St. Nicholas Arena in New York had been given up; and the appellants had no control over the new heavyweight champion; but this Court agrees with the District Court that the additional evidence taken by it showed that appellants still possessed all of the [\*\*\*3] power of monopoly and restraint. Pp. 254-255.

(b) Even if the individual appellants' stock in Madison Square Garden was lawfully acquired and was not the fruit of the conspiracy, it had been utilized to effect the purposes of the conspiracy and could be so used again, and the record supports the District Court's conclusion that they should be required to divest themselves of this stock in order to break up the unlawful combination and restore competition in championship boxing contests -- without being granted the alternative options requested by them. Pp. 255-259.

(c) Since the two international boxing clubs were formed pursuant to the conspiracy and were the means used to effectuate it, the requirement that they be dissolved was justified. Pp. 259-261.

(d) The District Court having found that one of the means used in effectuating the conspiracy was the ownership and control of arenas and stadia, the requirement of the decree that Madison Square Garden and the Chicago Stadium be rented to any qualified promoter at a reasonable rental, subject to specified conditions, was justified. Pp. 261-262.

(e) Practical considerations justify the prohibition against exclusive contracts [\*\*\*\*4] with contestants, even though they apply not only to championship bouts but to all professional boxing contests, thus going beyond the "relevant market" considered for the purposes of determining the Sherman Act violations. P. 262.

**Counsel:** Kenneth C. Royall argued the cause for appellants. On the brief were Mr. Royall and John F. Caskey for the Madison Square Garden Corporation et al., and Charles Sawyer for the International Boxing Club, Inc., of Illinois, et al.

Philip Elman argued the cause for the United States. On the brief were Solicitor General Rankin, Assistant Attorney General Hansen and Charles H. Weston.

**Judges:** Warren, Black, Frankfurter, Douglas, Clark, Harlan, Brennan, Whittaker; Stewart took no part in the consideration or decision of this case

**Opinion by:** CLARK

Opinion

[\*244] [\*\*\*273] [\*\*247] MR. JUSTICE CLARK delivered the opinion of the Court.

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This civil Sherman Act<sup>1</sup> case was here four years ago on direct appeal from a dismissal by the District Court, which had held that the Act did not apply to the business of professional boxing. We reversed, finding [\*\*\*274] that "the complaint states a cause of action [under the Act] and that the Government is [\*\*\*5] entitled to an opportunity to prove its allegations," and remanded the case for trial on the merits. *United States v. International Boxing Club, 348 U.S. 236 (1955)*. The complaint charged the appellants with a combination and conspiracy in unreasonable restraint of trade and commerce among the States in the promotion, broadcasting, and televising of professional world championship boxing contests, as well as a conspiracy to monopolize and monopolization of the same. After a trial, the District Court, in an opinion incorporating detailed findings of fact and conclusions of law based on the principles laid down in our earlier opinion, found that the allegations of the complaint had been sustained. *150 F.Supp. 397*. After further hearings on the nature and extent of the relief necessary to protect the public interest, the court entered its final judgment dissolving two of the corporate appellants, directing divestiture of certain stock owned by the individual appellants and granting injunctive relief designed to open up the market in the business of promoting professional world championship boxing matches.

[\*\*\*6] *LEdHN[1]*<sup>↑</sup> [1]The appellants, while not attacking any specific finding as clearly erroneous, claim that the proof did not show that they violated either Section 1 or 2 of the Act. In this regard appellants level their strongest blows at the District Court's definition of the relevant market. Out of the entire field of professional boxing, the District Court carved a market in championship contests alone, holding [\*245] it to be the relevant market at which the conspiracy was aimed. In the alternative, appellants insist that the relief granted the Government was "unnecessarily punitive," even if liability is assumed. On a direct appeal to this Court we noted probable jurisdiction, *356 U.S. 910 (1958)*. We have concluded that the findings of the District Court are not clearly erroneous and that in view of our former holding on the sufficiency of the complaint the judgment on the merits was properly entered. As to the relief granted we find that the court did not exceed the limits of allowable discretion in framing a decree "that will, so far as practicable, cure the ill effects of the illegal conduct, [\*\*\*7] and assure the public freedom from its continuance." *United States v. United States Gypsum Co., 340 U.S. 76, 88 (1950)*.

Our previous decision herein having decided that the promotion of professional [\*\*248] championship boxing contests on an interstate basis constituted trade and commerce among the States, within the meaning of the Sherman Act, there is no contest here either on the findings or the law on that point. Since on that appeal we discussed in some detail the allegations of the complaint, which the trial court has now found amply proven by the evidence, we shall only summarize the findings here.

#### THE FINDINGS.

The conspiracy began in January 1949, when appellants Norris and Wirtz, who owned and controlled the Chicago Stadium, the Detroit Olympia Arena and the St. Louis Arena, made an agreement with Joe Louis, the then heavyweight boxing champion of the world. Wishing to retire, Louis agreed to give up his title after obtaining from each of the four [\*\*\*275] leading contenders<sup>2</sup> exclusive promotion rights including rights to radio, television and [\*246] movie revenues. Upon securing these exclusive contracts Louis assigned them to [\*\*\*8] the appellant International Boxing Club, Illinois, which was organized by Norris and Wirtz for the purpose of promoting boxing for the combination in Illinois. They paid Louis \$ 150,000 cash plus an employment contract and a 20% stock interest in I. B. C., Illinois.

In March 1949 Norris and Wirtz approached appellant Madison Square Garden, in which they had for many years owned 50,000 shares of stock. It was the "foremost sports arena in New York City and is the best known arena of its kind in the United States, if not the world."<sup>3</sup> However, its facilities were tied up by an exclusive lease it had

<sup>1</sup> *15 U. S. C. § 1 et seq.*

<sup>2</sup> Ezzard Charles, Joe Walcott, Lee Savold, and Gus Lesnevich.

<sup>3</sup> The importance of Madison Square Garden in the present context is shown by the fact that of all the championship contests staged during the 12 years immediately preceding 1949, 45% were held in New York City, of which 75% were in Madison

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granted to Mike Jacobs' interests -- the leading professional boxing promoter in the field at that time. Norris and Wirtz proposed that they should all "work together now and keep the events for our buildings and not create a competitive situation that would be harmful to all." In order to effectuate this program, appellant Madison Square Garden bought [\*\*\*\*9] out Mike Jacobs' interests, including, in addition to his lease on Madison Square Garden, his exclusive leases to Yankee Stadium and the St. Nicholas Arena and his contract with the then welterweight champion Sugar Ray Robinson. These contracts were assigned to International Boxing Club, New York, organized for the purpose of promoting boxing for the combination in New York.

Once Jacobs' interests had been acquired, there remained only one substantial competitor in the field of [\*247] promoting championship boxing matches. That was Tournament of Champions, Inc., owned in part by the Columbia Broadcasting System. It [\*\*\*\*10] owned an exclusive lease on the Polo Grounds as well as an exclusive promotion contract covering the next two fights of the then middleweight champion of the world. In May 1949 Madison Square Garden bought all of the stock of Tournament of Champions at a cost of \$ 100,000 plus 25% of the net profits on the next two middleweight championship matches. The assets thus acquired were likewise assigned to I. B. C., New York. By a simultaneous separate agreement, Columbia Broadcasting System agreed for a five-year period not to invest in or promote any professional boxing matches in return for a first refusal right to the broadcasting of certain boxing matches staged for a like period in Madison Square Garden.

This series of agreements, consummated within four months' time, gave appellants exclusive control of the promotion of boxing matches in three championship [\*\*249] divisions, *i. e.*, heavyweight, middleweight, and welterweight. Not satisfied with this temporary control, however, appellants perpetuated their hold on championship bouts by requiring each contender for the title to grant to them an exclusive promotion contract to his championship fights, including film and broadcasting, [\*\*\*\*11] for a period of from three to five years. Over the facilities [\*\*\*276] for the staging of contests appellants exercised like control, owning or managing the "key" arenas and stadia in the Nation.<sup>4</sup>

Tightening the ropes around the ring thus built, Norris and Wirtz increased their stockholdings in Madison Square Garden to where they controlled it and were able [\*248] to "dictate its policies and boxing activities." This has continued their control over I. B. C., New York, the stock of which is now wholly owned by Madison Square Garden.<sup>5</sup> They are the sole stockholders of Chicago Stadium Corporation which in turn is the sole stockholder of I. B. C., Illinois. Their control over this boxing empire is revealed by the fact that Norris is president of each of the four top corporations, [\*\*\*\*12] *i. e.*, Madison Square Garden, I. B. C., New York, Chicago Stadium Corporation, and I. B. C., Illinois. He and Wirtz are directors in all four, while I. B. C., Illinois and I. B. C., New York, which have owned all of the promotion contracts with the contenders, have a joint board of directors.

The [\*\*\*\*13] effect of the conspiracy is obvious. Using the facilities of I. B. C., Illinois, and I. B. C., New York, appellants entered into exclusive promotion contracts with title aspirants, requiring exclusive handling agreements in the event the contender became champion. In amassing their empire, appellants obtained control of champions in three divisions. The choice given a contender thereafter was clear, *i. e.*, to sign with appellants or not to fight. With appellants in control of the key arenas and stadia of the country through Madison Square Garden, Chicago Stadium Corporation, and others, an event could not be successfully staged in any of these areas, the most fruitful in the Nation, without their [\*\*249] consent. The exercise of this power brought immediate results. From June

Square Garden. The balance of the New York championship bouts, with one exception, were held in Yankee Stadium, the Polo Grounds, or St. Nicholas Arena.

<sup>4</sup> Between 1937 and 1948, 50% of all championship contests were staged in either Madison Square Garden, Yankee Stadium, the Polo Grounds, St. Nicholas Arena, Chicago Stadium, Detroit Olympia Arena, or the St. Louis Arena.

<sup>5</sup> At the time the I. B. C.'s were formed, Joe Louis owned 20% of the stock of each and the other 80% was split evenly between Norris and Wirtz on one hand and Madison Square Garden on the other. At some point thereafter, Louis ceased to be a stockholder and his share was split evenly between Norris-Wirtz and Madison Square Garden. At the time of the final decree, apparently as the result of an effort to make a showing of separateness of control, the Norris-Wirtz interests owned all of the stock in I. B. C., Illinois, and Madison Square Garden owned all of the stock in I. B. C., New York. The trial court found that the two interests nevertheless still shared equally in the combined profits of both I. B. C.'s.

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1949, when appellants staged their first championship fight, until May 15, 1953, the date of the amended complaint, they staged or controlled the promotion of 36 of the 44 championship battles held in this country, giving them approximately 81% of that field. In two of the classifications, heavyweight and middleweight, the combine staged all of the contests. The power of the combine to exclude competitors [\*\*\*\*14] in the championship field is graphically shown by their promotion of 25 out of 27 fights in all divisions, a total of 93%, during the two-and-a-half-year period ending with the filing of the amended complaint. This power extended to the sale of film and broadcasting rights -- most valuable adjuncts to successful promotion in the business.

LEdHN[2] [2]Appellants launch a vigorous attack on the finding that the relevant market was the promotion of *championship* boxing contests in contrast to *all* professional boxing events. They rely [\*\*250] primarily on *United States v. du Pont & Co., [\*\*277] 351 U.S. 377 (1956)*. That case, involving an alleged monopoly of the market in cellophane, held that the relevant market was not cellophane alone but the entire field of flexible packaging materials. In testing for the relevant market in Sherman Act cases, the Court said:

". . . no more definite rule can be declared than that HN1 commodities reasonably interchangeable by consumers for the same [\*\*\*15] purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal." Du Pont, supra, at 395.

The appellants argue that the "physical identity of the products here would seem necessarily to put them in one and the same market." They say that any boxing contest, whether championship or not, always includes one ring, two boxers and one referee, fighting under the same rules before a greater or lesser number of spectators [\*250] either present at ringside or through the facilities of television, radio, or moving pictures.

We do not feel that this conclusion follows. As was also said in du Pont, supra, at 404:

LEdHN[3] [3]HN2 "The 'market' . . . will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered."

LEdHN[4] [4] [\*\*\*\*16] With this in mind, the lower court in the instant case found that there exists a "separate, identifiable market" for championship boxing contests. This general finding is supported by detailed findings to the effect that the average revenue from all sources for appellants' championship bouts was \$ 154,000, compared to \$ 40,000 for their nonchampionship programs; that television rights to one championship fight brought \$ 100,000, in contrast to \$ 45,000 for a nontitle fight seven months later between the same two fighters; that the average "Nielsen" ratings <sup>6</sup> over a two-and-one-half-year period were 74.9% for appellants' championship contests, and 57.7% for their nonchampionship programs (reflecting a difference of several million viewers between the two types of fights); that although the revenues from movie rights for six of appellants' championship bouts totaled over \$ 600,000, no full-length motion picture rights were sold for a non-championship contest; and that spectators pay "substantially more" for tickets to championship fights than for [\*251] nontitle fights. In addition, numerous representatives of the broadcasting, motion picture and advertising industries testified [\*\*\*\*17] to the general effect that a "particular and special demand exists among radio broadcasting and telecasting [and motion picture]

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<sup>6</sup> According to the District Court, the "Nielsen Average Audience rating is a percentage which purports to show the number of residential television sets that were tuned in to the program expressed as a percentage of the total residential television sets, whether turned off or on, which were in areas into which the program was telecast."

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companies for the rights to broadcast and telecast [and make and distribute films of] championship contests in contradistinction to similar rights to non-championship contests."<sup>7</sup>

LEdHN[5]<sup>1</sup> [5]In view of these findings, we cannot say that the lower court was "clearly erroneous" [\*\*\*18] in concluding [\*\*\*278] that nonchampionship fights are not "reasonably interchangeable for the same purpose" as championship contests. HN3<sup>1</sup> A determination [\*\*251] of the "part of the trade or commerce" encompassed by the Sherman Act involves distinctions in degree as well as distinctions in kind. One prime example of this is the application of the Act to trade or commerce in a localized geographical area. See, e. g., Schine Theatres v. United States, 334 U.S. 110 (1948); United States v. Griffith, 334 U.S. 100 (1948); cf. Times-Picayune v. United States, 345 U.S. 594 (1953); United States v. Columbia Steel Co., 334 U.S. 495 (1948). The case which most squarely governs this case is United States v. Paramount Pictures, 334 U.S. 131 (1948). There, the charge involved, *inter alia*, extensive motion picture theatre holdings. The District Court had refused to order a divestiture of such holdings on the grounds that no "national monopoly" had been intended or obtained. This Court [\*\*\*19] felt that such a finding was not dispositive of the issue, saying:

"First, there is no finding as to the presence or absence of monopoly on the part of the five majors [\*252] [defendants] in the *first-run* field for the entire country, in the *first-run* field in the 92 largest cities of the country, or in the *first-run* field in separate localities. Yet the *first-run* field, which constitutes the cream of the exhibition business, is the core of the present cases. Section 1 of the Sherman Act outlaws unreasonable restraints irrespective of the amount of trade or commerce involved ( United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224, 225, n. 59), and § 2 condemns monopoly of 'any part' of trade or commerce." Paramount, supra, at 172-173. (Emphasis in the original.)

LEdHN[6]<sup>1</sup> [6]Similarly, championship boxing is the "cream" of the boxing business, and, as has been shown above, is a sufficiently separate part of the trade or commerce to constitute the relevant market for Sherman Act purposes.<sup>8</sup>

[\*\*\*20] LEdHN[7]<sup>1</sup> [7]We have also examined the remainder of this characteristically lengthy record. When the case was here previously appellants did not deny that the allegations of the complaint stated a cause of action against them, provided their activity came within the meaning of the Sherman Act. We held that the complaint stated a cause of action. The District Court has now found these allegations to have been proven. With the case in this posture, appellants have an almost insurmountable burden. They must show that the findings, or at least the basic ones, are "clearly erroneous." Rule 52 (a), Rules of Civil Procedure. This they have not been able to do. It follows that the decree entered on the merits adjudging the appellants to have violated both §§ 1 and 2 of the Sherman Act must be affirmed.

[\*253] THE RELIEF.

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<sup>7</sup> Approximately 25% of the revenue produced by the appellants' championship fights during the period covered by the complaint was derived through the sale of radio, television and motion picture rights.

<sup>8</sup> By analogy, it bears those sufficiently "peculiar characteristics" found in automobile fabrics and finishes such as to bring them within the Clayton Act's "line of commerce." United States v. du Pont & Co., 353 U.S. 586, 593-595 (1957).

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LEdHN[8] [8] In approaching the question of relief we must remember that our [\*\*\*279] function is not to sit as a trial court. *Besser Mfg. Co. v. United States, 343 U.S. 444, 449-450 (1952)*; *United States v. National Lead Co., 332 U.S. 319 (1947)*; [\*\*\*\*21] cf. *United States v. Crescent Amusement Co., 323 U.S. 173, 185 (1944)*. As was said in *International Salt Co. v. United States, 332 U.S. 392, 400-401 (1947)*:

LEdHN[9] [9] HN4 [9] "The framing of [antitrust] decrees should take place in the District [\*\*252] rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case."

LEdHN[10] [10] The yardstick which the trial court should apply in monopolization cases is well stated by the Court in *Schine Theatres v. United States, 334 U.S. 110, 128-129 (1948)*. The decree should (1) put "an end to the combination or conspiracy when that is itself the violation"; (2) deprive "the antitrust defendants of the benefits of their conspiracy"; and (3) "break up or render impotent the monopoly power which violates the Act."

LEdHN[11] [11] HN5 [11] [\*\*\*\*22] The relief granted by a trial court in an antitrust case and brought here on direct appeal, thus by-passing the usual appellate review, has always had the most careful scrutiny of this Court. Though the records are usually most voluminous and their review exceedingly burdensome, we have painstakingly undertaken it to make certain that justice has been done. See, e. g., *United States v. Paramount Pictures, supra*; *Schine Theatres v. United States, supra*; *United States v. National Lead Co., supra*. That we have done here. We have finally concluded that the relief granted was not beyond the allowable discretion of the District Court.

#### [\*254] *The Bounds of the Relief Ordered.*

At the time of the final decree the Joe Louis agreements had elapsed; the exclusive-contract practice had been at least temporarily abandoned; the leases on Yankee Stadium, the Polo Grounds and St. Nicholas Arena in New York had been given up and the appellants had no control over the new heavyweight champion, Floyd Patterson. Nevertheless, the additional evidence taken by the District Court showed that they still possessed all of the power of [\*\*\*\*23] monopoly and restraint. In this we agree. The appellants had exercised a strangle hold on the industry for a long period. It was evident at the time of the decree that, statistically, they still dominated the staging of championship bouts and completely controlled the filming and broadcasting of those contests. They had gained this leadership through the elimination by purchase of all of their major competitors in the field; by the control of contending boxers through exclusive agreements; and by the staging of events through the ownership or lease of key stadia and arenas. This illegal activity gave appellants an odorous monopoly background which was known and still feared in the boxing world. In addition, Norris and Wirtz still possessed the major tools, so well used previously, necessary to continue their control. They owned or controlled the key arena and stadium in New York and Chicago, the most [\*\*\*280] lucrative communities in boxing; they continued to control all of the championship bouts staged there; they commanded the filming and broadcasting of all championship fights -- the cream of the business -- wherever staged; and though on the surface they owned no stock [\*\*\*\*24] directly in the two I. B. C. corporations, each was the wholly owned subsidiary of corporations which Norris and Wirtz did control and manage.

In this setting the District Court ordered Norris and Wirtz to divest themselves, within a five-year period, of [\*255] all stock which they owned "directly or indirectly" in Madison Square Garden. In addition, both of the International Boxing Clubs, Illinois and New York, were ordered dissolved. The Chicago Stadium and Madison Square Garden were each enjoined from staging more than two championship bouts annually. All exclusive agreements for the promotion of boxing events, including nonchampionship, were banned. Madison Square Garden was ordered for a period of five years to lease its premises when available at a "fair and reasonable" rental to any duly qualified promoter applying in writing therefor. Failure to agree on terms would require submission to the courts for determination. Like requirement [\*253] was imposed on Chicago Stadium Corporation, provided Norris-and-Wirtz control continued.

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The District Judge concluded that it was necessary to include each of these provisions in the decree in order to put an end to the combination, [\*\*\*\*25] deprive the appellants of the benefit of their conspiracy and break up their monopoly power. At the conclusion of the final hearing on relief he observed that prior to 1949 the Norris-Wirtz group was in Chicago while the Madison Square Garden enterprise was in New York. They were "two separate entities," one promoting contests in the mid-West and the other in New York. He declared that "in order to destroy this monopoly we have to return the situation as nearly as possible to the economic conditions as they existed in 1949" and, further, "I can see no way in this case . . . that a proper decree can be formulated unless that power that Wirtz and Norris have in Madison Square Garden is curtailed. They have to get out of the control."

*The Order of Divestiture.*

LEdHN[12A] [↑] [12A]

Appellants contend that since the stock owned by Norris and Wirtz was not acquired pursuant to the conspiracy, was not the fruit of illegal activity and was not [\*256] proven to be the lever by which Madison Square Garden was persuaded to join the conspiracy, divestiture was but punishment rather than a necessary corrective remedy. [\*\*\*\*26] They further say that the sale, even though made in the manner outlined in the decree,<sup>9</sup> would result in great loss to Norris and Wirtz. They contend that it was arbitrary for the District Court not to permit them to exercise an option, as proposed by them, of a choice between Madison Square Garden and the Chicago Stadium, both of which they still control.

It may be that the stock in Madison Square Garden was not the fruit of the conspiracy; but even if lawfully acquired it may be utilized as part of the conspiracy to effect its ends. See United States v. Paramount Pictures, supra, at 152. [\*\*\*281] Moreover, since the inception of the conspiracy Norris and [\*\*\*\*27] Wirtz have increased their holdings to over 219,000 shares. It was this stock ownership and their control of stock voting power that the trial court found dictated the election of the officers and directors of Madison Square Garden and gave to Norris and Wirtz the unquestioned control and management of its activities. Although reluctant at first to require a divestiture of this stock, the trial judge ultimately became convinced that it was the *sine qua non* of the relief. During the hearing he said:

"The great evil I found was the combination that Wirtz and Norris caused and created by joining up with Madison Square Garden. I regard Wirtz and Norris as one and Madison Square Garden as another, a separate entity and business interest. *The evil* [\*257] *primarily sprung from their combination, their concerted efforts and action. That has to be broken up.*" (Emphasis supplied.)

What is perhaps equally significant is that through the exercise of this power Norris and Wirtz elected the officers and board of directors of I. B. C., New York -- a joint board with I. B. C., Illinois, which they also controlled through the Chicago Stadium Corporation. This joint board [\*\*\*\*28] was the bridge over which the conspiracy was made effective. Over it the control of the promotion of championship boxing contests was secured. That this control remained effective up to the very date of the final hearing, [\*254] June 24, 1957, is shown by the following statement by the court on that date:

"The unlawful combination of the defendants still possesses and exercises its monopolistic control in the field of championship contests. It appears that since May 15, 1953 there have been held in the United States 37 championship contests, excluding one bantamweight contest. The defendants admit that they had promotional control over 24 of the 37 championship contests which were held or of 65 per cent of the market, but we find that the defendants were not financial strangers to the other 13 championship contests which were held in cities other than New York and Chicago. Because the defendants are licensed by state authorities to promote only in New York and Illinois, they could not be the persons actually designated as the promoter of the 13 championship

<sup>9</sup> Norris and Wirtz were given five years to sell their stock in Madison Square Garden, which stock is listed on the New York Stock Exchange. During this time, the stock is to be held by two trustees named by the court. If the stock is not sold within five years, the trustees are ordered to sell it within the next two years.

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contests, but all five of the championship contests which originated in cities other than Chicago or New York on Friday [\*\*\*\*29] nights were televised on IBC's-New York Friday night television series.

"We find, too, that all of the 37 championship contests in this period from May 15, 1953, save [\*258] only the five outdoor contests, were televised on either the defendants' Wednesday or Friday night television series, and that the profits of the sale of the telecasting rights inured to the benefit of the defendants."

LEdHN[13] [13]As this was some two and a half years after our opinion in the former appeal on January 31, 1955, it appears that appellants had continued exercising their unlawful control long after they well knew that this activity was within the coverage of the Sherman Act. In view of the fact that no denial was made on that appeal of the sufficiency of the Government's complaint it is reasonable to assume that appellants, subsequent to our opinion, knew that their conduct violated the Sherman Act, obedience to which is so important to our free enterprise system. Still they continued their [\*\*\*282] illegal activity. In fact from all appearances it is continuing to this day. Such conduct, in addition to the interlocking [\*\*\*30] nature of the ownership at the time of the final decree, fully justified the District Court's conclusion that the "dissolution of the combination can only be accomplished by an immediate and complete severance of the interlocking ownership of Norris and Wirtz in Madison Square Garden. . . . There must be a complete divestiture of the stockholdings of Norris and Wirtz in the Garden. The Government has established Norris and Wirtz control the Garden Corporation." Moreover, this was the only effective means at hand by which competition in championship events might be restored. It was intended to return the parties as near as possible to the *status quo* existing prior to the conspiracy.

LEdHN[12B] [12B]

For these reasons, we do not see why it was incumbent upon the court to give Norris and Wirtz certain options requested at the time of the decree. We shall mention only two. The first was that they have the right to exercise a choice of retaining either Madison Square Garden [\*259] or the Chicago Stadium. But this would not be conducive to the re-establishment of competition *between* the two interests, [\*\*\*\*31] which the District Court considered a necessity. Nor would it eliminate the "great evil" the trial court found in the Norris-Wirtz-Garden combination. Another requested option was that Norris and Wirtz be permitted to retain their control of Madison Square Garden and the latter be enjoined from promoting championship boxing events. But this would have eliminated the world's principal boxing center -- "the premier sports arena in the world," as appellants characterized it -- from promoting such events in competition with Norris and Wirtz.

[\*\*255] In short, the Government in its effort to free the professional boxing business of monopoly and unreasonable restraints would have won the battle but lost the war under either of the proffered alternatives. As this Court said in United States v. Crescent Amusement Co., 323 U.S. 173, 189-190 (1944):

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LEdHN[14] [14]Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, there will be tempting opportunity . . . to act in combination [\*\*\*\*32] . . . . The proclivity in the past to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future."

*The Dissolution of the Two International Boxing Clubs.*

Admittedly these corporations were formed pursuant to and were the means used to effectuate the conspiracy. As the trial judge said:

"These corporations are the promotional arms of the defendants, conceived and used to enable defendants [\*260] to restrain and monopolize promotion of championship boxing contests. Their assets are of but nominal value except for the goodwill attaching to their names by virtue of the conspiracy."

LEdHN[15] [15]The conditions existing here even subsequent to our former opinion confirm the need for such dissolution. Both corporations continued to share equally the profits the combination reaped from the staging of

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championship boxing contests. This also included revenues from championship contests promoted by others but televised by the combination. [\*\*\*283] They continue even now as the bridge between the choice arenas Norris and [\*\*\*33] Wirtz own or control and the boxers with whom they have exclusive promotion contracts. Through interlocking officers and directorates the two I. B. C.'s thus effectively hold the combination together. [HN6](#)[<sup>16</sup>] It is antitrust policy to decree dissolution "where the creation of the combination is itself the violation." [United States v. Crescent Amusement Co., supra, at 189](#), and cases there cited. This is one of those situations where the injunctive process affords too little relief too late.

[LEdHN\[16\]](#)[<sup>16</sup>] [16]Appellants argue that this is punitive; that the parent companies, under the decree, are left free to organize new corporations to handle their respective boxing promotions and, hence, dissolution is a useless act. The trial court felt, however, and we agree, that continued operation under the old I. B. C. charters might lead to a situation *nominis umbra* not conducive to the elimination of the old illegal practices. New corporations, if formed, would start off with clean slates free from numerous written [\*\*\*34] and oral agreements and understandings now existent and known throughout the industry. Hence dissolution might well have the salutary effect of completely clearing new horizons that the trial judge was attempting to create in the boxing world, especially when effected in conjunction [<sup>261</sup>] with the stock divestiture provision. Moreover, there would be little inconvenience and nominal expense even if, as appellants contend, they "as a practical matter must [form new corporations] if they are to promote any boxing at all." This we think a poor excuse for not completely eliminating, by dissolution, these old trappings of monopoly and restraint.

#### *The Compulsory Leasing Provisions.*

[LEdHN\[17\]](#)[<sup>17</sup>] [17]The District Court, having found that one of the means used in effectuating the conspiracy was the ownership and control of arenas and stadia, entered a compulsory leasing provision in the decree as to Madison Square Garden and the Chicago Stadium Corporation.<sup>10</sup>

[\*\*\*35] The [<sup>256</sup>] appellants' main concern with this provision of the decree is the requirement that in the event the terms of a lease cannot be agreed upon the matter will be submitted to the District Court. Appellants fear that this is not only an undesirable but an impractical activity for a District Court. But they have suggested no alternative to relieve the court of this burden. Obviously, such a provision may result in some disputes which must be settled. Until experience in the enforcement of the provision proves the reference to be too burdensome we see no reason to disturb it. If experience proves it unworkable the parties, under the decree, may apply to the court for [<sup>262</sup>] appropriate relief. See *Lorain Journal Co. v. United States*, 342 U.S. 143, 156-157 (1951); *International \*\*\*284 Salt Co. v. United States, supra, at 401*.

#### *Exclusive Contracts With Contestants.*

[LEdHN\[18\]](#)[<sup>18</sup>] [18]Appellants object to the prohibition against exclusive contracts applying to all professional boxing contests. They question the Government's enlarging its base from [\*\*\*36] championship bouts to all professional boxing. But human nature being what it is there is sound reason to say that exclusive contracts with boxers in nontitle contests would surely affect those same boxers when and if they arrive at the title. Such arrangements would give appellants, so experienced in the boxing field, a decided advantage over the independent promoter. Such a prohibition is fully justified at least until the effects of the conspiracy are fully dissipated. For the same reason we see no fault in the five-year prohibition against exclusive rights to a return bout.

[LEdHN\[19\]](#)[<sup>19</sup>] [19]The trial court recognized that these restrictions went beyond the "relevant market" which has been considered for purposes of determining the Sherman Act violations, but felt that "the relief here must be

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<sup>10</sup> This provision of the decree, applying only to championship contests, ordered appellants to lease their respective buildings upon reasonable written request by a qualified promoter, if the proposed rent is reasonable, if the applicant furnishes adequate security, and if at the time of the application the building is neither already under lease to another for the specified day nor in conflict at that time with "any well-established event" which has been regularly conducted therein. If the parties cannot agree on what constitutes adequate security or a reasonable rental, either party may apply to the court for a determination thereof.

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broader than the championship field because the evil to be remedied is broader." This Court has recognized that HN7<sup>15</sup> sometimes "relief, to be effective, must go beyond the narrow limits of the proven violation." United States v. United States Gypsum Co., supra, 340 U.S., at p. 90; [\*\*\*\*37] *Timken Co. v. United States, 341 U.S. 593, 600 (1951)*. When this sort of relief is granted, we must of course be especially wary lest the trial court overstep the correspondingly narrower limits of its discretion, but, for the reasons set out above, we feel that no such misuse of the trial court's power is present here.

We have considered the other objections of appellants to the decree and find them unsubstantial as presently [\*263] posed. In the event experience proves that some of the provisions are so severe as to require modification or amendment, the parties may apply to the District Court as provided in paragraph 25 of the decree. The judgment should be affirmed.

*It is so ordered.*

MR. JUSTICE STEWART took no part in the consideration or decision of this case.

**Dissent by:** FRANKFURTER (In Part); HARLAN (In Part)

## Dissent

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MR. JUSTICE FRANKFURTER, dissenting in part.

While I have heretofore expressed views in favor of the almost controlling deference to be paid to a District Court's considered formulation of the provisions appropriate to a decree designed [\*\*257] to remedy adjudicated violations of the antitrust laws, those views have not prevailed, [\*\*\*\*38] see the opinions in United States v. Paramount Pictures, 334 U.S. 131, and this Court has felt free to modify and eliminate provisions of an antitrust decree, particularly when a single judge has imposed an unconventional and drastic remedy. The main issue dealt with in MR. JUSTICE HARLAN's dissent, while a narrow one, is, in my view, important. While divestiture has been decreed by the district judge, the mandatory disposition of the stock has been delayed for five years, and the stock placed in trusteeship. During this five-year period a series of detailed controls have been imposed, under the [\*\*\*285] supervision of the District Court, in order to prevent appellants Norris and Wirtz from exercising the power their stock ownership has given them over the operations of Madison Square Garden. The ownership itself has been sterilized. I think it not an unreasonable forecast that, even were we to postpone for five years the decision whether to order the divestiture or continue the trusteeship, appellants Norris and Wirtz would not find it profitable to continue their sterilized ownership of the Garden stock. However, [\*264] there is no compelling reason [\*\*\*39] to order them to do what sound business judgment may compel. One has the right to assume that, in view of this Court's unanimous affirmance of the findings below that appellants were in violation of the Sherman Law, they will scrupulously obey the decree and not even by the subtlest indirection seek to avoid our decision. Therefore I think it is needless now to determine that divestiture must take place five years hence, rather than wait upon the event in order to determine whether divestiture should then be ordered.

Accordingly, I join MR. JUSTICE HARLAN's opinion.

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITTAKER join, dissenting in part.

I am unable to subscribe to the Court's approval of those parts of the decree below which ordered (1) the divestiture of the stockholdings of Norris and Wirtz in Madison Square Garden Corporation and (2) the dissolution of the New York and Illinois International Boxing Clubs. On the other aspects of the case I agree with the results the Court has reached.

DIVESTITURE.

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As a starting point I accept the conclusion of the District Court that competition in the promotion and exhibition of professional championship boxing [\*\*\*40] could not be effectively restored so long as Norris and Wirtz remained in control of Madison Square Garden's activities in this field. Because of the pre-eminence of the Garden as a site for boxing contests, the District Court found that its control by Norris and Wirtz constituted the fulcrum of the antitrust violations which were adjudged. That finding is supported by the evidence, and in turn justifies the court's conclusion that the elimination of their [\*265] influence in the Garden was prerequisite to restoring competition.

It by no means follows, however, that the order divesting Norris and Wirtz of their Garden stockholdings was an appropriate method of accomplishing that objective in the circumstances of this case. Unless past pronouncements of this Court cautioning against the indiscriminate use of divestiture as a remedy in antitrust cases, see *Timken Co.* v. *United States*, 341 U.S. 593, are to be taken less seriously than they should be, it seems to me that the Court has too lightly given approval to the use of that drastic measure here.

First. It is not at all clear to me just why the District Court, which in the early stages of the hearings [\*\*\*41] on relief [\*\*258] expressed itself strongly against divestiture, ultimately reached the conclusion that such a course was necessary. Indeed the record can be read as indicating the court's belief that the five-year trusteeship of the stock, though designed to alleviate some of the hardships of a forced sale, would at the same time effectively remove Norris and Wirtz from control over the Garden's affairs and therefore [\*\*\*286] in conjunction with the other provisions of the decree result in restoring competitive conditions, whether or not the correlative requirement of sale was carried out within the five-year period.<sup>1</sup> The decree itself supports this [\*266] reading. For despite the evident realization that the stock might not be sold within five years, the provisions of the decree especially aimed at opening up competition for the use of the Garden are all geared to this period. If in fact the District Court thought this five-year insulation of Norris and Wirtz from managerial and policy-making activities at the Garden would combine with the other restrictions to restore competition, justification for divestiture must then be found in a purpose to prevent a relapse [\*\*\*42] into noncompetitive conditions after the five years have elapsed, something which the District Court quite properly considered to be a function of the decree. On this premise I am at a loss to see why continuance of the trusteeship, and, if necessary, the concomitant restrictions on the Garden's activities, should not have been considered adequate to serve that end.

[\*\*\*\*43] *Second.* If I am mistaken in thus divining the thinking of the District Court, I still consider that in the circumstances of this case divestiture was at least ordered prematurely. Determination whether that drastic remedy was required should have been postponed until the expiration of the trusteeship period so that the necessity for its application could then be judged in light of the effectiveness of the other sanctions of the decree. I recognize that various contingencies can be conjured up to support the view that divestiture, rather than trusteeship, holds the more solid promise of assuring the preservation of competition. Nevertheless I think that rejection of a continuance of the trusteeship in favor of divestiture should, in the peculiar setting of this case, be based on experience rather than speculative apprehension.

[\*267] Three factors seem to me especially compelling toward such a course. In the first place, this cannot properly be considered a case of reprehensible immoral conduct or willful lawbreaking.<sup>2</sup> Not until January 31, 1955,

<sup>1</sup> Apart from its divestiture and dissolution provisions, the decree imposes wide-ranging and pervasive restrictions on appellants' activities in boxing promotion and exhibition. It renders void all exclusive contracts which they may presently have with boxers. It prohibits the making of new exclusive contracts, with the exception that, after five years, exclusive provision may be made for return bouts. Similarly, exclusive leases with stadia not owned by appellants are proscribed. So, too, are such arrangements with television and radio broadcasters. Further, appellants are restrained, for a period of five years, from promoting more than four championship boxing programs annually, two by Madison Square Garden and two, cumulatively, by Norris and Wirtz. During that five-year period also, the compulsory leasing provisions discussed in the Court's opinion are to be in effect. Finally, the decree removes Norris and Wirtz as officers and directors of Madison Square Garden, and enjoins them from holding such positions in the future.

<sup>2</sup>The District Court put the matter in this way: "I don't charge them [Norris and Wirtz] with malicious intentional and moral wrongdoing, nor do I proceed to formulate the decree on such a basis. They are guilty, if anything, of a moral, prohibitive wrong

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when this Court handed down its opinion in *United States v. International Boxing Club, 348 U.S. 236*, [\*\*\*44] did it become known that professional boxing was even subject to the federal antitrust laws. In view [\*\*\*287] of this Court's earlier decisions in the baseball cases, *Federal Baseball Club v. National League, 259 U.S. 200*, and *Toolson v. New York Yankees, Inc., 346 U.S. 356*, I think it reasonable to say that in 1949 when this alleged conspiracy began most well-informed lawyers believed that professional boxing, like professional baseball, was beyond antitrust stricture. Hence the appellants had every reason to believe their actions were innocent when taken. Putting the matter somewhat differently, we should be slow in lending approval to the use of such a drastic remedy as this in a case where the appellants have never had the opportunity to demonstrate their willingness to comply with the law once they have learned that it applies to their activities. In my opinion, the thrust of this factor is not blunted by arguing, as the Court does, that appellants should voluntarily have done something to unscramble their relationships during the two and a half years that elapsed between the Court's decision in the original *International* [\*\*\*45] *Boxing* case and the entry of the present decree. That sort of squeeze play should not be expected of those already involved in a lawsuit.

[\*268] Further, divestiture here is brought to bear upon a large investment much of which was acquired long before the conduct charged in this case began, and the balance of which was obtained prior to the announcement of the *International Boxing* decision. The "unlawful fruits" doctrine accordingly offers no justification for this divestiture. Although recognizing this to be true, the Court states that the Garden stock was nonetheless utilized as means of [\*\*\*46] accomplishing the antitrust violations. But this is just another way of saying that divestiture is a necessary element of effective relief; it affords no independent justification for the employment of that remedy.

Lastly, the divestiture order reaches far beyond the subject matter of the action. It permanently removes Norris and Wirtz from all interest in the Garden, over 90% of whose activities are entirely unrelated to professional boxing.

*Third.* It is true, of course, that the trial court's considered judgment on what is necessary to dissipate the effects and prevent recurrence of an adjudged antitrust violation is entitled to much deference from this Court. But by the same token this Court, before it is asked to put its stamp of approval on such a drastic remedy as divestiture, is entitled to have a clear and unambiguous expression of the district court's reasoning in choosing such a course. Especially is this so where, as here, this Court is the sole reviewing authority and in consequence has not had the benefit of an intermediate review of the issues by a Court of Appeals. In my opinion this record leaves much to be desired in this regard. The most I can make of [\*\*\*47] it, taking the case for divestiture most favorably to the Government, is that the District Court would have been justified in reserving that issue for consideration at the time the five-year trusteeship of the Norris and Wirtz stock expired. Certainly no adequate case for a present order of divestiture has been made out. In this view of [\*269] the matter it becomes unnecessary to discuss at this time the various "options" alternative to divestiture which were rejected by the District Court.

#### DISSOLUTION.

I can find no adequate basis for [\*\*\*288] the order dissolving the two International Boxing Clubs. My difficulty with this aspect of the relief is sufficiently shown by the fact that, as I read the record, it would be permissible for Madison Square Garden and the Norris and Wirtz interests in Chicago to create new corporations carrying exactly the same name as [\*\*260] the two present organizations. The only justification offered by the Government for this aspect of the decree is that the two clubs were instrumentalities of the antitrust conspiracy and that their dissolution was but an expedient for insuring that all of their illegal agreements had been put to an end. [\*\*\*48] But since all such agreements, both written and oral, are already canceled by other provisions of the decree, and since there is no suggestion that the sweeping relief granted by the District Court has any loopholes which would permit these organizations to function improperly, this justification is hardly convincing. In these circumstances dissolution appears to me to be not only punitive but futile, something not promotive of sound antitrust law enforcement.

I would remand the case to the District Court with instructions to modify its decree by striking the provisions for compulsory sale of the Norris and Wirtz stock in the Madison Square Garden Corporation, reserving the issue of

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which was in doubt as to whether it was even prohibitive at the time some of these acts were done, and serious doubt, but most people held it was not."

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divestiture for further proceedings at the end of the five-year trusteeship period, and eliminating the requirement of dissolution of the two International Boxing Clubs.

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End of Document



## UNITED STATES v. RCA

Supreme Court of the United States

December 8, 1958, Argued ; February 24, 1959, Decided

No. 54

**Reporter**

358 U.S. 334 \*; 79 S. Ct. 457 \*\*; 3 L. Ed. 2d 354 \*\*\*; 1959 U.S. LEXIS 1936 \*\*\*\*

UNITED STATES v. RADIO CORPORATION OF AMERICA ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

**Disposition:** [158 F.Supp. 333](#), judgment vacated and case remanded for further proceedings.

## **Core Terms**

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license, station, antitrust, anti trust law, radio, broadcasters, Communications, proceedings, sentence, regulatory scheme, rates, violations, monopoly, public interest, television, carriers, revoked, federal court, affiliation, conspiracy, questions, decree, repeal

## **LexisNexis® Headnotes**

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Communications Law > ... > Licensing > Renewals & Revocations > General Overview

**[HN1](#)** **Licensing, Renewals & Revocations**

See [47 U.S.C.S. § 311](#).

Communications Law > ... > Licensing > Renewals & Revocations > General Overview

**[HN2](#)** **Licensing, Renewals & Revocations**

See [47 U.S.C.S. § 313](#).

Administrative Law > Separation of Powers > Primary Jurisdiction

Antitrust & Trade Law > Regulated Industries > Communications

Communications Law > Public Enforcement > Orders & Hearings > Judicial Review

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[Antitrust & Trade Law](#) > [Procedural Matters](#) > [Jurisdiction](#) > [Primary Jurisdiction](#)

[Communications Law](#) > ... > [Regulated Entities](#) > [Broadcasting](#) > [Rate Regulation](#)

[Communications Law](#) > [Federal Acts](#) > [Federal Communications Act](#) > [General Overview](#)

[Communications Law](#) > [Regulators](#) > [US Federal Communications Commission](#) > [Authorities & Powers](#)

### [\*\*HN3\*\*](#) [Separation of Powers, Primary Jurisdiction](#)

The legislative history of the Communications Act reveals that the Federal Communications Commission is not given the power to decide antitrust issues as such, and that Commission action is not intended to prevent enforcement of the antitrust laws in federal courts.

[Administrative Law](#) > [Judicial Review](#) > [Reviewability](#) > [Exhaustion of Remedies](#)

[Civil Procedure](#) > ... > [Justiciability](#) > [Exhaustion of Remedies](#) > [Administrative Remedies](#)

[Administrative Law](#) > [Judicial Review](#) > [Reviewability](#) > [Jurisdiction & Venue](#)

[Administrative Law](#) > [Judicial Review](#) > [Reviewability](#) > [Preclusion](#)

[Administrative Law](#) > [Separation of Powers](#) > [Primary Jurisdiction](#)

[Civil Procedure](#) > ... > [Justiciability](#) > [Exhaustion of Remedies](#) > [General Overview](#)

### [\*\*HN4\*\*](#) [Reviewability, Exhaustion of Remedies](#)

The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

[Business & Corporate Compliance](#) > ... > [Transportation Law](#) > [Interstate Commerce](#) > [US Interstate Commerce Commission](#)

[Communications Law](#) > [Regulators](#) > [US Federal Communications Commission](#) > [General Overview](#)

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HÍ Í ÁMÉRÍKA HÍ LÁ JÁRÓDÁÍ Í Í LÁHSEÓdÁGÁÍ I ÁKÍ HÍ LÁFÍ JÁMÉSÓYÓÁJHÍ ÁKÍ

Transportation Law > Carrier Duties & Liabilities > General Overview

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Abandonment of Lines

## **[HN5](#) [down] Interstate Commerce, US Interstate Commerce Commission**

Radio broadcasters, including television broadcasters, are not included in the definition of common carriers in § 3(h) of the Communications Act, [47 U.S.C.S. § 153\(h\)](#), as are telephone and telegraph companies. Thus the extensive controls, including rate regulation, of Title II of the Communications Act (Act), [47 U.S.C.S. §§ 201- 222](#), do not apply. Television broadcasters remain free to set their own advertising rates. In contradistinction to communication by telephone and telegraph, which the Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition as it has done in the case of railroads.

Administrative Law > Judicial Review > Reviewability > Preclusion

Communications Law > ... > Regulated Entities > Broadcasting > Rate Regulation

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Primary Jurisdiction

## **[HN6](#) [down] Reviewability, Preclusion**

There being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief. The justification for primary jurisdiction in an administrative agency accordingly disappears.

Administrative Law > Agency Adjudication > Decisions > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Administrative Law > Agency Adjudication > Decisions > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

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

Communications Law > ... > Licensing > Renewals & Revocations > General Overview

## **[HN7](#) [down] Decisions, Collateral Estoppel**

Before the government can be collaterally estopped by a licensing decision of the Federal Communications Commission, a court must find whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy.

## **Lawyers' Edition Display**

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## Summary

An application by broadcasting companies to exchange television stations was granted by the Federal Communications Commission on December 21, 1955. The government, on December 4, 1956, instituted an action in the United States District Court for the Eastern District of Pennsylvania attacking the exchange as being in furtherance of a conspiracy to violate the federal anti-trust laws. The defendants contended that this action was barred for various reasons. It was alleged that the commission had authority to pass on the anti-trust questions presented, and, in any case, that the regulatory scheme of the Federal Communications Act had so displaced that of the Sherman Anti-Trust Act that the commission had primary jurisdiction; that the only method available to the government for redressing its anti-trust grievances was to intervene in the proceedings before the commission; that, since it did not, the anti-trust issues were determined adversely to it by the commission's approval of the exchange, so that the government was barred by principles of collateral estoppel and res judicata; and that in any event the long delay between approval of the exchange and filing of the present suit barred it because of laches. The District Court decided in favor of the defendants. ([158 F Supp 333](#).)

On appeal, the United States Supreme Court reversed. In an opinion by Warren, Ch. J., expressing the views of six members of the Court, all the issues described above were resolved against the defendants.

Harlan, J., concurred in the result.

Frankfurter and Douglas, JJ., did not participate.

## Headnotes

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LAW §320 > COMMUNICATIONS §16 > broadcasting licenses -- anti-trust violations. -- > Headnote:

[LEdHN\[1\]](#) [1]

The legislative history of 311 of the Communications Act of 1934 ( [47 USC 311](#)), directing the Federal Communications Commission to refuse a broadcasting station license to any person whose license had been revoked by a court under 313, authorizing the court to revoke such a license for violation of the federal anti-trust laws, compels the conclusion that the commission is not intended to have any authority to pass on anti-trust violations as such; courts retain jurisdiction to pass on alleged anti-trust violations irrespective of commission action.

WAIVER §9 > STATUTES §259 > broadcasting license -- repeal of law. -- > Headnote:

[LEdHN\[2\]](#) [2]

As shown by its legislative history, the repeal in the 1952 amendments to the Federal Communications Act (66 Stat 716) of the provision in 311 of the act, as originally enacted in 1934 (48 Stat 1086), that the granting by the Federal Communications Commission of a station license shall not estop the United States from proceeding against the licensee under the federal anti-trust laws, does not mean that, after the repeal, the United States is so estopped.

WAIVER §9 > broadcasting license -- anti-trust violations. -- > Headnote:

[LEdHN\[3\]](#) [3]

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In the absence of persuasive legislative history to the contrary, the provision in 311 of the Federal Communications Act, as originally enacted in 1934 (48 Stat 1086) and repealed in 1952 (66 Stat 716), that the granting of a station license by the Federal Communications Commission shall not estop the United States from proceeding against the licensee for violation of the federal anti-trust laws, was not limited in scope to insure only that the granting of a license would not estop the government to prosecute anti-trust violations subsequent to the transaction giving rise to the license proceeding, or of which the transaction was merely a small part.

LAW §322 > primary jurisdiction. -- > Headnote:

[LEdHN\[4\]](#) [4]

The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.

LAW §226 > exhaustion of remedies. -- > Headnote:

[LEdHN\[5\]](#) [5]

The rule requiring exhaustion of administrative remedies applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course.

LAW §322 > primary jurisdiction. -- > Headnote:

[LEdHN\[6\]](#) [6]

The doctrine of primary jurisdiction applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

COMMUNICATIONS §8 > television broadcasting -- rates. -- > Headnote:

[LEdHN\[7\]](#) [7]

Radio broadcasters, including television broadcasters, are not included in the definition of common carriers in 3(h) of the Federal Communications Act ([47 USC 153 \(h\)](#)), as are telephone and telegraph companies, and, consequently, the extensive controls, including rate regulation, of Title II of the Act (47 USC 201-222), do not apply; television broadcasters remain free to set their own advertising rates.

COMMUNICATIONS §24 > anti-trust violations -- judicial review. -- > Headnote:

[LEdHN\[8\]](#) [8]

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Exemptions of telephone and telegraph companies from the anti-trust laws by the Federal Communications Commission are subject to judicial review.

LAW §322 > COMMUNICATIONS §22 > primary jurisdiction -- television -- anti-trust violations. -- > Headnote:

[LEdHN\[9\]](#) [9]

The doctrine of primary jurisdiction is not applicable so as to require submission to the Federal Communications Commission of the question whether an agreement, approved by the commission, of two broadcasting companies to exchange television stations violates the federal anti-trust laws; the government may bring an independent action attacking the agreement on that ground without first resorting to the commission.

COMMUNICATIONS §15 > television -- exchange of stations. -- > Headnote:

[LEdHN\[10\]](#) [10]

The scope of approval by the Federal Communications Commission of an agreement between broadcasting companies to exchange television stations is limited to the statutory standard of "public interest, convenience, and necessity," the monetary terms of the exchange being of concern to the commission only as they might affect the ability of the parties to serve the public.

COMMUNICATIONS §15 > television -- anti-trust policy. -- > Headnote:

[LEdHN\[11\]](#) [11]

Federal anti-trust policy may be considered by the Federal Communications Commission in determining whether the "public interest, convenience, and necessity" will be served by proposed action of a broadcaster.

LAW §169 > JUDGMENT §248 > collateral estoppel -- government. -- > Headnote:

[LEdHN\[12\]](#) [12]

The government is not collaterally estopped by a former judgment or administrative decision unless it appears that in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy.

LAW §169 > COMMUNICATIONS §21 > res judicata -- television -- exchange of stations. -- > Headnote:

[LEdHN\[13\]](#) [13]

Approval by the Federal Communications Commission of an agreement between broadcasting companies to exchange television stations does not, either under the doctrine of collateral estoppel or res judicata principles,

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preclude the government from maintaining against such a company an independent action which attacks the exchange as being in furtherance of a conspiracy to violate the federal anti-trust laws.

ACTIONS §28 > laches -- action by government -- anti-trust violations. -- > Headnote:

[LEdHN\[14\]](#) [14]

An action by the government against broadcasting companies, attacking the exchange of television stations as violating the anti-trust laws, is not barred by laches because not instituted until more than 11 months after approval of the agreement by the Federal Communications Commission, since the commission had no power to decide the anti-trust issues and, consequently, the government had no duty either to enter the proceedings before the commission or to seek review of the license grant.

## Syllabus

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Approval by the Federal Communications Commission of appellees' agreement to exchange their television station in Cleveland for one in Philadelphia, which has since been consummated, does not bar this independent civil action by the Government under [§ 4](#) of the Sherman Act attacking the exchange as being in furtherance of a conspiracy to violate [§ 1](#) of that Act. Pp. 335-353.

1. The legislative history of the Communications Act of 1934, as amended, reveals that the Commission was not given the power to decide antitrust issues as such and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts. Pp. 339-346.

(a) A different result is not required by the fact that the 1952 amendments to the Act repealed the last sentence of [§ 311](#), which specifically provided that the granting of a license should not estop the United States or any aggrieved [\*\*\*\*2] person from proceeding against the licensee under the antitrust laws. Pp. 344-345.

(b) The last sentence of [§ 311](#) prior to its repeal in 1952 should not be construed narrowly as being intended to insure only that the granting of a license would not estop the Government from prosecuting antitrust violations subsequent to the transaction giving rise to the license proceeding, or of which the transaction was merely a small part. P. 345.

2. There being no pervasive regulatory scheme or rate structure involved, the scheme of the Act does not require application of the doctrine of primary jurisdiction so as to permit the Government to attack the exchange transaction as violative of the Sherman Act only by intervention in the proceedings before the Commission or by judicial review of the Commission's decision. Pp. 346-352.

3. Since the Commission has no power to decide antitrust questions, this independent antitrust suit is not barred by collateral estoppel, *res judicata* or laches. P. 352.

**Counsel:** Solicitor General Rankin argued the cause for the United States. With him on the brief were Assistant Attorney General Hansen, Daniel M. Friedman, Bernard M. Hollander and Raymond M. [\*\*\*\*3] Carlson.

Bernard G. Segal argued the cause for appellees. With him on the brief were Edward W. Mullinix, Josephine H. Klein and Lawrence J. McKay.

**Judges:** Warren, Black, Clark, Harlan, Brennan, Whittaker, Stewart; Frankfurter and Douglas took no part in the consideration or decision of this case

**Opinion by:** WARREN

## Opinion

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[\*335] [\*\*\*357] [\*\*459] MR. CHIEF JUSTICE **WARREN** delivered the opinion of the Court.

Appellees, Radio Corporation of America and National Broadcasting Company, are defendants in this civil antitrust action brought by the Government under § 4 of the Sherman Act, 15 U. S. C. § 4. After holding a preliminary hearing on three of appellees' affirmative defenses to that action, the federal district judge dismissed the complaint. 158 F.Supp. 333. The Government appealed directly to this Court under the Expediting Act, 15 U. S. C. § 29. The principal question presented is whether approval by the Federal Communications Commission of appellees' agreement to exchange their Cleveland television station for one in Philadelphia bars this independent action by the Government which attacks the exchange as being [\*\*\*\*4] in furtherance of a conspiracy to violate the federal antitrust laws.

The Government's complaint generally alleged the following facts. In 1954, National Broadcasting Company (NBC), a wholly owned subsidiary of Radio Corporation of America (RCA), owned five very high frequency (VHF) television stations. The stations were located in the following market areas: New York, which is the country's largest market; Chicago, second; Los Angeles, third; Cleveland, tenth; and Washington D. C., eleventh. According to the Government's allegations, in March 1954, NBC and RCA originated a continuing conspiracy [\*336] to acquire stations in five of the eight largest market areas in the country. Since Philadelphia is the country's fourth largest market area, acquisition of a Philadelphia station in exchange for appellees' Cleveland or Washington station would achieve one goal of the conspiracy.<sup>1</sup>

[\*\*\*5] One Philadelphia station, WPTZ, was owned by Westinghouse Broadcasting Company. This station and a Westinghouse-owned station in Boston were affiliated with the NBC network. In addition, Westinghouse desired NBC affiliation for a station to be acquired in Pittsburgh. In order to force Westinghouse to exchange its Philadelphia station for NBC's Cleveland station, it is alleged that NBC threatened Westinghouse with loss of the network affiliation of its Boston and Philadelphia stations, and threatened to withhold affiliation from its Pittsburgh station to be acquired. NBC also threatened to withhold network affiliation from any new VHF or UHF (ultra high frequency) stations which Westinghouse might acquire. By thus using its leverage as a network, [\*\*460] NBC is alleged to have forced Westinghouse to agree to the exchange contract under consideration. Under the terms of that contract NBC was to acquire the Philadelphia station, while Westinghouse was to acquire NBC's Cleveland station plus three million dollars.

The Government asked that the conspiracy be declared violative of § 1 of the Sherman Act, 15 U. S. C. § 1, that the appellees be divested of [\*\*\*6] such assets as the District Court deemed appropriate, that "such other and additional relief as may be proper" be awarded, and that the Government recover costs of the suit.

Appellees' affirmative defenses [\*\*\*358] arose out of the fact that the exchange had been approved by the Federal Communications [\*337] Commission.<sup>2</sup> FCC approval was required under § 310 (b) of the Communications Act of 1934, 48 Stat. 1086, as amended, 66 Stat. 716, 47 U. S. C. § 310 (b). Under that Section, appellees filed applications setting forth the terms of the transaction and the reasons for requesting the exchange. The Commission instituted proceedings to determine whether the exchange met the statutory requirements of § 310, that the "public interest, convenience, and necessity" would be served. They were not adversary proceedings. After extensive investigation of the transaction, the Commission was still not satisfied that the exchange would meet the statutory standards, and, over three dissents, issued letters seeking additional information on various subjects,

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<sup>1</sup> Under present FCC regulations, NBC can own no more than five stations, 47 CFR, 1958, § 3.636, so that acquisition of a new station would require that an existing one be relinquished.

<sup>2</sup> Federal Communications Commission Report No. 2793, Public Notice 27067, December 28, 1955.

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including antitrust problems, under § 309 (b) of the Act. After receiving answers to the letters, [\*\*\*\*7] the Commission, without holding a hearing, on December 21, 1955, granted the application to exchange stations.<sup>3</sup>

[\*\*\*\*8] [\*338] It was stipulated below that in passing upon the application, the Commission had all the information before it which has now been made the basis of the Government's complaint. It further appears that during the FCC proceedings the Justice Department was informed as to the evidence in the FCC's possession. It was further stipulated, and we assume, that the FCC decided all issues relative to the antitrust laws that were before it, and that the Justice Department had the right to request a hearing under § 309 (b), to file a protest under § 309 (c), to seek a rehearing under § 405, and to seek judicial review of the decision under § 402 (b). See *Far East Conference v. United States*, 342 U.S. 570, 576; *U. S. ex rel. Chapman v. Federal Power Comm'n*, 345 U.S. 153, 155, 156. The Department of Justice took none of these actions. Accordingly, on January 22, 1956, after the period in which the Department could have sought review had expired, NBC and Westinghouse consummated the exchange transaction according to [\*\*461] their contract. The Department did not file the present complaint until December 4, 1956, over ten months [\*\*\*\*9] later.

Against this background, appellees assert that the FCC had authority to pass on the antitrust questions presented, and, in any case, that the regulatory scheme of the Communications Act has so displaced that of the Sherman Act that the FCC had primary jurisdiction [\*\*359] to license the exchange transaction, with the result that any attack for antitrust reasons on the exchange transaction must have been by direct review of the license grant. Relying on this premise, they then contend that the only method available to the Government for redressing its antitrust grievances was to intervene in the FCC proceedings; that since it did not, the antitrust issues were determined adversely to it when the exchange was approved, so that it is barred by principles of collateral estoppel and *res [\*339] judicata*; and that in any case the long delay between approval of the exchange and filing of this suit bars the suit because of laches.

## I.

Whether these contentions are to prevail depends substantially upon the extent to which Congress authorized the FCC to pass on antitrust questions, and this in turn requires examination of the relevant legislative history. Two sections [\*\*\*\*10] of the Communications Act of 1934, 48 Stat. 1064, as amended, *47 U. S. C. § 151 et seq.*, deal specifically with antitrust considerations, *Sections 311* and *313*:

"**SEC. 311. HN1** [+] The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under *section 313*.

....

"**SEC. 313. HN2** [+] All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to [\*\*\*\*11] enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said

<sup>3</sup> Commissioner Bartley dissented from the action, urging that hearings should have been held because the facts theretofore revealed by the investigation had raised "serious questions as to the desirability and possible legality of the competitive practices followed by the network in obtaining dominance of major broadcast markets." He suggested that there was "a substantial question whether, once the Commission grants its approval to these transfers, certain provisions of the Clayton Act (viz. *15 U. S. C. Section 18*) might prevent Federal Trade Commission and Justice Department from taking any effective action in the event they concluded that possible violations of the anti-trust laws were involved." (Emphasis by the Commissioner.) Commissioner Doerfer, joined by Commissioner Mack, responded that it was unnecessary to hold a hearing because the investigation had fully revealed the facts. He concluded, however: "It is difficult to see how approval of this exchange may effectively preclude other governmental agencies from examining into this or any other transaction of the network companies."

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Commission or other governmental agency is by law authorized to act, any licensee shall be found **[\*340]** guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court."

These provisions were taken from the Radio Act of 1927.<sup>4</sup> They appear to have originated in a bill drafted by Congressman White of Maine, H. R. 5589, 69th Cong., 1st Sess. What is now § 311 appeared as the third paragraph of § 2 (C)<sup>5</sup> **[\*\*\*\*13]** **[\*\*\*360]** of that bill, while what is now **[\*\*462]** § 313 appeared as § 2 (G).

<sup>6</sup> **[\*\*\*\*14]** In the hearings on the bill before **[\*341]** the **[\*\*\*\*12]** House Committee, Congressman Reid of Illinois asked Judge Davis, Department of Commerce representative, whether the Secretary of Commerce<sup>7</sup> had any discretion to refuse a license under § 2 (C) (now § 311) to a party which the Secretary believed to be violating the antitrust laws. The following colloquy ensued:

Judge DAVIS. "He has no discretion under this act."

Congressman REID. "They have to be found guilty first; is that the idea?"

Congressman WHITE. "Yes. In other words, I tried to get away from placing upon the secretary the determination of a judicial question of that character. That involves, of course, a determination as to the facts; it requires a knowledge of the law and it requires an application of the law to the facts, and then it requires the exercise of judicial powers, if you leave that in his discretion, and I tried to lift it away from the secretary."

**[\*342]** Later on, the question arose as to what grounds were available to the Secretary to revoke licenses under § 2 (F) (now § 312). After Congressman White mentioned one statutory ground, Congressman Reid observed:<sup>9</sup>

"Yes; but you do not include unlawful combinations and monopolies and contracts or agreements in restraint of trade. That is not covered."

<sup>4</sup> 44 Stat. 1162. See H. R. Conf. Rep. No. 1918, 73d Cong., 2d Sess. 47, 49.

<sup>5</sup> "The Secretary of Commerce is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person, firm, company, or corporation, or any subsidiary thereof, which has been found guilty by any Federal court of unlawfully monopolizing or attempting to unlawfully monopolize radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means. The granting of a license shall not estop the United States or any person aggrieved from prosecuting such person, firm, company, or corporation for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade."

<sup>6</sup> "All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court."

<sup>7</sup> As then phrased, the Act was to be administered primarily by the Secretary of Commerce.

<sup>8</sup> Hearings before the House Committee on the Merchant Marine and Fisheries on H. R. 5589, 69th Cong., 1st Sess. 27.

<sup>9</sup> *Id.*, at 29.

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Congressman WHITE. "No; not in that section."

Congressman DAVIS of Tennessee. "Those are covered in 'G' [now [§ 313](#)]."

Congressman WHITE. "That is a judicial question and we have left it to the courts to pass on that."

This failure to include a provision permitting refusal of a license for antitrust **[\*\*463]** violations **[\*\*\*\*15]** in the absence of a judicial determination caused Congressman Davis to insert a lengthy Minority Report on H. R. 9108, which was old H. R. 5589 reintroduced by Congressman White.<sup>10</sup> Consequently, when the bill (then numbered H. R. 9971) reached the **[\*\*\*361]** floor of the House, Congressman Davis attempted to insert a number of amendments which would have strengthened the antitrust aspects of the bill. See 67 Cong. Rec. 5484, 5485. All were defeated, including an amendment to § 2 (C) (now [§ 311](#)) which would have required refusal of a license to any company "found by any Federal court or the commission to have been unlawfully monopolizing" radio communication. (Emphasis supplied.) See 67 Cong. Rec. 5501-5504, 5555.

Thus, in the Senate consideration of a version of the bill, when asked whether there was "anything in the bill providing in case the applicant for a permit is found to be acting in violation of the Sherman **antitrust law** or controls **[\*\*\*\*16]** a monopoly that the commission may pass upon **[\*343]** the question," Senator Dill of Washington, who was in charge of the bill in the Senate, replied:<sup>11</sup>

"The bill provides that in case anybody has been convicted under the Sherman **antitrust law** or any other law relating to monopoly he shall be denied a license; but the bill does not attempt to make the commission the judge as to whether or not certain conditions constitute a monopoly; it rather leaves that to the court."

Congress adjourned before any action could be taken on the bill at that session. At the next session, a Conference Committee reported out the version of the bills which became the Radio Act of 1927, with now [§ 311](#) being § 13 of the Act and now [§ 313](#) being § 15 of the Act, despite the vigorous but unsuccessful opposition of Congressman Davis in the House, see, e. g., 68 Cong. Rec. 2577, and Senator Pittman of Nevada in the Senate. See, e. g., 68 Cong. Rec. 3032, 3034.

Only one change was made in those **[\*\*\*\*17]** two Sections when they were incorporated into the Communications Act. [Section 311](#) was modified merely to authorize rather than to require the revocation of a license by the Commission after a court had found a radio broadcaster in violation of the antitrust laws, but had not ordered its license revoked, 48 Stat. 1086. In all other respects §§ 13 and 15 of the Radio Act were identical with, and had the same purpose as, [§§ 311](#) and [313](#) of the Communications Act.<sup>12</sup>

**LEdHN[1]↑** [1]While this history compels the conclusion that the FCC was not intended to have any authority to pass on antitrust violations as such, it is equally clear that courts retained jurisdiction to pass on alleged antitrust violations **[\*344]** irrespective of Commission action. Thus [§ 311](#), as originally enacted in 1934, 48 Stat. 1086, read as follows:

"The Commission is hereby directed to refuse a station license **[\*\*\*\*18]** and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under [section 313](#), and is hereby authorized to refuse such station license and/or permit to any other person (or to any person directly or indirectly controlled by such person) which has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize, radio communication, directly or indirectly, through the control of the manufacture or sale **[\*\*464]** of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition. *The granting of a **[\*\*\*362]** license shall not estop the United States or any person aggrieved from*

<sup>10</sup> See H. R. Rep. No. 404, 69th Cong., 1st Sess. 6, 16, 23.

<sup>11</sup> 67 Cong. Rec. 12507.

<sup>12</sup> H. R. Conf. Rep. No. 1918, 73d Cong., 2d Sess. 47, 49.

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*proceeding against such person for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such corporation.*" (Emphasis supplied.)

LEdHN[2] [2] [\*\*\*\*19] Appellees attempt to avoid the force of the italicized sentence in two ways. First, they point to its repeal in the 1952 amendments to the Act, 66 Stat. 716. That repeal was occasioned by objections from the industry that it was unfair for radio broadcasters who had been found in violation of the antitrust laws to be subject to license refusals by the Commission, even when the court as a part of its decree did not see fit to order the license revoked under § 313. See S. Rep. No. 142, 82d Cong., [\*345] 1st Sess. 9. Congress accordingly repealed all of the Section following the first comma, including the italicized sentence. It apparently considered that inherent in the scheme of the Act was the right to challenge under the antitrust laws even transactions approved by the Commission, for the Conference Committee carefully noted that repeal of the italicized sentence would not curtail such a right:<sup>13</sup>

"To the extent that this section of the conference substitute will eliminate from section 311 of the present law the last sentence, which is quoted above, the committee of conference does not feel that this is of any legal significance. It is the view of the members of the [\*\*\*\*20] conference committee that the last sentence of the present section 311 is surplusage and that by omitting it from the present law the power of the United States or of any private person to proceed under the antitrust laws would not be curtailed or affected in any way."

Thus, appellees' reliance on repeal of the last sentence of § 311 is clearly misplaced.

LEdHN[3] [3]Second, appellees urge that the italicized sentence as originally enacted had a very narrow scope; that it was intended to insure only that the granting of a license would not estop the Government from prosecuting anti-trust violations subsequent to the transaction giving rise to the license proceeding, or of which the transaction was merely a small part. They argue that the sentence was intended to permit only actions such as in Packaged Programs v. Westinghouse Broadcasting Co., 255 F.2d 708. But [\*\*\*\*21] the language of the sentence cannot be naturally read in such a narrow manner, and it would take persuasive legislative history so to restrict its application. Appellees point to no such history, nor to any cases so holding.

[\*346] Thus, HN3 [4] the legislative history of the Act reveals that the Commission was not given the power to decide antitrust issues as such, and that Commission action was not intended to prevent enforcement of the antitrust laws in federal courts.

## II.

We now reach the question whether, despite the legislative history, the over-all regulatory scheme of the Act requires invocation of a primary jurisdiction doctrine. The doctrine originated with Mr. Justice (later Chief Justice) White in Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426. It was [\*\*\*363] grounded on the necessity for administrative uniformity, and, in that particular [\*\*465] case, for maintenance of uniform rates to all shippers.<sup>14</sup> A second reason for the doctrine was suggested by Mr. Justice Brandeis in Great Northern R. Co. v.

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<sup>13</sup> H. R. Conf. Rep. No. 2426, 82d Cong., 2d Sess. 19.

<sup>14</sup> We recently explained the nature of the doctrine in United States v. Western Pacific R. Co., 352 U.S. 59, 63-64:

HN4 [5] "The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views."

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Merchants Elevator Co., 259 U.S. 285, 291, [\*\*\*\*22] where he pointed to the need for administrative skill "commonly to be found only in a body of experts" in handling the "intricate facts" of, in that case, the transportation industry.

[[LEdHN\[4\]](#) [4] [LEdHN\[5\]](#) [5] [LEdHN\[6\]](#) [6]

[\*\*\*\*23] Thus, when questions arose as to the applicability of the doctrine to transactions allegedly violative of the antitrust [\*347] laws, particularly involving fully regulated industries whose members were forced to charge only reasonable rates approved by the appropriate commission, this Court found the doctrine applicable.<sup>15</sup> United States v. Pacific & Arctic R. Co., 228 U.S. 87; Keogh v. Chicago & N. W. R. Co., 260 U.S. 156; United States Navigation Co. v. Cunard S. S. Co., 284 U.S. 474; Georgia v. Pennsylvania R. Co., 324 U.S. 439; Far East Conference v. United States, 342 U.S. 570. At the same time, this Court carefully noted that the doctrine did not apply when the action was only for the purpose of dissolving the conspiracy through which the allegedly invalid rates were set, for in such a case there would be no interference with rate structures or a regulatory scheme.<sup>16</sup> United States v. Pacific & Arctic R. Co., supra; Georgia v. Pennsylvania R. Co., supra. [\*\*\*364] The decisions sometimes emphasized the need for administrative [\*\*\*\*24] uniformity and uniform rates, [\*348] Keogh v. Chicago & N. W. R. Co., supra, while at other times they emphasized the need for administrative experience in distilling the relevant facts in a complex industry as a foundation for later court action. United States Navigation Co. v. Cunard S. S. Co., supra, and Far East Conference <sup>\*\*4661</sup> v. United States, supra, as explained in Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481, 497-499.

[\*\*\*\*25] The cases all involved, however, common carriers by rail and water. These carriers could charge only the published tariff, and that tariff must have been found by the appropriate agency to have been reasonable. Free rate competition was modified by federal controls. The Court's concern was that the agency which was expert in, and responsible for, administering those controls should be given the opportunity to determine questions within its special competence as an aid to the courts in resolving federal antitrust policy and federal regulatory patterns into a cohesive whole. That some resolution is necessary when the antitrust policy of free competition is placed beside a regulatory scheme involving fixed rates is obvious. Cf. McLean Trucking Co. v. United States, 321 U.S. 67. Accordingly, this Court consistently held that when rates and practices relating thereto were challenged under the antitrust laws, the agencies had primary jurisdiction to consider the reasonableness of such rates and practices in the light of the many relevant factors including alleged antitrust violations, for otherwise sporadic action by federal courts would disrupt an agency's delicate [\*\*\*\*26] regulatory scheme, and would throw existing rate structures out of balance.

[[LEdHN\[7\]](#) [7]While the television industry is also a regulated industry, it is regulated in a very different way. That difference is controlling. [HN5](#) Radio broadcasters, including television broadcasters, see Allen B. Dumont Laboratories <sup>\*\*3491</sup> v. Carroll, 184 F.2d 153, are not included in the definition of common carriers in § 3 (h) of the

<sup>15</sup> See, generally, 3 Davis, Administrative Law Treatise, §§ 19.05, 19.06; Jaffe, Primary Jurisdiction Reconsidered: The Anti-Trust Laws, 102 U. of Pa. L. Rev. 577; Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 436; von Mehren, The Antitrust Laws and Regulated Industries: The Doctrine of Primary Jurisdiction, 67 Harv. L. Rev. 929.

<sup>16</sup> This followed because, in the words of Mr. Justice Brandeis in Keogh v. Chicago & N. W. R. Co., supra, at 161, ". . . a combination of carriers to fix reasonable and non-discriminatory rates may be illegal." This Court in Georgia v. Pennsylvania R. Co., supra, took the position that shippers were entitled to have rates filed by carriers who were not parties to a conspiracy, even though the rates filed were the lowest which would be found to be reasonable. The risk that future filings would be at the uppermost limits of the zone of reasonableness was too great, and damage from the conspiratorial filings was presumed to flow. Of course, when the agency is permitted to exempt from antitrust coverage rates filed cooperatively, the doctrine equally applies to an attack on the alleged conspiracy. United States Navigation Co. v. Cunard S. S. Co., supra; Far East Conference v. United States, supra.

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Communications Act, [47 U. S. C. § 153 \(h\)](#), as are telephone and telegraph companies. Thus the extensive controls, including rate regulation, of Title II of the Communications Act, [47 U. S. C. §§ 201-222](#), do not apply.<sup>17</sup> [\*\*\*\*28] Television broadcasters remain free to set their own advertising rates. As this Court said in [Federal Communications Comm'n v. Sanders Bros. Radio Station, 309 U.S. 470, 474](#):

"In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier [\*\*\*\*27] activity [\*\*\*365] and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition as it has done in the case of railroads . . . ."

[\*350] [LEdHN\[9\]](#) [9] Thus, [HN6](#) there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by [\\*\\*467](#) federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears.<sup>18</sup>

[LEdHN\[8\]](#) [8]

[\*\*\*\*29] [LEdHN\[10\]](#) [10] The facts of this case illustrate that analysis. Appellees, like unregulated business concerns, made a business judgment as to the desirability of the exchange. Like unregulated concerns, they had to make this judgment with knowledge that the exchange might run afoul of the antitrust laws. Their decision varied from that of an [\*351] unregulated concern only in that they also had to obtain the approval of a federal agency. But scope of that approval in the case of the FCC was limited to the statutory standard, "public interest, convenience, and necessity." See, generally, [Federal Radio Comm'n v. Nelson Bros. Co., 289 U.S. 266](#); [Federal Communications Comm'n v. Pottsville Broadcasting Co., 309 U.S. 134](#); [Federal Communications Comm'n v. Sanders Bros. Radio Station, supra](#); [Federal Communications Comm'n v. RCA Communications, 346 U.S. 86](#). The monetary terms of the exchange were set by the parties, and were of concern to the Commission only as they might have affected the ability of the parties to serve the public. [\*\*\*\*30] Even after approval, the parties were free to complete or not to complete the exchange as their sound business judgment dictated. In every sense, the question

<sup>17</sup> Under Title II, common carriers are required to furnish communications service on reasonable request and may charge only just and reasonable rates, [§ 201](#). Such carriers must file rates with the FCC, and can charge only the rates as filed, [§ 203](#). The Commission may hold hearings on the lawfulness of filed rates, [§ 204](#), and after hearings may itself set the applicable rate, [§ 205](#). Cf. 49 U. S. C. § 15 et seq., 46 U. S. C. § 817. In view of this extensive regulation, Congress has provided that certain actions of telephone and telegraph companies may be exempted from the antitrust laws by the Commission, [§ 221 \(a\)](#) and [§ 222 \(c\)\(1\)](#). Cf. 49 U. S. C. §§ 5 (11), 5b (9) and 46 U. S. C. § 814. Such exemptions are, however, subject to review, see [Federal Maritime Board v. Isbrandtsen Co., 356 U.S. 481](#).

<sup>18</sup> This conclusion is re-enforced by the Commission's disavowal of either the power or the desire to foreclose the Government from antitrust actions aimed at transactions which the Commission has licensed. This position was taken both before the district judge below, and in a Supplemental Memorandum filed in this Court, page 8:

"Concurrent with the jurisdiction of the Department of Justice to enforce the Sherman Act, the Commission, of course, has jurisdiction to designate license applications for hearing on public interest questions arising out of facts which might also constitute violations of the antitrust laws. This does not mean, however, that its action on these public interest questions of communications policy is a determination of the antitrust issues as such. Thus, while the Commission may deny applications as not in the public interest where violations of the Sherman Act have been determined to exist, its approval of transactions which might involve Sherman Act violations is not a determination that the Sherman Act has not been violated, and therefore cannot forestall the United States from subsequently bringing an antitrust suit challenging those transactions."

Nor was this position taken merely for the purposes of this litigation, for it has been the view of the Commission over a period of years. See Report on Uniform Policy as to Violation by Applicants of Laws of United States, FCC Docket No. 9572 (1950), 1 Pike and Fischer, Radio Regulation, Part III, 91:495; *National Broadcasting Co. v. United States, 319 U.S. 190*. Since, as Mr. Justice Brandeis observed, the doctrine of primary jurisdiction rests in part upon the need for the skill of a "body of experts," it would be odd to impose the doctrine when the experts deny the relevance of their skill.

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faced by the parties was solely one of business judgment (as opposed to regulatory [\*\*\*366] coercion), save only that the Commission must have found that the "public interest" would be served by their decision to make the exchange. No pervasive regulatory scheme was involved.

[LEdHN\[11\]](#) [11] This is not to imply that federal antitrust policy may not be considered in determining whether the "public interest, convenience, and necessity" will be served by proposed action of a broadcaster, for this Court has held the contrary.<sup>19</sup> *National Broadcasting Co. v. United States*, 319 U.S. 190, 222-224. Moreover, in a given case the Commission might find that antitrust considerations alone would keep the statutory [\*\*468] standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television [\*352] facilities, which, if granted, would give him a monopoly of that [\*\*\*31] area's major media of mass communication. See 98 Cong. Rec. 7399; *Mansfield Journal Co. v. Federal Communications Comm'n*, 86 U.S. App. D. C. 102, 107, 108, 180 F.2d 28, 33, 34.

III.

[LEdHN\[12\]](#) [12] [LEdHN\[13\]](#) [13] The other contentions of appellees fall of their own weight if the FCC has no power to decide antitrust questions. Thus, [HNZ](#) before we can find the Government collaterally estopped by the FCC licensing, we must find "whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy. [\*\*\*32] " *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 403. (Emphasis supplied.) But the issue in controversy before the Commission was whether the exchange would serve the public interest, not whether § 1 of the Sherman Act had been violated. Consequently, there could be no estoppel. *Res judicata* principles are even more inapposite.

[LEdHN\[14\]](#) [14] Similarly, there could be no laches unless the Government was under some sort of a duty to go forward in the FCC proceedings. But unless the FCC had power to decide the antitrust issues, and we have held that it did not, the Government had no duty either to enter the FCC proceedings or to seek review of the license grant.<sup>20</sup>

[\*\*\*33] [\*353] Accordingly, the judgment of the District Court dismissing the action is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

MR. JUSTICE HARLAN concurs in the result, believing, as he understands part "I" of the Court's opinion to hold, that a Commission determination of "public interest, convenience, and necessity" cannot either constitute a binding adjudication upon any antitrust issues that may be involved in the Commission's proceeding or serve to exempt a licensee *pro tanto* from the antitrust laws, and that these considerations alone are dispositive of this appeal.

[\*\*\*367] MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

## References

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Annotation References:

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<sup>19</sup> See also Report on Uniform Policy as to Violation by Applicants of Laws of United States, FCC Docket No. 9572, 1 Pike and Fischer, Radio Regulation, Part III, 91:495.

<sup>20</sup> It is relevant to note that the Commission is not expressly required to give the Government notice that antitrust issues have been raised in a [§ 310 \(b\)](#) proceeding. Compare § 222 (c)(1) of the Act relating to common carriers, which expressly makes consolidations and mergers exempt from antitrust coverage if approved by the Commission, but which also expressly requires that notice be given to the Attorney General of the United States prior to approval.

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1. Legal aspects of radio communication and broadcasting, 40 ALR 1513, 66 ALR 1361, 76 ALR 1272, 82 ALR 1106, 89 ALR 420, 104 ALR 872, 124 ALR 982, 171 ALR 765.
2. Legal aspects of television, 15 ALR2d 785.
3. Licensing and control of telecast facilities, 95 L ed 1075.

[\*\*\*\*34] 4. Contracts of broadcast licensee as affected by action of Federal Communications Commission, 94 L ed 376.

5. The doctrine of primary jurisdiction, 94 L ed 806 and 1 L ed 2d 1596.

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## Minneapolis & S. L. R. Co. v. United States

Supreme Court of the United States

November 16-17, 1959, Argued ; December 14, 1959, Decided \*

No. 12

**Reporter**

361 U.S. 173 \*; 80 S. Ct. 229 \*\*; 4 L. Ed. 2d 223 \*\*\*; 1959 U.S. LEXIS 2 \*\*\*\*

MINNEAPOLIS & ST. LOUIS RAILWAY CO. v. UNITED STATES ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

**Disposition:** [165 F.Supp. 893](#), affirmed.

### Core Terms

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carrier, stock, acquisition, railroads, public interest, Commerce, intervened, anti trust law, transportation, Clayton Act, employees, relieved, acquire, per share, authorization, policies, approve, conditions, subsidiary, contracts, traffic, terms

### LexisNexis® Headnotes

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Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

#### [HN1](#) Interstate Commerce, Restraints of Trade

Section 5(2) of the Interstate Commerce Act, 49 U.S.C.S. § 5(2), provides, in part: (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) for two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise. (b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify designated parties, and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable.

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\* Together with No. 27, South Dakota et al. v. United States et al., and No. 28, Minnesota et al. v. United States et al., also on appeals from the same Court.

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Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Governments > State & Territorial Governments > Boundaries

## [\*\*HN2\*\*](#) [down] Interstate Commerce, Restraints of Trade

Section 5(2)(c) of the Interstate Commerce Act, 49 U.S.C.S. § 5(2)(c), states: In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected. Section 5(2)(d) states: The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest. Section 5(2)(f) states: As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

## [\*\*HN3\*\*](#) [down] Interstate Commerce, Restraints of Trade

Section 5(11) of the Interstate Commerce Act, 49 U.S.C.S. § 5(11) provides in part that: The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in any transaction approved by the Commission thereunder, shall have full power to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction and any carriers participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law insofar as may be necessary to enable it to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

## [\*\*HN4\*\*](#) [down] Interstate Commerce, Restraints of Trade

Section 5(11) of the Interstate Commerce Act (ICA), 49 U.S.C.S. § 5(11) is both a more recent and a more specific expression of congressional policy than [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), and [§ 7](#) of the Clayton Act, [15](#)

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[U.S.C.S. § 18](#), and in terms relieves the acquiring carrier, upon approval by the Interstate Commerce Commission of the acquisition, from the operation of the antitrust laws. Although § 5(11) of the ICA, 49 U.S.C.S. § 5(11), does not authorize the Commission to ignore the antitrust laws, there can be little doubt that the Commission is not to measure proposals for acquisitions by the standards of the antitrust laws. The problem is one of accommodation of § 5(2) of the ICA, 49 U.S.C.S. § 5(2), and the antitrust legislation. The Commission remains obligated to estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed acquisition and consider them along with the advantages of improved service and other matters in the public interest to determine whether the acquisition will assist in effectuating the over-all transportation policy.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Regulated Industries > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

## [HN5](#) Interstate Commerce, Restraints of Trade

Even though a railroad acquisition might otherwise violate the antitrust laws, Congress has authorized the Interstate Commerce Commission to approve them, if it finds they are in the public interest, because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy. It was informed that this policy would be furthered by encouraging the organization of stronger units in the industry. And in authorizing those acquisitions it did not import the general policies of the anti-trust laws as a measure of their permissibility. It in terms relieved participants in appropriate acquisitions from the requirements of those laws. § 5(11) of the Interstate Commerce Act, 49 U.S.C.S. § 5(11). It must be presumed that, in enacting this legislation, Congress took account of the fact that railroads are subject to strict regulation and supervision. Against this background, no other inference is possible but that, as a factor in determining the propriety of railroad acquisitions the preservation of competition among carriers, although still a value, is significant chiefly as it aids in the attainment of the objectives of the national transportation policy.

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

## [HN6](#) Transportation, Railroads

As respects railroad acquisitions, the Interstate Commerce Commission is not so bound by the antitrust laws that it must permit them to overbear what it finds to be in the public interest. A contrary view would, in effect, permit the Commission to authorize only those acquisitions which would not offend those laws. This would render meaningless the exemption relieving the participants in a properly approved acquisition of the requirements of those antitrust

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laws. Resolution of the conflicting considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms. The wisdom and experience of that Commission, not of the courts, must determine whether the proposed acquisition is consistent with the public interest.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

### [\*\*HN7\*\*](#) Interstate Commerce, Restraints of Trade

Congress has left the task of making the determination as to the effects of a railroad acquisition on competition to the wisdom and experience of the Interstate Commerce Commission. Where the determination it makes rests upon adequate findings which are, in turn, supported by substantial evidence, it is well within the limits of its discretion under the Interstate Commerce Act.

Antitrust & Trade Law > Clayton Act > Scope

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Antitrust & Trade Law > Clayton Act > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

### [\*\*HN8\*\*](#) Antitrust & Trade Law, Clayton Act

Section 10 of the Clayton Act, [15 U.S.C.S. § 20](#), prohibits a common carrier engaged in commerce from having any dealings in securities of more than \$ 50,000, in the aggregate, in any one year, with another corporation, when the said common carrier shall have upon its board of directors any person who is at the same time a director of such other corporation, except such purchases as shall be made by competitive bidding under regulations to be prescribed by the Interstate Commerce Commission.

Antitrust & Trade Law > Clayton Act > Scope

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Antitrust & Trade Law > Clayton Act > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

### [\*\*HN9\*\*](#) Antitrust & Trade Law, Clayton Act

The evident purpose of § 10 of the Clayton Act, [15 U.S.C.S. § 20](#), was to prohibit a corporation from abusing a carrier by palming off upon it securities, supplies and other articles without competitive bidding and at excessive prices through overreaching by, or other misfeasance of, common directors, to the financial injury of the carrier and

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the consequent impairment of its ability to serve the public interest. Even if a purchase of securities might, under other circumstances, violate § 10 of the Clayton Act, Congress, by § 5(11) of the Interstate Commerce Act, 49 U.S.C.S. § 5(11), has authorized the Interstate Commerce Commission to approve it if it finds that so doing is in the public interest. Congress has expressly said that, upon such approval, the carrier shall be relieved from the operation of the anti-trust laws.

Antitrust & Trade Law > Clayton Act > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

#### [HN10](#) [ ] Antitrust & Trade Law, Clayton Act

Section 10 of the Clayton Act, [15 U.S.C.S. § 20](#), is included in the "anti-trust laws" referred to in § 5(11) of the Interstate Commerce Act (ICA), 49 U.S.C.S. § 5(11). [Section 1](#) of the Clayton Act, [15 U.S.C.S. § 12](#), provides that: "anti-trust laws," as used in [§§ 12, 13](#), 14-21, and 22-27 of this title, includes §§ 1-27 of this title. Moreover, § 5(11) of the ICA, 49 U.S.C.S. § 5(11), avoids any ambiguity by including all other restraints, limitations, and prohibitions of law, Federal, State, or municipal.

Administrative Law > Agency Adjudication > Decisions > Contents

Civil Procedure > Judgments > Relief From Judgments > General Overview

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

#### [HN11](#) [ ] Decisions, Contents

The Administrative Procedure Act (APA) applies to proceedings before the Interstate Commerce Commission. The last sentence of § 8(b) of the APA, [5 U.S.C.S. § 1007\(b\)](#), provides in part: All administrative decisions shall become a part of the record and include a statement of: (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Administrative Law > ... > Formal Adjudicatory Procedure > Hearings > General Overview

Transportation Law > Interstate Commerce > General Overview

#### [HN12](#) [ ] Formal Adjudicatory Procedure, Hearings

By the express terms of § 8(b) of the Administrative Procedure Act, [5 U.S.C.S. § 1007\(b\)](#), the Interstate Commerce Commission is not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are material.

## Lawyers' Edition Display

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### Summary

Several rail carriers made rival applications to the Interstate Commerce Commission under 5(2) of the Interstate Commerce Act for authority to acquire control of another railroad company. The commission decided in favor of two

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applicants for joint control which proposed continued operation of the railroad company as a separate and independent carrier. (295 ICC 523.) The unsuccessful applicant then filed a complaint in the United States District Court for the District of Minnesota to vacate the commission's order. Various parties intervened. A three-judge court sustained the order. ([165 F Supp 893](#).)

On separate appeals, the Supreme Court affirmed the judgment below. In an opinion by Whittaker, J., it was held that the order was within the discretion of the commission, even though the acquisition may have violated antitrust laws, and that the commission did not violate the provisions of the Administrative Procedure Act requiring that all administrative decisions include a statement of findings upon all material issues.

Douglas, J., dissented without opinion.

## Headnotes

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INTERSTATE COMMERCE COMMISSION §39 > findings -- consolidation -- public interest. -- > Headnote:

[LEdHN\[1\]](#) [1]

Findings, made by the Interstate Commerce Commission upon applications by several rail carriers under 5(2) of the Interstate Commerce Act (49 USC 5(2)) for authority to acquire control of another railroad company, that the public interest would be best served by the continued operation of the latter company as a separate and independent carrier, as proposed by the successful applicant, do not deprive the unsuccessful applicant of fair comparative consideration, and are adequately supported by subsidiary findings that the unsuccessful applicant's plan contemplated the disappearance of the railroad company as an independent and neutral connection for the other 15 carriers with which it presently worked, that certain features of that plan would be extremely harmful to other carriers, that the plan contemplated the elimination of the railroad company's offices and the separation of its employees, and that numerous witnesses testified that the separate and independent operation of the railroad company under its present local management was a public necessity.

INTERSTATE COMMERCE COMMISSION §39 > consolidation -- antitrust laws. -- > Headnote:

[LEdHN\[2\]](#) [2]

Although 5(11) of the Interstate Commerce Act (49 USC 5(11)), providing that the authority of the Interstate Commerce Commission to approve combinations and consolidations of carriers under 5 shall be "exclusive and plenary," does not authorize the commission to ignore the antitrust laws, the commission is not to measure proposals for acquisition by one rail carrier of control of another by the standards of the antitrust laws, the problem being one of accommodation of 5(2) and the antitrust legislation, and the commission remaining obligated to estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed acquisition and consider them along with the advantages of improved service and other matters in the public interest to determine whether the acquisition will assist in effectuating the over-all national transportation policy.

INTERSTATE COMMERCE COMMISSION §39 > consolidation -- antitrust laws. -- > Headnote:

[LEdHN\[3\]](#) [3]

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It must be presumed that, in enacting 5(11) of the Interstate Commerce Act (49 USC 5(11)), which authorizes the Interstate Commerce Commission to approve acquisition by one rail carrier of control of another, if it finds it is in the public interest and which relieves participants in appropriate acquisitions from the requirements of the antitrust laws, Congress took account of the fact that railroads are subject to strict regulation and supervision.

INTERSTATE COMMERCE COMMISSION §39 > consolidation -- antitrust laws. -- > Headnote:

[LEdHN\[4\]](#) [4]

As respects acquisition by one rail carrier of control of another, the Interstate Commerce Commission is not so bound by the antitrust laws that it must permit them to overbear what it finds to be in the public interest.

ADMINISTRATIVE LAW §255 > INTERSTATE COMMERCE COMMISSION §176 > review -- consolidation. -- > Headnote:

[LEdHN\[5\]](#) [5]

The wisdom and experience of the Interstate Commerce Commission, not of the courts, must determine whether the proposed acquisition by one rail carrier of control of another is consistent with the public interest.

INTERSTATE COMMERCE COMMISSION §176 > review -- discretion -- consolidation. -- > Headnote:

[LEdHN\[6\]](#) [6]

A determination, made by the Interstate Commerce Commission upon applications by several rival rail carriers under 5(2) of the Interstate Commerce Act (49 USC 5(2)) for authority to acquire control of another railroad company, that the acquisition and plan of operation by the successful applicant would not result in any significant lessening of competition is within the limits of the commission's discretion where it rests upon adequate findings which are, in turn, supported by substantial evidence.

INTERSTATE COMMERCE COMMISSION §39 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §5 > consolidation -- Clayton Act. -- > Headnote:

[LEdHN\[7\]](#) [7]

Section 10 of the Clayton Act ([15 USC 20](#)), which prohibits a common carrier from having any dealings in securities of more than a specified amount with another corporation when the carrier has upon its board of directors a person who is at the same time a director of such corporation, excepting purchases made by competitive bidding under regulations to be prescribed by the Interstate Commerce Commission, is an **antitrust law** within the meaning of the rule that, as respects acquisition by one rail carrier of control of another, the commission is not so bound by the antitrust laws that it must permit them to overbear what it finds to be in the public interest.

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SECURITIES REGULATION §3 > carriers -- purpose of statute. -- > Headnote:

[LEdHN\[8\]](#) [8]

The purpose of 10 of the Clayton Act ([15 USC 20](#)) is to prohibit a corporation from abusing a carrier by palming off upon it securities, supplies, and other articles without competitive bidding and at excessive prices through overreaching by, or other misfeasance of, common directors to the financial injury of the carrier and the consequent impairment of its ability to serve the public interest.

INTERSTATE COMMERCE COMMISSION §39 > discretion -- consolidation. -- > Headnote:

[LEdHN\[9\]](#) [9]

The approval, under 5(2) of the Interstate Commerce Act (49 USC 5(2)), by the Interstate Commerce Commission of contracts under which a rail carrier proposes to acquire a 50 per cent interest in the stock of another rail carrier does not exceed the statutory limits of the commission's discretion, even though the contracts are in violation of 10 of the Clayton Act ([15 USC 20](#)), dealing with purchases by common carriers in case of interlocking directorates.

INTERSTATE COMMERCE COMMISSION §39 > consolidation -- antitrust laws. -- > Headnote:

[LEdHN\[10\]](#) [10]

Apart from criminal prosecutions, approval by the Interstate Commerce Commission of acquisition by one rail carrier of control of another operates under 5(11) of the Interstate Commerce Act (49 USC 5(11)) to relieve the acquiring carrier from the operation of the antitrust laws.

ADMINISTRATIVE LAW §4 > INTERSTATE COMMERCE COMMISSION §8 > statute. -- > Headnote:

[LEdHN\[11\]](#) [11]

The Administrative Procedure Act ([5 USC 1001 et seq.](#)) applies to proceedings before the Interstate Commerce Commission.

ADMINISTRATIVE LAW §157 > findings. -- > Headnote:

[LEdHN\[12\]](#) [12]

The requirement of 8(b) of the Administrative Procedure Act ([5 USC 1007\(b\)](#)) that all administrative decisions shall include a statement of findings and conclusions upon all material issues is satisfied where an administrative agency, although making no specific finding upon a contention, considers and discusses it.

ADMINISTRATIVE LAW §155 > findings. -- > Headnote:

[LEdHN\[13\]](#) [13]

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Section 8(b) of the Administrative Procedure Act ([5 USC 1007\(b\)](#)), providing that all administrative decisions shall include a statement of findings and conclusions upon all material issues of fact does not require findings upon contentions that are collateral or immaterial.

APPEAL §1646 > affirmance -- insufficient reasons of court below. -- > Headnote:

[LEdHN\[14\]](#) [14]

Whether or not the United States Supreme Court approves all of the reasons and legal conclusions of the District Court, its judgment sustaining an order of the Interstate Commerce Commission will be affirmed, where the District Court fairly considered and decided all of the issues raised by appellants, accorded to them a full and fair judicial review, and reached a right result.

## Syllabus

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Under § 5 (2) of the Interstate Commerce Act, the Commission was confronted with rival applications by several railroads for authority to acquire control of the Toledo, Peoria & Western Railroad, an independent, short-line, "bridge carrier" of through east-west traffic by-passing the congested Chicago and St. Louis gateways and connecting with 16 other railroads. After extended hearings, the Commission found that the plan for joint control of Western by the Santa Fe and Pennsylvania Railroads contemplated that Western would continue to be operated as a separate and independent carrier with responsible local management and that all existing routes via Western would be maintained and kept open without discrimination between connecting lines of railroads; but that the plan of the Minneapolis & St. Louis Railroad to acquire sole control of Western contemplated its disappearance as an independent and neutral connection for 15 other carriers, that it would be extremely harmful to other carriers and that it would result in termination of the employment of most of Western's [\*\*\*\*2] 24 executives and 225 other employees. The Commission concluded that the acquisition and plan of operation by the Santa Fe and Pennsylvania, subject to stated conditions, was within the scope of § 5 (2) of the Act, that the proposed terms and conditions were just and reasonable, and that the transaction would be consistent with the public interest. It, therefore, approved the Santa Fe-Pennsylvania application, dismissed the Minneapolis application, and denied applications by several intervening railroads for permission to participate in the acquisition of Western's stock. The District Court sustained the Commission's order. *Held:* The judgment is affirmed. Pp. 176-194.

1. The record shows that the Commission's finding that continued operation of Western as a "separate and independent carrier" was required by the "public interest" did not deprive the Minneapolis & St. Louis Railroad of "fair comparative consideration" and that it was made after full and fair consideration; and the District Court did not err in so holding. Pp. 184-185.

2. Notwithstanding appellants' contention that acquisition of Western by Santa Fe and Pennsylvania would create a combination in restraint [\*\*\*\*3] of commerce in violation of [§ 1](#) of the Sherman Act and would lessen competition or tend to create a monopoly in violation of [§ 7](#) of the Clayton Act, the record shows that the Commission fully estimated the scope and appraised the effects of any resulting curtailment of competition and concluded that the proposed acquisition and plan of operation would not result in any significant lessening of competition; and this determination rests upon adequate findings, supported by substantial evidence, and is well within the limits of the Commission's discretion under the Act. Pp. 185-189.

(a) Although § 5 (11) does not authorize the Commission to "ignore" the antitrust laws, it does authorize the Commission to approve acquisitions which might otherwise violate the antitrust laws, if it finds that such acquisitions are in the public interest, and, upon approval of the acquisitions by the Commission, it relieves the acquiring carriers from the operation of the antitrust laws. Pp. 185-187.

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(b) As respects railroad acquisitions, the Commission is not so bound by the antitrust laws that it must permit them to overbear what it finds to be in the public interest, and the wisdom and experience [\*\*\*4] of the Commission, not of the courts, must determine whether the proposed acquisition is in the public interest. Pp. 187-188.

(c) The Commission gave extensive consideration to this contention of appellants and determined that the acquisition of Western by Santa Fe and Pennsylvania and their plan of operation of Western would not result in any significant lessening of competition; and that determination was based upon adequate findings, supported by substantial evidence, and was well within the limits of the Commission's discretion under the Act. Pp. 188-189.

3. Notwithstanding appellants' contention that Pennsylvania actually contracted to purchase 50% of Western's stock from a trust company which had four common directors with Pennsylvania and that such purchase would violate § 10 of the Clayton Act, the Commission's action in approving Pennsylvania's acquisition of the stock, after fully considering all factors bearing thereon, did not exceed the statutory limits of the Commission's discretion. Pp. 189-191.

4. Whether or not § 5 (11) operates only *in futuro* is immaterial in this case, since the existing contractual arrangements through which Pennsylvania asked authority [\*\*\*5] to acquire 50% of Western's stock looked entirely to the future. Pp. 191-192.

5. Notwithstanding appellants' contention that the Commission violated § 8 (b) of the Administrative Procedure Act by failing to make findings which, they think, were compelled by the evidence, the record discloses that the Commission made adequate subsidiary findings upon all material issues and made the ultimate findings required by § 5 (2), that they support the Commission's order and that they are, in turn, supported by substantial evidence. Pp. 192-194.

6. The District Court fairly considered and decided all of the issues raised by appellants, accorded to them a full and fair judicial review, and reached a right result. P. 194.

**Counsel:** Max Swiren and Harold J. Soderberg argued the cause for appellants. Max Swiren, John G. Dorsey and Richard Musenbrock were on the brief for the Minneapolis & St. Louis Railway Co., appellant in No. 12; Parnell Donohue, Attorney General of South Dakota, Herman L. Bode, Assistant Attorney General, and Ernest W. Stephens for the State of South Dakota et al., appellants in No. 27; and Miles Lord, Attorney General of Minnesota, and Harold J. Soderberg, Assistant Attorney General, [\*\*\*6] for the State of Minnesota et al., appellants in No. 28.

Robert W. Ginnane and Starr Thomas argued the cause for appellees. Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, Robert W. Ginnane and B. Franklin Taylor, Jr. were on the brief for the United States and the Interstate Commerce Commission; Grenville Beardsley, Attorney General of Illinois, and Harry R. Begley, Special Assistant Attorney General, for the State of Illinois; Starr Thomas, Carl E. Bagge and Edwin A. Lucas for the Atchison, Topeka & Santa Fe Railway Co. et al.; and Robert H. Walker for certain municipalities and shippers et al., appellees.

**Judges:** Warren, Black, Frankfurter, Douglas, Clark, Harlan, Brennan, Whittaker, Stewart

**Opinion by:** WHITTAKER

## **Opinion**

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[\*176] [\*\*\*226] [\*\*232] MR. JUSTICE WHITTAKER delivered the opinion of the Court.

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These appeals present questions arising out of rival applications by several rail carriers to the Interstate Commerce Commission under § 5 (2) of the Interstate Commerce Act <sup>1</sup> for authority to acquire control of Toledo, Peoria & Western Railroad Company.

[\*\*\*7] [\*177] "Western [\*\*233]" is an independent, short-line "bridge carrier" <sup>2</sup> of through east-west traffic bypassing the congested Chicago gateway. Its line is about 234 miles long, extending from its connection with the Pennsylvania Railroad Company ("Pennsylvania") at Effner, on the Illinois-Indiana state line, westward, through Peoria, to its connection [\*227] with the main line of the Atchison, Topeka & Santa Fe Railway Company ("Santa Fe") at Lomax, Illinois, and thence southwesterly a short distance to Keokuk, Iowa. Its headquarters, shops and yards are located in East Peoria where it has 24 executives and where, and elsewhere along its line, it has about 225 other employees. It has connections for the interchange of traffic with 16 railroads, the principal ones being with the Pennsylvania at Effner, with the Santa Fe at Lomax, and with the New York, Chicago & St. Louis Railroad Company ("Nickel Plate"), the Illinois Terminal Railroad Company, the [\*178] Chicago, Burlington & Quincy Railroad Company ("Burlington") and the Minneapolis & St. Louis Railway Company ("Minneapolis") at Peoria. Its interchange connections with the other 10 railroads are at 17 other towns [\*\*\*8] along its line.

Western has outstanding 90,000 shares of common capital stock, 82% of which is owned by the testamentary trustees of the estate of George P. McNear -- Wilmington Trust Company and Guy Gladson -- and the remaining 18% is owned by members of the McNear family, a bank and the president of Western. In 1954, the trustees determined to sell their Western stock, and rival efforts were commenced by Minneapolis, on the one hand, and by

<sup>1</sup> Section 5 (2) of the Interstate Commerce Act (24 Stat. 380, as amended, 54 Stat. 905, 49 U. S. C. § 5 (2)) [HN1](#) provides, in pertinent part, that:

"(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph --

"(i) for . . . two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise . . . .

. . . .

"(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier . . . seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify . . . [designated parties], and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable . . . .

[HN2](#) "(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

"(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

. . . .

"(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. . . ."

<sup>2</sup> The term "bridge carrier" appears to mean a short-line carrier which transports through traffic from one long-line carrier to another.

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the Santa Fe and Pennsylvania, on the other hand, to purchase it. (Four of Wilmington Trust Company's directors were also directors of Pennsylvania.) Those negotiations culminated in a contract between the trustees and the Santa Fe, dated May 26, 1955, providing for the sale by the former and purchase by the latter of the stock at a price of \$ 135 per share, subject to the Commission's approval.<sup>3</sup> Soon afterward, [\*\*234] like agreements [\*\*\*9] [\*179] were made by the Santa Fe with the holders of the remaining 18% of the Western stock.

[\*\*\*10] On June 28, 1955, the Santa Fe entered into a contract to sell to the Pennsylvania Company, a wholly owned subsidiary of Pennsylvania, 50% of the outstanding capital stock of Western at \$ 135 per share,<sup>4</sup> subject [\*\*\*228] to approval of the Commission.

[\*\*\*11] On July 8, 1955, the Santa Fe and Pennsylvania Company and its parent, Pennsylvania, applied to the Commission under § 5 (2) of the Act<sup>5</sup> for approval of [\*180] those stock purchase agreements and the consequent joint control of Western. The Minneapolis intervened and objected to the application, as did also the States of Minnesota and South Dakota and their respective public service regulatory commissions.

Thereafter, on October 13, 1955, the Minneapolis applied to the Commission, under the same section of the Act, for authority to acquire sole control of Western, expressing its willingness to enter into contracts with Western's stockholders to purchase their stock at the same price and on the same terms as set forth in their existing contracts with the Santa Fe. The Santa Fe, the Pennsylvania Company and Pennsylvania intervened in the latter proceeding and objected to the Minneapolis application.

On motion of Minneapolis, the Commission consolidated the two proceedings. Thereafter, seven [\*\*\*12] other railroads having interchange connections with Western's line intervened. Two of them sought authority, at all events,<sup>6</sup> and two others of them sought authority, under stated conditions,<sup>7</sup> to participate, under [\*\*235] § 5 (2)(d)

<sup>3</sup> During the negotiations, Minneapolis first offered \$ 69.50, and later \$ 80, per share for the stock. On April 15, 1955, the Santa Fe and Pennsylvania each obtained letter commitments from the trustees for the sale to each of them of 26% of the Western stock at a price of \$ 100 per share. (Near the same time the Rock Island made a like offer to the trustees for 26% of the Western stock, but that offer was not accepted.) But a dispute arose -- and apparently still exists between the trustees and Pennsylvania -- with respect to the validity of those commitments. Thereupon, Minneapolis offered the trustees \$ 133 per share for the Western stock, but that offer was not accepted, and on May 26, 1955, the Santa Fe, acting, as the Commission found, "on behalf of that carrier alone," agreed with the trustees for the sale by the latter and purchase by the former of all the Western stock held by the trustees at a price of \$ 135 per share, and those parties on that date entered into a contract, accordingly, subject to approval of the Commission.

<sup>4</sup> The contract of June 28, 1955, between the Santa Fe and the Pennsylvania Company provided that it was without prejudice to any claims, causes of action or rights which Pennsylvania may have against the trustees of the McNear estate with respect to the letter commitment of April 15, 1955, for the sale by the trustees to Pennsylvania of 26% of the Western stock; and that, in the event Pennsylvania should acquire from the trustees, under that letter commitment, all or any part of such shares, the obligation of the Santa Fe under the contract to sell Western shares to the Pennsylvania Company was to be reduced accordingly. It appears that litigation was then, and is yet, pending by Pennsylvania against the trustees for the enforcement of the letter commitment of April 15, 1955.

The contract also contained a covenant which, in essence, provided that (1) Western "will continue to be operated as a separate and independent carrier with responsible management located along its lines in order to preserve to shippers and communities the present direct access to its officials," (2) that Western's properties will be maintained and improved, (3) that Western "will continue to maintain its own solicitation forces and will be entirely free to solicit traffic in such manner as best to serve the interests of" Western, (4) that all "existing routes and channels of trade via [Western] will be maintained and kept open without discrimination between connecting lines of railroad," and (5) that the Board of Directors of Western shall consist of 11 members, of whom one shall be the president of the company, two shall be officers of the Santa Fe, two shall be officers of the Pennsylvania Company, or Pennsylvania, or both, and the remaining six shall be prominent citizens not connected with either of the parties but selected by them through mutual agreement.

<sup>5</sup> See note 1.

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of the Act, **[\*181]** in the acquisition of the Western stock on an equal basis with the successful applicant. The State of Illinois, 18 cities or towns and seven chambers of commerce located on or along Western's line, two labor organizations representing Western's employees, **[\*\*229]** and a large number of shippers over Western's line, intervened in support of the Santa Fe-Pennsylvania application and in opposition to the Minneapolis application.

**[\*\*\*\*13]** After an extended consolidated hearing before him, the Commission's examiner issued a proposed report recommending approval of the Santa Fe-Pennsylvania application and dismissal of the Minneapolis application. Thereafter, upon exceptions, and briefs and arguments in their support, Division 4 of the Commission issued its report. It was confronted, as it said, with four alternative proposals, (1) for authorization of joint control of Western by the Santa Fe and Pennsylvania, (2) for authorization of sole control by the Minneapolis, (3) for authorization of two other railroads, at all events, and of two more railroads, under stated conditions, to participate in the acquisition of the Western stock on an equal basis with the successful applicant,<sup>8</sup> and (4) denial of both applications.

The Commission observed that "these proceedings represent a new and more complicated phase in the administration of section 5, since [they involve] 2 applications for authority to control the same property, and **[\*\*\*\*14]** petitions by 4 other carriers for inclusion in the transaction under varying circumstances." It recognized that, under § 5 (2) **[\*182]** of the Act and the National Transportation Policy,<sup>9</sup> it was required to "weigh whether each application is consistent with the public interest, with or without inclusion of other railroads, considering not only other intervening petitioners seeking such inclusion but also the other applicant and nonparticipating railroads as well." It thought that the burden of proof was "most heavy for an applicant in a proceeding like this, because it must not only overbalance the claims of those seeking to share in the control but also of those seeking to exclude it from the transaction." It conceived it to be its duty, under the Act and the National Transportation Policy, to "arrive at a standard of public interest and determine which of the various plans of control most nearly approximates it."

The Commission found that the Santa Fe-Pennsylvania **[\*\*\*\*15]** plan contemplates that Western "will continue to be operated as a separate and independent carrier with responsible management located along its lines"; that it "will continue to maintain its own solicitation forces and will be entirely free to solicit traffic in such manner as best to serve the interests of the Western," and that all "existing routes and channels of trade via the Western will be maintained and kept open without discrimination between connecting lines of railroad." It found, **[\*\*236]** on the other hand, that the Minneapolis plan "unequivocally contemplates the disappearance of the Western as an independent and neutral connection for the other 15 carriers with which it presently works"; that "for all practical purposes the Western would be integrated, consolidated, and merged into the Minneapolis for ownership, management, and operation"; that features of the Minneapolis plan "would be extremely harmful to other carriers"; that Western's headquarters office at Peoria would be eliminated, leaving only a trainmaster and a roadmaster at

<sup>6</sup>The New York, Chicago & St. Louis Railroad Company ("Nickel Plate") and the Chicago, Rock Island & Pacific Railroad Company ("Rock Island") sought authority, under § 5 (2)(d) of the Act (see note 1), to be included in the acquisition of Western's stock on an equal basis with the successful applicant or applicants.

<sup>7</sup>The Chicago, Burlington & Quincy Railroad Company ("Burlington") and the Wabash Railroad Company ("Wabash") did not object to approval of the Santa Fe-Pennsylvania application, provided the order required continuation of present routes and channels of trade via existing junctions and gateways and of all existing traffic and operating relations and arrangements, but they asked, in the event any railroad other than the Santa Fe and Pennsylvania be authorized to acquire an interest in Western's stock, that they, too, be authorized to participate therein to the same extent as any such other railroad.

The Illinois Central Railroad Company ("Illinois Central"), the Gulf, Mobile & Ohio Railroad Company ("Gulf") and the Chicago & North Western Railway Company ("North Western") asked that, if either application be approved, the order be conditioned to require the maintenance of all routes and channels of trade via existing gateways. The Monon Railroad Company asked that if the Santa Fe-Pennsylvania application be approved, the order contain a requirement that Pennsylvania shall grant to it certain trackage rights, and, if not done, that the Santa Fe-Pennsylvania application be denied.

<sup>8</sup>See notes 6 and 7.

<sup>9</sup>49 U. S. C., n. preceding [§ 1](#), 54 Stat. 899.

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[\*183] that point, and that the employment of most of Western's 24 executives and 225 other employees would be severed.

The Commission [\*\*\*\*16] further found [\*\*\*230] that "only the Minneapolis and its supporting interveners, the States of Minnesota and South Dakota, advocate the disappearance of the Western as a separate and independent operating carrier," and that all other parties to, and intervenors in, the proceedings "insist that the separate and independent operation of the Western under its present local management is a public necessity." It then found that the "public interest demands that the present policies of the Western in all respects be continued." It thereupon made the ultimate finding, required by § 5 (2)(b) of the Act, that the acquisition and plan of operation by the Santa Fe and Pennsylvania, subject to stated conditions, was "within the scope of section 5 (2) of the Interstate Commerce Act, as amended; that the terms and conditions proposed [by them] are just and reasonable, and that the transaction will be consistent with the public interest." The Commission then entered its order approving the Santa Fe-Pennsylvania application, dismissing the Minneapolis application, and denying the petitions of the several intervening railroads which sought to participate in the acquisition of the Western stock. [\*\*\*\*17] 295 I. C. C. 523.

Thereafter, Minneapolis petitioned the whole Commission for a reconsideration, and alternatively requested that, if the approval of the Santa Fe-Pennsylvania application be permitted to stand, it be authorized to participate equally with those railroads in the purchase of Western's stock on the same terms. That petition was denied.

Minneapolis then timely filed a complaint in the District Court for Minnesota against the United States and the Interstate Commerce Commission to vacate the Commission's order. The States of Minnesota and South Dakota and their respective regulatory commissions, [\*184] being interested in strengthening the Minneapolis, which operates in those States, intervened in support of the complaint. The defendants answered, asserting the full legality of the Commission's order. The Santa Fe, the Pennsylvania, the Pennsylvania Company, the State of Illinois, the 18 cities and seven chambers of commerce and the numerous shippers who were intervenors before the Commission, intervened in opposition to the complaint. The Nickel Plate intervened, complaining that the Commission had improperly denied its request to participate [\*\*\*\*18] in the purchase of the Western stock.

A three-judge court was convened and, after hearing, rendered its opinion and judgment sustaining the Commission's order. [165 F.Supp. 893](#). On separate appeals by the Minneapolis, the State of Minnesota and its regulatory commission, and the State of South Dakota and its regulatory commission, the case was brought here and we noted probable jurisdiction. 359 U.S. 933. All of those who were defendants and intervenors in opposition to the complaint in the District Court, except the Nickel Plate, are appellees in this Court.

Minneapolis, supported by the States of Minnesota and South Dakota, contends, first, that the Commission improperly adopted at the outset of its report the standard of "separate and independent management" of Western as the criterion governing the comparative [\*\*237] merits of the rival plans, which was antithetic to its application, and thereby deprived it of "fair comparative consideration," and that the District Court erred in approving the Commission's action.

**LEdHN[1]** [1]The record does not support that [\*\*\*231] contention. Rather, it shows that the Commission's governing standard was the "public [\*\*\*\*19] interest," although it ultimately did find that the public interest would be best served by Western's continued operation as a "separate and independent carrier." We believe that the recited findings show that the Commission [\*185] carefully "weighed" and considered "each application" in its labors to determine which, if either, of them was "consistent with the public interest." Its subsidiary findings (a) that the Minneapolis plan "unequivocally contemplates the disappearance of the Western as an independent and neutral connection for the other 15 carriers with which it presently works," (b) that certain features of the Minneapolis plan "would be extremely harmful to other carriers," (c) that the Minneapolis plan contemplates the elimination of Western's office and the separation of its employees, and (d) that numerous witnesses insisted "that the separate and independent operation of the Western under its present local management is a public necessity," fully support its conclusional finding that the "public interest demands that the present policies of the Western in all respects be continued." That finding, though antithetic to Minneapolis' application, did not deprive it [\*\*\*\*20] of "fair comparative consideration," but, on the contrary, it seems to us, was made by the Commission after full and fair consideration, and the District Court did not err in so holding.

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Appellants' principal contention appears to be that acquisition of control of Western by Santa Fe and Pennsylvania will create a combination in restraint of commerce in violation of § 1 of the Sherman Act<sup>10</sup> and will lessen competition or tend to create a monopoly in violation of § 7 of the Clayton Act,<sup>11</sup> and that the Commission's approval of their application was an abuse of power.

On their face these contentions would seem to run in the teeth of the language and purpose of § 5 (11) of the Interstate Commerce Act. That section, in substance, HN3<sup>12</sup> provides that "The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation [\*186] participating in . . . any transaction approved by the Commission thereunder, shall have [\*\*\*21] full power . . . to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction . . . and any carriers . . . participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law . . . insofar as may be necessary to enable [it] to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction." 24 Stat. 380, as amended, 54 Stat. 908, 49 U. S. C. § 5 (11).

LEdHN[2]<sup>13</sup> [2]Section 5 (11) HN4<sup>14</sup> is both a more recent and a more specific expression of congressional policy than § 1 of the Sherman Act and § 7 of the Clayton Act, and in terms relieves the acquiring carrier, upon approval by the Commission of the acquisition, "from the operation of the antitrust [\*\*\*232] laws . . ." Although § 5 (11) does not authorize the Commission to "ignore" the antitrust laws, [\*\*\*22] *McLean Trucking Co. v. United States*, 321 U.S. 67, 80, there can be "little doubt that the Commission is not to measure proposals for [acquisitions] [\*\*238] by the standards of the antitrust laws." 321 U.S., at 85-86. The problem is one of accommodation of § 5 (2) and the antitrust legislation. The Commission remains obligated to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the over-all transportation policy." 321 U.S., at 87.

[\*187] LEdHN[3]<sup>15</sup> [3]HN5<sup>16</sup> Even though such acquisitions might otherwise violate the antitrust laws, Congress has authorized the Commission to approve them, if it finds they are in the public interest, "because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy. It was informed that this policy would be furthered by 'encouraging the organization of stronger units' in the . . . industry. And in [\*\*\*23] authorizing those [acquisitions] it did not import the general policies of the anti-trust laws as a measure of their permissibility. It in terms relieved participants in appropriate [acquisitions] from the requirements of those laws. § 5 (11)." 321 U.S., at 85. It must be presumed that, in enacting this legislation, Congress took account of the fact that railroads are subject to strict regulation and supervision. "Against this background, no other inference is possible but that, as a factor in determining the propriety of [railroad acquisitions] the preservation of competition among carriers, although still a value, is significant chiefly as it aids in the attainment of the objectives of the national transportation policy." 321 U.S., at 85-86.

LEdHN[4]<sup>17</sup> [4]LEdHN[5]<sup>18</sup> [5]HN6<sup>19</sup> As respects railroad acquisitions, the Commission is not so bound by the antitrust laws that it must permit them to overbear what it finds to be in "the public interest." A contrary view would, in effect, permit the Commission to authorize only those acquisitions which would not offend those laws. "As has been said, this would render meaningless the exemption relieving the participants in a properly approved [\*\*\*24] [acquisition] of the requirements of those laws . . ." 321 U.S., at 86. Resolution of the conflicting considerations "is a complex task which requires extensive facilities, expert judgment and considerable knowledge

<sup>10</sup> 15 U. S. C. § 1, 26 Stat. 209.

<sup>11</sup> 15 U. S. C. § 18, 38 Stat. 731.

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of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, [\*188] but in its coordination of all other forms.' 79 Cong. Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed [acquisition] is 'consistent with the public interest.' Cf. [Interstate Commerce Commission v. Illinois Central R. Co., 215 U.S. 452](#); [Pennsylvania Co. v. United States, 236 U.S. 351](#); [United States v. Chicago Heights Trucking Co., 310 U.S. 344](#); [Purcell v. United States, 315 U.S. 381](#)." [321 U.S., at 87-88.](#)

Here, the Commission gave extensive consideration to the anti-competitive [\*\*\*233] contentions advanced by appellants, devoting more than five pages of its report [\*\*\*\*25] to that matter. It found that "all the carriers endeavoring to participate in its control are in competition with Western"; that the "important thing is not whether there is possibility of competition, but whether there is probability of existing or potential competition being diminished or strangled by the Western under the control of the Santa Fe and the Pennsylvania." After an extended analysis of the complex facts and conflicting evidence, the Commission found that control of Western by the Santa Fe and Pennsylvania [\*\*239] would not result in any significant lessening of competition. It pointed to the fact that although the Santa Fe's "long haul" is to Chicago and the Pennsylvania's "next to longest haul" is also to Chicago (its longest haul being to St. Louis) the Santa Fe has agreed, and is bound, "to place Lomax on a parity with Chicago from a solicitation standpoint, and . . . the Pennsylvania will recognize Effner as one of its principal interchanges along with Chicago and St. Louis"; that "there may be some diversion of traffic, but such diversion would not jeopardize the maintenance of adequate transportation service by the objecting intervening carriers."

The Commission [\*\*\*\*26] also pointed to the fact that Western had been in a prolonged receivership until 1927 when George P. McNear acquired its stock at a receiver's sale, [\*189] [Toledo, P. & W. R. Co. Acquisition, 124 I. C. C. 181](#). It further found that Western's modern existence began at that time and, under the guidance of McNear, was built into a fine railroad; that since McNear's death, in 1947, the present management has continued, with much success, the policies he established. Those policies, the Commission found, were, and are, "to maintain strict neutrality between all connections, and to participate in any haul of traffic no matter how slight [as a bridge] carrier through Peoria as an alternative route, bypassing the congested terminals of Chicago and St. Louis," and that those policies are to be continued under the Santa Fe-Pennsylvania plan.

[LEdHN\[6\]](#) [6]We think it is clear from this summary of its analysis and findings that the Commission fully estimated the scope and appraised the effects of any curtailment of competition which might result from the acquisition of Western by the Santa Fe and Pennsylvania, and, after having done so, concluded that their acquisition and plan [\*\*\*\*27] of operation of Western would not result in any significant lessening of competition. [HN7](#) Congress has left the task of making that determination to the wisdom and experience of the Commission. The determination it has made rests upon adequate findings which are, in turn, supported by substantial evidence and is well within the limits of its discretion under the Act.

Appellants argue that the Pennsylvania, in actuality, contracted to purchase 50% of the Western stock from Wilmington Trust Company, a co-trustee of the McNear trust, and that, since four persons were directors of both companies, that proposed stock purchase violates § 10 of the Clayton Act; that the Commission was without power to approve it; that, in any event, its action in "condoning" it was an abuse of power; and that the District Court, for those reasons also, erred in upholding the Commission's order.

[\*190] The Commission found that the Santa Fe in entering into the contract of May 26, 1955, with the trustees of the McNear trust was "acting on behalf of that carrier alone." [\*\*\*234] But even if we assume, for present purposes, that it was acting as well for the Pennsylvania, the result must be the same. Section [\*\*\*\*28] 10 of the Clayton Act [HN8](#) prohibits a common carrier engaged in commerce from having "any dealings in securities" of more than \$ 50,000, in the aggregate, in any one year, "with another corporation, . . . when the said common carrier shall have upon its board of directors . . . any person who is at the same time a director [of] such other corporation . . . , except such purchases [as] shall be made . . . by competitive bidding under regulations to be prescribed by [the] Commission." 38 Stat. 734, [15 U. S. C. § 20](#).

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LEdHN[7] [7] LEdHN[8] [8]Section 10 of the Clayton Act is, of course, an anti-trust law,<sup>12</sup> [\*\*\*\*30] and much of what we have just said relative [\*\*240] to the problem of accommodation of § 5 (2) of the Interstate Commerce Act and the antitrust laws is equally applicable to this contention. HN9 [The evident purpose of § 10 of the Clayton Act was to prohibit a corporation from abusing a carrier by palming off upon it securities, supplies and other articles without competitive bidding and at excessive prices through overreaching by, or other misfeasance of, common directors, to the financial injury of the carrier and the consequent impairment of its ability to serve the public interest.<sup>13</sup> But, even if this [\*\*\*\*29] purchase [\*191] of securities might, under other circumstances, violate § 10 of the Clayton Act, Congress, by § 5 (11) of the Interstate Commerce Act, has authorized the Commission to approve it if it finds that so doing is in the public interest. And Congress has expressly said that, upon such approval, the carrier shall be relieved "from the operation of the anti-trust laws . . ." A contrary view would, in effect, permit the Commission to authorize only those stock purchases which would not, in the absence of § 5 (11), offend the antitrust laws. "As has been said, this would render meaningless the exemption relieving the participants in a properly approved [acquisition] of the requirements of those laws . . ." *McLean Trucking Co. v. United States, supra, at 86.*

LEdHN[9] [9]Here, the Commission fully considered the contracts under which the Pennsylvania proposes to acquire a 50% interest in the Western stock and all other factors bearing on that matter and, after doing so, approved them. That action by the Commission did not exceed the statutory limits within which Congress has confined its discretion.

LEdHN[10] [10]Minneapolis contends that § 5 (11) operates only *in futuro* and confers "no authority to purge the taint of a transaction illegal at the time it was brought to the Commission." Whether there is merit in that contention, [\*\*\*\*31] [\*\*\*235] as a legal abstraction, we need not decide, for here the existing contractual arrangements through which Pennsylvania asks authority to acquire 50% of the Western stock look entirely to the future. Neither the stock sale and purchase contract between the trustees and the Santa Fe nor the one between the Santa Fe and the Pennsylvania [\*192] Company is a consummated transaction, but each is expressly subject to, and will become effective only upon, approval by the Commission. Apart from criminal prosecutions, with which we are not here concerned, it seems plain that approval of an acquisition by the Commission operates under § 5 (11), as that section says, to relieve the acquiring carrier "from the operation of the antitrust laws . . ."

Appellants next contend that the Commission violated § 8 (b) of the Administrative Procedure Act by failing to make findings which, they think, were compelled by the evidence.

LEdHN[11] [11]There can be no doubt that HN11 [the Administrative Procedure Act applies to proceedings before the Commission, *Riss & Co. v. United States*, 341 U.S. 907, and see *Chicago & Eastern Illinois R. Co. v. United* [\*\*241] *States*, 344 U.S. 917. [\*\*\*\*32]

The last sentence of § 8 (b) provides:

"All [administrative] decisions . . . shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."<sup>14</sup>

<sup>12</sup> It is clear that § 10 of the Clayton Act HN10 [is included in the "anti-trust laws" referred to in § 5 (11) of the Interstate Commerce Act. Section 1 of the Clayton Act, 15 U. S. C. (1952 ed.) § 12, provides that "Anti-trust laws," as used in sections 12, 13, 14-21, and 22-27 of this title, includes sections 1-27 of this title.] Moreover, § 5 (11) avoids any ambiguity by including "all other restraints, limitations, and prohibitions of law, Federal, State, or municipal."

<sup>13</sup> The legislative history of § 10 of the Clayton Act, though meager, supports the view stated in the text. In fact, the language of the several drafts of § 10, together with the types of abuses cited in support of its enactment, suggests strongly that the words "dealings in securities" were intended to cover only a carrier's dealings with related persons in its own securities. See H. R. Rep. No. 627, 63d Cong., 2d Sess., p. 3; S. Rep. No. 698, 63d Cong., 2d Sess., pp. 47-48; S. Doc. No. 585, 63d Cong., 2d Sess., pp. 8-9; 51 Cong. Rec. 15943.

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Upon the basis of that language, appellants argue that the Commission should have found that the price which the Santa Fe agreed to pay for the Western stock of \$ 135 per share was excessive. Though the Commission made no express finding upon that matter it did discuss it, pointing out that the certified value of Western's properties for ratemaking purposes was more than \$ 13,500,000; that it has no outstanding preferred stock and is relatively free of debt; that it has a fine earning record; that the transaction was at arm's length; that Minneapolis had [\*193] offered \$ 133 per share for the stock within a few days of the time when the Santa Fe contracted for its purchase at \$ 135 per share; and that the Minneapolis sought authority in this proceeding to acquire the stock at the same price. The Commission [\*\*\*\*33] concluded that if \$ 135 per share was a fair price for the one it was also for the other.

LEdHN[12] [12]Upon the same basis, appellants also argue that the Commission should have found that the Minneapolis application was in the public interest in that its acquisition of Western would greatly strengthen both Minneapolis and Western by eliminating many duplicating facilities and by reducing operating expenses by more than \$ 1,770,000 annually. The Commission did not make a specific finding upon that matter, but it did give consideration to it and found that most of that saving -- more than \$ 1,300,000 annually -- would be at the expense of Western's employees -- a matter which, because of the express command of clause 4 of § 5 (2)(c) of the Interstate Commerce Act (see note 1), it evidently thought was not [\*\*236] consistent with the public interest. Appellants further argue that the Commission should have found that the Minneapolis plan afforded adequate protection to Western's employees [\*\*\*\*34] by providing for their absorption into the Minneapolis as attrition among its own employees permitted. Again, although the Commission made no specific finding upon that contention it did consider and discuss it, and we think the law required no more.

LEdHN[13] [13]Appellants challenge the Commission's failure to make a number of other subsidiary findings, all of which have been considered, but we find that they relate to contentions that are so collateral or immaterial that the law did not require specific findings upon them. HN12 [1] By the express terms of § 8 (b), the Commission is not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or [\*194] discretion which are "material." From a thorough examination of the record, we are persuaded that the Commission has made adequate subsidiary findings upon all material issues and has made the ultimate findings required by § 5 (2), that they support the Commission's order, and are, in turn, supported by substantial evidence.

LEdHN[14] [14]Finally, appellants contend that the District Court, because of inadequate subsidiary findings by the Commission, was unable to, or at least did not, afford them [\*\*\*\*35] a proper judicial review, and merely "rubber stamped" the Commission's order. Whether or not we approve all of the reasons and legal conclusions of the District Court, it is clear that it fairly considered and decided all of the issues [\*\*242] raised by appellants, accorded to them a full and fair judicial review, and reached a right result. Accordingly the judgment is

*Affirmed.*

MR. JUSTICE DOUGLAS dissents.

## References

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Annotation References:

Construction and application of the Administrative Procedure Act, 94 L ed 631, 95 L ed 473, 97 L ed 884.

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End of Document

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<sup>14</sup> 60 Stat. 242, 5 U. S. C. § 1007 (b).



## United States v. Parke

Supreme Court of the United States

November 10, 1959, Argued ; February 29, 1960, Decided

No. 20

**Reporter**

362 U.S. 29 \*; 80 S. Ct. 503 \*\*; 4 L. Ed. 2d 505 \*\*\*; 1960 U.S. LEXIS 2013 \*\*\*\*; 1960 Trade Cas. (CCH) P69,611

UNITED STATES v. PARKE, DAVIS & CO.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

**Disposition:** [164 F.Supp. 827](#), reversed.

## **Core Terms**

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retailers, wholesalers, Sherman Act, prices, products, announced, customers, resale price, manufacturer, adherence, advertising, conspiracy, observe, selling, minimum retail price, concerted action, contracts, seller, cooperation, cases, retail price, acquiescence, combinations, contractual arrangement, cutoff, indictment, unilateral, antitrust, discount, suppress

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

**[HN1](#)[] Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. §§ 1, 3, 4](#).

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Contracts Law > Defenses > Illegal Bargains

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

**[HN2](#)[] Sherman Act, Scope**

Where a state adopts a Fair Trade Law which permits sellers under certain circumstances to make price-fixing agreements with purchasers, such agreements are not illegal under the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

### **HN3** [] **Monopolies & Monopolization, Attempts to Monopolize**

The purpose of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#) is to prohibit monopolies, contracts, and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce, in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the statute does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.

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

### **HN4** [] **Price Fixing & Restraints of Trade, Vertical Restraints**

An unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy.

Antitrust & Trade Law > Sherman Act > General Overview

### **HN5** [] **Antitrust & Trade Law, Sherman Act**

The Sherman Act, [15 U.S.C.S. § 1 et seq.](#) forbids combinations of traders to suppress competition.

Antitrust & Trade Law > Sherman Act > Claims

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

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

### **HN6** [] **Sherman Act, Claims**

When the manufacturer's actions go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, he has put together a combination in violation of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#) Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used.

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

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## International Trade Law > General Overview

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

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

### **HN7** International Aspects, Commerce With Foreign Nations

Under the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), competition not combination is the law of trade, and a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

### **HN8** US Department of Justice Actions, Civil Actions

The courts have an obligation, once a violation of the antitrust laws has been established, to protect the public from a continuation of the harmful and unlawful activities. A trial court's wide discretion in fashioning remedies is not to be exercised to deny relief altogether by lightly inferring an abandonment of the unlawful activities from a cessation which seems timed to anticipate suit.

## Lawyers' Edition Display

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### Summary

In order to carry out its program for the maintenance of minimum retail prices, the defendant, a manufacturer of pharmaceutical products, discussed this program with retailers who sold below such minimum prices and told them that if they continued to do so it would refuse to deal with them. The defendant also informed wholesalers in the area that it would refuse to deal with them if they sold defendant's products to offending retailers. Similar tactics were followed to induce retailers not to advertise defendant's products at prices below its minimum retail prices. This program was carried out until the Department of Justice started an investigation under the Sherman Antitrust Act.

In the present action the government sought an injunction under the Sherman Act against the defendant, alleging that defendant conspired and combined, in violation of 1 and 3 of the act, with retail and wholesale druggists in Washington, D. C., and Richmond, Virginia, to maintain the wholesale and retail prices of its products. The violation was alleged to have occurred during the summer of 1956 when there was no Fair Trade Law in the District of Columbia or State of Virginia. At the close of the government's evidence, the District Court dismissed the complaint on the ground that the government's proofs did not establish a violation of the act, because defendant's actions were merely a refusal to have business relations with retailers who disregarded its price policy, and hence were sanctioned under the doctrine laid down in [United States v Colgate Co. 250 US 300, 63 L ed 992, 39 S Ct 465, 7 ALR 443](#). Alternatively, the District Court rested its judgment of dismissal on the ground that in view of defendant's discontinuance of the practices attacked in the complaint there was no reason to believe that the alleged unlawful acts could possibly be repeated. ([164 F Supp 827.](#))

On appeal, the United States Supreme Court reversed and remanded the case to the District Court with directions to enter an appropriate injunction unless defendant elected to submit evidence in defense and refuted the government's right to injunctive relief established by the present record. In an opinion by Brennan, J., expressing the views of five members of the Court, it was held that defendant's practices, as described above, went beyond a mere refusal to deal with offending customers, even if there was no agreement, express or implied, concerning

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price maintenance. It was also held that the mere discontinuance by defendant of its practices after investigation by the Department of Justice had been commenced did not preclude injunctive relief.

Stewart, J., concurred in the judgment. He found no occasion to question, even by innuendo, the continuing validity of the Colgate decision.

Harlan, J., with the concurrence of Frankfurter and Whittaker, JJ., dissented. He expressed the view that the opinion of the court, in effect, overruled the Colgate decision, and that under that decision the government had not established a violation of the antitrust laws, the defendant having merely exercised his right to refuse to deal with offending customers.

## Headnotes

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MONOPOLIES §41 > resale price maintenance -- refusal to sell. -- > Headnote:

[LEdHN\[1\]](#) [1]

While a unilateral refusal to sell to customers who will not resell at prices suggested by the seller may be permissible under the Sherman Antitrust Act ([15 USC 1 et seq.](#)), an unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy.

ERROR §1477 > review of findings -- antitrust action. -- > Headnote:

[LEdHN\[2\]](#) [2]

Federal Civil Procedure [Rule 52 \(a\)](#), under which findings of fact shall not be set aside unless clearly erroneous, has no application to a finding, made by the District Court in an antitrust action, that there were no contractual arrangements for price maintenance, where the District Court premised its ultimate finding that the defendant did not violate the Sherman Act on an erroneous interpretation of the standard to be applied.

MONOPOLIES §41 > resale price maintenance. -- > Headnote:

[LEdHN\[3\]](#) [3]

Judicial inquiry into the legality, under the Sherman Antitrust Act, of a producer's attempts toward price maintenance, does not stop with a search of the record for evidence of purely contractual arrangements made between the producer on the one hand and wholesalers and retailers on the other.

MONOPOLIES §14 > test of combination. -- > Headnote:

[LEdHN\[4\]](#) [4]

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Whether an unlawful combination or conspiracy in violation of the Sherman Antitrust Act is proved is to be judged by what the parties actually did rather than by the words they used.

ERROR §1318 > question of law. -- > Headnote:

[LEdHN\[5\]](#) [5]

For the purposes of appellate review, the question whether the District Court applied the proper standard to essentially undisputed facts is a question of law.

MONOPOLIES §41 > resale price maintenance -- unlawful combination. -- > Headnote:

[LEdHN\[6\]](#) [6]

A producer creates a combination, prohibited by the Sherman Antitrust Act ([15 USC 1 et seq.](#)), with retailers and wholesalers to maintain retail prices, where he does not content himself with announcing his policy regarding retail prices and following this with a simple refusal to have business relations with any offending customer, and instead uses the refusal to deal with the wholesalers in order to elicit their willingness to deny his products to offending retailers and thereby help gain the retailers' adherence to his suggested minimum retail prices, and where the offending retailers are promptly cut off when the producer supplied the wholesalers with their names, and a large retailer who said he would abide by the price policy, is not cut off.

MONOPOLIES §41 > resale price maintenance -- unlawful combination. -- > Headnote:

[LEdHN\[7\]](#) [7]

A manufacturer is the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Antitrust Act ([15 USC 1 et seq.](#)) where he, with a view to inducing retailers to suspend advertising of his product at prices below his suggested minimum retail prices, does not rest with the simple announcement to the trade of his policy in that regard followed by a refusal to sell to offending retailers, but seeks and obtains assurances of compliance as well as compliance itself by using the willingness of one of the retailers to co-operate as a lever to gain acquiescence of other retailers in his program.

MONOPOLIES §5 > competition. -- > Headnote:

[LEdHN\[8\]](#) [8]

Under the Sherman Antitrust Act ([15 USC 1 et seq.](#)) competition, not combination, should be the law of trade.

MONOPOLIES §36 > control of prices. -- > Headnote:

[LEdHN\[9\]](#) [9]

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Under the Sherman Antitrust Act ([15 USC 1 et seq.](#)) a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.

MONOPOLIES §68 > cessation of unlawful conditions -- findings -- evidence. -- > Headnote:

[LEdHN\[10\]](#) [10]

A finding, made by the District Court in an antitrust action, that the unlawful conditions alleged in the complaint no longer exist and that there is no reason to believe that the unlawful acts alleged can possibly be repeated is not justified by the evidence, where there is no evidence that the compelling reason for defendant's ceasing these acts was forced upon it by business and economic conditions in its field, and it does not appear that defendant has announced to the trade that it will abandon its unlawful practices, and, moreover, there is evidence showing that defendant stopped its practices because the Department of Justice had instituted an investigation.

MONOPOLIES §68 > judicial relief. -- > Headnote:

[LEdHN\[11\]](#) [11]

The courts have an obligation, once a violation of the antitrust laws has been established, to protect the public from a continuation of the harmful and unlawful activities.

MONOPOLIES §68 > cessation of unlawful activities. -- > Headnote:

[LEdHN\[12\]](#) [12]

A trial court's wide discretion in fashioning remedies under the antitrust laws is not to be exercised to deny relief altogether by lightly inferring an abandonment of the unlawful activities from a cessation which seems timed to anticipate suit.

## Syllabus

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In a civil suit under [§ 4](#) of the Sherman Act charging appellee with combining and conspiring to maintain resale prices of its products in areas which have no "fair trade" laws, the Government introduced evidence showing that appellee had (1) announced a policy of refusing to deal with retailers who failed to observe appellee's suggested minimum resale prices or who advertised discount prices on appellee's products, (2) discontinued direct sales to those retailers who failed to abide by the announced policy, (3) induced wholesale distributors to stop selling appellee's products to the offending retailers, (4) secured unanimous adherence by informing a number of the retailers that if each of them would adhere to the announced policy one of their principal competitors would also do so, and (5) permitted the retailers to resume purchasing its products after they had indicated willingness to observe the policy. The evidence further established that [\*\*\*2] appellee had terminated these practices after becoming aware that the Department of Justice had begun an investigation of its price maintenance activities. The District Court dismissed the complaint on the ground that the Government had not shown a right to relief. *Held:* The judgment is reversed and the case remanded with directions to enter an appropriate judgment enjoining appellee

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from further violations of the Sherman Act, unless it elects to submit evidence in defense and refutes the Government's right to injunctive relief established by the present record. Pp. 30-49.

(a) The District Court erred in holding that these practices constituted only unilateral action by appellee in selecting its customers, as permitted by *United States v. Colgate & Co., 250 U.S. 300*. Appellee did not merely announce its policy and then decline to have further dealings with retailers who failed to abide by it, but, by utilizing wholesalers and other retailers, it actively induced unwilling retailers to comply with the policy. The resulting concerted action to maintain the resale prices constituted a conspiracy or combination in violation of the Sherman Act, although it [\*\*\*3] was not based on any contract, express or implied. Pp. 36-47.

(b) *Rule 52 of the Federal Rules of Civil Procedure* does not require affirmance of the District Court's ultimate finding that respondent did not violate the Sherman Act, because that conclusion was based on an erroneous interpretation of the law. Pp. 43-45.

(c) The District Court's alternative holding that dismissal of the complaint was warranted because there was no reasonable probability that appellee would resume its attempts to maintain resale prices is erroneous, because it is not supported by the evidence. Pp. 47-48.

**Counsel:** Daniel M. Friedman argued the cause for the United States. With him on the brief were Solicitor General Rankin, Acting Assistant Attorney General Bicks, Richard A. Solomon, Edward R. Kenney and Henry Geller.

Gerhard A. Gesell argued the cause for appellee. With him on the brief were Edward S. Reid, Jr. and Weaver W. Dunnan.

**Judges:** Warren, Black, Frankfurter, Douglas, Clark, Harlan, Brennan, Whittaker, Stewart

**Opinion by:** BRENNAN

## Opinion

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[\*30] [\*\*\*507] [\*\*505] MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Government sought an injunction under § 4 of the Sherman Act [\*\*\*4] against the appellee, Parke, Davis & Company, on a complaint alleging that Parke Davis conspired and [\*\*\*508] combined, in violation of §§ 1 and 3 of the Act,<sup>1</sup> [\*\*\*5] with [\*31] retail and wholesale druggists in Washington, D. C., and Richmond, Virginia, to maintain the wholesale and retail prices of Parke Davis pharmaceutical products. The violation was alleged to have

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<sup>1</sup> The pertinent provision of *Sections 1, 3 and 4* of the Act of July 2, 1890, 26 Stat. 209, as amended (*15 U. S. C. §§ 1, 3, 4*), commonly known as the Sherman Act, are as follows:

**HN1** "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor . . . ."

"**Sec. 3.** Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in . . . the District of Columbia, or in restraint of trade or commerce . . . between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor . . . ."

"**Sec. 4.** The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. . . ."

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occurred during the summer of 1956 when there was no Fair Trade Law in the District of Columbia or the State of Virginia.<sup>2</sup> After the Government completed the presentation of its evidence at the trial, and without hearing Parke Davis in defense, the District Court for the District of Columbia dismissed the complaint under Rule 41 (b) on the ground that upon the facts and the law the Government had not shown a right to relief. [164 F.Supp. 827](#). We noted probable jurisdiction of the Government's direct appeal under § 2 of the Expediting Act.<sup>3</sup> [359 U.S. 903](#).

Parke Davis makes some 600 pharmaceutical products which it markets nationally through drug wholesalers and **[\*32]** drug retailers. The retailers buy these products from the drug wholesalers or make large quantity purchases directly from Parke Davis. Sometime before 1956 Parke Davis announced a resale price **[\*\*\*\*6]** maintenance policy in its wholesalers' and retailers' catalogues. The wholesalers' catalogue contained a Net Price Selling Schedule listing suggested minimum resale prices on Parke Davis products sold by wholesalers to retailers. The catalogue stated that it was Parke Davis' continuing policy to deal only with drug wholesalers who observed that schedule and who sold only to drug retailers authorized by law to fill prescriptions. Parke Davis, when selling directly to retailers, quoted the same prices listed in the wholesalers' Net Price Selling Schedule but granted retailers discounts for volume purchases. Wholesalers were not authorized to grant similar discounts. The retailers' **[\*\*506]** catalogue contained a schedule of minimum retail prices applicable in States with Fair Trade Laws and stated that this schedule was suggested **[\*\*\*509]** for use also in States not having such laws. These suggested minimum retail prices usually provided a 50% markup over cost on Parke Davis products purchased by retailers from wholesalers but, because of the volume discount, often in excess of 100% markup over cost on products purchased in large quantities directly from Parke Davis.

There are **[\*\*\*\*7]** some 260 drugstores in Washington, D. C., and some 100 in Richmond, Virginia. Many of the stores are units of Peoples Drug Stores, a large retail drug chain. There are five drug wholesalers handling Parke Davis products in the locality who do business with the drug retailers. The wholesalers observed the resale prices suggested by Parke Davis. However, during the spring and early summer of 1956 drug retailers in the two cities advertised and sold several Parke Davis vitamin products at prices substantially below the suggested minimum retail prices; in some instances the prices apparently **[\*33]** reflected the volume discounts on direct purchases from Parke Davis since the products were sold below the prices listed in the wholesalers' Net Price Selling Schedule. The Baltimore office manager of Parke Davis in charge of the sales district which included the two cities sought advice from his head office on how to handle this situation. The Parke Davis attorney advised that the company could legally "enforce an adopted policy arrived at unilaterally" to sell only to customers who observed the suggested minimum resale prices. He further advised that this meant that "we can lawfully **[\*\*\*8]** say 'we will sell you only so long as you observe such minimum retail prices' but cannot say 'we will sell you only if you agree to observe such minimum retail prices,' since except as permitted by Fair Trade legislations [sic] agreements as to resale price maintenance are invalid." Thereafter in July the branch manager put into effect a program for promoting observance of the suggested minimum retail prices by the retailers involved. The program contemplated the participation of the five drug wholesalers. In order to insure that retailers who did not comply would be cut off from sources of supply, representatives of Parke Davis visited the wholesalers and told them, in effect, that not only would Parke Davis refuse to sell to wholesalers who did not adhere to the policy announced in its catalogue, but also that it would refuse to sell to wholesalers who sold Parke Davis products to retailers who did not observe the suggested minimum retail prices. Each wholesaler was interviewed individually but each was informed that his competitors were also being apprised of this. The wholesalers without exception indicated a willingness to go along.

<sup>2</sup> Congress has provided that **[HN2↑](#)** where a State adopts a "Fair Trade Law" which permits sellers under certain circumstances to make price-fixing agreements with purchasers, such agreements shall not be held illegal under the Sherman Act, [15 U. S. C. § 1](#). The Fair Trade Laws adopted in 16 States have been invalidated by their state courts on state grounds. H. R. Rep. No. 467, 86th Cong., 1st Sess. 6-7. On June 9, 1959, the House Committee on Interstate Commerce favorably reported a bill which, if passed, would enact a National Fair Trade Practice Act.

<sup>3</sup> 32 Stat. 823, [15 U. S. C. § 29](#), as amended by § 17 of the Act of June 25, 1948, 62 Stat. 989.

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Representatives called contemporaneously [\*\*\*9] upon the retailers involved, individually, and told each that if he did not observe the suggested minimum retail prices, Parke Davis would refuse to deal with him, and that furthermore [\*34] he would be unable to purchase any Parke Davis products from the wholesalers. Each of the retailers was also told that his competitors were being similarly informed.

Several retailers refused to give any assurances of compliance and continued after these July interviews to advertise and sell Parke Davis products at prices below the suggested minimum retail prices. Their names were furnished by Parke Davis to the wholesalers. Thereafter Parke Davis refused to fill direct orders from such retailers [\*\*\*510] and the wholesalers likewise refused to fill their orders.<sup>4</sup> This ban was not limited [\*\*507] to the Parke Davis products being sold below the suggested minimum prices but included all the company's products, even those necessary to fill prescriptions.

[\*\*\*10] The president of Dart Drug Company, one of the retailers cut off, protested to the assistant branch manager of Parke Davis that Parke Davis was discriminating against him because a drugstore across the street, one of the Peoples Drug chain, had a sign in its window advertising Parke Davis products at cut prices. The retailer was told that if this were so the branch manager "would see Peoples and try to get them in line." The branch manager testified at the trial that thereafter he talked to a vice-president of Peoples and that the following occurred:

"Q. Well, now, you told Mr. Downey [the vice-president of Peoples] at this meeting, did you not, Mr. Powers, [the assistant branch manager of Parke Davis] that you noticed that Peoples were cutting prices?

"A. Yes.

[\*35] "Q. And you told him, did you not, that it had been the Parke, Davis policy for many years to do business only with individuals that maintained the scheduled prices?

"A. I told Mr. Downey that we had a policy in our catalog, and that anyone that did not go along with our policy, we were not interested in doing business with them.

. . . .

"Q. . . . Now, Mr. Downey told you on the occasion of this visit, [\*\*\*11] did he not, that Peoples would stop cutting prices and would abide by the Parke-Davis policy, is that right?

"A. That is correct.

. . . .

"Q. When you went to call on Mr. Downey, you solicited his support of Parke, Davis policies, is not that right?

"A. That is right.

"Q. And he said, I will abide by your policy?

"A. That is right."

The District Court found, apparently on the basis of this testimony, that "The Peoples' representative stated that Peoples would stop cutting prices on Parke, Davis' products and Parke, Davis continued to sell to Peoples."

But five retailers continued selling Parke Davis products at less than the suggested minimum prices from stocks on hand. Within a few weeks Parke Davis modified its program. Its officials believed that the selling at discount prices would be deterred, and the effects minimized of any isolated instances of discount selling which might continue, if all advertising of such prices were discontinued. In August the Parke Davis representatives again called on the

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<sup>4</sup> When Parke Davis learned from a wholesaler's invoice that he had filled an order of one of the retailers, Parke Davis protested but was satisfied when the wholesaler explained that this was an oversight.

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retailers individually. When interviewed, the president of Dart Drug Company indicated [\*36] that he might be willing to stop advertising, although continuing [\*\*\*\*12] to sell at discount prices, if shipments to him were resumed. Each of the other retailers was then told individually by Parke Davis representatives that Dart was ready to discontinue advertising. Each thereupon said that if Dart stopped advertising he would also. On August 28 Parke Davis reported this reaction to Dart. Thereafter all of the retailers discontinued [\*\*\*511] advertising of Parke Davis vitamins at less than suggested minimum retail prices and Parke Davis and the wholesalers resumed sales of Parke Davis products to them. However, the suspension of advertising lasted only a month. One of the retailers again started newspaper advertising in September and, despite efforts of Parke Davis to prevent it, the others quickly followed suit. Parke Davis then stopped trying to promote the retailers' adherence to its suggested resale prices, and neither it nor the wholesalers have since declined further dealings with [\*\*508] them.<sup>5</sup> A reason for this was that the Department of Justice, on complaint of Dart Drug Company, had begun an investigation of possible violation of the antitrust laws.

[\*\*\*\*13] The District Court held that the Government's proofs did not establish a violation of the Sherman Act because "the actions of [Parke Davis] were properly unilateral and sanctioned by law under the doctrine laid down in the case of *United States v. Colgate & Co., 250 U.S. 300 . . .* 164 F.Supp., at 829.

The *Colgate* case came to this Court on writ of error under the Criminal Appeals Act, 34 Stat. 1246, from a District Court judgment dismissing an indictment for violation of the Sherman Act. The indictment proceeded [\*37] solely upon the theory of an unlawful combination between Colgate and its wholesale and retail dealers for the purpose and with the effect of procuring adherence on the part of the dealers to resale prices fixed by the company. However, the District Court construed the indictment as not charging a combination by *agreement* between Colgate and its customers to maintain prices. This Court held that it must disregard the allegations of the indictment since the District Court's interpretation of the indictment was binding and that without an allegation of unlawful *agreement* there was no Sherman Act violation charged. The [\*\*\*\*14] Court said:

**HN3** "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce -- in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." 250 U.S., at 307.

The Government concedes for the purposes of this case that under the *Colgate* doctrine a manufacturer, having announced a price maintenance policy, may bring about adherence to it by refusing to deal with customers who do not observe that policy. The Government contends, however, that subsequent decisions of this Court compel the holding that what Parke Davis did here by entwining the wholesalers and [\*\*\*\*15] retailers in a program to promote general compliance with its price maintenance policy went [\*38] beyond mere customer selection and [\*\*\*512] created combinations or conspiracies to enforce resale price maintenance in violation of §§ 1 and 3 of the Sherman Act.

The history of the *Colgate* doctrine is best understood by reference to a case which preceded the *Colgate* decision, *Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373*. Dr. Miles entered into written contracts with its customers obligating them to sell its medicine at prices fixed by it. The Court held that the contracts were void because they violated both the common law and the Sherman Act. The *Colgate* decision distinguished *Dr. Miles* on the ground that the *Colgate* indictment did not charge that company with selling its products to dealers *under agreements* which obligated the latter not to resell except at prices fixed by the seller. The [\*\*509] *Colgate* decision created some confusion and doubt as to the continuing vitality of the principles announced in *Dr. Miles*. This brought

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<sup>5</sup> Except that in December 1957, Parke Davis informed Dart Drug Company that it did not intend to have any further dealings with Dart. The latter has, however, continued to purchase Parke Davis products from wholesalers. Thus, Dart Drug cannot receive the volume discount on large quantity purchases.

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United States v. Schrader's Son, Inc., 252 U.S. 85, to [\*\*\*\*16] the Court. The case involved the prosecution of a components manufacturer for entering into price-fixing agreements with retailers, jobbers and manufacturers who used his products. The District Court dismissed, saying:

"Granting the fundamental proposition stated in the *Colgate* case, that the manufacturer has an undoubted right to specify resale prices and refuse to deal with any one who fails to maintain the same, or, as further stated, the act does not restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal, and that he of course may announce in advance the circumstances under which he will refuse to sell, it seems to me that it is a distinction without a difference to say that he may do so by the subterfuges [\*39] and devices set forth in the [*Colgate*] opinion and not violate the Sherman Anti-Trust Act, yet if he had done the same thing in the form of a written agreement, adequate only to effectuate the same purpose, he would be guilty of a violation of the law. . ." 264 F. 175, 184.

This Court reversed, and [\*\*\*\*17] said:

"The court below misapprehended the meaning and effect of the opinion and judgment in [*Colgate*]. We had no intention to overrule or modify the doctrine of *Dr. Miles Medical Co. v. Park & Sons Co.*, where the effort was to destroy the dealers' independent discretion through restrictive agreements." 252 U.S., at 99.

The Court went on to explain that the statement from *Colgate* quoted earlier in this opinion meant no more than that a manufacturer is not guilty of a combination or conspiracy if he merely "indicates his wishes concerning prices and declines further dealings with all who fail to observe them . . ."; however there is unlawful combination where a manufacturer "enters into agreements -- whether express or implied from a course of dealing or other circumstances -- with all customers . . . which undertake to bind them to observe fixed resale prices." *Ibid.*

The next decision was Frey & Son, Inc., v. Cudahy Packing Co., 256 U.S. 208. That was a treble damage suit alleging a conspiracy in violation of the Sherman Act between the manufacturer and jobbers to maintain resale prices. The plaintiff recovered a judgment. [\*\*\*\*18] The Court of Appeals for the Fourth Circuit reversed on the [\*\*\*513] authority of *Colgate*. The Court of Appeals concluded: "There was no formal written or oral agreement with jobbers for the maintenance of prices" and in that circumstance held [\*40] that under *Colgate* the trial court should have directed a verdict for the defendant. In holding that the Court of Appeals erred, this Court referred to the decision in *Schrader* as holding that the "essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances," so that in *Cudahy*, "Having regard to the course of dealing and all the pertinent facts disclosed by the present record, we think whether there existed an unlawful combination or agreement between the manufacturer and jobbers was a question for the jury to decide, and that the Circuit Court of Appeals erred when it held otherwise." 256 U.S., at 210.

But the Court also held improper an instruction which was given to the jury that a violation of the Sherman Act [\*\*510] might be found if the jury should find as facts that the defendant "indicated a sales plan to the wholesalers and jobbers, [\*\*\*\*19] which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and . . . [that] . . . defendant called this particular feature of this plan to their attention on very many different occasions, and . . . [that] . . . the great majority of them not only [expressed] no dissent from such plan, but actually [cooperated] in carrying it out by themselves selling at the prices named . . ." 256 U.S. 210-211. However, the authority of this holding condemning the instruction has been seriously undermined by subsequent decisions which we are about to discuss. Therefore, *Cudahy* does not support the District Court's action in this case, and we cannot follow it here. Less than a year after *Cudahy* was handed down, the Court decided Federal Trade Comm'n v. Beech-Nut Packing Co., 257 U.S. 441, which presented a situation bearing a marked resemblance to the Parke Davis program.

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In *Beech-Nut* the company had adopted a policy of refusing to sell its products to wholesalers or retailers who did not adhere to a schedule of resale prices. *Beech-Nut* [\*41] later implemented this policy by refusing to sell to [\*\*\*\*20] wholesalers who sold to retailers who would not adhere to the policy. To detect violations the company utilized code numbers on its products and instituted a system of reporting. When an offender was cut off, he would be reinstated upon the giving of assurances that he would maintain prices in the future. The Court construed the Federal Trade Commission Act to authorize the Commission to forbid practices which had a "dangerous tendency unduly to hinder competition or create monopoly." [257 U.S., at 454](#). The Sherman Act was held to be a guide to what constituted an unfair method of competition. The company had urged that its conduct was entirely legal under the Sherman Act as interpreted by *Colgate*. The Court rejected this contention, saying that "the Beech-Nut system goes far beyond the simple refusal to sell goods to persons who will not sell at stated prices, which in the *Colgate* Case was held to be within the legal right of the producer." *Ibid.* The Court held further that the nonexistence of contracts covering the practices was irrelevant since "the specific facts found show suppression of the freedom of competition by methods in which the company [\*\*\*\*21] secures the cooperation [\*\*\*514] of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose." [Id., at 455](#). That the Court considered that the Sherman Act violation thus established was dispositive of the issue before it is shown by the ground taken by Mr. Justice McReynolds in dissent. The parties had stipulated that there were no contracts covering the policy. Relying on his view of *Colgate*, he asked: "How can there be methods of cooperation . . . when the existence of the essential contracts is definitely excluded?" [Id., at 459](#). The majority did not read *Colgate* as requiring such contracts; rather, the Court dispelled the confusion over whether a combination effected by contractual arrangements, [\*42] express or implied, was necessary to a finding of Sherman Act violation by limiting *Colgate* to a holding that when the only act specified in the indictment amounted to saying that the trader had exercised his right to determine those with whom he would deal, and to announce the circumstances under which he would refuse to sell, no Sherman Act violation [\*\*\*\*22] was made out. However, because *Beech-Nut's* methods were as effective as agreements in producing the result that "all who would deal in the company's products are constrained to sell at the suggested prices," [257 U.S., at 455](#), the Court held that [\*\*511] the securing of the customers' adherence by such methods constituted the creation of an unlawful combination to suppress price competition among the retailers.

That *Beech-Nut* narrowly limited *Colgate* and announced principles which subject to Sherman Act liability the producer who secures his customers' adherence to his resale prices by methods which go beyond the simple refusal to sell to customers who will not resell at stated prices, was made clear in [United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 722](#):

"The *Beech-Nut* case recognizes that a simple refusal to sell to others who do not maintain the first seller's fixed resale prices is lawful but adds as to the Sherman Act, 'He [the seller] may not, consistently with the act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow [\*\*\*\*23] of commerce in the channels of interstate trade.' [257 U.S. at 453](#). The *Beech-Nut* Company, without agreements, was found to suppress the freedom of competition by coercion of its customers through special agents of the company, by reports of competitors about customers who violated resale prices, and by boycotts of price cutters. . . ."

[\*43] [LEdHN\[1\]](#) [1] *Bausch & Lomb*, like the instant case, was an action by the United States to restrain alleged violations of [§§ 1](#) and [3](#) of the Sherman Act. The Court, relying on *Beech-Nut*, held that a distributor, Soft-Lite Lens Company, Inc., violated the Sherman Act when, as was the case with Parke Davis, the refusal to sell to wholesalers was not used simply to induce acquiescence of the wholesalers in the distributor's published resale price list; the wholesalers "accepted Soft-Lite's proffer of a plan of distribution by cooperating in prices, limitation of sales to and approval of retail licensees. That is sufficient. . . . Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance [\*\*\*\*24] in effectuating its purpose is immaterial." [321 U.S., at 723](#). [\*\*\*515] Thus, whatever uncertainty previously existed as to the scope of the *Colgate* doctrine, *Bausch & Lomb* and *Beech-Nut* plainly fashioned its dimensions as meaning no more than

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that a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act. In other words, [HN4](#)<sup>1</sup> an unlawful combination is not just such as arises from a price maintenance *agreement*, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy.

[LEdHN\[2\]](#)<sup>1</sup> [2] [LEdHN\[3\]](#)<sup>1</sup> [3] [LEdHN\[4\]](#)<sup>1</sup> [4] [LEdHN\[5\]](#)<sup>1</sup> [5] In the cases decided before *Beech-Nut* the Court's inquiry [\*\*\*25] was directed to whether the manufacturer had entered into illicit contracts, express or implied. The District Court in this case apparently assumed that the Government could prevail only by establishing a contractual arrangement, albeit implied, between Parke Davis and its customers. Proceeding from the same premise Parke Davis strenuously urges that [Rule 52](#) of the Rules of Civil Procedure compels an affirmation of the [\*44] District Court since under that Rule the finding that there were no contractual arrangements should "not be set aside unless clearly erroneous." But [Rule 52](#) has no application here. The District Court premised its ultimate finding that Parke Davis did not violate the Sherman Act on an erroneous interpretation of the standard to be applied. The *Bausch & Lomb* and *Beech-Nut* decisions cannot be read as merely limited to particular fact complexes justifying the inference of an [\*\*512] agreement in violation of the Sherman Act. Both cases teach that judicial inquiry is not to stop with a search of the record for evidence of purely contractual arrangements. [\*\*\*26] The Sherman Act [HN5](#)<sup>1</sup> forbids combinations of traders to suppress competition. True, there results the same economic effect as is accomplished by a prohibited combination to suppress price competition if each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices. So long as *Colgate* is not overruled, this result is tolerated but only when it is the consequence of a mere refusal to sell in the exercise of the manufacturer's right "freely to exercise his own independent discretion as to parties with whom he will deal." [HN6](#)<sup>1</sup> When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, this countervailing consideration is not present and therefore he has put together a combination in violation of the Sherman Act. Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used. See *Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U.S. 600, 612. Because of the nature of the District Court's error we are reviewing a question of law, namely, whether the District Court applied the proper standard to essentially undisputed facts. See *Interstate [\*45] Circuit v. United States*, 306 U.S. 208; *United States v. Masonite Corp.*, 316 U.S. 265; *United States v. United States Gypsum Co.*, 333 U.S. 364; [\*\*\*516] *United States v. du Pont*, 353 U.S. 586; and also *United States v. Felin & Co.*, 334 U.S. 624; *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U.S. 147.

[LEdHN\[6\]](#)<sup>1</sup> [6] The program upon which Parke Davis embarked to promote general compliance with its suggested resale prices plainly exceeded the limitations of the *Colgate* doctrine and under *Beech-Nut* and *Bausch & Lomb* effected arrangements which violated the Sherman Act. Parke Davis did not content itself with announcing its policy regarding retail prices and following this with a simple [\*\*\*28] refusal to have business relations with any retailers who disregarded that policy. Instead Parke Davis used the refusal to deal with the wholesalers in order to elicit their willingness to deny Parke Davis products to retailers and thereby help gain the retailers' adherence to its suggested minimum retail prices. The retailers who disregarded the price policy were promptly cut off when Parke Davis supplied the wholesalers with their names. The large retailer who said he would "abide" by the price policy, the multi-unit Peoples Drug chain, was not cut off.<sup>6</sup> In thus involving the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act. Although Parke Davis' originally announced wholesalers' policy would not under *Colgate* have violated the [\*46] Sherman Act if its action thereunder [\*\*513] was the simple refusal without more to deal with wholesalers who did not

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<sup>6</sup> Indeed, if Peoples resumed adherence to the Parke Davis price scale after the interview between its vice-president and Parke Davis' assistant branch manager, p. 34, *supra*, shows that Parke Davis and Peoples entered into a price maintenance agreement, express, tacit or implied, such agreement violated the Sherman Act without regard to any wholesalers' participation.

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observe the wholesalers' Net Price Selling Schedule, that entire policy was tainted with the "vice [\*\*\*29] of . . . illegality," cf. [United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 724](#), when Parke Davis used it as the vehicle to gain the wholesalers' participation in the program to effectuate the retailers' adherence to the suggested retail prices.

[LEdHN\[7\]](#) [7] [LEdHN\[8\]](#) [8] [LEdHN\[9\]](#) [9] Moreover, Parke Davis also exceeded the "limited dispensation which [Colgate] confers," *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 626, [\*\*\*30] in another way, which demonstrates how far Parke Davis went beyond the limits of the Colgate doctrine. With regard to the retailers' suspension of advertising, Parke Davis did not rest with the simple announcement to the trade of its policy in that regard followed by a refusal to sell to the retailers who would not observe it. First it discussed the subject with Dart Drug. When Dart indicated willingness to go along the other retailers were approached and Dart's apparent willingness to cooperate was used as the lever to gain their acquiescence in the program. Having secured those acquiescences Parke Davis returned to Dart Drug with the report of that accomplishment. Not until all this was done was the advertising suspended and sales to all the retailers resumed. In this manner Parke Davis sought assurances of compliance [\*\*517] and got them, as well as the compliance itself. It was only by actively bringing about substantial unanimity among the competitors that Parke Davis was able to gain adherence to its policy. It must be admitted that a seller's announcement that he will not deal with customers who do not observe his policy may tend to engender confidence in each [\*\*\*31] customer that if he complies his competitors will also. But if a manufacturer is unwilling to rely on individual self-interest to bring [\*47] about general voluntary acquiescence which has the collateral effect of eliminating price competition, and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customers' acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product. The product then comes packaged in a competition-free wrapping -- a valuable feature in itself -- by virtue of concerted action induced by the manufacturer. The manufacturer is thus the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Act. [HNT](#) Under that Act "competition not combination, should be the law of trade," *National Cotton Oil Co. v. Texas*, 197 U.S. 115, 129, and "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce [\*\*\*32] is illegal per se." [United States v. Socony-Vacuum Oil Co.](#), 310 U.S. 150, 223. And see [United States v. McKesson & Robbins, Inc.](#), 351 U.S. 305; *Kiefer-Stewart Co. v. Seagram & Sons, Inc.*, 340 U.S. 211; *Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U.S. 600.

[LEdHN\[10\]](#) [10] The District Court also alternatively rested its judgment of dismissal on the holding that ". . . even if the unlawful conditions alleged in the Complaint had actually been proved, since 1956 they no longer existed, and [there is] no reason to believe, or even surmise, the unlawful acts alleged can possibly be repeated . . ." [164 F.Supp. 827, 830](#). We are of the view that the evidence does not justify any such finding. The District Court stated that "the compelling reason for defendant's so doing [ceasing its efforts] was forced upon it by business and economic conditions in its field." There is no evidence in the record that this was [\*\*514] the reason and any such conclusion must rest on speculation. It does not [\*\*\*33] appear even that [\*48] Parke Davis has announced to the trade that it will abandon the practices we have condemned. So far as the record indicates any reason, it is that Parke Davis stopped its efforts because the Department of Justice had instituted an investigation. The president of Dart Drug Company testified that he had told the Parke Davis representatives in August that he had just been talking to the Department of Justice investigators. He stated that the Parke Davis representatives had said that "they [knew] that the Antitrust Division was investigating them all over town," and that this was one of their reasons for visiting him. The witness testified that it was on this occasion, after the discussion of the investigation, that the Parke Davis representatives finally stated that if Dart would stop advertising, Parke Davis "would resume shipment, in so far as there was an Antitrust investigation going [\*\*\*518] on." Moreover Parke Davis' own employees, who were called by the Government as witnesses at the trial, admitted that they were aware of the investigation at the time and that the investigation was a reason for the discontinuance of the program. It seems to [\*\*\*34] us that if

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the investigation would prompt Parke Davis to discontinue its efforts, even more so would the litigation which ensued.

[LEdHN\[11\]](#) [11] [LEdHN\[12\]](#) [12] On the record before us the Government is entitled to the relief it seeks. [HN8](#) The courts have an obligation, once a violation of the antitrust laws has been established, to protect the public from a continuation of the harmful and unlawful activities. A trial court's wide discretion in fashioning remedies is not to be exercised to deny relief altogether by lightly inferring an abandonment of the unlawful activities from a cessation which seems timed to anticipate suit. See [\*United States v. Oregon State Medical Society, 343 U.S. 326, 333.\*](#)

The judgment is reversed and the case remanded to the District Court with directions to enter an appropriate [\*49] judgment enjoining Parke Davis from further violations of the Sherman Act unless the company elects to submit evidence in defense [\*\*\*35] and refutes the Government's right to injunctive relief established by the present record.

*It is so ordered.*

**Concur by:** STEWART

## Concur

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MR. JUSTICE STEWART, concurring.

I concur in the judgment. The Court's opinion amply demonstrates that the present record shows an illegal combination to maintain retail prices. I therefore find no occasion to question, even by innuendo, the continuing validity of the *Colgate* decision, [250 U.S. 300](#), or of the Court's ruling as to the jury instruction in [\*Cudahy, 256 U.S. 210-211.\*](#)

**Dissent by:** HARLAN

## Dissent

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MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER and MR. JUSTICE WHITTAKER join, dissenting.

The Court's opinion reaches much further than at once may meet the eye, and justifies fuller discussion than otherwise might appear warranted. Scrutiny of the opinion will reveal that the Court has done no less than send to its demise the *Colgate* doctrine which has been a basic part of **antitrust law** concepts since it was first announced in 1919 in [\*United States v. Colgate, 250 U.S. 300.\*](#)

I begin with that doctrine and how it was applied by the [\*\*\*36] District Court in this case. In the words of the Court's opinion, *Colgate* held that in the absence of a monopolistic setting, "a manufacturer, having announced a price maintenance policy, may bring about adherence to it by refusing to deal with customers who do not observe that policy." "And," [\*\*515] as said in *Colgate* (at 307), "of course, he may announce in advance the circumstances under which he will refuse to sell."

[\*50] The Government's complaint, seeking to enjoin alleged violations of [§§ 1](#) and [3](#) of the Sherman Act,<sup>1</sup> in substance charged Parke Davis with having combined and conspired with wholesalers and retailers of its products in the District of Columbia and Virginia, in four respects: (1) with retailers, to fix retail prices; [\*\*\*519] (2) with

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<sup>1</sup> These are the "restraint of trade," not the "monopoly," provisions of the Sherman Act. See Note 1 of the Court's opinion.

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retailers, to suppress advertising of cut prices; (3) with wholesalers, to fix wholesale prices; and (4) with wholesalers, to boycott retail price cutters. The Company's defense was that the activities complained of simply constituted a legitimate exercise of its rights under the *Colgate* doctrine. The detailed findings of the District Court are epitomized in its opinion as follows:

- (1) Parke Davis [\*\*\*37] "had well-established policies concerning the prices at which [its] products were to be sold by wholesalers and retailers, and the type of retailers to whom the wholesalers could re-sell";<sup>2</sup>
- (2) Parke Davis' "representatives . . . notified retailers concerning the policy under which its goods must be sold, but the retailers were free either to do without such goods or sell them in accordance with defendant's policy";
- (3) Parke Davis' "representatives likewise contacted wholesalers, notifying them of its policy and the wholesalers were likewise free to refuse to comply and thus risk being cut off by the defendant";
- (4) "every visit made by the representatives to the retailers and wholesalers was, to each of them, separate and apart from all others";
- (5) "the evidence is clear that both wholesalers and retailers valued [Parke Davis'] business so highly that they acceded to its policy";
- [\*51] (6) "there was no coercion by defendant and no agreement with [wholesaler or retailer] co-conspirators as alleged in the Complaint";
- (7) as to the Government's contention that proof of the alleged conspiracy "is implicit in (1) defendant's calling the attention of both retailers [\*\*\*38] and wholesalers to its policy, and (2) the distributors' acquiescence to the policy . . . the Court cannot agree to such a nebulous deduction from the record before it."

On these premises the District Court concluded: "Clearly, the actions of defendant were properly unilateral and sanctioned by law under the doctrine laid down in the case of [United States v. Colgate & Co., 250 U.S. 300](#) . . ."

The Court appears to recognize that as the *Colgate* doctrine was originally understood, the District Court's findings would require affirmance of its judgment here. It is said, however, that reversal is required because [Federal Trade Comm'n v. Beech-Nut Packing Co., 257 U.S. 441](#), and [United States v. Bausch & Lomb Optical Co., 321 U.S. 707](#), subsequently "narrowly [\*\*\*39] limited" the *Colgate* rule. The claim is that whereas prior to *Beech-Nut* it was considered that, fair trade laws apart, resale price maintenance came within the ban of the Sherman Act only if it was brought about by express or implied agreement between the parties -- which the Court says meant "contractual arrangements" -- *Beech-Nut*, which was carried forward by *Bausch & Lomb*, later established that such agreements or contractual arrangements need not be [\*\*516] shown. Recognizing that [§§ 1](#) and [3](#) of the Sherman Act explicitly require a "contract, combination . . . or conspiracy," the Court says this requirement is satisfied by conduct which falls short of express or implied agreement, if it goes beyond the seller's mere announcement of terms and his refusal to deal with those who will not comply with them. Concluding that the District [\*52] Court in the present case mistakenly [\*\*\*520] proceeded solely on the "agreement" view of *Colgate*, it is then said that its findings of fact are not binding on us because they were based on an erroneous legal standard, and that therefore "[Rule 52](#) has no application here."<sup>3</sup>

[\*\*\*40] I think this reasoning not only misconceives the *Beech-Nut* and *Bausch & Lomb* cases, but also mistakes the premises on which the District Court decided this case, and its actual findings of fact.

<sup>2</sup> Those "authorized by law to fill or dispense prescriptions."

<sup>3</sup> [Rule 52 \(a\), Fed. Rules Civ. Proc.](#) provides in relevant part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

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*First.* I cannot read *Beech-Nut* or *Bausch & Lomb* as introducing a new narrowing concept into the *Colgate* doctrine. Until today I had not supposed that any informed antitrust practitioner or judge would have had to await *Beech-Nut* to know that the concerted action proscribed by the Sherman Act need not amount to a contractual agreement. But neither do I think it would have been supposed that the Sherman Act does not require concerted action in some form. In *Beech-Nut* itself the Court stated the rule to be that a seller may not restrain trade "by contracts or combinations, express or implied," and there found suppression of competition "by methods in which the company secures the cooperation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose." [257 U.S., at 453, 455](#). It is obvious that the "methods" thus referred to were the "cooperative methods" which the Federal [\*\*\*\*41] Trade Commission had found to exist, for the Court expressly limited the Commission's order to the granting of relief against such methods. [Id., 455-456](#). Far from announcing that no concerted action need be shown, the Court accepted the Commission's factual determination that such action did exist.

[\*53] Similarly, in *Bausch & Lomb*, the District Court had found that Soft-Lite had entered into "agreements with wholesale customers" to fix prices and boycott unlicensed retailers. [321 U.S., at 717](#). This Court held that the facts "all amply support, indeed require, the inference of the trial court that a conspiracy to maintain prices down the distribution system existed between the wholesalers and Soft-Lite." [Id., 720](#). The Court reiterated that resale price maintenance could not be achieved "by agreement, express or implied." [Id., 721](#). In rejecting the applicability of the *Colgate* doctrine, it said that none of the cases applying the doctrine "involve, as the present case does, an agreement between the seller and purchaser to maintain resale prices." *Ibid.* It justified the finding of concerted action [\*\*\*\*42] on the ground that "the wholesalers accepted Soft-Lite's proffer of a plan of distribution by cooperating in prices, limitation of sales to and approval of retail licensees." [Id., 723](#).

The results in *Beech-Nut* and *Bausch & Lomb*, as in all Sherman Act cases, turned on the application of established standards of concerted action to the full sweep of the particular facts in those cases, and not upon any new meaning given to the words "contract, combination . . . [\*\*517] or conspiracy." The Court now says that the seller runs afoul of the Sherman Act when he goes beyond mere announcement of his policy and refusal to sell, not because the bare announcement and refusal fall outside the statutory phrase, but because any additional step removes a "countervailing consideration" [\*\*\*521] in favor of permitting a seller to choose his customers. But we are left wholly in the dark as to what the purported new standard is for establishing a "contract, combination . . . or conspiracy."

*Second.* The Court is mistaken in attributing to the District Court the limited view that Parke Davis' activities should, under *Colgate*, be upheld unless they involved some [\*\*\*\*43] express or implied "contractual arrangement" with [\*54] wholesalers or retailers. The Government's complaint specifically charged a "combination and conspiracy" between Parke Davis and its wholesale and retail customers in the areas involved, comprising a "continuing agreement, understanding and concert of action" in the four aspects already noted. *Ante*, p. 50. In its 31 detailed findings of fact the District Court repeatedly emphasized that Parke Davis did not have an "agreement or understanding of any kind" with its distributors, and it concluded that the evidence as a whole did not support the Government's allegations. It determined with respect to each of the four facets of the alleged conspiracy that "there was no coercion" and that "Parke, Davis did not combine, conspire or enter into an agreement, understanding or concert of action" with the wholesalers, retailers, or anyone else. I cannot detect in the record any indication that the District Court in making these findings applied anything other than the standard which has always been understood to govern prosecutions based on [§§ 1](#) and [3](#) of the Sherman Act.

*Third.* Bearing down heavily on the statement in [\*\*\*\*44] *Beech-Nut* that the conduct there involved showed more than "the simple refusal to sell," [257 U.S., at 454](#) (see also *Bausch & Lomb, supra, at 722*), the Court finds that Parke Davis' conduct exceeded the permissible limits of *Colgate* in two respects. The first is that Parke Davis announced that it would, and did, cut off wholesalers who continued to sell to price-cutting retailers. The second is that the Company in at least one instance reported its talks with one or more retailers to other retailers; that in "this manner Parke Davis sought assurances of compliance and got them"; and that it "was only by actively bringing about substantial unanimity among the competitors that Parke Davis was able to gain adherence to its policy."

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[\*55] There are two difficulties with the Court's analysis on these scores. The first is the findings of the District Court. As to refusals to sell to wholesalers, the lower court found that such conduct did not involve any concert of action, but was wholly unilateral on Parke Davis' part. And I cannot see how such unilateral action, permissible in itself, becomes any less unilateral because it is taken simultaneously with [\*\*\*\*45] similar unilateral action at the retail level. As to the other respect in which the Court holds Parke Davis' conduct was illegal, the District Court found that the Company did not make "the enforcement of its policies as to any one wholesaler or retailer dependent upon the action of any other wholesaler or retailer." And it further stated that the "evidence is clear that both wholesalers and retailers valued defendant's business so highly that they acceded to its policy," and that such acquiescence was not brought about by "coercion" or "agreement." Even if this were not true, so that concerted action among the retailers at the "horizontal" level might be inferred, as the Court indicates, under the principles of *Interstate Circuit, Inc., v. United* [\*\*518] *States, 306 U.S. 208*, [\*\*\*522] I do not see how that itself would justify an inference that concerted action at the "vertical" level existed between Parke Davis and the retailers or wholesalers.

The second difficulty with the Court's analysis is that even reviewing the District Court's findings only as a matter of law, as the Court purports to do, the cases do not justify overturning the lower court's [\*\*\*46] resulting conclusions. *Beech-Nut* did not say that refusals to sell to wholesalers who persisted in selling to cut-price retailers -- conduct which was present in that case (*257 U.S., at 448*) -- was a *per se* infraction of the *Colgate* rule, but only that it was offensive if it was the result of cooperative group action. While the Court in *Beech-Nut* and [\*56] *Bausch & Lomb* inferred from the aggressive, widespread, highly organized, and successful merchandising programs involved there that such concerted action existed in those cases, the defensive, limited, unorganized, and unsuccessful effort of Parke Davis to maintain its resale price policy<sup>4</sup> [\*\*\*47] does not justify our disregarding the District Court's finding to the contrary in this case.<sup>5</sup>

In light of the whole history of the *Colgate* doctrine, it is surely this Court, and not the District Court, that has proceeded on erroneous premises in deciding this case. Unless there is to be attributed to the Court a purpose to overturn the findings of fact of the District Court -- something which its opinion not only expressly disclaims doing, but which would also be in plain defiance of the *Federal Rules of Civil Procedure, Rule 52 (a)*, [\*57] and principles announced in past cases (see, e. g., *United States v. Yellow Cab Co., 338 U.S. 338, 341-342*; *International Boxing Club of New York, Inc., v. United States, 358 U.S. 242, 252*) [\*\*\*48] -- I think that what the Court has really done here is to throw the *Colgate* doctrine into discard.

To be sure, the Government has explicitly stated that it does not ask us to overrule *Colgate*, and the Court professes not to do so. But contrary to the long understanding of bench and bar, the Court treats *Colgate* as turning not on the absence of the concerted action explicitly required by §§ 1 and 3 of the Sherman Act, but upon the Court's notion of "countervailing" social policies. I can regard the Court's profession as no more than a bow to the fact that *Colgate*, decided more than 40 years ago, has become part of the economic regime of the country upon [\*\*\*523] which the commercial community and the lawyers who advise it have justifiably relied.

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<sup>4</sup>The District Court found, among other things, that the efforts of Parke Davis in the District of Columbia and Virginia came about only after some of its competitors had engaged in damaging local "deep price cutting" on Parke Davis products (Fdg. 12); that Parke Davis' sales in those areas constituted less than 5% of the total pharmaceutical sales therein (Fdg. 3); that these efforts followed the legal advice previously given by the Company's counsel (Fdg. 12); that Parke Davis did not have "any regularized or systematic machinery for maintaining its suggested minimum prices as to either retailers or wholesalers" (Fdg. 10); that the entire episode lasted only from July to the fall of 1956, when the Company "in good faith" abandoned all further such efforts (Fdgs. 12, 27); and that since that time retailers in these areas "have continuously sold and advertised Parke, Davis products at cut prices, and have been able to obtain those products from both the wholesalers and/or Parke, Davis itself." (Fdg. 27.)

<sup>5</sup>It may be observed that the facts found by the District Court militate more strongly against violation of the Sherman Act than those which formed the basis of the charge held erroneous by this Court in *Cudahy, 256 U.S., at 210-211*. Although the Court now repudiates what was said in *Cudahy* in this respect, I submit that there is nothing in *Beech-Nut*, *Bausch & Lomb*, or any other case in this Court which justifies this.

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[\*\*519] If the principle for which *Colgate* stands is to be reversed, it is, as the Government's position plainly indicates, something that should be left to the Congress. It is surely the emptiest of formalisms to profess respect for *Colgate* and eviscerate it in application.

I would affirm.

## References

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Annotation References:

[\*\*\*\*49] Right of manufacturer, producer, or wholesaler to control resale price, 7 ALR 449, 19 ALR 925, 32 ALR 1087, 103 ALR 1331, 125 ALR 1335.

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## Maryland & Virginia Milk Producers Ass'n v. United States

Supreme Court of the United States

January 19-20, 1960, Argued ; May 2, 1960, Decided \*

No. 62

**Reporter**

362 U.S. 458 \*; 80 S. Ct. 847 \*\*; 4 L. Ed. 2d 880 \*\*\*; 1960 U.S. LEXIS 1864 \*\*\*\*; 1960 Trade Cas. (CCH) P69,694

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., v. UNITED STATES

**Subsequent History:** Judgment entered by, Injunction granted at [United States v. Maryland & Virginia Milk Producers Assn., Inc., 1960 U.S. Dist. LEXIS 4806, 1960 Trade Cas. \(CCH\) P69860 \(D.D.C., Nov. 22, 1960\)](#)

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

[United States v. Maryland & Virginia Milk Producers Asso., 167 F. Supp. 45, 1958 U.S. Dist. LEXIS 3371 \(D.D.C., 1958\)](#)

[United States v. Maryland & Virginia Milk Producers Asso., 167 F. Supp. 799, 1958 U.S. Dist. LEXIS 3185 \(D.D.C., 1958\)](#)

[United States v. Maryland & Virginia Milk Producers Asso., 168 F. Supp. 880, 1959 U.S. Dist. LEXIS 3909 \(D.D.C., 1959\)](#)

**Disposition:** [167 F.Supp. 45](#), reversed. [167 F.Supp. 799, 168 F.Supp. 880](#), affirmed.

## **Core Terms**

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cooperative, Sherman Act, agricultural, milk, Clayton Act, Dairy, producers, Capper-Volstead Act, acquisition, anti trust law, dealers, exempt, charges, farmers, monopolization, practices, restraint of trade, associations, provisions, violations, contracts, monopoly

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > Sentencing > Fines

[HN1](#) **Antitrust & Trade Law, Sherman Act**

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\* Together with No. 73, United States v. Maryland and Virginia Milk Producers Association, Inc., also on appeal from the same Court.

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See [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > Sherman Act > General Overview

**[HN2](#)** [] **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 3.](#)

Antitrust & Trade Law > Clayton Act > General Overview

**HN3** [blue downward arrow icon] Antitrust & Trade Law, Clayton Act

See [15 U.S.C.S. § 18](#).

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

**HN4** Exemptions & Immunities, Collectives & Cooperatives

See 7 U.S.C.S. § 291.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

**H5** Exemptions & Immunities, Collectives & Cooperatives

See [7 U.S.C.S. § 292](#).

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**HN6** Exemptions & Immunities, Collectives & Cooperatives

See [15 U.S.C.S. § 17](#).

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

**HNT** Exemptions & Immunities, Collectives & Cooperatives

The privilege the Capper-Volstead Act, [7 U.S.C.S. § 291](#), grants milk producers to conduct their affairs collectively does not include a privilege to combine with competitors so as to use a monopoly position as a lever further to suppress competition by and among independent producers and processors.

# **Lawyers' Edition Display**

## Summary

In an antitrust action brought by the United States in the United States District Court for the District of Columbia against an agricultural cooperative supplying about 86 per cent of the milk purchased by all milk dealers in the metropolitan area of Washington, D. C., and having as members about 2,000 Maryland and Virginia dairy farmers, the complaint charged that the defendant had: (1) attempted to monopolize and had monopolized interstate trade and commerce in fluid milk in Maryland, Virginia, and the District of Columbia in violation of 2 of the Sherman Act; (2) through contracts and agreements combined and conspired with a dairy and others to eliminate competition in the same milk market area in violation of 3 of that act; and (3) bought all the assets of the dairy, the largest competitor of the defendant's dealers, the effect of which acquisition might be substantially to lessen competition or to tend to create a monopoly in violation of 7 of the Clayton Act. The chief defense set up by the defendant was that, because of its being a co-operative composed exclusively of dairy farmers, 6 of the Clayton Act and 1 and 2 of the Capper- Volstead Act completely immunized it from the antitrust laws with respect to the charges made in the complaint. Sustaining this defense, the District Court dismissed the first charge, where the defendant was not alleged to have acted in combination with others, but upheld the right of the government to go to trial on the second and third charges. ([167 F Supp 45](#)) After trial the court found for the United States on the second and third charge and entered a decree ordering the defendant to divest itself within a reasonable time of all assets acquired from the dairy and to cancel all contracts ancillary to the acquisition. ([167 F Supp 799, 168 F Supp 880](#)) The court refused to grant additional relief the United States asked for, retaining the cause for future orders, including the right of visitation. The United States appealed from this refusal and the dismissal of its first charge, and the defendant association appealed to review the judgments against it on the second and third charges.

On these appeals, the Supreme Court of the United States affirmed the judgment of the District Court on the second and third charges, and reversed the dismissal of the first charge, remanding the cause for a trial. In an opinion by Black, J., expressing the unanimous views of the court, the defendant's claim of immunity from the antitrust laws was rejected, in so far as all three charges made against defendant were concerned; it was also held that the findings of the District Court as to the violations referred to in the second and third charges were supported by the evidence.

The judgment of the District Court that the relief granted would be effective in undoing the violations found was accepted by the Supreme Court, in view of the fact that the District Court also retained the cause for future orders, including the right of visitation.

## Headnotes

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ADMINISTRATIVE LAW §322 > AGRICULTURE §12 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §20 > co-operatives -- authority of Secretary of Agriculture. -- > Headnote:

[LEdHN\[1\]](#) [1]

[Section 2](#) of the Capper-Volstead Act ([7 USC 292](#)), which authorizes the Secretary of Agriculture to issue a cease-and-desist order upon a finding that a co-operative has monopolized or restrained trade to such an extent that the price of an agricultural commodity has been unduly enhanced, is not intended to give the Secretary of Agriculture primary jurisdiction, and does not exclude all prosecutions under the Sherman Antitrust Act ([15 USC 1 et seq.](#)).

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RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §12 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES > exemptions -- agricultural associations. -- > Headnote:

[LEdHN\[2\]](#) [2]

Neither 1 of the Capper-Volstead Act ([7 USC 291](#)), authorizing persons engaged in the production of agricultural products to act together in associations, nor 6 of the Clayton Act ([15 USC 17](#)), providing that nothing contained in the antitrust laws shall be construed to forbid the existence and operation of agricultural organizations or to restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof, demonstrate a purpose wholly to exempt agricultural associations from the antitrust laws, it being immaterial whether charges under the Sherman Act are brought under 1 ([15 USC 1](#)) of the act, prohibiting combinations in restraint of trade, or under 2 ([15 USC 2](#)), prohibiting monopolies.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §5 > Sherman Act prohibitions. -- > Headnote:

[LEdHN\[3\]](#) [3]

*Section 1* of the Sherman Act ([15 USC 1](#)), prohibiting combinations in restraint of trade, and 2 ([15 USC 2](#)), prohibiting monopolies, closely overlap, and the same kind of predatory practices may show violations of all.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §12 > exemptions -- farmers' associations. --

> Headnote:

[LEdHN\[4\]](#) [4]

The full effect of 6 of the Clayton Act ([15 USC 17](#)) is that a group of farmers acting together as a single entity in an association cannot be restrained from lawfully carrying out the legitimate objects thereof; the section does not give such an entity full freedom to engage in predatory trade practices at will.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §12 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §20 > exemptions -- agricultural associations -- purpose. -- > Headnote:

[LEdHN\[5\]](#) [5]

The general philosophy of both the Capper-Volstead Act ([7 USC 291](#)), extending to capital stock agricultural co-operatives the exemption from antitrust laws given to nonstock agricultural associations by 6 of the Clayton Act ([15 USC 17](#)), and of 6 of the Clayton Act is simply that individual farmers should be given, through agricultural co-operatives acting as entities, the same unified competitive advantage and responsibility available to businessmen acting through corporations as entities.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §20 > effect of Capper-Volstead Act. --

> Headnote:

[LEdHN\[6\]](#) [6]

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The Capper-Volstead Act ([7 USC 291 et seq.](#)) does not leave co-operatives which it authorizes free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition with the co-operative.

PLEADING §176 > complaint -- restraint of trade -- agricultural co-operative -- dairy farmers. -- > Headnote:

[LEdHN\[7\]](#) [7]

Allegations in a complaint, in an action brought by the United States against an agricultural co-operative, which supplies about 86 per cent of the milk purchased by all milk dealers in the metropolitan area of Washington, D. C., and has a membership of about 2,000 Maryland and Virginia dairy farmers, that the defendant had threatened and undertaken diverse action to induce or compel dealers to purchase milk from the defendant, and induced and assisted others to acquire dealer outlets which were not purchasing milk from the defendant, and that the defendant eliminated producers and producers' agricultural co-operative associations not affiliated with the defendant from supplying milk to dealers, the statement of particulars listing a number of instances in which the defendant attempted to interfere with truck shipments of non-members' milk, and to induce a Washington dairy to switch its nonassociation producers to the Baltimore market, and that the defendant engaged in a boycott of a feed and farm supply store to compel its owner to purchase milk from the defendant, and that it compelled a dairy to buy its milk by using the leverage of that dairy's indebtedness to the defendant, charge anticompetitive activities which are so far outside the legitimate object of a co-operative that, if approved, they would constitute clear violations of the antimonopoly provisions of 2 of the Sherman Act ([15 USC 2](#)).

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §12 > RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34 > agricultural co-operative -- dairy farmers -- acquiring assets of competitor -- authority of Secretary of Agriculture. -- > Headnote:

[LEdHN\[8\]](#) [8]

Findings, in an antitrust action brought by the United States against an agricultural co-operative supplying about 86 per cent of the milk purchased by all milk dealers in the metropolitan area of Washington, D. C., and having as members about 2,000 Maryland and Virginia dairy farmers, that its motive for and result of purchasing the assets of a dairy in Washington was to eliminate the largest purchaser of nonassociation milk in the area, force former producers of such dairy either to join the defendant association or to ship to Baltimore, thus both bringing more milk to the defendant and diverting competing milk to another market, eliminate the defendant's prime competitive dealer from government contract milk bidding, and increase the defendant's control of the Washington market, support a District Court's conclusion that the acquisition of the dairy tended to create a monopoly or substantially lessen competition, and was therefore a violation of 7 of the Clayton Act ([15 USC 18](#)); the acquisition of the dairy is not protected by the last paragraph of 7 of the act providing, in part, that nothing contained in 7 shall apply to transactions duly consummated pursuant to authority given by the Secretary of Agriculture under any statutory provision vesting such power in him, there being no statutory provision that vests power in the Secretary to approve a transaction and thereby exempt a co-operative from the antitrust laws under the circumstances described above.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34 > agricultural co-operative -- dairy farmers -- acquiring assets of competitor. -- > Headnote:

[LEdHN\[9\]](#) [9]

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A classic combination or conspiracy to restrain trade in violation of 3 of the Sherman Act ([15 USC 3](#)) is shown by findings, in an action brought by the United States against an agricultural co-operative supplying about 86 per cent of the milk purchased by all milk dealers in the metropolitan area of Washington, D. C., and having as members about 2,000 Maryland and Virginia dairy farmers, that the defendant association purchased the assets of a dairy in Washington; that the motive for and result of the acquisition was to eliminate the largest purchaser of non-association milk in the area, force former non-association producers of the dairy either to join the defendant or to ship to Baltimore, thus both bringing more milk to the defendant and diverting competing milk to another market, eliminate the defendant's prime competitive dealer from government contract milk bidding, and increase the defendant's control of the Washington market; that the result of this transaction was a foreclosure of competition; that the transaction was entered into with the intent and purpose of restraining trade; and that an unreasonable restraint of trade, violative of the Sherman Act, has resulted from the acquisition of the dairy by the defendant.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > lawful activities. -- > Headnote:

[LEdHN\[10\]](#) [10]

Even lawful contracts and business activities may help to make up a pattern of conduct unlawful under the Sherman Antitrust Act ([15 USC 1 et seq.](#)).

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §20 > effect of Capper-Volstead Act. --

> Headnote:

[LEdHN\[11\]](#) [11]

The privilege which the Capper-Volstead Act ([7 USC 291 et seq.](#)) grants agricultural producers to conduct their affairs collectively does not include a privilege to combine with competitors so as to use a monopoly position as a lever to suppress competition by and among independent producers and processors.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §73 > decree -- discretion of court. --

> Headnote:

[LEdHN\[12\]](#) [12]

The formulation of a decree in an antitrust action is largely left to the discretion of the trial court.

APPEAL §1400 > review of discretion -- antitrust decree. -- > Headnote:

[LEdHN\[13\]](#) [13]

A judgment of the District Court that the relief granted by it in an antitrust action against an association will be effective in undoing the violation found by the court will not be rejected by the Supreme Court of the United States, where the District Court also retains the cause for future orders, including the right of visitation if deemed appropriate.

## Syllabus

The United States brought a civil antitrust action against an agricultural cooperative marketing association composed of about 2,000 Maryland and Virginia dairy farmers supplying about 86% of the milk purchased by all milk dealers in the Washington, D. C., metropolitan area. The complaint charged that the association had (1) monopolized and attempted to monopolize interstate trade and commerce in fluid milk in Maryland, Virginia and the District of Columbia, in violation of § 2 of the Sherman Act; (2) through contracts and agreements combined and conspired with Embassy Dairy and others to eliminate and foreclose competition in the same milk market area, in violation of § 3 of the Sherman Act; and (3) bought all assets of Embassy Dairy (the largest milk dealer in the area which competed with the association's dealers), the effect of [\*\*\*2] which might be to substantially lessen competition or tend to create a monopoly in violation of § 7 of the Clayton Act. The District Court dismissed the charge under § 2 of the Sherman Act; but it found for the Government on the charges under § 3 of the Sherman Act and § 7 of the Clayton Act and granted part, but not all, of the relief sought by the Government with respect to those charges. *Held:*

1. Section 2 of the Capper-Volstead Act, which authorizes the Secretary of Agriculture to issue a cease-and-desist order upon finding that a cooperative has monopolized or restrained trade to such an extent that the price of an agricultural commodity has been "unduly enhanced," does not exclude all prosecutions under the Sherman Act. *United States v. Borden Co.*, 308 U.S. 188. Pp. 462-463.
2. Neither § 6 of the Clayton Act nor § 1 of the Capper-Volstead Act leaves agricultural cooperatives free to engage in practices against others which are designed to monopolize trade or to restrain and suppress competition. Pp. 463-468.
3. The allegations of the complaint and the statement of particulars in this case charge anticompetitive activities which are so far [\*\*\*3] outside the legitimate objects of a cooperative that, if proved, they would constitute clear violations of § 2 of the Sherman Act; and the District Court erred in dismissing the charge of violating § 2. P. 468.
4. On the record in this case, the District Court properly found that the acquisition of Embassy Dairy by the association tended to create a monopoly or to substantially lessen competition, in violation of § 7 of the Clayton Act. Pp. 468-469.
5. The acquisition of Embassy Dairy by the association was not exempted from the provisions of § 7 of the Clayton Act by the last paragraph of that section, since there is no "statutory provision" that vests power in the Secretary of Agriculture to approve a transaction and thereby exempt a cooperative from the antitrust laws under the circumstances of this case, which involves no agricultural marketing agreement with the Secretary. Pp. 469-470.
6. The privilege the Capper-Volstead Act grants producers to conduct their affairs collectively does not include a privilege to combine with competitors so as to use a monopoly position as a lever further to suppress competition by and among independent producers and processors; and the [\*\*\*4] record sustains the District Court's finding that the association had violated § 3 of the Sherman Act. Pp. 470-472.
7. Having entered a decree ordering the association to divest itself of all assets acquired from Embassy Dairy and to cancel all contracts ancillary to their acquisition, and having retained jurisdiction to grant such further relief as might be appropriate, the District Court did not err in denying part of the relief sought by the Government. Pp. 472-473.

**Counsel:** Herbert A. Bergson and William J. Hughes, Jr. argued the cause for the Maryland and Virginia Milk Producers Association, Inc. With them on the brief were Daniel J. Freed, Howard Adler, Jr. and Daniel H. Margolis.

Philip Elman argued the cause for the United States. On the brief were Solicitor General Rankin, Acting Assistant Attorney General Bicks, Charles H. Weston, Irwin A. Seibel and Joseph J. Saunders.

**Judges:** Warren, Black, Frankfurter, Douglas, Clark, Harlan, Brennan, Whittaker, Stewart

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**Opinion by:** BLACK

## Opinion

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[\*460] [\*\*\*884] [\*\*849] MR. JUSTICE BLACK delivered the opinion of the Court.

This is a civil antitrust action brought by the United States in a Federal District Court against an agricultural [\*\*\*\*5] cooperative, the Maryland and Virginia Milk Producers Association, Inc. The Association supplies about 86% of the [\*\*850] milk purchased by all milk dealers in the Washington, D. C., metropolitan area, and has as members about 2,000 Maryland and Virginia dairy farmers. The complaint charged that the Association had: (1) attempted to monopolize and had monopolized interstate trade and commerce in fluid milk in Maryland, Virginia and the District of Columbia in violation of § 2 of the Sherman Act;<sup>1</sup> [\*\*\*8] (2) through contracts and agreements combined and conspired with Embassy Dairy and others to eliminate and foreclose competition in the same milk market area in violation of § 3 of that Act;<sup>2</sup> and (3) bought all the assets of Embassy Dairy, the largest milk dealer in the area which competed with the Association's dealers, the effect of which acquisition might be substantially to lessen competition or to tend to create [\*461] a monopoly in violation of § 7 of the Clayton Act.<sup>3</sup> [\*\*\*9] The chief defense set up by the Association was that, because of its being a cooperative composed exclusively of dairy farmers, § 6 of the Clayton Act<sup>4</sup> and §§ 1 and 2 of the Capper-Volstead [\*\*\*885] [\*\*\*6] Act<sup>5</sup> completely exempted and immunized it from the antitrust laws with respect to the charges made in the Government's complaint. The District Court concluded after arguments that

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<sup>1</sup> Sherman Act § 2: HN1 [↑] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 26 Stat. 209 (1890), as amended, 15 U. S. C. § 2.

<sup>2</sup> Sherman Act § 3: HN2 [↑] "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia . . . or between the District of Columbia and any State or States or foreign nations, is declared illegal. . ." 26 Stat. 209 (1890), as amended, 15 U. S. C. § 3. Section 1 declares the same prohibition as to commerce "among the several States." Although there was also a charge against the Association under § 1 there was no judgment against it on this section, and that charge is no longer relevant here.

<sup>3</sup> Clayton Act § 7: HN3 [↑] "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

....

"Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . [independent regulatory commissions] or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board." 38 Stat. 731 (1914), as amended, 15 U. S. C. § 18.

<sup>4</sup> 38 Stat. 731 (1914), 15 U. S. C. § 17, set forth in note 11, *infra*.

<sup>5</sup> Capper-Volstead Act § 1: HN4 [↑] "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . ." 42 Stat. 388 (1922), 7 U. S. C. § 291. Section 2 is set forth in note 7, *infra*.

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"an agricultural cooperative is entirely exempt from the provisions of the antitrust laws, both as to its very existence as well as to all of its activities, provided it does not enter into conspiracies or combinations [\[\\*\\*851\]](#) with persons who are not producers of agricultural commodities." [167 F.Supp. 45, 52.](#)

[\[\\*462\]](#) Accordingly the court dismissed the Sherman Act [§ 2](#) monopolization charge, where the Association was not alleged to have acted in combination with others, but upheld the right of the Government to go to trial on the Sherman Act [§ 3](#) and Clayton Act § 7 charges because they involved alleged activities with the owners of Embassy and other persons who were not agricultural producers. After trial the court found for the United States on the latter two charges and entered a decree ordering the Association to divest itself within a reasonable time of all assets acquired from Embassy and to cancel all contracts ancillary to the acquisition. [167 F.Supp. 799, 168 F.Supp. 880.](#) [\[\\*\\*\\*\\*7\]](#) The court refused to grant additional relief the United States asked for. It is from this refusal and the dismissal of its Sherman Act [§ 2](#) monopolization charge that the Government appealed directly to this Court under the Expediting Act.<sup>6</sup> The Association similarly appealed to review the judgments against it on the Sherman Act [§ 3](#) charge and the Clayton Act § 7 charge. We noted probable jurisdiction, *360 U.S. 927*, and treat both appeals in this opinion.

[LEdHN\[1\]↑](#) [1]The Association's chief argument for antitrust exemption is based on [§ 2](#) of [\[\\*\\*\\*\\*10\]](#) the Capper-Volstead Act, which authorizes the Secretary of Agriculture to issue a cease-and-desist order upon a finding that a cooperative has monopolized or restrained trade to such an extent that the price of an agricultural commodity has been "unduly enhanced."<sup>7</sup> The contention is that this provision was [\[\\*463\]](#) intended to give the Secretary of Agriculture primary jurisdiction, and thereby exclude any prosecutions at all under the Sherman Act. This Court unequivocally rejected the same contention in [United States v. Borden Co., 308 U.S. 188, 206](#), after full consideration of the same legislative history that we are now asked to review again. We adhere to the reasoning and holding of the *Borden* opinion on this point.

[\[\\*\\*\\*\\*11\]](#) [LEdHN\[2\]↑](#) [2][LEdHN\[3\]↑](#) [3]The [\[\\*\\*\\*886\]](#) Association also argues that without regard to [§ 2](#) of the Capper-Volstead Act, [§ 1](#) of that Act and § 6 of the Clayton Act demonstrate a purpose wholly to exempt agricultural associations from the antitrust laws. In the *Borden* case this Court held that neither § 6 of the Clayton Act nor the Capper-Volstead Act granted immunity from prosecution for the combination of a cooperative and others to restrain trade there charged as a violation of [§ 1](#) of the Sherman Act. Although the Court was not confronted with charges under [§ 2](#) of the Sherman Act in that case we do not believe that Congress intended to immunize cooperatives engaged in competition-stifling practices from prosecution under the antimonopolization provisions of [§ 2](#) of the Sherman Act, while making them responsible for such practices as violations of the antitrade-restraint provisions of [§§ 1](#) and [3](#) of that Act. These sections closely overlap, and the same kind of predatory practices may show violations of all.<sup>8</sup> The reasons underlying [\[\\*\\*852\]](#) [\[\\*\\*\\*\\*12\]](#) the Court's holding in the *Borden* case that the

<sup>6</sup> 32 Stat. 823 (1903), as amended, [15 U. S. C. § 29.](#)

<sup>7</sup> Capper-Volstead Act [§ 2](#): [HN5↑](#) "If the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof [after a "show cause" hearing he may direct] such association to cease and desist from monopolization or restraint of trade. . . ." This order may be enforced by the Attorney General if not obeyed by the association. 42 Stat. 388 (1922), [7 U. S. C. § 292.](#)

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cooperative there was not completely exempt under § 1 apply equally well to §§ 2 and 3. The Clayton [\*464] and Capper-Volstead Acts, construed in the light of their background, do not lend themselves to such an incongruous immunity-distinction between the sections as that urged here.

LEdHN[4] [4]In the early 1900's, when agricultural cooperatives were growing in effectiveness, there was widespread concern because the mere organization of farmers for mutual help was often considered to be a violation of the antitrust laws. Some state courts had sustained antitrust charges against agricultural cooperatives,<sup>9</sup> [\*\*\*\*15] and as a result [\*\*\*\*13] eventually all the States passed Acts authorizing their existence.<sup>10</sup> It was to bar such prosecutions by the Federal Government as to interstate transactions that Congress in 1914 inserted § 6 in the Clayton Act exempting agricultural organizations, along with labor unions, from the antitrust laws. This Court has held that the provisions of that section, set out below,<sup>11</sup> [\*\*\*\*16] relating to labor [\*465] unions do not manifest "a congressional [\*\*\*887] purpose wholly to exempt" them from the antitrust laws,<sup>12</sup> and neither the language nor the legislative history of the section indicates a congressional purpose to grant any broader immunity to agricultural cooperatives. The language shows no more than a purpose to allow farmers to act together in cooperative associations without the associations as such being "held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws," as they otherwise might have been. This interpretation is supported by the House and Senate Committee Reports on the bill.<sup>13</sup> Thus, the [\*\*853] full effect of § 6 is that a group of farmers acting together as a single entity in an association cannot be restrained [\*\*\*\*14] "from lawfully carrying out *the legitimate objects* thereof" (emphasis supplied), but the section cannot support the contention that

<sup>8</sup> Klor's, Inc., v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211; United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226, n. 59; Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 59-60.

<sup>9</sup> See, e. g., Reeves v. Decorah Farmers' Cooperative Society, 160 Iowa 194, 140 N. W. 844 (1913); Burns v. Wray Farmers' Grain Co., 65 Colo. 425, 176 P. 487 (1918); Ford v. Chicago Milk Shippers' Assn., 155 Ill. 166, 39 N. E. 651 (1895). Contra, Burley Tobacco Society v. Gillaspy, 51 Ind. App. 583, 100 N. E. 89 (1912). Hanna, Antitrust Immunities of Cooperative Associations, 13 Law and Contemp. Prob. 488-490 (1948); Hanna, Cooperative Associations and the Public, 29 Mich. L. Rev. 148, 163-165 (1930); Jensen, The Bill of Rights of U.S. Cooperative Agriculture, 20 Rocky Mt. L. Rev. 181, 184-189 (1948). See generally Att'y Gen. Nat'l Comm. Antitrust Rep. (1955), 306-313; Note, 57 Mich. L. Rev. 921 (1959).

<sup>10</sup> See statutes collected in Jensen, The Bill of Rights of U.S. Cooperative Agriculture, 20 Rocky Mt. L. Rev. 181, 191, n. 29 (1948); Note, 38 Harv. L. Rev. 87, 89, n. 17 (1924). See Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 556-558 (1902), holding Illinois exemption statute unconstitutional, and see dissent per McKenna, J., at 565, 571; overruled by Tigner v. Texas, 310 U.S. 141 (1940).

<sup>11</sup> Clayton Act § 6: HN6 [4] "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 38 Stat. 730 (1914), 15 U. S. C. § 17.

<sup>12</sup> Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 805; Duplex Printing Press Co. v. Deering, 254 U.S. 443, 468-469. Cf. United States v. Hutcheson, 312 U.S. 219.

<sup>13</sup> "In the light of previous decisions of the courts and in view of a possible interpretation of the law which would empower the courts to order the dissolution of such organizations and associations, your committee feels that all doubt should be removed as to the *legality of the existence and operations* of these organizations and associations, and that the law should not be construed in such a way as to authorize their *dissolution* by the courts under the antitrust laws or to forbid the individual members of such associations from carrying out the *legitimate and lawful objects* of their associations." (Emphasis supplied.) H. R. Rep. No. 627, 63d Cong., 2d Sess. 16; S. Rep. No. 698, 63d Cong., 2d Sess. 12.

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it gives such an entity full freedom to [\*466] engage in predatory trade practices at will. See [United States v. King, 229 F. 275, 250 F. 908, 910](#). Cf. [United States v. Borden Co., 308 U.S. 188, 203-205](#).

**LEdHN[5]** [5]The Capper-Volstead Act of 1922 extended § 6 of the Clayton [\*\*\*\*17] Act exemption to capital stock agricultural cooperatives which had not previously been covered by that section.<sup>14</sup> [Section 1](#) of the Capper-Volstead Act also provided that among "the legitimate objects" of farmer organizations were "collectively processing, preparing for market, handling, and marketing" products through common marketing agencies and the making of "necessary contracts and agreements to effect such purposes." We believe it is reasonably clear from the very language of the Capper-Volstead Act, as it was in § 6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage -- and responsibility -- available to businessmen acting through corporations as entities. As the House Report on the Capper-Volstead Act said:

"Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to the ordinary business [\*\*\*888] corporations so the farmers can take advantage of it."<sup>15</sup>

This indicates a purpose to make it possible for farmer-producers to organize together, set association policy, [\*\*\*\*18] fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws. It does not suggest [\*467] a congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their own businesses in their own legitimate way. In the Senate hearings on the Capper-Volstead Act the Secretary of Agriculture, who was given a large measure of authority under this Act, and the Solicitor of his Department, testified that the Act would not authorize cooperatives to engage in predatory practices in violation of the Sherman Act.<sup>16</sup> [\*\*\*\*20] And the [\*\*854] House Committee Report assured the Congress that:

"In the event that associations authorized by this bill shall do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law."<sup>17</sup>

**LEdHN[6]** [6] Although contrary inferences could be drawn from some parts of the legislative history, we are satisfied that the part [\*\*\*\*19] of the House Committee Report just quoted correctly interpreted the Capper-Volstead Act, and that the Act did not leave cooperatives free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition with the cooperative. [\*468] Therefore, we turn now to a consideration of the District Court's judgments in this case.

**LEdHN[7]** [7]Sherman Act [§ 2](#) Dismissal. -- The complaint charging monopolization alleged that the Association had "threatened and undertaken diverse actions to induce or compel dealers to purchase milk from the defendant [Association], and induced and assisted others to acquire dealer outlets" which were not purchasing milk from the Association. It also alleged that the Association "excluded, eliminated, and attempted to eliminate others,

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<sup>14</sup> Some Congressmen opposed § 6 of the Clayton Act because it did not include agricultural associations with capital stock. "Under the provisions of section 7 [now § 6] of this bill farmers' organizations with capital stock, organized for profit, would be left subject to the provisions of the Sherman [antitrust law](#)." H. R. Rep. No. 627, Pt. 4, 63d Cong., 2d Sess. 4. And see *id.*, Pt. 3, 10.

<sup>15</sup> H. R. Rep. No. 24, 67th Cong., 1st Sess. 2.

<sup>16</sup> The Solicitor of the Department of Agriculture testified that it was his "opinion that if the farmers want to create monopolies or want to engage in unfair practices in commerce, this bill certainly would not give them the right to do it, and they would have to get another bill. . . . These organizations would not be allowed to adopt any illegal means or methods of conducting their business," and if they "engaged in some practice that prevented other people from selling their milk . . . they would be subject to the antitrust laws. . . . It does not say . . . that they may adopt any unfair methods of competition." The Secretary of Agriculture testified to the same effect. Hearings before a Subcommittee of the Senate Judiciary Committee on H. R. 2373, 67th Cong., 1st Sess. 203, 204, 205.

<sup>17</sup> *Op. cit.*, [supra](#), note 15, at 3.

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including producers and producers' agricultural cooperative associations not affiliated with defendant, from supplying milk to dealers." Supporting this charge the statement of particulars listed a number of instances in which the Association attempted to interfere with truck shipments of nonmembers' milk, and an attempt during 1939-1942 to induce a Washington dairy to switch its non-Association producers to the Baltimore market. The statement of particulars also included charges that the Association engaged in a boycott of a feed and farm supply [\*\*\*\*21] store to compel its owner, who also owned an Alexandria dairy, to purchase milk from [\*\*\*889] the Association, and that it compelled a dairy to buy its milk by using the leverage of that dairy's indebtedness to the Association. We are satisfied that the allegations of the complaint and the statement of particulars, only a part of which we have set out, charge anticompetitive activities which are so far outside the "legitimate objects" of a cooperative that, if proved, they would constitute clear violations of § 2 of the Sherman Act by this Association, a fact, indeed, which the Association does not really dispute if it is subject to liability under this section. It was error for the District Court to dismiss the § 2 charge.

LEdHN[8] [8]Clayton Act § 7 Judgment. -- In 1954 the Association purchased the assets of Embassy Dairy in Washington. The complaint charged that this acquisition constituted [\*469] a violation of § 7 of the Clayton Act, which prohibits a corporation engaged in commerce from acquiring all or any part of the assets of another corporation so engaged where the effect may be to tend [\*\*\*\*22] to create a monopoly or substantially lessen competition. A trial was had before the District Court on this charge and the court found that the motive for and result of the Embassy acquisition was to: eliminate the largest purchaser of non-Association milk in the area; force former Embassy non-Association producers either to join the Association or to ship to Baltimore, thus both bringing more milk to the Association and diverting competing milk to another market; eliminate the Association's prime competitive dealer from government contract milk bidding; and increase the Association's control of the Washington [\*\*855] market. On these findings, amply supported by evidence, the District Court could properly conclude, as it did, that the Embassy acquisition tended to create a monopoly or substantially lessen competition, and was therefore a violation of § 7.<sup>18</sup>

This leaves the contention that the acquisition of Embassy was protected by the last paragraph of § [\*\*\*\*23] 7 of the Clayton Act which in pertinent part provides that:

"Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by . . . the Secretary of Agriculture under any statutory provision vesting such power in such . . . Secretary . . ."<sup>19</sup>

The Association contends that its purchase of Embassy Dairy was "consummated pursuant to authority given by . . . the Secretary of Agriculture." The trouble with this contention is that there is no "statutory provision" that vests power in the Secretary of Agriculture to approve a transaction and thereby exempt a cooperative [\*470] from the antitrust laws under the circumstances of this case. While there is a "statutory provision" vesting power in the Secretary of Agriculture to enter into agricultural marketing agreements which "shall be deemed to be lawful" and "not . . . be in violation of any of the antitrust laws of the United States," no such marketing agreement is involved here.<sup>20</sup>

[\*\*\*\*24] *Sherman Act § 3 Judgment.* -- The complaint charged that the Association, [\*\*\*890] Embassy and others had violated § 3 of the Sherman Act by engaging in a combination and conspiracy to eliminate and foreclose competition with the Association and with dealers purchasing milk from the Association. The District Court, with the consent of the parties, considered and decided this § 3 charge on the evidence offered on the § 7 Clayton Act charge. A crucial element in this charge of concerted action was the Association's purchase of Embassy's assets

<sup>18</sup> [167 F.Supp. 799, 807-808.](#)

<sup>19</sup> See note 3, *supra*.

<sup>20</sup> Agricultural Adjustment Act, § 8b, as amended, [7 U. S. C. § 608b](#). [United States v. Borden Co., 308 U.S. 188, 198-202](#); [United States v. Rock Royal Co-operative, Inc., 307 U.S. 533, 560](#); [United States v. Maryland & Virginia Milk Producers' Assn., Inc., 90 F.Supp. 681, 688](#).

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under a contract containing an agreement by the former owners of Embassy not to compete with the Association in the milk business in the Washington area for 10 years, and to attempt to have all former Embassy producers either join the Association or ship their milk to the Baltimore market. Also, particularly pertinent to the charge of a § 3 combination, was evidence showing a long and spirited business rivalry between the Association and its producers on the one hand and Embassy and its independent producers on the other. The Association had been "unhappy" about Embassy's price cutting and its generally "disruptive" competitive [\*\*\*25] practices that had made Embassy a "thorn in the side of the Association for many years." There was also evidence emphasized by the court in its [\*471] Clayton Act § 7 opinion that "the price paid by the Association for the transfer was far in excess of the actual and intrinsic value of the property purchased." [167 F.Supp. 799, 806](#). After readopting its Clayton Act § 7 findings regarding the anticompetitive motives and results of the Embassy acquisition, see p. 469, *supra*, the District Court made the three following additional findings on the Sherman Act § 3 charge: (1) "that the result of the transaction complained of was a foreclosure of competition," (2) "that the transaction complained of was entered [\*\*856] into with the intent and purpose of restraining trade,"<sup>21</sup> and (3) "that an unreasonable restraint of trade, violative of the Sherman Act, has resulted from the acquisition of Embassy Dairy by the defendant [Association]." On the basis of its findings and opinion the court then concluded that "the transaction involving the acquisition of Embassy Dairy by the defendant constitutes a violation of [Section 3](#) of the Sherman Act." [168 F.Supp. 880, 881, 882](#). [\*\*\*26]

[LEdHN\[9\]](#) [↑] [9] [LEdHN\[10\]](#) [↑] [10] [LEdHN\[11\]](#) [↑] [11] The facts found by the court show a classic combination or conspiracy to restrain trade, unless, as the Association contends, "the transaction involving the acquisition of Embassy" upon which the judgment against it was based is protected against Sherman Act prosecutions by the Capper-Volstead Act's provisions that cooperatives can lawfully make "the necessary contracts and agreements" to process, handle and market milk for their producer-members. The Embassy assets the Association acquired are useful in processing and marketing milk, [\*\*\*27] and we may assume, as it is contended, that their purchase simply for business use, without more, often would be permitted and would be lawful under the Capper-Volstead [\*472] Act. But even lawful contracts and business activities may help to make up a pattern of conduct unlawful under the Sherman Act.<sup>22</sup> [\*\*\*28] The contract of purchase here, viewed in the context [\*\*\*891] of all the evidence and findings, was not one made merely to advance the Association's own permissible processing and marketing business; it was entered into by both parties, according to the court's findings as we understand them, because of its usefulness as a weapon to restrain and suppress competitors and competition in the Washington metropolitan area. We hold that [HN7](#) [↑] the privilege the Capper-Volstead Act grants producers to conduct their affairs collectively does not include a privilege to combine with competitors<sup>23</sup> so as to use a monopoly position as a lever further to suppress competition by and among independent producers and processors.

[LEdHN\[12\]](#) [↑] [12] [LEdHN\[13\]](#) [↑] [13] Adequacy of Relief. -- The Government's appeal in this case is directed in part at the relief granted it by the District Court. The judgment requires the Association to "dispose of as a unit and as a going dairy business all [Embassy] assets . . . tangible or intangible, which it acquired on July 26, 1954, and replacements therefor," and to do so in "good faith" to preserve the business in "as good condition as possible." The District Court refused to go further and require the Association to dispose of "all assets used" in the Embassy operation, to prohibit the Association from operating as a dealer in the Washington market for a period after divestiture, to prevent the future acquisition of distributors without prior approval of the Government, and to grant the Government general "visitation rights" as to the Association's [\*\*\*29] records and employees. The District

<sup>21</sup> See [United States v. Griffith](#), 334 U.S. 100, 105. Cf. [United States v. Columbia Steel Co.](#), 334 U.S. 495, 525; [United States v. Paramount Pictures, Inc.](#), 334 U.S. 131, 173.

<sup>22</sup> See [Schine Chain Theatres, Inc., v. United States](#), 334 U.S. 110, 119.

<sup>23</sup> See [United States v. Maryland Cooperative Milk Producers, Inc.](#), 145 F.Supp. 151.

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Court was of the view that the Government would either be adequately **[\*473]** protected as to these matters by the "good faith" requirement or by subsequent orders of the District Court when the occasion necessitated. The formulation of decrees is largely left to the discretion of the trial court, and we see no reason to reject the judgment of the District Court that the relief it granted will be effective in undoing the violation it found in view of the fact that it also retains **[\*\*857]** the cause for future orders, including the right of visitation if deemed appropriate. See [Associated Press v. United States, 326 U.S. 1, 22-23.](#)

Accordingly, the judgment of the District Court finding violations of § 7 of the Clayton Act and § 3 of the Sherman Act is affirmed, and its dismissal of the charges under § 2 of the Sherman Act is reversed and remanded for a trial.

*Affirmed in part, reversed and remanded in part.*

## References

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Annotation References:

1. The doctrine of primary administrative jurisdiction, 94 L ed 806, 1 L ed 2d 1596.
- [\*\*\*\*30]** 2. Legality of combination among farmers, 25 ALR 1113, 33 ALR 247, 47 ALR 936, 77 ALR 405, 98 ALR 1406, 130 ALR 1326.
3. Right of one corporation to acquire stock in another as affected by the antitrust acts, 74 L ed 431.

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## **International Brotherhood of Teamsters, etc. v. Oliver**

Supreme Court of the United States

May 16, 1960, Decided

No. 813

**Reporter**

362 U.S. 605 \*; 80 S. Ct. 923 \*\*; 4 L. Ed. 2d 987 \*\*\*; 1960 U.S. LEXIS 1932 \*\*\*\*; 40 Lab. Cas. (CCH) P66,511; 1960 Trade Cas. (CCH) P69,718; 14 Ohio Op. 2d 277; 46 L.R.R.M. 2180

LOCAL 24, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL-CIO, ET AL. v. OLIVER ET AL.

**Prior History:** [\*\*\*\*1] ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

**Disposition:** [170 Ohio St. 207, 163 N. E. 2d 383](#), reversed.

### **Core Terms**

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provisions, carriers, hired

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Public Enforcement > State Civil Actions

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

#### [\*\*HN1\*\*](#) **Public Enforcement, State Civil Actions**

Ohio's **antitrust law** could not be applied to prevent contracting parties from carrying out their agreement upon a subject matter as to which federal law directed them to bargain.

### **Lawyers' Edition Display**

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#### **Summary**

In a decision rendered on January 19, 1959 ([358 US 283, 3 L ed 2d 312, 79 S Ct 297](#)), the United States Supreme Court ruled that the state of Ohio could not invalidate, as violative of its **antitrust law**, a provision of a collective bargaining contract between motor carriers and a teamsters' union, prescribing terms and conditions regulating the minimum rental and other terms of lease when a motor vehicle is leased to a carrier by an owner who drives the vehicle in the carrier's service, this being a subject of mandatory collective bargaining under the amended National Labor Relations Act, and thus within the rule that a state may not apply its **antitrust law** to prevent a union and an employer from carrying out portions of a collective bargaining contract between them dealing with a subject as to

which the federal labor relations statutes direct them to bargain. On remand, the Court of Appeals of the State of Ohio, Ninth Judicial District, conformed to the Supreme Court's decision, in so far as the lessor of the motor vehicles, acting as a lessor-driver, was concerned; but the Ohio court barred enforcement against the lessor of provisions of the collective bargaining contract in so far as the lessor was acting as a lessor-employer (that is, leasing trucks driven by his employees). The Supreme Court of Ohio dismissed the union's appeal. ([170 Ohio St 207, 163 NE2d 383](#).) The union having sought a writ of certiorari in the United States Supreme Court, the Supreme Court granted the writ, and reversed the judgment below. The ruling of the court, as stated in a per curiam opinion reflecting the views of six of its members, is adequately stated in the headnote, infra.

Whittaker, J., dissented.

Frankfurter and Stewart, JJ., did not participate.

## Headnotes

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COMMERCE §129.5 > labor relations -- collective bargaining -- state **antitrust law** -- motor carriers. -- > Headnote:

A state may not apply its **antitrust law** to prevent a labor union and an employer from carrying out their agreement upon a subject matter as to which federal law directs them to bargain; hence a state court may not bar, on the ground that antitrust violations are involved, a teamsters union and the motor carriers with which the union has entered into a collective bargaining contract from enforcing against one who leases his trucks, operated by his employees, to the motor carriers, a provision of the collective bargaining contract which specifies that hired or leased equipment, if not owner-driven, shall be operated only by employees of the motor carriers and which requires those carriers to use their own available equipment before hiring any extra equipment, such provision being concerned with the wages paid the lessor of the trucks, and thus being a subject of mandatory collective bargaining under the amended National Labor Relations Act.

## Syllabus

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Ohio's **antitrust law** may not be applied to prevent the contracting parties from carrying out a collective bargaining agreement upon a subject matter as to which the National Labor Relations Act directs them to bargain. ([Teamsters Union v. Oliver, 358 U.S. 283](#)). Therefore, certiorari is granted and the judgment below is reversed. Pp. 605-606.

**Counsel:** David Previant, Robert C. Knee, Bruce Laybourne and David Leo Uelmen for petitioners.

Bernard J. Roetzel and Charles R. Iden for respondents.

**Judges:** Warren, Black, Douglas, Clark, Harlan, Brennan, Whittaker; Frankfurter and Stewart took no part in the consideration or decision of this case.

**Opinion by:** PER CURIAM

## Opinion

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[\*605] [\*988] [\*\*924] The motion for leave to use the record in No. 49, October Term, 1958, is granted. The petition for certiorari is also granted. After our remand to the Court of Appeals of the State of Ohio, Ninth Judicial District, for proceedings not inconsistent with the opinion of this ([Court, 358 U.S. 283](#)), the Court of Appeals set aside its previous order "as [\*\*\*\*2] it concerns and applies to Revel Oliver, appellee, as a lessor-driver" but continued the order in full force and effect "as it concerns and applies to Revel Oliver, appellee, as a lessor-owner

and employer of drivers of his equipment." We read the judgment of the Court of Appeals as enjoining petitioners and respondents A. C. E. Transportation Co. and Interstate Truck Service, Inc., from enforcing against respondent Oliver those parts of Article [\*606] 32 which provide that hired or leased equipment, if not owner-driven, shall be operated only by employees of the certificated or permitted carriers and require those carriers to use their own available equipment before hiring any extra equipment. Art. XXXII, §§ 4 and 5, 358 U.S., at 298-299. While we do not think the issue was tendered to us when the case was last here, we are of opinion that these provisions are at least as intimately bound up with the subject of wages as the minimum rental provisions we passed on then. Accordingly, as in the previous case, we hold that [HN1](#) Ohio's antitrust law here may not "be applied to prevent the contracting parties from carrying out their agreement upon a subject matter as [\*\*\*\*3] to which federal law directs them to bargain." [358 U.S., at 295.](#)

The judgment accordingly is

*Reversed.*

MR. JUSTICE WHITTAKER dissents.

MR. JUSTICE FRANKFURTER and MR. JUSTICE STEWART took no part in the consideration or decision of this case.

## References

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Annotation References:

1. Subjects of mandatory collective bargaining under Federal Labor Relations Act, 12 ALR2d 265.
2. What are "wages" as to which amended National Labor Relations Act makes collective bargaining mandatory, 3 L ed 2d 1725.
3. National Labor Relations Act and Labor Management Relations Act as excluding state action, 93 L ed 470, 94 L ed 984, 95 L ed 384, 98 L ed 245, 99 L ed 559, 100 L ed 1174. See also 174 ALR 1051.

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## United States v. E. I. du Pont de Nemours & Co.

Supreme Court of the United States

February 20-21, 1961, Argued ; May 22, 1961, Decided

No. 55

### **Reporter**

366 U.S. 316 \*; 81 S. Ct. 1243 \*\*; 6 L. Ed. 2d 318 \*\*\*; 1961 U.S. LEXIS 2146 \*\*\*\*

UNITED STATES v. E. I. du PONT de NEMOURS & CO. ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

**Disposition:** [177 F.Supp. 1](#), affirmed in part, vacated in part, and remanded for further proceedings.

## **Core Terms**

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divestiture, decree, stock, acquisition, stockholders, shares, effective, provisions, antitrust, Courts, percent, voting, cases, shareholders, monopoly, parties, violations, fashioned, public interest, Clayton Act, monopolization, conspiracy, commerce, framing, anti trust law, pass through, Sherman Act, injunction, ownership, officers and directors

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Jurisdiction on Certiorari > Considerations Governing Review > Federal Court Decisions

### [\*\*HN1\*\*](#) [] **Considerations Governing Review, Federal Court Decisions**

Where the Court delegates to the district court the duty of formulating a decree in compliance with the principles announced in the Court's judgment of reversal, that gives the Court plenary power where the compliance has been attempted and the decree in any proper way is brought to the Court's attention to see that it follows the opinion of the Court.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

### [\*\*HN2\*\*](#) [] **Settlements, Consent Judgments**

Divestiture is itself an equitable remedy designed to protect the public interest.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Knowledge

### **HN3** Settlements, Consent Judgments

In considering the subject of divestiture, three dominant influences must guide our action: (1) The duty of giving complete and efficacious effect to the prohibitions of the statute; (2) the accomplishing of this result with as little injury as possible to the interest of the general public; and, (3) a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs that inspired and dominated the combination from the beginning.

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Mergers & Acquisitions Law > Antitrust > General Overview

### **HN4** Sherman Act, Remedies

Divestiture or dissolution is the traditional remedy for Sherman Act violations, [15 U.S.C.S. §§ 1](#) and [2](#), and it is reasonable to use the same remedy when § 7 of the Clayton Act, [15 U.S.C.S. § 18](#), which particularizes the Sherman Act standard of illegality, is involved.

## **Lawyers' Edition Display**

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### **Summary**

In [\*United States v E. I. du Pont de Nemours & Co., 353 US 586, 1 L ed 2d 1057, 77 S Ct 872\*](#), the Supreme Court held that the acquisition in the period 1917-1919 by du Pont of approximately 23 per cent of the General Motors voting common stock was a violation of 7 of the Clayton Act because its effect might be substantially to lessen competition or to tend to create a monopoly. Upon remand the District Court for the Northern District of Illinois refused to order complete divestiture of the stock, as requested by the government, but ordered a divestiture only of voting rights in the stock. The decree also enjoined du Pont from exercising voting rights in respect of its General Motors stock. ([177 F Supp 1](#).)

On appeal, the Supreme Court vacated the judgment of the District Court, except as to the provision enjoining du Pont from exercising the voting rights, and directed complete divestiture. In an opinion by Brennan, J., expressing the view of four members of the Court, it was held that complete divestiture was the only appropriate relief.

Frankfurter, J., joined by Whittaker and Stewart, JJ., dissented, expressing the view that, in ordering only divestiture of voting rights, the District Court did not abuse its discretion.

Clark and Harlan, JJ., did not participate.

## **Headnotes**

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APPEAL §1400 > discretion -- antitrust cases. -- > Headnote:

[LEdHN\[1\]](#) [1]

While the District Courts have the responsibility initially to fashion the remedy in antitrust cases, and the Supreme Court accords due regard and respect to the conclusion of the District Court, the Supreme Court has a duty itself to make sure that a decree is fashioned which will effectively redress proved violations of the antitrust laws.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §63 > public interest -- decree. -- > Headnote:

[LEdHN\[2\]](#) [2]

A public interest served by civil antitrust suits is that they effectively pry open to competition a market that has been closed by defendant's illegal restraints; the decree should accomplish no less than that.

APPEAL §1340 > direct appeal -- antitrust cases. -- > Headnote:

[LEdHN\[3\]](#) [3]

The congressional authorization, under 2 of the Expediting Act ([15 USC 29](#)), of a direct appeal to the Supreme Court from a final judgment of a District Court in an antitrust action, imposes upon the Supreme Court a special burden of reviewing the relief granted or denied by the district judge.

APPEAL §1759 > reversal -- compliance with mandate -- antitrust case -- remedy. -- > Headnote:

[LEdHN\[4A\]](#) [4A] [LEdHN\[4B\]](#) [4B]

A close examination by the Supreme Court of a District Court's action in fashioning a remedy in a government antitrust action in which the acquisition by one corporation of stock in another corporation was held to violate 7 of the Clayton Act ([15 USC 18](#)) because of the resultant likelihood of the creation of a monopoly is required where the District Court's decree was fashioned in obedience to the mandate sent down to the District Court by the Supreme Court after the latter court's reversal of the District Court's dismissal of the government's complaint, and, moreover, the District Court's inquiry was concerned mainly with the alleged adverse tax and market effects of complete divestiture of the stock, whereas the primary focus of inquiry should have been upon the question of the relief required effectively to eliminate the tendency of the acquisition condemned by 7.

APPEAL §1757 > compliance with mandate. -- > Headnote:

[LEdHN\[5\]](#) [5]

The Supreme Court has plenary power to determine whether its mandate was scrupulously and fully carried out.

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APPEAL §1317 > compliance with mandate. -- > Headnote:

[LEdHN\[6\]](#) [6]

No stipulation by the government can circumscribe the power of the Supreme Court to see that its mandate is carried out.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §74 > remedy -- stock ownership. --

> Headnote:

[LEdHN\[7\]](#) [7]

The required relief in an action for violation of 7 of the Clayton Act ([15 USC 18](#)), which prohibits acquisition by one corporation of stock of another where the effect of such acquisition may be to tend to create a monopoly, is a remedy which reasonably assures the elimination of that tendency; findings of possible harsh consequences for the owners of the stock of the corporations involved are not of material assistance in fashioning the remedy.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §73 > remedy. -- > Headnote:

[LEdHN\[8\]](#) [8]

The key to the question of an antitrust remedy is the discovery of measures effective to restore competition.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §74 > remedy -- punitive measures. --

> Headnote:

[LEdHN\[9\]](#) [9]

Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive; but courts are authorized and required to decree effective relief to redress the violations, whatever the adverse effect of such a decree on private interests.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §78 > divestiture. -- > Headnote:

[LEdHN\[10\]](#) [10]

In civil antitrust actions divestiture is an equitable remedy designed to protect the public interest.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §78 > divestiture. -- > Headnote:

[LEdHN\[11\]](#) [11]

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If complete divestiture is a necessary element of effective relief in a civil antitrust action, the government cannot be denied the remedy because economic hardship, however severe, may result.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §74 > remedy -- hardship. -- > Headnote:

[LEdHN\[12\]](#) [12]

Economic hardship can influence choice only as among two or more effective remedies in civil antitrust action; if the remedy chosen is not effective, it will not be saved because an effective remedy would entail harsh consequences.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §74 > remedy -- criteria. -- > Headnote:

[LEdHN\[13\]](#) [13]

The criteria guiding the court in fashioning a remedy in civil antitrust actions are: (1) the duty of giving complete and efficacious effect to the prohibitions of the antitrust laws, (2) the accomplishing of this result with as little injury as possible to the interest of the general public, and (3) a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interest in the stock or securities of the unlawful combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs; however, if the relief is not effective, there is no occasion to consider the third criterion.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §78 > remedy -- partial divestiture. --

> Headnote:

[LEdHN\[14\]](#) [14]

The adverse tax and market consequences resulting from complete divestiture of stock acquired in violation of 7 of the Clayton Act ( [15 USC 18](#)) cannot save the remedy of partial divestiture, passing to the stockholders of the offending corporation the right to vote the shares, if, though less harsh, partial divestiture is not an effective remedy.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §78 > remedy -- divestiture. -- > Headnote:

[LEdHN\[15A\]](#) [15A] [LEdHN\[15B\]](#) [15B]

Complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate 7 of the Clayton Act ( [15 USC 18](#)); however, even if administrative agencies charged with the duty of enforcing the statute are required by 11 of the act ( [15 USC 21](#)) to order divestiture whenever they find a violation of 7, the powers of courts acting under 15 ( [15 USC 25](#)) are not so restricted.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §78 > remedy -- divestiture. -- > Headnote:

[LEdHN\[16\]](#) [16]

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To remedy the violation of 7 of the Clayton Act ([15 USC 18](#)) by du Pont's acquisition of 23 per cent of General Motors stock, complete divestiture, and not the divestiture only of voting rights, is the appropriate remedy.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §73 > remedy. -- > Headnote:

[LEdHN\[17\]](#) [17]

Once the government has successfully borne the burden of establishing a violation of the antitrust laws, all doubts as to the remedy are to be resolved in its favor.

## Syllabus

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In this civil antitrust proceeding, this Court held that acquisition by the du Pont Company of 23% of the common stock of General Motors Corporation had led to the insulation from free competition of most of the General Motors market in automobile finishes and fabrics and tended to create a monopoly of a line of commerce, in violation of § 7 of the Clayton Act. Therefore, this Court reversed the District Court's judgment dismissing the complaint and remanded the case to that Court for a determination of the equitable relief necessary and appropriate in the public interest. [353 U.S. 586](#). After the taking of further evidence, pertaining mostly to the tax and market consequences to the shareholders of the two companies, the District Court declined to require du Pont to divest itself completely of the General Motors stock, as urged by the Government, and sought to satisfy the requirements of this [\*\*\*\*2] Court's mandate by requiring du Pont to transfer its voting rights in most of the General Motors stock to certain of du Pont's shareholders, by enjoining the two companies from having any preferential or discriminatory trade relations with each other and by various other injunctive provisions designed to prevent du Pont from exercising any control over the management of General Motors. *Held*: This remedy is not adequate, and the District Court is directed to proceed expeditiously to enter a decree requiring du Pont to divest itself completely of the General Motors stock within not to exceed 10 years from the effective date of the decree. Pp. 318-335.

(a) When a violation of the antitrust laws has been proved, the initial responsibility to fashion an appropriate remedy lies with the District Court, and this Court accords due regard and respect to the conclusion of the District Court; but this Court has a duty to be sure that a decree is fashioned which will effectively redress the violations of the antitrust laws. Pp. 322-325.

(b) Since the decree in this case was fashioned by the District Court in obedience to the judgment sent to it by this Court after reversal of the District [\*\*\*\*3] Court's judgment dismissing the Government's complaint, this Court has plenary power to determine whether its own judgment was scrupulously and fully carried out. Pp. 325-326.

(c) In civil proceedings, courts are not authorized to punish antitrust violators, and relief must not be punitive; but courts are required to decree relief effective to redress the violations and restore competition, whatever the adverse effect of such a decree on private interests. Pp. 326-328.

(d) In this case, the proposed partial divestiture through the transfer of voting rights would not be an effective remedy; and, notwithstanding the adverse tax and market consequences which the District Court found would result, the Government is entitled to a decree directing complete divestiture -- a remedy peculiarly appropriate in cases of stock acquisitions which violate § 7 of the Clayton Act. Pp. 326-333.

(e) The alternative, suggested belatedly by du Pont, that its General Motors stock be disenfranchised, would not provide effective relief, and it might have undesirable effects on the capital structure, management and control of General Motors. P. 333.

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(f) The injunctive provisions of the District Court's [\*\*\*\*4] decree would not adequately remove the objections to the effectiveness of its main provision for the transfer of voting rights, and the public is entitled to the surer, cleaner remedy of complete divestiture. Pp. 333-334.

(g) Once the Government has successfully borne the considerable burden of establishing a violation of the antitrust laws, all doubts as to the remedy are to be resolved in its favor. P. 334.

(h) The District Court's decree is vacated in its entirety, except as to the provisions enjoining du Pont itself from exercising voting rights in respect of its General Motors stock. Pp. 334-335.

(i) In order that this protracted litigation may be concluded as soon as possible, the District Court is directed to proceed expeditiously to formulate and enter a decree providing for the complete divestiture by du Pont of its General Motors stock, to commence within 90 days, and to be completed within not to exceed 10 years, of the effective date of the decree. P. 335.

**Counsel:** John F. Davis argued the cause for the United States. With him on the briefs were former Solicitor General Rankin, Solicitor General Cox, Acting Assistant Attorney General Bicks, Acting Assistant Attorney [\*\*\*\*5] General Kirkpatrick, Philip Elman, Charles H. Weston and Bill G. Andrews.

Hugh B. Cox argued the cause for E. I. du Pont de Nemours & Co., appellee. With him on the brief were John Lord O'Brian, Charles A. Horsky, Daniel M. Gibbon, Nestor S. Foley and Alvin Friedman.

Robert L. Stern argued the cause for General Motors Corp., appellee. With him on the brief were Leo F. Tierney, Bryson P. Burnham, Henry M. Hogan and Robert A. Nitschke.

Wilkie Bushby argued the cause for Christiana Securities Co. et al., appellees. With him on the brief was Philip C. Scott.

Briefs of amici curiae, urging affirmance, were filed by Andrew J. Dallstream and Manuel E. Cowen for du Pont and General Motors shareholders, respectively, and by Joseph M. Proskauer and Harold H. Levin for Clara M. Blum et al.

**Judges:** Warren, Black, Frankfurter, Douglas, Brennan, Whittaker, Stewart; Clark and Harlan took no part in the consideration or decision of this case.

**Opinion by:** BRENNAN

## Opinion

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[\*318] [\*\*\*320] [\*\*1246] Mr. JUSTICE BRENNAN delivered the opinion of the Court.

The United States filed this action in 1949 in the District Court for the Northern District of Illinois. The complaint alleged that the [\*\*\*\*6] ownership and use by appellee E. I. du Pont de Nemours & Co. of approximately 23 percent of the voting common stock of appellee General Motors Corporation was a violation of sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1, 2, and of section 7 of the Clayton Act, 15 U. S. C. § 18. After trial, the District Court dismissed the complaint. 126 F.Supp. 235 (D. C. N. D. 1954). On the Government's appeal, we reversed. We held that du Pont's acquisition of the 23 percent of General Motors stock had led to the [\*\*\*321] insulation from free competition of [\*319] most of the General Motors market in automobile finishes and fabrics, with the resultant likelihood, at the time of suit, of the creation of a monopoly of a line of commerce, and, accordingly, that du Pont had violated § 7 of the Clayton Act. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957).<sup>1</sup> We

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<sup>1</sup> Since a holding that the Clayton Act had been violated sufficed to dispose of the case, we did not decide whether du Pont had also violated the Sherman Act. See 353 U.S., at 588, note 5.

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did not, however, determine what equitable relief was necessary in the public interest. Instead, we observed that "the District Courts . . . are clothed 'with large discretion to model their judgments to fit the exigencies [\*\*\*\*7] of the particular case.' *International Salt Co. v. United States*, 332 U.S. 392, 400-401," and remanded the cause to the District Court "for a determination, after further hearing, of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute." [353 U.S., at 607-608.](#)

On remand, the District Court invited the Government to submit a plan of relief which in its opinion would be effective to remedy the violation. The court also appointed two *amici curiae* to represent the interests of General Motors and du Pont shareholders, respectively, most of whom, of course, had not been made parties to this litigation. The Government submitted a proposed plan of relief. That plan included diverse forms of [\*\*\*\*8] injunctive relief, but its principal feature was a requirement that within 10 years the du Pont company completely divest itself of its approximately 63 million General Motors shares. The Government proposed that about two-thirds of these shares be distributed *pro rata* to the generality of du Pont shareholders in the form of dividends over the 10-year period. The other one-third of du Pont's [\*\*1247] General Motors holdings -- stock which [\*320] would have gone to appellees Christiana Securities Company and Delaware Realty and Investment Company, holding companies long identified with the du Pont family itself -- were to go to a court-appointed trustee, to be sold gradually over the same 10-year period. Du Pont objected that the Government's plan of complete divestiture entailed harsh income-tax consequences for du Pont stockholders and, if adopted, would also threaten seriously to depress the market value of du Pont and General Motors stock. Du Pont therefore proposed its own plan designed to avoid these results. The salient feature of its plan was substitution for the Government's proposed complete divestiture of a plan for partial divestiture in the form of a so-called [\*\*\*\*9] "pass through" of voting rights, whereby du Pont would retain all attributes of ownership of the General Motors stock, including the right to receive dividends and a share of assets on liquidation, except the right to vote. The vote was to be "passed through" to du Pont's shareholders proportionally to their holdings of du Pont's own shares, except that Christiana and Delaware would "pass through" the votes allocable to them to their own shareholders. The *amicus curiae* also proposed plans of compliance, substantially equivalent to the du Pont plan. The *amicus* representing the generality of du Pont shareholders proposed in addition a program of so-called [\*\*\*322] "take-downs," by which du Pont shareholders would be allowed to exchange their du Pont common stock for a new class of du Pont "Special Common," plus their *pro rata* share of du Pont-held General Motors common stock.

The District Court held several weeks of hearings. The evidence taken at the hearings, largely of expert witnesses, fills some 3,000 pages in the record before us, and, together with the numerous financial charts and tables received as exhibits, bears mainly not on the competition-restoring effect [\*\*\*\*10] of the several proposals, but [\*321] rather on which proposal would have the more, and which the less, serious tax and market consequences for the owners of the du Pont and General Motors stock. The District Court concluded that although ". . . there is no need for the Court to resolve the conflict in the evidence as to how severe those consequences would be[, t]he Court is persuaded beyond any doubt that a judgment of the kind proposed by the Government would have very serious adverse consequences." [177 F.Supp. 1, 42 \(D. C. N. D. Ill. 1959\)](#). The court for this reason rejected the Government's plan and adopted the du Pont proposal, with some significant modifications. The "pass through" of voting rights, for example, was so limited that neither Christiana, Delaware, nor their officers and directors (plus resident members of the latter's families), should be able to vote any of the du Pont-held General Motors stock; General Motors shares allocable to the two companies or to their officers and directors, or to the officers and directors of du Pont, or to resident members of the families of the officers and directors of the several companies, were to be sterilized, [\*\*\*\*11] voted by no one. Du Pont, Christiana, and Delaware were forbidden to acquire any additional General Motors stock. Du Pont and General Motors might not have any preferential or discriminatory trade relations or contracts with each other. No officer or director of du Pont, Christiana, or Delaware might also serve as an officer or director of General Motors. Nor might du Pont, Christiana, or Delaware nominate or propose any person to be a General Motors officer or director, or seek in any way to influence the choice of persons to fill those posts. The Government objected that without a provision ordering complete divestiture the decree, although otherwise satisfactory, was inadequate to redress the antitrust violation, and filed its appeal here under [§ 2](#) of the Expediting Act, [15 U. S. C. § 29](#). We noted probable jurisdiction. [362 U.S. 986 \[\\*\\*1248\]](#) (1960).

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[\*322] A threshold question -- and one which, although subsidiary, is most important -- concerns the scope of our review of the District Court's discharge of the duty delegated by our judgment to formulate a decree. In our former opinion we alluded to the "large discretion" of the [\*\*\*\*12] District Courts in matters of remedy in antitrust cases. Many opinions of the Court in such cases observe that "the formulation of decrees is largely left to the discretion of the trial court . . . ," *Maryland & Virginia Milk Producers Assn. v. United States*, 362 U.S. 458, 473 (1960); "in framing relief in antitrust cases, a range of discretion rests with the trial judge," *Besser Mfg. Co. v. United States*, 343 U.S. 444, 449 (1952); "the determination of the [\*\*\*323] scope of the decree to accomplish its purpose is peculiarly the responsibility of the trial court," *United States v. United States Gypsum Co.*, 340 U.S. 76, 89 (1950); "the framing of decrees should take place in the District rather than in Appellate Courts," *International Salt Co. v. United States*, 332 U.S. 392, 400 (1947). The Court has on occasion said that decrees will be upheld in the absence of a showing of an abuse of discretion. See, e. g., *Maryland & Virginia Milk Producers Assn. v. United States, supra, p. 473*; *United States v. W. T. Grant Co.*, 345 U.S. 629, 634 (1953); *Timken Roller Bearing* [\*\*\*\*13] *Co. v. United States*, 341 U.S. 593 (1951);<sup>2</sup> *United States v. National Lead Co.*, 332 U.S. 319, 334-335 (1947); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 185 (1944).<sup>3</sup> These [\*323] expressions are not, however, to be understood to imply a narrow review here of the remedies fashioned by the District Courts in antitrust cases. On the contrary, our practice, particularly in cases of a direct appeal from the decree of a single judge, is to examine the District Court's action closely to satisfy ourselves that the relief is effective to redress the antitrust violation proved. "The relief granted by a trial court in an antitrust case and brought here on direct appeal, thus by-passing the usual appellate review, has always had the most careful scrutiny of this Court. Though the records are usually most voluminous and their review exceedingly burdensome, we have painstakingly undertaken it to make certain that justice has been done." *International Boxing Club v. United States*, 358 U.S. 242, 253 (1959); see also *id., at 263* (dissenting opinion). We have made it clear [\*\*\*\*14] that a decree formulated by a District Court is not "subject only to reversal for gross abuse. Rather we have felt an obligation to intervene in this most significant phase of the case when we concluded there were inappropriate provisions in the decree." *United States v. United States Gypsum Co., supra, p. 89*.

LEdHN[1] [1] LEdHN[2] [2] [\*\*\*\*15] In sum, we assign to the District Courts the responsibility *initially* to fashion the remedy, but recognize that while we accord due regard and respect to the conclusion of the District Court, [\*\*1249] we have a duty ourselves to be sure that a decree is fashioned which will effectively redress proved violations of the antitrust laws. The proper disposition of antitrust cases is obviously of great public importance, and their remedial phase, more often than not, is crucial. For the suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it. "A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes [\*324] [\*\*\*324] less than that, the Government has won a lawsuit and lost a cause." *International Salt Co. v. United States, supra, p. 401*.

LEdHN[3] [3] Our practice reflects the situation created by the congressional authorization, under § 2 of the Expediting Act,<sup>4</sup> [\*\*\*\*17] of a direct appeal to this Court from [\*\*\*\*16] the judgment of relief fashioned by a single

<sup>2</sup> In this case, however, a majority of the Court substantially modified the District Court's decree, in spite of expressions of deference written into the principal opinion.

<sup>3</sup> In *Crescent Amusement* the Court relied in part on the fact that the district judge had initially found the violation of law. This circumstance was said to enhance the deference owed to the district judge's determination of the measures appropriate to eliminate the violation, *323 U.S., at 185*. This factor is not present in the case before us.

<sup>4</sup> 32 Stat. 823, as amended, *15 U. S. C. § 29*. The purpose of this statute was to expedite determination of antitrust cases by allowing the Attorney General to obtain a special Circuit (now District) Court of several judges by filing a certificate of public importance under § 1 of the Act, 32 Stat. 823, as amended, *15 U. S. C. § 28* (no such certificate was filed in this case), and by providing for direct appeal to the Supreme Court from the decree of the trial court, whether composed of one or several judges, such appeal to be within this Court's obligatory jurisdiction. Congress was moved by the "far-reaching importance of the cases

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judge. Congress has deliberately taken away the shield of intermediate appellate review by a Court of Appeals, and left with us alone the responsibility of affording the parties a review of his determination.<sup>5</sup> This circumstance imposes a special burden upon us, for, as Mr. Justice Roberts said for the Court, ". . . it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching [**\*325**] importance to the judgment of a single judge, without review of the relief granted or denied by him," *Hartford-Empire Co. v. United States*, 324 U.S. 570, 571 (1945), clarifying 323 U.S. 386 (1945).

LEdHN[4A][] [4A] LEdHN[5][] [5] These principles alone would require our close examination of the District Court's action. But the necessity for that examination in this case further appears [**\*\*\*\*18**] in the light of additional considerations. First of all, the decree was fashioned in obedience to the judgment which we sent down to the District Court after our reversal of that court's dismissal of the Government's complaint. We have plenary power to determine whether our judgment was scrupulously and fully carried out. Chief Justice Taft, speaking for the Court, said in *Continental Ins. Co. v. United States*, 259 U.S. 156, 166 (1922), HN1[] "We delegated to the District Court the duty of formulating a decree in compliance with the principles announced in our judgment of reversal, and that gives us plenary power where the compliance [**\*\*1250**] has been attempted and the decree in any proper way is brought to our attention to see that it follows our opinion."<sup>6</sup>

[**\*\*\*325**] LEdHN[4B][] [4B] LEdHN[7][] [7] Secondly, the record is concerned mainly with the alleged adverse tax and market effects of the Government's proposal for complete divestiture. But the primary focus of inquiry, as we shall show, is upon the question of [**\*\*\*\*19**] the relief required effectively to eliminate the tendency of the acquisition condemned by § 7. For it will be remembered that the violation was not *actual* monopoly but only a *tendency* towards [**\*326**] monopoly. The required relief therefore is a remedy which reasonably assures the elimination of that tendency. Does partial divestiture in the form of the "pass through" of voting power, together with the ancillary relief, give an effective remedy, or is complete divestiture necessary to assure effective relief? Little in the record or in the District Court's opinion is concerned with that crucial question. The findings of possible harsh consequences relied upon to justify rejection of complete divestiture are thus hardly of material assistance in reaching judgment on the central issue. If our examination persuades us that the remedy decreed leaves the public interest in the elimination of the tendency inadequately protected, we should be derelict in our duty if we did not correct the error.

[**\*\*\*\*20**] LEdHN[8][] [8] LEdHN[9][] [9] LEdHN[10][] [10] Before we examine the adequacy of the relief allowed by the District Court, it is appropriate to review some general considerations concerning that most drastic, but most effective, of antitrust remedies -- divestiture. The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive. But courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests. HN2[] Divestiture is itself an equitable remedy designed to protect the public interest. In United States v. Crescent

arising under [the] antitrust laws . . . ." 36 Cong. Rec. 1679 (remarks of Senator Fairbanks, Feb. 4, 1903). See also H. R. Rep. No. 3020, 57th Cong., 2d Sess. 2 (1903).

<sup>5</sup> In one case this elimination of the normal review by the Court of Appeals almost prevented there being any review of the District Court at all. See *United States v. Aluminum Co. of America*, 320 U.S. 708 (1943) (noting the absence of a quorum in this Court to hear an Expediting Act appeal from a District Court). But Congress acted to keep such an important matter from going unreviewed, see H. R. Rep. No. 1317, 78th Cong., 2d Sess. (1944), and enacted a special statute, 58 Stat. 272, 15 U. S. C. § 29, pursuant to which this Court immediately certified the case to a *Circuit Court of Appeals*, 322 U.S. 716 (1944), which proceeded to decide the appeal. 148 F.2d 416 (C. A. 2d Cir. 1945). See also United States v. United States District Court, 334 U.S. 258 (1948).

<sup>6</sup> LEdHN[6][] [6] Government counsel at the trial advised the District Court that he had no authority to suggest modes of divestiture different from the plan presented by the Government to the District Court. Appellees suggest that the Government is thus estopped from urging other modes of divestiture on this appeal. But plainly, under the rule of *Continental Insurance*, no stipulation by the Government could circumscribe this Court's power to see that its mandate is carried out.

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Amusement Co., supra, where we sustained divestiture provisions against an attack similar to that successfully made [\*\*\*\*21] below, we said, at p. 189: "It is said that these provisions are inequitable and harsh income tax wise, that they exceed any reasonable requirement for the prevention of future violations, and that they are therefore punitive. . . . Those who violate the Act may not reap [\*327] the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience." <sup>7</sup>

LEdHN[11]<sup>8</sup> [11] LEdHN[12]<sup>9</sup> [12] LEdHN[13]<sup>10</sup> [13] [\*\*\*\*22] If the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot [\*\*\*326] be denied the latter remedy because economic hardship, however severe, may result. Economic hardship can influence choice only as among two or more effective remedies. If the remedy chosen is not effective, it will not be saved because an effective remedy would entail harsh consequences. This proposition is not novel; [\*\*1251] it is deeply rooted in antitrust law and has never been successfully challenged.

<sup>8</sup> The criteria were announced in one of the earliest cases. In United States v. American Tobacco Co., 221 U.S. 106, 185 (1911), we said:

HN3<sup>11</sup> "In considering the subject . . . three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest [\*328] of the general public; and, 3, a proper regard for [\*\*\*\*23] the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning."

The Court concluded in that case that, despite the alleged hardship which would be involved, only dissolution of the combination would be effective, and therefore ordered dissolution. Plainly, if the relief is not effective, there is no occasion to consider the third criterion.

[\*\*\*\*24] LEdHN[14]<sup>12</sup> [14] Thus, in this case, the adverse tax and market consequences which the District Court found would be concomitants of complete divestiture cannot save the remedy of partial divestiture through the "pass through" of voting rights if, though less harsh, partial divestiture is not an effective remedy. We do not think that the "pass through" is an effective remedy and believe that the Government is entitled to a decree directing complete divestiture.

LEdHN[15A]<sup>13</sup> [15A] It cannot be gainsaid that complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7.<sup>9</sup> [\*\*\*\*26] That statute is specific and "narrowly [\*329] directed,"<sup>10</sup> Standard Oil Co.

<sup>7</sup> Bills were introduced in the Eighty-sixth Congress to ameliorate the income-tax consequences of gain on disposition of stock pursuant to orders enforcing the antitrust laws. See Hearings on S. 200 before the Senate Committee on Finance, 86th Cong., 1st Sess. (1959); Hearings on H. R. 8126 before the House Committee on Ways and Means, 86th Cong., 1st Sess. (1959); H. R. Rep. No. 1128, 86th Cong., 1st Sess. (1959).

<sup>8</sup> See, e. g., United States v. Crescent Amusement Co., 323 U.S. 173, 189 (1944); United States v. Corn Products Refining Co., 234 F. 964, 1018 (D. C. S. D. N. Y. 1916), appeal dismissed on motion of appellant, 249 U.S. 621 (1919); United States v. E. I. du Pont de Nemours & Co., 188 F. 127, 153 (C. C. D. Del. 1911), modified, 273 F. 869 (D. C. D. Del. 1921); In re Crown Zellerbach Corp., CCH Trade Reg. Rep. 1957-1958 para. 26,923, at p. 36,462 (F. T. C. 1958).

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LEdHN[15B]<sup>14</sup> [15B] We reject the Government's argument that the Federal Trade Commission and other administrative agencies charged with the duty of enforcing the statute are required by § 11 of the Clayton Act to order divestiture whenever they find a violation of § 7, and that therefore courts acting under § 15 must give the same relief. Even if the administrative

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v. [United States, 337 U.S. 293, 312 \[\\*\\*\\*327\] \(1949\)](#), and it outlaws a particular form of economic control -- stock acquisitions which tend to create a monopoly of any line of commerce. The very words of § 7 suggest that an undoing of the acquisition is a natural remedy. [\*\*\*25] [HN4↑](#) Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control,<sup>11</sup> [\*\*\*27] and it is reasonable [\*330] to [\*1252] think immediately of the same remedy when § 7 of the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved. Of the very few litigated<sup>12</sup> § 7 cases which have been reported, most decreed divestiture as a matter of course.<sup>13</sup> [\*\*\*28] Divestiture [\*331] has been [\*\*\*328] called the most important of antitrust remedies.<sup>14</sup> It is simple, relatively easy to administer, and sure. It should always [\*1253] be in the forefront of a court's mind when a violation of § 7 has been found.

[LEdHN\[16\]↑](#) [16]The divestiture only of voting rights does not seem to us to be a remedy adequate to promise elimination of the tendency of du Pont's acquisition offensive to § 7. Under the decree, two-thirds of du Pont's

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agencies were so limited, a question which we do not decide, Congress would not be deemed to have restricted the broad remedial powers of courts of equity without explicit language doing so in terms, or some other strong indication of intent. *Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944)*.

<sup>10</sup> The words were actually used of § 3 of the Clayton Act, but they are equally applicable to § 7.

<sup>11</sup> See *Northern Securities Co. v. United States, 193 U.S. 197 (1904)*; *Standard Oil Co. v. United States, 221 U.S. 1 (1911)*; *United States v. American Tobacco Co., 221 U.S. 106 (1911)*; *United States v. Union Pacific R. Co., 226 U.S. 61 (1912)*, modified, *226 U.S. 470 (1913)*; *United States v. Reading Co., 226 U.S. 324 (1912)*, modified, *228 U.S. 158 (1913)*; *United States v. Reading Co., 253 U.S. 26 (1920)*, modified after remand, *Continental Ins. Co. v. United States, 259 U.S. 156 (1922)*; *United States v. Lehigh Valley R. Co., 254 U.S. 255 (1920)*; *United States v. Southern Pacific Co., 259 U.S. 214 (1922)*; *United States v. Crescent Amusement Co., 323 U.S. 173 (1944)*; *Hartford-Empire Co. v. United States, 323 U.S. 386 (1945)*, clarified, *324 U.S. 570 (1945)*; *United States v. National Lead Co., 332 U.S. 319 (1947)*; *Schine Chain Theatres, Inc., v. United States, 334 U.S. 110 (1948)*; *United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948)*; *Besser Mfg. Co. v. United States, 343 U.S. 444 (1952)*; *International Boxing Club v. United States, 358 U.S. 242 (1959)*; *United States v. E. I. du Pont de Nemours & Co., 188 F. 127 (C. C. D. Del. 1911)*, modified, *273 F. 869 (D. C. D. Del. 1921)*; *United States v. Lake Shore & M. S. R. Co., 203 F. 295 (D. C. S. D. Ohio 1912)*, modified, *281 F. 1007 (D. C. S. D. Ohio 1916)*; *United States v. International Harvester Co., 214 F. 987 (D. C. D. Minn. 1914)*, modification denied, *10 F.2d 827 (D. C. D. Minn. 1926)*, aff'd, *274 U.S. 693 (1927)*; *United States v. Eastman Kodak Co., 226 F. 62 (D. C. W. D. N. Y. 1915)*, decree entered, *230 F. 522 (D. C. W. D. N. Y. 1916)*, appeal dismissed on motion of appellant, *255 U.S. 578 (1921)*; *United States v. Corn Products Refining Co., 234 F. 964 (D. C. S. D. N. Y. 1916)*, appeal dismissed on motion of appellant, *249 U.S. 621 (1919)*; *United States v. Minnesota Mining & Mfg. Co., 92 F.Supp. 947 (D. C. D. Mass. 1950)*, modified, *96 F.Supp. 356 (D. C. D. Mass. 1951)*; *United States v. Imperial Chemical Indus., Ltd., 100 F.Supp. 504 (D. C. S. D. N. Y. 1951)*, decree entered, *105 F.Supp. 215 (D. C. S. D. N. Y. 1952)*.

In many of these cases the courts referred to "dissolution" or "divorcement" instead of "divestiture." These terms have traditionally been treated as to a large degree interchangeable, and we so regard them. See Hale and Hale, Market Power: Size and Shape Under the Sherman Act 370 (1958); Adams, Dissolution, Divorcement, Divestiture: the Pyrrhic Victories of Antitrust, 27 Ind. L. J. 1, note 1 (1951).

<sup>12</sup> Appellees rely on several Clayton Act consent decrees granting relief short of divestiture, but the circumstances surrounding such negotiated agreements are so different that they cannot be persuasively cited in a litigation context.

<sup>13</sup> See, e. g., *Maryland & Virginia Milk Producers Assn. v. United States, 362 U.S. 458 (1960)*; *Aluminum Co. of America v. Federal Trade Comm'n, 284 F. 401 (C. A. 3d Cir. 1922)*, cert. denied, *261 U.S. 616 (1923)*, modification denied, *299 F. 361 (C. A. 3d Cir. 1924)*; *United States v. New England Fish Exchange, 258 F. 732 (D. C. D. Mass. 1919)*, modification denied, *292 F. 511 (D. C. D. Mass. 1923)*, on which appellees place great reliance, is not a clear exception. It is true that defendants there were allowed to retain the assets (not the stock) of one of the eight corporations whose stock they had acquired in violation of § 7. But probably acquisition of only one of those corporations' stock would not have been illegal. The only clear exception in the courts is *American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F.Supp. 387 (D. C. S. D. N. Y. 1957)*, aff'd on the defendant's appeal, *259 F.2d 524 (C. A. 2d Cir. 1958)*. But the authority of that case is somewhat diminished by the fact that it was brought not by the Government but by a private plaintiff, and by the absence of any discussion in the opinion of the issue of divestiture *vel non*. See *152 F.Supp., at 400-401* and note 16.

<sup>14</sup> See Hale and Hale, *op cit.*, *supra*, note 11, at 370.

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holdings of General Motors stock will be voted by du Pont shareholders -- upwards of 40 million shares. Common sense tells us that under this arrangement there can be little assurance of the dissolution of the intercorporate community of interest which we found to violate the law. The du Pont shareholders will *ipso facto* also be General Motors voters. It will be in their interest to vote in such a way as to induce General Motors to favor du Pont, the very result which we found illegal on the first appeal. It may be true, as appellees insist, that these shareholders will not exercise as much influence on General Motors as did du Pont when it held and voted the shares as a block. And it is true that there is no showing in this record that the [\*\*\*29] du Pont shareholders will combine to vote together, or that their information about General Motors' activities will be detailed enough to enable them to vote their shares as strategically as du Pont itself has done. But these arguments misconceive the nature of this proceeding. The burden is not on the Government to show *de novo* that a "pass through" of the General Motors vote, like du Pont's ownership of General Motors stock, would violate § 7. *United States v. Aluminum Co. of America*, 91 F.Supp. 333, 346 (D. C. S. D. N. Y. 1950. It need only appear that the decree entered leaves a substantial likelihood that the tendency towards monopoly of the acquisition condemned by § 7 has not [\*332] been satisfactorily eliminated. We are not required to assume, contrary to all human experience, that du Pont's shareholders will not vote in their own self-interest. Moreover, the General Motors management, which over the years has become accustomed to du Pont's special relationship,<sup>15</sup> would know that the relationship continues to a substantial degree, and might well act accordingly. The same is true of du Pont's competitors. They might not try so vigorously [\*\*\*30] to break du Pont's hold on General Motors' business, as if complete divestiture were ordered. And finally, the influence of the du Pont company itself would not be completely dissipated. For under the decree du Pont would have the power to sell its General Motors shares; the District Court expressly held that "there would be nothing [\*\*\*329] in the decree to prevent such dispositions." *177 F.Supp.*, at 41. Such a sale would presumably restore the vote separated from the sold stock while du Pont owned it. This power to transfer the vote could conceivably be used to induce General Motors to favor du Pont products. In sum, the "pass through" of the vote does not promise elimination of the violation offensive to § 7. What was said of the Sherman Act in *United States v. Union Pacific R. Co.*, 226 U.S. 470, 477 (1913), applies here: "So far as is consistent with this purpose a court of equity dealing with such combinations should conserve the property interests involved, but never in such wise as to sacrifice the object and purpose of the statute. The decree of the courts must be faithfully executed and no form of dissolution be permitted that [\*\*\*31] in substance or effect amounts to restoring the [\*333] combination which it was the purpose of the decree to terminate."

Du Pont replies, *inter alia*, that it would be willing for all of its General Motors stock to be disenfranchised, if [\*\*1254] that would satisfy the requirement for effective relief. This suggestion, not presented to the District Court, is distinctly an afterthought. If the suggestion is disenfranchisement only while du Pont retains the stock, it would not avoid the hazards inherent in du Pont's power to transfer the vote. If the suggestion is permanent loss of the vote, it would create a large and permanent separation of corporate ownership from control, which would not [\*\*\*32] only run directly counter to accepted principles of corporate democracy, but also reduce substantially the number of voting General Motors shares, thereby making it easier for the owner of a block of shares far below an absolute majority to obtain working control, perhaps creating new antitrust problems for both General Motors and the Department of Justice in the future. And finally, we should be reluctant to effect such a drastic change in General Motors' capital structure, established under state corporation law.

*LEDHN[17]* [17]Appellees argue further that the injunctive provisions of the decree supplementary to the "pass through" of voting rights adequately remove any objections to the effectiveness of the "pass through." Du Pont is enjoined, for example, from in any way influencing the choice of General Motors' officers and directors, and from entering into any preferential trade relations with General Motors. And, under para. IX of the decree, the Government may reapply in the future should this injunctive relief prove inadequate. Presumably this provision could be used to prevent the exercise of the power [\*\*\*33] to transfer the vote. But the public interest should not in this case be required to depend upon the often cumbersome and [\*334] time-consuming injunctive remedy.

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<sup>15</sup> For the significance of such long habit, see *North American Co. v. Securities & Exchange Comm'n*, 327 U.S. 686, 693 (1946); *United States v. Imperial Chemical Indus., Ltd.*, 105 F.Supp. 215, 236-237 (D. C.S. D. N. Y. 1952); Douglas, Democracy and Finance 33 (1940).

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Should a violation of one of the prohibitions be thought to occur, the Government would have the burden of initiating contempt proceedings and of proving by a preponderance of the evidence that a violation had indeed been committed.<sup>16</sup> [\*\*\*\*34] Such a remedy would, judging from the history of this litigation, take years to obtain. Moreover, an injunction can hardly be detailed enough to cover in advance all the many fashions in which [\*\*\*330] improper influence might manifest itself. And the policing of an injunction would probably involve the courts and the Government in regulation of private affairs more deeply than the administration of a simple order of divestiture.<sup>17</sup> We think the public is entitled to the surer, cleaner remedy of divestiture. The same result would follow even if we were in doubt. For it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.<sup>18</sup>

We therefore direct complete divestiture. Since the District Court's decree was framed around the provision directing only partial divestiture, and since General Motors, Christiana, and Delaware acquiesced in its provisions only on that basis, we shall not pass upon the [\*\*1255] provisions for ancillary relief but shall vacate the decree [\*335] in its entirety except as to the provisions of para. VI enjoining du Pont itself from exercising voting rights in respect of its General Motors stock. In this way the District Court will be free to fashion a new decree consistent with this opinion at a new hearing at which all parties may be heard. General Motors, Christiana, and [\*\*\*\*35] Delaware will thus be able to renew, for the District Court's decision in the first instance, any objections they may have to the power of the Court to grant relief against them.

We believe, however, that this already protracted litigation should be concluded as soon as possible. To that end we direct the District Court on receipt of our judgment to enter an order requiring du Pont to file within 60 days a proposed judgment providing for complete divestiture of its General Motors stock, to commence within 90 days, and to be completed within not to exceed 10 years, of the effective date of the District Court's judgment, and requiring the Government to file, within 30 days after service upon it of du Pont's proposed judgment, either proposed specific amendments to such du Pont judgment or a proposed alternate judgment of divestiture. The District Court shall give precedence to this cause on its calendar.

The judgment of the District Court, except to the extent para. VI is affirmed, is vacated and remanded for further proceedings consistent with this opinion.

*It is so ordered.*

MR. JUSTICE CLARK and MR. JUSTICE HARLAN took no part in the consideration or decision of this case.  
[\*\*\*\*36]

**Dissent by:** FRANKFURTER

## Dissent

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Mr. JUSTICE FRANKFURTER, whom Mr. JUSTICE WHITTAKER and Mr. JUSTICE STEWART join, dissenting.

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<sup>16</sup> [United States v. Corn Products Refining Co., 234 F. 964, 1018 \(D. C. S. D. N. Y. 1916\)](#), appeal dismissed on motion of appellant, [249 U.S. 621 \(1919\)](#); 12 Ala. L. Rev. 214, 220-221 (1959); Note, 56 Col. L. Rev. 420, 430 (1956) ("contempt citations are a poor method of restoring competition . . ."); Berge, Some Problems in the Enforcement of the Antitrust Laws, 38 Mich. L. Rev. 462, 469 (1940).

<sup>17</sup> See Hale and Hale, *op. cit.*, [supra](#), note 11, at 379.

<sup>18</sup> [United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 726 \(1944\)](#); [Local 167, International Brotherhood of Teamsters v. United States, 291 U.S. 293, 299 \(1934\)](#). Cf. *William R. Warner & Co. v. Eli Lilly & Co.*, 265 U.S. 526, 532 (1924) (same principle applied to private litigation).

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In *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, the Court held that the acquisition and continued ownership by E. I. du Pont de Nemours & Co. [\*336] of twenty-three percent of the stock of the General Motors Corporation constituted a violation of § 7 of the Clayton Act.<sup>1</sup> The question now before us is the [\*\*\*331] adequacy of the terms of the enforcement of that judgment by the *United States District Court for the Northern District of Illinois*, 177 F.Supp. 1. In order to determine whether the district judge satisfactorily discharged the duties assigned him, it is necessary to be clear about these underlying elements of the question for decision: (1) What did this Court hold and say in finding that du Pont had violated § 7? (2) What considerations guided the district judge in fashioning his decree? (3) What principles has this Court laid down for the formulation of decrees by District Courts, particularly under the antitrust laws, and for review of those decrees here?

[\*\*\*37] I.

As the Court described it, the "primary issue" in the Government's suit against du Pont, General Motors, and related parties was "whether du Pont's commanding position as General Motors' supplier of automotive finishes and fabrics was achieved on competitive merit alone, or because its acquisition of the General Motors' stock, and the consequent close intercompany relationship, led to the insulation of most of the General Motors' market from free competition, with the resultant likelihood, at the time of suit, of the creation of a monopoly of a line of commerce." 353 U.S., at 588-589. [\*\*1256] The question was asked in the context of these facts.

The transaction out of which the case arose was the acquisition by du Pont, during the period 1917-1919, of [\*337] a twenty-three percent stock interest in General Motors. That "colossus of the giant automobile industry" absorbed "upwards of two-fifths of the total sales of automotive vehicles in the Nation" over the period from 1938 to 1955. In 1955 it ranked first in sales and second in assets among all United States industrial corporations. Purchases of automotive fabrics and finishes by General Motors from [\*\*\*38] du Pont ran into millions of dollars annually in the years immediately preceding the institution of the Government's suit in 1949. Du Pont supplied sixty-seven percent of General Motors' requirements for finishes in 1946 and sixty-eight percent in 1947. The figures for fabrics supplied to General Motors by du Pont in those years are fifty-two and three-tenths percent and thirty-eight and five-tenths percent respectively.

Du Pont's "commanding position as a General Motors supplier" was not achieved until after its acquisition of a substantial fraction of General Motors' stock. At the time of this purchase, du Pont was actively seeking markets for its nitrocellulose, artificial leather, celluloid, rubber-coated goods, and paints and varnishes used by automobile manufacturers. Leading du Pont executives in 1917 and 1918 indicated that the acquisition of General Motors stock was due in part to a belief that it would secure for du Pont an important market for its automotive products.

"This background of the acquisition, particularly the plain implications of the contemporaneous documents, destroys any basis for a conclusion that the purchase was made 'solely for investment.' Moreover, [\*\*\*39] immediately after the acquisition, du Pont's influence growing out of it [\*\*\*332] was brought to bear within General Motors to achieve primacy for du Pont as General Motors' supplier of automotive fabrics and finishes." 353 U.S., at 602.

[\*338] A former du Pont official became a General Motors vice president and set about maximizing du Pont's share of the General Motors market. Lines of communications were established between the two companies and several du Pont products were actively promoted. Within a few years various du Pont manufactured items were filling the entire requirements of from four to seven of General Motors' eight operating divisions. The Fisher Body division, long controlled by the Fisher brothers under a voting trust even though General Motors owned a majority of its stock, followed an independent course for many years, but by 1947 and 1948 "resistance had collapsed" and its purchases from du Pont "compared favorably" with purchases by other General Motors divisions. Competitors came to receive higher percentages of General Motors business in later years, but it is "likely" that this trend stemmed "at least in part" from the needs of General [\*\*\*40] Motors outstripping du Pont's capacity.

<sup>1</sup> 38 Stat. 731, 15 U. S. C. (1946 ed.) § 18. The suit was brought prior to the enactment in 1950 of amendments to the Act which, by their terms, are inapplicable to previous acquisitions. 64 Stat. 1125, 15 U. S. C. § 18.

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"The fact that sticks out in this voluminous record is that the bulk of du Pont's production has always supplied the largest part of the requirements of the one customer in the automobile industry connected to du Pont by a stock interest. The inference is overwhelming that du Pont's commanding position was promoted by its stock interest and was not gained solely on competitive merit." [353 U.S., at 605.](#)

This Court agreed with the trial court "that considerations of price, quality and service were not overlooked by either du Pont or General Motors." [353 U.S., at 606.](#) However, it determined that neither this factor, **[\*\*1257]** nor "the fact that all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including du Pont's competitors," [353 U.S., at 1\\*339\] 607,](#) outweighed the Government's claim for relief. This claim, as submitted to the District Court and dismissed by it, [126 F.Supp. 235,](#) alleged violation not only of **[\*\*\*\*41]** § 7 of the Clayton Act, but also of [§§ 1 and 2](#) of the Sherman Act.<sup>2</sup> The latter provisions proscribe any contract, combination, or conspiracy in restraint of interstate or foreign trade, and monopolization of, or attempts, combinations, or conspiracies to monopolize, such trade. However, this Court put to one side without consideration the Government's appeal from the dismissal of its Sherman Act allegations.<sup>3</sup> It rested its decision solely on § 7, which reads in pertinent part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

....

"This section shall not apply to **[\*\*\*333]** corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. **[\*\*\*\*42]** . . ."

The purpose of this provision was thus explained in the Court's opinion:

"Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or **[\*340]** any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation. The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended. . . ." [353 U.S., at 589.](#)

Thus, a finding of conspiracy to restrain trade or attempt to monopolize was excluded from the Court's decision. Indeed, as already **[\*\*\*\*43]** noted, the Court proceeded on the assumption that the executives involved in the dealings between du Pont and General Motors acted "honorably and fairly" and exercised their business judgment only to serve what they deemed the best interests of their own companies. This, however, did not bar finding that du Pont had become pre-eminent as a supplier of automotive fabrics and finishes to General Motors; that these products constituted a "line of commerce" within the meaning of the Clayton Act; that General Motors' share of the market for these products was substantial; and that competition for this share of the market was endangered by the financial relationship between the two concerns:

"The statutory policy of fostering free competition is obviously furthered when no supplier has an advantage over his competitors from **[\*\*1258]** an acquisition of his customer's stock likely to have the effects condemned by the

<sup>2</sup> 26 Stat. 209, as amended, 50 Stat. 693, [15 U. S. C. §§ 1, 2.](#)

<sup>3</sup> See [353 U.S., at 588, n. 5.](#)

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statute. We repeat, that the test of a violation of § 7 is whether, at the time of suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraints. The conclusion upon this record is inescapable that such [\*341] likelihood [\*\*\*\*44] was proved as to this acquisition. . ." [353 U.S., at 607.](#)

On the basis of the findings which led to this conclusion, the Court remanded the case to the District Court to determine the appropriate relief. The sole guidance given the Court for discharging the task committed to it was this:

"The judgment must therefore be reversed and the cause remanded to the District Court for a determination, after further hearing, of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute. The District Courts, in the framing of equitable decrees, are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case.' *International Salt Co. v. United States, 332 U.S. 392, 400-401.*" [353 U.S., at 607-608.](#)

This brings us to the course of the proceedings in the District Court.

## II.

This Court's judgment was filed in the District Court on July 18, 1957. The first pretrial conference -- held to appoint *amici curiae* to [\*\*\*344] represent the interests of the stockholders of du Pont and General Motors and to consider the procedure [\*\*\*\*45] to be followed in the subsequent hearings -- took place on September 25, 1957. At the outset, the Government's spokesman explained that counsel for the Government and for du Pont had already held preliminary discussions with a view to arriving at a relief plan that both sides could recommend to the court. Du Pont, he said, had proposed disenfranchisement of its General Motors stock along with other restrictions on the du Pont-General Motors relationship. The Government, deeming these suggestions inadequate, had urged [\*342] that any judgment include divestiture of du Pont's shares of General Motors. Counsel for the Government invited du Pont's views on this proposal before recommending a specific program, but stated that if the court desired, or if counsel for du Pont thought further discussion would not be profitable, the Government was prepared to submit a plan within thirty days.

Counsel for du Pont indicated a preference for the submission of detailed plans by both sides at an early date. No previous antitrust case, he said, had involved interests of such magnitude or presented such complex problems of relief. The submission of detailed plans would place the issues [\*\*\*\*46] before the court more readily than would discussion of divestiture or disenfranchisement in the abstract. The Court adopted this procedure with an appropriate time schedule for carrying it out.

The Government submitted its proposed decree on October 25, 1957. The plan called for divestiture by du Pont of its 63,000,000 shares of General Motors stock by equal annual distributions to its stockholders, as a dividend, over a period of ten years. Christiana Securities Company and Delaware Realty & Investment Company, major stockholders in du Pont, and the stockholders of Delaware were dealt with specially by provisions requiring the annual sale by a trustee, again over a ten-year period, of du Pont's General Motors stock allocable to them, as well as any General Motors stock which Christiana and Delaware owned outright. If, in the trustee's judgment, "reasonable market conditions" did not prevail during any given year, he was to be allowed to [\*\*1259] petition the court for an extension of time within the ten-year period. In addition, the right to vote the General Motors stock held by du Pont was to be vested in du Pont's stockholders, other than Christiana and Delaware and the [\*\*\*\*47] stockholders of Delaware; du Pont, Christiana, and Delaware were to be enjoined from acquiring [\*343] stock in or exercising control over General Motors; du Pont, Christiana, and Delaware were to be prohibited to have any director or officer in common with General Motors, and vice versa; and General Motors and du Pont were to be ordered to terminate any agreement that provided for the purchase by General Motors of any specified percentage of its requirements of any du Pont manufactured product, or for the grant of exclusive patent rights, or for a grant by General Motors to du Pont of a preferential right to make or sell any chemical discovery of General Motors, or for the maintenance of any joint commercial enterprise by the two companies.

On motion of the *amici curiae*, the court directed that a ruling be obtained from the Commissioner of Internal Revenue as to the federal income tax consequences of the Government's plan. On May 9, 1958, [\*\*\*335] the

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Commissioner announced his rulings. The annual dividends paid to du Pont stockholders in shares of General Motors stock would be taxable as ordinary income to the extent of du Pont's earnings and profits. The measure, [\*\*\*\*48] for federal income tax purposes, of the dividend to individual stockholders would be the fair market value of the shares at the time of each annual distribution. In the case of taxpaying corporate stockholders, the measure would be the lesser of the fair market value of the shares or du Pont's tax basis for them, which is approximately \$ 2.09 per share. The forced sale of the General Motors stock owned by or allocable to Christiana, Delaware, and the stockholders of Delaware, and deposited with the trustee, would result in a tax to those parties at the capital gains rate.

Du Pont's counterproposal was filed on May 14, 1958. Under its plan du Pont would retain its General Motors shares but be required to pass on to its stockholders the right to vote those shares. Christiana and Delaware would, in turn, be required to pass on the voting rights to the General Motors shares allocable to them to their own [\*344] stockholders. Du Pont would be enjoined from having as a director, officer, or employee anyone who was simultaneously an officer or employee of General Motors, and no director, officer, or employee of du Pont could serve as a director of General Motors without court approval. [\*\*\*\*49] Du Pont would be denied the right to acquire any additional General Motors stock except through General Motors' distributions of stock or subscription rights to its stockholders.

On June 6, 1958, General Motors submitted its objections to the Government's proposal. It argued, *inter alia*, that a divestiture order would severely depress the market value of the stock of both General Motors and du Pont, with consequent serious loss and hardship to hundreds of thousands of innocent investors, among them thousands of small trusts and charitable institutions; that there would be a similar decline in the market values of other automotive and chemical stocks, with similar losses to the stockholders of those companies; that the tremendous volume of General Motors stock hanging over the market for ten years would hamper the efforts of General Motors and other automobile manufacturers to raise equity capital; and that all this would have a serious adverse effect on the entire stock market and on general business activity. General Motors comprehensively contended that the Government plan would not be "in the public interest" as required by the mandate of this Court.

The decrees proposed [\*\*\*\*50] by the *amici curiae* were filed in August of 1958. These plans, like du Pont's, contained provisions for passing the vote on du [\*\*1260] Pont's General Motors shares on to the ultimate stockholders of du Pont, Christiana, and Delaware, except that officers and directors of the three companies, their spouses, and other people living in their households, as well as other specified [\*345] persons, were to be totally disenfranchised. Both plans also prohibited common directors, officers, or employees between du Pont, Christiana, and Delaware, on the one hand, and General Motors on the other. Further, both plans placed restrictions on trade relations between du Pont and General Motors. *Amicus* Dallstream, representing the du Pont stockholders, proposed in addition a program termed a "takedown," by which du [\*\*\*336] Pont would create a new class of stock, "du Pont Special Common," which would have no rights in du Pont's General Motors stock and which du Pont stockholders could obtain, along with their allocable portion of the General Motors shares owned by du Pont, at times suitable to them, in exchange for their present du Pont common. This proposal would have different, [\*\*\*\*51] and in several respects more favorable, tax consequences than those of the Government's plan.<sup>4</sup>

In a memorandum filed on September 26, 1958, the Government, on the assumption that divestiture was required under the Clayton Act, suggested various ways in which its decree might be modified to ameliorate its harsh tax consequences. The Government stated that it would have no objections to the modifications discussed in the memorandum but it did not submit amendments to its original proposal.

On the same day, the Government filed a motion for a preliminary injunction, seeking to restrain du Pont, Christiana, and Delaware from exercising their voting rights in General Motors stock, to prevent du Pont, Christiana, and Delaware from having any director, officer, or employee in common with General Motors or nominating any such person to serve in General Motors, [\*346] and [\*\*\*\*52] to prohibit further acquisitions of General Motors stock by the three corporations. The Government urged that since all parties were in substantial agreement on

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<sup>4</sup> For a discussion of *amicus* Dallstream's recommendations, see the opinion of the District Court, [177 F.Supp., at 9-10](#).

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these measures as the minimum appropriate relief, the court should adopt them without delay. The court denied the motion on November 3, 1958, on the ground that the Government had failed to show a likelihood of irreparable injury in the absence of immediate relief and that, with final determination of the case not far distant, it would be undesirable to begin deciding issues piecemeal at that late date.

After further preliminaries which need not be recounted, the trial of the issues on the appropriate relief commenced on February 16, 1959, and continued to a conclusion on April 9, 1959. The Government presented its evidence on twelve hearing days; the defendants and *amici* also presented evidence on twelve days; and the Government took four more hearing days for the presentation of rebuttal evidence. Briefs were filed and the case was submitted to the court in June 1959. The court's decision was announced on October 2, 1959.

The printed record of the proceedings below covers 3,340 pages. Of this, trial of the issues [\*\*\*53] pertaining to the terms of the decree fills 2,380 pages. An additional 543 pages contain exhibits. In the course of the trial twenty-nine witnesses were called by the Government and thirty-two by the defendants and *amici*. The printed exhibits number 193 submitted by the Government, thirty-two by du Pont, thirty by General Motors, nine by Christiana and Delaware, and one by *amicus* Dallstream. The bulk of this mass of evidence bore principally upon disputes over the market and tax consequences of divestiture of du Pont's General Motors stock and upon the requirement of resort [\*\*1261] to this remedy for the effective enforcement of § 7.

[\*347] On occasion the Government objected to the attention that was being focused on the details of its proposed decree. The Government insisted that its ultimate aim was [\*\*\*337] not to further a specific plan but to obtain any reasonable order of divestiture. However, late in the trial the Government indicated that its original divestiture proposal stood before the court unamended in any detail.

"Mr. Reycraft (chief counsel for the Government): . . .

. . .

"I might also add that it is rather an obvious thought that [\*\*\*54] the judgment which we did file was approved by not only the Assistant Attorney General but the Attorney General, and that *while I am authorized here to represent the Government, I have no authority to change the decisions they make.*

"The Court: *It is my understanding then that you are standing on the decree that you proposed before this hearing started*

"Mr. Reycraft: *That is right, sir.*

. . .

"Mr. Cox (counsel for du Pont): . . .

". . . I understand Mr. Reycraft's position now to be that he stands on the judgment that was filed. But if the Government should come in on its brief with a brand new proposal sometime, may it please the Court, we may find ourselves in a position where we will have to come into Court and ask for some kind of an opportunity to have a look at that.

"The Court: That will depend entirely on the extent or the character of the deviation from the original proposal.

"Mr. Cox: I would assume that would be true.

[\*348] "The Court: *From what Mr. Reycraft has said, I am assuming that that is the decree, with probably minor changes.*

"Mr. Reycraft: *I have nothing further, your Honor.*<sup>5</sup> (Emphasis added throughout.)

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<sup>5</sup> Transcript of Proceedings, March 31, 1959.

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Thus [\*\*\*55] it appears that the Government stood on its original proposal, rather than on alternative suggestions.

And so one comes to consider how the court dealt with the issues presented by the parties.

III.

After disposing of two preliminary questions -- ruling in favor of the amenability of General Motors, Christiana, and Delaware, as parties not condemned as violators of § 7, to the enforcing power of the court, and against the amenability to direct enforcement of holders of both du Pont and Delaware stock who were not parties to the suit -- the court thus defined the central issue before it:

"Under the mandate of the Supreme Court it is the responsibility of this Court to frame a judgment which will eliminate the effects of du Pont's acquisition of stock of General Motors which are offensive to the statute. The effect of the acquisition which the Supreme Court found to be offensive to the statute was the 'reasonable probability' that the acquisition might result [\*\*\*56] in restraint or monopolization of the market for automotive fabrics and finishes. [353 U.S. 586, 595, 607, 77 S. Ct. 872, 1 L. Ed. 2d 1057](#). Accordingly, the problem before this Court is one of devising a judgment that will effectively guard against the probability of restraint or monopolization which the Supreme [\*\*\*338] Court found to exist." [177 F.Supp., at 12-13](#).

[\*349] [\*\*1262] In discharging its duty under this mandate, particularly since relevant circumstances might offer a choice between effective alternatives, the court deemed it appropriate not to exclude from consideration the vast multiform interests at stake -- both the hundreds of thousands of truly innocent stockholders and the bearing on the national economy of the nature of the disposition of du Pont's General Motors holdings.

"This does not mean that the private interests of the stockholders can outweigh the public interest in a judgment that will effectively dissipate the effects of the acquisition found to be unlawful. But it does mean that in the opinion of this Court the primary public purpose should be achieved so far as possible without inflicting unnecessary injury [\*\*\*57] upon innocent stockholders in the various corporations involved. The purpose of the judgment should be remedial and not punitive. [Hartford-Empire Co. v. United States, 323 U.S. 386, 409, 65 S. Ct. 373, 89 L. Ed. 322; United States v. National Lead Co., 332 U.S. 319, 67 S. Ct. 1634, 91 L. Ed. 2077](#). No harsh and oppressive consequences should be visited upon the stockholders unless it can be shown on the facts that these results are inescapable if a decree is to be framed that will comply with the mandate of the Supreme Court. The cases leave no doubt that these are considerations which the Court should weigh in the framing of its final judgment. [United States v. American Tobacco Co., 221 U.S. 106, 185, 31 S. Ct. 632, 55 L. Ed. 663](#). Compare [Timken Roller Bearing Co. v. United States, 341 U.S. 593, 604, 71 S. Ct. 971, 95 L. Ed. 1199](#)." [177 F.Supp., at 13-14](#).

The Government's first major contention -- that by the terms of the Clayton Act the court had no choice but [\*350] to order total divestiture -- was rejected on the basis of an analysis of the statute and this Court's reaffirmation of the "large discretion" [\*\*\*58] possessed by the District Courts "to mold their judgments to fit the exigencies of the particular case." The court proceeded to a consideration of the evidence introduced by the parties. The first subject was the tax impact of the Government's proposed decree. Extensive expert evidence (much of which was derived from a statistical survey found by the court to have been soundly and objectively conducted) indicated that individual stockholders of du Pont would pay income taxes at a rate of fifty percent to sixty percent under the Government's plan, and that the taxes payable by such persons could amount to \$ 1,000,000,000 if the value of the General Motors shares were \$ 50 per share, and approximately \$ 770,000,000 if \$ 40 per share. The capital gains tax on the sale of the General Motors stock allocable to Christiana and Delaware would be perhaps as much as \$ 200,000,000. The court determined that variations of the Government's plan would also result in vast tax levies. It found, for example, that if a single distribution were employed to dispose of the 63,000,000 General Motors shares, at an assumed market value of \$ 45 per share the total tax cost would be \$ 588,044,000.

A second [\*\*\*59] economic consequence of the Government's divestiture scheme would be its impact on the market value of the securities involved. The Government relied on three types of evidence to show that [\*\*\*339] its plan would have little influence on the market prices of General Motors and du Pont stock. The first type was

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expert testimony that there was a regular flow of investment money coming into the market. However, upon detailed review of the testimony of a dozen witnesses, the court concluded that "there was no convincing evidence in this category that any substantial portion of this investment [351] money would be directed to buying General Motors stock at the true value of the stock, if the Government decree were in effect." [177 F.Supp., at 22.](#)

[\*\*1263] The Government's second type of evidence relating to the market consequences of its decree was the statistical testimony of academic and professional analysts. The court noted that it was shown no charts or statistics relating to a situation "remotely approaching" the forced sale of 2,000,000 shares of General Motors stock each year for ten years, attended by additional sales of both General Motors and du [\[\\*\\*\\*\\*60\]](#) Pont stock for tax and other purposes. Further, it found that one Government expert admitted he would defer to the judgment of investment bankers in the matter of the price for which the General Motors stock could be sold; another testified that in the past an increase in stock supply of twenty percent had been associated with price declines of between ten and fifteen percent; the testimony of another Government witness was based on inadequately drawn statistical tables, and his demeanor on the witness stand deprived his evidence of credibility; a fourth witness' opinions had no foundation in factual evidence.

The Government's third type of evidence related to securities offerings in the recent past. The court determined that the circumstances of these offerings -- *i. e.*, their background, magnitude, timing, and duration -- made them dissimilar to a divestiture of du Pont's interest in General Motors. In any event most of these offerings did have a depressing effect on the market value of the stock involved. None of this evidence, the court found, gave assurance that the Government proposal would not cause serious loss on the sale of General Motors and du Pont stock during [\[\\*\\*\\*\\*61\]](#) the divestiture period.

The defendants countered the Government's case with a variety of evidence. Two experienced underwriters testified that the Government's ten-year divestiture [\[352\]](#) plan would result in a decline in the value of General Motors stock of from twenty percent to thirty percent; that heavy tax sales of du Pont would lower its price at least twenty-five percent; that distribution of General Motors stock in lieu of cash dividends would be even worse from this standpoint; that even an extension of the divestiture period to twenty years would not prevent declines in the neighborhood of fifteen percent; that a further loss estimated at from \$ 1.50 to \$ 2 per share sold in underwriting expense would be incurred by Christiana and Delaware; and, finally, that the trustee could never make the sales during the divestiture period anyway, since he could not realize a price, in the words of the Government's proposed final judgment, "sufficiently high to reflect the fair value and true worth of the stock."

Several trust management executives testified that because of the tax consequences of the Government's decree and the difficulties of allocating equitably the General [\[\\*\\*\\*\\*62\]](#) Motors [\[\\*\\*\\*340\]](#) shares received as dividends by the trusts, they, and presumably others in their position throughout the country, would be forced to make mass sales of du Pont stock. Executives of several insurance companies and an investment trust company predicted declines in the value of General Motors stock and expressed an intention to buy it for their concerns only at considerably reduced prices. Many witnesses concurred in the view that the Government's decree would render future financing by General Motors highly uneconomic and very difficult to accomplish.

The court then appraised the evidence bearing on possible voting control of General Motors, under a decree of less than total divestiture, by corporations or individuals affiliated with du Pont. It determined that the Government's broadest grouping -- individuals who were stockholders of Delaware, additional individuals named du Pont, and certain corporations in which both groups [\[353\]](#) (sixty-five persons in all) own stock or on whose boards they sit -- would, under the du Pont plan's "pass-through" of voting rights, aggregate the vote of about eight percent of the total vote of General Motors. It was unclear [\[\\*\\*\\*\\*63\]](#) to the court either [\[\\*\\*1264\]](#) that this combination had a reasonable basis in fact or that, even if it did represent a cohesive block of votes, it was a large enough block to exercise any real control over General Motors. However, the court deemed it unnecessary to resolve these questions, since it intended to frame a decree to guarantee that concerted action by these stockholders would be precluded.

On the basis of its appraisal of the evidence, the court reached its essential conclusions. The first question was what provision to make with respect to du Pont's 63,000,000 shares of General Motors. It determined that a careful

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and detailed plan for a "pass-through" of the votes of these shares to du Pont's stockholders and an injunction to prevent du Pont and General Motors from sharing common officers, directors, and employees were necessary. The court then considered whether title to the stock, stripped of these vital incidents of ownership, must also be taken from du Pont, "in order to remove and to guard against the probability of restraint or monopolization of trade which was the consequence the Supreme Court found to be offensive to the statute." [177 F.Supp., at 40.](#) [\*\*\*64] "There is no evidence," it concluded, "on which the Court could make such a finding." [177 F.Supp., at 40.](#)

"In essence, therefore, what would be left in du Pont would be the most sterile kind of an investment. The Court notes in this connection that Section 7 of the Clayton Act expressly excludes from its operation 'corporations purchasing such stock solely for investment and not using the same by voting or otherwise' to bring about anti-competitive effects. There would thus appear to be a recognition on the [\*354] part of Congress that the holding of stock does not in all instances carry with it the power to bring about consequences offensive to the statute. The Court recognizes that the Supreme Court has held that in the past du Pont has not held its stock in General Motors solely for investment. This Court is of the opinion, however, that the divestiture and ancillary injunctive provisions referred to hereafter will be effective to assure that hereafter General Motors stock will be held by du Pont solely for investment.

....

" [\*\*\*341] In the circumstances, therefore, the Court finds that there is nothing in the record made in the hearing on relief [\*\*\*65] or in the record in the trial in chief which would support, even by inference, the conclusion that du Pont's possession of the bare legal title to General Motors stock, stripped of its right to vote and of its right to representation on the Board of General Motors, would create any possibility that the stock would have any influence on the practices and policies of General Motors or could be used in any way that would be inconsistent with the mandate of the Supreme Court." [177 F.Supp., at 41.](#)

What was on the other side of the ledger? The evidence indicated that divestiture of legal title would visit upon thousands of innocent investors adverse tax and market consequences, always severe even if varying in detail depending on the variation of the Government's plan. The court concluded that any plan for divestiture of legal title to du Pont's interest in General Motors would either impair the value of the property interests involved or impose severe tax consequences on du Pont's stockholders. Moreover, any plan that produced as a by-product the accumulation of vast amounts of cash by du Pont would have the undesirable result [\*355] of enhancing greatly du Pont's [\*\*\*66] economic power and position. All this led the court to hold that total divestiture, while unnecessary to remove the anticompetitive consequences of du Pont's ownership of the General Motors stock, would impose unfair injury on the stockholders of those companies.

[\*\*1265] The court dealt with the Government's two objections to its result. The fear that block voting of the passed-through votes on the General Motors shares by investors who were related by blood or business interest would leave control of General Motors in the hands of du Pont's close associates was met by precluding the stockholders of Christiana and Delaware, as well as other specified persons, from voting their allocable shares of du Pont's General Motors stock. The objection that retention by du Pont of any financial stake in General Motors, even on behalf of its stockholders, would provide incentive to intercorporate favoritism between the two, while deemed merely a "naked suggestion," was answered by providing specific relief against preferential trade relations between du Pont and General Motors. In light of the proof and of these precautionary prohibitions, the court concluded that to order divestiture [\*\*\*67] of du Pont's title to the General Motors stock would "constitute a serious abuse of discretion." [177 F.Supp., at 49.](#)<sup>6</sup>

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<sup>6</sup> A summary of the detailed provisions of the decree carrying out the direction and purposes of the court's opinion follows.

Du Pont, Christiana, and Delaware were enjoined from acquiring additional General Motors stock except as stock or rights might be distributed to them as stockholders by General Motors.

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[\*\*\*\*68] [\*356] IV.

[\*\*\*342] The questions presented by this appeal must be considered in the setting of the proceedings, summarized above, that led [\*\*1266] to the District Court's conclusions in formulating its decree. Since the Court rejects the Government's [\*357] claim that total divestiture is statutorily required upon a finding of a violation of § 7 of the Clayton Act, I need say no more about it.

If a District Court is not subject to any statutory requirement to order divestiture in a § 7 case, is it left without guidance or direction in fashioning an appropriate decree as a court of equity? Of course not. There is a body of authority, both procedural and substantive, by which it is to be guided. It is, however, well to remember that the wise admonition that general principles do not decide concrete cases has sharp applicability to equity decrees. Any apparently applicable policy or rule, abstractly stated, must be related to the specific circumstances of a particular case in which it is invoked and applied. Care must be taken to consider phrases used in relation to the particular facts of the cases relied on.

One principle has comprehensive application. [\*\*\*69] It is that courts of equity, as this Court advised the District Court in remanding the case to it to fashion the appropriate relief, "are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case.'" [353 U.S., at 607-608](#). This is a commonplace,<sup>7</sup> but one of

Du Pont, Christiana, and Delaware, on the one hand, and General Motors, on the other, were prohibited to have common officers, directors, or employees. The former three were also restrained from nominating any person to be an officer or director of General Motors.

Du Pont and General Motors were compelled to terminate, for as long as du Pont, Christiana, or Delaware own any General Motors stock, any agreement between them which (1) requires General Motors to purchase from du Pont a specified percentage of its requirements of any product (with certain time provisos), or (2) grants to either concern exclusive patent rights, or grants to du Pont preferential rights to make or sell any chemical discovery of General Motors.

Du Pont, Christiana, and Delaware were restrained, for the same period, from entering into any joint business venture with General Motors and from knowingly holding stock in any business enterprise in which General Motors holds stock. The same restrictions were applied to General Motors.

Du Pont was enjoined, again for the stock-holding period, from dealing with General Motors with respect to du Pont products on terms more favorable than those on which it is willing to deal with General Motors' competitors. The same restriction was placed upon General Motors in its dealings with du Pont.

Du Pont, Christiana, and Delaware, and their directors and officers, and the members of the families of their directors and officers who reside in the same household with them, were enjoined from exercising their voting rights in General Motors stock owned by them or allocable to them under the decree, and from attempting to influence anyone voting General Motors stock.

The vote on the General Motors shares owned by du Pont was ordered "passed through" to the stockholders of du Pont (subject to the prohibitions of the preceding paragraph), and the notification and proxy machinery necessary to effectuate this provision was outlined. Provision was made for the appointment of a monitor of these voting procedures.

A procedure was established whereby du Pont and Christiana might sell or otherwise dispose of their General Motors stock.

Two separate provisions preserved the right of any party to apply to the court for modification of the decree in the event of a change of circumstances (such as the advent of legislative tax relief) and for further orders necessary for carrying out the judgment.

Du Pont, Christiana, and Delaware were directed to obtain from their officers and directors, and their families, written consents to be bound by the voting restrictions of the judgment.

For the purpose of securing compliance with the judgment, the Department of Justice was authorized to conduct reasonable inspections of the records and interviews with the employees of du Pont, Christiana, and Delaware and to apply to the court for similar privileges as to General Motors upon a showing of good cause.

<sup>7</sup> See, e. g., [United States v. Crescent Amusement Co., 323 U.S. 173, 185](#); [International Salt Co. v. United States, 332 U.S. 392, 400-401](#); [Besser Mfg. Co. v. United States, 343 U.S. 444, 449-450](#); [International Boxing Club v. United States, 358 U.S. 242, 253](#).

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compelling importance. To forget it is [\*\*\*343] to forget equity's special function and historic significance. The transcendence of this doctrine derives from the recognition [\*358] that without it the effort to dispense equal justice under law would all too often be frustrated. The landmark sentences of *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330, express the principles that must guide the chancellor:

"We are dealing here with the requirements of equity practice with a background of several hundred years of history. . . . The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation [\*\*\*\*70] between the public interest and private needs as well as between competing private claims. . . ."

If, indeed, equity's characteristic flexibility is deeply rooted in history, the administration of justice makes greater demands upon it now than ever before. As business transactions become increasingly complex, they multiply and complicate the issues presented to courts even in litigation of ordinary dimensions. How much more is this true of a suit of the magnitude and reach of the one before us, with inevitable impact far beyond the interests of the immediate parties. In such a case we need to be specially mindful that the purpose of equity jurisdiction is to adapt familiar [\*\*\*\*71] principles of law to intricate, elusive, and unfamiliar facts. As one member of this Court recently put it: "Equity decrees are not like the packaged goods this machine age produces. They are uniform only in that they seek to do equity in a given case." [United Steelworkers of America v. United States](#), 361 U.S. 39, 62, 71 (dissenting opinion).<sup>8</sup>

[\*\*\*\*72] [\*359] [\*\*1267] The District Court was duty bound to exercise discretion -- which means to weigh contending considerations and conflicting evidence as a matter of judgment -- in framing a decree to meet the needs of the case. It could not escape exercising discretion -- that is, exercising its judgment within an area of allowable choice -- which this Court committed to it. Discretion precludes whimsy or caprice. Discretion means the judicial discretion of a court of equity. Where precedent or judicial tradition has established limitations on the chancellor's range of choice, he must respect them. What limitations confined the court below? Consideration of the relevant authorities on the formulation of antitrust decrees becomes necessary.

[\*\*\*344] First, what was open to consideration in the District Court? Its overriding concern had to be for the protection of the public interest. It was its duty to hear all the evidence bearing on that question and in any conflict with private interests decisively to resolve doubts in favor of the general welfare. The account of the District Court's procedures, and of the considerations on which it reached its reflective conclusions, [\*\*\*\*73] in Parts II and III of this opinion establishes, I submit, that it fully conformed to this essential requirement. Although it considered the Government's case on the likelihood of block voting of the votes of the General Motors shares passed through to Delaware and Christiana of doubtful [\*360] strength, it sterilized those shares to prevent their being voted at all. Again, although it found no proof in the record to support the Government's "naked suggestion" concerning the probability of future preferential trade relations between General Motors and du Pont, it constructed a set of prohibitions against such dealing between the two enterprises. As already noted, the court fashioned its decree in deference to its conception of its "primary duty" to devise a judgment "that will effectively guard against the probability of restraint or monopolization which the Supreme Court found to exist." [177 F.Supp., at 13](#).

<sup>8</sup> In addition, see, for example, McClintock, *Equity* (2d ed. 1948), § 30:

"A court of equity may frame its decree so as to protect to the greatest extent possible the conflicting interests of the parties; to accomplish this it may require the performance of conditions, may experiment to determine how best to accomplish its purpose, and may use either the negative or the positive form of decree."

Pomeroy, *Equity Jurisprudence* (5th ed. 1941), § 109:

"Equitable remedies . . . are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties."

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Did the District Court fail in its duty because it deemed relevant for consideration as one factor in striking the balance involved in its conclusion the consequences of divestiture to thousands upon thousands of blameless stockholders and other so-called [\*\*\*\*74] private interests? The decisions of this Court gave full warrant to the District Court that it did not exceed its discretionary powers in doing so. The weighty words of *United States v. American Tobacco Co., 221 U.S. 106, 185*, are apposite:

"In considering the subject . . . three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership [\*\*1268] or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning. . . ."

And in *Standard Oil Co. v. United States, 221 U.S. 1, 78*, the Court admonished that "the fact must not be [\*361] overlooked that injury to the public by the prevention of [\*\*\*\*75] an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property." The importance of these considerations was reiterated in *Continental Ins. Co. v. United States, 259 U.S. 156*, with the Government actively championing their propriety, and suggesting that "it seemed wise not to amputate any more than was necessary to secure the great policy of the Sherman law." *259 U.S., at 169.* In *United States v. United Shoe Machinery Co., \*\*\*345J 247 U.S. 32, 46*, the Court labeled dissolution a remedy "extreme, even in its mildest demands" and counseled "If there be need for this the difficulties of achievement should not deter; but the difficulties may admonish against the need . . . ." This holds for divestiture.<sup>9</sup>

[\*\*\*\*76] This Court's decisions leave no doubt that it was proper for the District Court to attend to the likelihood of danger to the public welfare that might arise from the serious adverse market consequences of divestiture and to the likelihood of extensive loss to innocent investors through both market decline and tax levy. It is apparent that the Department of Justice recognized the relevance of the tax impact. In a statement on proposed legislation to alleviate the tax burden of divestiture decrees, Robert A. Bicks, then Acting Assistant Attorney General in charge of the Antitrust Division of the Justice Department, said:

"Bear in mind, the 1890 Sherman and the 1914 Clayton Acts, the basic antitrust statutes, became law before the income tax was a reality. And the landmark [\*362] antitrust cases -- dissolving illegal trusts and monopolies via divestiture -- were largely a product of an era marked by no income tax or much lower tax rates. Indeed, there is real basis for concluding that some bench-mark antitrust divestiture cases . . . might well not have been decreed had today's tax rates prevailed." Bicks, Statement on H. R. 7361 and H. R. 8126 before the House Committee [\*\*\*\*77] on Ways and Means, July 20, 1959, 4 Antitrust Bulletin 557 (1959).

It is obvious from the context of these remarks that their immediate objective was to smooth the way toward obtaining divestiture in this very case.<sup>10</sup>

In a case such as *du Pont*, in which the challenged transaction occurred approximately thirty years prior to the initiation of suit, the force of these considerations [\*\*1269] is greatly enhanced. The relationship between General Motors and du Pont stood uncondemned by the Government through successive [\*\*\*\*78] administrations

<sup>9</sup> See also *United States v. Terminal R. Assn., 224 U.S. 383;* *United States v. American Can Co., 234 F. 1019;* *United States v. Great Lakes Towing Co., 208 F. 733, 217 F. 656.*

<sup>10</sup> The Bicks statement itself makes repeated reference to the pending *du Pont* case. See 4 Antitrust Bulletin, at 561, n. 7, 562, n. 8, 567, n. 13. And the Committee Report and Hearings recur again and again to the serious tax problem engendered by the case. See H. R. Rep. No. 1128, 86th Cong., 1st Sess.; Hearings on H. R. 8126 before the House Committee on Ways and Means, 86th Cong., 1st Sess.; Hearings on S. 200 before the Senate Committee on Finance, 86th Cong., 1st Sess.

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throughout that period. This is not remotely to hint any form of estoppel against resort to divestiture as relief for the illegality, however belatedly established, were it otherwise the required means for correction of past misconduct or its future avoidance. I do maintain that, as this Court has recognized, it was altogether proper for the District Court -- even incumbent upon it -- to take "account of what was done during that time -- the many millions of dollars spent, the developments made, and the [\*363] enterprises undertaken, the investments by the public that have been invited and are not to be ignored." [United States v. United States Steel Corp., 251 U.S. 417, 453](#).

In short, the factors that influenced [\*\*\*346] the District Court were fit considerations for judicial scrutiny. But we still have to inquire what criteria were open to the District Court for appraising the relevant variables and how that court's determinations are to be reviewed by this Court.

The very foundation for judgment in reviewing a District Court's decree in a case like this is the inherent nature of its task in adjudicating claims arising under the antitrust [\*\*\*79] laws. The sweeping generality of the antitrust laws differentiates them from ordinary statutes. "As a charter of freedom," wrote Mr. Chief Justice Hughes for the Court, "the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions." [Appalachian Coals, Inc., v. United States, 288 U.S. 344, 359-360](#). This is no less true of the Clayton Act's prohibition "where the effect . . . may be to substantially lessen competition." Correspondingly broad is the area within which a District Court must move to fit the remedy to the range of the outlawry. Far-reaching responsibility is vested in the court charged with fashioning a decree and the decree it fashions must be judged on review in light of this responsibility.

"In the anti-trust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law. . . . They would not have been given, or allowed to keep, such authority in the anti-trust field, and they would not so freely have altered from time to time the interpretation of its substantive provisions, if courts were in the habit of proceeding with the [\*\*\*80] surgical ruthlessness that [\*364] might commend itself to those seeking absolute assurance that there will be workable competition, and to those aiming at immediate realization of the social, political, and economic advantages of dispersal of power." [United States v. United Shoe Machinery Corp., 110 F.Supp. 295, 348](#) (a decision affirmed by this Court without opinion, [347 U.S. 521](#)).

Partly on the basis of these views, the Attorney General's National Committee to Study the Antitrust Laws recommended that divestiture "not be decreed as a penalty," that it "not be invoked where less drastic remedies will accomplish the purpose of the litigation," and that possible disruption of industry and markets as well as effect on the public, investors, customers, and employees be taken into account. Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), pp. 355-356. This statement fairly reflects the views of this Court, to the effect that a decree must not "impose penalties in the guise of preventing future violations," *Hartford-Empire Co. v. United States, 323 U.S. 386, 409*; that the least harsh of [\*\*\*81] available measures should be adopted when the Court is satisfied that they will be effective, e. g., *Timken Roller* [\*1270] *Bearing Co. v. United States, 341 U.S. 593, 603* (concurring opinion); and that injunctive relief may well be an adequate sanction against continued wrongdoing, *id., at 604* (concurring opinion), and *Standard Oil Co. v. United States, 221 U.S. 1, 77*. Add to this that we have recognized a sound basis in reason for distinguishing palpably illegal activity from conduct that was arguably permissible, [\*347] and for dealing with the latter less severely than the former. See [Federal Trade Comm'n v. National Lead Co., 352 U.S. 419, 429](#); [United States v. United States Gypsum Co., 340 U.S. 76, 89-90](#).

[\*365] The principles thus pronounced by this Court were duly heeded by the District Court. The salient feature of its attitude was its disposition to favor the Government's claims on behalf of the public interest. It even rejected the defendants' argument, based on *National Lead* and *Gypsum, supra*,<sup>11</sup> that it should take into account [\*\*\*82] that the question whether the acquisition violated the law was, to say the least, reasonably in doubt, and that therefore

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<sup>11</sup> And see [United States v. United Shoe Machinery Corp., 110 F.Supp. 295, 348](#).

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no blame should be imputed to the officers and directors of the defendants. "The Court . . . approaches the problem on the assumption that the appropriate relief is that which is necessary to eliminate the effects of the acquisition offensive to the statute, notwithstanding that the acquisition might reasonably have been believed to be permissible when made." [177 F.Supp., at 14.](#)

The Government urges, however, that divestiture is, if not the required relief, at least the normal and ordinary relief in stock acquisition cases. The contention is that, as the safest remedy, i. e., the surest of anticompetitive results, divestiture is, and has been considered to be, the preferred relief for all save a few exceptional cases. Support for this view is drawn from a long line of [\*\*\*\*83] cases in which divestiture has been decreed. The contention calls for detailed scrutiny.

The objectives of divestiture were thus stated in [Schine Chain Theatres, Inc., v. United States, 334 U.S. 110, 128-129:](#)

"Divestiture or dissolution must take account of the present and future conditions in the particular industry as well as past violations. It serves several functions: (1) It puts an end to the combination or conspiracy when that is itself the violation. (2) It [\*366] deprives the antitrust defendants of the benefits of their conspiracy. (3) It is designed to break up or render impotent the monopoly power which violates the Act. . ." <sup>12</sup>

[\*\*\*\*84] This tripartite formulation summarizes the considerations that have guided this Court's rulings on divestiture. In *Standard Oil Co. v. United States, 221 U.S. 1*, the source of modern **antitrust law**, the defendants were charged with combination and conspiracy to restrain trade in and monopolize interstate and foreign commerce in petroleum products, in violation of §§ 1 and 2 of the Sherman Act. The lower court found both provisions offended by a combination of seven individual defendants and thirty-eight corporate defendants to lodge in the Standard Oil Co. of New Jersey substantial stock ownership of and control over many subsidiary corporations in the [\*\*1271] petroleum industry and [\*\*\*348] to cause Standard Oil to manage their affairs so as to throttle competition, findings sustained here. Coming to the problem of remedy, while acknowledging that "ordinarily" injunctive relief would be adequate to restrain repetition of the illegal activity, the Court found that the situation presented by the Standard Oil aggrandizement called for stiffer measures: "But in a case like this, where the condition which has been brought about in violation of the statute, [\*\*\*\*85] *in and of itself*, is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies." [221 U.S., at 77.](#) (Emphasis added.) Recognition of this need -- that intercorporate [\*367] connections call for severance when persistence of the relationship in itself would constitute a violation of the antitrust laws -- has been steadfastly adhered to. "Dissolution of the combination will be ordered where the creation of the combination is itself the violation." [United States v. Crescent Amusement Co., 323 U.S. 173, 189.](#) It has been the controlling factor in the majority of the divestiture decrees in the intervening years, since most situations before the Court have similarly demanded this relief.<sup>13</sup>

[\*\*\*\*86] The second element of the *Schine* rationale -- depriving antitrust defendants "of the benefits of their conspiracy" -- is equally well established. [United States v. Crescent Amusement Co., 323 U.S. 173,](#) was a Sherman Act suit in which certain motion picture exhibitors were found to have used their combined buying power

<sup>12</sup> For a similar statement see [United States v. Minnesota Mining & Mfg. Co., 96 F.Supp. 356, 357.](#)

"In general the object of the remedies under the anti-trust laws is to prevent the continuance of wrongful conduct, and to deprive the wrongdoers of the fruits of their unlawful conduct, and to prevent the creation anew of restraint forbidden by law. . . ."

<sup>13</sup> In the *Crescent* case, [323 U.S., at 189](#), the Court placed in this category *Northern Securities Co. v. United States, 193 U.S. 197*; *Standard Oil Co. v. United States, 221 U.S. 1*; *United States v. American Tobacco Co., 221 U.S. 106*; *United States v. Union Pacific R. Co., 226 U.S. 61*; *United States v. Reading Co., 253 U.S. 26*; *United States v. Lehigh Valley R. Co., 254 U.S. 255*; and *United States v. Southern Pacific Co., 259 U.S. 214*. Our survey of these cases sustains this classification. To this list may be added *International Boxing Club v. United States, 358 U.S. 242*, in which the Court accepted the District Court's finding that "The great evil" in the case "was the combination that Wirtz and Norris caused and created by joining up with Madison Square Garden." [358 U.S., at 256.](#)

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to obtain terms more favorable than those received by their independent competitors in licensing films, whereby independents were driven from the field and a monopoly in theater operation developed in many towns. Each corporate exhibitor was required to divest itself of its interest in any other corporate defendant or its affiliates.

"Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their [\*368] unlawful project on the plea of hardship or inconvenience. That principle is adequate here to justify divestiture of all interest in some of the affiliates since their acquisition was part of the fruits of the conspiracy." [323 U.S., at 189](#).<sup>14</sup>

[\*\*\*\*87] The third *Schine* objective of divestiture was "to break up or render impotent the monopoly power which violates the Act." The role of divestiture in meeting this need was spelled out in the *Crescent* case:

"Common control was one of the [\*\*\*349] instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. [\*\*1272] If that affiliation continues, there will be tempting opportunity for these exhibitors to continue to act in combination against the independents. The proclivity in the past to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future. . ." [323 U.S., at 189-190](#).

These, then, are the justifiable bases for compelling divestiture. They explain and define the authorities on which the Government relies. Do they, or any of them, invalidate the District Court's refusal to decree divestiture in the circumstances of this case and justify this Court in overruling that court's exercise of discretion in finding divestiture uncalled for?

The notion that the very existence of an interest by du Pont in the stock of General Motors constitutes [\*\*\*\*88] a violation of the Act need not detain us. It cannot be questioned that, as the Court's opinion on the merits in this case makes clear, the violation condemned is the effect of the stockholding on competition, not the [\*369] stockholding as such.<sup>15</sup> To be sure, this illegal tendency to lessen competition may be ended by terminating any intercorporate relationship. But just as surely the unlawfulness of the tendentious stockholding may be ended by preventing its harmful consequences.

[\*\*\*\*89] Nor is divestiture required as a means of depriving the defendant of the fruits of its violation. While du Pont's interest in General Motors might serve as a tool for the accomplishment of antitrust violations, it is certainly not the fruit of any such violation. The fruit -- the benefit -- of a violation of § 7 is the unfair competitive position of one corporation through its stock interest in another. Effective termination of this competitive advantage was precisely the design of the elaborate injunctive provisions devised by the District Court.

<sup>14</sup> See additionally, [International Boxing Club v. United States, 358 U.S. 242, 253](#).

<sup>15</sup> This construction of the statute had long been settled. See *International Shoe Co. v. Federal Trade Comm'n*, [280 U.S. 291, 297-298](#).

"Section 7 of the Clayton Act, as its terms and the nature of the remedy prescribed plainly suggest, was intended for the protection of the public against the evils which were supposed to flow from the undue lessening of competition. . . .

....

"Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree . . . that is to say, to such a degree as will injuriously affect the public. . . ."

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The final desideratum -- vitiating a monopoly power -- is not literally applicable to the du Pont situation, since the District Court dismissed the monopoly charge under the Sherman Act and this Court refused to review the dismissal. [353 U.S., at 588, n. 5](#). But even if this criterion were carried over into a Clayton Act setting to enforce the desirability of avoiding every potentiality of monopoly power, there is no compulsion to decree divestiture. Such [**\*370**] argumentative power does not preclude restraints, by injunctive relief, that render it "impotent," to use the language of the *Schine* case. Nor is there [\*\*\*\*90] in the record before us any basis in fact for the fears that have evoked the application of this principle in previous divestiture cases. There is no finding in this case, as there were in *Crescent* and *Schine*, of a deliberate conspiracy aimed at the destruction of competition. [\*\*\*350] We cannot point in this case, as we have on occasion in the past, to any blatantly anticompetitive scheme. See, e. g., [United States v. Reading Co., 253 U.S. 26, 59](#). Instead we have only the finding that "there is a reasonable [\*\*1273] probability that the acquisition is likely to result in the condemned restraints," [353 U.S., at 607](#), i. e., to restrain commerce. Moreover, the Court explicitly ruled executive misconduct out of the case -- "without any design to overreach anyone, including du Pont's competitors." [353 U.S., at 607](#).

Even in the *Crescent* case, the Court voiced its concern for the future only by way of support for its conclusion that the District Court's severance of the defendants could not be reversed for abuse of discretion. [323 U.S., at 190](#). The Court sustained, rather than overturned, the lower [\*\*\*\*91] court's judgment. To infer that the Court would have found an abuse of discretion had the District Court in *Crescent* limited itself to a decree of injunctive relief is an unwarranted assumption. But the Government in effect draws such an inference for the purpose of this case, even though the facts of du Pont's violation do not faintly resemble the offense of the movie exhibitors in *Crescent*. When the powerful interests of James J. Hill and J. Pierpont Morgan coalesce to place in one controlling parent the stock of the Great Northern and Northern Pacific Railways, *Northern Securities Co. v. United States, 193 U.S. 197*; when the Standard Oil Co. or the American Tobacco Co. obtain monopoly positions in their vast industrial empires, see *Standard Oil Co. v. [371] United States, 221 U.S. 1*, and *United States v. American Tobacco Co., 221 U.S. 106*; when the rail carriers controlling the means of transportation of anthracite coal combine to destroy a potential competitor, [United States v. Reading Co., 226 U.S. 324](#), the facts demand the major surgery of divestiture -- destruction of the [\*\*\*\*92] offending combinations. But to hold that the treatment of these conscious conspiracies to restrain trade and to achieve monopoly power is compelling precedent for determining the relief necessary and appropriate to remedy the only wrong judicially found by this Court under § 7, is to treat situations flagrantly different as though they were the same. Surely there is merit to the notion of shaping the punishment to fit the crime, even beyond the precincts of the Mikado's palace.

The grounds thus canvassed furnish the relevant considerations for this Court's review of the District Court's decree. The obvious must be restated. We do not sit to draft antitrust decrees *de novo*. This is a court of appeal, not a trial court. We do not see the witnesses, sift the evidence in detail, or appraise the course of extended argument, session after session, day after day. (A review of Part III of this opinion abundantly shows the extent to which the District Court's appraisal of the credibility of witnesses, analysis of expert testimony, and reconciliation of the claims of counsel entered into the painstaking process that led to the court's views on complicated issues and ultimately to [\*\*\*\*93] the formulation of its decree.) In short, this Court does not partake of the procedure and is not charged with the responsibility demanded of the court entrusted with the task of devising the details of a decree appropriate [\*\*\*351] for the governance of a vastly complicated situation arising out of unique circumstances. By its nature, this Court, as an appellate tribunal, lacks the means -- the procedural facilities -- to evolve a decree in a case like this. For these reasons this [**\*372**] Court sent this case back to the District Court, quoting in part ([353 U.S., at 608](#)), without specific limitation, the comprehensively general guidelines of an earlier case:

"The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case." *International Salt Co. v. United States, 332 U.S. 392, 400-401*.<sup>16</sup>

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<sup>16</sup> To the same effect, see [Associated Press v. United States, 326 U.S. 1](#); *Lorain Journal Co. v. United States, 342 U.S. 143*; *International Boxing Club v. United States, 358 U.S. 242*; *Maryland & Virginia Milk Producers Assn. v. United States, 362 U.S. 458*.

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[\*\*\*\*94] [\*\*1274] To tell a trial judge that he has discretion in certain matters is to tell him that there is a range of choices available to him. It is to tell him that the responsibility is his, and that he will not be reversed except for straying outside the permissible range of choice, *i. e.*, for abuse of discretion. See, *e. g.*, [United States v. Crescent Amusement Co., 323 U.S. 173, 189](#); [Timken Roller Bearing Co. v. United States, 341 U.S. 593, 600-601](#). In sustaining the judgment in [Lorain Journal Co. v. United States, 342 U.S. 143, 156](#), the Court stated its standard for upholding the trial court's decree as simply that "*The decree is reasonably consistent with the requirements of the case and remains within the control of the court below.*" (Emphasis in the original.) Certainly we ought not to reverse the carefully wrought results of a conscientious trial judge without a showing amounting almost to a demonstration that he exceeded the fair limits of judicial choice which this Court explicitly reposed in him.<sup>17</sup>

[\*\*\*\*95] [\*373] When a district judge has failed to accord parties an adequate hearing [\*\*\*352] or has been otherwise wanting in the administration of fair procedure, there is the best of reasons for this Court to secure for them the full measure of judicial consideration which they are owed but failed to receive. But when, as in this case, the comprehensiveness of the hearing, the full consideration of the issues, both through evidence and argument, the evident diligence and searching competence of the judge -- reflected throughout the long hearing -- and his care in expounding the reasons for his judgment demonstrate a deep awareness of the duty with which this Court charged him without any restrictions on his task except that he was entrusted "with large discretion," reversal of the lower court's result can be justified only by a showing of patent misconception of [\*374] governing law or want of [\*\*1275] conscientious regard for "the exigencies of the particular case." When judged by the relevant decisions and pronouncements of this Court, such legal defects or inadequacies are impressively disproved by this record.

It may be suggested that however faithfully the trial [\*\*\*\*96] court abided by the other teachings of this Court, it forgot one, namely, "that relief, to be effective, must go beyond the narrow limits of the proven violation." [United States v. United States Gypsum Co., 340 U.S. 76, 90](#). See [International Salt Co. v. United States, 332 U.S. 392, 400](#). This principle is important but it carries no warrant for reversal in this case. It has already been pointed out that the District Court specifically applied this principle in significant provisions of its decree. This Court found a danger of restraint of trade only in the market for automobile fabrics and finishes. The District Court nevertheless extended the injunctive provisions of its decree to all trade relations between du Pont and General Motors, regardless of the products involved. This Court proceeded on the assumption that the officers and directors of the companies had acted honorably and in the best interests of their respective corporations. Yet the District Court, responsive to the Government's urging, though without substantial evidence in the record, chose to sterilize the voting power not only of du Pont's officers and directors, but also [\*\*\*\*97] of a major block of its large shareholders, the shareholders of Christiana and Delaware. In fact, the District Court exceeded the Government's requests in several substantial respects. This is true with respect to the injunction against cooperative and preferential

<sup>17</sup> The Court should not allow itself to be led to a contrary conclusion by the language of [United States v. United States Gypsum Co., 340 U.S. 76](#), or [Hartford-Empire Co. v. United States, 324 U.S. 570](#). The *Gypsum* case says only that the District Court's conclusions should not be subject to reversal merely for gross abuse of discretion, and that this Court must intervene when the provisions of the decree are "inappropriate." I could not agree more, either with these views or with those expressed in the remarks that formed their preface:

"The determination of the scope of the decree to accomplish its purpose is peculiarly the responsibility of the trial court. Its opportunity to know the record and to appraise the need for prohibitions or affirmative actions normally exceeds that of any reviewing court." [340 U.S., at 89](#).

In *Hartford-Empire* the opinion of the Court says "it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching importance to the judgment of a single judge, without review of the relief granted or denied by him." [324 U.S., at 571](#). These words, if given the reading they seem most readily to bear, are certainly unobjectionable, for our power to review the antitrust relief determinations of trial judges is not in doubt. If this language is to be read to authorize *de novo* consideration here of all the details of a lower court's decree, then it marks a real aberration in this branch of the law. Whatever respect such a view might once have deserved, it deserves none now, for our recent decisions have uniformly adopted the principle of appellate deference to trial court discretion. See cases cited in notes 7 and 16, *supra*.

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business practices between du Pont and General Motors,<sup>18</sup> the prohibition against interlocking corporate personnel,<sup>19</sup> [\*375] and the detail of the retention of jurisdiction and reopening clauses.<sup>20</sup>

Moreover, the principle of extending relief beyond the narrow limits of the violation has an important limiting corollary. The trial court is not authorized to order relief which it is without findings to support. "A full exploration of facts is usually necessary [\*\*\*\*98] in order properly to draw such a decree." *Associated Press v. United States*, 326 U.S. 1, 22. [\*\*\*353] This Court has unhesitatingly reversed remedial action by the lower courts, both for and against the Government, when wanting in supporting findings. See *Hartford-Empire Co. v. United States*, 323 U.S. 386, 418; *Schine Chain Theatres, Inc., v. United States*, 334 U.S. 110; *United States v. Paramount Pictures*, 334 U.S. 131, 170-174; *Hughes v. United States*, 342 U.S. 353, 357-358. But if findings on questions of fact, or mixed questions of law and fact, are essential to the formulation of a decree, it becomes virtually impossible to develop a basis for a divestiture order at this stage on this record. The District Court found that once all of du Pont's ties to General Motors, save its stock interest, were severed the record is barren of justification for an inference of reasonable probability of restraint of trade. Conversely, it found that the tax and market consequences of divestiture would be so onerous that, in the absence of any serious anticompetitive danger, it would [\*\*\*\*99] have constituted an abuse of discretion to enter such a decree. These conclusions were based in significant measure on the firsthand factual analysis [\*\*1276] that only a trial judge is in a position to make. For the Court to require divestiture, thereby overturning a trial court judgment [\*376] founded on an appraisal of voluminous conflicting evidence and opinion, is in effect to displace the trial court's function as a fact-finder.

The Government suggests that possibly, in "exceptional" cases, some remedy other than divestiture may suffice, but that this is not the "exceptional" case. If this is not an "exceptional" case, what would be? Is it really tenable to regard this an ordinary, a conventional, a run-of-the-mill case?

Du Pont began to acquire General Motors stock while World War I was still in progress. It owned that stock openly for three decades before this suit was instituted to challenge the validity of the acquisition. During that period the number of General Motors and du Pont stockholders expanded from a few thousand to many hundreds of thousands. The value of the General Motors stock greatly increased. The tax laws were substantially changed. The [\*\*\*\*100] District Court has fashioned a closely knit network of provisions to prevent preferential dealings between General Motors and du Pont. So certain was it that divestiture would, on the basis of its findings, work great and unjustifiable loss on wholly innocent investors, that it considered a divestiture order beyond its discretionary power. The precedents of this Court to which the District Court could look for guidance in the discharge of its duty permitted, at the least, the inferences (1) that the framing of the decree lay within its discretion, (2) that within the scope of that discretion it was free to consider all relevant consequences, both public and private, of the plans proposed, (3) that it was under no compulsion to order divestiture, (4) that there was ample reason to avoid a harsh remedy if it were to conclude that a less severe one would be effective, (5) that both the facts and the formulated reasoning of prior divestiture cases made them distinguishable from the [\*377] du Pont problem, and (6) that unless the District Court abused its discretion by disregarding this Court's guides for its decision, [\*\*\*354] its judgment would stand on review. In the face [\*\*\*\*101] of all this, it is indeed "exceptional" for this Court to upset the lower court's judgment that its decree met the needs established in the proceeding before it.

The essential appeal of the Government's position lies in its excitation of fear of any intercorporate relationship between two such colossi as du Pont and General Motors. It is easy to calm this fear by a requirement of divestiture. Insofar as the Court yields to that fear, it is strange, indeed, that this was not obvious to the Court when it found the illegality for which it directed the District Court to evolve a corrective remedy. Not a single consideration now advanced by the Court for directing divestiture was not available when the case was originally here. For not one of these considerations is based on evidence elicited at the hearing before the District Court, directed by this Court, for determining the relief. Such a limitation on the discretionary decree-fashioning power, upon full hearing in

<sup>18</sup> Compare the Government's proposed Article IX with Section V of the final judgment.

<sup>19</sup> Compare the Government's proposed Article X with Section IV of the final judgment.

<sup>20</sup> Compare the Government's proposed Article XIII with Sections IX and XII of the final judgment.

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the District Court, certainly could not have been in this Court's mind when it remitted that function to the District Court, otherwise it would have spoken its mind and not left it all to the "large discretion" of the [\*\*\*\*102] court. In any event it requires prophetic confidence to conclude that that decree is so obviously inadequate as to require reversal before it can be tried in practice. Neither the record when the case was first here nor the facts adduced at the hearing on molding the decree give warrant for this Court to set aside the trial court's finding on the improbability of future restraint of trade in view of the safeguarding terms of the decree. If the Court were to allow the District Court's maturely considered scheme for protecting the dominant public interest [\*378] with less than "surgical ruthlessness" [\*\*1277] to proceed, time might show that the relief granted by the District Court was well based, and that this Court's willingness to give it a try properly averted reasonably founded fear of serious economic dislocation.

Reversal by way of commanding divestiture is a "judgment from speculation," carrying with it irreversible consequences, whereas the District Court's decree leaves the door open for "judgment from experience," *Tanner v. Little, 240 U.S. 369, 386*, under its clauses retaining jurisdiction to modify the judgment in the light of changed circumstances. [\*\*\*\*103] Resort to such safety valve clauses is an established practice in review of antitrust remedies, for they allow the courts to act on the basis of informed hindsight rather than treacherous conjecture. In *International Salt Co. v. United States, 332 U.S. 392, 401*, the Court enunciated this principle in language pertinent here:

"The District Court has retained jurisdiction, by the terms of its judgment, for the purpose of 'enabling any of the parties . . . to apply to the court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment' and 'for the amendment, modifications or termination of any of the provisions . . .' We think it would not be good judicial administration to strike paragraph VI from the judgment to meet a hypothetical situation when the District Court has [\*\*\*355] purposely left the way open to remedy any such situations if and when the need arises. The factual basis of the claim for modification should appear in evidentiary form before the District Court rather than in the argumentative form in which it is before us. . . ."

[\*379] The wisdom of this [\*\*\*\*104] policy is reflected in many of our decisions.<sup>21</sup> Why should it not guide the Court's decision in this case? The Government's presentation boils down to an unsubstantiated assertion that *any* tie between du Pont and General Motors gravely jeopardizes the play of competitive forces. When we are asked to assume this, we are asked to assume that even after a decree fashioned with the circumspection with which this was, a "reasonable probability" exists that the defendants will, in a wholly undefined way, combine to violate the antitrust laws. We are asked, in essence, to enter Alice's Wonderland where proof is unnecessary and the governing rule of law is "Sentence first, verdict after."

[\*\*\*\*105] The District Court here concluded that the relief it devised would dispel all potential restraints upon free competition as effectively as would divestiture, while divestiture was likely to cause serious economic disturbance unwarranted by a need for that remedy. Neither in its procedures nor in its consideration of the data presented to it did the court fail to discharge the obligations placed upon it by the decisions of this Court and by the only instruction -- to exercise "large discretion" -- given it by the Court in this case. In no way did the District Court abuse the discretion entrusted to it. Its judgment should therefore be affirmed.

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<sup>21</sup> See *Associated Press v. United States, 326 U.S. 1, 22-23; Timken Roller Bearing Co. v. United States, 341 U.S. 593, 604* (opinion of Mr. Justice Reed); *Lorain Journal Co. v. United States, 342 U.S. 143, 157; Maryland & Virginia Milk Producers Assn. v. United States, 362 U.S. 458, 473*.



## **California v. Federal Power Comm'n**

Supreme Court of the United States

March 1, 1962, Argued ; April 30, 1962, Decided

No. 187

### **Reporter**

369 U.S. 482 \*; 82 S. Ct. 901 \*\*; 8 L. Ed. 2d 54 \*\*\*; 1962 U.S. LEXIS 2161 \*\*\*\*; 1962 Trade Cas. (CCH) P70,302; 16 Oil & Gas Rep. 1065

CALIFORNIA v. FEDERAL POWER COMMISSION ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

**Disposition:** [111 U. S. App. D. C. 226, 296 F.2d 348](#), reversed.

## **Core Terms**

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antitrust, merger, antitrust suit, Clayton Act, proceedings, anti trust law, acquisition, courts, stock, natural gas, consummated, public convenience, interlocutory, immunity, restrain, approve, matters, unscrambling, entrusted, lessening, temporary, hearings

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Clayton Act > General Overview

[\*\*HN1\*\*](#) [PDF] **Antitrust & Trade Law, Clayton Act**

See [15 U.S.C.S. § 18](#).

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

Governments > Local Governments > Administrative Boards

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Clayton Act

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

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## [\*\*HN2\*\*](#) [down] Collectives & Cooperatives, Capper-Volstead Act

Immunity from the antitrust laws is not lightly implied.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Clayton Act

Real Property Law > Common Interest Communities > Cooperatives > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

## [\*\*HN3\*\*](#) [down] Collectives & Cooperatives, Clayton Act

Section 7 of the Clayton Act, [15 U.S.C.S. § 18](#) gives immunity to transactions duly consummated pursuant to authority given by the Secretary of Agriculture under any statutory provision vesting such power in such Secretary, however the only authority of the Secretary is to approve "marketing agreements," and not other types of agreements or restraints typically covered by the antitrust laws.

Governments > Legislation > Interpretation

## [\*\*HN4\*\*](#) [down] Legislation, Interpretation

When there are two acts upon the same subject, the rule is to give effect to both if possible.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

## [\*\*HN5\*\*](#) [down] Regulated Industries, Transportation

Section 7 of the Clayton Act, [15 U.S.C.S. 18](#), which prohibits stock acquisitions, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly, contains a proviso that nothing contained in § 7 shall apply to transactions duly consummated pursuant to authority given by the Federal Power Commission under any statutory provision vesting such power in such commission.

Antitrust & Trade Law > Clayton Act > General Overview

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Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

#### **HN6** [↓] Antitrust & Trade Law, Clayton Act

The words "transactions duly consummated pursuant to authority" given the Federal Power Commission under any statutory provision vesting such power in it are not a grant of power to adjudicate antitrust issues. Congress makes clear that by this proviso in § 7 of the Clayton Act, [15 U.S.C.S. 18](#), it is not intended that any agency mentioned shall be granted any authority or powers which it does not already possess.

Energy & Utilities Law > Antitrust Issues > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > Natural Gas Industry > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

#### **HN7** [↓] Energy & Utilities Law, Antitrust Issues

The Federal Power Commission's standard, set forth in § 7 of the Natural Gas Act (Act), [15 U.S.C.S. 717](#), is that the acquisition or merger, will serve the public convenience and necessity. If existing natural gas companies violate the antitrust laws, the commission is advised by § 20(a) of the Act to transmit such evidence to the Attorney General whom, in his discretion, may institute the necessary criminal proceedings. Other administrative agencies are authorized to enforce section seven of the Clayton Act when it comes to certain classes of companies or persons, but the Commission is not included in the list.

Antitrust & Trade Law > Clayton Act > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

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

See [15 U.S.C.S. § 21](#).

Energy & Utilities Law > Antitrust Issues > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

#### **HN9** [↓] Energy & Utilities Law, Antitrust Issues

Approval of a transaction by the Federal Power Commission is no bar to an antitrust suit.

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Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > General Overview

#### **HN10** [blue icon] **Antitrust & Trade Law, Clayton Act**

Section 7 of the Clayton Act, [15 U.S.C.S. § 18](#) is designed to arrest in its incipency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation.

Antitrust & Trade Law > Clayton Act > General Overview

Evidence > Burdens of Proof > General Overview

#### **HN11** [blue icon] **Antitrust & Trade Law, Clayton Act**

Once the government has successfully borne the considerable burden of establishing a violation of the Clayton Act, all doubts as to the remedy are to be resolved in its favor.

Energy & Utilities Law > Antitrust Issues > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Jurisdiction

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Communications Law > Regulators > US Federal Communications Commission > Jurisdiction

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > General Overview

Energy & Utilities Law > ... > US Federal Energy Regulatory Commission > Civil Actions > Jurisdiction

Energy & Utilities Law > Natural Gas Industry > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Mergers & Acquisitions Law > General Overview

#### **HN12** [blue icon] **Energy & Utilities Law, Antitrust Issues**

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Section 7 of the Clayton Act prohibits stock acquisitions having a prescribed effect. Section 7 of the Natural Gas Act confers jurisdiction on the Federal Power Commission over the acquisition of assets of natural gas companies, not over stock acquisitions in them.

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Pipelines & Transportation > Natural Gas Transportation

Energy & Utilities Law > Utility Companies > Buying & Selling of Power

### **HN13** [L] **Natural Gas Industry, Distribution & Sale**

See [15 U.S.C.S. 717\(7\)\(c\)](#).

Administrative Law > Judicial Review > Reviewability > Exhaustion of Remedies

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Primary Jurisdiction

Administrative Law > Separation of Powers > Jurisdiction

Administrative Law > Separation of Powers > Primary Jurisdiction

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

### **HN14** [L] **Reviewability, Exhaustion of Remedies**

The function of the United States Supreme Court is to see that the policy entrusted to the courts is not frustrated by an administrative agency. Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted.

## **Lawyers' Edition Display**

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### **Summary**

A natural gas company acquired the stock of a pipeline corporation, and after the United States brought an action in a Federal District Court against the two companies charging that this acquisition violated 7 of the Clayton Act, the natural gas company applied to the Federal Power Commission for a certificate of convenience and necessity allowing it to acquire the pipeline corporation's assets. The federal court hearing the antitrust suit continued the suit until final decision in the administrative proceedings, in which the Commission authorized the merger. (22 FPC 1091, 23 FPC 350.) An intervenor in the administrative proceedings obtained review of this decision by the United States Court of Appeals for the District of Columbia Circuit, which affirmed the [Commission. \(111 App DC 226, 296 F2d 348.\)](#)

On certiorari, the United States Supreme Court reversed the judgment of the Court of Appeals, vacated the Commission's order approving the merger, and remanded the case to the Commission. In an opinion by Douglas,

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J., expressing the views of five members of the Court, it was held that the Commission should not have proceeded to a decision on the merits of the application while the antitrust suit was pending in the courts.

Harlan, J., joined by Stewart, J., dissented on the ground that the rule announced by the Court disturbs the proper relationship between courts hearing antitrust cases and administrative agencies which have before them matters with respect to which the antitrust laws are applicable.

Frankfurter and White, JJ., did not participate.

## Headnotes

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ADMINISTRATIVE LAW §123 > PUBLIC SERVICE COMMISSIONS §31 > merger -- evidence -- antitrust violations. --

> Headnote:

[LEdHN\[1\]](#) [1]

Evidence of antitrust violations is relevant in an application by the alleged violator to the Federal Power Commission for a certificate of public convenience and necessity authorizing the acquisition of another corporation's facilities for the transportation or sale of natural gas.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §5 > immunity. -- > Headnote:

[LEdHN\[2\]](#) [2]

Immunity from the antitrust laws is not lightly implied.

STATUTES §229 > on same subject. -- > Headnote:

[LEdHN\[3\]](#) [3]

Where there are two legislative acts upon the same subject, the rule is to give effect to both if possible.

INTERSTATE COMMERCE COMMISSION §39 > mergers -- antitrust immunity. -- > Headnote:

[LEdHN\[4\]](#) [4]

Under 49 USC 5(11), which provides that any carriers participating in or resulting from any transaction approved by the Interstate Commerce Commission are relieved from the operation of the antitrust laws, mergers of carriers that are approved have an antitrust immunity.

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PUBLIC SERVICE COMMISSIONS §26 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES  
§86 > jurisdiction -- deciding antitrust issues. -- > Headnote:

[LEdHN\[5\]](#) [5]

The proviso in 7 of the Clayton Act ([15 USC 18](#)), which makes "transactions duly consummated pursuant to authority" given by the Federal Power Commission "under any statutory provisions vesting such power in such Commission" not subject to the provision prohibiting stock acquisitions substantially lessening competition or tending to create a monopoly, does not authorize the Federal Power Commission to adjudicate antitrust issues.

ADMINISTRATIVE LAW §320 > COMMISSIONS §26 > merger -- antitrust issue -- awaiting court's decision. -- > Headnote:

[LEdHN\[6\]](#) [6]

The Federal Power Commission should not proceed to a decision on the merits of an application for a certificate of convenience and necessity authorizing the acquisition of another corporation's facilities for the transportation or sale of natural gas where there is pending in the courts a suit challenging the validity of the transaction under the antitrust laws, but should await the decision of the courts.

ADMINISTRATIVE LAW §174 > PUBLIC SERVICE COMMISSIONS §32 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §44 > order approving merger -- effect -- antitrust suit. -- > Headnote:

[LEdHN\[7\]](#) [7]

Approval by the Federal Power Commission of a merger, by the issuance of a certificate of public convenience and necessity authorizing the acquisition of facilities for the transportation or sale of natural gas, is no bar to an antitrust suit brought by the Federal Government against the companies permitted to merge, charging unlawful acquisition by one of the companies of the stock of the other.

PUBLIC SERVICE COMMISSIONS §26 > jurisdiction -- mergers. -- > Headnote:

[LEdHN\[8\]](#) [8]

Section 7 of the Natural Gas Act ([15 USC 717f\(c\)](#)) confers upon the Federal Power Commission jurisdiction over the acquisition of assets of natural gas companies, but not over stock acquisitions in them.

ADMINISTRATIVE LAW §320 > primary jurisdiction. -- > Headnote:

[LEdHN\[9\]](#) [9]

Where primary jurisdiction is in an administrative agency, courts withhold action until the agency has acted, and where primary jurisdiction is in the courts, administrative agencies should withhold action until the courts have acted.

## Syllabus

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One natural gas company acquired nearly all of the stock of another, and the Federal Government commenced an action in a Federal District Court to have the acquisition of stock declared to be in violation of § 7 of the Clayton Act and to require divestiture. Shortly thereafter, the company which had acquired the stock applied to the Federal Power Commission under § 7 of the Natural Gas Act for authority to merge the assets of the two companies. The Commission authorized the merger of assets while the antitrust action was still pending in the District Court. The Court of Appeals sustained the Commission's action. *Held:* The Commission should not have proceeded to a decision on the merits of the merger application when there was pending in the courts a suit challenging the validity of that transaction under the antitrust laws. It should have awaited the decision of the courts. [\*\*\*2] Pp. 483-490.

**Counsel:** William M. Bennett argued the cause and filed briefs for petitioner.

Solicitor General Cox argued the cause for the Federal Power Commission, respondent. With him on the briefs were Assistant Attorney General Orrick, John G. Laughlin, Jr., John C. Mason, Ralph S. Spritzer, Howard E. Wahrenbrock, Robert L. Russell and Arthur H. Fribourg.

Arthur H. Dean argued the cause for the El Paso Natural Gas Co., respondent. With him on the briefs were Charles V. Shannon, Stanley M. Morley and Stephen Rackow Kaye.

**Judges:** Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart; Frankfurter took no part in the decision of this case; White took no part in the consideration or decision of this case.

**Opinion by:** DOUGLAS

## Opinion

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[\*483] [\*\*56] [\*\*902] Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE BRENNAN.

El Paso Natural Gas Company first acquired the stock of the Pacific Northwest Pipeline Corp. and then applied to the Federal Power Commission for authority to acquire the assets pursuant to § 7 of the Natural Gas Act, 52 Stat. 825, [15 U. S. C. § 717f\(c\)](#). This application was dated August 7, 1957. Prior thereto, on [\*\*\*3] July 22, 1957, the Federal Government commenced an action against El Paso and Pacific Northwest, alleging that El Paso's acquisition of the stock of Pacific Northwest violated [\*\*903] § 7 of the Clayton Act,<sup>1</sup> 38 Stat. 731, as amended, 64 Stat. 1125, [15 U. S. C. § 18](#). On September 30, 1957, El Paso and Pacific Northwest filed a motion to dismiss the antitrust suit or to stay it, pending completion of the proceedings before the Commission. On October 21, 1957, that motion was denied after hearing; and we denied certiorari. 355 U.S. 950.

[\*\*\*4] [\*484] In May and June 1958, the Department of Justice wrote four letters to the Commission, asking that the proceeding be stayed pending the outcome of the antitrust suit. On July 29, 1958, the Department of Justice

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<sup>1</sup> Section 7 of the Clayton Act provides in relevant part:

[HN1](#) "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly."

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was advised by the Commission that it would not stay its proceedings. The Commission invited the Antitrust Division of the Department to participate in the administrative proceedings; but it did not do so.

The hearings before the Commission started September 17, 1958. On October 2, 1958, El Paso and Pacific Northwest moved in the District Court for a continuance of the antitrust suit. On October 6, 1958, the Department of Justice asked the Commission to postpone its hearing, pending final outcome of the antitrust suit which had then been set for trial November 17, 1958. On October 7, 1958, the Commission wrote the District Court that if the court denied El Paso and Pacific Northwest's motion for a continuance and proceeded with the antitrust trial, the Commission would continue its merger hearings to a date that would not conflict with the trial date of the antitrust case, but [\*\*\*57] that if the court granted the motion for continuance, the Commission would [\*\*\*5] proceed with its hearing. On October 13, 1958, the District Court continued the antitrust suit until the final decision in the administrative proceedings. The latter proceedings were concluded, the Commission authorizing the merger on December 23, 1959. 22 F. P. C. 1091, 23 F. P. C. 350. The merger was consummated December 31, 1959.

Petitioner intervened in the administrative proceedings August 27, 1957, and obtained review by the Court of Appeals, which affirmed the [Commission \(111 U. S. App. D. C. 226, 296 F.2d 348\)](#), Judge Fahy dissenting. We granted certiorari, 368 U.S. 810.

[LEdHN\[1\]](#) [1] Evidence of antitrust violations is plainly relevant in merger applications, for part of the content of "public convenience and necessity" as used in § 7 of the Natural [\[\\*485\]](#) Gas Act is found in the laws of the United States. [City of Pittsburgh v. Federal Power Commission, 99 U. S. App. D. C. 113, 237 F.2d 741.](#)

[LEdHN\[2\]](#) [2] [LEdHN\[3\]](#) [3] [\*\*\*6] [LEdHN\[4\]](#) [4] [HN2](#) Immunity from the antitrust laws is not lightly implied. The exemption of agricultural cooperatives from the antitrust laws granted by § 6 of the Clayton Act and § 1 and § 2 of the Capper-Volstead Act of 1922 became relevant in *Milk Producers Assn. v. United States, 362 U.S. 458*. [HN3](#) While § 7 of the Clayton Act gave immunity [\[\\*904\]](#) to "transactions duly consummated pursuant to authority given by . . . the Secretary of Agriculture under any statutory provision vesting such power in such . . . Secretary," we held that the only authority of the Secretary was to approve "marketing agreements" ([id., 469-470](#)) and not other types of agreements or restraints, typically covered by the antitrust laws. Accordingly, we held that the District Court was authorized to direct the cooperative to dispose as a unit of the assets of an independent producer that had been acquired to stifle competition and restrain trade. We could not assume that Congress, having granted only a limited exemption [\[\\*7\]](#) from the antitrust laws, nonetheless granted an overall inclusive one. See [United States v. Borden Co., 308 U.S. 188, 198-202](#). [HN4](#) "When there are two acts upon the same subject, the rule is to give effect to both if possible." [Id., at 198](#). Here, as in [United States v. R. C. A., 358 U.S. 334](#), while "antitrust considerations" are relevant to the issue of "public interest, convenience, and necessity" ([id., at 351](#)), there is no "pervasive regulatory scheme" (*ibid.*) including the antitrust laws that has been entrusted to the Commission. And see *National Broadcasting Co. v. United States, 319 U.S. 190, 223*. Under the Interstate Commerce Act, mergers of carriers that are approved have an antitrust immunity, as § 5 (11) of that Act specifically provides that the carriers involved "shall be and they are hereby relieved from the operation of the antitrust [\[\\*486\]](#) laws . . ." See *McLean Trucking Co. v. United States, 321 U.S. 67*.

[LEdHN\[5\]](#) [5] [\[\\*8\]](#) There is no comparable provision under the Natural Gas Act. [HN5](#) Section 7 of the Clayton Act -- which prohibits stock acquisitions "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create [\[\\*58\]](#) a monopoly" -- contains a proviso that "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . Federal Power Commission . . . under any statutory provision vesting such power in such Commission . . ." [HN6](#) The words "transactions duly consummated pursuant to authority" given the Commission "under any statutory provision vesting such power" in it are plainly not a grant of power to adjudicate antitrust issues. Congress made clear that by this proviso in § 7 of the Clayton Act ". . . it is not intended that . . . any . . . agency" mentioned "shall be granted any authority or powers which it does not already possess." S. Rep.

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No. 1775, 81st Cong., [\*\*\*\*9] 2d Sess., p. 7. [HN7](#) The Commission's standard, set forth in § 7 of the Natural Gas Act, is that the acquisition, merger, etc., will serve the "public convenience and necessity." If existing natural gas companies violate the antitrust laws, the Commission is advised by § 20 (a) to "transmit such evidence" to the Attorney General "who, in his discretion, may institute the necessary criminal proceedings." Other administrative agencies are authorized to enforce § 7 of the Clayton Act when it comes to certain classes of companies or persons;<sup>2</sup> but the Federal Power Commission is not included in the list.

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[\*487] [LEdHN\[6\]](#) [6]We do not decide whether in this case there were any violations of the antitrust [\*\*905] laws. We rule only on one select issue and that is: should the Commission proceed to a decision on the merits of a merger application when there is pending in the courts a suit challenging the validity of that transaction under the antitrust laws? We think not. We think the Commission in those circumstances should await the decision of the courts.

The Commission considered the interplay between § 7 of the Clayton Act and § 7 of the Natural Gas Act and said:

"Section 7 of the Clayton Act, under which the antitrust suit was brought, prohibits the acquisition by one corporation of the stock or assets of another corporation where 'the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.' Exempt, however, are transactions consummated pursuant to Commission authority. This shows, reasons the presiding examiner, that Congress placed reliance on the Commission not to approve an acquisition of assets in violation of the injunction of the Clayton Act, [\*\*\*\*11] unless in the carefully exercised judgement of the Commission, the acquisition would nevertheless be in the public interest. What we are attempting to arrive at is the public convenience and necessity. In reaching our determination, we do not have authority to determine whether a given transaction is in violation of the [\*\*\*59] Clayton Act, but we are required to consider the bearing [\*488] of the policy of the antitrust laws on the public convenience and necessity. [City of Pittsburgh v. F. P. C., 237 F.2d 741, 754](#) (CADC). With the presiding examiner, we find that any lessening of competition whether in the consumer markets or the producing fields, does not prevent our approving the merger because there are other factors which outweigh the elimination of Pacific as a competitor. In any case, it appears that any lessening of competition is not substantial." 22 F. P. C. 1091, 1095.

Apart from the fact that the Commission did undertake to make a finding reserved to the courts by § 7 of the Clayton Act,<sup>3</sup> there are practical reasons why it should have held its hand until the courts had acted.

[\*\*\*\*12] [LEdHN\[7\]](#) [7]One is that if the Commission approves the transaction and the courts in the antitrust suit later hold it to be illegal, an unscrambling is necessary. [Milk Producers Assn. v. United States, supra](#). Thus a needless waste of time and money may be involved. Also these unscrambling processes often raise complicated and perplexing problems on tax matters and otherwise, as our recent decision in [United States v. du Pont & Co., 353 U.S. 586, 366 U.S. 316](#), shows.<sup>4</sup> Such complexities [\*489] are inherent in the situation, as [HN9](#) approval

<sup>2</sup> Section 11 of the Clayton Act, [15 U. S. C. § 21](#), vests authority to enforce compliance with § 7 by the persons subject thereto:

[HN8](#) ". . . in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows: . . ."

<sup>3</sup> Where "the effect of such acquisition may be substantially to lessen competition." Section 7, *supra*, note 1.

<sup>4</sup> In that case, which also was under § 7 of the Clayton Act, we said: [HN10](#) "Section 7 is designed to arrest in its incipency not only the substantial lessening of competition from the acquisition by one corporation of the whole or any part of the stock of a competing corporation, but also to arrest in their incipency restraints or monopolies in a relevant market which, as a reasonable

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of the **[\*\*906]** transaction by the Commission would be no bar to the antitrust suit. See *United States v. R. C. A., supra.*

**[\*\*\*\*13]** Another practical reason is that a transaction consummated under the aegis of the Commission as being a matter of "public convenience and necessity" is bound to carry momentum into the antitrust suit. The very prospect of undoing what was done raises a powerful influence in the antitrust litigation, as *United States v. du Pont & Co., supra*, illustrates.

The orderly procedure is for the Commission to await decision in the antitrust suit before taking action.

**LEdHN[8]↑** [8]**HN12↑** Section 7 of the Clayton Act, so far as material here, prohibits stock acquisitions having a prescribed effect. Section 7 of the Natural Gas Act confers jurisdiction on the Commission over the acquisition of assets of natural gas companies,<sup>5</sup> not over stock acquisitions in them. **[\*\*\*60]** Had the Commission stayed its hand and had the courts found the stock acquisition unlawful, the entire transaction would have been set aside *in limine*. Had the courts found the stock acquisition lawful, presumably no problems under § 7 of the Clayton Act would have remained. **[\*490]** When the Commission proceeds in the face of a pending but **[\*\*\*\*14]** undecided antitrust suit and approves a merger that has been preceded, as this one was, by a stock acquisition, it in substance treats the entire relation of the companies -- from the acquisition of stock to the merger -- as an integrated transaction. If that administrative action were approved, the Commission would be allowed to do by indirection what it has no jurisdiction to do directly.

**[\*\*\*\*15]** **LEdHN[9]↑** [9]It is not for us to say that the complementary legislative policies reflected in § 7 of the Clayton Act on the one hand and in § 7 of the Natural Gas Act on the other should be better accommodated. **HN14↑** Our function is to see that the policy entrusted to the courts is not frustrated by an administrative agency. Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. *Texas & Pac. R. Co. v. Abilene Oil Co.*, 204 U.S. 426. The converse should also be true, lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the Federal Power Commission. Moreover, as noted, the Commission in holding that "any lessening of competition is not substantial" was in the domain of the Clayton Act, a domain which is entrusted to the court in which the antitrust suit was pending.

The judgment of the Court of Appeals is reversed and the case is remanded for proceedings in conformity with this **[\*\*\*\*16]** opinion.

*It is so ordered.*

MR. JUSTICE FRANKFURTER took no part in the decision of this case.

**[\*\*907]** MR. JUSTICE WHITE took no part in the consideration or decision of this case.

**Dissent by:** HARLAN

probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation." 353 U.S., at 589. As to the remedy we stated in *United States v. du Pont & Co.*, 366 U.S., at 334: "We think the public is entitled to the surer, cleaner remedy of divestiture. The same result would follow even if we were in doubt. **HN11↑** For it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor."

<sup>5</sup> Section 7 (c) provides in relevant part:

**HN13↑** "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations."

## Dissent

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[\*491] MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

In this case originating in the Federal Power Commission, the Court today announces a new and surprising antitrust procedural rule: If the Commission is asked to "proceed to a decision on the merits of a merger application when there is pending in the courts a suit challenging the validity of that [merger and its antecedent] transaction[s] under the antitrust laws," the Commission must abstain from a determination and "await decision in the antitrust suit before taking action." (*Ante*, pp. 487, 489.)

The holding does not turn on any facts or circumstances which may be said to be peculiar to this particular case. It is not limited to Federal Power Commission proceedings. Without advertizing to any legal principle or statute to support [\*\*\*61] its decision, the Court appears to lay down a pervasive rule, born solely of its own abstract notions of what "orderly procedure" requires, that seemingly [\*\*\*17] will henceforth govern every agency action involving matters with respect to which the antitrust laws are applicable and antitrust litigation is then pending in the courts.

I cannot subscribe to a decision which broadly works such havoc with the proper relationship between the administrative and judicial functions in matters of this kind. The decision, on the one hand, in effect transfers to the Antitrust Division of the Department of Justice regulatory functions entrusted to administrative agencies, and on the other hand deprives the courts in government antitrust litigation of the authority given them by statute to determine whether or not interlocutory relief is necessary or appropriate. What this new rule entails is illustrated by this case: A business transaction of great magnitude and importance, which the Federal Power [\*492] Commission has found to be in the public interest, is, at least for the time being, set for naught, without the slightest inquiry into whether the antitrust charges leveled against it are weighty or not. The Court's action is the more unusual because it is taken (1) despite the antitrust court's denial of interlocutory relief when such relief was [\*\*\*18] belatedly sought by the Government; (2) in the face of the considered judgment of the Solicitor General, representing the public interests respectively involved in the administrative and antitrust proceedings, that determination of the ultimate effect of the Commission's order should be left to abide the event of the antitrust case, and that meanwhile such order should be allowed to stand; and (3) at the instance only of an intervenor in the Commission's proceeding which was not even a party to the Government's antitrust suit.

The undiscriminating nature and reach of this decision become apparent when attention is focused on the procedural events occurring prior to the order of the Commission which is here under attack. On July 22, 1957, the Department of Justice instituted a civil action in the United States District Court in Utah against the El Paso Natural Gas Company and the Pacific Northwest Pipeline Company, seeking to restrain an alleged violation of § 7 of the Clayton Act. This violation was said to have occurred when, beginning in January 1957, El Paso embarked on a program of acquiring nearly all of Pacific's outstanding common stock. The complaint asked that the purchase [\*\*\*19] be declared to be a violation of § 7 of the Clayton Act and that El Paso be directed to divest itself of Pacific's stock. No interlocutory relief appears to have been requested.

On August 7, 1957, El Paso filed with the Federal Power Commission its application for authorization to merge Pacific's assets with its own. Despite this announced intention further to intermingle the affairs of the two corporations, [\*493] the Government did not seek temporary [\*\*908] relief from the District Court in Utah. El Paso, on the other hand, contended that "primary jurisdiction" with regard to the merger resided with the Commission and sought to have the antitrust action stayed. Its motion was denied by the District Court, and on March 3, 1958, we denied leave to file a petition for common-law certiorari to that decision. 355 U.S. 950.

When the case was returned to [\*\*\*62] the District Court the Government again made no effort to obtain from that court an order maintaining the status quo pending the outcome of the suit. Instead, the Assistant Attorney General in charge of the Antitrust Division suggested to the Commission that it stay its own proceedings until the [\*\*\*20] antitrust suit had terminated. When this request was rejected by the Commission, the Antitrust Division withdrew from the Commission proceedings despite an express invitation from the Commission that it participate.

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Hearings before the Commission's examiner were scheduled to begin on September 17, 1958, and the trial of the antitrust suit in the District Court was set for November 17, 1958. At a hearing on several pretrial matters held in the District Court on September 5 and 6, the Government, for the first time, moved for a temporary injunction to restrain the asset merger even if the Commission's approval were forthcoming.<sup>1</sup> That motion was denied and not renewed thereafter. The Commission's hearings began on September 17 and were recessed on September 26 until November 12.

El Paso again moved in the District Court [\*\*\*\*21] for a continuance of the antitrust trial until after the Commission had passed on the merger application, and the Government [\*494] once more asked the Commission to stay its proceedings pending the outcome of the antitrust case. While noting that the Government had refused the Commission's invitation to intervene in the merger proceedings, the Commission agreed to defer to the District Court. It notified the court that if El Paso's motion for a continuance of the trial were denied, the Commission would continue its merger proceeding to a later date. On October 13, 1958, the District Court issued an order granting El Paso's motion and continued the antitrust trial "until the final determination by the Federal Power Commission of the applications now pending before it." The Government has never sought to review this order by mandamus or by any other available means. The Commission subsequently held its hearings and authorized the merger of El Paso and Pacific in an order dated December 23, 1959. It is that order which the Court today in effect holds to have been entered without jurisdiction.

The Court relies on three "practical reasons" to support its perplexing conclusion [\*\*\*\*22] that despite the Government's failure promptly to seek relief *pendente lite* in the antitrust suit, its failure to press for review of the denial of such relief when belatedly sought, and the Commission's expressed willingness to defer to the antitrust court, the Commission was nonetheless required to withhold approval of the merger application: (1) If the asset merger were approved and executed, and the stock purchase thereafter held to be illegal, an "unscrambling" involving "needless waste of time and money" would be necessary; (2) such an "unscrambling" would "raise complicated and perplexing problems on tax matters and otherwise"; (3) the Commission's approval of the asset merger "is bound to carry momentum into the antitrust suit." (*Ante*, pp. 488-489.) Whatever weight these considerations may be deemed to have, I think that "orderly [\*\*909] procedure" [\*495] [\*\*\*63] required their determination, at least in the first instance, by the antitrust court, if indeed they were not rejected by the District Court on the Government's 1958 motion to enjoin consummation of the merger. Their consideration by this Court as an original matter is entirely inappropriate, and [\*\*\*\*23] in no event do any of them affect the *validity* of the Commission's order approving the merger.<sup>2</sup>

## I.

Section 15 of the Clayton Act, [15 U. S. C. § 25](#), grants jurisdiction to the United States District Courts "to prevent and restrain violations" of the Clayton Act, and empowers the United States Attorneys "to institute proceedings in equity to [\*\*\*\*24] prevent and restrain such violations." The same statutory section provides that pending determination of the merits of a complaint filed by the United States "and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises." Consequently, it is the duty of the District Court before which an antitrust suit is pending to pass on the desirability of temporary relief in order to avoid later problems of "unscrambling." In the case before us, it was not until more than a year after the Government knew of El Paso's intention to merge Pacific's assets with its own that it requested the District Court to enjoin the execution of [\*496] this plan. The court's denial of the temporary injunction must be presumed to have been based on its evaluation of the likelihood of success of the antitrust suit and of the difficulties that might

<sup>1</sup> The fact that such a motion was made and denied does not appear in the record before this Court. However, it is asserted in El Paso's brief and is not denied by any of the other parties.

<sup>2</sup> Because of the posture of this case, I would not reach the question as to what weight should be given to the pendency of administrative merger proceedings by an antitrust court which is asked to grant interlocutory relief. However, I think more can be said than the Court does in favor of staying the hand of an antitrust court pending consideration by the appropriate agency of matters touching on "those areas . . . in which active regulation has been found necessary to compensate for the inability of competition to provide adequate regulation." [Federal Communications Comm'n v. RCA Communications, Inc., 346 U.S. 86, 92](#).

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arise if interlocutory relief were denied. Not having renewed its motion, the Government may surely not revive it indirectly by attacking the Commission's order. Moreover, by what authority is petitioner, the State of California, an intervenor only in the Commission's proceedings, [\*\*\*\*25] empowered to assert claims relating to the enforcement of the antitrust laws that are unavailable to the Government, the plaintiff in the antitrust action?

## II.

Similarly, whatever is meant by the suggestion that the Commission's approval carries "momentum" into the antitrust suit, this factor is one that should be remedied, if necessary, by purging the antitrust proceedings of any improper influence deriving from the agency determination, not by invalidating the administrative action. The Court's holding -- which is unnecessary to a decision of this case and, as the Government argues, also premature<sup>3</sup> -- that the concluding proviso of § 7 of the Clayton Act gives the Commission's approval of this asset merger no immunizing effect against the [\*\*\*64] antitrust claim, surely lends added support to the view that the agency is permitted to consider this application as it might consider any other which suggests no difficulties under the antitrust laws. If the Commission's approval is irrelevant to the merits of the Government's [\*497] antitrust suit, it is the court considering the antitrust claim which should guard itself against giving weight to this irrelevancy, not the [\*\*\*\*26] Commission passing on the merger application. And if the lower courts should ultimately go wrong in this [\*\*910] regard, their error would be correctible in this Court.

Likewise there is little substance to the difficulty which this Court finds in a court "undoing what was done" (*ante*, p. 489) by the Commission. Had the antitrust trial court been fearful on that score it could have entered an appropriate interlocutory order ensuring that nothing would be done while the litigation was pending.

## III.

Finally, I do not think that the record in this case justifies a conclusion that the Commission's refusal to postpone consideration of the merger application amounted to an abuse of [\*\*\*\*27] discretion. On the Court's premise that the agency's approval did not immunize the transaction from antitrust liability, the Commission's action in granting the certificate of public convenience and necessity did no more than *permit* the merger to be consummated subject to all possible antitrust infirmities. And even proceeding on the Commission's premise that the proviso of § 7 of the Clayton Act gives it the power to immunize mergers from antitrust liability, its decision to go ahead after being notified by the District Court that the motion to continue the antitrust suit had been granted could hardly be regarded as an abuse of discretion.

In conclusion, the Court's decision in this case creates a wholly artificial imbalance between antitrust law enforcement and administrative regulation with respect to federally regulated industries. By displacing the continuing supervision of a court over such interlocutory [\*498] terms as are "just in the premises" with an absolute rule prohibiting the regulating agency from considering applications relating to matters which are also involved in a pending antitrust suit, this decision seems to leave no room for sensible accommodation [\*\*\*\*28] of the two sets of interests in a given instance. Neither the inflexible rule announced by the Court nor its decision on the facts of this case is supported by reason or authority.

I would affirm.

## References

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Annotation References:

1. Factors properly considered by Federal Power Commission upon application for certificate of public convenience and necessity under Natural Gas Act. 5 L ed 2d 1000.

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<sup>3</sup> Whatever may be the impact on a § 7 action of the Commission's approval of this merger, it can be felt only in the antitrust suit. Consequently, I would, as the Solicitor General has suggested, leave this issue open for consideration in the District Court should the agency's order be asserted as a defense in that action.

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2. The doctrine of primary administrative jurisdiction. 94 L ed 806; 1 L ed 2d 1596.

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## United States v. Loew's

Supreme Court of the United States

October 16, 1962, Argued ; November 5, 1962, Decided \*

No. 42

**Reporter**

371 U.S. 38 \*; 83 S. Ct. 97 \*\*; 9 L. Ed. 2d 11 \*\*\*; 1962 U.S. LEXIS 2332 \*\*\*\*; 135 U.S.P.Q. (BNA) 201

UNITED STATES v. LOEW'S INCORPORATED ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

**Disposition:** [189 F.Supp. 373](#), judgments vacated and causes remanded.

## Core Terms

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films, license, package, Station, decree, patent, Pictures, block, television station, block booking, tying arrangement, distributors, contracts, Artists, negotiations, television, monopoly, booked, economic power, tying product, feature film, Differentials, conditioning, cases, tied product, Sherman Act, modification, products, anti trust law, judgments

## LexisNexis® Headnotes

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Antitrust & Trade Law > Sherman Act > General Overview

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

### [HN1](#) [] Antitrust & Trade Law, Sherman Act

Tying agreements serve hardly any purpose beyond the suppression of competition. They are an object of antitrust concern for two reasons -- they may force buyers into giving up the purchase of substitutes for the tied product, and they may destroy the free access of competing suppliers of the tied product to the consuming market. A tie-in contract may have one or both of these undesirable effects when the seller, by virtue of his position in the market for the tying product, has economic leverage sufficient to induce his customers to take the tied product along with the tying item.

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\* Together with No. 43, Loew's Incorporated et al. v. United States, and No. 44, C & C Super Corp. v. United States, also on appeals from the same Court.

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

**HN2** [down arrow] Price Fixing & Restraints of Trade, Tying Arrangements

The standard of illegality of a tying agreement is that the seller must have sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product. Market dominance -- some power to control price and to exclude competition -- is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.

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

Copyright Law > ... > Multilateral Treaties > Berne Convention > Formalities

Evidence > Inferences & Presumptions > General Overview

## **HN3** Price Fixing & Restraints of Trade, Tying Arrangements

The requisite economic power for an illegal tying agreement is presumed when the tying product is patented or copyrighted.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

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

**[HN4](#)** Tying Arrangements, Sherman Act Violations

The existence of a valid patent on the tying product, without more, establishes a distinctiveness sufficient to conclude that any tying arrangement involving the patented product would have anticompetitive consequences.

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

**HN5** Price Fixing & Restraints of Trade, Tying Arrangements

The mere presence of competing substitutes for a tying product is insufficient to destroy the legal, and indeed the economic, distinctiveness of a copyrighted product. By the same token, the distinctiveness of a copyrighted tied product is not inconsistent with the fact of competition which is suppressed by the tying arrangements.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Copyright Law > ... > Civil Infringement Actions > Remedies > Injunctions

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > Scope > General Overview

## **HN6** Monopolies & Monopolization, Attempts to Monopolize

Accommodation between the statutorily dispensed monopoly in the combination of contents in a patented or copyrighted product and the statutory principles of free competition demands that extension of a patent or copyright monopoly by the use of tying agreements be strictly confined.

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations](#)

[Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview](#)

## **HN7** Tying Arrangements, Sherman Act Violations

The thrust of the antitrust laws cannot be avoided merely by claiming that otherwise illegal conduct is compelled by contractual obligations. Were it otherwise, the antitrust laws could be nullified. Contractual obligations cannot thus supersede statutory imperatives. Hence, tying arrangements, once found to exist in a context of sufficient economic power, are illegal without elaborate inquiry as to the business excuse for their use.

[Civil Procedure > Judgments > Entry of Judgments > Consent Decrees](#)

[Civil Procedure > Judicial Officers > Judges > General Overview](#)

[Civil Procedure > Appeals > Standards of Review > General Overview](#)

## **HN8** Entry of Judgments, Consent Decrees

A trial judge's ability to formulate a decree tailored to deal with the violations existent in each case is normally superior to that of any reviewing court, due to his familiarity with testimony and exhibits. Notwithstanding the policy that primary responsibility for the decree must rest with the trial judge if workable results are to obtain, it is the reviewing court's duty to examine the decree in light of the record to see that the relief it affords is adequate to prevent the recurrence of the illegality which brought on the given litigation.

[Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview](#)

## **HN9** Injunctions, Grounds for Injunctions

To ensure that injunctive relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined.

## **Lawyers' Edition Display**

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### **Summary**

The main issue in the present case was the validity, under 1 of the Sherman Act, of the practice by distributors of copyrighted motion-picture films of conditioning the sale or licensing of one or more copyrighted feature films to television stations upon the purchase of one or more other unwanted or inferior films. In a civil action brought by the United States in the United States District Court for the Southern District of New York for the purpose of enjoining the practice, the District Court granted injunctive relief. ([189 F Supp 373](#).)

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On direct appeal of the distributors, the Supreme Court, in an opinion by Goldberg, J., unanimously held that the practice violated 1 of the Sherman Act.

Upon the government's cross appeal asserting the inadequacy of the relief granted by the decree below, the Court vacated the decree, ordering an enlargement of its provision in the particulars specified in headnote 22, infra. Harlan, J., with the concurrence of Stewart, J., dissented, expressing the view that the decree should be left undisturbed.

## **Headnotes**

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RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 62 > tying agreements -- copyrighted motion-picture films. -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C]

The practice by distributors of motion picture films of conditioning the sale of one or more copyrighted feature films to television stations upon the purchase of one or more other films violates 1 of the Sherman Act ([15 USC 1](#)), declaring illegal every contract in restraint of trade; these tying arrangements both by their inherent nature and by their effect injuriously restrain trade.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 30 > tying agreements. -- > Headnote:

[LEdHN\[2\]](#) [2]

Tying agreements serve hardly any purpose beyond the suppression of competition; they are an object of antitrust concern because they may force buyers into giving up the purchase of substitutes for the tied product and may destroy the free access of competing suppliers of the tied product to the consuming market.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 30 > tying agreements -- economic power. --

> Headnote:

[LEdHN\[3\]](#) [3]

The standard of illegality of a tying agreement is that the seller must have sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product; market dominance, that is, some power to control price and to exclude competition, is by no means the only test of the seller's requisite economic power; even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 62 > tying agreements -- market dominance.

-- > Headnote:

[LEdHN\[4A\]](#) [4A] [LEdHN\[4B\]](#) [4B]

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Market dominance on the part of the seller of a tying product as one of the tests of the illegality of the tying agreement does not necessitate a demonstration of market power in the sense of 2 of the Sherman Act ([15 USC 2](#)), which makes it a criminal offense to monopolize, or attempt to monopolize, interstate or foreign commerce.

EVIDENCE § 343.5 > tying agreements -- copyrighted motion-picture films. -- > Headnote:

[LEdHN\[5\]](#) [5]

As to tying agreements involving a product which is patented or copyrighted, it is presumed that the seller has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product.

PATENTS § 4 > extent of right. -- > Headnote:

[LEdHN\[6\]](#) [6]

A patentee may not use his patent rights to exact tribute for other articles.

PATENTS § 4 > purpose of patent laws. -- > Headnote:

[LEdHN\[7\]](#) [7]

One of the objectives of the patent laws is to reward uniqueness.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 55 > patents -- tying agreements. --

> Headnote:

[LEdHN\[8\]](#) [8]

Any tying arrangement involving a patented product has anticompetitive consequences.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 62 > tying arrangements -- motion pictures. --

> Headnote:

[LEdHN\[9\]](#) [9]

The rule under which tying agreements involving copyrighted motion pictures are in violation of 1 of the Sherman Act ([15 USC 1](#)) embraces tying agreements between distributors of motion picture films and television stations, a copyrighted feature film not losing its legal or economic uniqueness because it is shown on a television rather than a movie screen.

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EVIDENCE § 343.5 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 62 > tying agreements -- copyrighted motion-picture films -- presumption of uniqueness. -- > Headnote:

LEdHN[10] [  ] [10]

The findings of a district judge, supported by the record in an action by the United States to enjoin distributors of copyrighted motion-picture films from conditioning the sale of one or more of such films to television stations upon the purchase of one or more other films, that each film block booked by the television stations was in itself a unique product, that feature films varied in theme, in artistic performance, stars, audience appeal, etc., and were not fungible, and that since each of the distributors by reason of its copyright had a monopolistic position as to each tying product, sufficient economic power to impose an appreciable restraint on free competition in the tied product was present, confirm the presumption of uniqueness resulting from the existence of the copyright itself.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 62 > tying agreements -- motion-picture films  
-- effect on competition. -- > Headnote:

LEdHN[11] [  ] [11]

There can be no question as to the adverse effects on free competition resulting from illegal block booking contracts between distributors of copyrighted motion-picture films and television stations where it appears that the television stations forced by the distributors to take unwanted films were denied access to films marketed by other distributors who, in turn, were foreclosed from selling the stations.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 27 > tying agreements -- motion- picture films  
-- substantiality of commerce involved. -- > Headnote:

LEdHN[12] [  ] [12]

There is no question as to the substantiality of the commerce involved in illegal block booking contracts between distributors of copyrighted motion- picture films and television stations, where 25 contracts found to have been illegally block booked involved payments to distributors ranging from \$ 60,800 to over \$ 2,500,000, and a substantial portion of the licensing fees represented the cost of the inferior films which the stations were required to accept.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 62 > tying agreements -- motion-picture films -- competing substitutes. -- > Headnote:

LEdHN[13] [  ] [13]

In determining the illegality of tying agreements involving copyrighted products, the mere presence of competing substitutes for the tying product--such as in the case of block booking contracts between distributors of copyrighted motion-picture films and television stations, the availability of other programming material as well as other feature films--is insufficient to destroy the legal and economic distinctiveness of the copyrighted product; by the same token, the distinctiveness of the copyrighted tied product is not inconsistent with the fact of competition, in the form of other programming material and other films, which is suppressed by the tying arrangements.

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 55 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 62 > tying agreements -- patents -- copyrights. -- > Headnote: [LEdHN\[14\]](#) [14]

Accommodation between the statutorily dispensed monopoly in the combination of contents in the patented or copyrighted product and the statutory principles of free competition demands that extension of the patent or copyright monopoly by the use of tying agreements be strictly confined.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 62 > licensing. -- > Headnote: [LEdHN\[15\]](#) [15]

A refusal to license one or more copyrights unless another is accepted is illegal.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 68 > illegal block booking contracts -- motion pictures -- injunctive relief. -- > Headnote:

LEdHN[16] [  ] [16]

Even though the number of illegal block booking contracts between distributors of copyrighted motion-picture films and television stations is small, injunctive relief is warranted, where the trial court, exercising sound judgment, concludes that such relief is necessary to prevent further violations; this is particularly so where the record shows that one of the distributors instituted its policy of making individual films available only shortly after suit was brought, and another distributor publicized its willingness to deal in individual films only after the commencement of suit was imminent.

APPEAL § 1482 > review of injunctive relief -- in antitrust action. -- > Headnote:

LEdHN[17] [  ] [17]

The legal conclusions and decree of a district judge granting injunctive relief under the Sherman Act against illegal block booking contracts between distributors of copyrighted motion-picture films and television stations will not be disturbed by the United States Supreme Court merely because the judge did not find illegal more than a small number of contracts, where the illegal behavior of each defendant had substantial anticompetitive effects.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 5 > contractual obligations as defense. --> Headnote:

LEdHN[18] [18]

The thrust of the antitrust laws cannot be avoided merely by claiming that the otherwise illegal conduct is compelled by contractual obligations; such obligations cannot supersede statutory imperatives.

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 30 > tying agreements. -- > Headnote: [LEdHN/19](#) [19]

Tying agreements, once found to exist in a context of sufficient economic power, are illegal without elaborate inquiry as to the business excuse for their use.

APPEAL § 1400 > scope of decree in antitrust suit -- reviewability. -- > Headnote:

LEdHN[20] [  ] [20]

Although primary responsibility for the formulation of a decree in an antitrust suit must rest with the trial judge if workable results are to obtain, it is the duty of the United States Supreme Court to examine the decree in the light of the record to see that the relief it affords is adequate to prevent the recurrence of the illegality which brought on the given litigation.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 75 > decree in antitrust suit -- scope of relief.

-- > Headnote:

[LEdHN\[21\]](#) [  ] [21]

To insure effectual relief in an antitrust action, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 81 > decree in antitrust suit -- enlargement. --> Headnote:

[LEdHN\[22A\]](#) [  ] [22A] [LEdHN\[22B\]](#) [  ] [22B] [LEdHN\[22C\]](#) [  ] [22C]

A decree of a District Court enjoining as illegal block booking contracts between distributors of copyrighted motion-picture films and television stations should be enlarged so as to (1) require the distributors to price the films individually and offer them on a picture-by-picture basis; (2) prohibit, with the exception of all legitimate cost justifications, differentials in price between a film when sold individually and when sold as part of a package; (3) proscribe temporary refusals by a distributor to deal on less than a block basis while he is negotiating with a competing television station for a package sale, but permitting a seller briefly to defer licensing or selling to a customer pending the expeditious conclusion of bona fide negotiations already being conducted with a competing station on a proposal wherein the distributor has simultaneously offered to license or sell films either individually or in a package.

## Syllabus

1. Section 1 of the Sherman Act was violated when individual distributors of copyrighted feature motion picture films for television exhibition engaged in block booking such films to television broadcasting stations -- *i. e.*, conditioning the license or sale of the right to exhibit one or more feature films upon acceptance by each station of a package or block of films containing one or more unwanted or inferior films -- even in the absence of any

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combination or conspiracy between the distributors and any monopolization or attempt to monopolize. Pp. 39-50, 52.

2. The fact that, on the records in these cases, each defendant was found to have entered into a comparatively small number of illegal contracts did not make it improper for the District Court to grant injunctive relief. Pp. 50-51.

3. The block booking engaged in by one of the defendants cannot be justified or excused by its plea of business necessity, since the thrust of [\*\*\*2] the antitrust laws cannot be avoided merely by claiming that the otherwise illegal conduct was compelled by contractual obligations to a third party. Pp. 51-52.

4. The decrees entered by the District Court should be amended so as to:

(a) Require the defendants to price films individually and offer them on a picture-by-picture basis. Pp. 52-54.

(b) Prohibit differentials in price between a film when sold individually and when sold as part of a package, except when such price differentials are justified by relevant and legitimate cost considerations. Pp. 54-55.

(c) Proscribe "temporary" refusals by a distributor to deal on less than a block basis, except that a distributor may briefly defer licensing or selling to a customer pending the expeditious conclusion of bona fide negotiations already being conducted with a competing station on a proposal wherein the distributor has simultaneously offered to license or sell films either individually or in a package. P. 55.

**Counsel:** Daniel M. Friedman argued the cause for the United States. With him on the briefs were Solicitor General Cox, Assistant Attorney General Loewinger, Lionel Kestenbaum and Richard A. Solomon.

Louis Nizer argued [\*\*\*3] the cause for Loew's Incorporated et al., appellees in No. 42 and appellants in No. 43. With him on the briefs was Benjamin Melniker.

Myles J. Lane argued the cause and filed briefs for Screen Gems, Inc., appellee in No. 42 and appellant in No. 43. With him on the briefs was Everett A. Frohlich.

Mervin C. Pollak argued the cause and filed briefs for C & C Super Corp., appellee in No. 42 and appellant in No. 44.

Justin M. Golenbock argued the cause for National Telefilm Associates, Inc., appellee in No. 42. With him on the brief were Russell S. Knapp and Seymour Shainswit.

**Judges:** Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg

**Opinion by:** GOLDBERG

## Opinion

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[202] [\*39] [\*\*15] [\*\*99] MR. JUSTICE GOLDBERG delivered the opinion of the Court.

LEdHN[1A] [↑] [1A]

These consolidated appeals present as a key question the validity under § 1 of the Sherman Act<sup>1</sup> of block booking of copyrighted feature motion pictures for television exhibition. We hold that the tying agreements here are illegal and in violation of the Act.

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<sup>1</sup> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ." 26 Stat. 209 (1890), as amended, 15 U. S. C. § 1.

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[\*\*\*\*4] [\*40] The United States brought separate civil antitrust actions in the Southern District of New York in 1957 against six major distributors of pre-1948 copyrighted motion picture feature films for television exhibition, alleging that each defendant had engaged in block booking in violation of § 1 of the Sherman Act. The complaints asserted that the defendants had, in selling to television stations, conditioned the license or sale of one or more feature films upon the acceptance by the station of a package or block containing one or more unwanted or inferior films. No combination or conspiracy among the distributors was alleged; nor was any monopolization or attempt to monopolize under § 2 of the Sherman Act averred. The sole claim of illegality rested on the manner in which each defendant had marketed its product. The successful pressure applied to television station customers to accept inferior films along with desirable pictures was the gravamen of the complaint.

After a lengthy consolidated trial, the district judge filed exhaustive findings of fact, conclusions of law, and a carefully reasoned opinion, 189 F.Supp. 373, in which he found that the actions [\*\*\*\*5] of the defendants constituted violations of § 1 of the Sherman Act. The conclusional finding of fact and law was that

". . . the several defendants have each, from time to time and to the extent set forth in the specific findings of fact, licensed or offered [\*\*100] to license one or more feature films to television stations on condition that the licensee also license one or more other such feature films, and have, from time to time and to the extent set forth in the specific findings of fact, refused, expressly or impliedly, to license feature films to television stations unless one or more other such feature films were accepted by the licensee." 189 F.Supp., at 397-398.

[\*41] The judge recognized that there was keen competition between the defendant distributors, and therefore rested his conclusion solely on the individual behavior of each in engaging in block booking. In reaching his decision he carefully considered the evidence relating to each of the 68 licensing agreements that the Government had contended involved block booking. He concluded that only 25 of the contracts were illegally entered into. Nine of these belonged to defendant C & C Super [\*\*\*\*6] Corp., which had an admitted policy of insisting on block booking that it sought to justify on special grounds.

Of the others, defendant Loew's, Incorporated, had in two negotiations that resulted in licensing agreements declined to furnish stations KWTV of Oklahoma City and WBRE of Wilkes-Barre with individual [\*\*\*16] film prices and [203] had refused their requests for permission to select among the films in the groups. Loew's exacted from KWTV a contract for the entire Loew's library of 723 films, involving payments of \$ 314,725.20. The WBRE agreement was for a block of 100 films, payments to total \$ 15,000.

Defendant Screen Gems, Inc., was also found to have block booked two contracts, both with WTOP of Washington, D. C., one calling for a package of 26 films and payments of \$ 20,800 and the other for 52 films and payments of \$ 40,000. The judge accepted the testimony of station officials that they had requested the right to select films and that their requests were refused.

Associated Artists Productions, Inc., negotiated four contracts that were found to be block booked. Station WTOP was to pay \$ 118,800 for the license of 99 pictures, which were divided into three groups [\*\*\*\*7] of 33 films, based on differences in quality. To get "Treasure of the Sierra Madre," "Casablanca," "Johnny Belinda," "Sergeant York," and "The Man Who Came to Dinner," among others, WTOP also had to take such films as "Nancy Drew [\*42] Troubleshooter," "Tugboat Annie Sails Again," "Kid Nightingale," "Gorilla Man," and "Tear Gas Squad." A similar contract for 100 pictures, involving a license fee of \$ 140,000, was entered into by WMAR of Baltimore. Triangle Publications, owner and operator of five stations, was refused the right to select among Associated's packages, and ultimately purchased the entire library of 754 films for a price of \$ 2,262,000 plus 10% of gross receipts. Station WJAR of Providence, which licensed a package of 58 features for a fee of \$ 25,230, had asked first if certain films it considered undesirable could be dropped from the offered packages and was told that the packages could not be split.

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Defendant National Telefilm Associates was found to have entered into five block booked contracts. Station WMAR wanted only 10 Selznick films, but was told that it could not have them unless it also bought 24 inferior films from the "TNT" package and 12 unwanted [\*\*\*8] "Fabulous 40's." It bought all of these, for a total of \$ 62,240. Station WBRE, before buying the "Fox 52" package in its entirety for \$ 7,358.50, requested and was refused the right to eliminate undesirable features. Station WWLP of Springfield, Massachusetts, inquired about the possibility of splitting two of the packages, was told this was not possible, and then bought a total of 59 films in two packages for \$ 8,850. A full package contract for National's "Rocket 86" group of 86 films was entered into by KPIX of San Francisco, payments to total \$ 232,200, after KPIX requested and was denied permission [\*\*101] to eliminate undesirable films from the package. Station WJAR wanted to drop 10 or 12 British films from this defendant's "Champagne 58" package, was told that none could be deleted, and then bought the block for \$ 31,000.

The judge found that defendant United Artists Corporation had in three consummated negotiations conditioned the sale of films on the purchase of an entire [\*43] package. The "Top 39" were licensed by WAAM of Baltimore for \$ 40,000 only after receipt of a refusal to sell 13 of the 39 films in the package. Station WHTN of Huntington, West Virginia, [\*\*\*9] purchased "Award 52" for \$ 16,900 after United Artists refused to deal on any basis other than [\*\*\*17] purchase of the entire 52 films. Thirty-nine films were purchased by WWLP for \$ 5,850 after an initial inquiry about selection of titles was refused.

Since defendant C & C was found to have had an overall policy of block booking, the court did not analyze the particular circumstances of the nine negotiations which had resulted in the licensing of packages of films. C & C's policies resulted in at least one station having to take a package in which "certain of the films were unplayable since they had a foreign language sound track." [189 F.Supp., at 389.](#)

The court entered separate final judgments against the defendants, wherein each was enjoined from

"(A) Conditioning or tying, or attempting to condition or tie, the purchase or license of the right to exhibit any feature film over any television station upon the purchase or license of any other film;

"(B) Conditioning the purchase or license of the right to exhibit any feature film over any television station upon the purchase or license for exhibition over any other television station of that feature film, or [\*\*\*10] any other film;

"(C) Entering into any agreement to sell or license the right to exhibit any feature film over any television station in which the differential between the price or fee for such feature film when sold or licensed alone and the price or fee for the same film when sold or licensed with one or more other film [sic] has the effect of conditioning the sale or license of such film upon the sale or license of one or more other films."

[\*44] [204] All of the defendants except National Telefilm<sup>2</sup> appeal from the decree. The appeals of defendants Loew's, Screen Gems, Associated Artists, and United Artists raise identical issues and are consolidated as No. 43. The appeal of defendant C & C raises additional issues, and is therefore separately numbered as No. 44. The Government, although it won on the merits below, asserts in a cross-appeal (No. 42) that the scope and specificity of the decree entered by the District Court were inadequate to prevent the continued attainment of illegal objectives. It seeks to have the decree broadened in a number of ways. All of the defendants below oppose these modifications. The cases are here on direct appeal from the District Court [\*\*\*11] under [§ 2](#) of the Expediting Act, 32 Stat. 823, as amended, [15 U. S. C. § 29](#). We noted probable jurisdiction, 368 U.S. 973, and consolidated the appeals. We shall consider No. 43 first, since appellants there raise the fundamental question whether their activities were in violation of the antitrust laws. We shall thereafter consider No. 44, the special arguments of appellant C & C, and finally No. 42, the Government's request for broadening the decree.

I.

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<sup>2</sup>National Telefilm has, however, filed a brief in opposition to the Government's requests for modifications in the decree, discussed below.

[\*\*102] [LEdHN\[2\]](#)<sup>1</sup> [2][LEdHN\[3\]](#)<sup>1</sup> [3] his case raises the recurring question of whether specific tying arrangements violate § 1 of the Sherman Act.<sup>3</sup> This Court has recognized that " [\*\*\*12] [HN1](#)<sup>1</sup> tying agreements [\*\*\*18] serve hardly any purpose beyond the suppression of competition," [Standard Oil Co. of California v. United States, 337 U.S. 293, 305-306](#). They are an object of anti-trust [\*45] concern for two reasons -- they may force buyers into giving up the purchase of substitutes for the tied product, see [Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 605](#), and they may destroy the free access of competing suppliers of the tied product to the consuming market, see [International Salt Co. v. United States, 332 U.S. 392, 396](#). A tie-in contract may have one or both of these undesirable effects when the seller, by virtue of his position in the market for the tying product, has economic leverage sufficient to induce his customers to take the tied product along with the tying item. [HN2](#)<sup>1</sup> The standard of illegality is that the seller must have "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product . . . ." [Northern Pacific R. Co \[\\*\\*\\*13\] . v. United States, 356 U.S. 1, 6](#). Market dominance -- some power to control price and to exclude competition -- is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.<sup>4</sup>

[LEdHN\[4A\]](#)<sup>1</sup> [4A]

[\*\*\*\*14] [LEdHN\[5\]](#)<sup>1</sup> [5][LEdHN\[6\]](#)<sup>1</sup> [6][HN3](#)<sup>1</sup> The requisite economic power is presumed when the tying product is patented or copyrighted, [International Salt Co. v. United States, 332 U.S. 392; United States \[\\*46\] v. Paramount Pictures, Inc., 334 U.S. 131](#). This principle grew out of a long line of patent cases which had eventuated in the doctrine that a patentee who utilized tying arrangements would be denied all relief against infringements of his patent. [Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502](#); [Carbice Corp. v. American Patents Dev. Corp., 283 U.S. 27](#); [Leitch Mfg. Co. v. Barber Co., 302 U.S. 458](#); [Ethyl Gasoline Corp. v. United States, 309 U.S. 436](#); [Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488](#); [Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661](#). [\*\*\*19] These [\*\*\*15] cases reflect a hostility to use of the statutorily granted patent monopoly to extend the patentee's economic control to unpatented products. The patentee is protected as to his invention, but may not use his patent rights to exact tribute for other articles.

[\*\*103] [LEdHN\[7\]](#)<sup>1</sup> [7][LEdHN\[8\]](#)<sup>1</sup> [8] Since one of the objectives of the patent laws is to reward uniqueness, the principle of these cases was carried over into **antitrust law** on the theory that [HN4](#)<sup>1</sup> the [205] existence of a valid patent on the tying product, without more, establishes a distinctiveness sufficient to conclude that any tying arrangement involving the patented product would have anticompetitive consequences. *E. g.*, [International Salt Co. v. United States, 332 U.S. 392](#). In [United States v. Paramount Pictures, Inc., 334 U.S. 131, 156-159](#), the principle

<sup>3</sup> See [International Salt Co. v. United States, 332 U.S. 392](#); [United States v. Paramount Pictures, Inc., 334 U.S. 131](#); [Times-Picayune Pub. Co. v. United States, 345 U.S. 594](#); [Northern Pacific R. Co. v. United States, 356 U.S. 1](#).

<sup>4</sup> Since the requisite economic power may be found on the basis of either uniqueness or consumer appeal, and since market dominance in the present context does not necessitate a demonstration of market power in the sense of § 2 of the Sherman Act, it should seldom be necessary in a tie-in sale case to embark upon a full-scale factual inquiry into the scope of the relevant market for the tying product and into the corollary problem of the seller's percentage share in that market. This is even more obviously true when the tying product is patented or copyrighted, in which case, as appears in greater detail below, sufficiency of economic power is presumed. Appellants' reliance on [United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377](#), is therefore misplaced.

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of the patent cases was applied to copyrighted feature films which had been block booked into movie theaters.  
 [\*\*\*\*16] The Court reasoned that

"The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. In *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127, Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress, 'The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits [\*47] derived by the public from the labors of authors.' It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius. But the reward does not serve its public purpose if it is not related to the quality of the copyright. Where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other. The practice tends to equalize rather than differentiate the reward for the individual copyrights. Even where all the films included in the package are of equal quality, the requirement that all be taken if one is desired increases the market for some. Each stands not on its own footing but in whole or in [\*\*\*\*17] part on the appeal which another film may have. As the District Court said, the result is to add to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses." 334 U.S., at 158.

Appellants attempt to distinguish the *Paramount* decision in its relation to the present facts: the block booked sale of copyrighted feature films to exhibitors in a new medium -- television. Not challenging the District Court's finding that they did engage in block booking, they contend that the uniqueness attributable to a copyrighted feature film, though relevant in the movie-theater context, is lost when the film is being sold for television use. Feature films, they point out, constitute less than 8% of television programming, and they assert that films are "reasonably interchangeable" with other types of programming material and with other feature films as well. Thus they argue that their behavior is not to be judged by the principle of the patent cases, as applied to copyrighted materials in *Paramount Pictures*, but by the general [\*48] principles which govern the validity of tying arrangements of nonpatented products, e. g. [\*\*\*\*18], *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 6, 11. [\*\*\*20] They say that the Government's proof did not establish their "sufficient economic power" in the sense contemplated for nonpatented products.<sup>5</sup>

LEdHN[4B] [↑] [4B]

LEdHN[9] [↑] [9] Appellants cannot escape the applicability of *Paramount Pictures*. A copyrighted feature film does not lose its [\*\*104] legal or economic uniqueness because it is shown on a television rather than a movie screen.

LEdHN[10] [↑] [10] [\*\*\*\*19] The district judge found that each copyrighted film block booked by appellants for television use "was in itself a unique product"; that feature films "varied in theme, in artistic performance, in stars, in audience appeal, etc., and were not fungible; and that since each defendant by reason of its copyright had a "monopolistic" position as to each tying product, "sufficient economic power" to impose an appreciable restraint on free competition in the tied product was present, as demanded by the *Northern Pacific* decision. 189 F.Supp., at

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<sup>5</sup> Appellants' framing of their argument in terms of each of them not having dominance in the market for television exhibition of feature films misconceives the applicable legal standard. As noted, supra, p. 45, "sufficient economic power" as contemplated by the *Northern Pacific* case is a term more inclusive in scope than "market dominance."

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381.<sup>6</sup> We agree. These findings of the district judge, supported by the record, confirm the presumption of uniqueness resulting from the existence of the copyright itself.

LEdHN[11] [11] LEdHN[12] [12] LEdHN[13] [13] Moreover, there can be no question in this case of the adverse effects on free competition resulting from appellants' [\*49] illegal block booking contracts. Television stations forced by appellants to take unwanted films were denied access to films marketed by other distributors who, in turn, were foreclosed from selling to the stations. Nor can there be any question as to the substantiality of the commerce involved. The 25 contracts found to have been illegally block booked involved payments to appellants ranging from \$ 60,800 in the case of Screen Gems [206] to over \$ 2,500,000 in the case of Associated Artists. A substantial portion of the licensing fees represented the cost of the inferior films which the stations were required to accept. These anticompetitive consequences are an apt illustration of the reasons underlying our recognition that HN5 the mere presence of competing [\*\*\*21] substitutes for the tying product, here taking the form of other programming material as well as other feature films, is insufficient to destroy the legal, and indeed the economic, distinctiveness of the copyrighted product. Standard Oil Co. of California v. United States, 337 U.S. 293, 307; Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 611 and n. 30. By the same token, the distinctiveness of the copyrighted tied product is not inconsistent with the fact of competition, in the form of other programming material and other films, which is suppressed by the tying arrangements.

LEdHN[1B] [1B] LEdHN[14] [14] It is therefore clear that the tying [\*\*\*21] arrangements here both by their "inherent nature" and by their "effect" injuriously restrained trade. United States v. American Tobacco Co., 221 U.S. 106, 179.HN6 Accommodation between the statutorily dispensed monopoly in the combination [\*\*\*22] of contents in the patented or copyrighted product and the statutory principles of free competition demands that extension of the patent or copyright monopoly by the use of tying agreements be strictly confined. There may be rare circumstances in which the doctrine we have enunciated under § 1 of the Sherman Act prohibiting tying arrangements involving patented or copyrighted [\*50] tying products is inapplicable. However, we find it difficult to conceive of such a case, and the present case is clearly not one.

LEdHN[15] [15] The principles underlying our *Paramount Pictures* decision have general application to tying arrangements involving copyrighted products, and govern here. Applicability of *Paramount Pictures* brings with it a meeting of the test of *Northern Pacific*, since *Paramount Pictures* is but a particularized application of the general doctrine as reaffirmed in *Northern Pacific*. Enforced block [\*105] booking of films is a vice in both the motion picture and television industries, and that the sin is more serious (in dollar amount) in one than the other does not expiate the [\*\*\*23] guilt for either. Appellants' block booked contracts are covered by the flat holding in Paramount Pictures, 334 U.S., at 159, that "a refusal to license one or more copyrights unless another copyright is accepted" is "illegal."

LEdHN[16] [16] LEdHN[17] [17] Appellants (other than C & C) make the additional argument that each of them was found to have entered into such a small number of illegal contracts as to make it improper to enter injunctive relief. Appellants urge that their over-all sales policies were to allow selective purchasing of films, and that in light of this, the fact that a few contracts were found to be illegal does not justify the entering of injunctive relief. We disagree. Illegality having been properly found, appellants cannot now complain that its incidence was too scattered to warrant injunctive relief. The trial judge, exercising sound judgment, has concluded that injunctive relief is necessary to prevent further violations. We think that finding wholly warranted. Moreover, the record shows that Loew's [\*\*\*24] only instituted its policy of making individual films available shortly after suit was brought, and there is evidence that United Artists was conscientious in publicizing its willingness [\*51] to deal in individual films only after the commencement of suit was imminent. There is no reason to disturb the judge's legal conclusions and decree merely because he did not find more illegal agreements when, as here, the illegal behavior of each defendant had substantial anticompetitive effects.

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<sup>6</sup> To use the trial court's apt example, forcing a television station which wants "Gone With The Wind" to take "Getting Gertie's Garter" as well is taking undue advantage of the fact that to television as well as motion picture viewers there is but one "Gone With The Wind."

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11.

[LEdHN\[1C\]](#) [↑] [1C] [LEdHN\[18\]](#) [↑] [18] [LEdHN\[19\]](#) [↑] [19] Appellant C & C in its separate appeal raises certain arguments which amount to an attempted business justification for its admitted block booking policy. C & C purchased the telecasting rights in some 742 films known as the "RKO Library." It did so with a bank loan for the total purchase price, and to get the bank loan it needed a guarantor, which it found in the [\*\*\*22] International Latex Corporation. Latex, however, demanded and secured an agreement [\*\*\*\*25] from C & C that films would not be sold without obtaining in return a commitment from television stations to show a minimum number of Latex spot advertisements in conjunction with the films. Thus, since stations could not feasibly telecast the minimum number of spots without buying a large number of films to spread them over, C & C by requiring the minimum number of advertisements effectively forced block booking on those stations which purchased its films. C & C contends the block booking was merely the by-product of two legitimate business motives -- Latex' desire for a saturation advertising campaign, and C & C's wish to buy a large film library. However, the obvious answer to this contention is that [HN7](#) [↑] the thrust of the antitrust laws cannot be avoided merely by claiming that the otherwise illegal [207] conduct is compelled by contractual obligations. Were it otherwise, the antitrust laws could be nullified. Contractual obligations cannot thus supersede statutory imperatives. Hence, tying arrangements, once found to exist in a context [\*52] of sufficient economic power, are illegal "without [\*\*\*\*26] elaborate inquiry as to . . . the business excuse for their use," *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5.

In Nos. 43 and 44, therefore, we agree with the merits of the District Court's decision. It correctly found that the conditioning of the sale of one or more copyrighted feature films to television stations upon the purchase of one or more other films is illegal. The antitrust laws do not permit a compounding of the statutorily conferred monopoly.

III.

L**E**dHN|201<sup>↑</sup>] [20] HN8<sup>↑</sup>] The trial judge's ability to formulate a decree tailored to deal with [\*\*106] the violations existent in each case is normally superior to that of any reviewing court, due to his familiarity with testimony and exhibits. Notwithstanding our belief that primary responsibility for the decree must rest with the trial judge if workable results are to obtain, it is our duty to examine the decree in light of the record to see that the relief it affords is adequate to prevent the recurrence of the illegality which brought [\*\*\*27] on the given litigation.

*United States v. United States Gypsum Co., 340 U.S. 76, 89.*

The United States contends that the relief afforded by the final judgments<sup>7</sup> is inadequate and that to be adequate it must also: (1) require the defendants to price the films individually and offer them on a picture-by-picture basis; (2) prohibit noncost-justified differentials in price between a film when sold individually and when sold as part of a package; (3) proscribe "temporary" refusals by a distributor to deal on less than a block basis while he is negotiating with a competing television station for a package sale.

[\*53] [LEdHN\[21\]](#) [↑] [21]Some of the practices which the Government seeks to have enjoined with its requested modifications are acts which may be entirely proper when viewed alone. [\*\*\*\*28] [HNg](#) [↑] To ensure, however, that relief is effectual, otherwise permissible practices connected [\*\*\*23] with the acts found to be illegal must sometimes be enjoined. *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 461; *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 724; *Hartford-Empire Co. v. United States*, 323 U.S. 386, 409; *International Salt Co. v. United States*, 332 U.S. 392, 401; *United States v. United States Gypsum Co.*, 340 U.S. 76, 88-89. When the Government has won the lawsuit, it is entitled to win the cause as well, *International Salt Co. v. United States*, *supra*, 332 U.S., at 401.

<sup>7</sup> The operative portion of the injunctions appears at p. 43, *supra*.

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~~GÃFÃHÃLÃGÃF~~

*A. Initial Offer of Individual Films, Individually Priced.*

Under the final judgments entered by the court, a distributor would be free to offer films in a package initially, without stating individual prices. If, however, he delayed at all in producing individual prices upon request, he would subject himself to a possible contempt sanction. The Government's first request would prevent this "first bite" possibility, forcing the offer of the films [\*\*\*\*29] on an individual basis at the outset (but, as we view it, not precluding a simultaneous package offer, [United States v. Paramount Pictures, Inc., supra, 334 U.S., at 159.](#))

[LEdHN\[22A\]](#) [↑] [22A]

This is a necessary addition to the decrees, in view of the evidence appearing in the record. Television stations which asked for the individual prices of some of the better pictures "couldn't get any sort of a firm kind of an answer," according to one station official. He stated that they received a "certain form of equivocation, like the price for the better pictures that we wanted was so high that it wouldn't be worth our while to discuss the matter, [\*54] . . . the implication being that it wouldn't happen." A Screen Gems intracompany memorandum about a Baton Rouge station's price request stated that "I told him that I would be happy to talk to him about it, figuring we could start the old round robin that worked so well in Houston & San Antonio." Without the proposed amendment to the decree, distributors might surreptitiously violate it by allowing or directing their salesmen to be reluctant to [\*\*\*\*30] produce the individual price list on request. This subtler form of sales pressure, though not accompanied by any observable delay over time, might well result [\*\*107] in some television stations buying the block rather than trying to talk the seller into negotiating on an individual basis. Requiring the production of the individual list on first approach will obviate this danger.

*B. Prohibition of Noncost-justified Price Differentials.*

[LEdHN\[22B\]](#) [↑] [22B]

The final judgments as entered only prohibit a price differential between a [208] film offered individually and as part of a package which "has the effect of conditioning the sale or license of such film upon the sale or license of one or more other films." The Government contends that this provision appearing by itself is too vague and will lead to unnecessary litigation. Differentials unjustified by cost savings may already be prohibited under the decree as it now appears. Nevertheless, the addition of a specific provision to prevent such differentials will prevent uncertainty in the operation of the decree. To ensure that litigation [\*\*\*24] over [\*\*\*\*31] the scope and application of the decrees is not left until a contempt proceeding is brought, the second requested modification should be added. The Government, however, seeks to make distribution costs the only saving which can legitimately be the basis of a discount. We would not so limit the relevant cost justifications. To prevent definitional arguments, and to ensure [\*55] that all proper bases of quantity discount may be used, the modification should be worded in terms of allowing all legitimate cost justifications.

*C. Prohibition of "Temporary" Refusals to Deal.*

[LEdHN\[22C\]](#) [↑] [22C]

The Government's third request is, like the first, designed to prevent distributors from subjecting prospective purchasers to a "run-around" on the purchase of individual films. No doubt temporary refusal to sell in broken lots to one customer while negotiating to sell the entire block to another is a proper business practice, viewed *in vacuo*, but we think that if permitted here it may tend to force some stations into buying pre-set packages to forestall a competitor's getting the entire group. In recognition of this [\*\*\*\*32] the Government seeks a blanket prohibition against all temporary refusals to deal. We agree in the main, except that the modification proposed by the Government fails to give full recognition to that part of this Court's holding in *Paramount Pictures* which said,

"We do not suggest that films may not be sold in blocks or groups, when there is no requirement, express or implied, for the purchase of more than one film. All we hold to be illegal is a refusal to license one or more copyrights unless another copyright is accepted." [334 U.S., at 159.](#)

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We therefore grant the Government's request, but modify it only to the limited degree necessary to permit a seller briefly to defer licensing or selling to a customer pending the expeditious conclusion of bona fide negotiations already being conducted with a competing station on a proposal wherein the distributor has simultaneously offered to license or sell films either individually or in a package.

The modifications we have specified will bring about a greater precision in the operation of the decrees. We [\*56] have concluded that they will properly protect the interest of the Government in guarding against [\*\*\*33] violations and the interest of the defendants in seeking in good faith to comply.

The judgments are vacated and the causes are remanded to the District Court for further proceedings in conformity with this opinion.

*Vacated and remanded.*

**Concur by:** HARLAN (In Part)

**Dissent by:** HARLAN (In Part)

## **Dissent**

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MR. JUSTICE HARLAN, with whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

I agree with and join in Parts I and II of the Court's opinion, relating to No. 43 and No. 44, respectively. As to Part III, relating to No. 42, I dissent. My disagreement [\*108] goes not so much to the particular additional relief granted, but to the fact that the Court has deemed it appropriate to concern itself at all with such comparatively trivial remedial glosses upon the District Court's decree.

[\*\*25] I think it distorts the proper relationship of this Court to the lower federal courts, whose assessment of a particular situation is bound to be more informed than ours, for us to exercise revisory power over the terms of antitrust relief, except in instances where things have manifestly gone awry. This is not such a case, as the meticulous handling of it by the District [\*\*\*34] Court abundantly shows. In my view its decree should be left undisturbed.

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End of Document

## White Motor Co. v. United States

Supreme Court of the United States

January 14-15, 1963, Argued ; March 4, 1963, Decided

No. 54

**Reporter**

372 U.S. 253 \*; 83 S. Ct. 696 \*\*; 9 L. Ed. 2d 738 \*\*\*; 1963 U.S. LEXIS 2578 \*\*\*\*; 1963 Trade Cas. (CCH) P70,679; 6 Fed. R. Serv. 2d (Callaghan) 1077

WHITE MOTOR CO. v. UNITED STATES

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

**Disposition:** [194 F.Supp. 562](#), reversed.

## Core Terms

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distributors, dealers, territorial, trucks, customers, restrictions, manufacturer, contracts, sales, summary judgment, competitors, price-fixing, limitations, compete, territorial limits, anti trust law, Sherman Act, horizontal, purchasing, accessories, practices, vertical, markets, selling, fleet, political subdivision, prices, per se violation, discounts, franchise

## LexisNexis® Headnotes

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Civil Procedure > ... > Summary Judgment > Hearings > General Overview

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

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

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

[\*\*HN1\*\*](#)  **Summary Judgment, Hearings**

See [Fed. R. Civ. P. 56](#).

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

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

[\*\*HN2\*\*](#)  **US Department of Justice Actions, Civil Actions**

HÃI GÃÃU ĐÃI HÃÃA HÃÃU ĐÃA JÃI HÃÃA JÃI LÃÃU SÃÃO ĐÃA Á HÃÃA HÃÃA LÃÃF JÃI HÃÃU SÃÃY QUÃÃI Í HÃÃA

Summary judgments have a place in the antitrust field, as elsewhere, though they are not appropriate where motive and intent play leading roles. Some of the law in this area is so well developed that where the gist of the case turns on documentary evidence, the rule at times can be divined without a trial.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

### **HN3** Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question a court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

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

### **HN4** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Per se antitrust violations are agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

## **Lawyers' Edition Display**

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### **Summary**

The United States brought a civil action in the United States District Court for the Northern District of Ohio against a truck manufacturer, seeking a permanent injunction against an alleged unlawful combination and conspiracy in violation of 1 and 3 of the Sherman Antitrust Act. The complaint alleged, and the truck manufacturer admitted, that it had entered into identical contracts with its approximately 300 distributors and dealers, providing that (1) each distributor would charge dealers the same price for trucks that the manufacturer charged its direct dealers; (2) all distributors and dealers would give "national accounts," "fleet accounts," and governmental agencies the same discount on parts and accessories as the manufacturer gave them; (3) each distributor had the exclusive right to sell the manufacturer's trucks within a described territory, but would not sell such trucks except to individuals, firms, or corporations having a place of business and/or purchasing headquarters in the territory; and (4) each distributor would not sell or authorize its dealers to sell such trucks to any federal or state government or any department or political subdivision thereof, without the manufacturer's written consent. Finding that these provisions were per se violations of the Sherman Act, the District Court granted summary judgment accordingly. ([194 F Supp 562](#).)

On direct appeal from the ruling that provisions (3) and (4) above are unlawful, the Supreme Court of the United States reversed. In an opinion by Douglas, J., expressing the views of five members of the Court, it was held that summary judgment was inappropriate and that the legality of the territorial and customer limitations should be determined only after a trial, since not enough was known about the impact of vertical territorial and customer limitations on competition to decide whether they are per se violations of the Sherman Act.

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Brennan, J., while joining in the judgment and opinion of the Court, concurred in an opinion setting forth the factors relevant to determining whether the territorial and customer limitations are valid.

Clark, J., joined by Warren, Ch. J., and Black, J., dissented on the ground that the vertical limitations were illegal per se.

White, J., did not participate.

## Headnotes

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PLEADING §48.5 > summary judgments -- antitrust cases. -- > Headnote:

[LEdHN\[1\]](#) [1]

Summary judgments have a place in the antitrust field, although they are not appropriate where motive and intent play leading roles.

RESTRAINTS OF TRADE AND MONOPOLIES §55 > tied sales of patented and unpatented products. -- > Headnote:

[LEdHN\[2\]](#) [2]

The sale of an unpatented product when tied to a patented article is a per se violation of the antitrust laws, since it is a bald effort to enlarge the monopoly of the patent beyond its terms.

RESTRAINTS OF TRADE AND MONOPOLIES §53 > dividing markets. -- > Headnote:

[LEdHN\[3\]](#) [3]

If competitors agree to divide markets, they run afoul of the antitrust laws.

RESTRAINTS OF TRADE AND MONOPOLIES §30 > group boycotts. -- > Headnote:

[LEdHN\[4\]](#) [4]

Group boycotts are per se violations of the antitrust laws.

RESTRAINTS OF TRADE AND MONOPOLIES §36 > PLEADING §48.5 > price fixing -- trial. -- > Headnote:

[LEdHN\[5\]](#) [5]

Price fixing, both vertical and horizontal, is a per se violation of the antitrust laws, and a trial to show its nature, extent, and degree is not necessary.

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RESTRAINTS OF TRADE AND MONOPOLIES §75 > injunctions -- scope. -- > Headnote:

[LEdHN\[6\]](#) [6]

In any price-fixing case restrictive practices ancillary to the price- fixing scheme are properly restrained.

PLEADING §48.5 > antitrust laws -- sales territories -- summary judgment. -- > Headnote:

[LEdHN\[7\]](#) [7]

In a civil antitrust suit brought by the government against a truck manufacturer which has two types of price-fixing agreements, (1) requiring its distributors to charge its dealers the same price for trucks as the manufacturer charges its direct dealers, and (2) requiring all distributors and dealers to give certain truck purchasers the same discount on parts and accessories as the manufacturer gives to such purchasers, and which also has agreements limiting the territories in which, and the customers to which, each distributor can sell, the government is not entitled, on motion for summary judgment, without more detailed findings, to an injunction restraining the nonprice-fixing arrangements on the ground that they are ancillary to the price-fixing scheme.

RESTRAINTS OF TRADE AND MONOPOLIES §16 > rule of reason. -- > Headnote:

[LEdHN\[8\]](#) [8]

There is read into the Sherman Act a "rule of reason" which normally requires an ascertainment of the facts peculiar to the particular business.

RESTRAINTS OF TRADE AND MONOPOLIES §3 > legality -- test. -- > Headnote:

[LEdHN\[9\]](#) [9]

The true test of the legality under the antitrust laws of an agreement concerning trade is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition; to determine this question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied, the condition of the business before and after the restraint is imposed, and the history, purpose, and nature of the restraint, as well as its effect.

EVIDENCE §343.5 > presumptions -- restraint of trade -- per se violations. -- > Headnote:

[LEdHN\[10\]](#) [10]

The category of per se violations of the antitrust laws is made up of agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

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RESTRAINTS OF TRADE AND MONOPOLIES §30 > tying arrangements -- per se violations. -- > Headnote:

[LEdHN\[11\]](#) [11]

Tying arrangements or agreements by a party to sell one product but only on the condition that the buyer also purchases a different or tied product, or at least agrees that he will not purchase that product from any other supplier, may fall in the category of per se violations of the antitrust laws, although not necessarily so.

RESTRAINTS OF TRADE AND MONOPOLIES §30 > tying arrangements. -- > Headnote:

[LEdHN\[12\]](#) [12]

Tying agreements are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a not insubstantial amount of interstate commerce is affected.

RESTRAINTS OF TRADE AND MONOPOLIES §30 > tying arrangements. -- > Headnote:

[LEdHN\[13\]](#) [13]

Where a seller who has entered into a tying agreement has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item, any restraint of trade attributable to such tying arrangement is insignificant at most.

RESTRAINTS OF TRADE AND MONOPOLIES §30 > tying device. -- > Headnote:

[LEdHN\[14\]](#) [14]

Unless a tying device is employed by a small company in an attempt to break into a market, the use of such a device can rarely be harmonized with the strictures of the antitrust laws, which are intended primarily to preserve and stimulate competition.

RESTRAINTS OF TRADE AND MONOPOLIES §53 > horizontal territorial limitations. -- > Headnote:

[LEdHN\[15\]](#) [15]

Horizontal territorial limitations, like group boycotts or concerted refusals by traders to deal with other traders, are naked restraints of trade with no purpose except stifling of competition, and are classified as per se violations of the antitrust laws.

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RESTRAINTS OF TRADE AND MONOPOLIES §53 > vertical territorial limitations. -- > Headnote:

[LEdHN\[16\]](#) [16]

The question whether a vertical territorial limitation is a per se violation of the Sherman Act depends on the actual impact of the agreement on competition.

PLEADING §48.5 > mergers -- summary judgment. -- > Headnote:

[LEdHN\[17\]](#) [17]

A trial, rather than the use of summary judgment, is normally necessary in antitrust cases involving mergers, where the question is presented as to whether the merger will tend substantially to lessen competition or whether, despite a substantial lessening of competition, a merger will be held immune from the antitrust laws because the acquired company was a failing one.

PLEADING §48.5 > summary judgment -- distributor's agreement -- validity. -- > Headnote:

[LEdHN\[18\]](#) [18]

Summary judgment is improperly employed, and a trial is necessary, to determine the validity under the Sherman Act of a truck manufacturer's agreements with its distributors in which each distributor is granted the exclusive right to sell trucks purchased from the manufacturer in a defined territory, and is forbidden to sell trucks purchased from the manufacturer except to individuals, firms, or corporations having a place of business and/or purchasing headquarters in the territory, and in which the distributor agrees not to sell or authorize his dealers to sell such trucks to any federal or state government or any department or political subdivision thereof, without the manufacturer's written consent. Points from Separate Opinion

RESTRAINTS OF TRADE AND MONOPOLIES §53 > exclusive sales territories -- validity. -- > Headnote:

[LEdHN\[19\]](#) [19]

Territorial restrictions on sales, if induced solely or even primarily by a manufacturer's dealers and distributors, are unlawful under the antitrust laws, even though they are formally imposed by the manufacturer rather than through interdealer agreement. [From separate opinion of Brennan, J.]

RESTRAINTS OF TRADE AND MONOPOLIES §51 > antitrust laws -- forbidding sales to certain customers -- validity. --

> Headnote:

[LEdHN\[20\]](#) [20]

The validity of distributors' agreements with a truck manufacturer that the distributors will not sell to certain customers depends upon whether, but for the restrictions, the distributors could compete with the manufacturer for the customers' business, or whether it appears as a practical matter that the distributors could neither fill such customers' orders nor service the trucks purchased by them. [From separate opinion of Brennan, J.]

## Syllabus

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The United States brought this civil suit to restrain alleged violations of the Sherman Act by appellant, a manufacturer of trucks, and moved for a summary judgment, contending that appellant's franchise contracts constituted *per se* violations of [§§ 1](#) and [3](#). Such contracts restricted the geographic areas within which distributors and dealers were permitted to sell trucks and parts, restricted the persons to whom distributors and dealers were permitted to sell trucks for resale, precluded distributors and dealers from selling trucks to any federal or state government or subdivision thereof and other large customers without permission of appellant, fixed the resale price for trucks and parts sold by distributors to dealers for retail sale, and fixed the retail price of parts and accessories sold by distributors and dealers to certain designated customers. Appellant did not file any affidavit denying the Government's allegations; but it did [\*\*\*\*2] file a brief containing allegations of fact, denying that its agreements were illegal, and contending that it should be allowed to present, at trial, evidence of the reasonableness of its contracts when considered in their own unique business and economic context. The District Court granted summary judgment for the Government. Appellant appealed directly to this Court from all but the price-fixing aspects of the judgment. *Held:* Apart from the price-fixing aspects of the case, summary judgment was improperly granted, and the legality of the territorial and customer limitations of appellant's franchise contracts should be determined only after a trial. Pp. 254-264.

(a) Summary judgments have a place in the antitrust field; but they are not appropriate "where motive and intent play leading roles." [Poller v. Columbia Broadcasting System](#), 368 U.S. 464. Pp. 259-261.

(b) This is the first case involving a territorial restriction in a *vertical* arrangement; and this Court knows too little of the actual impact of that restriction and the one respecting customers to reach a conclusion on the bare bones of the documentary evidence before it. Pp. 261-264.

**Counsel:** [\*\*\*\*3] Gerhard A. Gesell argued the cause for appellant. With him on the briefs were Rufus S. Day, Jr. and Nestor S. Foley.

Solicitor General Cox argued the cause for the United States. With him on the brief were Assistant Attorney General Loewinger and Robert B. Hummel.

Briefs of amici curiae were filed by Sigmund Timberg for Serta Associates, Inc., et al., and by John Bodner, Jr. for the Sandura Company.

**Judges:** Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, Goldberg; White took no part in the consideration or decision of this case

**Opinion by:** DOUGLAS

## Opinion

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[\*254] [\*\*\*\*741] [\*\*697] MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a civil suit under the antitrust laws that was decided below on a motion for summary judgment. [Rule 56](#) of the Rules of Civil Procedure at the time of the hearing below permitted summary judgment to be entered [HN1](#) [↑] "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Since that time, an amendment to [Rule 56](#), which is included in proposed changes submitted to [\*\*\*\*4] Congress pursuant to [28 U.S.C. § 2072](#), would add the following requirement:

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"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

But no such requirement was present when the present case was decided; and appellant, though strenuously opposing summary judgment and demanding a trial, submitted no such affidavits. It did, however, in its brief in [\*255] opposition to the motion for summary judgment, make allegations concerning factual matters which the District Court thought were properly raised and which we think were relevant to a decision on the merits.

Appellant manufactures trucks and sells them (and parts) to distributors,<sup>1</sup> to dealers, and to various large users. Both the distributors and dealers sell trucks (and parts) [\*\*\*742] to users. Moreover, some distributors resell trucks (and [\*\*\*5] parts) to dealers, selected with appellant's consent. All of the dealers sell trucks (and parts) only to users. The principal practices charged as violations of §§ 1 and 3 of the Sherman Act, 26 Stat. 209, 15 U. S. C. §§ 1, 3, concern limitations or restrictions on the territories within which distributors or dealers may sell and limitations or restrictions on [\*\*698] the persons or classes of persons to whom they may sell. Typical of the *territorial clause* is the following:

"Distributor is hereby granted the exclusive right, except as hereinafter provided, to sell during the life of this agreement, in the territory described below, White and Autocar trucks purchased from Company hereunder.

"STATE OF CALIFORNIA: Territory to consist of all of Sonoma County, south of a line starting at the western boundary, or Pacific Coast, passing through the City of Bodega, and extending due east to the east boundary line of Sonoma County, with the exception of the sale of fire truck chassis to the State of California and all political subdivisions thereof.

"Distributor agrees to develop the aforementioned territory to the satisfaction of Company, and not to [\*\*\*6] [\*256] sell any trucks purchased hereunder except in accordance with this agreement, and not to sell such trucks except to individuals, firms, or corporations having a place of business and/or purchasing headquarters in said territory."

Typical of the *customer clause* is the following:

"Distributor further agrees not to sell nor to authorize his dealers to sell such trucks to any Federal or State government or any department or political subdivision thereof, unless the right to do so is specifically granted by Company in writing."

These provisions, applicable to distributors and dealers alike, are claimed by appellee to be *per se* violations of the Sherman Act.<sup>2</sup> The District Court adopted that view and granted summary judgment accordingly. 194 F.Supp. 562. We noted probable jurisdiction. 369 U.S. 858. [\*\*\*7] See 15 U. S. C. § 29.

Appellant, in arguing for a trial of the case on the merits, made the following representations to the District Court: the territorial clauses are necessary in order for appellant to compete with those who make other competitive kinds of trucks; appellant could theoretically have its own retail outlets throughout the country and sell to users directly; that method, however, is not feasible as it entails a costly and extensive sales organization; the only feasible method is the distributor or dealer system; for that system to be effective against the existing competition of the larger companies, a distributor or dealer must make vigorous and intensive efforts in a restricted territory, and if he is to be held responsible for energetic performance, it is fair, reasonable, and necessary that appellant protect him against invasions of [\*\*\*8] his territory by other distributors or dealers of appellant; that appellant in order to obtain [\*257] maximum sales in a given area must insist that its distributors and dealers concentrate on trying to take

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<sup>1</sup> We are advised by appellant that since the judgment below, White "no longer uses distributors as a separate tier in its system, but sells directly to dealers instead."

<sup>2</sup> Appellant does not appeal from the District Court's ruling that the provisions of the contracts fixing resale prices were unlawful.

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sales away from other competing [\*\*\*743] truck manufacturers rather than from each other. Appellant went on to say:

"The plain fact is, as we expect to be able to show to the satisfaction of the Court at a trial of this case on the merits, that the outlawing of exclusive distributorships and dealerships in specified territories would reduce competition in the sale of motor trucks and not foster such competition."

As to the customer clauses, appellant represented to the District Court that one of their purposes was to assure appellant "that 'national accounts,' 'fleet accounts' and Federal and State governments and departments and political subdivisions thereof, which are classes of customers with respect to which the defendant [\*\*699] is in especially severe competition with the manufacturers of other makes of trucks and which are likely to have a continuing volume of orders to place, shall not be deprived of their appropriate discounts on their purchases of repair [\*\*\*9] parts and accessories from any distributor or dealer, with the result of becoming discontented with The White Motor Company and the treatment they receive with reference to the prices of repair parts and accessories for White trucks."

The agreements fixing prices of parts and accessories to these customers<sup>3</sup> were, according to appellant, only an adjunct to the customer restriction clauses and amounted merely to an agreement to give these classes of customers their proper discounts. "In a way this affects the prices which these classes of customers have to pay for such parts and accessories, but it affects, as a practical matter, only spare and repair parts and accessories and it affects only the discounts to be given to these particular classes of customers. The provisions are necessary if the defendant's [\*258] future sales to 'National Accounts,' 'Fleet Accounts' and Federal and State governments and departments and political subdivisions thereof, in competition with other truck manufacturers, are not to be seriously jeopardized."

[\*\*\*10] White also argued below:

"On principle, there is no reason whatsoever why a manufacturer should not have one distributor who is limited to selling to one class of customers and another distributor who is limited to selling to another class of customers or why a distributor should not be limited to one class of customers and the manufacturer reserve the right to sell to another class of customers. There are many circumstances under which there could be no possible objection to limiting the class of customers to which distributors or dealers resell goods, and there are many reasons why it would be reasonable and for the public interest that distributors or dealers should be limited to reselling to certain classes of customers.

"In the instant case, it is both reasonable and necessary that the distributors (except for sales to approved dealers) and direct dealers and dealers be limited to selling to the purchasing public, in order that they may be compelled to develop properly the full potential of sales of White trucks in their respective territories, and to assure The White Motor Company that the persons selling White trucks to the purchasing public shall be fair and honest, to [\*\*\*11] the end of increasing and perpetuating sales of White trucks in competition with other makes of trucks; [\*\*\*744] and it is reasonable and necessary that The White Motor Company reserve to itself the exclusive right to sell White trucks to Federal and State governments or any department or political subdivision thereof rather than to sell such trucks to such governments or [\*259] departments or political subdivisions thereof through distributors or dealers, and The White Motor Company should have a perfect right so to do.

"Therefore, based both on the decisions of the Federal Courts and on principle, the limitations on the classes of customers to whom distributors or dealers may sell White trucks are not only not illegal per se, as the plaintiff must prove to succeed on its motion for summary judgment, but these limitations have proper purposes and effects and are fair and reasonable and not violative of the antitrust laws as being in unreasonable [\*\*700] restraint of competition or trade and commerce."

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<sup>3</sup> See note 2, *supra*.

In this Court appellant defends the customer clauses on the ground that "the only sure way to make certain that something really important is done right, is to do it for [\*\*\*\*12] oneself. The size of the orders, the technicalities of bidding and delivery, and other factors all play a part in this decision."

[LEdHN\[1\]](#) [↑] [HN2](#) [↑] Summary judgments have a place in the antitrust field, as elsewhere, though, as we warned in [\*Poller v. Columbia Broadcasting System, 368 U.S. 464, 473\*](#), they are not appropriate "where motive and intent play leading roles." Some of the law in this area is so well developed that where, as here, the gist of the case turns on documentary evidence, the rule at times can be divined without a trial.

[LEdHN\[2\]](#) [↑] [2] [LEdHN\[3\]](#) [↑] [3] [LEdHN\[4\]](#) [↑] [4] [LEdHN\[5\]](#) [↑] [5] Where the sale of an unpatented product is tied to a patented article, that is a *per se* violation since it is a bald effort to enlarge the monopoly of the patent [\*\*\*\*13] beyond its terms. *Mercoid Corp. v. Honeywell Co.*, 320 U.S. 680, 684; *International Salt Co. v. United States*, 332 U.S. 392, 395-396. And see *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436. If competitors agree to divide markets, they run afoul of the antitrust laws. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593. Group boycotts [\*260] are another example of a *per se* violation. *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457; *Klor's v. Broadway-Hale Stores*, 359 U.S. 207. Price-fixing arrangements, both vertical ( *United States v. Parke, Davis & Co.*, 362 U.S. 29; *Dr. Miles Medical Co. v. Park & Sons*, 220 U.S. 373) and horizontal ( *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150; *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211), have also been held to be *per se* violations of the antitrust laws; and a trial to show their nature, extent, and degree is no longer necessary.

**LEdHN[6][↑] [6] [\*\*\*\*14]** As already stated, there was price fixing here and that part of the injunction issued by the District Court is not now challenged. In any price-fixing case restrictive practices ancillary to the price-fixing scheme [\*\*\*745] are also quite properly restrained. Such was *United States v. Bausch & Lomb Co., 321 U.S. 707*, where price fixing was "an integral part of the whole distribution system" ( *id., 720*) including customer restrictions. No such finding was made in this case; and whether or not the facts would permit one we do not stop to inquire.

**LEDHN[7]** [7]Appellant apparently maintained two types of price-fixing agreements. Under the first, a distributor was allowed to appoint dealers under him, but each distributor had to agree with appellant that he would charge the dealers the same price for trucks that appellant charged its direct dealers. The agreement affected only five percent of the trucks sold by appellant. And there were no price-fixing provisions pertaining to truck sales to ultimate purchasers. The other price-fixing arrangement required all distributors [\*\*\*\*15] and dealers to give "national accounts," "fleet accounts," and governmental agencies the same discount on parts and accessories as White gave them. No figures are given, but it was assumed by the District Court that the amount of commerce involved under this agreement was relatively small. Without more [\*261] detailed findings we therefore cannot say that the case is governed by *United States v. Bausch & Lomb Co., supra*.

We are asked to extend the holding in *Timken Roller Bearing Co. v. United States*, *supra* (which banned horizontal arrangements among competitors to divide territory), to a vertical arrangement by one manufacturer restricting the territory of his distributors or dealers. We intimate no view one way or the other on the legality of such an arrangement, for we believe that the applicable rule of law should be designed after a trial.

This is the first case involving a territorial restriction in a *vertical* arrangement; and we know too little of the actual impact of both that restriction and the one respecting customers to reach a conclusion on the bare bones of the documentary evidence before us.

[\*\*\*HR8] [\*\*\*\*16] Standard Oil Co. v. *United States*, 221 U.S. 1, 62, read into the Sherman Act the "rule of reason." That "rule of reason" normally requires an ascertainment of the facts peculiar to the particular business. As stated in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238:

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[LEdHN\[9\]](#) [↑] [9][HN3](#) [↑] "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, [\*\*\*\*17] the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention [\*262] will save an otherwise [\*\*746] objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

[LEdHN\[10\]](#) [↑] [10][LEdHN\[11\]](#) [↑] [11]We recently reviewed *per se* violations of the antitrust laws in *Northern Pac. R. Co. v. United States*, 356 U.S. 1. That category of [HN4](#) [↑] antitrust violations is made up of "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." [\*Id., p. 5\*](#). Tying arrangements or agreements by a party "to sell one product but only on the condition that [\*\*\*\*18] the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier" ([\*id., pp. 5-6\*](#)) may fall in that category, though not necessarily so.

[LEdHN\[12\]](#) [↑] [12][LEdHN\[13\]](#) [↑] [13]"They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected. . . . Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself. [\*\*\*\*19] " [\*Id., pp. 6-7\*](#).

[\*263] [\*\*702] We recently noted the importance of the nature of the tying arrangement in its factual setting:

[LEdHN\[14\]](#) [↑] [14]"Thus, unless the tying device is employed by a small company in an attempt to break into a market, cf. [Harley-Davidson Motor Co., 50 F. T. C. 1047, 1066](#), the use of a tying device can rarely be harmonized with the strictures of the antitrust laws, which are intended primarily to preserve and stimulate competition." *Brown Shoe Co. v. United States*, 370 U.S. 294, 330.

[LEdHN\[15\]](#) [↑] [15][LEdHN\[16\]](#) [↑] [16]Horizontal territorial limitations, like "group boycotts, or concerted refusals by traders to deal with other traders" ([Klor's v. Broadway-Hale Stores, supra, 212](#)), are naked restraints of trade with no purpose except stifling of competition. A vertical territorial limitation may or may not have that purpose or effect. We do not know enough of the economic [\*\*\*\*20] and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business (cf. *Brown Shoe, supra*, at 330; [United States v. Jerrold Electronics Corp., 187 F.Supp. 545, 560-561](#), aff'd, 365 U.S. 567) [\*\*\*747] and within the "rule of reason." We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a "pernicious effect on competition and lack . . . any redeeming virtue" ([Northern Pac. R. Co. v. United States, supra, p. 5](#)) and therefore should be classified as *per se* violations of the Sherman Act.

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**LEdHN[17]** [↑] [17]There is an analogy from the merger field that leads us to conclude that a trial should be had. A merger that would otherwise offend the antitrust laws because of a [\*264] substantial lessening of competition has been given immunity where the acquired company was a failing one. See *International [\*\*\*21] Shoe Co. v. Commission, 280 U.S. 291, 302-303*. But in such a case, as in cases involving the question whether a particular merger will tend "substantially to lessen competition" (*Brown Shoe Co. v. United States, supra, pp. 328-329*), a trial rather than the use of the summary judgment is normally necessary. *United States v. Diebold, Inc., 369 U.S. 654*.

**LEdHN[18]** [↑] [18]We conclude that the summary judgment, apart from the price-fixing phase of the case, was improperly employed in this suit. Apart from price fixing, we do not intimate any view on the merits. We only hold that the legality of the territorial and customer limitations should be determined only after a trial.

Reversed.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

**Concur by:** BRENNAN

## Concur

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MR. JUSTICE BRENNAN, concurring.

While I join the opinion of the Court, the novelty of the antitrust questions prompts me to add a few words. I fully agree that it would be premature to declare either the territorial or the customer restrictions illegal *per se*, since "we know [\*\*\*22] too little of the actual impact [of either form of restraint] . . . to reach a conclusion on the bare bones of the . . . evidence before us." But it seems to me that distinct problems are raised by the two types of restrictions and that the District Court will wish to have this distinction in mind at the trial.

I.

I discuss first the territorial limitations. The insulation of a dealer or distributor through territorial restraints [\*703] against sales by neighboring dealers who would otherwise [\*265] be his competitors involves a form of restraint upon alienation, which is therefore historically and inherently suspect under the antitrust laws.<sup>1</sup> [\*\*\*24] See *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 404-408*. That proposition does not, however, tell us that every form of such restraint is utterly without justification and is therefore to be [\*\*\*748] deemed unlawful *per se*. That is true only of those "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm [\*\*\*23] they have caused or the business excuse for their use." *Northern Pac. R. Co. v. United States, 356 U.S. 1, 5*. Specifically, the *per se* rule of prohibition has been applied to price-fixing agreements, group boycotts, tying arrangements, and horizontal divisions of markets. As to each of these practices, experience and analysis have established the utter lack of justification to excuse its inherent threat to competition.<sup>2</sup> To gauge the appropriateness of a *per se* test for the forms of restraint involved in this case, then, we must determine whether experience warrants, at this stage, a conclusion that inquiry into effect upon competition

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<sup>1</sup>For a general consideration of the history and legality of restraints upon alienation, both at common law and under the Sherman Act, see Levi, The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance, Supreme Court Review (Kurland ed. 1960), 258, 270-278.

<sup>2</sup>The general principle which the Court has stated with respect to price-fixing agreements is applicable alike to boycotts, divisions of markets, and tying arrangements: "Whatever economic justification particular . . . agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224, n. 59, at 226*.

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and economic justification [\*266] would be similarly irrelevant.<sup>3</sup> With respect to the territorial limitations of the type at bar, I agree that the courts have as yet been shown no sufficient experience to warrant such a conclusion.

[\*\*\*\*25] The Government urges, and the District Court found, that these restrictions so closely resemble two traditionally outlawed forms of restraint -- horizontal market division and resale price maintenance -- that they ought to be governed by the same absolute legal test. Both [\*\*704] analogies are surely instructive, and all the more so because the practices at bar are *sui generis*; but both are, at the same time, misleading. It seems to me that consideration of the similarities has thus far obscured consideration of the equally important differences, which serve in my [\*267] view to distinguish the practice here from others as to which we have held a *per se* test clearly appropriate.

LEdHN19 [19]Territorial limitations bear at least [\*\*\*749] a superficial resemblance to horizontal divisions of markets among competitors, which we have held to be tantamount to agreements not to compete, and hence inevitably violative of the Sherman Act,<sup>4</sup> *Timken Roller Bearing Co. v. United States*, 341 U.S. 593. If it were clear that the territorial restrictions involved in this case had [\*\*\*26] been induced solely or even primarily by appellant's dealers and distributors, it would make no difference to their legality that the restrictions were formally imposed by the manufacturer rather than through inter-dealer agreement.<sup>5</sup> Cf. *Interstate Circuit, Inc., v. United States*, 306 U.S. 208; *United States v. Masonite Corp.*, 316 U.S. 265, 275-276. But for aught that the present record discloses, an equally plausible inference is that the territorial restraints were imposed upon unwilling distributors by the manufacturer to serve exclusively his own interests. That inference gains some credibility from the fact that these limitations -- unlike, for example, exclusive franchise agreements -- bind the dealers to a rather harsh bargain while leaving the manufacturer unfettered. In any event, neither the source nor the purpose of these restraints can be conclusively determined on the pleadings or the supporting affidavits. The crucial question whether, despite the differences in form, these restraints serve the same pernicious purpose and have the same [\*268] inhibitory effects upon competition as horizontal divisions of markets, [\*\*\*27] is one which cannot be answered without a trial.<sup>6</sup>

<sup>3</sup> Outside the categories of restraint which are *per se* unlawful, this Court has said that the question to be answered is "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." *Chicago Board of Trade v. United States*, 246 U.S. 231, 238.

While the Government urges upon us the adoption of a *per se* rule of illegality, it nonetheless recognizes that not all the considerations relevant to the validity of this particular form of restraint are or could be presented by the present case: "What is the importance of *interbrand* as opposed to *intrabrand* competition? . . . Will White's restrictions remain reasonable if its share of the market increases? . . . These are only a few of the issues relevant to a trial of the 'reasonableness' of any particular set of territorial restrictions. Nor could one be content with a single investigation. Business conditions change. The effect of restricting competition among dealers today may be different tomorrow." Brief for the United States, pp. 31-32.

<sup>4</sup> See *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 240-245; *United States v. National Lead Co.*, 63 F.Supp. 513, aff'd, 332 U.S. 319. See also Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), 26.

<sup>5</sup> For contrasting views on this question, compare Kessler and Stern, Competition, Contract, and Vertical Integration, 69 Yale L. J. 1, 113 (1959), with Robinson, Restraints on Trade and the Orderly Marketing of Goods, 45 Cornell L. Q. 254, 267-268 (1960).

<sup>6</sup> See, for an elaboration and discussion of some of the factors which might enter such an inquiry, *Snap-On Tools Corp.*, FTC Docket 7116, 3 CCH Trade Reg. Rep. para. 15,546; Jordan, Exclusive and Restricted Sales Areas Under the Antitrust Laws, 9 *U. C. L. A. L. Rev.* 111, 125-129 (1962). For further discussion of the reasons which make such an inquiry desirable with respect to restraints of this very kind, see Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 698-699 (1962).

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[\*\*\*\*28] The analogy to resale price maintenance agreements is also appealing, but is no less deceptive. Resale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much *between* that product and competing brands. See *United States v. Parke, Davis & Co., 362 U.S. 29, 45-47*. While territorial restrictions may indirectly have a similar effect upon *intra*-brand competition, the effect upon *inter*-brand competition is not necessarily the same as that of resale price maintenance.<sup>7</sup>

[\*\*\*\*29] [\*\*\*750] [\*\*705] Indeed, the principal justification which the appellant offers for the use of these limitations is that they foster a vigorous inter-brand competition which might otherwise be absent. Thus, in order to determine the lawfulness of this form of restraint, it becomes necessary to assess the merit of this and other extenuations offered by the appellant. Surely it would be significant to the disposition of [\*269] this case if, as appellant claims, some such arrangement were a prerequisite for effective competition on the part of independent manufacturers of trucks. Whatever relationship such restraints may bear to the ultimate survival of producers like White should be fully explored by the District Court if we are properly to appraise this excuse for resort to these practices.

There are other situations, not presented directly by this case, in which the possibility of justification cautions against a too hasty conclusion that territorial limitations are invariably unlawful. Arguments have been suggested against that conclusion, for example, in the case of a manufacturer starting out in business or marketing a new and risky product; the suggestion is [\*\*\*\*30] that such a manufacturer may find it essential, simply in order to acquire and retain outlets, to guarantee his distributors some degree of territorial insulation as well as exclusive franchises. It has also been suggested that it may reasonably appear necessary for a manufacturer to subdivide his sales territory in order to ensure that his product will be adequately advertised, promoted, and serviced.<sup>8</sup> It is, I think, the [\*270] inappropriateness or irrelevance of such justifications as these to the practices traditionally condemned under the *per se* test that principally distinguishes the territorial restraints involved in the present case from horizontal market divisions and resale price maintenance.

[\*\*\*\*31] Another issue which seems to me particularly to require a full inquiry into the pros and cons of these territorial restrictions is whether, assuming that some justification for these limitations can be shown, their operation is reasonably related to the needs which brought them into being. To put the question another way, the problem is not simply whether some justification can be found, but whether the restraint so justified is more restrictive than necessary, or excessively anticompetitive, when viewed in light of the [\*\*\*751] extenuating interests.<sup>9</sup> That

<sup>7</sup> See Note, Restricted Channels of Distribution Under the Sherman Act, 75 Harv. L. Rev. 795, 800-801 (1962). It may be relevant to the question whether the territorial restrictions were intended to suppress price competition that appellant also maintained a schedule of resale prices in its distributor agreements, though there has been no challenge here to the District Court's finding that those provisions were unlawful *per se*.

<sup>8</sup> For situations in which such extenuations might be relevant, compare, e. g., *Packard Motor Car Co. v. Webster Motor Car Co., 100 U. S. App. D. C. 161, 243 F.2d 418*; *Schwing Motor Co. v. Hudson Sales Corp., 138 F.Supp. 899* (D. C. D. Md.), aff'd, *239 F.2d 176* (C. A. 4th Cir.). In the former case the court observed, in holding an exclusive franchise arrangement not violative of the Sherman Act:

"The short of it is that a relatively small manufacturer, competing with large manufacturers, thought it advantageous to retain its largest dealer in Baltimore, and could not do so without agreeing to drop its other Baltimore dealers. To penalize the small manufacturer for competing in this way not only fails to promote the policy of the antitrust laws but defeats it." *100 U. S. App. D. C., at 164, 243 F.2d, at 421*. The doctrine of the *Packard* and *Schwing* cases is, however, of necessarily limited scope; not only were the manufacturers involved much smaller than the "big three" of the automobile industry against whom they competed, but both had experienced declines in their respective market shares. And the exclusive franchises involved in those cases apparently were not accompanied by territorial limitations. See Jordan, *supra*, note 6, at 135-139. See, for consideration of a similar problem by the Federal Trade Commission, *Columbus Coated Fabrics Corp., 55 F. T. C. 1500, 1503-1504*.

<sup>9</sup> If the restraint is shown to be excessive for the manufacturer's needs, then its presence invites suspicion either that dealer pressures rather than manufacturer interests brought it about, or that the real purpose of its adoption was to restrict price

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question [\*\*706] is one which can be adequately treated only by examining the operation and practical effect of the restraints, whatever may be their form. And in order to appraise that effect, it is necessary to know what sanctions are imposed against distributors who "raid," or sell across territorial boundaries in violation of the agreements. If, for example, such a cross-sale incurs only an obligation to share (or "pass over") the profit with the dealer whose territory has been invaded -- as is most often, and apparently [\*271] here, the case<sup>10</sup> -- then the practical effect upon competition of a territorial [\*\*\*32] limitation may be no more harmful than that of the typical exclusive franchise -- the lawfulness of which the Government does not dispute here. If, on the other hand, the dealer who cross-sells runs the risk under the agreement of losing his franchise altogether, intra-brand competition across territorial boundaries involves serious hazards which might well deter any effort to compete.

[\*\*\*33] Another pertinent inquiry would explore the availability of less restrictive alternatives. In the present case, for example, as the Government suggests, it may appear at the trial that whatever legitimate business needs White advances for territorial limitations could be adequately served, with less damage to competition, through other devices -- for example, an exclusive franchise,<sup>11</sup> [\*\*\*34] an assignment of areas of primary responsibility to each distributor,<sup>12</sup> or a revision of the levels of profit pass-over so [\*272] as to minimize the deterrence to cross-selling by neighboring dealers where competition is feasible.<sup>13</sup> But no such inquiry as this into the question of [\*\*\*752] alternatives could meaningfully be undertaken until the District Court has ascertained the effect upon competition of the particular territorial restraints in suit, and of the [\*\*707] particular sanctions by which they are enforced.

## [\*\*\*35] II.

I turn next to the customer restrictions. These present a problem quite distinct from that of the territorial limitations. The customer restraints would seem inherently the more dangerous of the two, for they serve to suppress all competition between manufacturer and distributors for the custom of the most desirable accounts. At the same time they seem to lack any of the countervailing tendencies to foster competition between brands which may accompany the territorial limitations. In short, there is far more difficulty in supposing that such customer restrictions can be justified.

competition, cf. *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 457-459; *United States v. Masonite Corp., supra*. See Turner, *supra*, note 6, at 698-699, 704-705.

<sup>10</sup> In its complaint, the Government charged that any dealer or distributor who sells in another's reserved territory must pay to the injured distributor "a specified amount of money for violation of said exclusive territory . . ." There has been no suggestion in this case that more drastic sanctions, such as withdrawal or cancellation of a franchise, have ever been invoked by the appellant to check cross-selling. The pass-over provisions contained in the typical White contract (in a provision governing "adjustment on outside deliveries") seem representative of exclusive-territory sanctions generally employed. See Note, Restricted Channels of Distribution Under the Sherman Act, 75 Harv. L. Rev. 795, 814-816 (1962).

<sup>11</sup> The District Court suggested, [194 F.Supp., at 585-586](#), and the Government seems to concede, that certain types of exclusive franchises would not violate the Sherman Act, although a determination of the legality of such arrangements would seem also to require an examination of their operation and effect.

<sup>12</sup> See *Snap-On Tools Corp.*, FTC Docket No. 7116, 3 CCH Trade Reg. Rep. para. 15,546, p. 20,414. A number of consent decrees have recently recognized the lawfulness of area-of-primary-responsibility covenants as substitutes for the more restrictive exclusive arrangements. See, e. g., *United States v. Bostitch, Inc.*, CCH 1958 Trade Cases para. 69,207 (D. C. D. R. I.); *United States v. Rudolph Wurlitzer Co.*, CCH 1958 Trade Cases para. 69,011 (D. C. W. D. N. Y.). The thrust of such provisions is, however, only that the dealer must adequately represent the manufacturer in the assigned area, not that he must stay out of other areas. See generally 60 Mich. L. Rev. 1008 (1962).

<sup>13</sup> The essential question whether such restraints exceed the appellant's competitive needs cannot be answered, as the Government suggests, simply by reference to the views of major automobile manufacturers that territorial limitations are unnecessary to ensure effective promotion and servicing for their products. See Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce on Automobile Marketing Legislation, 84th Cong., pp. 160, 248, 285, 323.

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LEdHN[20] [↑] [20]The crucial question to me is whether, in any meaningful sense, the distributors could, but for the restrictions, [\*273] compete with the manufacturer for the reserved outlets.<sup>14</sup> If they could, but are prevented from doing so only by the restrictions, then in the absence of some justification neither presented nor suggested by this record, their invalidity would seem to be apparent. Cf. United States v. McKesson & Robbins, Inc., 351 U.S. 305, 312; United States v. Klearflax Linen Looms, Inc., 63 F.Supp. 32. [\*\*\*36] If, on the other hand, it turns out that as a practical matter the restricted dealers could neither fill the orders nor service the fleets of the governmental and fleet customers, then the District Court might conclude that because there would otherwise be no meaningful competition, the restrictive agreements do no more than codify the economically obvious. It might even be that such restrictions were originally designed to foreclose the distributors from soliciting the reserved accounts, but that now the restrictions have become meaningless because the distributors would in any event be unable to compete.

[\*\*\*37] The reasons given by White for the use of customer restrictions strike me as untenable if in operation and effect the restrictions are found to stifle competition. These justifications are of three types. First, White argues that such restrictions are required because "[a] distributor or dealer is not competent to handle this intricate process [of servicing large accounts] until he has had [\*274] many months of specialized White training"; and that there is a consequent danger of "unauthorized dealers" who "will be unqualified to work out specifications [\*\*\*753] for trucks to meet customers' peculiar requirements." To the extent that these fears are well founded, they represent the concerns which any manufacturer may legitimately have about his distributors' ability to deal effectively with large or demanding customers. By their very terms, however, these concerns seem to call not for cutting the distributors completely out of this segment of the market, but rather for such less drastic measures as, for example, improved supervision and training, or perhaps a special form of manufacturer's warranty to the governmental and fleet purchasers to protect against unsatisfactory [\*\*\*38] distributor servicing.

The second justification White offers is that "the only sure way to make certain that something really important is done right, is to do it for oneself." This argument [\*\*708] seems to me to prove too much, for if the distributors truly cannot be counted on to solicit and service the governmental and fleet accounts -- not all of which are, in fact, large or demanding -- then this suggests that the only adequate solution may be vertical integration, the elimination of all independent or franchised distribution. But that White is either unwilling or unable to do. Instead, it seeks the best of both worlds -- to retain a distribution system for the general run of its customers, while skimming off the cream of the trade for its own direct sales. That, it seems to me, the antitrust laws would not permit, cf. *Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 375*, if in fact the distributors could compete for the reserved accounts without the restrictions.

The third justification, which White offered in its jurisdictional statement, is that customer limitations are essential to enable it to "more effectively compete against [\*\*\*39] its competitors by selling trucks directly" to the reserved [\*275] customers rather than "through the interposition of distributors or dealers." This argument invites consideration of what to me is the essential vice of the customer restrictions. The manufacturer's very position in the channels of distribution should afford him an inherent cost advantage over his distributors. In the nature of things, it would seem that the large purchasers would buy from whichever outlet gave them the lowest prices. Thus, if the manufacturer always did grant discounts which the distributors were unable to grant, there would seem to be no reason whatever for denying the distributors able to overcome that advantage access to the preferred customers. Conversely, the presence of such restrictions in the agreements between White and its distributors suggests that they are designed, at least in part, to protect a noncompetitive pricing structure, in which the manufacturer in fact does *not* always charge the lowest prices.

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<sup>14</sup> In an analogous case, brought under § 5 of the Federal Trade Commission Act, the Commission dismissed the complaint because of insufficient evidence that customer limitations had foreclosed meaningful competition. *In the Matter of Roux Distributing Co., 55 F. T. C. 1386*. The finding that non-contractual customer restrictions had a clearly anticompetitive effect in United States v. Klearflax Linen Looms, Inc., 63 F.Supp. 32, was one which could seemingly not have been made without a trial on the merits, even though the manufacturer involved held a position of virtual monopoly. See Note, Restricted Channels of Distribution Under the Sherman Act, 75 Harv. L. Rev. 795, 817-818 (1962).

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In sum, the proffered justifications do not seem to me to sanction customer restrictions which suppress all competition between the manufacturer and his distributors for the [\*\*\*\*40] most desirable customers. On trial, as I see it, the Government will necessarily prevail unless the proof warrants a finding that, even in the absence of the restrictions, the economics of the trade are such that the distributors cannot compete for the reserved accounts.

**Dissent by:** CLARK

## Dissent

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MR. JUSTICE CLARK, with whom THE [\*\*\*754] CHIEF JUSTICE and MR. JUSTICE BLACK join, dissenting.

The Court is reluctant to declare vertical territorial arrangements illegal *per se* because "This is the first case involving a territorial restriction in a *vertical* arrangement; and we know too little of the actual impact . . . of that restriction . . . to reach a conclusion on the bare bones of the documentary evidence before us." The "bare bones" consist of the complaint and answer, excerpts from interrogatories, exhibits and deposition of the secretary [\*276] of White Motor on behalf of the Government, taken in 1959, the formal motion of the Government for summary judgment and an excerpt entitled "Argument" from the brief of White Motor in opposition thereto. I believe that these "bare bones" really lay bare one of the most brazen violations of the Sherman Act that I have experienced [\*\*\*41] in a quarter of a century.

This "argument," which the appellant has convinced the Court raises a factual issue requiring a trial, points out that each distributor is required to maintain a sales room, service station and a representative number of White trucks. "In return for these agreements of the distributor . . . it is only fair and reasonable and, in fact, necessary . . . that the distributor shall be protected [\*\*709] in said distributor's territory against selling therein by defendant's other distributors . . . who have not made the investment of money and effort . . . in the said territory." Likewise, appellant's argument continues, "similar provisions in direct dealers' contracts and in contracts between the distributors and their respective dealers have the same purposes and the same effects." These limitations have "the purpose and effect of promoting the business and increasing the sales of White trucks in competition with The White Motor Company's powerful competitors." Emphasizing that the motor-truck manufacturing industry is one of "the most highly competitive industries in this country," appellant points up that its share "is very small" and "by no stretch of [\*\*\*42] the imagination, could be said to dominate the market in trucks." It insists that there are but two ways to market trucks: (1) selling to the public through its own sales and service stations, and (2) through the distributor-dealer distribution system which it presently follows. It discards the first as being "feasible only for a very large company." As to the second, the distributors and dealers must not be allowed to spread their efforts "too thinly over more territory [\*277] than they can vigorously and intensively work." It is therefore necessary, appellant says, "to confine their efforts to a territory no larger than they have the financial means and sales and service facilities and capabilities to intensively cultivate . . ." In return "it is only fair and reasonable, and indeed necessary, that The White Motor Company protect its dealers and distributors in their respective allotted territories against the exploitation by other White distributors or dealers, and indeed by the Company itself . . ." In order to procure "distributors and dealers that will adequately represent The White Motor Company's line of motor trucks, [it] has to agree that these men shall be exclusive [\*\*\*43] sales representatives in a given territory." For this reason appellant "will not allow any other of its distributors or dealers [\*\*\*755] to come into the territory and scalp the market for White trucks therein." Rather than "cutting each other's throats" White Motor insists that they "concentrate on trying to take sales away from other competing truck manufacturers . . ." The net effect of its justification for the territorial allocation is that "these limitations have proper purposes and effects and are fair and reasonable . . ." (Italicized in original.)

On the price-fixing requirement in the contracts, which White Motor has abandoned on appeal, the "argument" points out that this requirement was limited to about 5% of its sales and was not followed in sales to the public. Justification for its use otherwise was that it insured that all of its agents "get an equal break pricewise," which was a necessary step to having "satisfied and efficient dealer organizations." As to the required discounts provision on repair parts and accessories, it says that these are necessary "if the defendant's future sales to 'National Accounts,'

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'Fleet Accounts' and Federal and State governments [\*\*\*\*44] . . . and political subdivisions . . . are not to be seriously jeopardized." After all, it says, "probably [\*278] nothing will make the owner of a motor vehicle so peeved as to be overcharged for repair parts and accessories."

The situation in which White Motor finds itself may be summed up in its own words, *i. e.*, that its contracts are "the only feasible way for [it] to compete effectively with its bigger and more powerful competitors . . ." In this justification it attempts but to make a virtue of business necessity, which has long been rejected as a defense in such cases. See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407-408 (1911); *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457, 467-468 (1941), and *Northern Pac. R. Co.* [\*\*710] v. *United States*, 356 U.S. 1, 5 (1958). This is true because the purpose of these provisions in its contracts as shown by White Motor's own "argument" is to enable it to compete with its "powerful competitors" and "protect its dealers and distributors in their respective allotted territories against the exploitation by other White [\*\*\*\*45] distributors or dealers" and thus prevent them from "cutting each other's throats." These grounds for its action may be good for White Motor but they are disastrous for free competitive enterprise and, if permitted, will destroy the effectiveness of the Sherman Act. For under these contracts a person wishing to buy a White truck must deal with only one seller who by virtue of his agreements with dealer competitors has the sole power as to the public to set prices, determine terms and even to refuse to sell to a particular customer. In the latter event the customer could not buy a White truck because a neighboring dealer must reject him under the White Motor contract unless he has "a place of business and/or purchasing headquarters" in the latter's territory. He might buy another brand of truck, it is true, but the existence of interbrand competition has never been a justification for an explicit agreement to eliminate competition. See *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956). Likewise [\*279] each White Motor dealer is isolated from all competition with other White Motor dealers. One cannot make a sale or purchase of a White Motor truck [\*\*\*\*46] outside of his own territory. [\*\*\*756] He is confined to his own economic island.

I have diligently searched appellant's offer of proof but fail to find any allegation by it that raises an issue of fact. All of its statements are economic arguments or business necessities none of which have any bearing on the legal issue. It clearly appears from its contracts that "all room for competition between retailers [dealers], who supply the public, is made impossible." *John D. Park & Sons Co. v. Hartman*, 153 F. 2d, 42 (C. A. 6th Cir.), opinion by Mr. Justice Lurton, then circuit judge, and adopted by Mr. Justice Hughes, later Chief Justice, in *Dr. Miles Medical Co. v. John D. Park & Sons Co., supra, at 400* (1911). I have read and re-read appellant's "argument" and even though I give it the dignity of proof I return to the conclusion, as did Mr. Justice Lurton, that "If these contracts leave any room at any point of the line for the usual play of competition between the dealers . . . it is not discoverable." *Ibid.*

This Court, it is true, has never held whether there is a difference between market divisions voluntarily undertaken by a [\*\*\*\*47] manufacturer such as White Motor and those of dealers in a commodity, agreed upon by themselves, such as were condemned in *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951). White does not contend that its distribution system has any less tendency to restrain competition among its distributors and dealers than a horizontal agreement among such distributors and dealers themselves. It seems to place some halo around its agreements because they are vertical. But the intended and actual effect is the same as, if not even more destructive than, a price-fixing agreement or any of its *per se* counterparts. This is true because price-fixing [\*280] agreements, being more easily breached, must be continually policed by those forming the combination, while contracts for a division of territory, being easily detected, are practically self-enforcing. Moreover, White Motor has admitted that each of its distributors and dealers, numbering some 300, has entered into identical contracts. In its "argument" it says that "it has to" agree to these exclusive territorial arrangements in order to get financially able and capable distributors and dealers. It [\*\*\*\*48] has [\*\*711] nowise denied that it has been required by the distributors or dealers to enter into the contracts. Indeed the clear inference is to the contrary. The motivations of White Motor and its distributors and dealers are inextricably intertwined; the distributors and dealers are each acquainted with the contracts and have readily complied with their requirements, without which the contracts would be of no effect. It is hard for me to draw a distinction on the basis of who initiates such a plan. Indeed, under *Interstate Circuit, Inc., v. United States*, 306 U.S. 208, 223 (1939), the unanimity of action by some 300 parties here forms the basis of an "understanding that all were to join" and the economics of the situation would certainly require as much. There this Court on a much weaker factual basis held:

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"It taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such . . . methods without some understanding that all were to join, and we reject as beyond the range of probability [\*\*\*757] that it was the result of mere chance."

Likewise, the other [\*\*\*\*49] restrictions in the contracts run counter to the Sherman Act. This Court has held the restriction on the withholding of customers to be illegal as a contract between potential competitors not to compete, United States v. McKesson & Robbins, Inc., supra, at 312 (1956), [\*281] and White Motor's prohibition on resales without its approval is condemned by United States v. Bausch & Lomb Co., 321 U.S. 707, 721 (1944). Experience, as well as our cases, has shown that these restrictions have a "pernicious effect on competition and lack . . . any redeeming virtue . . ." Northern Pac. R. Co. v. United States, supra, at 5.

The Court says that perhaps the reasonableness or the effect of such arrangements might be subject to inquiry. But the rule of reason is inapplicable to agreements made solely for the purpose of eliminating competition. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price fixing); Fashion Originators' Guild v. Federal Trade Comm'n, supra (group boycotts); International Salt Co. v. United States, 332 U.S. 392 (1947), and United States v. National Lead Co., 332 U.S. 319 (1947) [\*\*\*\*50] (tying arrangements); Timken Roller Bearing Co. v. United States, supra; Nationwide Trailer Rental System v. United States, 355 U.S. 10 (1957), affirming 156 F.Supp. 800 (D. C. D. Kan. 1957), and United States v. National Lead Co., supra (division of markets). The same rule applies to the contracts here. The offered justification must fail because it involves a contention contrary to the public policy of the Sherman Act, which is that the suppression of competition is in and of itself a public injury. To admit, as does the petitioner, that competition is eliminated under its contracts is, under our cases, to admit a violation of the Sherman Act. No justification, no matter how beneficial, can save it from that interdiction.

The thrust of appellant's contention seems to be in essence that it cannot market its trucks profitably without the advantage of the restrictive covenants. I note that other motor car manufacturers -- including the "big three" -- abandoned the practice over a decade ago. One of these, American Motors, told the Eighty-fourth Congress, before which legislation was pending to permit division [\*282] of territory, [\*\*\*\*51] <sup>1</sup> that it was "not in favor of any legislation, permissive or otherwise, that restricts the right of the customer to choose any dealers from whom he desires to purchase." Hearings before a Subcommittee [\*\*712] of the House Committee on Interstate and Foreign Commerce on Automobile Marketing Legislation, 84th Cong., p. 285. American Motors seems to have been able to survive and prosper against "big three" competition. But even though White Motor gains an advantage through the use of the restrictions, "the question remains whether it is one which [it] is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell." Dr. Miles Medical [\*\*\*758] Co., supra, at 407-408. And, Mr. Justice Hughes continued:

"As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant [\*\*\*52] cannot be regarded as sufficient to support its system." Id. at 408.

The milk in the coconut is that White Motor "having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic." Id. at 409.

Today the Court does a futile act in remanding this case for trial. In my view appellant cannot plead nor prove an issue upon which a successful defense of its contracts can be predicated. Neither time (I note the case is [\*283] now in its sixth year) nor all of the economic analysts, the statisticians, the experts in marketing, or for that matter the ingenuity of lawyers, can escape the unalterable fact that these contracts eliminate competition and under our cases are void. The net effect of the remand is therefore but to extend for perhaps an additional five years White

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<sup>1</sup> H. R. 6544, 84th Cong., 1st Sess. The bill was never reported from the Committee.

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Motor's enjoyment of the fruits of its illegal [\*\*\*53] action. Certainly the decision has no precedential value<sup>2</sup> in substantive antitrust law.

## References

Validity under federal antitrust laws of agreement conferring exclusive sales agency for designated territory

## Annotation References:

Extent of trader's right to exercise his own discretion as to the persons with whom he will or will not deal. 68 L ed 448.

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<sup>2</sup> Our recent certification of the amendment to the summary judgment procedure under [Rule 56](#), quoted in the Court's opinion, will eliminate the problem posed here, *i. e.*, the sufficiency of the record.

## **United States v. Philadelphia Nat'l Bank**

Supreme Court of the United States

February 20-21, 1963, Argued ; June 17, 1963, Decided

No. 83

**Reporter**

374 U.S. 321 \*; 83 S. Ct. 1715 \*\*; 10 L. Ed. 2d 915 \*\*\*; 1963 U.S. LEXIS 2413 \*\*\*\*; 1963 Trade Cas. (CCH) P70,812

UNITED STATES v. PHILADELPHIA NATIONAL BANK ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

**Disposition:** [201 F.Supp. 348](#), reversed.

### **Core Terms**

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merger, banks, acquisitions, Clayton Act, stock, concentration, bank merger, agencies, consolidation, effects, regulation, anti trust law, national bank, insured, Sherman Act, commerce, commercial bank, largest, proposed merger, anticompetitive, antitrust, deposits, loophole, loans, Currency, factors, merge, banking industry, legislative history, four-county

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

**[HN1](#)[ Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 1](#).

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

**[HN2](#)[ Antitrust Statutes, Clayton Act**

See [15 U.S.C.S. § 18](#).

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

374 U.S. 321, \*321; 83 S. Ct. 1715, \*\*1715; 10 L. Ed. 2d 915, \*\*\*915; 1963 U.S. LEXIS 2413, \*\*\*\*1

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

### **HN3** Financial Institutions, Bank Mergers

See [12 U.S.C.S. § 1828\(c\)](#).

Antitrust & Trade Law > Clayton Act > Jurisdiction

Mergers & Acquisitions Law > Sales of Assets > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Banking Law > Federal Acts > General Overview

Banking Law > Federal Acts > Federal Trade Commission Act > General Overview

Banking Law > Federal Acts > Federal Trade Commission Act > Scope & Enforcement

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

### **HN4** Clayton Act, Jurisdiction

Section 7 of the Clayton Act, [15 U.S.C.S. § 18](#), reaches acquisitions of corporate stock or share capital by any corporation engaged in commerce, but it reaches acquisitions of corporate assets only by corporations subject to the jurisdiction of the Federal Trade Commission (FTC). The FTC, under § 5 of the Federal Trade Commission Act, has no jurisdiction over banks. [15 U.S.C.S. §45\(a\)\(6\)](#).

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

### **HN5** Antitrust Statutes, Clayton Act

The stock-acquisition provision of § 7 of the Clayton Act, [15 U.S.C.S. § 18](#), embraces every corporation engaged in commerce, including banks.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

### **HN6** Antitrust & Trade Law, Exemptions & Immunities

Immunity from the antitrust laws is not lightly implied.

Governments > Legislation > Interpretation

## [\*\*HN7\*\*](#) Legislation, Interpretation

The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

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

Governments > Legislation > Expiration, Repeal & Suspension

## [\*\*HN8\*\*](#) Antitrust & Trade Law, Exemptions & Immunities

Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and are found in cases of plain repugnancy between the antitrust and regulatory provisions.

Administrative Law > Separation of Powers > Primary Jurisdiction

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Primary Jurisdiction

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

## [\*\*HN9\*\*](#) Separation of Powers, Primary Jurisdiction

The doctrine of primary jurisdiction requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Banking Law > Commercial Banks > Bank Expansions > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

## [\*\*HN10\*\*](#) Regulated Industries, Financial Institutions

The tests of illegality under the Sherman Act, [15 U.S.C.S. §§ 1, 2](#), and the Clayton Act, [15 U.S.C.S. § 15](#), are complementary. The public policy announced by [§ 7](#) of the Clayton Act, [15 U.S.C.S. §18](#), is to be taken into consideration in determining whether acquisition of assets violates the prohibitions of the Sherman Act against unreasonable restraints.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

#### **HN11**[] **Antitrust Statutes, Clayton Act**

The statutory test of whether a proposed merger is lawful under [§ 7](#) of the Clayton Act, [15 U.S.C.S § 18](#), is whether the effect of the merger may be substantially to lessen competition in any line of commerce in any section of the country.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

#### **HN12**[] **Antitrust Statutes, Clayton Act**

The proper question to be asked in determination of the appropriate section of the country is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate. This depends upon the geographic structure of supplier-customer relations. The area of effective competition in the known line of commerce must be chartered by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

#### **HN13**[] **Antitrust Statutes, Clayton Act**

The determination of whether the effect of a merger may be to substantially lessen competition in the relevant market requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future. Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market; yet the relevant economic data are both complex and elusive. Unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded. The courts must be alert to the danger of subverting congressional intent by permitting a too-

broad economic investigation. In any case in which it is possible, without doing violence to the congressional objective embodied in [§ 7](#) of the Clayton Act, [15 U.S.C.S. § 18](#), to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

Mergers & Acquisitions Law > Antitrust > Remedies

#### [\*\*HN14\*\*](#) [down] **Antitrust Statutes, Clayton Act**

A merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

#### [\*\*HN15\*\*](#) [down] **Antitrust Statutes, Clayton Act**

The test of a competitive market is not only whether small competitors flourish but also whether consumers are well served.

## **Lawyers' Edition Display**

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### **Summary**

Two Philadelphia banks, both engaged in interstate commerce, one organized under the laws of the United States and the other under Pennsylvania law, proposed a merger. In accordance with the Bank Merger Act of 1960 ([12 USC 1828\(c\)](#)), an application for approval of the merger was filed with, and approved by, the Comptroller of the Currency. The United States then brought the present civil action in the United States District Court for the Eastern District of Pennsylvania to enjoin the merger as violating 1 of the Sherman Act and 7 of the Clayton Act ([15 USC 18](#)), which in its pertinent part prohibits the acquisition by one corporation of the stock of another where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. After trial, the District Court dismissed the action with prejudice. ([201 F Supp 348](#).)

On appeal, the United States Supreme Court reversed with direction to enter judgment enjoining the proposed merger. In an opinion by Brennan, J., expressing the views of five members of the Court, it was held that the merger violated 7 of the Clayton Act. This decision was rested on the grounds that 7 was applicable to bank mergers, that the Bank Merger Act of 1960 did not immunize mergers approved thereunder by the appropriate administrative agencies from challenge under the federal antitrust laws, and that 7 was violated because the merger, if realized, would result in a single bank's controlling at least 30 percent of the commercial bank business in the four-county Philadelphia metropolitan area.

374 U.S. 321, \*321; 83 S. Ct. 1715, \*\*1715; 10 L. Ed. 2d 915, \*\*\*915; 1963 U.S. LEXIS 2413, \*\*\*\*1

Harlan, J., joined by Stewart, J., dissented on the ground that 7 of the Clayton Act did not apply to a bank merger.

Goldberg, J., in a memorandum, agreed with the view expressed in the dissenting opinion by Harlan, J., but made it clear that he did not necessarily dissent from the judgment of the Court invalidating the merger, because the result might be justified under the Sherman Act, expressing, however, no ultimate conclusion concerning the latter issue.

White, J., did not participate.

## Headnotes

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > merger of banks -- injunctive relief. --

> Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B]

The merger of two banks resulting in a single bank's controlling at least 30 percent of the commercial bank business in the four-county Philadelphia metropolitan area must be enjoined because forbidden by 7 of the Clayton Act ([15 USC 18](#)), prohibiting the acquisition by a corporation engaged in commerce of stock of another corporation so engaged, where in any line of commerce in any section of the country the effect of such acquisition may be substantially to lessen competition.

BANKS §3.5 > consolidation -- merger. -- > Headnote:

[LEdHN\[2\]](#) [2]

A consolidation of two banks exists where the resulting bank is a different entity from either of the constituent banks; in a merger one bank disappears in the other surviving bank.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §35 > acquisition by bank of assets of other bank. -- > Headnote:

[LEdHN\[3\]](#) [3]

In view of 5 of the Federal Trade Commission Act, ([15 USC 45 \(a\)\(6\)](#)), exempting banks from the jurisdiction of the Federal Trade Commission, the acquisition by one bank of the assets of another is not within 7 of the Clayton Act ([15 USC 18](#)), providing that no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation where in any line of commerce in any section of the country the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §86 > banks -- jurisdiction of Federal Trade Commission. -- > Headnote:

[LEdHN\[4\]](#) [4]

374 U.S. 321, \*321; 83 S. Ct. 1715, \*\*1715; 10 L. Ed. 2d 915, \*\*\*915; 1963 U.S. LEXIS 2413, \*\*\*\*1

No jurisdiction over banks is conferred upon the Federal Trade Commission by 11 of the amended Clayton Act ([15 USC 21](#)), providing that authority to enforce compliance with 2, 3, 7, and 8 of the act by persons respectively subject thereto is vested in the Federal Reserve Board where applicable to banks, and in the Federal Trade Commission where applicable to "all other character of commerce"; bank mergers do not fall into the residual category of "all other character of commerce."

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §22 > banking as commerce. -- > Headnote:  
[LEdHN\[5\]](#) [5]

Banking is, where the operations stretch across state lines, commerce within the meaning of 7 of the Clayton Act ([15 USC 18](#)), directed against the acquisition by one corporation engaged in commerce of the stock or assets of another corporation so engaged.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §86 > RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §103 > remedial powers of FTC. -- > Headnote:  
[LEdHN\[6\]](#) [6]

The question of the Federal Trade Commission's remedial powers under 11 of the Clayton Act ([15 USC 21](#)) regarding violations of the act is to be distinguished from that of its remedial powers under 5 of the Federal Trade Commission Act ([15 USC 45\(b\)](#)); the Commission has no power to order divestiture in 5 proceedings.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > stock acquisition -- assets acquisition -- merger. -- > Headnote:  
[LEdHN\[7\]](#) [7]

Read together, the stock-acquisition and assets-acquisition provisions of 7 of the Clayton Act ([15 USC 18](#))--providing that no corporation engaged in commerce shall acquire the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the assets of another corporation so engaged, where the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly--reach mergers, which fit neither category perfectly but lie somewhere between the two ends of the spectrum; so construed, the specific exception for acquiring corporations not subject to the Commission's jurisdiction excludes from the coverage of 7 only assets acquisitions by such corporations when not accomplished by merger.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §20 > RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §86 > bank mergers -- jurisdiction of administrative agencies to enforce 7 of Clayton Act. -- > Headnote:

[LEdHN\[8\]](#) [8]

The Bank Merger Act of 1960 ([12 USC 1828 \(c\)](#)), assigning roles in merger applications to the Federal Deposit Insurance Corporation and the Comptroller of the Currency as well as to the Federal Reserve Board, supplants

374 U.S. 321, \*321; 83 S. Ct. 1715, \*\*1715; 10 L. Ed. 2d 915, \*\*\*915; 1963 U.S. LEXIS 2413, \*\*\*\*1

whatever authority the Federal Reserve Board may have acquired under 11 of the Clayton Act ([15 USC 21](#)), by virtue of the 1950 amendment of 7 thereof ([15 USC 18](#)), to enforce the stock- acquisition provisions of 7 against bank mergers; since the Bank Merger Act applies only to mergers, consolidations, acquisitions of assets, and assumptions of liabilities, but not to outright stock acquisitions, the Federal Reserve Board's authority under 11, as it existed before the 1950 amendment (64 Stat 1125) of 7 of the Clayton Act, remains unaffected.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > stock-acquisition provision -- assets-acquisition provision -- merger. -- > Headnote:

[LEdHN\[9\]](#) [9]

Though re-enacted in haec verba by the 1950 amendment (64 Stat 1125), the stock-acquisition provision of 7 of the Clayton Act ([15 USC 18](#))--providing that no corporation engaged in commerce shall acquire the stock and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the assets of another corporation so engaged, where the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly--must be deemed expanded in its new context to include, at the very least, acquisitions by merger or consolidation, transactions which entail a transfer of stock of the parties, while the assets-acquisition provision clearly reaches corporate acquisitions involving no such transfer.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §6 > purpose of amended 7 of Clayton Act. --

> Headnote:

[LEdHN\[10\]](#) [10]

The objective of including the phrase "corporation subject to the jurisdiction of the Federal Trade Commission" in 7 of the Clayton Act ([15 USC 18](#)), as amended in 1950 (64 Stat 1125)--providing that no corporation engaged in commerce shall acquire the stock and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the assets of another corporation so engaged, where the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly--is not to limit the amalgamations to be covered by the amended statute but to make explicit the role of the Federal Trade Commission in administering the section.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §7 > immunity. -- > Headnote:

[LEdHN\[11\]](#) [11]

Immunity from the antitrust laws is not lightly implied.

STATUTES §151.5 > STATUTES §155 > administrative construction -- views of members of Congress. -- > Headnote:

[LEdHN\[12\]](#) [12]

The construction of the amended 7 of the Clayton Act ([15 USC 18](#)) as applicable to bank mergers is not foreclosed because, after the passage of the amendment, some members of Congress, and for a time the Justice Department, voiced a contrary view.

EVIDENCE §167 > inferences -- congressional intent. -- > Headnote:

[LEdHN\[13\]](#) [13]

The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.

EVIDENCE §167 > STATUTES §154 > inferences -- congressional intent -- Clayton Act -- Bank Merger Act. -- > Headnote:

[LEdHN\[14\]](#) [14]

The views of Congress in enacting the Bank Merger Act of 1960 ([12 USC 1828\(c\)](#)) form a hazardous basis for inferring the intent of Congress in enacting the 1950 amendment (64 Stat 1125) of 7 of the Clayton Act ([15 USC 18](#)), even though misunderstanding of the scope of 7 may have played some part in the passage of the 1960 act; the design fashioned in the Bank Merger Act being predicated upon uncertainty as to the scope of 7, the court may, in construing that scope, dispel the uncertainty.

BANKS §3.5 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §20 > mergers -- immunity from antitrust laws. -- > Headnote:

[LEdHN\[15A\]](#) [15A] [LEdHN\[15B\]](#) [15B]

By directing the appropriate banking agencies to consider competitive factors before approving mergers, the Bank Merger Act of 1960 ([12 USC 1828\(c\)](#)) does not immunize approved mergers from challenge under the federal antitrust laws, the act not requiring such agencies either to give competitive factors any particular weight or to hold a hearing before approving an application for merger, and there being no specific provision for judicial review of the administrative decision.

APPEAL §1092 > waiver of error in appellate court. -- > Headnote:

[LEdHN\[16\]](#) [16]

Although appellees' contention below that the Bank Merger Act ([12 USC 1828\(c\)](#)), by directing the appropriate banking agencies to consider competitive factors before approving mergers, immunizes approved mergers from challenge under the federal antitrust laws, was abandoned on appeal, the United States Supreme Court will consider this contention because it touches the proper relations of the judicial and administrative spheres.

STATUTES §248.5 > implied repeal -- antitrust laws. -- > Headnote:

[LEdHN\[17\]](#) [17]

Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and will be found only in cases of plain repugnancy between the antitrust and regulatory provisions.

374 U.S. 321, \*321; 83 S. Ct. 1715, \*\*1715; 10 L. Ed. 2d 915, \*\*\*915; 1963 U.S. LEXIS 2413, \*\*\*\*1

ADMINISTRATIVE LAW §322 > primary jurisdiction. -- > Headnote:

[LEdHN\[18\]](#) [18]

The doctrine of "primary jurisdiction" requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme; court jurisdiction is not thereby ousted, but only postponed.

ADMINISTRATIVE LAW §324 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §68 > bank merger -- primary administrative jurisdiction. -- > Headnote:

[LEdHN\[19\]](#) [19]

Decision of the question whether a bank merger violates 7 of the Clayton Act ([15 USC 18](#)) and hence is enjoinable is not subject to postponement under the doctrine of primary administrative jurisdiction, where there may be no power of judicial review of the decision of the appropriate administrative agency approving the merger, and such approval does not in any event confer immunity from the antitrust laws, and moreover, even if the doctrine were applicable, the action would not be barred since the agency proceeding was completed before the action was commenced.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §20 > effect of Bank Merger Act. --

> Headnote:

[LEdHN\[20\]](#) [20]

The Bank Merger Act of 1960 ([12 USC 1828\(c\)](#)) is not intended to extinguish other sources of federal restraint of bank acquisitions having anticompetitive effects.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > mergers. -- > Headnote:

[LEdHN\[21\]](#) [21]

The Sherman Act forbids mergers effecting an unreasonable restraint of trade.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §5 > Sherman Act -- Clayton Act. --

> Headnote:

[LEdHN\[22\]](#) [22]

The Clayton and Sherman Acts do not embody approaches to antitrust policy inconsistent with or unrelated to each other; the tests of illegality under both acts are complementary.

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §7 > construction of federal legislation -- acquisition of stock. -- > Headnote:

[LEdHN/23](#) [↓] [23]

The public policy announced by 7 of the Clayton Act, which is directed against the acquisition by one corporation of the stock or assets of another corporation, is to be taken into consideration in determining whether acquisition of assets violates the prohibitions of the Sherman Act against unreasonable restraints, even though not every violation of 7 of the Clayton Act is necessarily a violation of the Sherman Act.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > bank merger -- line of commerce. --

> Headnote:

[LEdHN/24](#) [↓] [24]

The cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term "commercial banking" composes a distinct line of commerce within the meaning of 7 of the Clayton Act ([15 USC 18](#)), prohibiting the acquisition by one corporation of the stock or assets of another corporation where "in any line of commerce" the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > bank merger -- lessening of competition -- appropriate "section of the country." -- > Headnote:

[LEdHN/25](#) [↓] [25]

In determining the appropriate "section of the country" within the meaning of 7 of the Clayton Act ([15 USC 18](#)), which prohibits the acquisition by one corporation of the stock of another corporation where in any line of commerce "in any section of the country" the effect of such acquisition may be substantially to lessen competition, the proper question to be asked is not where the banks which are parties to a merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate; this depends upon the geographic structure of supplier-customer relations.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > merger -- area of effective competition. -- > Headnote:

[LEdHN/26](#) [↓] [26]

In determining whether a merger violates 7 of the Clayton Act ([15 USC 18](#)), prohibiting the acquisition by one corporation of the assets of another where "in any line of commerce in any section of the country" the effect of such acquisition may be substantially to lessen competition, the area of effective competition in a known line of commerce must be chartered by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > bank mergers -- lessening competition -- area. -- > Headnote:

[LEdHN\[27\]](#) [27]

The four-county Philadelphia metropolitan area, which state law recognizes as a meaningful banking community in allowing Philadelphia banks to branch within it, and which would seem roughly to delineate the area in which bank customers who are neither very large nor very small find it practical to do their banking business, is--for the purposes of 7 of the Clayton Act ([15 USC 18](#)), prohibiting the acquisition by one corporation of the stock of another where in any line of commerce in any section of the country the effect of such acquisition may be substantially to lessen competition--a more appropriate "section of the country" in which to appraise the merger of two Philadelphia banks than any larger or smaller or different area; this conclusion is fortified by the fact that three federal banking agencies regard the area in which banks have their offices as an "area of effective competition."

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > merger -- impact on competition. --

> Headnote:

[LEdHN\[28\]](#) [28]

Determination of the question whether the effect of a merger "may be substantially to lessen competition" in the relevant market, so as to bring the merger within the prohibition of 7 of the Clayton Act ([15 USC 18](#)), requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34 > acquisition of stock and assets of corporation -- simplification of test of illegality. -- > Headnote:

[LEdHN\[29\]](#) [29]

In any case in which it is possible, without doing violence to the congressional objective embodied in 7 of the Clayton Act ([15 USC 18](#))--prohibiting the acquisition by one corporation of the stock or assets of another corporation where in any line of commerce in any section of the country the effect of such acquisition may be substantially to lessen competition--to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration.

EVIDENCE §343.5 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > merger -- illegality -- burden of proof. -- > Headnote:

[LEdHN\[30\]](#) [30]

Under 7 of the Clayton Act ([15 USC 18](#)), prohibiting the acquisition by one corporation of the stock of another where the effect of such acquisition may be substantially to lessen competition, a merger which produces a firm control of an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of

374 U.S. 321, \*321; 83 S. Ct. 1715, \*\*1715; 10 L. Ed. 2d 915, \*\*\*915; 1963 U.S. LEXIS 2413, \*\*\*\*1

evidence clearly showing that the merger is not likely to have such anticompetitive effects; such a test lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in the light of Congress' design in 7 to prevent undue concentration.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > merger -- integration by contract. --

> Headnote:

[LEdHN\[31\]](#) [31]

Integration by a corporate merger is more suspect as violating the antitrust laws than integration by contract, because of the greater permanence of the former.

EVIDENCE §979 > weight -- in antitrust case involving bank merger. -- > Headnote:

[LEdHN\[32A\]](#) [32A] [LEdHN\[32B\]](#) [32B]

In a suit to enjoin the merger of two Philadelphia commercial banks as violating 7 of the Clayton Act ([15 USC 18](#)) in which there is nothing in the record to rebut the inherently anticompetitive tendency manifested by the percentages of the business which would be controlled by the bank resulting from the merger, testimony by bank officers to the effect that competition among banks in Philadelphia was vigorous and would continue to be so after the merger is entitled to little weight, in view of the witnesses' failure to give concrete reasons for their conclusions, and of equally little value are the assurances offered by bank witnesses that customers dissatisfied with the services of the resulting bank may readily turn to the 40 other banks in the Philadelphia area; that some of the bank officers who testified represented small banks in competition with defendants does not substantially enhance the probative value of their testimony.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > competitive market -- test. --

> Headnote:

[LEdHN\[33\]](#) [33]

For the purposes of the antitrust laws, the test of a competitive market is not only whether the competitors flourish but also whether the consumers are well served; congressional concern is with the protection of competition, not competitors.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §11 > coverage of antitrust laws -- commercial banking. -- > Headnote:

[LEdHN\[34\]](#) [34]

Commercial banking is not, because it is subject to a high degree of governmental regulation or because it deals in the intangibles of credit and services rather than in the manufacture or sale of tangible commodities, immune from the anticompetitive effects of undue concentration.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > bank merger -- justifications. --

> Headnote:

[LEdHN\[35A\]](#) [ ] [35A] [LEdHN\[35B\]](#) [ ] [35B]

A bank merger otherwise falling within the prohibitions of 7 of the Clayton Act ([15 USC 18](#)) cannot be justified on the grounds that only through mergers can banks follow their customers to suburbs and retain their business, or that the increased lending limit of the resulting bank will enable it to compete with large out-of-state banks for very large loans, or that the area in which the banks operate needs a bank larger than it presently has in order to bring business to the area and stimulate its economic development.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > effects of competition. -- > Headnote:

[LEdHN\[36\]](#) [ ] [36]

Anticompetitive effects in one market cannot be justified by procompetitive consequences in another.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §17 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > merger. -- > Headnote:

[LEdHN\[37\]](#) [ ] [37]

A corporate merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial; 7 of the Clayton Act ([15 USC 18](#)) proscribes anticompetitive mergers, the benign and the malignant alike.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > bank mergers -- justification. --

> Headnote:

[LEdHN\[38\]](#) [ ] [38]

Section 7 of the Clayton Act ([15 USC 18](#)), as applied to prohibit bank mergers, does not mandate cutthroat competition in the banking industry, and does not exclude defenses based on dangers to liquidity or solvency, if to avert them a merger is necessary; it does require, however, that the forces of competition be allowed to operate within the broad framework of governmental regulation of the industry, and the fact that banking is a highly regulated industry critical to the nation's welfare makes the play of competition not less important but more so.

## Syllabus

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Appellees, a national bank and a state bank, are the second and third largest of the 42 commercial banks in the metropolitan area consisting of Philadelphia and its three contiguous counties, and they have branches throughout that area. Appellees' boards of directors approved an agreement for their consolidation, under which the national bank's stockholders would retain their stock certificates, which would represent shares in the consolidated bank,

while the state bank's stockholders would surrender their shares in exchange for shares in the consolidated bank. After obtaining reports, as required by the Bank Merger Act of 1960, from the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Attorney General, all of whom advised that the proposed merger would substantially lessen competition in the area, the Comptroller of the Currency approved it. The United States sued to enjoin consummation [\*\*\*\*2] of the proposed consolidation, on the ground, *inter alia*, that it would violate [§ 7](#) of the Clayton Act. *Held*: The proposed consolidation of appellee banks is forbidden by [§ 7](#) of the Clayton Act, and it must be enjoined. Pp. 323-372.

1. By the amendments to [§ 7](#) of the Clayton Act enacted in 1950, Congress intended to close a loophole in the original section by broadening its scope so as to cover the entire range of corporate amalgamations, from pure stock acquisitions to pure acquisitions of assets, and it did not intend to exclude bank mergers. Pp. 335-349.
2. The Bank Merger Act of 1960, by directing the banking agencies to consider competitive factors before approving mergers, did not immunize mergers approved by them from operation of the federal antitrust laws; and the doctrine of primary jurisdiction is not applicable here. [\*California v. Federal Power Commission\*, 369 U.S. 482](#). Pp. 350-355.
3. The proposed consolidation of appellee banks would violate [§ 7](#) of the Clayton Act, and it must be enjoined. Pp. 355-372.
  - (a) The "line of commerce" here involved is commercial banking. Pp. 355-357.
  - (b) The "section of the country" which is relevant [\*\*\*\*3] here is the metropolitan area consisting of Philadelphia and its three contiguous counties. Pp. 357-362.
  - (c) The consolidated bank would control such an undue percentage share of the relevant market (at least 30%) and the consolidation would result in such a significant increase in the concentration of commercial banking facilities in the area (33%) that the result would be inherently likely to lessen competition substantially, and there is no evidence in the record to show that it would not do so. Pp. 362-367.
  - (d) The facts that commercial banking is subject to a high degree of governmental regulation and that it deals with the intangibles of credit and services, rather than in the manufacture or sale of tangible commodities, do not immunize it from the anticompetitive effects of undue concentration. Pp. 368-370.
  - (e) This proposed consolidation cannot be justified on the theory that only through mergers can banks follow their customers to the suburbs and retain their business, since this can be accomplished by establishing new branches in the suburbs. P. 370.
  - (f) This proposed consolidation cannot be justified on the ground that the increased lending limit would enable the [\*\*\*\*4] consolidated bank to compete with the large out-of-state banks, particularly the New York banks, for very large loans. Pp. 370-371.
  - (g) This proposed consolidation cannot be justified on the ground that Philadelphia needs a bank larger than it now has in order to bring business to the area and stimulate its economic development. P. 371.
  - (h) This Court rejects appellees' pervasive suggestion that application of the procompetitive policy of [§ 7](#) to the banking industry will have dire, although unspecified, consequences for the national economy. Pp. 371-372.

**Counsel:** Assistant Attorney General Loewinger argued the cause for the United States. With him on the briefs were Solicitor General Cox, Charles H. Weston, George D. Reycraft, Lionel Kestenbaum and Melvin Spaeth.

Philip Price and Arthur Littleton argued the cause for appellees. With them on the brief were Ernest R. von Starck, Donald A. Scott, Carroll R. Wetzel, John J. Brennan and Minturn T. Wright III.

**Judges:** Warren, Black, Clark, Harlan, Brennan, Stewart, Goldberg; White took no part in the consideration or decision of this case.

**Opinion by:** BRENNAN

## Opinion

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[\*323] [\*\*\*921] [\*\*1720] MR. JUSTICE BRENNAN delivered [\*\*\*\*5] the opinion of the Court.

LEdHN[1A] [↑] [1A]

The United States, appellant here, brought this civil action in the United States District Court for the Eastern District of Pennsylvania under § 4 of the Sherman Act, 15 U. S. C. § 4, and § 15 of the Clayton Act, 15 U. S. C. § 25, to enjoin a proposed merger of The Philadelphia National Bank (PNB) and Girard Trust Corn Exchange Bank (Girard), appellees here. The complaint charged violations of § 1 of the Sherman Act, 15 U. S. C. § 1, and [\*\*\*922] § 7 of the Clayton Act, 15 U. S. C. § 18.<sup>1</sup> From a judgment for appellees after trial, see 201 F.Supp. 348, the United States appealed to this Court under § 2 of the Expediting Act, 15 U. S. C. § 29. Probable jurisdiction was noted. 369 U.S. 883. We reverse the judgment of the District Court. We hold that the merger of appellees is forbidden by § 7 of the [\*324] Clayton Act and so must be enjoined; we need not, and therefore do not, reach the further question of alleged violation [\*\*\*6] of § 1 of the Sherman Act.

### [\*\*\*7] I. THE FACTS AND PROCEEDINGS BELOW.

#### A. *The Background: Commercial Banking in the United States.*

Because this is the first case which has required this Court to consider the application of the antitrust laws to the commercial banking industry, and because aspects of the industry and of the degree of governmental regulation of it will recur throughout our discussion, we deem it appropriate to begin with a brief background description.<sup>2</sup>

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<sup>1</sup> Section 1 of the Sherman Act provides in pertinent part: HN1 [↑] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Section 7 of the Clayton Act, as amended in 1950 by the Celler-Kefauver Antimerger Act, provides in pertinent part: HN2 [↑] "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

<sup>2</sup> The discussion in this portion of the opinion draws upon undisputed evidence of record in the case, supplemented by pertinent reference materials. See Board of Govs. of the Fed. Res. System, Financing Small Business (Comm. print 1958); The Federal Reserve System (3d ed. 1954); Concentration of Banking in the United States (Comm. print 1952); Bogen, The Competitive Position of Commercial Banks (1959); Commission on Money and Credit, Money and Credit (1961); Freeman, The Problems of Adequate Bank Capital (1952); Hart, Money, Debt, and Economic Activity (2d ed. 1953); Lent, The Changing Structure of Commercial Banking (1960); Sayers, Modern Banking (5th ed. 1960); Staff of House Select Comm. on Small Business, 86th Cong., 2d Sess., Banking Concentration and Small Business (1960); U.S. Attorney General's Comm. on Administrative Procedure, Federal Control of Banking (S. Doc. No. 186, 76th Cong., 3d Sess., 1940); Fox, Supervision of Banking by the Comptroller of the Currency, in Public Administration and Policy Formation (Redford ed. 1956), 117; Stokes, Public Convenience and Advantage in Applications for New Banks and Branches, 74 Banking L. J. 921 (1957). For materials which focus specifically on the question of competition in the banking industry, see also Alhadeff, Monopoly and Competition in Banking (1954); Chapman, Concentration of Banking (1934); Horvitz, Concentration and Competition in New England Banking (1958); Lawrence, Banking Concentration in the United States (1930); Berle, Banking Under the Anti-Trust Laws, 49 Col. L. Rev. 589 (1949); Chandler, Monopolistic Elements in Commercial Banking, 46 J. Pol. Econ. 1 (1938); Gruis, Antitrust Laws and Their Application to Banking, 24 Geo. Wash. L. Rev. 89 (1955); Funk, Antitrust Legislation Affecting Bank Mergers, 12 Bus. Law. 496 (1957); Klebaner, Federal Control of Commercial Bank Mergers, 37 Ind. L. J. 287 (1962); Wemple and Cutler, The Federal Bank Merger Law and the Antitrust Laws, 16 Bus. Law. 994 (1961); Comment, Bank Charter, Branching, Holding Company and

[\*\*\*\*8] [\*325] Commercial [\*\*1721] banking in this country is primarily unit banking. That is, control of commercial banking is [\*\*923] diffused throughout a very large number of independent, local banks -- 13,460 of them in 1960 -- rather than concentrated in a handful of nationwide banks, as, for example, in England and Germany. There are, to be sure, in addition to the independent banks, some 10,000 branch banks; but branching, which is controlled largely by state law -- and prohibited altogether by some States -- enables a bank to extend itself only to state lines and often not that far.<sup>3</sup> It is also the case, of course, that many banks place loans and solicit deposits outside their home area. But with these qualifications, it remains true that ours is essentially a decentralized system of community banks. Recent years, however, have witnessed a definite trend toward concentration. Thus, during the decade ending in 1960 the number of commercial banks in the United [\*326] States declined by 714, despite the chartering of 887 new banks and a very substantial increase in the Nation's credit needs during the period. Of the 1,601 independent banks which thus disappeared, [\*\*\*\*9] 1,503, with combined total resources of well over \$ 25,000,000,000, disappeared as the result of mergers.

Commercial banks are unique among financial institutions in that they alone are permitted by law to accept demand deposits. This distinctive power gives commercial banking a key role in the national economy. For banks do not merely deal in, but are actually a source of, money and credit; when a bank makes a loan by crediting the borrower's demand deposit account, it augments the Nation's credit supply.<sup>4</sup> Furthermore, the [\*\*\*\*10] power to accept demand deposits makes banks the intermediaries in most financial transactions (since transfers of substantial moneys are almost always by check rather than by cash) and, concomitantly, the repositories of very substantial individual and corporate funds. The banks' use of these funds is conditioned by the fact that their working capital consists very largely of demand deposits, which makes liquidity the guiding principle of bank lending and investing policies; thus it is that banks are the chief source of the country's short-term business credit.

Banking operations are varied and complex; "commercial banking" describes a congeries of services and credit devices.<sup>5</sup> But among [\*\*\*924] them the creation of additional [\*327] money and credit, the management [\*1722] [\*\*\*\*11] of the checking-account system, and the furnishing of short-term business loans would appear to be the most important. For the proper discharge of these functions is indispensable to a healthy national economy, as the role of bank failures in depression periods attests. It is therefore not surprising that commercial banking in the United States is subject to a variety of governmental controls, state and federal. Federal regulation is the more extensive, and our focus will be upon it. It extends not only to the national banks, i. e., banks chartered under federal law and supervised by the Comptroller of the Currency, see [12 U. S. C. § 21 et seq.](#) For many state banks, see [12 U. S. C. § 321](#), as well as virtually all the national banks, [12 U. S. C. § 222](#), are members of the Federal Reserve System (FRS), and more than 95% of all banks, see [12 U. S. C. § 1815](#), are insured by the

Merger Laws: Competition Frustrated, 71 Yale L. J. 502 (1962); Note, Federal Regulation of Bank Mergers: The Opposing Views of the Federal Banking Agencies and the Department of Justice, 75 Harv. L. Rev. 756 (1962).

<sup>3</sup> In addition, there is a certain amount of bank holding company activity. The Bank Holding Company Act of 1956, [12 U. S. C. §§ 1841-1848](#), brought bank holding companies under stringent federal regulation. As of 1958, the 43 registered bank holding companies controlled 5.7% of all banking offices and 7.4% of all deposits. Lent, The Changing Structure of Commercial Banking (1960), 19. See also Comment, *supra*, note 2, 71 Yale L. J., at 516-522.

<sup>4</sup> Such creation is not, to be sure, pure sleight of hand. A bank may not make a loan without adequate reserves. Nevertheless, the element of bank money creation is real. *E. g.*, Samuelson, Economics (5th ed. 1961), 331-343.

<sup>5</sup> The principal banking "products" are of course various types of credit, for example: unsecured personal and business loans, mortgage loans, loans secured by securities or accounts receivable, automobile installment and consumer goods installment loans, tuition financing, bank credit cards, revolving credit funds. Banking services include: acceptance of demand deposits from individuals, corporations, governmental agencies, and other banks; acceptance of time and savings deposits; estate and trust planning and trusteeship services; lock boxes and safety-deposit boxes; account reconciliation services; foreign department services (acceptances and letters of credit); correspondent services; investment advice. It should be noted that many other institutions are in the business of supplying credit, and so more or less in competition with commercial banks (see further, pp. 356-357, *infra*), for example: mutual savings banks, savings and loan associations, credit unions, personal-finance companies, sales-finance companies, private businessmen (through the furnishing of trade credit), factors, direct-lending government agencies, the Post Office, Small Business Investment Corporations, life insurance companies.

Federal Deposit Insurance Corporation (FDIC). State member and nonmember insured banks are subject to a federal regulatory scheme almost as elaborate as that which governs the national banks.

[\*\*\*\*12] The governmental controls of American banking are manifold. First, the Federal Reserve System, through its open-market operations, see [12 U. S. C. §§ 263 \(c\)](#), 353-359, control of the rediscount rate, see [12 U. S. C. § 357](#), and modifications of reserve requirements, see [12 U. S. C. §§ 462, 462b](#), [\*328] regulates the supply of money and credit in the economy and thereby indirectly regulates the interest rates of bank loans. This is not, however, rate regulation. The Reserve System's activities are only designed to influence the prime, *i. e.*, minimum, bank interest rate. There is no federal control of the maximum, although all banks, state and national, are subject to state usury laws where applicable. See [12 U. S. C. § 85](#). In the range between the maximum fixed by state usury laws and the practical minimum set by federal fiscal policies (there is no law against undercutting the prime rate but bankers seldom do), bankers are free to price their loans as they choose. Moreover, charges for other banking services, such as service charges for checking privileges, are free of governmental [\*\*\*\*13] regulation, state or federal.

Entry, branching, and acquisitions are covered by a network of state and federal statutes. A charter for a new bank, state or national, will not be granted unless the invested capital and management of the applicant, and its prospects for doing sufficient business to operate at a reasonable profit, give adequate protection against undue competition and possible failure. See, e. g., [12 U. S. C. §§ 26, 27, 51](#); [12 CFR § 4.1 \(b\)](#); Pa. Stat. Ann., Tit. 7, § 819-306. Failure to meet these standards may cause the FDIC to refuse an application for insurance, [12 U. S. C. §§ 1815, 1816](#), and may cause the FDIC, Federal Reserve Board (FRB), and Comptroller to refuse permission to branch to insured, member, and national banks, respectively. [12 U. S. C. §§ 36, 321, 1828 \(d\)](#). Permission to merge, consolidate, acquire assets, or assume liabilities may be refused by the agencies on the same grounds. [12 U. S. C. \(1958 ed., Supp. IV\) § 1828 \(c\)](#), note 8, *infra*. Furthermore, national banks appear to be subject to state geographical [\*\*\*\*14] limitations on branching. See [12 U. S. C. § 36 \(c\)](#).

[\*329] Banks are also subject to a number of specific provisions aimed at ensuring sound banking practices. For example, member banks of the Federal Reserve [\*\*1723] System may not pay interest on demand deposits, [12 U. S. C. § 371a](#), may not invest in common stocks or hold for their own account investment securities of any one obligor in excess of 10% of the bank's unimpaired capital and surplus, see [12 U. S. C. §§ 24](#) Seventh, 335, and may not pay interest on time or savings deposits above the rate fixed by the FRB, [12 U. S. C. § 371b](#). The payment of interest on deposits by nonmember insured banks is also federally regulated. [12 U. S. C. \(1958 ed., Supp. IV\) § 1828 \(g\)](#); 12 CFR, 1962 Supp., Part 329. In the case of national banks, the 10% limit on the obligations of a single obligor includes loans as well as investment securities. See [12 U. S. C. § 84](#). Pennsylvania imposes the same limitation upon banks chartered under its laws, such as Girard. Pa. Stat. Ann. (1961 Supp.), Tit. [\*\*\*\*15] 7, § 819-1006.

But perhaps the most effective weapon of federal regulation of banking is the broad visitatorial power of federal bank examiners. Whenever the agencies deem it necessary, they may order "a thorough examination of all the affairs of the bank," whether it be a member of the FRS or a nonmember insured bank. [12 U. S. C. §§ 325, 481, 483, 1820 \(b\)](#); [12 CFR § 4.2](#). Such examinations are frequent and intensive. In addition, the banks are required to furnish detailed periodic reports of their operations to the supervisory agencies. [12 U. S. C. §§ 161, 324, 1820 \(e\)](#). In this way the agencies maintain virtually a day-to-day surveillance of the American banking system. And should they discover unsound banking practices, they are equipped with a formidable array of sanctions. If in the judgment of the FRB a member bank is making "undue use of bank credit," the Board may suspend the bank from the use of the credit facilities of the FRS. [12 U. S. C. § 301](#). The FDIC has an even more formidable [\*330] power. If it finds "unsafe or unsound practices" in the conduct of the business [\*\*\*\*16] of any insured bank, it may terminate the bank's insured status. [12 U. S. C. § 1818 \(a\)](#). Such involuntary termination severs the bank's membership in the FRS, if it is a state bank, and throws it into receivership if it is a national bank. [12 U. S. C. § 1818 \(b\)](#). Lesser, but nevertheless drastic, sanctions include publication of the results of bank examinations. [12 U. S. C. §§ 481, 1828 \(f\)](#). As a result of the existence of this panoply of sanctions, recommendations by the agencies concerning banking practices tend to be followed by bankers without the necessity of formal compliance proceedings. 1 Davis, Administrative Law (1958), § 4.04.

Federal supervision of banking has been called "probably the outstanding example in the federal government of regulation of an entire industry through methods of supervision . . . . The system may be one of the most successful [systems of economic regulation], if not the most successful." *Id.*, § 4.04, at 247. To the efficacy of this system we may owe, in part, the virtual disappearance of bank failures from the American economic scene.<sup>6</sup>

[\*\*\*\*17] B. [\*\*\*926] *The Proposed Merger of PNB and Girard.*

The Philadelphia National Bank and Girard Trust Corn Exchange Bank are, respectively, the second and third largest of the 42 commercial banks with head offices in the Philadelphia metropolitan area, which consists of the City of Philadelphia and its three contiguous counties in Pennsylvania. The home county of both banks is the [\*331] city itself; Pennsylvania law, however, permits branching [\*\*1724] into the counties contiguous to the home county, Pa. Stat. Ann. (1961 Supp.), Tit. 7, § 819-204.1, and both banks have offices throughout the four-county area. PNB, a national bank, has assets of over \$ 1,000,000,000, making it (as of 1959) the twenty-first largest bank in the Nation. Girard, a state bank, is a member of the FRS and is insured by the FDIC; it has assets of about \$ 750,000,000. Were the proposed merger to be consummated, the resulting bank would be the largest in the four-county area, with (approximately) 36% of the area banks' total assets, 36% of deposits, and 34% of net loans. It and the second largest (First Pennsylvania Bank and Trust Company, now the largest) would have between them 59% of [\*\*\*\*18] the total assets, 58% of deposits, and 58% of the net loans, while after the merger the four largest banks in the area would have 78% of total assets, 77% of deposits, and 78% of net loans.

The present size of both PNB and Girard is in part the result of mergers. Indeed, the trend toward concentration is noticeable in the Philadelphia area generally, in which the number of commercial banks has declined from 108 in 1947 to the present 42. Since 1950, PNB has acquired nine formerly independent banks and Girard six; and these acquisitions have accounted for 59% and 85% of the respective banks' asset growth during the period, 63% and 91% of their deposit growth, and 12% and 37% of their loan growth. During this period, the seven largest banks in the area increased their combined share of the area's total commercial bank resources from about 61% to about 90%.

In November 1960 the boards of directors of the two banks approved a proposed agreement for their consolidation under the PNB charter. By the terms of the agreement, PNB's stockholders were to retain their share certificates, which would be deemed to represent an equal [\*332] number of shares in the consolidated bank, while [\*\*\*\*19] Girard's stockholders would surrender their shares in exchange for shares in the consolidated bank, receiving 1.2875 such shares for each Girard share. Such a consolidation is authorized, subject to the approval of the Comptroller of the Currency, by 12 U. S. C. (1958 ed., Supp. IV) § 215.<sup>7</sup> [\*\*\*\*21] But under the Bank Merger Act of 1960, 12 U. S. C. (1963 ed., Supp. IV) § 1828 [\*\*\*927] (c), the Comptroller may not give his approval until he has received reports from the other two banking agencies and the Attorney General respecting the probable effects of the proposed transaction on competition.<sup>8</sup> All three reports [\*\*1725] advised that the proposed [\*333] merger

<sup>6</sup> In 1957, for example, there were three bank suspensions in the entire country by reason of financial difficulties; in 1960, two; and in 1961, nine. Of these nine, four involved state banks which were neither members of the FRS nor insured by the FDIC. 1961 Annual Report of the Comptroller of the Currency 286. In a typical year in the 1920's, roughly 600 banks failed throughout the country, about 100 of them national banks. See S. Rep. No. 196, Regulation of Bank Mergers, 86th Cong., 1st Sess. 17-18.

<sup>7</sup> The proposed "merger" of appellees is technically a consolidation, since the resulting bank will be a different entity from either of the constituent banks, whereas if the transaction were a merger, Girard would disappear into PNB and PNB would survive. However, the proposed transaction resembles a merger very closely, in that PNB's shareholders are not to surrender their present share certificates and the resulting bank is to operate under PNB's charter. In any event, the statute treats mergers and consolidations essentially alike, compare 12 U. S. C. (1958 ed., Supp. IV) § 215 with § 215a, and it is not suggested that the legal question of the instant case would be affected by whether the transaction is technically a merger or a consolidation. Therefore, throughout this opinion we use the term "merger."

<sup>8</sup> Section 1828 (c) provides in pertinent part:

would have substantial anticompetitive effects in the Philadelphia metropolitan area. However, on February 24, 1961, the Comptroller approved the merger. No opinion was rendered at that time. But as required by [S. 1828 \(c\)](#), the Comptroller explained the basis for his decision to approve the merger in a statement to be included in his annual report to Congress. As to effect upon competition, he reasoned that "since there will remain an adequate number of alternative [\*\*\*\*20] sources of banking service in Philadelphia, and in view of the beneficial effects of this consolidation upon international and national competition it was concluded that the over-all effect upon competition would not be unfavorable." He also stated that the consolidated bank "would be far better able to serve the convenience and needs of its community by being of material assistance to its city and state in their efforts to attract new industry and to retain existing industry." The day after the Comptroller approved the [\*334] merger, the United States commenced the present action. No steps have been taken to consummate the merger pending the outcome of this litigation.

[LEdHN\[2\]](#) [↑] [2]

[\*\*\*\*22] C. [\*\*\*928] *The Trial and the District Court's Decision.*

The Government's case in the District Court relied chiefly on statistical evidence bearing upon market structure and on testimony by economists and bankers to the effect that, notwithstanding the intensive governmental regulation of banking, there was a substantial area for the free play of competitive forces; that concentration of commercial banking, which the proposed merger would increase, was inimical to that free play; that the principal anticompetitive effect of the merger would be felt in the area in which the banks had their offices, thus making the four-county metropolitan area the relevant geographical market; and that commercial banking was the relevant product market. The defendants, in addition to offering contrary evidence on these points, attempted to show business justifications for the merger. They conceded that both banks were economically strong and had sound management, but offered the testimony of bankers to show that the resulting bank, with its greater prestige and increased lending limit,<sup>9</sup> would be better able to compete with large out-of-state [\*\*1726] (particularly New York) banks, would [\*\*\*\*23] attract new business to Philadelphia, and in general would promote the economic development of the metropolitan area.<sup>10</sup>

[HN3](#) [↑] "No insured [by FDIC] bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank without the prior written consent (i) of the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District [of Columbia] bank, or (ii) of the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a District bank), or (iii) of the [Federal Deposit Insurance] Corporation if the acquiring, assuming, or resulting bank is to be a nonmember insured bank (except a District bank). . . . In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this chapter. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. In the interests of uniform standards, before acting on a merger, consolidation, acquisition of assets, or assumption of liabilities under this subsection, the agency (unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved) shall request a report on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection . . . . The Comptroller, the Board, and the Corporation shall each include in its annual report to the Congress a description of each merger, consolidation, acquisition of assets, or assumption of liabilities approved by it during the period covered by the report, along with the following information: . . . a statement by the Comptroller, the Board, or the Corporation, as the case may be, of the basis for its approval."

<sup>9</sup> See [12 U. S. C. § 84](#), p. 329, *supra*. The resulting bank would have a lending limit of \$ 15,000,000, of which \$ 1,000,000 would not be attributable to the merger but to unrelated accounting factors.

<sup>10</sup> There was evidence that Philadelphia, although it ranks fourth or fifth among the Nation's urban areas in terms of general commercial activity, ranks only ninth in terms of the size of its largest bank, and that some large business firms which have their head offices in Philadelphia must seek elsewhere to satisfy their banking needs because of the inadequate lending limits of

[\*\*\*\*24] [\*335] Upon this record, the District Court held that: (1) the passage of the Bank Merger Act of 1960 did not repeal by implication the antitrust laws insofar as they may apply to bank mergers; (2) § 7 of the Clayton Act is inapplicable to bank mergers because banks are not corporations "subject to the jurisdiction of the Federal Trade Commission"; (3) but assuming that § 7 is applicable, the four-county Philadelphia metropolitan area is not the relevant geographical market because PNB and Girard actively compete with other banks for bank business throughout the greater part of the northeastern United States; (4) but even assuming that § 7 is applicable and that the four-county area is the relevant market, there is no reasonable probability that competition among commercial banks in the area will be substantially lessened as the result of the merger; (5) since the merger does not violate § 7 of the Clayton Act, *a fortiori* it does not violate § 1 of the Sherman Act; (6) the merger will benefit the Philadelphia metropolitan area economically. The District Court also ruled that for the purposes of § 7, commercial banking is a line of commerce; the appellees do not contest [\*\*\*\*25] this ruling.

## [[\*\*929] II. THE APPLICABILITY OF SECTION 7 OF THE CLAYTON ACT TO BANK MERGERS.]

### A. *The Original Section and the 1950 Amendment.*

LEdHN[3] [3]By its terms, the present § 7 HN4 reaches acquisitions of corporate stock or share capital by any corporation engaged [\*336] in commerce, but it reaches acquisitions of corporate assets only by corporations "subject to the jurisdiction of the Federal Trade Commission." The FTC, under § 5 of the Federal Trade Commission Act, has no jurisdiction over banks. 15 U. S. C. § 45 (a)(6).<sup>11</sup> Therefore, [[\*\*1727]] if the proposed merger be deemed an assets acquisition, it is not within § 7.<sup>12</sup> Appellant argues vigorously that a merger is crucially different from a pure assets acquisition,<sup>13</sup> [\*337] and [\*337] appellees argue with equal vigor that it is crucially different

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Philadelphia's banks; First Pennsylvania and PNB, currently the two largest banks in Philadelphia, each have a lending limit of \$ 8,000,000. Girard's is \$ 6,000,000.

Appellees offered testimony that the merger would enable certain economies of scale, specifically, that it would enable the formation of a more elaborate foreign department than either bank is presently able to maintain. But this attempted justification, which was not mentioned by the District Court in its opinion and has not been developed with any fullness before this Court, we consider abandoned.

<sup>11</sup> We reject the argument that § 11 of the Clayton Act, as amended, 15 U. S. C. § 21, confers jurisdiction over banks upon the FTC. That section provides in pertinent part: "Authority to enforce compliance with sections 13, 14, 18, and 19 of this title [§§ 2, 3, 7, and 8 of the Clayton Act, as amended] by the persons respectively subject thereto is vested . . . in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce . . ." The argument is that since the FRB has no authority to enforce the Clayton Act against bank mergers, see note 22, *infra*, bank mergers must fall into the residual category of "all other character of commerce" and so be subject to the FTC. However, there is no intimation in the legislative history of the 1950 amendment to § 7 and 11 that the FTC's traditional lack of jurisdiction over banks was to be disturbed. Moreover, it is clear from the language of § 11 that "banks, banking associations, and trust companies" are meant to comprise a distinct "character of commerce," and so cannot be part of the "other character of commerce" reserved to the FTC.

The exclusion of banks from the FTC's jurisdiction appears to have been motivated by the fact that banks were already subject to extensive federal administrative controls. See T. C. Hurst & Son v. Federal Trade Comm'n, 268 F. 874, 877 (D. C. E. D. Va. 1920).

<sup>12</sup> No argument is made in this case that banking is not commerce, and therefore that § 7 is inapplicable; plainly, such an argument would have no merit. See Transamerica Corp. v. Board of Govs. of Fed. Res. Sys., 206 F.2d 163, 166 (C. A. 3d Cir. 1953); cf. United States v. South-Eastern Underwriters Assn., 322 U.S. 533.

<sup>13</sup> "A merger necessarily involves the complete disappearance of one of the merging corporations. A sale of assets, on the other hand, may involve no more than a substitution of cash for some part of the selling company's properties, with no change in corporate structure and no change in stockholder interests. Shareholders of merging corporations surrender their interests in those corporations in exchange for their very different rights in the resulting corporation. In an asset acquisition, however, the shareholders of the selling corporation obtain no interest in the purchasing corporation and retain no interest in the assets

from a pure stock acquisition.<sup>14</sup> [\*\*\*930] Both positions, we think, have merit; a merger fits neither category neatly. Since the literal terms of § 7 thus do not dispose [\*\*\*\*26] of our question, we must determine whether a congressional design to embrace bank mergers is revealed in the history of the statute. The question appears to be one of first impression; we have been directed to no previous case in which a merger or consolidation was challenged under § 7 of the Clayton Act, as amended, where the acquiring corporation was not subject to the FTC's jurisdiction.

LEdHN[4] [4]

[\*\*\*\*27] LEdHN[5] [5]

When it was first enacted in 1914, § 7 referred only to corporate acquisitions of stock and share capital; it was silent as to assets acquisitions and as to mergers and consolidations. [\*338] Act of October 15, 1914, c. 323, § 7, 38 Stat. 731-732, note 18, *infra*. It is true that the omission may not have been an oversight. Congress' principal concern was with the activities of holding companies, [\*\*\*\*29] and specifically with the practice whereby corporations secretly acquired control of their competitors by purchasing the stock of those companies. Although assets acquisitions and mergers were known forms of corporate amalgamation at the time, their no less dangerously anticompetitive effects may not have been fully apparent to the Congress.<sup>15</sup> Still, the statutory language, read in the light of the overriding congressional purpose to [\*1728] control corporate concentrations tending to monopoly, lent itself to a construction whereby § 7 would have reached at least mergers and consolidations. It would hardly have done violence to the language so to have interpreted the vague term "share capital," see 30 Geo. Wash. L. Rev. 1024, 1027-1028 (1962), or to have adopted the view that: "where the assets are exchanged for the stock of the purchasing company, assuming that the two companies were previously in competition, it is apparent that the seller has acquired stock in a competing company . . . [and] therefore, that in effecting the merger section 7 was violated and hence the distribution of the stock received by the selling company to its shareholders and its subsequent [\*\*\*\*30] dissolution are no bar to proceedings by the government to set aside the purchase." Handler, Industrial Mergers and the Anti-Trust Laws, 32 Col. L. Rev. 179, 266 (1932).<sup>16</sup>

But the courts found mergers to be beyond the reach of § 7, even when the merger technique had supplanted [\*339] stock acquisitions as the prevalent mode of corporate amalgamation. United States v. Celanese Corp. of America, 91 F.Supp. 14 (D. C. S. D. N. Y. 1950); see Thatcher Mfg. Co. v. Federal Trade Comm'n and Swift & Co. v. Federal Trade [\*\*\*\*31] Comm'n, decided together with Federal Trade Comm'n v. Western Meat Co., 272 U.S. 554; Arrow-Hart & Hegeman Elec. Co. v. Federal Trade Comm'n, [\*\*\*931] 291 U.S. 587.<sup>17</sup> As a result, § 7

transferred. In a merger, unlike an asset acquisition, the resulting firm automatically acquires all the rights, powers, franchises, liabilities, and fiduciary rights and obligations of the merging firms. In a merger, but not in an asset acquisition, there is the likelihood of a continuity of management and other personnel. Finally, a merger, like a stock acquisition, necessarily involves the acquisition by one corporation of an immediate voice in the management of the business of another corporation; no voice in the decisions of another corporation is acquired by purchase of some part of its assets." Brief for the United States, 75-76.

<sup>14</sup> "[A] merger such as appellees' may be effected upon the affirmative vote of the holders of only two-thirds of the outstanding stock of each bank . . . but if PNB were acquiring all of the Girard stock each Girard shareholder could decide for himself whether to transfer his shares. A merger requires public notice whereas stock can be acquired privately. A shareholder dissenting from a merger has the right to receive the appraised value of his shares . . . whereas no shareholder has a comparable right in an acquisition of stock. Furthermore the corporate existence of a merged company is terminated by a merger, but remains unaffected by an acquisition of stock." Brief for Appellees, 30-31.

<sup>15</sup> The legislative history of the 1914 Act is reviewed in Brown Shoe Co. v. United States, 370 U.S. 294, 313-314, and notes 22-24.

<sup>16</sup> In the case of an acquisition like the instant one, in which shares in the acquired corporation are to be exchanged for shares in the resulting corporation, *a fortiori* we discern no difficulty in conceptualizing the transaction as a "stock acquisition." Compare note 13, *supra*.

[\*\*1729] became largely [\*340] a dead letter. Comment, 68 Yale L. J. 1627, 1629-1630 (1959); see Federal Trade Commission, *The Merger Movement: A Summary Report* (1948), 1, 3-6; Henderson, *The Federal Trade Commission* (1924), 40. Meanwhile, this Court's decision in *United States v. Columbia Steel Co.*, 334 U.S. 495, stirred concern whether the Sherman Act alone was a check against corporate acquisitions. Note, 52 Col. L. Rev. 766, 768 (1952).

[LEdHN\[6\]](#) [6]

[\*\*\*\*32] [LEdHN\[7\]](#) [7] It was against this background that Congress in 1950 amended § 7 to include an assets-acquisition provision. Act of December 29, 1950 (Celler-Kefauver Antimerger Act), c. 1184, 64 Stat. 1125-1126, 15 U. S. C. § 18.<sup>18</sup> [\*\*\*\*34] [\*341] The legislative history is [\*\*\*932] silent on the specific questions why the amendment made no explicit reference to mergers, why assets acquisitions by corporations not subject to FTC

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<sup>17</sup> Statements to the same effect may be found in, e. g., *Brown Shoe Co.*, *supra*, at 313-314, 316; *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 592; *United States v. Columbia Steel Co.*, 334 U.S. 495, 507, n. 7; *United States v. Columbia Pictures Corp.*, 189 F.Supp. 153, 182 (D. C. S. D. N. Y. 1960). See also 33 Op. Atty. Gen. 225, 241 (1922); Hernacki, *Mergerism and Section 7* of the Clayton Act, 20 Geo. Wash. L. Rev. 659, 676-677 (1952); Wemple and Cutler, *The Federal Bank Merger Law and the Antitrust Laws*, 16 Bus. Law. 994, 999-1000 (1961); Note, *Section 7* of the Clayton Act: A Legislative History, 52 Col. L. Rev. 766, 768-769 (1952).

Actually, the holdings in the three cases that reached this Court, *Thatcher*, *Swift*, and *Arrow-Hart*, were quite narrow. See generally Note, 26 Col. L. Rev. 594-596 (1926). They were based not on a lack of substantive power under § 7, but on the enforcement section, § 11, which limited the FTC's remedial powers to "an order requiring such person to cease and desist from such violations [of §§ 2, 3, 7, and 8 of the Clayton Act], and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act." 38 Stat. 735. Faced with Congress' evident refusal to confer upon the FTC the ordinary powers of a court of equity, this Court held that unless the assets were acquired after the FTC's order of stock divestiture had been issued (which was the case in *Federal Trade Comm'n v. Western Meat Co.*, *supra*, where the Commission was sustained), the Commission could not order a divestiture of assets. Compare *Board of Govs. of Fed. Res. Sys. v. Transamerica Corp.*, 184 F.2d 311 (C. A. 9th Cir. 1950), with *Federal Trade Comm'n v. International Paper Co.*, 241 F.2d 372 (C. A. 2d Cir. 1956). Since under this Court's decisions the FTC was powerless even where the transfer of assets was an evasive maneuver aimed at defeating the FTC's remedial jurisdiction over stock acquisitions violative of § 7, *a fortiori* the Commission was powerless against the typical merger. See *Arrow-Hart & Hegeman Elec. Co. v. Federal Trade Comm'n, supra*, at 595, 598-599. As part of the 1950 amendments to the Clayton Act, § 11 was amended to read: "an order requiring such person to . . . divest itself of the stock, or other share capital, or assets, held . . ." 15 U. S. C. § 21. Whether as an original matter *Thatcher*, *Swift* and *Arrow-Hart* were correctly decided is no longer an open question, since they were the explicit premise of the 1950 amendment to § 7. See *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 458, p. 349, *infra*.

The question of the FTC's remedial powers under § 11 of the Clayton Act is to be distinguished from that of its remedial powers under § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45(b). In *Federal Trade Comm'n v. Eastman Kodak Co.*, 274 U.S. 619, the Court, relying on *Thatcher* and *Swift*, held that the Commission had no power to order divestiture in § 5 proceedings. But cf. *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 129-131; *Pan American World Airways v. United States*, 371 U.S. 296, 312, and n. 17.

<sup>18</sup> See note 1, *supra*, for text of amended § 7. The original § 7 read in pertinent part: "no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

The passage of the 1950 amendment followed many years of unsuccessful attempts to enact legislation plugging the assets-acquisition loophole. See Note, 52 Col. L. Rev. 766-767, notes 3 and 4 (1952). To be sure, the 1950 amendment was intended not only to enlarge the number of transactions covered by § 7 but also to change the test of illegality. The legislative history pertinent to the latter point is reviewed in *Brown Shoe Co.*, *supra*, at 315-323, and is not directly relevant to the present discussion.

jurisdiction were not included, and what these omissions signify. Nevertheless, the basic congressional design clearly emerges and from that design the answers to these questions may be inferred. Congress primarily sought to bring mergers within § 7 and thereby close what it regarded as a loophole in the section.<sup>19</sup> [\*\*\*\*35] But, in addition, it sought [\*\*1730] to reach transactions such as that involved in *Columbia Steel*, which was a simple purchase [\*342] of assets and not a merger.<sup>20</sup> In other words, Congress contemplated that the 1950 amendment would give § 7 a reach which would bring the entire range of corporate amalgamations, from pure stock acquisitions [\*\*\*33] to pure [\*\*\*933] assets acquisitions, within the scope of § 7. Thus, the stock-acquisition and assets-acquisition provisions, *read together*, reach mergers, which fit neither category perfectly but lie somewhere between the two ends of the spectrum. See pp. 336-337, and notes 13, 14, *supra*. So construed, the specific exception for acquiring corporations not subject to the FTC's jurisdiction excludes from the coverage of § 7 only assets acquisitions by such corporations when not accomplished by merger.

[\*\*\*\*36] [\*343] This construction is supported by a number of specific considerations.

*First*. Any other construction would be illogical and disrespectful of the plain congressional purpose in amending § 7, because it would create a large loophole in a statute designed to close a loophole. It is unquestioned that HN5 [the stock-acquisition provision of § 7] embraces every corporation engaged in commerce, including banks. And it is plain that Congress, in amending § 7, considered a distinction for antitrust purposes between acquisition of corporate control by purchase of stock and acquisition by merger unsupportable in reason, and sought to overrule the decisions of this Court which had recognized such a distinction.<sup>21</sup> If, therefore, mergers in industries outside

<sup>19</sup> "The purpose of the proposed legislation [the 1950 amendments to § 7] is to prevent corporations from acquiring another corporation by means of the acquisition of its assets, whereunder [sic] the present law it is prohibited from acquiring the stock of said corporation. Since the acquisition of stock is significant chiefly because it is likely to result in control of the underlying assets, failure to prohibit direct purchase of the same assets has been inconsistent and paradoxical as to the over-all effect of existing law." S. Rep. No. 1775, 81st Cong., 2d Sess. 2. This theme pervaded congressional consideration of the proposed amendments. See, e. g., H. R. Rep. No. 1191, 81st Cong., 1st Sess., *passim*; Hearing before Subcommittee No. 3 of the House Committee on the Judiciary on Amending Sections 7 and 11 of the Clayton Act, 81st Cong., 1st Sess., ser. 10, pp. 11-13, 28-29, 39, 117; Hearings before a Subcommittee of the Senate Committee on the Judiciary on Corporate Mergers and Acquisitions, 81st Cong., 1st and 2d Sess. 4-5, 15, 20, 62-63, 126-129, 139, 321; 95 Cong. Rec. 11485 (Congressman Celler, sponsor of the bill to amend § 7 in the House: "this bill seeks to plug a loophole in the present antitrust laws. . . . It is time to stop, look, and listen and to call a halt to the merger movement that is going on in this country"), 11493-11494, 11497, 11502; 96 Cong. Rec. 16433, 16443.

<sup>20</sup> *Columbia Steel* involved the cash purchase by United States Steel Corporation of the physical assets of Consolidated Steel Corporation; there was no exchange of shares and no alteration of Consolidated's corporate identity. See Transcript of Record, United States v. Columbia Steel Co., 334 U.S. 495 (No. 461, October Term, 1947), pp. 453-475. As a result of the purchase, in its horizontal aspect, U.S. Steel controlled about 24% of the structural steel fabricating market in an 11-state western area. This Court held that the acquisition could not be reached under § 7 of the Clayton Act, see 334 U.S., at 507, n. 7, and did not violate the Sherman Act. It should be noted, however, that the Court regarded the 24% market-share figure proposed by the Government as a "doubtful assumption" and also pointed to "unusual conditions" tending to mitigate the anticompetitive effect of the acquisition. 334 U.S., at 529. *Columbia Steel* was repeatedly cited by Congressmen considering the amendment of § 7 as an example of what they conceived to be the inability of the Sherman Act, as then construed, to deal with the problems of corporate concentration. See, e. g., H. R. Rep. No. 1191, 81st Cong., 1st Sess. 10-11, and n. 16; Hearing before Subcommittee No. 3 of the House Committee on the Judiciary on Amending Sections 7 and 11 of the Clayton Act, 81st Cong., 1st Sess., ser. 10, pp. 28, 73; Hearings before a Subcommittee of the Senate Committee on the Judiciary on Corporate Mergers and Acquisitions, 81st Cong., 1st and 2d Sess. 24; 96 Cong. Rec. 16453 (Senator Kefauver, Senate sponsor of the bill to amend § 7: "the *Columbia Steel* Co. case is a vivid illustration of the necessity for the proposed amendment of the Clayton Act"), 16503; and cf. 96 Cong. Rec. 16498-16499.

<sup>21</sup> See note 19, *supra*. The congressional attitude toward this Court's *Thatcher*, *Swift*, and *Arrow-Hart* decisions is typified in this remark of Senator O'Conor's: "The Court, in effect, said that the [Federal Trade] Commission was quite free to use the power which Congress had conferred upon it, so long as it confined the use of that power to ordering the divestiture of pieces of paper which happened to be worthless." 96 Cong. Rec. 16433. Senator O'Mahoney remarked, for example, that there was "no doubt

374 U.S. 321, \*343; 83 S. Ct. 1715, \*\*1730; 10 L. Ed. 2d 915, \*\*\*933; 1963 U.S. LEXIS 2413, \*\*\*\*36

[\*344] the FTC's [\*\*1731] jurisdiction were deemed beyond the reach of § 7, the result would be precisely that difference in treatment which Congress rejected. On the other hand, excluding from the section assets acquisitions not by merger in those industries does not appear to create a lacuna of practical importance.<sup>22</sup> [\*\*\*\*37]

[\*\*\*\*38] LEdHN[8] [↑] [8]

[\*\*\*\*39] [\*345] Second. [\*\*\*934] The Congress which debated the bill to amend § 7 was fully aware of the important differences between a [\*\*1732] merger and a pure purchase of assets. For example, Senator Kilgore remarked:

"When you talk about mergers, you are talking about a stock transaction. . . .

. . . .

of the fundamental fact that an innocent defect in the drafting of section 7 of the Clayton Act back in 1914 had resulted in creating a great opportunity for escape by flagrant violators of the law." 96 Cong. Rec. 16443. After sharply criticizing this Court's decisions, the Senator continued: "I take it the record is perfectly clear that what this bill purports to do is to correct an omission in the original Clayton Act. When the authors of the Clayton Act and the Congress which passed it enacted the bill into law they thought they were giving the Federal Trade Commission administrative authority to prevent monopolistic mergers . . ." *Ibid.* So also, Senator Kefauver observed: "it would have been much better for the economy of the country to have repealed sections 7 and 11 of the Clayton Act rather than let this wide-open loophole to remain. Most of the large and monopolistic mergers which have become detrimental to the free-enterprise system of our Nation have occurred by way of this plain evasion of the intent of the original Clayton Act." 96 Cong. Rec. 16451.

<sup>22</sup> A cash purchase of another bank's assets would not seem to be a fully effective method of corporate acquisition. In other industries, a cash purchase of plant, inventory, patents, trade secrets, and the like will often directly enhance the competitive position of the acquiring corporation, as in *Columbia Steel Co.* But a bank desiring to increase its share of banking business through corporate acquisition would ordinarily need to acquire the other bank's deposits and capital, not merely its assets. For more deposits mean more working capital, and additions to capital and surplus increase the lending limit. A cash purchase, in effect, only substitutes cash for cash, since bank assets consist principally of cash and very liquid securities and loans receivable, and adds nothing to the acquiring bank's capital and surplus or to its working capital. True, an exchange of its stock for assets would achieve the acquiring bank's objectives. We are clear, however, that in light of Congress' overriding purpose, in amending § 7, to close the loophole in the original section, if such an exchange (or other clearly evasive transaction) were tantamount in its effects to a merger, the exchange would not be an "assets" acquisition within the meaning of § 7 but would be treated as a transaction subject to that section.

We have not overlooked the fact that there are corporations in other industries not subject to the FTC's jurisdiction. Chief among these are air carriers subject to the Civil Aeronautics Board and other carriers subject to the Interstate Commerce Commission. Both agencies have been given, expressly, broad powers to exempt mergers and acquisitions in whatever form from the antitrust laws. See 49 U. S. C. §§ 1378, 1384; 49 U. S. C. § 5 (11) and (13). Therefore, the exclusion of assets acquisitions in such industries from § 7 would seem to have little significance.

Section 11 of the Clayton Act, 15 U. S. C. § 21, vests the FRB with authority to enforce § 7 "where applicable to banks." This provision has been in the Act since it was first passed in 1914 and was not changed by the 1950 amendments. The Bank Merger Act of 1960, assigning roles in merger applications to the FDIC and the Comptroller of the Currency as well as to the FRB, plainly supplanted, we think, whatever authority the FRB may have acquired under § 11, by virtue of the amendment of § 7, to enforce § 7 against bank mergers. Since the Bank Merger Act applies only to mergers, consolidations, acquisitions of assets, and assumptions of liabilities but not to outright stock acquisitions, the FRB's authority under § 11 as it existed before the 1950 amendment of § 7 remains unaffected. See, e. g., *Transamerica Corp. v. Board of Govs. of Fed. Res. Sys.*, 206 F.2d 163 (C. A. 3d Cir. 1953).

Nothing in this opinion, of course, limits the power of the FTC, under §§ 7 and 11, as amended, to reach any transaction, including mergers and consolidations, in the broad range between and including pure stock and pure assets acquisitions, where the acquiring corporation is subject to the FTC's jurisdiction, see 15 U. S. C. § 45 (a)(6), and to order divestiture of the stock, share capital, or assets acquired in the transaction, see 15 U. S. C. § 21.

". . . Actually what you do is merge the stockholdings of both corporations, and instead of that -- I am thinking in practical terms -- you merge the corporate entities of the two corporations and you get one corporation out of it, and you issue stock in the one corporation in lieu of the stock in the other corporation, whereupon the stock of the corporation which had been merged is canceled by the new corporation, and you have one corporation handling the operation of two. So it really is a stock transaction in the final wind-up, regardless of what you call it. But what I call a purchase of assets is where you purchase physical assets, things upon which you could lay your hand, either in the records or on the ground . . . ." Hearings before a Subcommittee of [\*346] the Senate Committee on the Judiciary on Corporate Mergers and Acquisitions, 81st Cong. [\*\*\*\*40], 1st and 2d Sess. 176; to the same effect, see, e. g., [id. at 100, 139, 320-325](#).

[LEdHN\[9\]](#) [9] Plainly, acquisition of "assets" as used in amended [§ 7](#) was not meant to be a simple equivalent of acquisition by merger, but was intended rather to ensure against the blunting of the antimerger thrust of the section by evasive transactions such as had rendered the original section ineffectual. Thus, the stock-acquisition provision of [§ 7](#), though reenacted *in haec verba* by the 1950 amendment, must be deemed expanded in its new context to include, at the very least, acquisitions by [\*\*\*935] merger or consolidation, transactions which entail a transfer of stock of the parties, while the assets-acquisition provision clearly reaches corporate acquisitions involving no such transfer. And see note 22, *supra*. This seems to be the point of Congressman Patman's remark, typical of many, that: "What this bill does is to put all corporate mergers on the same footing, whether the result of the acquisitions of stock or the acquisition of physical assets." Hearings, *supra*, at 126. To the same effect is the House [\*\*\*\*41] Report on the bill to amend [§ 7](#): "The bill retains language of the present statute which is broad enough to prevent evasion of the central purpose. It covers not only purchase of assets or stock but also any other method of acquisition . . . . It forbids not only direct acquisitions but also indirect acquisitions . . . ." H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8-9.

[LEdHN\[10\]](#) [10] Third. The legislative history shows that the objective of including the phrase "corporation subject to the jurisdiction of the Federal Trade Commission" in [§ 7](#) was not to limit the amalgamations to be covered by the amended statute but to make explicit the role of the FTC in administering the section. The predominant focus of the hearings, [\*347] debates, and committee reports was upon the powers of the FTC. The decisions of this Court which had uncovered the loophole in the original [§ 7](#) -- *Thatcher*, *Swift*, and *Arrow-Hart* -- had not rested directly upon the substantive coverage of [§ 7](#), but rather upon the limited scope of the FTC's divestiture powers under [§ 11](#). See note 17, *supra*. There were intimations [\*\*\*\*42] that the courts' power to enforce [§ 7](#) might be far greater. See *Thatcher Mfg. Co. v. Federal Trade Comm'n, supra, at 561*; *Swift & Co. v. Federal Trade Comm'n, supra, at 563*; *Federal Trade Comm'n v. Eastman Kodak Co.*, 274 U.S. 619, 624; *Arrow-Hart & Hegeman Elec. Co. v. Federal Trade Comm'n, supra, at 598-599*; Irvine, The Uncertainties of [Section 7](#) of the Clayton Act, 14 Cornell L. Q. 28 (1928). Thus, [\*\*1733] the loophole was sometimes viewed as primarily a gap in the FTC's jurisdiction.<sup>23</sup> Furthermore, although the Clayton Act has always provided for dual enforcement by court and agency, see [15 U. S. C. § 25](#); [United States v. W. T. Grant Co.](#), 345 U.S. 629; *United States Alkali Export Assn. v. United States*, 325 U.S. 196, 208, prior to the 1950 amendment enforcement of [§ 7](#) was left largely to the FTC. Martin, Mergers and the Clayton Act (1959), 205, 219; Montague, The Celler Anti-Merger Act: An Administrative Problem in an Economic Crisis, 37 A. B. A. J. 253 [\*348] (1951). And the impetus [\*\*\*\*43] to amend [§ 7](#) came in large part from the FTC. See, e. g., Martin, *supra*, 187-194; Federal [\*\*\*936] Trade Commission, Annual Reports, 1928, pp. 18-19; 1940, pp. 12-13; 1948, pp. 11-22; The Merger Movement: A Summary Report (1948). Congress in 1950 clearly intended to remove all question concerning the FTC's remedial power over corporate acquisitions, and therefore explicitly enlarged the FTC's jurisdiction. Congress' choice of this means of underscoring the FTC's role in

<sup>23</sup> See, e. g., statement of Assistant Attorney General Bergson: "If it [§ 7](#) is to have any significant effect for the future, it is essential that it be amended so that the Federal Trade Commission will be in a position to deal with the merger problem as it exists today." Hearing before Subcommittee No. 3 of the House Committee on the Judiciary on Amending [Sections 7](#) and [11](#) of the Clayton Act, 81st Cong., 1st Sess., ser. 10, p. 28. See also 96 Cong. Rec. 16437, 16452-16453; 95 Cong. Rec. 11490-11491, 11499, 11504 (Representative Byrne: "the suggested amendment to [sections 7](#) and [11](#) of the Clayton Act would merely give the [Federal Trade] Commission the same power in regard to asset acquisitions that it already possesses over acquisitions of stock. This would close the loophole and restore meaning to the statute.").

enforcing § 7 provides no basis for a construction which would undercut the dominant congressional purpose of eliminating the difference in treatment accorded stock acquisitions and mergers by the original § 7 as construed.

[\*\*\*\*44] LEdHN[11]<sup>↑</sup> [11] Fourth. It is settled law that HN6<sup>↑</sup> "immunity from the antitrust laws is not lightly implied." California v. Federal Power Comm'n, 369 U.S. 482, 485. Cf. United States v. Borden Co., 308 U.S. 188, 198-199; United States v. Southern Pac. Co., 259 U.S. 214, 239-240. This canon of construction, which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy, is controlling here. For there is no indication in the legislative history to the 1950 amendment of § 7 that Congress wished to confer a special dispensation upon the banking industry; if Congress had so wished, moreover, surely it would have exempted the industry from the stock-acquisition as well as the assets-acquisition provision.

LEdHN[12]<sup>↑</sup> [12]LEdHN[13]<sup>↑</sup> [13]LEdHN[14]<sup>↑</sup> [14] [\*\*\*\*45] Of course, our construction of the amended § 7 is not foreclosed because, after the passage of the amendment, some members of Congress, and for a time the Justice Department, voiced the view that bank mergers were still beyond the reach of the section.<sup>24</sup> [\*\*\*\*47] "HN7<sup>↑</sup> The views of a subsequent [\*349] Congress form a hazardous basis for inferring the intent of an earlier one." United States v. Price, 361 U.S. 304, 313; see Rainwater v. United [\*\*1734] States, 356 U.S. 590, 593; United States v. United Mine Workers, 330 U.S. 258, 282; cf. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 590. This holds true even though misunderstanding of the scope of § 7 may have played some part in the passage of the Bank Merger Act of 1960.<sup>25</sup> There is a question, to which we shall shortly turn, whether there exists such inconsistency between the Bank Merger Act and § 7, as we now construe it, as to require a holding that § 7 must be deemed repealed *pro tanto*; but that is a different question from [\*\*\*\*46] whether misunderstanding of the scope of § 7 is relevant to our task of defining what scope Congress gave the section in 1950. When Congress enacted the Bank Merger Act, [\*\*\*937] the applicability of § 7 to bank mergers was still to be authoritatively determined; it was a subject of speculation. Thus, this is not a case in which our "earlier decisions are part of the arch on which the new structure rests, [and] we [must] refrain from disturbing them lest we change the design that Congress fashioned." State Board of Ins. v. Todd Shipyards Corp., 370 U.S. 451, 458. Cf. note 17, *supra*. The design fashioned in the Bank Merger Act was predicated upon uncertainty as to the scope of § 7, and we do no violence to that design by dispelling the uncertainty.

[\*350] B. *The Effect of the Bank Merger Act of 1960.*

LEdHN[15A]<sup>↑</sup> [15A]LEdHN[17]<sup>↑</sup> [17] Appellees contended below that the Bank Merger Act, by directing the banking agencies to consider competitive factors before approving mergers, 12 U. S. C. (1958 ed., Supp. IV) § 1828 (c), note 8, *supra*, immunizes approved mergers from challenge under the federal antitrust laws.<sup>26</sup> [\*\*\*\*49] We think the District Court was correct in rejecting this contention. No express immunity is conferred by the Act.<sup>27</sup> HN8<sup>↑</sup> Repeals of the antitrust laws by implication from a regulatory statute are strongly [\*\*\*\*48] disfavored,

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<sup>24</sup> See, e. g., Staff of Subcommittee No. 5 of House Committee on the Judiciary, 82d Cong., 2d Sess., Bank Mergers and Concentration of Banking Facilities (1952) vii; H. R. 5948, printed in 102 Cong. Rec. 2108-2109 (1956); Hearings before a Subcommittee of the Senate Committee on Banking and Currency on the Financial Institutions Act of 1957, 85th Cong., 1st Sess., pt. 2, p. 1030 (testimony of Attorney General Brownell); H. R. Rep. No. 1416, Regulation of Bank Mergers, 86th Cong., 2d Sess. 9; S. Rep. No. 196, Regulation of Bank Mergers, 86th Cong., 1st Sess. 1-2, 5.

<sup>25</sup> See, e. g., remarks of Representative Spence: "The Clayton Act is ineffective as to bank mergers because in the case of banks it covers only stock acquisitions and bank mergers are not accomplished that way." 106 Cong. Rec. 7257 (1960). See also note 24, *supra*.

<sup>26</sup> This contention was abandoned on appeal. We consider it, nevertheless, because it touches the proper relations of the judicial and administrative spheres. United States v. Western Pac. R. Co., 352 U.S. 59, 63.

374 U.S. 321, \*350; 83 S. Ct. 1715, \*\*1734; 10 L. Ed. 2d 915, \*\*\*937; 1963 U.S. LEXIS 2413, \*\*\*\*48

<sup>28</sup> [\*\*\*\*50] and [\*351] have only been found [\*\*1735] in cases of plain repugnancy between the antitrust and regulatory provisions. <sup>29</sup> Two recent cases, *Pan American World Airways v. United States*, 371 U.S. 296, and *California v. Federal Power Comm'n*, 369 U.S. 482, [\*\*\*938] illustrate this principle. In *Pan American*, the Court held that because the Civil Aeronautics Board had been given broad powers to enforce the competitive standard clearly delineated by the Civil Aeronautics Act, and to immunize a variety of transactions from the operation of the antitrust laws, the Sherman Act could not be applied to facts composing the precise ingredients of a case subject to the Board's broad regulatory and remedial powers; in contrast, the banking agencies have authority neither to enforce the antitrust laws against mergers, cf. note 22, *supra*, nor to grant immunity from those laws.

[LEdHN\[16\]](#) [↑] [16]

[LEdHN\[15B\]](#) [↑] [15B]

In the *California* case, on the other hand, the Court held that the FPC's approval of a merger did not confer immunity from § 7 of the Clayton Act, even though, as in the instant case, the agency had taken the competitive factor into account in passing upon the merger application. See *369 U.S., at 484-485, 487-488*. We think *California* is controlling here. Although the Comptroller was required to consider effect upon competition in passing upon appellees' merger application, he was not required to give this factor any particular weight; he was not even required to (and did not) hold a hearing before approving the application; and there is no specific provision for judicial review of his decision.<sup>30</sup> Plainly, the [\*352] range [\*\*\*\*51] and scope of administrative powers under the Bank Merger Act bear little resemblance to those involved in *Pan American*.

Nor did Congress, in passing the Bank Merger Act, embrace the view that federal regulation of banking is so comprehensive that enforcement of the antitrust laws would be either unnecessary, in light of the completeness of the regulatory structure, or disruptive of that structure. On the contrary, the legislative history of the Act seems clearly to refute any suggestion that applicability of the antitrust laws was to be affected. Both the House and Senate Committee Reports stated that the Act would not affect in any way the applicability [\*\*\*\*52] of the antitrust laws to bank acquisitions. H. R. Rep. No. 1416, 86th Cong., 2d Sess. 9; S. Rep. No. 196, 86th Cong., 1st Sess. 3. See also, e. g., 105 Cong. Rec. 8131 (remarks of Senator Robertson, the Act's sponsor). Moreover, bank regulation is in most respects less complete than public utility regulation, to which interstate rail and air carriers, among others, are subject. Rate regulation in the banking industry is limited and largely indirect, see p. 328, *supra*;

<sup>27</sup> Contrast this with the express exemption provisions of, e. g., the Federal Aviation Act, 49 U. S. C. § 1384; Federal Communications Act, *47 U. S. C. §§ 221 (a), 222 (c)(1)*; Interstate Commerce Act, 49 U. S. C. §§ 5 (11), 5b (9), 22; Shipping Act, 46 U. S. C. (1958 ed. Supp. III) § 814; Webb-Pomerene Act, *15 U. S. C. § 62*; and the Clayton Act itself, *§ 7, 15 U. S. C. § 18*.

<sup>28</sup> See *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 314-315; *United States v. Joint Traffic Assn.*, 171 U.S. 505; *Northern Securities Co. v. United States*, 193 U.S. 197, 343 (plurality opinion), 374-376 (dissenting opinion); *United States v. Pacific & Arctic Ry. & Nav. Co.*, 228 U.S. 87, 105, 107; *Keogh v. Chicago & N. W. R. Co.*, 260 U.S. 156, 161-162; *Central Transfer Co. v. Terminal Railroad Assn.*, 288 U.S. 469, 474-475; *Terminal Warehouse Co. v. Pennsylvania R. Co.*, 297 U.S. 500, 513-515; *United States v. Borden Co.*, 308 U.S. 188, 197-206; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226-228; *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-457; *United States Alkali Export Assn. v. United States*, 325 U.S. 196, 205-206; *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 809-810; *Northern Pac. R. Co. v. United States*, 356 U.S. 1; *United States v. Radio Corp. of America*, 358 U.S. 334; *Maryland & Va. Milk Producers Assn. v. United States*, 362 U.S. 458, 464-467; *California v. Federal Power Comm'n*, 369 U.S. 482; *Pan American World Airways v. United States*, 371 U.S. 296, 304, 305; *Silver v. New York Stock Exchange*, 373 U.S. 341.

<sup>29</sup> See, e. g., *Keogh v. Chicago & N. W. R. Co.*, *supra*, at 163; *Pan American World Airways v. United States*, *supra*, at 309-310. Cf. *Texas & Pac. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426.

<sup>30</sup> With respect to the question (upon which we intimate no view) whether judicial review of the Comptroller's decision is possible notwithstanding the absence of a specific provision, see Note, 75 Harv. L. Rev. 756, 762-763 (1962); Note, 37 N. Y. U. L. Rev. 735, 750, n. 95 (1962); cf. 1 Davis, *Administrative Law* (1958), § 4.04.

banks are under no duty not to discriminate in their services; and though the location of bank offices is regulated, banks may do business -- place loans and solicit deposits -- [\*\*1736] where they please. The fact that the banking agencies maintain a close surveillance of the industry with a view toward preventing unsound practices that might impair liquidity or lead to insolvency does not make federal banking regulation all-pervasive, although it does minimize the hazards of intense competition. Indeed, that there are so many direct public controls over unsound competitive practices in the industry refutes the argument that private controls of competition are necessary in the [\*\*\*939] public interest [\*\*\*\*53] and ought therefore to be immune from scrutiny under the antitrust laws. Cf. Kaysen and Turner, Antitrust Policy (1959), 206.

[\*353] [LEdHN\[18\]](#) [↑] [18] [LEdHN\[19\]](#) [↑] [19] We note, finally, that the doctrine of "primary jurisdiction" is not applicable here. [HN9](#) [↑] That doctrine requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme. See [Far East Conference v. United States, 342 U.S. 570](#); [Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285](#); Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 436, 464 (1954).<sup>31</sup> Court jurisdiction is not thereby ousted, but only postponed. See [General Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 433](#); [Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481, 498-499](#); [\*\*\*54] 3 Davis, Administrative Law (1958), 1-55. Thus, even if we were to assume the applicability of the doctrine to merger-application proceedings before the banking agencies,<sup>32</sup> the present action would not be barred, for the agency proceeding was completed before the antitrust action was commenced. Cf. [United States v. Western Pac. R. Co., 352 U.S. 59, 69](#); [Retail Clerks Int'l Assn. v. Schermerhorn, 373 U.S. 746, 756](#). We recognize that the practical effect of applying the doctrine of primary [\*354] jurisdiction has sometimes been to channel judicial enforcement of antitrust policy into appellate review of the agency's decision, see [Federal Maritime Bd. v. Isbrandtsen Co., supra](#); cf. [D. L. Piazza Co. v. West Coast Line, Inc., 210 F.2d 947 \(C. A. 2d Cir. 1954\)](#), or even to preclude such enforcement entirely if the agency has the power to approve the challenged activities, see [United States Nav. Co. v. Cunard S. S. Co., 284 U.S. 474](#); cf. [United States v. Railway Express Agency, 101 F.Supp. 1008 \(D. C. D. Del. 1951\)](#); but see [Federal Maritime Bd. v. \[\\*\\*\\*55\] Isbrandtsen Co., supra](#). But here there may be no power of judicial review of the administrative decision approving the merger, and such approval does not in any event confer immunity from the antitrust laws, see pp. 350-352, *supra*. Furthermore, the considerations that militate against finding a repeal of the antitrust laws by implication from the existence of a regulatory scheme also argue persuasively against attenuating, by postponing, the courts' jurisdiction to enforce those laws.

[\*\*\*56] [LEdHN\[20\]](#) [↑] [20] [LEdHN\[21\]](#) [↑] [21] [LEdHN\[22\]](#) [↑] [22] [LEdHN\[23\]](#) [↑] [23] It [\*\*\*940] [\*\*1737] should be unnecessary to add that in holding as we do that the Bank Merger Act of 1960 does not preclude application of § 7 of the Clayton Act to bank mergers, we deprive the later statute of none of its intended force. Congress plainly did not intend the 1960 Act to extinguish other sources of federal restraint of bank acquisitions having anticompetitive effects. For example, Congress certainly knew that bank mergers would continue subject to the Sherman Act, see p. 352, *supra*, as well as that pure stock acquisitions by banks would continue subject to § 7 of the Clayton Act. If, in addition, bank mergers are subject to § 7, we do not see how the objectives of the 1960 Act are thereby thwarted. It is not as if the Clayton and Sherman Acts embodied approaches to antitrust policy inconsistent with or unrelated to each other. The [\*\*\*57] Sherman Act, of course, forbids mergers effecting an

<sup>31</sup> See generally Jaffe, Primary Jurisdiction Reconsidered. The Anti-Trust Laws, 102 U. of Pa. L. Rev. 577 (1954); Latta, Primary Jurisdiction in the Regulated Industries and the Antitrust Laws, 30 U. of Cin. L. Rev. 261 (1961); Note, Regulated Industries and the Antitrust Laws: Substantive and Procedural Coordination, 58 Col. L. Rev. 673 (1958).

<sup>32</sup> In [California v. Federal Power Comm'n, supra](#), the Court held that the FPC must stay its proceeding on a merger application until the completion of a pending antitrust suit by the Justice Department; *a fortiori*, the court entertaining the suit would not be required to abstain pending consideration of the merger application by the FPC. We need not and do not consider the question whether the *California* decision would control here had the Comptroller been denied an opportunity to approve the merger before the antitrust suit was commenced.

unreasonable restraint of trade. See, e. g., *Northern [355] Securities Co. v. United States, 193 U.S. 197; United States v. Union Pac. R. Co., 226 U.S. 61*; indeed, there is presently pending before this Court a challenge to a bank merger predicated solely on the Sherman Act. *United States v. First Nat. Bank & Trust Co. of Lexington*, prob. juris. noted, *post*, p. 824. And **HN10**[<sup>1</sup>] the tests of illegality under the Sherman and Clayton Acts are complementary. "The public policy announced by § 7 of the Clayton Act is to be taken into consideration in determining whether acquisition of assets . . . violates the prohibitions of the Sherman Act against unreasonable restraints." *United States v. Columbia Steel Co., 334 U.S. 495, 507, n. 7*; see Note, 52 Col. L. Rev. 766, 768, n. 10 (1952). To be sure, not every violation of § 7, as amended, would necessarily be a violation of the Sherman Act; our point is simply that since Congress passed the 1960 Act with [\*\*\*\*58] no intention of displacing the enforcement of the Sherman Act against bank mergers -- or even of § 7 against pure stock acquisitions by banks -- continued application of § 7 to bank mergers cannot be repugnant to the design of the 1960 Act. It would be anomalous to conclude that Congress, while intending the Sherman Act to remain fully applicable to bank mergers, and § 7 of the Clayton Act to remain fully applicable to pure stock acquisitions by banks, nevertheless intended § 7 to be completely inapplicable to bank mergers.

### III. THE LAWFULNESS OF THE PROPOSED MERGER UNDER SECTION 7.

**HN11**[<sup>1</sup>] The statutory test is whether the effect of the merger "may be substantially to lessen competition" "in any line of commerce in any section of the country." We analyzed the test in detail in *Brown Shoe Co. v. United States, 370 U.S. 294*, and that analysis need not be repeated or extended here, for the instant case presents only a straightforward problem of application to particular facts.

[\*356] **LEdHN[24]**[<sup>1</sup>] [24] [\*\*\*\*59] We have no difficulty in determining the "line of commerce" (relevant product or services market) and "section of the country" (relevant geographical market) in which to appraise the probable competitive effects of appellees' proposed merger. We agree with the District Court that the cluster of products (various kinds of credit) and services [\*\*\*941] (such as checking accounts and trust administration) denoted by the term "commercial banking," see note 5, *supra*, composes a distinct line of commerce. Some commercial banking products or services are so distinctive that they are entirely free of effective competition from products or services of other financial institutions; the checking account is in this category. Others enjoy such cost advantages as to be insulated within a broad range from substitutes furnished by other institutions. For example, commercial banks compete with small-loan companies in the personal-loan market; but the small-loan companies' rates are [\*\*1738] invariably much higher than the banks', in part, it seems, because the companies' working capital consists in substantial part of bank loans.<sup>33</sup> [\*\*\*\*61] Finally, there are banking facilities which, [\*357] [\*\*\*\*60] although in terms of cost and price they are freely competitive with the facilities provided by other financial institutions, nevertheless enjoy a settled consumer preference, insulating them, to a marked degree, from competition; this seems to be the case with savings deposits.<sup>34</sup> In sum, it is clear that commercial banking is a market "sufficiently

<sup>33</sup> Cf. *United States v. Aluminum Co. of America, 148 F.2d 416, 425 (C. A. 2d Cir. 1945)*. In the instant case, unlike *Aluminum Co.*, there is virtually no time lag between the banks' furnishing competing financial institutions (small-loan companies, for example) with the raw material, *i. e.*, money, and the institutions' selling the finished product, *i. e.*, loans; hence the instant case, compared with *Aluminum Co.* in this respect, is a *fortiori*. As one banker testified quite frankly in the instant case in response to the question: "Do you feel that you are in substantial competition with these institutions [personal-finance and sales-finance companies] that you lend . . . such money to for loans that you want to make?" -- "Oh, no, we definitely do not. If we did, we would stop making the loans to them." (R. 298.) The reason for the competitive disadvantage of most lending institutions *vis-a-vis* banks is that only banks obtain the bulk of their working capital without having to pay interest or comparable charges thereon, by virtue of their unique power to accept demand deposits. The critical area of short-term commercial credit, see pp. 326-327, *supra*, appears to be one in which banks have little effective competition, save in the case of very large companies which can meet their financing needs from retained earnings or from issuing securities or paper.

<sup>34</sup> As one witness for the defendants testified:

"We have had in Philadelphia for 50 years or more the mutual savings banks offering 1/2 per cent and in some instances more than 1/2 per cent higher interest than the commercial banks. Nevertheless, the rate of increase in savings accounts in

374 U.S. 321, \*357; 83 S. Ct. 1715, \*\*1738; 10 L. Ed. 2d 915, \*\*\*941; 1963 U.S. LEXIS 2413, \*\*\*\*60

inclusive to be meaningful in terms of trade realities." *Crown Zellerbach Corp. v. Federal Trade Comm'n*, 296 F.2d 800, 811 (C. A. 9th Cir. 1961).

LEdHN[25] [25] [\*\*\*\*62] LEdHN[26] [26] We part company with the District Court on the determination of the appropriate "section of the country." HN12 [26] The proper question to be asked in this case is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate. [\*\*\*942] See Bock, *Mergers and Markets* (1960), 42. This depends upon "the geographic structure of supplier-customer relations." Kaysen and Turner, *Antitrust* [\*358] *Policy* (1959), 102. In banking, as in most service industries, convenience of location is essential to effective competition. Individuals and corporations typically confer the bulk of their patronage on banks in their local community; they find it impractical to conduct their banking business at a distance.<sup>35</sup> [\*\*\*\*65] See *Transamerica Corp. v. Board* [\*\*1739] of Govs. of Fed. Res. Sys., 206 F.2d 163, 169 (C. A. 3d Cir. 1953). The factor of inconvenience localizes banking competition [\*\*\*\*63] as effectively as high transportation costs in other industries. See, e. g., *American* [\*359] *Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F.Supp. 387, 398 (D. C. S. D. N. Y. 1957), aff'd, 259 F.2d 524 (C. A. 2d Cir. 1958). Therefore, since, as we recently said in a related context, the "area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, *and to which the purchaser can practicably turn for supplies*," *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (emphasis supplied); see *Standard Oil Co. v. United States*, 337 U.S. 293, 299 and 300, n. 5, the four-county area in which appellees' offices are located would seem to be the relevant geographical market. Cf. *Brown Shoe Co.*, *supra*, at 338-339. In fact, the vast bulk of appellees' business originates in the four-county area.<sup>36</sup> [\*\*\*\*66] Theoretically, we should be concerned with the [\*\*\*943] possibility

commercial banks has kept pace with and in many of the banks exceeded the rate of increase of the mutual banks paying 3 1/2 per cent. . . .

"I have made some inquiries. There are four banks on the corner of Broad and Chestnut. Three of them are commercial banks all offering 3 per cent, and one is a mutual savings bank offering 3 1/2. As far as I have been able to discover, there isn't anybody in Philadelphia who will take the trouble to walk across Broad Street to get 1/2 of 1 per cent more interest. If you ask me why, I will say I do not know. Habit, custom, personal relationships, convenience, doing all your banking under one roof appear to be factors superior to changes in the interest rate level." (R. 1388-1389.)

<sup>35</sup> Consider the following colloquy between governmental counsel and a witness for the defendants:

"Q. What do you consider to be the area of a branch office?

"A. Well, there is no set rule on that. We hope to have an area from 1 1/2 to 2 miles.

"However, we have opened branches directly in the communities where other banks are established, in fact, across the street from them because it is not only a question of getting new business, it's a question of servicing and retaining the accounts that we now have.

. . . .

"Q. And your business is not necessarily dependent upon it [the customer] being within a mile or two of a branch, is it?

"A. To a large degree, it is, because we found that we were losing deposit accounts regularly from our in-town offices because other banks were opening or had offices in other sections of the city; and in order to retain those accounts and to get additional business we felt it was necessary to establish branches." (R. 1815.)

As far as the customer for a bank loan is concerned, "the size of his market is somewhat dependent upon his own size, how well he is known, and so on. For example, for small business concerns known primarily locally, they may consider that their market is a strictly local one, and they may be forced by circumstances to do business with banks in a nearby geographic relationship to them. On the other hand, as businesses increase in size, the scope of their business activities, their national reputation, the alternatives they have available to them will be spread again over a very large area, possibly as large as the entire United States." (R. 1372.) (Defendants' testimony on direct examination.)

<sup>36</sup> The figures for PNB and Girard respectively are: 54% and 63% of the dollar volume of their commercial and industrial loans originate in the four-county area; 75% and 70%, personal loans; 74% and 84%, real estate loans; 41% and 62%, lines of credit; 94% and 72%, personal trusts; 81% and 94%, time and savings deposits; 56% and 77%, demand deposits; 93% and 87%, demand deposits of individuals. Actually, these figures may be too low. The evidence discloses that most of the business done

that bank offices on the perimeter of the area may be in [\*360] effective competition with bank offices within; actually, this seems to be a [\*\*\*\*64] factor of little significance.<sup>37</sup>

[\*\*\*\*67] [LEdHN/271](#) [27] We recognize that the area in which appellees have their offices does not [\*\*1740] delineate with perfect accuracy an appropriate "section of the country" in which to appraise the effect of the merger upon competition. Large borrowers and large depositors, the record shows, may find it practical to do a large part of their banking business outside their home community; very small borrowers and depositors may, as a practical matter, be confined to bank offices in their immediate neighborhood; and customers [\*361] of intermediate size, it would appear, deal with banks within an area intermediate between these extremes. See notes 35-37, *supra*. So also, some banking services are evidently more local in nature than others. But that in banking the relevant geographical market is a function of each separate customer's economic scale means simply that a workable compromise must be found: some fair intermediate delineation which avoids the indefensible extremes of drawing the market either so expansively as to make the effect of the merger upon competition seem insignificant, because only the [\*\*\*\*68] very largest bank customers are taken into account in defining the market, or so narrowly as to place appellees in different markets, because only the smallest customers are considered. We think that the four-county Philadelphia metropolitan area, which state law apparently recognizes as a meaningful banking community in allowing [\*\*\*944] Philadelphia banks to branch within it, and which would seem roughly to delineate the area in which bank customers that are neither very large nor very small find it practical to do their banking business, is a more appropriate "section of the country" in which to appraise the instant merger than any larger or smaller or different area. Cf. Hale and Hale, *Market Power: Size and Shape Under the Sherman Act* (1958), 119. We are helped to this conclusion by the fact that the three federal banking agencies regard the area in which banks have their offices as an "area of effective competition." Not only did the FDIC and FRB, in the reports they submitted to the Comptroller of the Currency in connection with appellees' application for permission to merge, so hold, but the Comptroller, in his statement approving the merger, agreed: "With respect to [\*\*\*\*69] the effect upon competition, there are three separate levels and effective areas of competition involved. These are the national level for national [\*362] accounts, the regional or sectional area, and the local area of the City of Philadelphia and the immediately surrounding area."

outside the area is with large borrowers and large depositors; appellees do not, by and large, deal with small businessmen and average individuals not located in the four-county area. For example, of appellees' combined total business demand deposits under \$ 10,000, 94% originate in the four-county area. This reinforces the thesis that the smaller the customer, the smaller is his banking market geographically. See note 35, *supra*.

The appellees concede that the four-county area has sufficient commercial importance to qualify, under *Brown Shoe Co.*, *supra*, at 336-337, as a "section of the country" within the meaning of [§ 7](#). See *Maryland & Va. Milk Producers Assn. v. United States*, 362 U.S. 458, 469; cf. [United States v. Yellow Cab Co.](#), 332 U.S. 218, 226; *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co.*, 293 U.S. 268, 279.

<sup>37</sup> Appellees suggest not that bank offices skirting the four-county area provide meaningful alternatives to bank customers within the area, but that such alternatives are provided by large banks, from New York and elsewhere, which solicit business in the Philadelphia area. There is no evidence of the amount of business done in the area by banks with offices outside the area; it may be that such figures are unobtainable. In any event, it would seem from the local orientation of banking insofar as smaller customers are concerned, see notes 35 and 36, *supra*, that competition from outside the area would only be important to the larger borrowers and depositors. If so, the four-county area remains a valid geographical market in which to assess the anticompetitive effect of the proposed merger upon the banking facilities available to the smaller customer -- a perfectly good "line of commerce," in light of Congress' evident concern, in enacting the 1950 amendments to [§ 7](#), with preserving small business. See *Brown Shoe Co.*, *supra*, at 315-316. As a practical matter the small businessman can only satisfy his credit needs at local banks. To be sure, there is still some artificiality in deeming the four-county area the relevant "section of the country" so far as businessmen located near the perimeter are concerned. But such fuzziness would seem inherent in any attempt to delineate the relevant geographical market. Note, 52 Col. L. Rev. 766, 778-779, n. 77 (1952). And it is notable that outside the four-county area, appellees' business rapidly thins out. Thus, the other six counties of the Delaware Valley account for only 2% of appellees' combined individual demand deposits; 4% demand deposits of partnerships and corporations; 7%, loans; 2%, savings deposits; 4%, business time deposits.

374 U.S. 321, \*362; 83 S. Ct. 1715, \*\*1740; 10 L. Ed. 2d 915, \*\*\*944; 1963 U.S. LEXIS 2413, \*\*\*\*69

[\*\*1741] [LEdHN\[28\]](#)<sup>↑</sup> [28] [LEdHN\[29\]](#)<sup>↑</sup> [29] Having determined the relevant market, we come to the ultimate question under [§ 7](#): whether the effect of the merger "may be substantially to lessen competition" in the relevant market. Clearly, this is not the kind of question which is susceptible of a ready and precise answer in most cases. [HN13](#)<sup>↑</sup> It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended [§ 7](#) was intended to arrest anticompetitive tendencies in their "incipiency." See *Brown Shoe Co.*, *supra*, at 317, 322. [\*\*\*\*70] Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market; yet the relevant economic data are both complex and elusive. See generally Bok, [Section 7](#) of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226 (1960). And unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded. See *Crown Zellerbach Corp. v. Federal Trade Comm'n*, 296 F.2d 800, 826-827 (C. A. 9th Cir. 1961). So also, we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation. *Standard Oil Co. v. United States*, 337 U.S. 293, 313. And so in any case in which it is possible, without doing violence to the congressional objective embodied in [§ 7](#), to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration. See *Union Carbide Corp.*, Trade Reg. Rep., FTC Complaints and Orders, 1961-1963, para. 15503, at 20375-20376 (concurring opinion). This is such a case.

[LEdHN\[30\]](#)<sup>↑</sup> [30] [\*\*\*\*71] We noted in *Brown Shoe Co.*, *supra*, at 315, that "the dominant theme pervading congressional consideration of [\*363] the 1950 amendments [to [§ 7](#)] was a fear of what was considered to be a rising tide of economic concentration in the American economy." This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable [\*\*\*945] anticompetitive effects. Specifically, we think that [HN14](#)<sup>↑</sup> a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. See *United States v. Koppers Co.*, 202 F.Supp. 437 (D. C. W. D. Pa. 1962).

Such a test lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect [\*\*\*\*72] in light of Congress' design in [§ 7](#) to prevent undue concentration. Furthermore, the test is fully consonant with economic theory.<sup>38</sup> That "competition is likely to be greatest when there are many sellers, none of which has any significant market share,"<sup>39</sup> is common ground among most economists, and was undoubtedly a premise [\*\*1742] of congressional reasoning about the antimerger statute.

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[\*364] [LEdHN\[1B\]](#)<sup>↑</sup> [1B] The merger of appellees will result in a single bank's controlling at least 30% of the commercial banking business in the four-county Philadelphia metropolitan area.<sup>40</sup> [\*\*\*\*74] Without attempting to

<sup>38</sup> See Kayser and Turner, Antitrust Policy (1959), 133; Stigler, Mergers and Preventive Antitrust Policy, 104 U. of Pa. L. Rev. 176, 182 (1955); Bok, *supra*, at 308-316, 328. Cf. Markham, Merger Policy Under the New [Section 7](#): A Six-Year Appraisal, 43 Va. L. Rev. 489, 521-522 (1957).

<sup>39</sup> Comment, "Substantially to Lessen Competition . . .": Current Problems of Horizontal Mergers, 68 Yale L. J. 1627, 1638-1639 (1959); see, e. g., Machlup, The Economics of Sellers' Competition (1952), 84-93, 333-336; Bain, Barriers to New Competition (1956), 27. Cf. Mason, Market Power and Business Conduct: Some Comments, 46-2 Am. Econ. Rev. (1956), 471.

<sup>40</sup> See p. 331, *supra*. We note three factors that cause us to shade the percentages given earlier in this opinion, in seeking to calculate market share. (1) The percentages took no account of banks which do business in the four-county area but have no offices there; however, this seems to be a factor of little importance, at least insofar as smaller customers are concerned, see note 37, *supra*. (2) The percentages took no account of banks which have offices in the four-county area but not their home offices there; however, there seem to be only two such offices and appellees in this Court make no reference to this omission. (3) There are no percentages for the amount of business of banks located in the area, other than appellees, which originates in the area. Appellees contend that since most of the 40 other banks are smaller, they do a more concentratedly local business

specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.<sup>41</sup> [\*365] Further, [\*\*\*946] whereas presently the two largest banks in the area (First Pennsylvania and PNB) control between them approximately 44% of the area's commercial banking business, the two largest after the merger (PNB-Girard and First Pennsylvania) will control 59%. Plainly, we think, this increase of more than 33% in concentration must be regarded as significant.<sup>42</sup>

[\*\*\*\*75] [LEdHN\[31\]](#) [↑] [31]Our conclusion that these percentages raise an inference that the effect of the contemplated merger of appellees may be substantially to lessen competition is not an arbitrary one, although neither the terms of § 7 nor the legislative history suggests that any particular percentage share was deemed critical. The House Report states that the tests of illegality under amended § 7 "are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act." H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8. Accordingly, we [\*\*1743] have relied upon decisions under these other sections in applying § 7. See *Brown Shoe Co.*, *supra*, *passim*; cf. [United States v. E. I. du Pont de Nemours & Co.](#), [353 U.S. 586, 595](#), and n. 15. In *Standard Oil Co. v. United States*, [337 U.S. 293](#), cited in S. Rep. No. 1775, 81st Cong., 2d Sess. 6, this Court held violative of § 3 of the Clayton Act exclusive contracts [\*366] whereby the defendant company, which accounted for 23% of the sales in the relevant [\*\*\*\*76] market and, together with six other firms, accounted for 65% of such sales, maintained control over outlets through which approximately 7% of the sales were made. In [Federal Trade Comm'n v. Motion Picture Adv. Serv. Co.](#), [344 U.S. 392](#), we held unlawful, under § 1 of the Sherman Act and § 5 of the Federal Trade Commission Act, rather than under § 3 of the Clayton Act, exclusive arrangements whereby the four major firms in the industry had foreclosed 75% of the relevant market; the respondent's market share, evidently, was 20%. Kessler and Stern, *Competition, Contract, and Vertical Integration*, 69 Yale L. J. 1, 53 n. 231 (1959). In the instant case, by way of comparison, the four largest banks after the merger will foreclose 78% of the relevant market. P. 331, *supra*. And in *Standard Fashion Co. v. Magrane-Houston Co.*, [258 U.S. 346](#), the Court held violative of § 3 a series of exclusive contracts whereby a single manufacturer controlled 40% of the industry's retail outlets. [\*\*\*947] Doubtless these cases turned to some extent upon whether "by the nature of the market there is room for newcomers." *Federal Trade Comm'n v. Motion Picture Adv. Serv. Co.*, *supra*, at 395. [\*\*\*\*77] But they remain highly suggestive in the present context, for as we noted in *Brown Shoe Co.*, *supra*, at 332, n. 55, integration by merger is more suspect than integration by contract, because of the greater permanence of the former. The market share and market concentration figures in the contract-integration cases, taken together with scholarly opinion, see notes 41 and 42, *supra*, support, we believe, the inference we draw in the instant case from the figures disclosed by the record.

than appellees, and hence account for a relatively larger proportion of such business. If so, we doubt much correction is needed. The five largest banks in the four-county area at present control some 78% of the area banks' assets. Thus, even if the small banks have a somewhat different pattern of business, it is difficult to see how that would substantially diminish the appellees' share of the local banking business.

No evidence was introduced as to the quantitative significance of these three factors, and appellees do not contend that as a practical matter such evidence could have been obtained. Under the circumstances, we think a downward correction of the percentages to 30% produces a conservative estimate of appellees' market share.

<sup>41</sup> Kayser and Turner, *supra*, note 38, suggest that 20% should be the line of *prima facie* unlawfulness; Stigler suggests that any acquisition by a firm controlling 20% of the market after the merger is presumptively unlawful; Markham mentions 25%. Bok's principal test is increase in market concentration, and he suggests a figure of 7% or 8%. And consult note 20, *supra*. We intimate no view on the validity of such tests for we have no need to consider percentages smaller than those in the case at bar, but we note that such tests are more rigorous than is required to dispose of the instant case. Needless to say, the fact that a merger results in a less-than-30% market share, or in a less substantial increase in concentration than in the instant case, does not raise an inference that the merger is *not* violative of § 7. See, e. g., *Brown Shoe Co.*, *supra*.

<sup>42</sup> See note 41, *supra*. It is no answer that, among the three presently largest firms (First Pennsylvania, PNB, and Girard), there will be no increase in concentration. If this argument were valid, then once a market had become unduly concentrated, further concentration would be legally privileged. On the contrary, if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great. Comment, note 39, *supra*, at 1644.

374 U.S. 321, \*366; 83 S. Ct. 1715, \*\*1743; 10 L. Ed. 2d 915, \*\*\*947; 1963 U.S. LEXIS 2413, \*\*\*\*77

LEdHN[32A] [32A] There is nothing in the record of this case to rebut the inherently anticompetitive tendency manifested by these percentages. There was, to be sure, testimony by bank officers to the effect that competition among banks in [\*367] Philadelphia was vigorous and would continue to be vigorous after the merger. We think, however, that the District Court's reliance on such evidence was misplaced. This lay evidence on so complex an economic-legal problem as the substantiality of the effect of this merger upon competition was entitled to little weight, in view of the witnesses' failure to give concrete reasons [\*\*\*\*78] for their conclusions.<sup>43</sup>

LEdHN[32B] [32B] LEdHN[33] [33]

Of equally [\*\*\*\*79] little value, we think, are the assurances offered by appellees' witnesses that customers dissatisfied with the services of the resulting [\*\*1744] bank may readily turn to the 40 other banks in the Philadelphia area. In every case short of outright monopoly, the disgruntled customer has alternatives; even in tightly oligopolistic markets, there may be small firms operating. A fundamental purpose of amending S.7 was to arrest the trend toward concentration, the *tendency* to monopoly, before the consumer's alternatives disappeared through merger, and that purpose would be ill-served if the law stayed its hand until 10, or 20, or 30 more Philadelphia banks were absorbed. This is not a fanciful eventuality, in view of the strong trend toward mergers evident in the area, see p. 331, *supra*; and we might note also that entry of new competitors into the banking field is far from easy.<sup>44</sup>

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[\*368] LEdHN[34] [34] So also, we reject the position that commercial banking, because it is subject to a high degree of governmental regulation, or because it deals in the intangibles of credit and services rather than in the manufacture or sale of tangible commodities, is [\*\*\*948] somehow immune from the anticompetitive effects of undue concentration. Competition among banks exists at every level -- price, variety of credit arrangements, convenience of location, attractiveness of physical surroundings, credit information, investment advice, service charges, personal accommodations, advertising, miscellaneous special and extra services -- and it is keen; on this appellees' own witnesses were emphatic.<sup>45</sup> [\*369] There is no reason to [\*\*1745] think that concentration is less

<sup>43</sup> The fact that some of the bank officers who testified represented small banks in competition with appellees does not substantially enhance the probative value of their testimony. HN15 The test of a competitive market is not only whether small competitors flourish but also whether consumers are well served. See United States v. Bethlehem Steel Corp., 168 F.Supp. 576, 588, 592 (D. C. S. D. N. Y. 1958). "Congressional concern [was] with the protection of *competition*, not *competitors*." *Brown Shoe Co.*, *supra*, at 320. In an oligopolistic market, small companies may be perfectly content to follow the high prices set by the dominant firms, yet the market may be profoundly anticompetitive.

<sup>44</sup> Entry is, of course, wholly a matter of governmental grace. See p. 328, *supra*. In the 10-year period ending in 1961, only one new bank opened in the Philadelphia four-county area. That was in 1951. At the end of 10 years, the new bank controlled only one-third of 1% of the area's deposits.

<sup>45</sup> The following colloquy is representative:

"Q. Mr. Jennings, what is the nature of competition among commercial banks?

"A. Keen, highly competitive. I think, from my own observation, that I have never known competition among banks to be keener than it is today. . . .

"Q. In what area does competition exist? . . .

"A. I think the stiffest, sternest competition of all is in the field to obtain demand deposits and loans. . . .

"Q. What form does the competition take?

"A. It takes many forms. If we are dealing with the deposits of large corporations, wealthy individuals, I would say that most, if not all, of the major banks of the country are competing for such deposits. The same would hold true as regards loans to those corporations or wealthy individuals.

"If we go into the field of smaller loans, smaller deposits, the competition is more regional -- wide but nevertheless regional -- and there the large banks as well as the small banks are after that business with everything they have.

inimical to the free play of competition in banking than in other service industries. On the contrary, it is in all probability more inimical. For example, banks compete to fill the credit needs of businessmen. Small businessmen especially are, as a practical matter, confined to their locality for the satisfaction of their [\*\*\*\*81] credit needs. See note 35, *supra*. If the number of banks in the locality is reduced, the vigor of competition for filling the marginal small business borrower's needs is likely to diminish. [\*370] At the same time, his concomitantly greater difficulty in obtaining credit is likely to put him at a disadvantage *vis-a-vis* larger businesses with [\*\*\*949] which he competes. In this fashion, concentration in banking accelerates concentration generally.

[\*\*\*\*82] [LEdHN\[35A\]](#) [35A]

We turn now to three affirmative justifications which appellees offer for the proposed merger. The first is that only through mergers can banks follow their customers to the suburbs and retain their business. This justification does not seem particularly related to the instant merger, but in any event it has no merit. There is an alternative to the merger route: the opening of new branches in the areas to which the customers have moved -- so-called *de novo* branching. Appellees do not contend that they are unable to expand thus, by opening new offices rather than acquiring existing ones, and surely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition.

[LEdHN\[36\]](#) [36] Second, it is suggested that the increased lending limit of the resulting bank will enable it to compete with the large out-of-state banks, particularly the New York banks, for very large loans. We reject this application of the concept of "countervailing power." Cf. [\*\*\*\*83] *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, [340 U.S. 211](#). If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader. For if all the commercial banks in the Philadelphia area merged into one, it would be smaller than the largest bank in New York City. This is not a case, plainly, where two small firms in a market propose to merge in order to be able to compete more successfully with the leading firms in that [\*371] market. Nor is it a case in which lack of adequate banking facilities is causing hardships to individuals or businesses in the community. The present two largest banks in Philadelphia have lending limits of \$ 8,000,000 each. The only businesses located in the Philadelphia area which find such limits inadequate are large enough readily to obtain bank credit in other cities.

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....

"Q. What form does the competition take? Is it competition in price?

"A. No, I wouldn't say that it is competition as to price. After all, interest rates are regulated at the top level by the laws of the 50 states. Interest rates at the bottom level have no legal limitation, but for practical purposes the prime rate . . . furnishes a very effective floor. I would say that the area of competition for interest rates would range between, let us say, the prime rate of 4 1/2 and 6 per cent for normal loans exclusive of consumer loans, where higher rates are permitted.

....

"In the area of service charges, I would say that banks are competitive in that field. They base their service charges primarily on their costs, but they have to maintain a weather eye to windward as to what the competitors are charging in the service charge field. The minute they get out of line in connection with service charges they find their customers will start to protest, and if something isn't done some of the customers will leave them for a differential in service charges of any significance.

"I do not believe that competition is really affected by the price area. I think it is affected largely by the quality and the caliber of service that banks give and whether or not they feel they are being received in the right way, whether they are welcome in the bank. Personalities enter into it very heavily, but I do not think price as such is a major factor in banking competition. It is there, it is a factor, but not major." (R. 1940-1942.)

It should be noted that besides competition in interest rates, there is a great deal of indirect price competition in the banking industry. For example, the amount of compensating balance a bank requires of a borrower (*i. e.*, the amount the borrower must always retain in his demand deposit account with the bank) affects the real cost of the loan, and varies considerably in the bank's discretion.

LEdHN[35B] [↑] [35B] LEdHN[37] [↑] [37] [\*\*\*\*84] This brings us to appellees' final contention, that Philadelphia needs a bank larger than it now has in order to bring business to the area and stimulate its economic development. See p. 334 and note 10, *supra*. We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. [\*\*1746] It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.

LEdHN[38] [↑] [38] In holding as we do that the merger of appellees would violate § 7 and must therefore be enjoined, we reject appellees' pervasive suggestion that application of the procompetitive policy of § 7 to the banking industry will have dire, although unspecified, [\*\*\*\*85] consequences for the national economy. Concededly, [\*\*\*950] PNB and Girard are healthy and strong; they are not undercapitalized or overloaned; they have no management problems; the Philadelphia area is not overbanked; ruinous competition is not in the offing. Section 7 does not mandate cutthroat competition in the banking industry, and does not exclude defenses based on dangers to liquidity or [\*372] solvency, if to avert them a merger is necessary.<sup>46</sup> It does require, however, that the forces of competition be allowed to operate within the broad framework of governmental regulation of the industry. The fact that banking is a highly regulated industry critical to the Nation's welfare makes the play of competition not less important but more so. At the price of some repetition, we note that if the businessman is denied credit because his banking alternatives have been eliminated by mergers, the whole edifice of an entrepreneurial system is threatened; if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected; and unless competition is allowed to fulfill [\*\*\*\*86] its role as an economic regulator in the banking industry, the result may well be even more governmental regulation. Subject to narrow qualifications, it is surely the case that competition is our fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy. Cf. *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 4. There is no warrant for declining to enforce it in the instant case.

The judgment of the District Court [\*\*\*\*87] is reversed and the case remanded with direction to enter judgment enjoining the proposed merger.

*It is so ordered.*

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

Dissent by: HARLAN

## Dissent

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[\*373] MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

I suspect that no one will be more surprised than the Government to find that the Clayton Act has carried the day for its case in this Court.

In response to an apparently accelerating trend toward concentration in the commercial banking system in this country, a trend which existing laws were evidently illsuited to control, numerous bills were introduced in Congress from 1955 to 1960.<sup>1</sup> During this period, the Department of Justice and the federal banking agencies<sup>2</sup> advocated

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<sup>46</sup> Thus, arguably, the so-called failing-company defense, see *International Shoe Co. v. Federal Trade Comm'n*, 280 U.S. 291, 299-303, might have somewhat larger contours as applied to bank mergers because of the greater public impact of a bank failure compared with ordinary business failures. But the question what defenses in § 7 actions must be allowed in order to avert unsound banking conditions is not before us, and we intiate no view upon it.

[\*\*\*951] divergent methods of dealing with the competitive aspects of bank mergers, the former urging [\*\*1747] the extension of § 7 of the Clayton Act to cover such mergers and the latter supporting a regulatory scheme under which the effect of a bank merger on competition would be only one of the factors to be considered in determining whether the merger would be in the public interest. The Justice Department's [\*\*\*\*88] proposals were repeatedly rejected by Congress, and the regulatory approach of the banking agencies was adopted in the Bank Merger Act of 1960. See *infra*, pp. 379-383.

Sweeping aside the "design fashioned in the Bank Merger Act" as "predicated upon uncertainty as to the scope of § 7" of the Clayton Act (*ante*, p. 349), the Court today holds § 7 to be applicable to bank mergers and concludes that it has been violated in this case. I respectfully submit that this holding, which sanctions a remedy [\*374] regarded [\*\*\*\*89] by Congress as inimical to the best interests of the banking industry and the public, and which will in large measure serve to frustrate the objectives of the Bank Merger Act, finds no justification in either the terms of the 1950 amendment of the Clayton Act or the history of the statute.

## I.

The key to this case is found in the special position occupied by commercial banking in the economy of this country. With respect to both the nature of the operations performed and the degree of governmental supervision involved, it is fundamentally different from ordinary manufacturing and mercantile businesses.

The unique powers of commercial banks to accept demand deposits, provide checking account services, and lend against fractional reserves permit the banking system as a whole to create a supply of "money," a function which is indispensable to the maintenance of the structure of our national economy. And the amount of the funds held by commercial banks is very large indeed; demand deposits alone represent approximately three-fourths of the money supply in the United States.<sup>3</sup> Since a bank's assets must be sufficiently liquid to accommodate demand withdrawals, short-term commercial [\*\*\*\*90] and industrial loans are the major element in bank portfolios, thus making commercial banks the principal source of short-term business credit. Many other services are also provided by banks, but in these more or less collateral areas they receive more active competition from other financial institutions.<sup>4</sup>

[\*375] Deposit banking operations affect not only the volume of money and credit, but also the value of the dollar and the stability of the currency system. In this field, considerations other than simply the preservation of competition are relevant. Moreover, commercial banks are entrusted with the safekeeping of large amounts of funds belonging to individuals and corporations. Unlike the ordinary investor, these depositors do not [\*\*\*\*91] regard their funds as [\*\*\*\*952] subject to a risk of loss and, at least in the case of demand depositors, they do not receive a return for taking such a risk. A bank failure is a community disaster; its impact first strikes the bank's depositors most heavily, and then spreads throughout the economic life of the community.<sup>5</sup> Safety and soundness of banking practices are thus critical factors in any banking system.

The [\*\*1748] extensive blanket of state and federal regulation of commercial banking, much of which is aimed at limiting competition, reflects these factors. Since the Court's opinion describes, at some length, aspects of the supervision exercised by the federal banking agencies (*ante*, pp. 327-330), I do no more here than point

<sup>1</sup> See Wemple and Cutler, The Federal Bank Merger Law and the Antitrust Laws, 16 Bus. Law. 994, 995 (1961). Many of the bills are summarized in Funk, Antitrust Legislation Affecting Bank Mergers, 75 Banking L. J. 369 (1958).

<sup>2</sup> These agencies and the areas of their primary supervisory responsibility are: (1) the Comptroller of the Currency -- national banks; (2) the Federal Reserve System -- state Reserve-member banks; (3) the FDIC -- insured nonmember banks.

<sup>3</sup> Samuelson, Economics (5th ed. 1961), p. 311.

<sup>4</sup> For example, savings and loan associations, credit unions, and other institutions compete with banks in installment lending to individuals, and banks are in competition with individuals in the personal trust field.

<sup>5</sup> Since bank insolvencies destroy sources of credit, not only borrowers but also others who rely on the borrowers' ability to secure loans may be adversely affected. See Berle, Banking Under the Anti-Trust Laws, 49 Col. L. Rev. 589, 592 (1949).

out [\*\*\*\*92] that, in my opinion, such regulation evidences a plain design grounded on solid economic considerations to deal with banking as a specialized field.

This view is confirmed by the Bank Merger Act of 1960 and its history.

Federal legislation dealing with bank mergers<sup>6</sup> dates from 1918, when Congress provided that, subject to the [\*376] approval of the Comptroller of the Currency, two or more national banks could consolidate to form a new national bank;<sup>7</sup> similar provision was made in 1927 for the consolidation of a state and a national bank resulting in a national bank.<sup>8</sup> In 1952 mergers of national and state banks into national banks were authorized, also conditioned on approval by the Comptroller of the Currency.<sup>9</sup> In 1950 Congress authorized the theretofore prohibited<sup>10</sup> [\*\*\*\*94] merger or consolidation of a national bank with a state bank when the assuming or resulting bank would be a state bank.<sup>11</sup> In addition, the Federal Deposit Insurance Act was amended to require the approval of the FDIC for all mergers and consolidations between insured and noninsured banks, and of specified federal banking agencies for conversions of insured banks into insured state banks if the conversion [\*\*\*\*93] would result in the capital stock or surplus of the newly formed bank being less than that of the converting bank.<sup>12</sup> The Act further required insured banks merging with insured state banks to secure the approval of the Comptroller of the Currency if the assuming bank would be a national bank, and the [\*377] approval of the Board of Governors of the Federal Reserve System and the FDIC, respectively, if the assuming or resulting bank would be a state member bank or nonmember insured bank.<sup>13</sup>

None [\*\*\*953] of this legislation prescribed standards by which the appropriate federal banking agencies were to be guided in determining the significance to be attributed to the anticompetitive effects of a proposed merger. As previously noted (*supra, p. 373*), Congress became increasingly concerned with this problem in the 1950's. The antitrust laws apparently provided no solution; in only one case prior to 1960, *United States v. Firstamerica Corp.*, Civil No. 38139, N. D. Cal., March 30, 1959, settled by consent decree, had either the Sherman or Clayton Act been invoked to attack a commercial bank merger.

[\*\*1749] Indeed the [\*\*\*\*95] inapplicability to bank mergers of § 7 of the Clayton Act, even after it was amended in 1950, was, for a time, an explicit premise on which the Department of Justice performed its antitrust duties. In passing upon an application for informal clearance of a bank merger in 1955, the Department stated:

"After a complete consideration of this matter, we have concluded that this Department would not have jurisdiction to proceed under section 7 of the Clayton Act. For this reason this Department does not presently plan to take any

<sup>6</sup>The term "merger" is generally used throughout this opinion to designate any form of corporate amalgamation. See note 7 in the Court's opinion, *ante*, p. 332. Occasionally, however, as in the above paragraph, the terms "merger" and "consolidation" are used in their technical sense.

<sup>7</sup> 40 Stat. 1043, as amended, 12 U. S. C. (Supp. IV, 1963) § 215.

<sup>8</sup> 44 Stat. 1225, as amended, 12 U. S. C. (Supp. IV, 1963) § 215.

<sup>9</sup> 66 Stat. 599, as amended, 12 U. S. C. (Supp. IV, 1963) § 215a.

<sup>10</sup> See Paton, Conversion, Merger and Consolidation Legislation -- "Two-Way Street" For National and State Banks, 71 Banking L. J. 15 (1954).

<sup>11</sup> 64 Stat. 455, as amended, 12 U. S. C. § 214a.

<sup>12</sup> 64 Stat. 457; see 64 Stat. 892 (now 74 Stat. 129, 12 U. S. C. (Supp. IV, 1963) § 1828 (c)).

<sup>13</sup> *Ibid.* However, under the Act, insured banks merging with insured state banks did not have to obtain approval unless the capital stock or surplus of the resulting or assuming bank would be less than the aggregate capital stock or surplus of all the merging banks.

374 U.S. 321, \*377; 83 S. Ct. 1715, \*\*1749; 10 L. Ed. 2d 915, \*\*\*953; 1963 U.S. LEXIS 2413, \*\*\*\*95

action on this matter." Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 1st Sess., Ser. 3, pt. 3, p. 2141 (1955).

[\*378] And in testifying before the Senate Committee on Banking and Currency in 1957 Attorney General Brownell, speaking of bank mergers, noted:

"On the basis of these provisions the Department of Justice has concluded, and all apparently agree, that asset acquisitions by banks are not covered by [section 7](#) [of the Clayton Act] as amended in 1950." Hearings on the Financial Institutions Act of 1957 before a Subcommittee of the Senate Committee on Banking and Currency, 85th Cong. [\*\*\*\*96], 1st Sess., pt. 2, p. 1030 (1957).

Similar statements were repeatedly made to Congress by Justice Department representatives in the years prior to the enactment of the Bank Merger Act.<sup>14</sup>

The inapplicability of [§ 7](#) to bank mergers was also an explicit basis on which Congress acted in passing the Bank Merger Act of 1960. The Senate Report on S. 1062, the bill that was finally enacted, stated:

"Since bank mergers are customarily, if not invariably, carried out by asset acquisitions, they are exempt from [section 7](#) of the Clayton Act. (Stock acquisitions by bank holding companies, as distinguished from mergers and consolidations, [\*\*\*\*97] are subject to both the Bank Holding Company Act of 1956 and [sec. 7](#) of the Clayton Act.)" S. Rep. No. 196, 86th Cong., 1st Sess. 1-2 (1959).

"In 1950 (64 Stat. 1125) [section 7](#) of the Clayton Act was amended to correct these deficiencies. Acquisitions of assets were included within the section, [\*379] in addition to stock acquisitions, but only in the [\*\*\*954] case of corporations subject to the jurisdiction of the Federal Trade Commission (banks, being subject to the jurisdiction of the Federal Reserve Board for purposes of the Clayton Act by virtue of [section 11](#) of that act, were not affected)." *Id. at 5.*<sup>15</sup> [\*\*\*\*98]

During the floor debates Representative Spence, the Chairman of the House Committee on Banking and Currency, recognized the same difficulty: "The Clayton Act is ineffective as to bank mergers because [\*\*1750] in the case of banks it covers only stock acquisitions and bank mergers are not accomplished that way." 106 Cong. Rec. 7257 (1960).<sup>16</sup>

But instead of extending the scope of [§ 7](#) to cover bank mergers, as numerous proposed amendments to that section were designed to accomplish,<sup>17</sup> Congress made the [\*380] deliberate policy judgment that "it is

<sup>14</sup> See Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 1st Sess., Ser. 3, pt. 1, pp. 243-244 (1955); Hearings on S. 3911 before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 2d Sess. 60-61, 84 (1956); Hearings on S. 1062 before the Senate Committee on Banking and Currency, 86th Cong., 1st Sess. 9 (1959).

<sup>15</sup> See also H. R. Rep. No. 1416, 86th Cong., 2d Sess. 5 (1960) ("The Federal antitrust laws are also inadequate to the task of regulating bank mergers; while the Attorney General may move against bank mergers to a limited extent under the Sherman Act, the Clayton Act offers little help."); *id. at 9* ("Because [section 7](#) [of the Clayton Act] is limited, insofar as banks are concerned, to cases where a merger is accomplished through acquisition of stock, and because bank mergers are accomplished by asset acquisitions rather than stock acquisitions, the act offers 'little help,' in the words of Hon. Robert A. Bicks, acting head of the Antitrust Division, in controlling bank mergers.").

<sup>16</sup> In the Senate, a sponsor of S. 1062, Senator Fulbright, reported that the "1950 amendment to [section 7](#) of the Clayton Act, which for the first time imposed controls over mergers by means other than stock acquisitions, did not apply to bank mergers which are practically invariably accomplished by means other than stock acquisition. Accordingly for all practical purposes bank mergers have been and still are exempt from [section 7](#) of the Clayton Act." 106 Cong. Rec. 9711 (1960).

<sup>17</sup> E. g., H. R. 5948, 84th Cong. 1st Sess. (1955); S. 198, 85th Cong., 1st Sess. (1957); S. 722, 85th Cong., 1st Sess. (1957); see note 1, *supra*.

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impossible to subject bank mergers to the simple rule of section 7 of the Clayton Act. Under that act, a merger would be barred if it might tend substantially to lessen competition, regardless of the effects on the public interest." 105 Cong. Rec. 8076 (1959) (remarks of Senator Robertson, a sponsor of S. 1062). Because of the peculiar nature of the commercial banking industry, its crucial role in the economy, [\*\*\*\*99] and its intimate connection with the fiscal and monetary operations of the Government, Congress rejected the notion that the general economic and business premises of the Clayton Act should be the only considerations applicable to this field. Unrestricted bank competition was thought to have been a major cause of the panic of 1907 and of the bank failures of the 1930's,<sup>18</sup> [\*\*\*\*101] and was regarded as a highly undesirable condition to impose on banks in the future:

[\*\*\*955] "Banking is too important to depositors, to borrowers, to the Government, and the public generally, to permit unregulated and unrestricted competition in that field.

[\*381] "The antitrust laws have reflected an awareness of the difference between banking and other regulated industries on the one hand, and ordinary unregulated industries and commercial enterprises on the other hand." 106 Cong. Rec. 9711 (1960) (remarks of Senator Fulbright, a sponsor of S. 1062).

"It is this distinction between banking and other businesses which justifies different treatment for bank mergers and other mergers. It was this distinction that led the Senate to reject the flat prohibition of the Clayton Act test which applies [\*\*\*\*100] to other mergers." *Id.*, at 9712.<sup>19</sup>

Thus the Committee on Banking and Currency recommended "continuance of the existing exemption from section 7 [\*\*1751] of the Clayton Act." 105 Cong. Rec. 8076 (1959). Congress accepted this recommendation; it decided to handle the problem of concentration in commercial banking "through banking laws, specially framed to fit the particular needs of the field . . ." S. Rep. No. 196, 86th Cong., 1st Sess. 18 (1959). As finally enacted in 1960, the Bank Merger Act embodies the regulatory approach advocated by the banking agencies, vesting in them responsibility for its administration and placing the scheme within the framework of existing banking laws as an amendment to § 18(c) of the Federal Deposit Insurance Act, 12 U. S. C. (Supp. IV, 1963), § 1828(c).<sup>20</sup> [\*\*\*\*103] It [\*\*\*\*102] maintains the latter Act's requirement of advance approval by the appropriate federal agency for mergers between insured banks and between insured and noninsured [\*382] banks (*supra*, pp. 375-377), but establishes that such approval is necessary in every merger of this type. To aid the respective agencies in determining whether to approve a merger, and in "the interests of uniform standards" (12 U. S. C. (Supp. IV, 1963) § 1828(c)), the Act requires the two agencies not making the particular decision and the Attorney General to submit to the immediately responsible agency reports on the competitive factors involved. It further provides that in addition to considering the banking factors examined by the FDIC in connection with applications to become an insured bank, which focus primarily on matters of safety and soundness,<sup>21</sup> the approving agency "shall also take

<sup>18</sup> S. Rep. No. 196, 86th Cong., 1st Sess. 17 (1959): "Time and again the Nation has suffered from the results of unregulated and uncontrolled competition in the field of banking, and from insufficiently regulated competition. . . . The rapid increase in the number of small weak banks, to such a large number that the Comptroller could not effectively supervise them or control any but the worst abuses, was one of the factors which led to the panic of 1907.

"The banking collapse in the early 1930's again was in large part the result of insufficient regulation and control of banks, in effect the result of too much competition." See also 105 Cong. Rec. 8076 (1959): "But unlimited and unrestricted competition in banking is just not possible. We have had too many panics and banking crises and bank failures, largely as the result of excessive competition in banking, to consider for a moment going back to the days of free banking or unregulated banking."

<sup>19</sup> See also S. Rep. No. 196, 86th Cong., 1st Sess. 16 (1959): "But it is impossible to require unrestricted competition in the field of banking, and it would be impossible to subject banks to the rules applicable to ordinary industrial and commercial concerns, not subject to regulation and not vested with a public interest."

<sup>20</sup> For the pertinent text of the statute, see note 8 in the Court's opinion, *ante*, pp. 332-333.

<sup>21</sup> These factors are: "the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served,

374 U.S. 321, \*382; 83 S. Ct. 1715, \*\*1751; 10 L. Ed. 2d 915, \*\*\*955; 1963 U.S. LEXIS 2413, \*\*\*\*102

into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to [\*\*\*956] be in the public interest." [12 U. S. C. \(Supp. IV, 1963\) § 1828 \(c\).](#)

The congressional purpose clearly emerges from the terms of the statute and from the committee reports, hearings, and floor debates on the bills. Time and again it was repeated that effect on competition was *not to be the controlling factor* in determining whether to approve a bank merger, that a merger could be approved as being in the public interest even though it would cause a substantial lessening of competition. The following statement is typical:

"The committee wants to make crystal clear its intention that the various banking factors in any particular [\*383] case may be held to outweigh [\*\*\*\*104] the competitive factors, and that the competitive factors, however favorable or unfavorable, are not, in and of themselves, controlling on the decision. And, of course, the banking agencies are not bound in their consideration of the competitive factors by the report of the Attorney General." S. Rep. No. 196, 86th Cong., 1st Sess. 24 (1959); [\*id.\* at 19, 21.](#)<sup>22</sup> [\*\*\*\*105]

[\*\*1752] The foregoing statement also shows that it was the congressional intention to place the responsibility for approval squarely on the banking agencies; the report of the Attorney General on the competitive aspects of a merger was to be advisory only.<sup>23</sup> And there was deliberately omitted any attempt to specify or restrict the kinds of circumstances in which the agencies might properly determine that a proposed merger would be in the public interest notwithstanding its adverse effect on competition.<sup>24</sup>

[\*\*\*\*106] [\*384] What Congress has chosen to do about mergers and their effect on competition in the highly specialized field of commercial banking could not be more "crystal clear." ([Supra, p. 382.](#)) But in the face of overwhelming evidence to the contrary, the Court, with perfect equanimity, finds "uncertainty" in the foundations of the Bank Merger Act (*ante*, p. 349) and on this premise puts it aside as irrelevant to the task of construing the scope of [§ 7](#) of the Clayton Act.

I am unable to conceive of a more inappropriate case in which to overturn the considered opinion of all concerned as to the reach of prior [\*\*\*957] legislation.<sup>25</sup> For 10 years everyone -- the department responsible for antitrust law enforcement, the banking industry, the Congress, and the bar -- proceeded on the assumption that the 1950 amendment of the Clayton Act did not affect bank mergers. This assumption provided a major impetus to the

and whether or not its corporate powers are consistent with the purposes of this chapter." [12 U. S. C. \(Supp. IV, 1963\) § 1828 \(c\).](#) Compare § 6 of the Federal Deposit Insurance Act, [12 U. S. C. § 1816.](#)

<sup>22</sup> See also 106 Cong. Rec. 7259 (1960): "The language of S. 1062 as amended by the House Banking and Currency Committee and as it appears in the bill we are now about to pass in the House makes it clear that the competitive and monopolistic factors are to be considered along with the banking factors and that after considering all of the factors involved, if the resulting institution will be in the public interest, then the application should be approved and otherwise disapproved."

<sup>23</sup> 106 Cong. Rec. 7257 (1960): "This puts the responsibility for acting on a proposed merger where it belongs -- in the agency charged with supervising and examining the bank which will result from the merger. Out of their years of experience in supervising banks, our Federal banking agencies have developed specialized knowledge of banking and the people who engage in it. They are experts at judging the condition of the banks involved, their prospects, their management, and the needs of the community for banking services. They should have *primary responsibility* in deciding whether a proposed merger would be in the public interest." (Emphasis added.)

<sup>24</sup> H. R. Rep. No. 1416, 86th Cong., 2d Sess. 11-12 (1960): "We are convinced, also, that approval of a merger should depend on a positive showing of some benefit to be derived from it. As previously indicated, your committee is not prepared to say that the cases enumerated in the hearings are the only instances in which a merger is in the public interest, nor are we prepared to devise a specific and exclusive list of situations in which a merger should be approved."

<sup>25</sup> Compare *State Board of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 457, in which this Court refused to reconsider certain prior decisions because Congress had "posed a regime of state regulation" of the insurance business on their continuing validity. Cf. [Toolson v. New York Yankees, Inc.](#), 346 U.S. 356.

enactment of remedial legislation, and Congress, when it finally settled on what it thought was the solution to the problem at hand, emphatically rejected the remedy now brought to life by the Court.

**[\*\*\*\*107]** The result is, of course, that the Bank Merger Act is almost completely nullified; its enactment turns out to have been an exorbitant waste of congressional time and energy. As the present case illustrates, the Attorney General's report to the designated banking agency is no longer truly advisory, for if the agency's decision is not **[\*385]** satisfactory a § 7 suit may be commenced immediately.<sup>26</sup> **[\*\*\*\*108]** The bank merger's legality will then be judged solely from its competitive aspects, unencumbered by any considerations peculiar **[\*\*1753]** to banking.<sup>27</sup> And if such a suit were deemed to lie after a bank merger has been consummated, there would then be introduced into this field, for the first time to any significant extent, the threat of divestiture of assets and all the complexities and disruption attendant upon the use of that sanction.<sup>28</sup> The only vestige of the Bank Merger Act which remains is that the banking agencies will have an initial veto.<sup>29</sup>

**[\*\*\*\*109] [\*386] [\*\*\*958]** This frustration of a manifest congressional design is, in my view, a most unwarranted intrusion upon the legislative domain. I submit that *whatever* may have been the congressional purpose in 1950, Congress has now so plainly pronounced its current judgment that bank mergers are not within the reach of § 7 that this Court is duty bound to effectuate its choice.

But I need not rest on this proposition, for, as will now be shown, there is nothing in the 1950 amendment to § 7 or its legislative history to support the conclusion that Congress even then intended to subject bank mergers to this provision of the Clayton Act.

## II.

Prior to 1950, § 7 of the Clayton Act read, in pertinent part, as follows:

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<sup>26</sup> If a bank merger such as this falls within the category of a "stock" acquisition, a § 7 suit to enjoin it may be brought not only by the Attorney General, but by the Federal Reserve Board as well. See § 11 of the Clayton Act, 15 U. S. C. § 21 (vesting authority in the Board to enforce § 7 "where applicable to banks"). In an attempt to retain some semblance of the structure erected by Congress in the Bank Merger Act, the Court states that it "supplanted . . . whatever authority the FRB may have acquired under § 11, by virtue of the amendment of § 7, to enforce § 7 against bank mergers." *Ante*, p. 344, note 22. Since both the Attorney General and the Federal Reserve Board have purely advisory roles where a bank merger will result in a national bank, the Court's reasoning with respect to the effect of the Bank Merger Act upon enforcement authority should apply with equal force to both.

<sup>27</sup> Indeed the Court has erected a simple yardstick in order to alleviate the agony of analyzing economic data -- control of 30% of a commercial banking market is prohibited. *Ante*, pp. 363-364.

<sup>28</sup> Although § 7 of the Clayton Act is applicable to an outright purchase of bank stock, this form of amalgamation is infrequently used in the banking field and does not involve divestiture problems of the same magnitude as does an asset acquisition.

<sup>29</sup> It is true, as the Court points out (*ante*, p. 354), that Congress, in enacting the Bank Merger Act, agreed that the applicability of the Sherman Act to banking should not be disturbed. See, e. g., 105 Cong. Rec. 8076 (1959). But surely this alone provides no conceivable justification for applying the Clayton Act as well. Apart from the fact that the Sherman Act covers many kinds of restraints besides mergers, one of the sponsors of the Bank Merger Act (Senator Fulbright) expressed his expectation that in a Sherman Act case a bank merger would not be subjected to strict antitrust standards to the exclusion of all other considerations: "And even if the Sherman Act is held to apply to banking and to bank mergers, it seems clear that under the rule of reason spelled out in the Standard Oil case, different considerations will be found applicable, in a regulated field like banking, in determining whether activities would 'unduly diminish competition,' in the words of the Supreme Court in that case." 106 Cong. Rec. 9711 (1960). Moreover, this Court has recognized in other areas that it may be necessary to accommodate the Sherman Act to regulatory policy. *McLean Trucking Co. v. United States*, 321 U.S. 67, 83; *Federal Communications Comm'n v. RCA Communications, Inc.*, 346 U.S. 86, 91-92. See also United States v. Columbia Steel Co., 334 U.S. 495, 527. And of course the Sherman Act is concerned more with existing anticompetitive effects than with future probabilities, and thus would not reach incipient restraints to the same extent as would § 7 of the Clayton Act. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 317-318 and notes 32, 33.

"That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of [\*387] such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, [\*\*1754] or to restrain such commerce in any section or community, or tend to [\*\*\*\*110] create a monopoly of any line of commerce."

In 1950 this section was amended to read (the major amendments being indicated in italics):

"That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital *and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets* of another corporation engaged also in commerce, where *in any line of commerce in any section of the country*, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

If Congress did intend the 1950 amendment to reach bank mergers, it certainly went at the matter in a very peculiar way. While prohibiting asset acquisitions having the anticompetitive effects described in § 7, it limited the applicability of that provision to corporations subject to the jurisdiction of the Federal Trade Commission, which does not include banks. And it reenacted the stock-acquisition provision in the very same language which -- as it was fully aware -- had been interpreted not to reach the type of merger customarily used in the banking industry. [\*\*\*\*111] See *infra*, pp. 389-393. In the past this Court has drawn the normal inference that such a reenactment indicates congressional adoption of the prior judicial statutory construction. E. g., *United States v. Dixon, 347 U.S. 381; Overstreet v. North Shore Corp., 318 U.S. 125, 131-132.* [\*\*\*959]

[\*388] In this instance, however, the Court holds that the stock-acquisition provision underwent an expansive metamorphosis, so that it now embraces all mergers or consolidations involving an exchange of stock. Since bank mergers usually, if not always, do involve exchanges of stock, the effect of this construction is to rob the Federal Trade Commission provision relating to asset acquisitions of all force as a substantive limitation upon the scope of § 7; according to the Court the purpose of that provision was merely to ensure the Commission's role in the enforcement of § 7. *Ante*, pp. 346-348. In short, under this reasoning bank mergers to all intents and purposes are fully within the reach of § 7.

A more circumspect look at the 1950 amendment of § 7 and its background will show that this construction is not tenable.

The language [\*\*\*\*112] of the stock-acquisition provision itself is hardly congenial to the Court's interpretation. The PNB-Girard merger is technically a consolidation, governed by § 20 of the national banking laws, 12 U. S. C. (Supp. IV, 1963) § 215. Under that section, the corporate existence of both PNB and Girard, all of their rights, franchises, assets, and liabilities, would be automatically vested in the resulting bank, which would operate under the PNB charter. PNB itself would acquire nothing. Rather, the two banks would be creating a new entity by the amalgamation of their properties, and the subsequent conversion of Girard stock (which would then represent ownership in a nonfunctioning entity) into stock of the resulting bank would simply be part of the mechanics by which ownership in the new entity would be reflected. Clearly this is not a case of a corporation acquiring the stock of another functioning corporation, which is the only situation where "the effect of . . . [a stock] acquisition may be substantially to lessen competition." (Emphasis added.)

[\*389] There are further crucial differences between a merger and a stock acquisition. A merger normally requires public [\*\*\*\*113] [\*\*1755] notice and the approval of the holders of two-thirds of the outstanding shares of each corporation, and dissenting shareholders have the right to receive in cash the appraised value of their shares.<sup>30</sup> A purchase of stock may be done privately, and the only approval involved is that of the individual parties to the

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<sup>30</sup> In these respects a merger is precisely the contrary of what § 7 was originally designed to proscribe -- the secret acquisition of corporate control. See the Court's opinion, *ante*, p. 338.

transaction. Unlike a merged company, a corporation whose stock is acquired usually remains in business as a subsidiary of the acquiring corporation.<sup>31</sup>

[\*\*\*\*114] The Government, however, contends that a merger more closely resembles a stock acquisition than an asset acquisition because of one [\*\*\*960] similarity of central importance: the acquisition by one corporation of an immediate voice in the management of the business of another corporation. But this is obviously true *a fortiori* of asset acquisitions of sufficient magnitude to fall within the prohibition of § 7; if a corporation buys the plants, equipment, inventory, etc., of another corporation, it acquires absolute control over, not merely a voice in the management of, another business.

The legislative history of the 1950 amendment also unquestionably negates any inference that Congress intended [\*390] to reach bank mergers. It is true that the purpose was "to plug a loophole" in § 7 (95 Cong. Rec. 11485 (1949) (remarks of Representative Celler)). But simply to state this broad proposition does not answer the precise questions presented here: what was the nature of the loophole sought to be closed; what were the means chosen to close it?

The answer to the latter question is unmistakably indicated by the relationship between the 1950 amendment and previous judicial [\*\*\*\*115] decisions. In *Arrow-Hart & Hegeman Elec. Co. v. Federal Trade Comm'n*, 291 U.S. 587, this Court, by a divided vote, ruled on the scope of the Federal Trade Commission's remedial powers under the original Clayton Act. After the Commission had issued a § 7 complaint against a holding company which had been formed by the stockholders of two manufacturing corporations, steps were taken to avoid the Commission's jurisdiction. Two new holding companies were formed, each acquired all the common stock of one of the manufacturing companies, and each issued its stock directly to the stockholders of the original holding company. This company then dissolved and the two new holding companies and their respective manufacturing subsidiaries merged into one corporation. This Court held that the Commission had no authority, after the merger, to order the resulting corporation to divest itself of assets. An essential part of this holding was that the merger in question, which was technically a consolidation similar to that here planned by PNB and Girard, was not a stock acquisition within the prohibitions of § 7: "If the merger of the two manufacturing corporations and the [\*\*\*\*116] combination of their assets was in any respect a violation of any antitrust law, as to which we express no opinion, it was necessarily a [\*\*1756] violation of statutory prohibitions other [\*391] than those found in the Clayton Act." 291 U.S., at 599; see *id.*, at 595.<sup>32</sup>

This decision, along with two others earlier handed down by this Court (*Thatcher Mfg. Co. v. Federal Trade Comm'n* and *Swift & Co. v. Federal Trade Comm'n*, decided together with *Federal Trade Comm'n v. Western Meat Co.*, 272 U.S. 554), perhaps provided more of a spur to enactment of the "assets" amendment to § 7 than any other single factor. These decisions were universally regarded as opening the unfortunate loophole whereby § 7 could be evaded through the use of an asset acquisition. Representative Celler expressed the view of Congress in this fashion:

"The result of these decisions has so weakened sections 7 and 11 . . . as to give to the Federal Trade Commission [\*\*\*961] and the Department of Justice merely a paper sword to prevent improper mergers." 95 Cong. Rec. 11485 (1949).<sup>33</sup>

<sup>31</sup> That the stock-acquisition provision was not intended to cover mergers is strongly suggested by the second paragraph of § 7: "No corporation shall acquire . . . any part of the stock . . . of one or more corporations . . . where . . . the effect . . . of the use of such stock by the voting or granting of proxies . . . may be substantially to lessen competition, or to tend to create a monopoly." 15 U. S. C. § 18. (Emphasis added.) After a merger has been consummated, the resulting corporation holds no stock in any party to the merger; thus there can be in this situation no such thing as a restraint of trade by "the use" of the voting power of acquired stock.

<sup>32</sup> On this point, the dissenters agreed: "It is true that the Clayton Act does not forbid corporate mergers . . ." 291 U.S., at 600. See also *United States v. Celanese Corp. of America*, 91 F.Supp. 14.

[\*\*\*\*118] [\*392] Since this Court's decisions were cast in terms of the scope of the Federal Trade Commission's jurisdiction, Congress, in amending [§ 7](#) so as to close that gap, emphasized its expectation -- made plain in the committee reports, hearings, and debates -- that the Commission would assume the principal role in enforcing the section.<sup>34</sup> Implicit here is that no change in the enforcement powers of the other agencies named in [§ 11](#) was contemplated.<sup>35</sup> Of more importance, the legislative history demonstrates that it was the asset-acquisition provision that was designed to plug the loophole created by *Thatcher*, *Swift*, and *Arrow*. Although *Arrow*, unlike *Thatcher* and *Swift*, involved a consolidation of the same type as the PNB-Girard merger, the members of Congress drew no distinction among these cases, invariably discussing all three of them in the same breath as examples of asset acquisitions.<sup>36</sup> Indeed, the House report stated that

"the Supreme Court . . . held [in *Arrow*] that if an acquiring corporation secured *title to the physical* [\*\*1757] assets of a corporation whose stock it had acquired before the Federal Trade Commission issues [\*\*\*\*119] its final order, the Commission lacks power to direct divestiture of the physical assets . . ." H. R. Rep. No. 1191, 81st Cong., 1st Sess. 5 (1949). (Emphasis added.)

And on the Senate floor it was pointed out that "the *method* by which . . . [the merger in *Arrow*] had been [\*393] accomplished was an innocent one . . ." 96 Cong. Rec. 16505 (1950). (Emphasis added.) Clearly the understanding of Congress was that a consolidation of two corporations was an acquisition of assets.<sup>37</sup>

[\*\*\*\*120] Nor [\*\*\*962] did Congress act inadvertently or without purpose in limiting the asset-acquisition provision to corporations subject to the jurisdiction of the Federal Trade Commission, thereby excluding bank mergers. The reports, hearings, and debates on the 1950 amendment reveal that Congress was then concerned with the rising tide of *industrial* concentration -- *i. e.*, "the external expansion . . . through mergers, acquisitions, and consolidations"<sup>38</sup> of corporations engaged in manufacturing, mining, merchandising, and of other kindred commercial endeavors. Specialized areas of the economy such as banking were not even considered. Thus the Federal Trade Commission's 1948 report on mergers recounted the statistics on concentration in a multitude of industries -- *e. g.*, steel, cement, electrical equipment, food and dairy products, tobacco, textiles, paper, chemicals, rubber -- but included not one figure on banking concentration.<sup>39</sup> [\*\*\*\*122] This report was repeatedly cited and

<sup>33</sup> See also Hearings on H. R. 988, H. R. 1240, H. R. 2006, H. R. 2734 before Subcommittee No. 3 of the House Committee on the Judiciary, 81st Cong., 1st Sess. 38-39 (1949); Hearings on H. R. 2734 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st & 2d Sess. 109-110 (1950): "The loophole sought to be filled resulted from a series of Supreme Court decisions. (*Swift & Co. v. FTC* and *Thatcher Mfg. Co. v. FTC* (272 U.S. 554); *Arrow-Hart & Hegeman Co. v. FTC* (291 U.S. 587).) In these decisions the Supreme Court held that [section 7](#) of the Clayton Act, while prohibiting the acquisition of stock of a competitor, gave the Federal Trade Commission no authority under [section 11](#) to order divestiture of assets which had been acquired before a cease-and-desist order was issued, even though the acquisition resulted from the voting of illegally held stock."

<sup>34</sup> The Federal Trade Commission had assumed primary enforcement responsibility before the 1950 amendment. See Martin, *Mergers and the Clayton Act* (1959), p. 197.

<sup>35</sup> Compare note 26, *supra*.

<sup>36</sup> See note 33 *supra*; Hearings on H. R. 2734 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st & 2d Sess. 97 (1950). And this Court has, after the 1950 amendment, described *Arrow* as a case involving an asset acquisition. *Brown Shoe Co. v. United States*, 370 U.S. 294, 313 and note 20.

<sup>37</sup> The single excerpt quoted by the Court (*ante*, p. 345) casts no doubt on this proposition, for Senator Kilgore's remark occurred in the course of a discussion in which he was trying to make the point that there is no difference in *practical* effect, as opposed to the legal distinction, between a merger and a stock acquisition. Thus at the end of the paragraph quoted by the Court the Senator stated: ". . . I cannot see how on earth you can get the idea that the purchase of the stock of the corporation, all of it, does not carry with it the transfer of all of the physical assets in that corporation." Hearings on H. R. 2734 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st & 2d Sess. 176 (1950).

<sup>38</sup> H. R. Rep. No. 1191, 81st Cong., 1st Sess. 2 (1949).

heavily relied on by members of Congress and others to demonstrate the magnitude [**\*394**] of the merger movement and the economic dangers it presented.<sup>40</sup> In the committee hearings the focus was [**\*\*\*\*121**] exclusively upon amalgamation in the ordinary commercial fields,<sup>41</sup> and similarly the Senate and House reports spoke solely of industrial concentration as the evil to be remedied.<sup>42</sup> On the floor of the House, Representative Celler indicated the extent of concentration of industrial power:

"Four companies now have 64 percent of the steel business, four have 82 percent of the copper business, two have 90 percent of the aluminum [**\*\*1758**] business, three have 85 percent of the automobile business, two have 80 percent of the electric lamp business, four have 75 percent of the electric refrigerator business, two have 80 percent of the glass business, four have 90 percent of the cigarette business, and so forth.

"The antitrust laws are a complete bust unless we pass this bill." 95 Cong. Rec. 11485 (1949).

The legislative history is thus singularly devoid of any evidence that Congress sought to deal with the special problem of banking concentration.

I do not mean to suggest, of course, that § 7 of the Clayton Act is thereby rendered applicable only to ordinary commercial and industrial corporations and not to firms in any "regulated" sector of the economy. The [**\*395**] point is that when Congress included in § 7 asset acquisitions by corporations subject to the Federal Trade Commission's jurisdiction, and at the same time [**\*\*\*963**] continued in § 11 the Federal Reserve Board's jurisdiction [**\*\*\*\*123**] over banks, it was not acting irrationally. Rather, the absence of any mention of banks in the legislative history of the 1950 amendment, viewed in light of the prior congressional treatment of banking as a distinctive area with special characteristics and needs, compels the conclusion that bank mergers were simply not then regarded as part of the loophole to be plugged.<sup>43</sup>

This conclusion is confirmed by a number of additional considerations. It was not until after the passage of the 1950 amendment of § 7 that Representative Celler, its cosponsor requested the staff of the Antitrust Subcommittee of the House Committee on the Judiciary "to prepare a report indicating the concentration existing in our banking system." Staff of Subcommittee No. 5, House Committee on the Judiciary, [**\*\*\*\*124**] 82d Cong., 2d Sess., Report on Bank Mergers and Concentration of Banking Facilities III (1952). The introduction to the report reveals that:

"On March 21, 1945, the Board of Governors of the Federal Reserve System wrote to the chairman of the Committee on the Judiciary requesting that the provisions of H. R. 2357, Seventy-ninth Congress, first session, one of the early predecessors of the Celler Antimerger Act, be extended so as to include corporations subject to the jurisdiction of the Federal Reserve Board under section 11 of the Clayton Act. Because of the revisions made in subsequent versions of antimerger bills, however, it became impracticable [**\*396**] to include within the scope of the act corporations other than those subject to regulation by the Federal Trade Commission. Banks, which are placed squarely within the authority of the Federal Reserve Board by section 11 of the Clayton Act, are therefore circumscribed insofar as mergers are concerned only by the old provisions of section 7, and certain additional statutes which do not presently concern themselves substantively with the question of competition in the field of banking." *Id.*, at VII.

<sup>39</sup> Federal Trade Commission, The Merger Movement: A Summary Report (1948), *passim*.

<sup>40</sup> E. g., Hearings on H. R. 988, H. R. 1240, H. R. 2006, H. R. 2734 before Subcommittee No. 3 of the House Committee on the Judiciary, 81st Cong., 1st Sess. 39-40 (1949); 95 Cong. Rec. 11503 (1949); 96 Cong. Rec. 16505 (1950).

<sup>41</sup> Hearings on H. R. 2734 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st & 2d Sess. 5-6, 17, 57-59 (1950); Hearings on H. R. 988, H. R. 1240, H. R. 2006, H. R. 2734 before Subcommittee No. 3 of the House Committee on the Judiciary, 81st Cong., 1st Sess. 40, 113 (1949).

<sup>42</sup> S. Rep. No. 1775, 81st Cong., 2d Sess. 3 (1950); H. R. Rep. No. 1191, 81st Cong., 1st Sess. 2-3 (1949).

<sup>43</sup> It is interesting to note that in the same year in which § 7 was amended Congress passed an act *facilitating* certain kinds of bank mergers which had theretofore been prohibited. See note 11, *supra*, and accompanying text.

It is also worth [\*\*\*\*125] noting that in 1956 Representative Celler himself introduced another amendment to [§ 7](#), explaining that "all the bill [H. R. 5948] does is plug a loophole in the present law dealing with bank mergers . . . . This loophole exists because [section 7](#) of the Clayton Act prohibits bank mergers . . . only if such mergers are accomplished by [\*\*1759] stock acquisition." 102 Cong. Rec. 2109 (1956). The bill read in pertinent part: "No bank . . . shall acquire . . . the whole or any part of the assets of another corporation engaged also in commerce . . ." *Ibid.* The amendment passed the House but was defeated in the Senate.

For all these reasons, I think the conclusion is inescapable that [§ 7](#) of the Clayton Act does not apply to the PNB-Girard merger. The Court's contrary conclusion seems to me little better than a *tour de force*.<sup>44</sup>

Memorandum of MR. JUSTICE GOLDBERG.

I agree fully [\*\*\*\*126] with my Brother HARLAN that [§ 7](#) of the Clayton Act has no application to bank mergers [\*\*\*964] of the type involved here, and I therefore join in the conclusions expressed in his opinion on that point. However, while I [\*397] thus dissent from the Court's holding with respect to the applicability of the Clayton Act to this merger, I wish to make clear that I do not necessarily dissent from its judgment invalidating the merger. To do so would require me to conclude in addition that on the record as it stands the Government has failed to prove a violation of the Sherman Act, which is fully applicable to the commercial banking business. In my opinion there is a substantial Sherman Act issue in this case, but since the Court does not reach it and since my views relative thereto would be superfluous in light of today's disposition of the case, I express no ultimate conclusion concerning it. Compare [Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 585](#) (Murphy, J., dissenting); [Poe v. Ullman, 367 U.S. 497, 555](#) (STEWART, J., dissenting).

## References

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### [\*\*\*\*127] Annotation References:

1. Application to banks and banking institutions of antimonopoly or antitrust laws. 83 ALR2d 374.
2. Validity and construction of statute creating Federal Trade Commission. 6 ALR 366, 11 ALR 797, 18 ALR 549, 30 ALR 1129, 32 ALR 792, 51 ALR 331, 68 ALR 847, 79 ALR 1200.
3. The doctrine of primary administrative jurisdiction. 94 L ed 806, 1 L ed 2d 1596.

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<sup>44</sup> Since the Court does not reach the Sherman Act aspect of this case, it would serve no useful purpose for me to do so.



## **United States v. First Nat'l Bank & Trust Co.**

Supreme Court of the United States

March 4-5, 1964, Argued ; April 6, 1964, Decided

No. 36

### **Reporter**

376 U.S. 665 \*; 84 S. Ct. 1033 \*\*; 12 L. Ed. 2d 1 \*\*\*; 1964 U.S. LEXIS 2172 \*\*\*\*; 1964 Trade Cas. (CCH) P71,072

UNITED STATES v. FIRST NATIONAL BANK & TRUST CO. OF LEXINGTON ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.

**Disposition:** [208 F.Supp. 457](#), reversed.

## **Core Terms**

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consolidation, banking, Sherman Act, deposits, cases, commerce, Steel, factors, loans, interstate, mergers, competitors, constitutes, elimination, antitrust, bigness, merging, commercial bank, relevant market, probable, compete, traffic, dollar, volume

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

[\*\*HN1\*\*](#) [down arrow] **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. §§ 1, 2.](#)

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Consolidation & Merger

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

[\*\*HN2\*\*](#) [down arrow] **Railroads & Rail Transportation, Consolidation & Merger**

Where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger or consolidation, itself constitutes a violation of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

## Lawyers' Edition Display

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### Summary

The United States brought a civil antitrust suit in the United States District Court for the Eastern District of Kentucky to enjoin the consolidation of two commercial banks whose principal places of business were Lexington, Kentucky, on the ground that the consolidation would violate 1 and 2 of the Sherman Act ([15 USC 1, 2](#)). The District Court dismissed the complaint on the ground that no violation of the Sherman Act was shown. ([208 F Supp 457](#).)

On direct appeal, the Supreme Court of the United States reversed. In an opinion by Douglas, J., expressing the views of five members of the Court, it was held that although there was no underlying predatory purpose, the proposed consolidation would violate 1 of the Sherman Act because (1) under the doctrine of [Northern Securities Co. v U. S., 193 US 197, 48 L ed 679, 24 S Ct 436](#), the consolidation of the two banks, which were the largest and the fourth largest commercial banks in Lexington, would put an end to their not insubstantial competition with each other, without reference to the remaining competition from the other commercial banks in Lexington, and (2) under the factors relied on in [U. S. v Columbia Steel Co., 334 US 495, 92 L ed 1533, 68 S Ct 1107](#)--the percentage of the business controlled, the strength of the remaining competition, the presence of a purpose to monopolize rather than to satisfy business requirements, the probable development of the industry, consumer demands, and other characteristics of the market--the proposed consolidation was unlawful under 1. The opinion also stated that the Columbia Steel Case, holding that a merger of steel companies did not violate the Sherman Act, must be confined to its special facts.

Brennan and White, JJ., while agreeing that the proposed consolidation would violate 1 of the Sherman Act, indicated that they would rest the decision solely on the Columbia Steel Case.

Harlan, J., joined by Stewart, J., dissented on the grounds that the doctrine of the Northern Securities Case had been rejected and that the proposed consolidation was not illegal under the factors set forth in the Columbia Steel Case.

### Headnotes

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §35 > bank consolidation -- relevant market --  
> Headnote:

[LEdHN\[1\]](#) [1]

In determining whether a bank consolidation constitutes a combination in restraint of trade and commerce in violation of 1 of the Sherman Act ([15 USC 1](#)), commercial banking is one relevant market in a county where commercial banks are the only financial institutions authorized to receive demand deposits and to offer checking accounts; commercial banks are the only financial institutions in the county which accept time deposits from partnerships and corporations and make single-payment loans to individuals and commercial and industrial loans to businesses; and commercial banks in the county offer a wider variety of financial services than the other financial institutions, including deposit boxes, Christmas clubs, correspondent bank facilities, collection services, and trust department services.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §35 > bank consolidation -- effect on competition -- > Headnote:

[LEdHN\[2\]](#) [2]

A bank consolidation should be judged in the light of its effect on competition in a certain county, in determining whether the consolidation constitutes a combination in restraint of trade and commerce in violation of 1 of the Sherman Act ([15 USC 1](#)), where the factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries, practically all of the business of the banks in the city where the consolidation would occur originates in the county, businesses in the area (except for large national companies) are restricted to banks in the county for working capital loans, commercial banks outside the city do a negligible amount of business in the county, and there is a negligible amount of competition from corporate fiduciaries outside the county.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §15 > RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §18 > RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §35 > bank consolidation -- purpose -- size -- > Headnote:

[LEdHN\[3\]](#) [3]

Even though there is no predatory purpose, a consolidation of the largest and fourth largest banks in a county would constitute an unreasonable restraint of trade, in violation of 1 of the Sherman Act ([15 USC 1](#)), where the county has only six banks and the bank to be established by the consolidation would be larger than all the remaining banks combined; the banks to be consolidated are close competitors in the trust department business, and between them hold 94.82 percent of all trust assets, 92.20 per cent of all trust department earnings, and 79.62 percent of all trust accounts; and the testimony of three of the four remaining banks is that the consolidation would seriously affect their ability to compete effectively over the years, that the "image" of "bigness" is a powerful attraction to customers and an advantage which increases progressively with disparity in size, and that the multiplicity of extra services in the trust field which the new company could offer would tend to foreclose competition there.

## Syllabus

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In this civil action the United States, the appellant, charges that the consolidation of the largest and fourth largest of the six commercial banks in Fayette County, Kentucky, violates [§§ 1](#) and [2](#) of the Sherman Act. The Comptroller of the Currency had approved the consolidation although reports, required by the Bank Merger Act of 1960, from the Attorney General, the Federal Deposit Insurance Corporation, and the Board of Governors of the Federal Reserve System all concluded that it would adversely affect competition in the area. Although recognizing that approval by the Comptroller of the Currency did not immunize the consolidation from the operation of the Act, the District Court found that no violation was shown. *Held:* The consolidation of the appellee banks constitutes a violation of [§ 1](#) of the Sherman Act. Pp. 666-673.

(a) Commercial banking is one relevant product market in which to judge the effect of the consolidation on [\\*\\*\\*\\*2](#) competition. Pp. 666-668.

(b) The consolidation should be judged by its effect on competition in Fayette County, the geographical market. P. 668.

(c) The new bank controls over half of the relevant market and by its disparity of size, as attested by three of the four remaining banks, will seriously affect their long-range ability to compete, despite the absence of any "predatory" purpose. P. 669.

(d) The elimination of significant competition between the parties to the consolidation, which were major competitive factors in the relevant market, of itself constitutes an unreasonable restraint of trade in violation of [§ 1](#) of the Act. [Northern Securities Co. v. United States, 193 U.S. 197](#), followed; [United States v. Columbia Steel Co., 334 U.S. 495](#), distinguished. Pp. 669-673.

**Counsel:** Daniel M. Friedman argued the cause for the United States. On the brief were Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Larry L. Williams, Melvin Spaeth and Richard J. Wertheimer.

Robert M. Odear argued the cause for appellees. With him on the brief were Gladney Harville, Rufus Lisle and Clinton M. Harbison.

**Judges:** [\*\*\*3] Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg

**Opinion by:** DOUGLAS

## Opinion

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[\*666] [\*\*\*3] [\*\*1033] Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE **BLACK**.

This is a civil suit in which the United States charges that the consolidation of First National Bank and Trust Co. of Lexington, Kentucky (First National), and Security Trust Co. of Lexington (Security Trust), to form First Security National Bank and Trust Co. (First Security), [\*\*1034] constitutes a combination in restraint of trade and commerce in violation of [§ 1](#) of the Sherman Act and a combination and an attempt to monopolize trade and commerce in violation of [§ 2](#) of that Act.<sup>1</sup> 26 Stat. 209 as amended, [HN1](#) [↑] [15 U. S. C. §§ 1, 2](#).

[\*\*\*4] The plan of consolidation was submitted to the Comptroller of the Currency and he, pursuant to the provision of the Bank Merger Act of 1960, 74 Stat. 129, 12 U. S. C. (Supp. IV) [§ 1828](#) (c), requested and received reports of the probable competitive effects of the proposed consolidation [\*667] from the Attorney General, the Federal Deposit Insurance Corp., and the Board of Governors of the Federal Reserve System. Each report concluded that the consolidation would adversely affect competition among commercial banks in Fayette County. Nevertheless, the Comptroller of the Currency approved the consolidation on February 27, 1961; it was effected March 1, and this Sherman Act suit was filed the same day. The District Court, while agreeing that the Comptroller of the Currency's approval of the consolidation did not render it immune from challenge under the Sherman Act,<sup>2</sup> held that no violation of that Act had been shown. [208 F.Supp. 457](#). The case is here on direct appeal. [15 U. S. C. § 29](#). We noted probable jurisdiction. [374 U.S. 824](#).

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<sup>1</sup> [Sections 1](#) and [2](#) of the Sherman Act provide in pertinent part:

"[SEC. 1](#). Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

"[SEC. 2](#). Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

<sup>2</sup> That issue was put to rest by [United States v. Philadelphia National Bank, 374 U.S. 321, 350-355](#).

[\*\*\*\*5] LEdHN[1]<sup>↑</sup> [1]We agree with the District Court that commercial banking is one relevant market<sup>3</sup> for determining the § 1 issue in the case. In Fayette County commercial banks are the only financial institutions authorized to receive demand deposits and to offer checking accounts. They are also the only financial institutions in the county that accept time deposits from partnerships and corporations and that make single-payment loans to individuals<sup>4</sup> and commercial and industrial loans to businesses. Moreover, commercial banks offer a wider variety of financial services than the other financial institutions, e. g., deposit [\*668] boxes, Christmas Clubs, [\*\*\*4] correspondent bank facilities, collection services, and trust department services.

[\*\*\*\*6] LEdHN[2]<sup>↑</sup> [2]We also agree with the District Court that the consolidation should be judged in light of its effect on competition in Fayette County.<sup>5</sup> The record establishes that here, as in United States v. Philadelphia National Bank, 374 U.S. 321, the "factor of inconvenience" does indeed localize [\*\*1035] banking competition "as effectively as high transportation costs in other industries." 374 U.S., at 358. Practically all of the business of the banks in Lexington originates in Fayette County. Only 4.8% of First National's demand deposit accounts and 4.5% of Security Trust's were held by depositors who did not maintain offices in Lexington. In dollar volume the percentage was 2.8 for each bank. Apart from large national companies, businesses in the area are restricted to the Fayette County banks for their working capital loans; and commercial banks outside Lexington do a negligible amount of business in the county. There is also a negligible amount of competition from corporate fiduciaries outside Fayette County.

[\*\*\*\*7] We turn then to the facts relevant to the alleged restraint of trade under the Sherman Act.

Prior to the consolidation the relative size of First National as compared to its five competitors was as follows:

	<b>Assets</b>	<b>Deposits</b>	<b>Loans</b>
Fir st Na tio nal	39.83%	40.06%	40.22%
Citi ze ns Un ion	17.06	16.78	16.41
Ba nk of Co m me rce	12.99	13.32	14.46
Se cur	12.87	11.88	13.98

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<sup>3</sup> In view of our disposition of the case we find it unnecessary to determine whether trust department services alone are another relevant market.

<sup>4</sup> Small loan companies make personal loans of \$ 800 or less at interest rates higher than those charged by commercial banks. Since commercial banks carry a large volume of demand deposits, their real estate loans are generally of a shorter duration than those offered by savings and loan associations or insurance companies.

<sup>5</sup> The Federal Deposit Insurance Corp. and the Federal Reserve Board used Fayette County as the geographical market, the latter saying that "since there are no concentrations of population in other counties close enough to create competition with other banks, the competitive effects of the proposed consolidation would be confined to the Lexington banks."

	<i>Assets</i>	<i>Deposits</i>	<i>Loans</i>
ity Tr ust			
Ce ntr al Ba nk	9.14	9.66	8.85
Se co nd Na tio nal	8.10	8.30	6.09

[\*669] The bank established by the consolidation was larger than all the remaining banks combined:

	<i>Assets</i>	<i>Deposits</i>	<i>Loans</i>
Fir st Se cur ity	52.70%	51.95%	54.20%
Citi ze ns Un ion	17.06	16.78	16.41
Ba nk of Co m me rce	12.99	13.32	14.46
Ce ntr al Ba nk	9.14	9.66	8.85
Se co nd Na tio nal	8.10	8.30	6.09

Prior to the consolidation, First National and Security Trust had been close competitors in the trust department business. Between them they held 94.82% of all trust assets, 92.20% of all trust department earnings, and 79.62% of all trust accounts:

	<i>Trust Assets</i>	<i>Trust Dept. Earnings</i>	<i>Number of Trust Accounts</i>
Se cu ri ty Tr	50.55%	46.91%	54.31%

	<i>Trust Assets</i>	<i>Trust Dept. Earnings</i>	<i>Number of Trust Accounts</i>
First National Bank of Commerce	44.27	45.29	25.31
Citizen's Second National Bank	3.41	4.21	16.01
Security First National Bank	1.33	.63	2.12
Bancorp	.44	2.96	2.26

[\*\*\*8] [\*\*\*5] [\*\*1036] There was here no "predatory" purpose. But we think it clear that significant competition will be eliminated by the consolidation. There is testimony in the record from three of the four remaining banks that the consolidation will seriously affect their ability to compete effectively over the years; that the "image" of "bigness" is a powerful attraction to customers, an advantage that increases progressively with disparity in size; and that the multiplicity of extra services in the trust field which the new company could offer tends to foreclose competition there.

LEdHN[3] [↑] [3]We think it clear that the elimination of significant competition between First National and Security Trust constitutes an unreasonable restraint of trade in violation [\*670] of § 1 of the Sherman Act. The case, we think, is governed by *Northern Securities Co. v. United States*, 193 U.S. 197, and its progeny. The Northern Pacific and the Great Northern operated parallel lines west of Chicago. A holding company acquired the controlling stock in each company. A violation of § 1 was adjudged [\*\*\*9] without reference to or a determination of the extent to which the traffic of the combined roads was still subject to some competition. It was enough that the two roads competed, that their competition was not insubstantial, and that the combination put an end to it. *Id.*, at 326-328.

*United States v. Union Pacific R. Co.*, 226 U.S. 61, was in the same tradition. Acquisition by Union Pacific of a controlling stock interest in Southern Pacific was held to violate § 1 of the Sherman Act. As in the *Northern Securities* case the Court held the combination illegal because of the elimination of the *inter se* competition between the merging companies, without reference to the strength or weakness of whatever competition remained. The Court said:

"It is urged that this competitive traffic was infinitesimal when compared with the gross amount of the business transacted by both roads, and so small as only to amount to that incidental restraint of trade which ought not to be held to be within the law; but we think the testimony amply shows that, while these roads did a great deal of business for which they did not compete and that the competitive business [\*\*\*10] was a comparatively small part of the sum total of all traffic, state and interstate, carried over them, nevertheless such competing traffic was large in volume, amounting to many millions of dollars. Before the transfer of the stock this traffic was the subject of active competition between these systems, but by reason of the power arising from such transfer it has since been placed

under a common control. [\*671] It was by no means a negligible part, but a large and valuable part, of interstate commerce which was thus directly affected." *Id., at 88-89.*

[\*\*6] *United States v. Reading Co., 253 U.S. 26*, is the third of the series. There a holding company brought under common control two competing interstate carriers and two competing coal companies. That was held "without more" to be a violation of §§ 1 and 2 of the Sherman Act. *Id., at 59.*

The fourth of the series is *United States v. Southern Pacific Co., 259 U.S. 214*, in which the acquisition by Southern Pacific of stock of Central Pacific -- a connecting link for transcontinental shipments by a competitor of Southern Pacific -- was held [\*\*\*\*11] [\*\*1037] to violate the Sherman Act. In reference to the earlier cases<sup>6</sup> the Court said:

"These cases, collectively, establish that one system of railroad transportation cannot acquire another, nor a substantial and vital part thereof, when the effect of such acquisition is to suppress or materially reduce the free and normal flow of competition in the channels of interstate trade." *Id., at 230-231.*

We need not go so far here as we went in *United States v. Yellow Cab Co., 332 U.S. 218, 225*, where we said:

". . . the amount of interstate trade thus affected by the conspiracy is immaterial in determining whether a violation of the Sherman Act has been charged in the complaint. *Section 1* of the Act outlaws unreasonable restraints on interstate commerce, regardless of the amount of the commerce affected."

The four [\*\*\*\*12] railroad cases at least stand for the proposition that *HN2*<sup>↑</sup> where merging companies are major competitive [\*672] factors in a relevant market, the elimination of significant competition between them, by merger or consolidation, itself constitutes a violation of § 1 of the Sherman Act. That standard was met in the present case in view of the fact that the two banks in question had such a large share of the relevant market.

It is said that *United States v. Columbia Steel Co., 334 U.S. 495*, is counter to this view. There the United States Steel Corp. acquired the assets of Consolidated Steel Corp. Both made fabricated structural steel products, the former selling on a nation-wide basis, the latter in 11 States. The conclusion that the acquisition was lawful was reached after the Court observed, *inter alia*, that because of rate structures and the location of United States Steel's fabricating subsidiaries, the latter were unable to compete effectively in Consolidated's market. *Id., at 511-518, 529-530.* The *Columbia Steel* case must be confined [\*\*\*\*13] to its special facts. The Court said:

"In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command [\*\*\*7] of a market varies with the setting in which that factor is placed." *Id., at 527-528.*

In the present case all those factors clearly point the other way, as we have seen. Where, as here, the [\*673] merging companies are major competitive factors in a relevant market, the elimination of significant competition between them constitutes a violation of § 1 of the Sherman Act. In view of our conclusion under § 1 of the Sherman Act, we do not reach the questions posed [\*\*\*\*14] under § 2.

Reversed.

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<sup>6</sup> Two of which had been decided after *Standard Oil Co. v. United States, 221 U.S. 1*, which announced "the rule of reason."

MR. JUSTICE BRENNAN and MR. JUSTICE WHITE agree with the Court that the elimination of competition between **[\*\*1038]** the two banks in the circumstances here presented was a violation of § 1 of the Sherman Act. They would rest the reversal, however, solely on the conclusion that the factors relied on in *United States v. Columbia Steel Co., 334 U.S. 495, 527-528*, quoted by the Court, as applied to the facts of this case, clearly compel the reversal.

**Dissent by:** HARLAN

## Dissent

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MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

But for the Court's return to a discarded theory of antitrust law, this case would have little future importance. The decision last Term in *United States v. Philadelphia National Bank, 374 U.S. 321*, that § 7 of the Clayton Act, 15 U. S. C. § 18, is applicable to bank mergers surely marks the end of cases like this one, in which the Government relies solely on §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1, 2. Since, however, this case, doomed to be a novelty in the reports, has become the vehicle for turning the clock back to antitrust [\*\*\*\*15] law of days long past, I am constrained to do more than merely register my dissent.

I.

Stripped of embellishments, the Court's opinion amounts to an invocation of formulas of antitrust numerology and a presumption that in the antitrust field good **[\*674]** things come usually, if not always, in small packages.<sup>1</sup> The "facts relevant to the alleged restraint of trade under the Sherman Act," *ante*, p. 668, on which the Court relies, are: (1) the size relative to their competitors of First National and Security Trust before the consolidation and of First Security after the consolidation; (2) the competitive position before the consolidation of First National and Security Trust in the more limited area of trust business;<sup>2</sup> and (3) "testimony in the record from three of the four remaining banks that the consolidation will seriously affect their ability to compete effectively over the years . . . ," *ante*, p. 669.

[\*\*\*\*16] The testimony to which the Court adverts was provided by competitors of First Security and was characterized **[\*\*8]** by the district judge who heard it as seemingly "based merely upon surmise and . . . lacking in factual support." 208 F.Supp. 457, 460. Since the Court suggests no reason for regarding this evidentiary finding of the trial court as "clearly erroneous," it must be accepted here, e. g., *United States v. Yellow Cab Co., 338 U.S. 338, 341-342*, leaving as the factual basis for the Court's decision only the statistics unquestionably showing that First National and Security Trust were big and First Security is bigger. The embellishment which adorns these statistics is the proposition that "where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by **[\*675]** merger or consolidation, itself constitutes a violation of § 1 of the Sherman Act," *ante*, pp. 671-672.

The sole support for this proposition, which is defended by no independent reasoning whatever, is the four "railroad cases," a reiteration of which forms the **[\*\*1039]** bulk of the Court's opinion. [\*\*\*\*17]<sup>3</sup> It is questionable whether those cases, three of which involved the combination of massive transportation systems<sup>4</sup> and the fourth a

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<sup>1</sup> Compare the dissenting opinion in *United States v. Columbia Steel Co., 334 U.S. 495, 534*.

<sup>2</sup> The reason for singling out this aspect of the banks' activities is unclear, since the Court does not determine even whether trust department services should be regarded as a relevant market. See *ante*, p. 667, note 3. In view of the majority's disposition of the case, I do not set out here my reasons for believing that the District Court's determination that the consolidation in question does not violate § 2 of the Sherman Act (monopoly) should be affirmed.

<sup>3</sup> *United States v. Yellow Cab Co., 332 U.S. 218*, cited by the Court, *ante*, p. 671, is wholly irrelevant.

combination of "two great competing interstate carriers and . . . two great competing coal companies extensively engaged in interstate commerce" <sup>5</sup> have any relevance to the present factual situation. That question, however, need not be explored.

In *United States v. Columbia Steel Co.*, 334 U.S. 495, these same cases were cited by the Government for the same proposition urged here: that "control by one competitor over [\*\*\*\*18] another violates the Sherman Act . . .," *id. at 531*. The Court relegated the cases to a footnote and stated that it would not "examine those cases to determine whether we would now approve either their language or their holdings." *Ibid.* The facts of the "railroad cases" were found to be "so dissimilar from that presented" that they could "furnish little guidance" in deciding the later case. *Ibid.* Beyond this explicit rejection of these cases as a basis for decision is their further rejection clearly implicit in the portion of the *Columbia Steel* opinion which the Court quotes, *ante*, p. 672.

"In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the [\*676] percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market." 334 U.S., at 527.

Quite obviously, if "bigness" alone provided a sufficient answer to the questions involved in [\*\*\*\*19] a § 1 charge, it would be pointless to attend to the factors set out in *Columbia Steel* and reiterated here, in form approvingly but in fact without regard.

[\*\*\*9] II.

If regard be had to the criteria enumerated in *Columbia Steel*, none of them except perhaps those which deal with "bigness" favor the Government here. Although for purposes of the Sherman Act, such statistics have little meaning in the absence of a context,<sup>6</sup> [\*\*\*\*20] it may be admitted that the figures in this case of *dollar volume*<sup>7</sup> and the *percentage of business controlled* are large. So far as [\*\*1040] these figures have relevance under the *Columbia Steel* test, they perhaps speak against the appellee.

[\*677] On the other hand, the *strength of the remaining competition* is attested by findings of fact in the District Court, not refuted or even mentioned in the Court's opinion:

"As of December 31, 1960, there were in operation in Lexington, beside the First National Bank and Trust Company and Security Trust Company, four other commercial banks, namely:

<sup>4</sup> *Northern Securities Co. v. United States*, 193 U.S. 197; *United States v. Union Pacific R. Co.*, 226 U.S. 61; *United States v. Southern Pacific Co.*, 259 U.S. 214.

<sup>5</sup> *United States v. Reading Co.*, 253 U.S. 26, 59.

<sup>6</sup> The presumption which the Court laid down in *Philadelphia National Bank, supra, at 363*, that "a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is . . . inherently likely to lessen competition substantially . . ." was concerned with the application of § 7 of the Clayton Act. Compare *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 612, a Sherman Act case in which the Court noted that "no magic inheres in numbers," and quoted with approval the statement in *Columbia Steel, supra, at 528*, that "the relative effect of percentage command of a market varies with the setting in which that factor is placed."

<sup>7</sup> As found by the District Court, in 1960, First National had "total assets of \$ 65,069,000, total deposits of \$ 58,673,000 and total net loans and discounts of \$ 35,434,000." 208 F.Supp., at 459. Security Trust, in 1960, had "total assets of \$ 21,033,000, total deposits of \$ 17,402,000 and total net loans and discounts of \$ 12,317,000." *Ibid.*

"Citizens Union National Bank and Trust Company, with total assets of \$ 27,876,000, total deposits of \$ 24,569,000 and total net loans and discounts of \$ 14,457,000;

"Bank of Commerce, with total assets of \$ 21,230,000, total deposits of \$ 19,500,000 and total net loans and discounts of \$ 12,738,000;

"Central Bank and Trust Company, with total assets of \$ 14,930,000, with [\*\*\*\*21] total deposits of \$ 14,144,000, and with total net loans and discounts of \$ 7,799,000;

"Second National Bank and Trust Company, with total assets of \$ 13,240,000, total deposits of \$ 12,157,000 and total net loans and discounts of \$ 5,362,000.

....

"Before and since the consolidation herein referred to, all the banks in Fayette County have been operated successfully in the field of commercial banking and in competition with each other.

....

"In the trial of the case, other than the officials and employees of the defendant, First Security National Bank and Trust Company, numerous witnesses, most of whom were men of long experience in the field of banking, testified to the effect that, in their opinion, the consolidation of the two Lexington banks herein referred to would not lessen [\*678] competition in the banking field in Fayette County and did not tend to create a monopoly in that field.

"According to their testimony, the fact that the merged bank had a large percentage of the trust business of the community did not and [\*\*\*10] would not substantially restrain or lessen competition in the field of commercial banking." [208 F.Supp., at 459-460.](#)<sup>8</sup> [\*\*\*\*22]

The *motive* behind the consolidation also is indicated by the findings below, similarly unchallenged, that ". . . the consolidation herein referred to clearly appears to have been the result of a lawful program of expansion on the part of the merging banks rather than an invidious scheme to restrain competition or to secure monopoly in the local field of banking." [208 F.Supp., at 460.](#) Any doubts on this score are removed by the explicit concession of government counsel at oral argument before this Court that there is no evidence at all in the record of an anticompetitive motive behind the consolidation.

There is nothing whatever in the findings below or in [\*\*\*\*23] the opinion of this Court pertinent to the other criteria laid down in *Columbia Steel* -- the probable development of the industry, consumer demands, [\*\*1041] and other market characteristics -- which supports the Court's conclusion.<sup>9</sup> [\*679] In sum, the Court's analysis of the facts of this case ends where it begins; the conclusion that the consolidation violates the Sherman Act collapses into the agreed premise that First Security is "big."

[\*\*\*\*24] III.

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<sup>8</sup> The only contrary evidence, testimony of presidents of three of the four competing local banks who "expressed considerable fear that the consolidation would result in serious loss to the other banks and would be disastrous to some of them," [208 F.Supp., at 460](#), was discredited by the District Court. See [supra, p. 674](#).

<sup>9</sup> With reference to the probable development of the industry, the Government turns to the past and notes that the number of local banks decreased from 10 to 7 between 1929 and 1938; but this statistic, more at home in a Clayton Act case, is of doubtful significance in the present context, particularly in view of the period during which the decrease occurred. The same may be said of the Government's reference to the testimony of the president of a competing bank that the consolidation from which his bank resulted was carried through (years before the First Security consolidation) principally to enable it "to better compete with the First National." In fact, in the three years since the First Security consolidation, there has been no further concentration.

The truth is, of course, that this is, if anything, a Clayton Act case masquerading in the garb of the Sherman Act. One can hardly doubt that it comes to us under these false colors only because the decision last Term that bank mergers could be reached under the Clayton Act was indeed a surprise to the Government. See my dissenting opinion in *Philadelphia National Bank, supra, at 373*. No one has more sympathy for the Government in this respect than I. Nevertheless, having "at the outset elected to proceed not under the Clayton but the Sherman Act," *Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 609*, "the Government here must measure up to the criteria of the more stringent law," *id., at 610*.

The pernicious effect of allowing the Government to change horses in midstream in fact if not quite in form <sup>10</sup> goes beyond this case and, in the field of banking, beyond even the revitalization of a properly moribund [\*\*\*11] rule of **antitrust law**. In combination with the *Philadelphia National Bank* case, today's decision effectively precludes any possibility that the will of the Congress with respect to bank mergers [\*\*\*\*25] will be carried out. The Congress has plainly indicated that it does not intend that mergers in [\*680] the banking field be measured solely by the antitrust considerations which are applied in other industries. Characteristic of such indications, set out in detail in my dissenting opinion in the *Philadelphia National Bank* case, *supra*, at 374-386, is the following excerpt from the Senate Report on the bill which became the Bank Merger Act of 1960, *12 U. S. C. (Supp. IV, 1963) § 1828 (c)*:

"The committee wants to make crystal clear its intention that the various banking factors in any particular case may be held to outweigh the competitive factors, and that the competitive factors, however favorable or unfavorable, are not, in and of themselves, controlling on the decision." S. Rep. No. 196, 86th Cong., 1st Sess., 24.

[\*\*\*\*26] Adherence to the principles enunciated in *Columbia Steel, supra*, would leave room for an accommodation within the framework of the antitrust laws of the special features of banking recognized by Congress. It is difficult to see how features peculiar to banking [\*\*1042] or indeed any other features of a particular case which, in reason, should lead to a different result, can stand up against the bludgeon with which the Court now strikes at combinations which may well have no fault except "bigness."

I would affirm.

## References

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Annotation References:

Application to banks and banking institutions of antimonopoly or antitrust laws. 83 ALR2d 374.

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End of Document

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<sup>10</sup> It is one thing to say, as the Court did in *Times-Picayune, supra*, at 609, that "the Clayton Act's more specific standards illuminate the public policy which the Sherman Act was designed to subserve . . ." It is quite another thing to treat them as interchangeable. See *id., at 609-610*.



## **United States v. Continental Can Co.**

Supreme Court of the United States

April 28, 1964, Argued ; June 22, 1964, Decided

No. 367

### **Reporter**

378 U.S. 441 \*; 84 S. Ct. 1738 \*\*; 12 L. Ed. 2d 953 \*\*\*; 1964 U.S. LEXIS 2224 \*\*\*\*; 1964 Trade Cas. (CCH) P71,146

UNITED STATES v. CONTINENTAL CAN CO. ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

**Disposition:** [217 F.Supp. 761](#), reversed and remanded.

## **Core Terms**

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merger, glass container, glass, metal, containers, commerce, metal container, products, lines, interindustry, manufacturers, producer, combined, effects, sales, beer, baby food, anticompetitive, acquisition, largest, shipped, bottle, packaging, customer, probable, billion, food, soft drink, compete, markets

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Clayton Act > General Overview

### [\*\*HN1\*\*](#) **[ Antitrust & Trade Law, Clayton Act]**

That competition may be called inter-industry competition and is between products with distinctive characteristics does not automatically remove it from the reach of § 7 of the Clayton Act, [15 U.S.C.S. § 18](#).

Antitrust & Trade Law > Clayton Act > General Overview

### [\*\*HN2\*\*](#) **[ Antitrust & Trade Law, Clayton Act]**

Interchangeability of use and cross-elasticity of demand are not to be used to obscure competition but to recognize competition where, in fact, competition exists.

Antitrust & Trade Law > Clayton Act > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Distribution, Processing & Storage

HÌ Ì ÁMÈJÀ I FÊI I FLÀ I ÁMÈDÖFÌ HÌ FÊEFTI HÌ LÁFGSE OÀÉGÀ ÁÍ HÀEJÌ HÀFJÌ I ÁMÈSÓYÒÁGGI FÊEFTI

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

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

That there are price differentials between the two products or that the demand for one is not particularly or immediately responsive to changes in the price of the other are relevant matters but not determinative of the product market issue under the Clayton Act, [15 U.S.C.S. § 18](#).

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

### **HN4** [] Antitrust & Trade Law, Clayton Act

Market shares are the primary indicia of market power but a judgment under § 7 of the Clayton Act, [15 U.S.C.S. § 18](#), is not to be made by any single qualitative or quantitative test. The merger must be viewed functionally in the context of the particular market involved, its structure, history and probable future. Where a merger is of such a size as to be inherently suspect, elaborate proof of market structure, market behavior and probable anticompetitive effects may be dispensed with in view of § 7's design to prevent undue concentration. Moreover, the competition with which § 7 deals includes not only existing competition but that which is sufficiently probable and imminent.

Antitrust & Trade Law > Clayton Act > General Overview

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

Where there has been a history of tendency toward concentration in the industry tendencies toward further concentration are to be curbed in their incipiency. Where concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great.

## **Lawyers' Edition Display**

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### **Summary**

In a civil antitrust suit brought in the United States District Court for the Southern District of New York, the United States sought an order requiring the nation's second largest producer of metal containers to divest itself of the assets of the nation's third largest producer of glass containers, whose assets it had acquired in exchange for stock and the assumption of liabilities. After the close of the government's case, the District Court dismissed the complaint, finding only three relevant product markets or lines of commerce--the metal can industry, the glass container industry, and containers for the beer industry--and concluding that the merger had no significant effect on competition in any of these three product markets, and therefore did not violate 7 of the [Clayton Act](#). ([217 F Supp 761](#).)

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On direct appeal, the Supreme Court of the United States reversed. In an opinion by White, J., expressing the views of six members of the Court, it was held that under the evidence thus far adduced (1) the relevant product market was the combined glass and metal container industries and all end uses for which they compete, and (2) the merger's anticompetitive impact on this line of commerce rendered the merger illegal under 7 of the Clayton Act.

Goldberg, J., concurring, stated that in his view the Court was not finally deciding the relevant line of commerce, and that on remand the defendants could "rebut the *prima facie inference*" that metal and glass containers constitute one line of commerce.

Harlan, J., joined by Stewart, J., dissented on the ground that metal and glass containers did not constitute a single line of commerce.

## Headnotes

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MONOPOLIES §14 > product markets -- submarkets -- > Headnote:

[LEdHN\[1\]](#) [1]

Although the outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it, there may be, within this broad market, well-defined sub-markets which in themselves constitute product markets for antitrust purposes.

MONOPOLIES §34 > assets acquisitions -- protected competition -- > Headnote:

[LEdHN\[2\]](#) [2]

Under 7 of the Clayton Act ([15 USC 18](#)), which forbids the acquisition by a corporation subject to the Federal Trade Commission's jurisdiction of any part of the assets of another corporation engaged in commerce where in any line of commerce in any section of the country the effect of the acquisition may be substantially to lessen competition, the protected competition is not limited to competition between identical products.

MONOPOLIES §34 > assets acquisitions -- competition -- > Headnote:

[LEdHN\[3\]](#) [3]

The fact that competition may be called "inter-industry competition" and is between products with distinctive characteristics does not automatically remove it from the reach of 7 of the Clayton Act ([15 USC 18](#)), which forbids the acquisition by a corporation subject to the Federal Trade Commission's jurisdiction of any part of the assets of another corporation engaged in commerce where in any line of commerce in any section of the country the effect of the acquisition may be substantially to lessen competition.

MONOPOLIES §34 > assets acquisitions -- recognition of competition -- > Headnote:

[LEdHN\[4\]](#) [4]

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In a suit under 7 of the Clayton Act ([15 USC 18](#)), which forbids the acquisition by a corporation subject to the Federal Trade Commission's jurisdiction of any part of the assets of another corporation engaged in commerce where in any line of commerce in any section of the country the effect of the acquisition may be substantially to lessen competition, interchangeability of use and cross-elasticity of demand are not to be used to obscure competition but to recognize competition where, in fact, competition exists.

MONOPOLIES §34.5 > competition -- glass and metal container industries -- > Headnote:

[LEdHN\[5\]](#) [5]

The competition between the metal container industry and the glass container industry falls within the competition-preserving proscriptions of 7 of the Clayton Act ([15 USC 18](#)) by reason of the customer response to innovation and other competitive stimuli, even though the interchangeability of use may not be so complete and the cross-elasticity of demand may not be so immediate as in the case of most intraindustry mergers.

MONOPOLIES §34 > competition -- price differentials -- > Headnote:

[LEdHN\[6\]](#) [6]

That there are price differentials between two products or that the demand for one is not particularly or immediately responsive to changes in the price of the other are relevant matters, but not determinative of the product market issue under 7 of the Clayton Act ([15 USC 18](#)), which forbids the acquisition by a corporation subject to the Federal Trade Commission's jurisdiction of any part of the assets of another corporation where in any line of commerce in any section of the country the effect of the acquisition may be substantially to lessen competition.

MONOPOLIES §34.5 > line of commerce -- delineation -- > Headnote:

[LEdHN\[7\]](#) [7]

Under 7 of the Clayton Act ([15 USC 18](#)), which forbids certain mergers where their effect may be to substantially lessen competition or to tend to create a monopoly "in any line of commerce in any section of the country," the contours of a "line of commerce" must, as nearly as possible, conform to competitive reality, and where the area of effective competition cuts across industry lines, so must the relevant line of commerce.

MONOPOLIES §34.5 > line of commerce -- glass and metal containers -- > Headnote:

[LEdHN\[8\]](#) [8]

In a suit to require a metal container manufacturer to divest itself of the assets of a glass container manufacturer, on the ground that the assets acquisition violates 7 of the Clayton Act ([15 USC 18](#)) by reason of its anticompetitive effect on a line of commerce, the relevant product market or line of commerce is the combined glass and metal container industries and all end uses for which they compete, where there is a rather general confrontation between metal and glass containers and the competition between them for the same end uses is insistent, continuous, effective, and quantity-wise, very substantial, even though there are some end uses for which glass and metal cannot compete.

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ERROR §1112.5 > matters not urged below -- > Headnote:

[LEdHN\[9\]](#) [9]

In reviewing a federal court judgment in a suit for divestment of corporate assets as acquired in violation of the Clayton Act's proscription of such acquisitions where they may have the effect of substantially lessening competition in any "line of commerce," the Supreme Court of the United States is not precluded from reaching the question of the *prima facie* existence of a particular "line of commerce" by reason of the fact that that line of commerce was not pressed on the lower court, where the line of commerce is composed largely, if not entirely, of more particularized lines of commerce urged in the lower court.

MONOPOLIES §34 > lines of commerce -- submarkets -- > Headnote:

[LEdHN\[10\]](#) [10]

Under 7 of the Clayton Act ([15 USC 18](#)), which proscribes certain corporate stock and assets acquisitions where the effect may be substantially to lessen competition in any "line of commerce," the fact that there may be a broader product market or line of commerce made up of metal, glass, and other competing containers does not necessarily negative the existence of submarkets of cans, glass, plastic, or cans and glass together.

MONOPOLIES §34.5 > merger -- anticompetitive effect -- > Headnote:

[LEdHN\[11\]](#) [11]

In determining the anticompetitive effect of a merger governed by 7 of the Clayton Act ([15 USC 18](#)), market shares are the primary indicia of market power, but judgment is not to be made by any single qualitative or quantitative test; the merger must be viewed functionally in the context of the particular market involved, its structure, history, and probable future.

EVIDENCE §979 > merger -- anticompetitive effect -- weight of evidence -- > Headnote:

[LEdHN\[12\]](#) [12]

Under 7 of the Clayton Act ([15 USC 18](#)), forbidding certain mergers where the effect may be substantially to lessen competition in any line of commerce in any section of the country, elaborate proof of market structure, market behavior, and probable anticompetitive effects may be dispensed with where a merger is of such a size as to be inherently suspect.

MONOPOLIES §34 > assets acquisitions -- imminent competition -- > Headnote:

[LEdHN\[13\]](#) [13]

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Section 7 of the Clayton Act ([15 USC 18](#)), forbidding certain stock and assets acquisitions the effect of which may be substantially to lessen competition, deals not only with existing competition but also with competition which is sufficiently probable and imminent.

MONOPOLIES §34.5 > merger -- glass and metal container manufacturers -- > Headnote:

[LEdHN\[14\]](#) [14]

Section 7 of the Clayton Act ([15 USC 18](#)), which forbids acquisition by a corporation subject to the Federal Trade Commission's jurisdiction of any part of the assets of another corporation engaged in commerce where the effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly in any line of commerce, is violated by a metal container manufacturer's acquisition of all the assets of a glass container manufacturer where before the merger the metal container manufacturer ranked second and the glass container manufacturer sixth in the product market embracing the combined metal and glass container industries.

MONOPOLIES §34.5 > merger -- determining anticompetitive effect -- > Headnote:

[LEdHN\[15\]](#) [15]

In a government action under 7 of the Clayton Act ([15 USC 18](#)) to require a metal container manufacturer to divest itself of all the assets of a glass container manufacturer, acquired as the result of a corporate merger, a Federal District Court errs when, in determining the anticompetitive effect of the merger, it places heavy reliance on the metal container manufacturer's management of the acquired assets after the merger while the metal container manufacturer was under some pressure because of the pending antitrust suit.

MONOPOLIES §34 > Clayton Act -- purpose -- > Headnote:

[LEdHN\[16\]](#) [16]

The purpose of 7 of the Clayton Act ([15 USC 18](#)), forbidding certain corporate stock and assets acquisitions, is to arrest anticompetitive arrangements in their incipency.

## Syllabus

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The Government seeks an order requiring the divestiture, as a violation of § 7 of the Clayton Act, by Continental Can Company (CCC), the second largest producer of metal containers, of the assets acquired in 1956 of Hazel-Atlas Glass Company (HAG), the third largest producer of glass containers. CCC, which had a history of acquiring other companies, produced no glass containers in 1955, but shipped 33% of all metal containers sold in this country. HAG, which produced no metal containers, shipped 9.6% of the glass containers that year. The geographic market was held by the District Court to be the entire country. The Government had urged ten product markets, including the can industry, the glass container industry, and various lines of commerce defined by the end use of the containers. The District Court found three product markets, metal containers, glass containers, and metal and glass beer containers. Although finding [\*\*\*2] interindustry competition between metal, glass and plastic containers, the District Court held them to be separate lines of commerce. Holding that the Government had failed

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to prove reasonable probability of lessening competition in any line of commerce, the District Court dismissed the complaint at the end of the Government's case. *Held*:

1. Interindustry competition between glass and metal containers may provide the basis for defining a relevant product market. Pp. 447-458.

(a) The competition protected by § 7 is not limited to that between identical products. P. 452.

(b) Cross-elasticity of demand and interchangeability of use are used to recognize competition where it exists, not to obscure it. *Brown Shoe Co. v. United States, 370 U.S. 326*. P. 453.

(c) There has been insistent, continuous, effective and substantial end-use competition between metal and glass containers; and though interchangeability of use may not be so complete and cross-elasticity of demand not so immediate as in the case of some intra-industry mergers, the long-run results bring the competition between them within § 7. Pp. 453-455.

(d) There is a large area of effective competition [\*\*\*3] between metal and glass containers, which implies one or more other lines of commerce encompassing both industries. Pp. 456-457.

(e) If an area of effective competition cuts across industry lines, the relevant line of commerce must do likewise. P. 457.

(f) Based on the present record, the interindustry competition between glass and metal containers warrants treating the combined glass and metal container industries and all end uses for which they compete as a relevant product market. P. 457.

(g) Complete interindustry competitive overlap is not required before § 7 is applicable and some noncompetitive segments in a proposed market area do not prevent its identification as a line of commerce. P. 457.

(h) That there may be a broader product market, including other competing containers, does not prevent the existence of a submarket of cans and glass containers. Pp. 457-458.

2. On the basis of the evidence so far presented the merger between CCC and HAG violates § 7 because it will have a probable anticompetitive effect within the relevant line of commerce. Pp. 458-466.

(a) In determining whether a merger will have probable anticompetitive effect, it must be looked at functionally [\*\*\*4] in the context of the market involved, its structure, history and future. P. 458.

(b) Where a merger is of such magnitude as to be inherently suspect, detailed market analysis and proof of likely lessening of competition are not required in view of § 7's purpose of preventing undue concentration. P. 458.

(c) The product market of the combined metal and glass container industries was dominated by six companies, of which CCC ranked second and HAG sixth. P. 461.

(d) The 25% of the product market held by the merged firms approaches the percentage found presumptively bad in *United States v. Philadelphia National Bank, 374 U.S. 321*, and nearly the same as that involved in *United States v. Aluminum Co. of America, 377 U.S. 271*, and the addition to CCC's share is larger here than in Aluminum Co. P. 461.

(e) Where there has been a trend toward concentration in an industry, any further concentration should be stopped. P. 461.

(f) Where an industry is already highly concentrated, it is important to prevent even slight increases therein. Pp. 461-462.

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(g) The argument that CCC's and HAG's products were not in direct competition at the [\*\*\*5] time of the merger and that therefore the merger could have no effect on competition ignores the fact that the removal of HAG as an independent factor in the glass container industry and in the combined metal and glass container market foreclosed its potential competition with CCC, neglects the further fact that CCC, already a dominant firm in an oligopolistic market, has increased its power and effectiveness, and fails to consider the triggering effect that a merger of such large companies has on the rest of the industry which seeks to follow the pattern with anticompetitive results. Pp. 462-465.

**Counsel:** Ralph S. Spritzer argued the cause for the United States. On the brief were Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum and Arthur J. Murphy, Jr.

Helmer R. Johnson argued the cause for appellees. With him on the brief was Mark F. Hughes.

**Judges:** Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg

**Opinion by:** WHITE

## Opinion

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[\*443] [\*\*\*956] [\*\*1740] MR. JUSTICE WHITE delivered the opinion of the Court.

In 1956, Continental Can Company, the Nation's second largest producer of metal containers, acquired all of the assets, [\*\*\*6] business and good will of Hazel-Atlas Glass Company, the Nation's third largest producer of glass containers, in exchange for 999,140 shares of Continental's common stock and the assumption by Continental of all the liabilities of Hazel-Atlas. The Government brought this action seeking a judgment that the acquisition violated § 7 of the Clayton Act <sup>1</sup> [\*\*\*7] and requesting an [\*444] appropriate divestiture order. Trying the case without a jury, the District Court found that the Government had failed to prove reasonable probability of anticompetitive effect in any line of commerce, and accordingly dismissed the complaint at the close of the Government's case. *United States v. Continental Can Co., 217 F.Supp. 761* (D. C. S. D. N. Y.). We noted probable jurisdiction to consider the specialized problems incident to the application of § 7 to interindustry mergers and acquisitions.<sup>2</sup> 375 U.S. 893. [\*\*\*957] We reverse the decision of the District Court.

I.

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<sup>1</sup> Section 7 of the Clayton Act, 38 Stat. 731, as amended by the Celler-Kefauver Antimerger Act, 64 Stat. 1125, *15 U. S. C. § 18*, provides in relevant part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

<sup>2</sup> Both parties and the District Court refer to this as an interindustry merger. The word "industry" is susceptible of more than one meaning. It might be defined in terms of end uses for which various products compete; so defined it would be roughly equivalent to the concept of a "line of commerce." According to this interpretation the glass and metal container businesses, to the extent they compete, are in the same industry. On the other hand, "industry" might also denote an aggregate of enterprises employing similar production and marketing facilities and producing products having markedly similar characteristics. In many instances, the segments of economic endeavor embraced by these two concepts of "industry" will be substantially coextensive, since those who employ the same types of machinery to turn out the same general product often compete in the same market. Since this is not such a case it will be helpful to use the word "industry" as referring to similarity of production facilities and products. So viewed, "interindustry competition" becomes a meaningful concept.

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The industries [\*\*\*8] with which this case is principally concerned are, as found by the trial court, the metal can industry, the glass container industry and the plastic container industry, each producing one basic type of container made of metal, glass, and plastic, respectively.

Continental Can is a New York corporation organized in 1913 to acquire all the assets of three metal container [\*445] manufacturers. Since 1913 Continental has acquired 21 domestic metal container companies as well as numerous others engaged in the packaging business, including producers of flexible packaging; a manufacturer of polyethylene bottles and similar plastic containers; 14 producers of paper containers and paperboard; four companies making closures [\*\*1741] for glass containers; and one -- Hazel-Atlas -- producing glass containers. In 1955, the year prior to the present merger, Continental, with assets of \$ 382 million, was the second largest company in the metal container field, shipping approximately 33% of all such containers sold in the United States. It and the largest producer, American Can Company, accounted for approximately 71% of all metal container shipments. National Can Company, the third largest, [\*\*\*9] shipped approximately 5%, with the remaining 24% of the market being divided among 75 to 90 other firms.<sup>3</sup>

[\*\*\*10] During 1956, Continental acquired not only the Hazel-Atlas Company but also Robert Gair Company, Inc. -- a leading manufacturer of paper and paperboard products -- and White Cap Company -- a leading producer of vacuum-type metal closures for glass food containers -- so that Continental's assets rose from \$ 382 million in 1955 [\*446] to more than \$ 633 million in 1956, and its net sales and operating revenues during that time increased from \$ 666 million to more than \$ 1 billion.

[\*\*\*958] Hazel-Atlas was a West Virginia corporation which in 1955 had net sales in excess of \$ 79 million and assets of more than \$ 37 million. Prior to the absorption of Hazel-Atlas into Continental the pattern of dominance among a few firms in the glass container industry was similar to that which prevailed in the metal container field. Hazel-Atlas, with approximately 9.6% of the glass container shipments in 1955, was third. Owens-Illinois Glass Company had 34.2% and Anchor-Hocking Glass Company 11.6%, with the remaining 44.6% being divided among at least 39 other firms.<sup>4</sup>

[\*\*\*11] After an initial attempt to prevent the merger under a 1950 consent decree failed, the terms of the decree being [\*447] held inapplicable to the proposed acquisition, the Government moved for a preliminary [\*\*1742]

<sup>3</sup> The District Court found that the basic raw material used in the manufacture of cans, and the major cost factor bearing on their price is tin-coated steel (tin plate). In some instances uncoated steel (blackplate) or aluminum is used instead of tin plate. Other raw materials include soldering compounds, paints, varnishes, lithographic inks, paper and cartons for packaging. Cans are rigid and unbreakable, can be hermetically sealed and are impermeable to gases. They are lighter than glass containers, can be heat-processed faster, and are not chemically inert.

Forty-nine members of the metal can industry are organized in a trade association known as the Can Manufacturers Institute which maintains a professional staff of three. Acting largely through committees, it deals with various technical problems of the industry and carries out some promotional activities emphasizing the advantages of the metal can.

<sup>4</sup> According to the findings of the District Court, glass containers are made principally from sand, lime, and soda ash, and the major factor in determining their price is the cost of labor. Glass containers are rigid, breakable, and chemically inert. They can be hermetically sealed and, unlike many cans, can be easily resealed after they have been opened. The industry recognizes two basic types of containers, the wide mouth and the narrow neck. Members of this industry also have a trade association, the Glass Container Manufacturers Institute, which, through its 45 employees and its standing committees, carries on such activities as market research and promotion, technical research, package design and specifications, the development of standard testing and quality control procedures, problems of freight rates, labor relations, and liaison work with government. In recent decades the expansion of the glass container industry has been more rapid than, and often realized at the expense of, the metal can industry. During World War II, for example, substantial increments in the market served by glass container manufacturers were made possible by the short supply of tin plate.

The third industry found by the District Court to be involved in this multi-industry competitive picture was the plastic container industry, which, though a relative newcomer, has enjoyed impressive growth since making its debut in the mid-1940's. Its dollar sales volume is small compared with that of its metal and glass counterparts, but its growth has been and continues to be steady and rapid.

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injunction against its consummation and sought a temporary restraining order pending the determination of its motion. The temporary restraining order was denied, and on the same day the merger was accomplished. The Government then withdrew its motion for a preliminary injunction and continued the action as one for divestiture.

At the conclusion of the Government's case, Continental moved for dismissal of the complaint. After the District Court had granted the motion under [Rule 41 \(b\) of the Federal Rules of Civil Procedure](#) but before a formal opinion was filed, this Court handed down its decision in *Brown Shoe Co. v. United States*, [370 U.S. 294](#); additional briefs directed to the applicability of *Brown Shoe* were filed. The trial judge held that under the guidelines laid down by *Brown Shoe* the Government had not established its right to relief under § 7 of the Clayton Act. This appeal followed.

## II.

We deal first with the relevant [\*\*\*12] market. It is not disputed here, and the District Court held, that the geographical market is the entire United States. As for the product market, the court found, as was conceded by the parties, that the can industry and the glass container industry were relevant lines of commerce. Beyond these two product markets, however, the Government urged the recognition of various other lines of commerce, some of them defined in terms of the end uses for which tin and glass containers [\*\*\*959] were in substantial competition. These end-use claims were containers for the beer industry, containers for the soft drink industry, containers for the canning industry, containers for the toiletry and cosmetic industry, containers for the medicine and health industry, and containers for the household and chemical industry. [217 F.Supp., at 778-779](#).

[\*448] The court, in dealing with these claims, recognized that there was interindustry competition and made findings as to its extent and nature:

"There was substantial and vigorous inter-industry competition between these three industries and between various of the products which they manufactured. Metal can, glass container [\*\*\*13] and plastic container manufacturers were each seeking to enlarge their sales to the thousands of packers of hundreds of varieties of food, chemical, toiletry and industrial products, ranging from ripe olives to fruit juices to tuna fish to smoked tongue; from maple syrup to pet food to coffee; from embalming fluid to floor wax to nail polish to aspirin to veterinary supplies, to take examples at random.

"Each industry and each of the manufacturers within it was seeking to improve their products so that they would appeal to new customers or hold old ones." [217 F.Supp., at 780-781](#).

Furthermore the court found that:

"Hazel-Atlas and Continental were part of this overall industrial pattern, each in a recognized separate industry producing distinct products but engaged in inter-industry competition for the favor of various end users of their products." [Id., at 781](#).

The court, nevertheless, with one exception -- containers for beer -- rejected the Government's claim that existing competition between metal and glass containers had resulted in the end-use product markets urged by the Government: "The fact that there is inter-industry or inter-product [\*\*\*14] competition between metal, glass and plastic containers is not determinative of the metes and bounds of a relevant product market." *Ibid.* In the trial court's view, the Government failed to make "appropriate distinctions . . . between inter-industry or overall commodity [\*449] [\*\*1743] competition and the type of competition between products with reasonable interchangeability of use and cross-elasticity of demand which has Clayton Act significance." [Id., at 781-782](#). The interindustry competition, concededly present, did not remove this merger from the category of the conglomerate combination, "in which one company in two separate industries combined with another in a third industry for the purpose of establishing a diversified line of products." [Id., at 782](#).

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LEDHN[1] [1] We cannot accept this conclusion. The District Court's findings having established the existence of three product markets -- metal containers, glass containers and metal and glass beer containers -- the disputed issue on which that court erred is whether the admitted competition between metal and [\*\*\*\*15] glass containers for uses other than packaging beer was of the type and quality deserving of § 7 protection and therefore the basis for defining a relevant product market. In resolving this issue we are instructed on the one hand that "for every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range." Times-Picayune v. United States, 345 U.S. 594, 612, n. 31. [\*\*\*960] On the other hand it is improper "to require that products be fungible to be considered in the relevant market." United States v. du Pont, 351 U.S. 377, 394. In defining the product market between these terminal extremes, we must recognize meaningful competition where it is found to exist. Though the "outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it," there may be "within this broad market, well-defined submarkets . . . which, in themselves, constitute product markets for antitrust purposes." Brown Shoe Co. v. United States, 370 U.S. 294, 325. Concededly these guidelines offer [\*\*\*\*16] no precise formula for judgment and they necessitate, rather than avoid, careful consideration based upon the entire record.

[\*450] It is quite true that glass and metal containers have different characteristics which may disqualify one or the other, at least in their present form, from this or that particular use; that the machinery necessary to pack in glass is different from that employed when cans are used; that a particular user of cans or glass may pack in only one or the other container and does not shift back and forth from day to day as price and other factors might make desirable; and that the competition between metal and glass containers is different from the competition between the can companies themselves or between the products of the different glass companies. These are relevant and important considerations but they are not sufficient to obscure the competitive relationships which this record so compellingly reveals.

Baby food was at one time packed entirely in metal cans. Hazel-Atlas played a significant role in inducing the shift to glass as the dominant container by designing "what has become the typical baby food jar." According to Continental's estimate, [\*\*\*\*17] 80% of the Nation's baby food now moves in glass containers. Continental has not been satisfied with this contemporary dominance by glass, however, and has made intensive efforts to increase its share of the business at the expense of glass. In 1954, two years before the merger, the Director of Market Research and Promotion for the Glass Container Manufacturers Institute concluded, largely on the basis of Continental's efforts to secure more baby food business, that "the can industry is beginning to fight back more aggressively in this field where it is losing ground to glass." In cooperation with some of the baby food companies Continental carried out what it called a Baby Food Depth Survey in New York and Los Angeles to [\*\*1744] discover specific reasons for the preference of glass-packed baby food. Largely in response to this and other in-depth surveys, advertising campaigns were conducted which were designed [\*451] to overcome mothers' prejudices against metal containers.<sup>5</sup>

[\*\*\*\*18] In [\*\*\*961] the soft drink business, a field which has been, and is, predominantly glass territory, the court recognized that the metal can industry had "after considerable initial difficulty . . . developed a can strong enough to resist the pressures generated by carbonated beverages" and "made strenuous efforts to promote the use of metal cans for carbonated beverages as against glass bottles." 217 F.Supp., at 798. Continental has been a major factor in this rivalry. It studied the results of market tests to determine the extent to which metal cans could "penetrate this

<sup>5</sup> In 1952 Continental ran a series of advertisements emphasizing the following "5 reasons why cans are an ideal container for baby foods:"

- "1. ECONOMICAL. Baby food in cans is usually priced as low or lower than baby food packed in other containers."
- "2. STERILE. Processing sterilizes the inside, and light, dust and germs can't get into a hermetically sealed can."
- "3. EXTRA SAFETY. Cans are sealed to stay sealed until the consumer opens them."
- "4. SHATTERPROOF. Steel and tin won't break, shatter or chip."
- "5. SAFE FOR LEFT-OVERS. Food can be safely left in the can, just keep it covered and under refrigeration."

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tremendous market," and its advertising has centered around the advantages of cans over glass as soft drink containers, emphasizing such features as convenience in stacking and storing, freedom from breakage and lower distribution costs resulting from the lighter weight of cans.

The District Court found that "although at one time almost all packaged beer was sold in bottles, in a relatively short period the beer can made great headway and may well have become the dominant beer container." [217 F.Supp., at 795](#). Regardless of which industry may have the upper hand at a given moment, [\*\*\*\*19] however, an [\*452] intense competitive battle on behalf of the beer can and the beer bottle is being waged both by the industry trade associations and by individual container manufacturers, one of the principal protagonists being Continental. Technological development has been an important weapon in this battle. A significant factor in the growth of the beer can appears to have been its no-return feature. The glass industry responded with the development of a lighter and cheaper one-way bottle.

In the food canning, toiletry and cosmetic, medicine and health, and household and chemical industries the existence of vigorous competition was also recognized below. In the case of food it was noted that one type of container has supplanted the other in the packing of some products and that in some instances similar products are packaged in two or more different types of containers. In the other industries "glass container, plastic container and metal container manufacturers are each seeking to promote their lines of containers at the expense of other lines, . . . all are attempting to improve their products or to develop new ones so as to have a wider customer appeal," [217 F.Supp., at 804](#), [\*\*\*\*20] the result being that "manufacturers from time to time may shift a product from one type of container to another." [Id., at 805](#).

[LEdHN\[2\]](#) [↑] [2][LEdHN\[3\]](#) [↑] [3]In the light of this record and these findings, we think the District Court employed an unduly narrow construction of the "competition" protected by § 7 and of "reasonable interchangeability of use or the cross-elasticity of demand" in judging the facts of this case. We reject the opinion below insofar as it holds that these terms as used in the statute or in *Brown Shoe* were intended [\*\*1745] to limit the competition protected by § 7 to competition between identical products, to the kind of competition which exists, for example, between the metal containers of one company and those of another, or between the several manufacturers of glass [\*\*\*962] containers. Certainly, [HN1](#) [↑] that [\*453] the competition here involved may be called "inter-industry competition" and is between products [\*\*\*\*21] with distinctive characteristics does not automatically remove it from the reach of § 7.

[LEdHN\[4\]](#) [↑] [4][LEdHN\[5\]](#) [↑] [5][HN2](#) [↑] Interchangeability of use and cross-elasticity of demand are not to be used to obscure competition but to "recognize competition where, in fact, competition exists." *Brown Shoe Co. v. United States*, [370 U.S., at 326](#).In our view there is and has been a rather general confrontation between metal and glass containers and competition between them for the same end uses which is insistent, continuous, effective and quantitywise very substantial. Metal has replaced glass and glass has replaced metal as the leading container for some important uses; both are used for other purposes; each is trying to expand its share of the market at the expense of the other;<sup>6</sup> [\*\*\*\*23] and each is attempting to preempt for itself every use for which its product is physically suitable, even though some such uses have traditionally been regarded as the exclusive [\*\*\*\*22] domain of the competing industry.<sup>7</sup> [\*\*\*\*24] In differing [\*\*1746] degrees [\*454] for different end uses manufacturers

<sup>6</sup> Consumer preferences for glass or metal are often regional and traceable to factors other than the intrinsic superiority of the preferred container. For example, the one-way beer bottle was highly successful in Baltimore -- due in part to the efforts of "a highly motivated leading brewer" -- but failed to make headway in Detroit. And though glass appears to have about 80% of the Nation's baby food business, as of the time of the merger cans had over 60% of the business west of the Mississippi. According to one opinion in the record, all Canadian baby food moves in cans. And an official of the Glass Container Manufacturers Institute reported to that body that pickles, preserves, and jams are packed in tin cans in Canada.

<sup>7</sup> Ford Sammis & Company, a firm of market economists, conducted for the Glass Container Manufacturers Institute market surveys of 28 different product classifications. On the basis of over 3 1/4 million individual answers to questions asked in more than 12,000 personal interviews, Ford Sammis concluded the following:

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[\*\*\*963] in each industry take into consideration the price of the containers of the opposing industry in formulating their own pricing [\*455] policy.<sup>8</sup> Thus, though the interchangeability of use may not be so complete and the cross-elasticity of demand not so immediate as in the case of most intraindustry mergers, there is over the long run the kind of customer response to innovation and other competitive stimuli that brings the competition between these two industries within § 7's competition-preserving proscriptions.

LEdHN[6] [6]Moreover, price is only one factor in a user's choice between one container or the [\*\*\*\*25] other. HN3 That there are price differentials between the two products or that the demand for one is not particularly or immediately responsive to changes in the price of the other are relevant matters but not determinative of the product market issue. Whether a packager will use glass or cans may depend not only on the price of the package but also upon other equally important considerations. The consumer, for example, may begin to prefer one type of container over the other and the manufacturer of baby food cans may therefore find that his problem is the

"Every consumer product tends to standardize on a single type of container. Glass has become the standard, traditional container for a host of products, including catsup, salad dressings, salad oil, instant coffee, prune juice, mayonnaise, peanut butter, jams and syrup. Other products have standardized on tin cans -- regular coffee, evaporated milk, dog food, and most fruits, vegetables and juices.

"However, no traditional market is ever secure for any type of container. Marketers are apt to try out new containers at any time, in their constant search for ways to increase sales.

"When this happens, the result is a period of container competition, which may run through one or more of three separate stages."

1. Stage 1, according to the Sammis report, occurs when a new type of container is first introduced by a secondary brand. Thus "[a] new container can become a potent sales force for a brand, if strong consumer preference exists (or is promoted) for that type of container. Recognizing this, secondary brands are constantly trying out new types of containers as sales incentive. While leading brands are ordinarily satisfied to maintain the status quo, secondary brands are willing to gamble to improve their positions."

2. The second stage comes about in this manner: "If a secondary brand increases its sales during the period when it is introducing a new type of container, the sales increase is usually attributed to the new container, by marketer and competitors alike. Advertising, product changes or other factors may actually be more important than the new container, but circumstantial evidence points to the container.

"Leading brands are not prone to sit idly by while competitors cut into their share of the market. They tend to cover competitors' bets by offering both traditional and new types of containers to their customers. This creates Stage 2 of container competition."

3. "When leading brands are available in a choice of containers, consumers' container preference is no longer in conflict with their brand preferences. They can have the brand they want in the container they want. Sales of leading brands under these circumstances seek the level of consumer preference for each type of container.

"If preference for one type of container greatly exceeds preference for the other type, the products then tends [sic] eventually to standardize once again on a single type of container -- the container most consumers prefer. This process is subject to promotion of container by brand marketers or container manufacturers. The alternate outcome can be favorable to either the new or the traditional container."

<sup>8</sup>The chairman of the board of Owens-Illinois Glass Co. testified that he takes into account the price of metal containers in pricing glass containers for beer, soft drinks, and household and chemical products, and to a lesser degree for toiletries and cosmetics. In assessing the likelihood that it could "penetrate [the] tremendous market" for soft drink containers Continental concluded "assuming that the merchandising factors are favorable and that the product quality is well received, the upper limit on market acceptance will then be determined by *price*." Continental also stated in an intercompany memorandum that in the fight between the beer can and the one-way bottle "the key factor, in our estimation, is *pricing*," and concluded that a reduction in the price of one-way beer bottles was to "be regarded as a further attempt on the part of the glass manufacturers to maintain their position in the one-way package field."

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housewife rather [\*456] than the packer or the price of his cans.<sup>9</sup> This may not be price competition but it is nevertheless meaningful competition between interchangeable containers.

[\*\*\*\*26] We therefore conclude that the area of effective competition between the metal and glass container industry is far broader than that of containers for beer. It is true that the record in this case does not identify with particularity all end uses for which competition exists and all those for which competition may be non-existent, too remote, or too ephemeral to warrant § 7 application. Nor does the record furnish the exact quantitative share of the relevant market which is enjoyed by the individual participating can and glass companies. But "the 'market,' as most concepts in law or economics, cannot be measured by [\*\*\*964] metes and bounds. . . . Obviously no magic [\*\*1747] inheres in numbers." *Times-Picayune v. United States*, 345 U.S. 594, 611-612. "Industrial activities cannot be confined to trim categories." *United States v. du Pont*, 351 U.S. 377, 395. The claimed deficiencies in the record cannot sweep aside the existence of a large area of effective competition between the makers of cans and the makers of glass containers. We know enough to conclude that the rivalry between cans and glass containers is pervasive and that [\*\*\*\*27] the area of competitive overlap between these two product markets is broad enough to make the position of the individual companies within their own industries very relevant to the merger's impact within the broader competitive area that embraces both of the merging firms' respective industries.

LEdHN[7] [7]Glass and metal containers were recognized to be two separate lines of commerce. But given the area of effective [\*457] competition between these lines, there is necessarily implied one or more other lines of commerce embracing both industries. Since the purpose of delineating a line of commerce is to provide an adequate basis for measuring the effects of a given acquisition, its contours must, as nearly as possible, conform to competitive reality. Where the area of effective competition cuts across industry lines, so must the relevant line of commerce; otherwise an adequate determination of the merger's true impact cannot be made.

LEdHN[8] [8]Based on the evidence thus far revealed by this record we hold that the interindustry competition [\*\*\*\*28] between glass and metal containers is sufficient to warrant treating as a relevant product market the combined glass and metal container industries and all end uses for which they compete. There may be some end uses for which glass and metal do not and could not compete, but complete interindustry competitive overlap need not be shown. We would not be true to the purpose of the Clayton Act's line of commerce concept as a framework within which to measure the effect of mergers on competition were we to hold that the existence of noncompetitive segments within a proposed market area precludes its being treated as a line of commerce.

LEdHN[9] [9]This line of commerce was not pressed upon the District Court. However, since it is coextensive with the two industries, which were held to be lines of commerce, and since it is composed largely, if not entirely, of the more particularized end-use lines urged in the District Court by the Government, we see nothing to preclude us from reaching the question of its *prima facie* existence at this stage of the case.

LEdHN[10] [10] [\*\*\*\*29] Nor are we concerned by the suggestion that if the product market is to be defined in these terms it must include plastic, paper, foil and any other materials competing for the same business. That there may be a [\*458] broader product market made up of metal, glass and other competing containers does not necessarily negative the existence of submarkets of cans, glass, plastic or cans and glass together, for "within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust [\*\*\*965] purposes." *Brown Shoe Co. v. United States*, 370 U.S., at 325.

III.

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<sup>9</sup> An official of the Glass Container Manufacturers Institute described that organization's advertising program as three-pronged, directed at the packer, the retailer, and the ultimate consumer.

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[\[11\]](#) [11] [\[12\]](#) [12] [\[13\]](#) [13] We approach the ultimate judgment under § 7 having in mind the teachings of *Brown Shoe*, supplemented by their application and elaboration in [\*United States v. Philadelphia National Bank, 374 U.S. 321\*](#), and [\*United States v. El Paso Natural Gas Co., 376 U.S. 651\*](#). The [\*\*\*\*30] issue is whether the merger between Continental and Hazel-Atlas will have probable anticompetitive effect within the relevant line of commerce. [HN4](#) Market shares are the primary indicia of market power but a judgment [\*\*1748] under § 7 is not to be made by any single qualitative or quantitative test. The merger must be viewed functionally in the context of the particular market involved, its structure, history and probable future. Where a merger is of such a size as to be inherently suspect, elaborate proof of market structure, market behavior and probable anticompetitive effects may be dispensed with in view of § 7's design to prevent undue concentration. Moreover, the competition with which § 7 deals includes not only existing competition but that which is sufficiently probable and imminent. See [\*United States v. El Paso Natural Gas Co., supra\*](#).

Continental occupied a dominant position in the metal can industry. It shipped 33% of the metal cans shipped by the industry and together with American shipped about 71% of the industry total. Continental's share amounted [\*\*\*\*31] to 13 billion metal containers out of a total of 40 billion and its \$ 433 million gross sales of metal containers [\*459] amounted to 31.4% of the industry's total gross of \$ 1,380,000,000. Continental's total assets were \$ 382 million, its net sales and operating revenues \$ 666 million.

In addition to demonstrating the dominant position of Continental in a highly concentrated industry, the District Court's findings clearly revealed Continental's vigorous efforts all across the competitive front between metal and glass containers. Continental obviously pushed metal containers wherever metal containers could be pushed. Its share of the beer can market ran from 43% in 1955 to 46% in 1957. Its share of both beer can and beer bottle shipments, disregarding the returnable bottle factor, ran from 36% in 1955 to 38% in 1957. Although metal cans have so far occupied a relatively small percentage of the soft drink container field, Continental's share of this can market ranged from 36% in 1955 to 26% in 1957 and its portion of the total shipments of glass and metal soft drink and beverage containers, disregarding the returnable bottle factor, was 7.2% in 1955, approximately 5.4% in [\*\*\*\*32] 1956 and approximately 6.2% in 1957 (for 1956 and 1957 these figures include Hazel-Atlas' share). In the category covering all nonfood products, Continental's share was approximately 30% of the total shipments of metal containers for such uses.

Continental's major position in the relevant product market -- the combined metal and glass container industries -- prior to the merger is undeniable. Of the 59 billion containers shipped in 1955 by the metal (39 3/4 billion) and glass (19 1/3 billion) [\*\*\*966] industries, Continental shipped 21.9%, to a great extent dispersed among all of the end uses for which glass and metal compete.<sup>10</sup> Of the [\*\*1749] six largest firms in the product market, it ranked second.

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<sup>10</sup> Determination of market shares is made somewhat more difficult in this case than in the ordinary intraindustry merger because the indices of total production of the two industries are expressed differently, the metal container industry reporting to the Census Bureau in terms of tinplate consumed in manufacture, and the glass container industry in terms of units of containers. On the basis of figures and data supplied by the Census Bureau and the Can Manufacturers Institute the Government has derived a conversion factor showing the relationship between tinplate consumption and total containers manufactured, thereby permitting a comparison of the relative positions of the firms competing within the glass and metal container line of commerce. It would appear that the District Court relied on figures disclosed by application of this factor, since it found that American and Continental shipped approximately 38% and 33%, respectively, of the metal cans sold in the United States. [217 F.Supp., at 773.](#)

Continental objects to the use of this conversion scheme, however, arguing that it ignores such considerations as size of cans and the returnable feature of some types of bottles. We are not persuaded. Since different systems of statistical notation are employed by these industries, a common referential standard is an absolute prerequisite to a comparison of market shares. Consistent with this Court's declarations in other cases concerning the high degree of relevance of market shares to the effect of mergers on competition, we believe that slight variations one way or the other which may inhere in the use of a conversion formula should not blind us to the broad significance of the resulting percentages. In the compilation of statistics "precision in detail is less important than the accuracy of the broad picture presented." *Brown Shoe Co. v. United States, 370 U.S., at 342, n. 69.*

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[\*\*\*\*33] [\*460] When Continental acquired Hazel-Atlas it added significantly to its position in the relevant line of commerce. Hazel-Atlas was the third largest glass container manufacturer in an industry in which the three top companies controlled 55.4% of the total shipments of glass containers. Hazel-Atlas' share was 9.6%, which amounted to 1,857,000,000 glass containers out of a total of 19 1/3 billion industrial total. Its annual sales amounted to \$ 79 million, its assets exceeded \$ 37 million and it had 13 plants variously located in the United States. In terms of total containers shipped, Hazel-Atlas ranked sixth in the relevant line of commerce, its almost 2 billion containers being 3.1% of the product market total.

[\*461] [LEDHN\[14\]](#) [14]The evidence so far presented leads us to conclude that the merger between Continental and Hazel-Atlas is in violation of § 7. The product market embracing the combined metal and glass container industries was dominated by six firms having a total of 70.1% of the business.<sup>11</sup> Continental, with 21.9% of the shipments, ranked second within this product market, and [\*\*\*\*34] Hazel-Atlas, with 3.1%, ranked sixth. Thus, of this vast market -- amounting at the time of the merger to almost \$ 3 billion in annual sales -- a large percentage already belonged to Continental before the merger. By the acquisition of Hazel-Atlas stock Continental not only increased its own share more than 14% from 21.9% to 25%, but also reduced from five to four the most significant competitors [\*\*\*967] who might have threatened its dominant position. The resulting percentage of the combined firms approaches that held presumptively bad in [United States v. Philadelphia National Bank, 374 U.S. 321](#), and is almost the same as that involved in [United States v. Aluminum Co. of America, 377 U.S. 271](#). The incremental addition to the acquiring firm's share is considerably larger than in Aluminum Co. The case falls squarely within the principle that [HNS](#) where there has been a "history of tendency toward concentration in the industry" tendencies toward further concentration "are to be curbed in their incipency." *Brown Shoe Co. v. United*

<sup>11</sup> The six largest firms, and their respective percentages of the relevant market as of the year prior to the merger are:

American Can Co

26.8%

## Continental Can Co

21.9%

Owens-Illinois Glass Co

11.2%

Anchor-Hocking Glass Co

3.8%

National Can Co

3.3%

Hazel-Atlas Glass Co

3.1%

### Total

70.1%

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States, 370 U.S., at 345, 346. [\*\*\*\*35] Where "concentration is already great, the importance of preventing [\*462] even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." United States v. Philadelphia National Bank, 374 U.S. 321, 365, n. 42; United States v. Aluminum Co. of America, supra.

Continental insists, however, that whatever the nature of interindustry competition in general, the types of containers produced by Continental and Hazel-Atlas at the time of the merger were for the most part not in competition with each other and hence the merger could have no effect on competition. This argument ignores several important [\*\*\*\*36] matters.

First: The District Court found that both Continental and Hazel-Atlas were [\*\*1750] engaged in interindustry competition characteristic of the glass and metal can industries. While the position of Hazel-Atlas in the beer and soft drink industries was negligible in 1955, its position was quite different in other fields. Hazel-Atlas made both wide-mouthed glass jars and narrow-necked containers but more of the former than the latter. Both are used in packing food, medicine and health supplies, household and industrial products and toiletries and cosmetics, among others, and Hazel-Atlas' position in supplying the packaging needs of these industries was indeed important. In 1955, it shipped about 8% of the narrow-necked bottles and about 14% of the wide-mouthed glass containers for food; about 10% of the narrow-necked and 40% of the wide-mouthed glass containers for the household and chemical industry; about 9% of the narrow-necked and 28% of the wide-mouthed glass containers for the toiletries and cosmetics industry; and about 6% of the narrow-necked and 25% of the wide-mouthed glass containers for the medicine and health industry. Continental, as we have said, in 1955 [\*\*\*\*37] shipped 30% of the containers used for these same nonfood purposes. In these industries the District Court found that the glass container and metal [\*463] container manufacturers were each seeking to promote their lines of containers at the expense of the other lines and that all were attempting to improve their products or to develop new ones so as to have a wider customer appeal. We think it quite clear that Continental and Hazel-Atlas were set off directly against one another in this process and that the merger therefore carries with it the probability of foreclosing actual and potential competition between these two concerns. Hazel-Atlas has been removed as an independent factor in the glass industry and in the line of commerce which includes both metal cans and glass containers.

LEdHN[15] [15]We think the District Court erred [\*\*\*968] in placing heavy reliance on Continental's management of its Hazel-Atlas division after the merger while Continental was under some pressure because of the pending government antitrust suit. Continental acquired by the merger the power to guide the development of Hazel-Atlas [\*\*\*\*38] consistently with Continental's interest in metal containers; contrariwise it may find itself unwilling to push metal containers to the exclusion of glass for those end uses where Hazel-Atlas is strong. It has at the same time acquired the ability, know-how and the capacity to satisfy its customers' demands whether they want metal or glass containers. Continental need no longer lose customers to glass companies solely because consumer preference, perhaps triggered by competitive efforts by the glass container industry, forces the packer to turn from cans to glass. And no longer does a Hazel-Atlas customer who has normally packed in glass have to look elsewhere for metal containers if he discovers that the can rather than the jar will answer some of his pressing problems.

Second: Continental would view these developments as representing an acceptable effort by it to diversify its product lines and to gain the resulting competitive advantages, thereby strengthening competition which it [\*464] declared the antitrust laws are designed to promote. But we think the answer is otherwise when a dominant firm in a line of commerce in which market power is already concentrated among a [\*\*\*\*39] few firms makes an acquisition which enhances its market power and the vigor and effectiveness of its own competitive efforts.

Third: A merger between the second and sixth largest competitors in a gigantic line of commerce is significant not only for its intrinsic effect on competition but also for its tendency to endanger a much broader anticompetitive effect by triggering other mergers by companies seeking the same competitive advantages sought by Continental in this case. As the Court said in *Brown Shoe*, "if a merger achieving 5% control were now [\*\*1751] approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares." 370 U.S., at 343-344.

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Fourth: It is not at all self-evident that the lack of current competition between Continental and Hazel-Atlas for some important end uses of metal and glass containers significantly diminished the adverse effect of the merger on competition. Continental might have concluded that it could effectively insulate itself from competition by acquiring a major firm not presently directing its market acquisition efforts toward the same end uses as Continental, but possessing [\*\*\*40] the potential to do so. Two examples will illustrate. Both soft drinks and baby food are currently packed predominantly in glass, but Continental has engaged in vigorous and imaginative promotional activities attempting to overcome consumer preferences for glass and secure a larger share of these two markets for its tin cans. Hazel-Atlas was not at the time of the merger a significant producer of either of these containers, but with comparatively little difficulty, if it were an independent firm making independent business judgments, [\*465] it could have developed its soft drink and baby food capacity. The acquisition of Hazel-Atlas by a company engaged in such intense efforts to effect a [\*\*\*969] diversion of business from glass to metal in both of these lines cannot help but diminish the likelihood of Hazel-Atlas realizing its potential as a significant competitor in either line. Our view of the record compels us to disagree with the District Court's conclusion that Continental, as a result of the merger, was not "likely to cease being an innovator in either [the glass or metal container] line." [217 F.Supp., at 790](#). It would make little sense for one [\*\*\*41] entity within the Continental empire to be busily engaged in persuading the public of metal's superiority over glass for a given end use, while the other is making plans to increase the Nation's total glass container output for that same end use. Thus, the fact that Continental and Hazel-Atlas were not substantial competitors of each other for certain end uses at the time of the merger may actually enhance the long-run tendency of the merger to lessen competition.

LEdHN[16] [16]We think our holding is consonant with the purpose of § 7 to arrest anticompetitive arrangements in their incipiency. Some product lines are offered in both metal and glass containers by the same packer. In such areas the interchangeability of use and immediate interindustry sensitivity to price changes would approach that which exists between products of the same industry. In other lines, as where one packer's products move in one type container while his competitor's move in another, there are inherent deterrents to customer diversion of the same type that might occur between brands of cans or bottles. But the possibility of such transfers [\*\*\*42] over the long run acts as a deterrent against attempts by the dominant members of either industry to reap the possible benefits of their position by raising prices above the competitive [\*466] level or engaging in other comparable practices. And even though certain lines are today regarded as safely within the domain of one or the other of these industries, this pattern may be altered, as it has been in the past. From the point of view not only of the static competitive situation but also the dynamic long-run potential, we think that the Government has discharged its burden of proving *prima facie* anticompetitive effect. Accordingly the judgment is reversed and the case remanded for further proceedings consistent with this opinion.

Reversed.

**Concur by:** GOLDBERG

## Concur

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MR. JUSTICE GOLDBERG, concurring.

I fully agree with the Court that "since the purpose of delineating a line of commerce is to provide an adequate [\*\*1752] basis for measuring the effects of a given acquisition, its contours must, as nearly as possible, conform to competitive reality." *Ante*, at p. 457. I also agree that "on the evidence thus far revealed by this record," there has been a *prima facie* [\*\*\*43] showing "that the interindustry competition between glass and metal containers . . . [warrants] treating as a relevant product market the combined glass and metal container industries and all end uses for which they compete." *Ibid.* I wish to make it clear, however, that, as I read the opinion of the Court, the Court does not purport finally to decide the determinative line of commerce. Since the District Court "dismissed the complaint at the close of the Government's case, [\*\*\*970]" *ante*, at p. 444, upon remand it will be open to the defendants not only to rebut the *prima facie* inference that metal and glass containers may be considered together as a line of commerce but also to prove that plastic or other containers in fact compete with metal and glass to such

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an extent that as a matter of "competitive reality" they must be considered as part of the determinative line of commerce.

**Dissent by:** HARLAN

## Dissent

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[\*467] MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

Measured by any antitrust yardsticks with which I am familiar, the Court's conclusions are, to say the least, remarkable. Before the merger which is the subject of this case, Continental Can [\*\*\*\*44] manufactured metal containers and Hazel-Atlas manufactured glass containers.<sup>1</sup> The District Court found, with ample support in the record, that the Government had wholly failed to prove that the merger of these two companies would adversely affect competition in the metal container industry, in the glass container industry, or between the metal container industry and the glass container industry. Yet this Court manages to strike down the merger under § 7 of the Clayton Act, because, in the Court's view, it is anticompetitive.<sup>2</sup> With all respect, the Court's conclusion is based on erroneous analysis, which makes an abrupt and unwise departure from established antitrust law.

[\*\*\*\*45] I agree fully with the Court that "we must recognize meaningful competition where it is found," *ante*, p. 449, and that "inter-industry" competition, such as that involved in this case, no less than "intra-industry" competition is protected by § 7 from anticompetitive mergers. As [\*468] this Court has, in effect, recognized in past cases, the concept of an "industry," or "line of commerce," is not susceptible of reduction to a precise formula. See *Brown Shoe Co., Inc., v. United States*, 370 U.S. 294, 325; *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 394-396; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611. It would, therefore, be artificial and inconsistent with the broad protective purpose of § 7, see *Brown Shoe, supra, at 311-323*, to attempt to differentiate between permitted and prohibited mergers [\*\*1753] merely by asking whether a probable reduction in competition, if it is found, will be within a single "industry" or between two or more "industries."

Recognition that the purpose of § 7 is not to be thwarted by limiting its protection to intramural [\*\*\*\*46] competition within strictly defined "industries," does not mean, however, that the concept of a "line of commerce" is no longer serviceable. More precisely, it does not, as the majority [\*\*\*971] seems to think, entail the conclusion that wherever "meaningful competition" exists, a "line of commerce" is to be found. The Court declares the initial question of this case to be "whether the admitted competition between metal and glass containers for uses other than packaging beer was of the type and quality deserving of § 7 protection and *therefore* the basis for defining a relevant product market." *Ante*, p. 449. (Emphasis added.) And the Court's answer is similarly phrased: ". . . We hold that the *interindustry competition* between glass and metal containers is sufficient to warrant treating as a relevant product market the combined glass and metal container industries and all end uses for which they compete." *Ante*, p. 457. (Emphasis added.) Quite obviously, such a conclusion simply reads the "line of commerce" element out of § 7, and destroys its usefulness as an aid to analysis.

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<sup>1</sup> Both companies manufactured other related products which for present purposes may be disregarded. See the description of the two companies in the opinion of the District Court, *217 F.Supp. 761, 769-770*.

<sup>2</sup> Section 7 of the Clayton Act, as amended by the Act of December 29, 1950, 64 Stat. 1125, *15 U. S. C. § 18*, provides in pertinent part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

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The distortions to which this approach leads are evidenced by the Court's application [\*\*\*47] of it in this case. [\*469] Having found that there is "interindustry competition between glass and metal containers" the Court concludes that "the combined glass and metal container industries" is the relevant line of commerce or "product market" in which anticompetitive effects must be measured. *Ante*, p. 457. Applying that premise, the Court then notes Continental's "dominant position" in the *metal can industry*, *ante*, p. 458, and finds that Continental has a "major position" in the "relevant product market -- *the combined metal and glass container industries*," *ante*, p. 459. (Emphasis added.) Hazel-Atlas, being the third largest producer of *glass containers*, is found to rank sixth in the relevant product market -- again, the combined metal and glass container industries. *Ante*, p. 460. This "evidence," coupled with the market shares of Continental and Hazel-Atlas in the combined product market,<sup>3</sup> leads the Court to conclude that the merger violates § 7.

[\*\*\*48] "The resulting percentage of the combined firms," the Court says, "approaches that held presumptively bad in *United States v. Philadelphia National Bank*, 374 U.S. 321." *Ante*, p. 461. The *Philadelphia Bank* case, which involved the merger of two banks plainly engaged in the same line of commerce,<sup>4</sup> is, however, entirely distinct from the present situation, which involves two separate industries. The bizarre result of the Court's approach [\*470] is that market percentages of a nonexistent market enable the Court to dispense with "elaborate proof of market structure, market behavior and probable anticompetitive effects," *ante*, p. 458. As I shall show, the Court has "dispensed [\*\*1754] with" proof which, given heed, shows how completely fanciful its market-share analysis is.

[\*\*\*49] In fairness to the District Court it [\*\*972] should be said that it did not err in failing to consider the "line of commerce" on which this Court now relies. For the Government did not even suggest that such a line of commerce existed until it got to this Court.<sup>5</sup> And it does not seriously suggest even now that such a line of commerce exists.<sup>6</sup> The truth [\*471] is that "glass and metal containers" form a distinct line of commerce only in the mind of this Court.

<sup>3</sup> The Court confesses to some difficulty in determining market shares. See *ante*, pp. 459-460, n. 10.

<sup>4</sup> "We have no difficulty in determining the 'line of commerce' (relevant product or services market) . . . in which to appraise the probable competitive effects of appellees' proposed merger. We agree with the District Court that the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking' . . . composes a distinct line of commerce. . . . In sum, it is clear that commercial banking is a market 'sufficiently inclusive to be meaningful in terms of trade realities.' *Crown Zellerbach Corp. v. Federal Trade Comm'n*, 296 F.2d 800, 811 (C. A. 9th Cir. 1961)." [374 U.S., at 356-357.](#)

<sup>5</sup> In the District Court, the Government relied on 10 "lines of commerce." In addition to "the packaging industry," "the can industry," "the glass container industry," and "metal closures" (not relevant here), the Government argued that there were six "lines of commerce" which were defined by the end product for which the containers were used, e. g., "containers for the beer industry." See [217 F.Supp., at 778-779.](#)

<sup>6</sup> Although the Government makes the suggestion, which the Court now accepts, that wherever there is competition there is a "line of commerce," so that "the 'line of commerce' within which the merger's effect on competition should be appraised is the production and sale of containers used for all purposes for which metal or glass containers may be used . . ." (Brief, p. 18), it concedes the artificiality of this approach and, in so doing, itself rejects the market-share analysis adopted by the Court. The Government states that its suggested test of illegality of a merger involving inter-industry competition "omits analysis of statistics regarding market shares simply because those traditional yardsticks are generally unavailable to measure the full consequences which an interindustry merger would have on competition." (Brief, p. 22.)

The test which the Government advocates is that it "can satisfy its burden of showing that the merger may have the effect of substantially lessening competition by proving (a) the existence of substantial competition between two industries; (b) a high degree of concentration in either or both of the competing industries; and (c) the dominant positions of each of the merging companies in its respective industry." (Brief, p. 22.) This approach, which has at least the virtue of facing up to its own logic, frankly disavows attention to a "line of commerce." The effect of the Court's approach is not markedly different from that of the Government's test, see *infra*, p. 476, and there is some suggestion in the last few pages of the Court's opinion that the Court appreciates this. As discussed hereafter, however, there is nothing in the Court's opinion to support adoption of the

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[\*\*\*\*50] The District Court found, and this Court accepts the finding, that this case "deals with three separate and distinct industries manufacturing separate and distinct types of products": metal, glass, and plastic containers. [217 F.Supp., at 780.](#)

"Concededly there was substantial and vigorous inter-industry competition between these three industries and between various of the products which they manufactured. Metal can, glass container and plastic container manufacturers were each seeking to enlarge their sales to the thousands of packers of hundreds of varieties of food, chemical, toiletry and industrial products, ranging from ripe olives to fruit juices to tuna fish to smoked tongue; from maple syrup to pet food to coffee; from embalming fluid to floor wax to nail polish to aspirin to veterinary supplies, to take examples at random."

"Each industry and each of the manufacturers within it was seeking to improve their products so that they would appeal to new customers or hold old ones. Hazel-Atlas and Continental were part of this overall [\[\\*\\*1755\]](#) industrial pattern, each in a recognized separate industry producing distinct products but engaged in inter-industry [\[\\*\\*\\*51\]](#) competition for the favor of various end users of their products." [217 F.Supp., at 780-781.](#)

[\*472] Only this Court will not be "concerned," [\[\\*\\*\\*973\]](#) *ante*, p. 457, that without support in reason or fact, it dips into this network of competition and establishes metal and glass containers as a separate "line of commerce," leaving entirely out of account all other kinds of containers: "plastic, paper, foil and any other materials competing for the same business," *ibid.*<sup>7</sup> [\[\\*\\*\\*52\]](#) [Brown Shoe, supra](#), on which the Court relies for this travesty of economics, *ante*, p. 458, spoke of "well-defined submarkets" within a broader market, and said that "the boundaries of such a submarket" were to be determined by "*practical indicia*," [370 U.S., at 325.](#)<sup>8</sup> (Emphasis added.) Since the Court here provides its own definition of a market, unrelated to any market reality whatsoever, *Brown Shoe* must in this case be regarded as a bootstrap.

The Court is quite wrong when it says that the District Court "employed an unduly narrow construction of the 'competition' protected by § 7" and that it held that "the competition protected by § 7 [is limited] to competition between identical products," *ante*, p. 452. Quite to the contrary, the District Court expressly stated that [\[\\*473\]](#) "Section 7 is applicable to conglomerate mergers where the facts warrant," [217 F.Supp., at 783](#) [\[\\*\\*\\*53\]](#) (footnote omitted).<sup>9</sup> The difference between the District Court and this Court lies rather in the District Court's next sentence: "But there must be evidence that the facts warrant such application." *Ibid.*

If attention is paid to the conclusions of the court below, it is obvious that this Court's analysis has led it to substitute a meaningless figure -- the merged companies' share of a nonexistent "market" -- for the sound, careful factual findings of the District Court.

The District Court found:<sup>10</sup>

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Government's "per se" approach, and the facts developed in the District Court demonstrate that, so far as one can tell from this case at least, a *per se* approach to the problem of inter-industry competition is wholly inappropriate.

<sup>7</sup> If the competition between metal and glass containers is sufficient to constitute them collectively a "line of commerce," why does their competition with plastic containers and "other materials competing for the same business" not require that all such containers be included in the same line of commerce? The Court apparently concedes that the competition is multilateral.

<sup>8</sup> The "practical indicia" specified by the Court were: "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." [370 U.S., at 325](#) (footnote omitted). While many of these factors weigh *against* the Court's conclusion that metal and glass containers should be combined in a single line of commerce, not one of them speaks for the Court's conclusion that they should be segregated from all other kinds of containers and together form a separate line of commerce.

<sup>9</sup> The District Court observed also that "relevant markets are neither economic abstractions nor artificial conceptions." [217 F.Supp., at 768.](#) In this respect, in view of the majority's present opinion, the district judge must, I suppose, be deemed to have erred.

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[\*\*\*54] (1) With respect to the merger's effect on competition within the metal container industry, that "prior to its acquisition Hazel-Atlas did not manufacture or sell metal cans . . ." [217 F.Supp., at 770](#).

[\*\*\*974] (2) With respect to the merger's effect on competition within the glass container industry, that "Continental did not, directly [\*\*1756] or through subsidiaries, manufacture or sell glass containers . . ." *Ibid.*

[\*474] (3) With respect to the merger's effect on the metal container industry's efforts to compete with the glass container industry,

"The Government fared no better on its claim that as a result of the merger Continental was likely to lose the incentive to push can sales at the expense of glass. The Government introduced no evidence showing either that there had been or was likely to be any slackening of effort to push can sales. On the contrary, as has been pointed out, the object of the merger was diversification, and Continental was actively promoting intra-company competition between its various product lines. Since by far the largest proportion of Continental's business was in metal cans, it scarcely seemed likely [\*\*\*55] that cans would suffer at the expense of glass."

"Moreover, subsequent to the merger Continental actively engaged in a vigorous research and promotion program in both its metal and glass container lines. *In the light of the record and of the competitive realities, the notion that it was likely to cease being an innovator in either line is patently absurd.*" [217 F.Supp., at 790](#) (footnote omitted). (Emphasis added.)

(4) With respect to the merger's effect on the glass container industry's efforts to compete with the metal container industry,

"In addition the Government advanced the converse of the proposition which it urged with respect to the metal can line -- that as a result of the merger Continental was likely to lose the incentive to push glass container sales at the expense of cans. In view of what has been said concerning the purpose of Continental's diversification program and the course it pursued after the merger, it is no more likely that Continental would slacken its efforts to promote glass [\*475] than that it would slacken its efforts to promote cans. Indeed, if it had planned to do so there would have been little, if any, point to acquiring [\*\*\*56] Hazel-Atlas, a major glass container producer." [217 F.Supp., at 793](#).

It is clear from the foregoing that the District Court fully considered the possibility that a merger of leading producers in two industries between which there was competition would dampen the inter-industry rivalry. The basis of the decision below was not, therefore, an erroneous belief that § 7 did not reach such competition but a careful study of the Government's proof, which led to the conclusion that "in the light of the record and of the competitive realities, the notion that . . . [the merged company] was likely to cease being an innovator in either line is patently absurd."

Surely this failure of the Court's mock-statistical analysis to reflect the facts as found on the record demonstrates what the Government concedes,<sup>11</sup> and what one would in any event have thought to be [\*\*1757] obvious: When a merger is attacked on the ground that competition *between* two distinct industries, or lines of [\*\*\*975] commerce, will be affected, the shortcut "market share" approach developed in the *Philadelphia Bank* case, see [374 U.S., at](#)

<sup>10</sup> This summary of the District Court's findings includes only so much as is relevant to the majority's opinion. The District Court gave detailed attention to each of the Government's contentions, in an opinion of 48 pages. Its conclusions were summarized in the following statement:

"Viewing the evidence as a whole, quite apart from theory, there was a total failure by the Government to establish the essential elements of a violation of Section 7. As will be apparent from a discussion of the proof relating to each specific line of commerce, the Government did not lay either the statistical or testimonial foundations required to establish its case. It was this failure of proof which required the dismissal of the complaint and entry of judgment for the defendants." [217 F.Supp., at 787](#).

<sup>11</sup> See note 6, *supra*.

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[362-365](#); *ante*, p. 458, has no place. [\*\*\*\*57] In such a case, the legality of the merger must surely depend, as it did below, on an inquiry into competitive effects in the actual lines of commerce which are involved. In this case, the result depends -- or should depend -- on the impact of the merger in the two lines of commerce here involved: the metal container industry and the glass container industry.<sup>12</sup> As the findings [\*476] of the District Court which are quoted above make plain, reference to these two actual lines of commerce does not preclude protection of inter-industry competition. Indeed, by placing the merged company in the setting of other companies in each of the respective lines of commerce which are also engaged in inter-industry competition, this approach is far more likely than the Court's to give § 7 full, but not artificial, scope.

[\*\*\*\*58] The Court's spurious market-share analysis should not obscure the fact that the Court is, in effect, laying down a "per se" rule that mergers between two large companies in related industries are presumptively unlawful under § 7. Had the Court based this new rule on a conclusion that such mergers are inherently likely to dampen interindustry competition or that so few mergers of this kind would fail to have that effect that a "per se" rule is justified, I could at least understand the thought process which lay behind its decision. It would, of course, be inappropriate to prescribe *per se* rules in the first case to present a problem, cf. *White Motor Co. v. United States*, [372 U.S. 253](#), let alone a case in which the facts suggest that a *per se* rule is unsound. And to lay down a rule on either of the bases suggested would require a much more careful look at the nature of competition between industries than the Court's casual glance in that direction.

In any event, the Court does not take this tack. It chooses instead to invent a line of commerce the existence of which no one, not even the Government, has imagined; for which businessmen and [\*\*\*\*59] economists will look in vain; a line of commerce which sprang into existence only when the merger took place and will cease to exist when the [\*477] merger is undone. I have no idea where § 7 goes from here, nor will businessmen or the antitrust bar. Hitherto, it has been thought that the validity of a merger was to be tested by examining its effect in identifiable, "well-defined" ([Brown Shoe, supra, at 325](#)) markets. Hereafter, however slight (or even nonexistent) the competitive impact of a merger on any actual market, businessmen must rest uneasy lest the Court create some "market," in which the merger presumptively dampens competition, out of bits and pieces of real ones. No one could say that such a fear is unfounded, since the Court's creative powers in this respect are declared to be as extensive as the competitive relationships [\*\*976] between industries. This is said to be recognizing "meaningful competition where it is found to exist." It is in fact imagining effects on competition where none has been shown.

I would affirm the judgment of the District Court.

## References

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[\*\*\*\*60] Annotation References:

Right of one corporation to acquire stock in another, as affected by the antitrust acts. 74 L ed 431.

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<sup>12</sup> The Government urged other lines of commerce below, see note 5, *supra*, but has abandoned all of them here except "containers for the canning industry," a line of commerce defined by end use and including "all metal cans and glass containers for the end uses of 'canning' food." [217 F.Supp., at 799](#). The District Court gave detailed reasons, which the record fully supports, for rejecting the Government's contention that this was a distinct line of commerce. See [217 F.Supp., at 799-802](#).

## **United States v. Boston & M. R.R.**

Supreme Court of the United States

January 21, 1965, Argued ; March 8, 1965, Decided

No. 232

**Reporter**

380 U.S. 157 \*; 85 S. Ct. 868 \*\*; 13 L. Ed. 2d 728 \*\*\*; 1965 U.S. LEXIS 2435 \*\*\*\*; 1965 Trade Cas. (CCH) P71,390

UNITED STATES v. BOSTON & MAINE RAILROAD ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

**Disposition:** [225 F.Supp. 577](#), vacated and remanded.

### **Core Terms**

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substantial interest, railroad, interlocking, common carrier, dealings, bidding

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Clayton Act > Penalties

Criminal Law & Procedure > Appeals > Right to Appeal > Government

Antitrust & Trade Law > Clayton Act > General Overview

#### **[HN1](#)[] Clayton Act, Penalties**

See [15 U.S.C.S. § 20](#).

Governments > Legislation > Interpretation

#### **[HN2](#)[] Legislation, Interpretation**

A criminal statute is to be construed strictly, not loosely.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Interpretation

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### [\*\*HN3\*\*](#) [down] Antitrust & Trade Law, Clayton Act

The fact that a particular activity may be within the same general classification and policy of those covered does not necessarily bring it within the ambit of the criminal prohibition.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Regulated Industries > General Overview

### [\*\*HN4\*\*](#) [down] Regulated Industries, Transportation

Bribery might well be in the family of offenses covered under a conflict of interest statute. But it is more remote from an antitrust frame of reference. While history shows a rather wide pattern of railroad misconduct leading to § 10 of the Clayton Act, [15 U.S.C.S. § 20](#), that section is a rather narrow prohibition applicable to activity that is conceptually within the antitrust philosophy.

Criminal Law & Procedure > ... > Accusatory Instruments > Bill of Particulars > General Overview

### [\*\*HN5\*\*](#) [down] Accusatory Instruments, Bill of Particulars

See [Fed. R. Crim. P. 7\(f\)](#).

## **Lawyers' Edition Display**

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### **Summary**

In a federal criminal proceeding in the District Court of Massachusetts, count I of the indictment charged that a railroad and three of its officers violated 10 of the Clayton Act by the railroad's sale of 10 coaches, valued in excess of \$ 50,000, to another corporation, in which the railroad's three officers had a "substantial interest," competitive bidding not having been used. A bill of particulars described the officers' "substantial interest" in the purchasing corporation as consisting of an agreement for the purpose of producing profits for the purchasing corporation from dealings by it in property acquired from the railroad through the assistance of the three officers and pursuant to which the officers were to and did receive substantial moneys. Granting motions to dismiss count I, the District Court held that 10 was limited to one who had a present legal interest in the purchasing corporation and did not include one whose only interest was in the outcome of what may have been an illegal and illicit plan to siphon off for his personal benefit property of the railroad through the medium of the purchasing corporation. ([225 F Supp 577](#).)

On direct appeal, the United States Supreme Court vacated and remanded the case, giving the government an opportunity to file an amended bill of particulars in the District Court. In an opinion by Douglas, J., expressing the unanimous view of the Court, it was held that the District Court properly concluded that the defendants' conduct, as alleged in the bill of particulars, was not within the scope of 10; but it was also held that the District Court's construction of 10 had been too narrow and that the words "substantial interest in such other corporation," as used in 10, presupposed either an existing investment in the corporation, or the creation of the corporation for one's own use, or a joint venture or continued course of dealings with the corporation for profit sharing.

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## Headnotes

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CRIMINAL LAW §61 > bill of particulars -- demurrer -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B]

For purposes of a demurrer to a federal indictment, the bill of particulars forms no part of the record.

APPEAL §1150 > raising question in court below -- bill of particulars -- motion to dismiss -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

The United States Supreme Court is not required to express any view as to the applicability, on motions to dismiss under [Federal Criminal Procedure Rule 12](#), of the rule that a bill of particulars forms no part of the record for purposes of a demurrer to an indictment, where the parties made no attempt to invoke this rule at any stage of the proceeding.

STATUTES §184 > construction -- > Headnote:

[LEdHN\[3\]](#) [3]

Penal statutes are to be construed strictly.

STATUTES §185 > construction -- enlarging meaning -- > Headnote:

[LEdHN\[4\]](#) [4]

The fact that a particular activity may be within the same general classification and policy of those covered by a particular criminal statute does not necessarily bring it within the ambit of the criminal prohibition.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §35 > Clayton Act 10 -- nature of statute --

> Headnote:

[LEdHN\[5\]](#) [5]

Section 10 of the Clayton Act ([15 USC 20](#)), dealing with purchases by common carriers in case of interlocking directorates and similar matters, is an [antitrust law](#) and is not strictly a conflict of interest statute.

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §35 > Clayton Act 10 -- meaning of "substantial interest" -- > Headnote:

[LEdHN\[6\]](#) [6]

The words "substantial interest in such other corporation," as used in 10 of the Clayton Act ([15 USC 20](#)), prohibiting common carriers from specified dealings with a corporation where the common carrier's officers have any substantial interest in such corporation, presuppose either an existing investment in the corporation, or the creation of the corporation for one's own use, or a joint venture or continued course of dealings, licit or illicit, with the corporation for profit sharing; but the meaning of these words is not broad enough to be applicable to a railroad's officers who have agreed to assist another corporation in obtaining profits by purchasing the railroad's coaches and who have received substantial monies from the purchasing corporation pursuant to the agreement.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §35 > Clayton Act 10 -- nature of statute --

> Headnote:

[LEdHN\[7\]](#) [7]

Although history shows a rather wide pattern of railroad misconduct leading to the enactment of 10 of the Clayton Act ([15 USC 20](#)), dealing with purchases by common carriers in case of interlocking directorates and similar matters, that section is a rather narrow prohibition applicable to activity which is conceptually within the antitrust philosophy.

CRIMINAL LAW §61 > bill of particulars -- amendment -- > Headnote:

[LEdHN\[8A\]](#) [8A] [LEdHN\[8B\]](#) [8B]

If, by reason of the bill of particulars, an indictment is insufficient against a motion to dismiss, the government should be granted an opportunity to file an amended bill of particulars, pursuant to [Rule 7\(f\) of the Federal Rules of Criminal Procedure](#).

## Syllabus

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Appellees, a railroad and three of its officers, were indicted under § 10 of the Clayton Act for participating in the noncompetitive sale of equipment to another corporation in which the officers had a "substantial interest," described in a bill of particulars as an agreement for substantial payment to the individual appellees for effecting the sale. Holding that § 10 applies to a "then present legal interest," and not one dependent on the outcome of an illegal plan, the District Court dismissed the indictment. *Held*:

1. Under the strict construction applicable to a criminal statute, the words "substantial interest" in § 10 presuppose, not bribery (which the indictment here in effect charges) under a conflict of interest law, but either an existing investment in the purchaser, the creation of the purchaser for the use of those acting for the seller, or a joint venture or continued course of dealings for profit sharing with [\*\*\*\*2] the purchaser, each of which would be within the concept of this antitrust statute. Pp. 160-162.
2. Since an amended bill of particulars may be filed under [Rule 7 \(f\) of the Federal Rules of Criminal Procedure](#), the case is vacated and remanded. P. 162.

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**Counsel:** Robert B. Hummel argued the cause for the United States. With him on the briefs were Solicitor General Cox, Assistant Attorney General Orrick and John H. Dougherty.

Edward O. Proctor, Sr., argued the cause for appellees. On the brief for appellee Boston & Maine Railroad was Edward B. Hanify. With Mr. Proctor on the brief for appellees McGinnis et al. were William T. Griffin, Lothrop Withington and John M. Reed.

**Judges:** Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg

**Opinion by:** DOUGLAS

## Opinion

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[\*158] [\*\*\*730] [\*\*869] MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This is a direct appeal under the Criminal Appeals Act, [18 U. S. C. § 3731](#), from the District Court's order dismissing Count I of an indictment ([225 F.Supp. 577](#)) for failure to state an offense under § 10 of the Clayton Act, 38 Stat. 734, [\*\*\*\*3] [15 U. S. C. § 20. HN1](#)[<sup>1</sup>] That section provides in relevant part:

"No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than \$ 50,000, in the aggregate, in any one year, with another corporation, firm, partnership, or association when the said common carrier shall have upon its board of directors or as its president, manager, or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or *who has any substantial interest in, such other corporation, firm, partnership, or association*, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. . ." (Italics added.)

[LEdHN\[1A\]](#)[<sup>1</sup>] [1A] [\*\*\*\*4] [LEdHN\[2A\]](#)[<sup>1</sup>] [2A]Count I charged that appellee railroad and the three other appellees, officers of the railroad, violated § 10 by the road's sale on August 14, 1958, of 10 coaches valued in excess of \$ 50,000 to the International Railway Equipment Corp. in which the three officers had "a substantial interest," competitive bidding not having been used. That count charged that appellee McGinnis knowingly voted [\*159] for the sale and that all three appellee officers knowingly directed the act. A bill of particulars <sup>1</sup> described the "substantial interest" of those officers in the purchasing corporation as follows:

"The substantial interest of defendants McGinnis and Glacy in defendant International consisted of an understanding, agreement, relationship, arrangement and concert of action among the said defendants McGinnis, Glacy, and International, and others, for, among other things, the purpose of producing profits for International from dealings by it in property acquired from the B&M through the intervention, direction or assistance of defendants McGinnis, Glacy, and Benson, and pursuant to which defendants McGinnis, [\*\*\*\*5] Glacy, and Benson were to and did receive substantial monies."

[LEdHN\[1B\]](#)[<sup>1</sup>] [1B] [LEdHN\[2B\]](#)[<sup>1</sup>] [2B]

The District Court held:

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<sup>1</sup> This case was decided below and argued here on the assumption that, although the indictment itself was sufficient against a motion to dismiss, it became insufficient for that purpose by reason of the bill of particulars. We have held, however, that "the bill of particulars . . . forms no part of the record *for the purposes of the demurrer.*" [United States v. Comyns](#), 248 U.S. 349, 353 (emphasis supplied); [Dunlop v. United States](#), 165 U.S. 486. Since the parties have made no attempt to invoke this rule at any stage in this proceeding, we are not required to express any view as to whether this rule for demurrs is applicable on motions to dismiss under [Rule 12, Fed. Rules Crim. Proc.](#)

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"The statute is limited [\*\*\*\*6] to one who has a then present legal interest in the buying corporation and does not include one whose only interest is in [\*\*\*731] the outcome of what may have been an illegal and illicit plan to siphon off for his personal benefit property of the Boston and Maine [\*\*870] Railroad through the medium of International." [225 F.Supp., at 578.](#)

[\*160] [LEdHN\[3\]\[↑\]](#) [3]HN2[↑] A criminal statute is to be construed strictly, not loosely. Such are the teachings of our cases from [United States v. Wiltberger, 5 Wheat. 76](#), down to this day. Chief Justice Marshall said in that case:

"The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." [Id. p. 95.](#) [LEdHN\[4\]\[↑\]](#) [4]HN3[↑] [\*\*\*\*7] The fact that a particular activity may be within the same general classification and policy of those covered does not necessarily bring it within the ambit of the criminal prohibition. [United States v. Weitzel, 246 U.S. 533.](#) [LEdHN\[5\]\[↑\]](#) [5]What is the reach of § 10? It is not strictly a conflict of interest statute such as we dealt with in [United States v. Mississippi Valley Co., 364 U.S. 520](#). In [Minneapolis & St. Louis R. Co. v. United States, 361 U.S. 173, 190](#), we described § 10 as "an antitrust law."

Section 10, indeed, has its roots in President Wilson's message to Congress of January 20, 1914, on the subject of "trusts," in which he denounced the abuses of "interlockings of the personnel of the directorates of great corporations." 51 Cong. Rec. 1962-1964; H. R. Rep. No. 627, 63d Cong., 2d Sess., pp. 17-18. Section 10 started as part of § 9 of the House bill and forbade certain types of interlocking office-holding. See S. Doc. No. 584, 63d Cong., 2d Sess., p. 10. The Senate made two main changes. First, it did not prohibit interlocking [\*\*\*\*8] office-holding but seized rather on competitive bidding as the control. S. Rep. No. 698, 63d Cong., 2d Sess., pp. 47-48. Second, the Senate required competitive bidding not only when a director or other officer or agent of a common carrier was also a director or other officer of any firm with which the carrier had dealings to the amount of more than [\*161] \$ 50,000 in any one year, but also when the director or other officer of a common carrier had "any direct or indirect interest in" the other firm. S. Doc. No. 584, 63d Cong., 2d Sess., p. 13. The Conference changed the phrase "any direct or indirect interest in" to the present wording "any substantial interest in." *Id.*, pp. 13-14. As Senator Chilton, one of the Conferees, reported:

". . . It not only prevents corporations which are interlocked by officers and directors, but it says: 'Or who has any substantial interest in such of them.'

"The Senator will recall all we had before us, the ease by which interlocking directorates could be gotten around; in other words, you could have your son, or your cousin, or your lawyer, or your agent upon the corporation and accomplish the same thing as if you were on the board [\*\*\*\*9] yourself. . . .

....

". . . They can not dodge it by having a supply company, and even though they have discarded the form of interlocking directors, if there be the interest of the railroad or the [\*\*\*732] common carrier in the supply company, as the Senator chooses to call it, then it is prohibited." 51 Cong. Rec. 15943.

[LEdHN\[6\]\[↑\]](#) [6][LEdHN\[7\]\[↑\]](#) [7]As we have seen, Count I charges a "transaction" to sell 10 coaches to International, and the bill of particulars suggests that it was agreed that the three individual appellees would receive "substantial monies" for their part in effecting the sale. It is earnestly urged that since those appellees stood to profit from the deal with International, they [\*\*871] had a "substantial interest in" International within the meaning of § 10. It is pointed out that the railroad scandals of that age were not limited to interlocking directorates and multiple shareholding, but that suppliers of railroad materials had made substantial gifts to the railroad officials with whom they dealt. See [In re Financial Transactions of the New York, \[\\*162\] N. H. & H. R. Co., 31 I. C. C.](#)

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32. [\*\*\*\*10]<sup>2</sup> But we are confined by the words that Congress used in § 10. If the rule of strict construction is to be followed, the words "substantial interest in," as used in § 10, presuppose either an existing investment of some kind in International, or the creation of International by the three individual appellees for their use, or a joint venture or continued course of dealings, licit or illicit, with International for profit sharing. But it is doubtful that this indictment, as illuminated by the bill of particulars, alleges anything more in substance than a bribe. [HN4](#)<sup>↑</sup> Bribery might well be in the family of offenses covered under a conflict of interest statute. But it is more remote from an antitrust frame of reference. While history shows a rather wide pattern of railroad misconduct leading to § 10, that section is a rather narrow prohibition applicable to activity that is conceptually within the antitrust philosophy. We cannot broaden it to include the present case, unless we attribute to Congress a purpose to make it a more general panacea for conflict of interest activities; but neither [\*\*\*\*11] do we take the same narrow view of the statute as the District Court.

[LEdHN\[8A\]](#)<sup>↑</sup> [8A] Since the Government may choose to file, and the District Court may choose to allow, an amended bill of particulars,<sup>3</sup> we vacate and remand the case, leaving open all questions except our construction of the statute.

[LEdHN\[8B\]](#)<sup>↑</sup> [8B]

[\*\*\*\*12] *Vacated and remanded.*

## References

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Annotation References:

Right of one corporation to acquire stock in another as affected by the antitrust acts. 74 L ed 431.

Right of accused to bill of particulars in antitrust case. 5 ALR2d 444, 468.

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<sup>2</sup>The Commission reported: "Purchases of cars and coal are two large expenditures that railroads make. The New Haven purchased cars almost exclusively from James B. Brady without competition and to the extent of some \$ 37,000,000. Mr. Brady, as a witness, made no secret of his generosity to the officials with whom he had business. His methods were justified by him on the ground that the officers of the New Haven were old friends." 31 I. C. C., at 61.

<sup>3</sup>[HN5](#)<sup>↑</sup> [Rule 7 \(f\)](#) of the Rules of Criminal Procedure provides, "A bill of particulars may be amended at any time subject to such conditions as justice requires."



## Columbia Artists Management v. United States

Supreme Court of the United States

May 24, 1965, Decided

No. 775

**Reporter**

381 U.S. 348 \*; 85 S. Ct. 1553 \*\*; 14 L. Ed. 2d 679 \*\*\*; 1965 U.S. LEXIS 2425 \*\*\*\*; 1965 Trade Cas. (CCH) P71,450

COLUMBIA ARTISTS MANAGEMENT INC. ET AL. v. UNITED STATES ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

**Disposition:** Affirmed.

### **Core Terms**

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concert, artist, decree, consent decree, resale price, modification, contract provision, Sherman Act, audience, modified, margin

**Counsel:** Seymour D. Lewis and Ralph F. Colin for appellants.

Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum and Elliott H. Moyer for the United States, and Theodore R. Kupferman for appellee Summy-Birchard, Inc.

**Judges:** Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg

**Opinion by:** PER CURIAM

### **Opinion**

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[\*\*\*679] [\*348] [\*\*1553] The motion to affirm is granted and the judgment is affirmed.

**Dissent by:** HARLAN; STEWART; GOLDBERG

### **Dissent**

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MR. JUSTICE HARLAN, MR. JUSTICE STEWART, and MR. JUSTICE GOLDBERG, dissenting.

An examination of the proceedings in this case convinces us that a summary disposition of this matter is not appropriate.

In 1955 the Government brought an antitrust action against appellant Columbia, appellant Community Concerts, Inc. (Columbia's wholly owned subsidiary), and two corporations whose successor is appellee Summy-Birchard,

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Inc.\* Columbia and Summy-Birchard manage professional concert artists, and their affiliates, Community and the Civic Concert Service division of Summy-Birchard, are "concert services," organizing [\*\*\*2] and maintaining [\*349] local nonprofit "audience associations" throughout the country which sponsor concert series. Normally an audience association pays an artist an established fee set by the artist and his manager, out of which the artist's manager retains a share and the concert service also retains a share known as the "margin." The Government's complaint charged a conspiracy to monopolize the business of managing and booking concert artists and the business of forming and maintaining audience associations.

On October 20, 1955, a consent decree was entered by the District Court for the Southern District of New York, the terms of which provide that the managing companies must make their artists available to all concert services at the same rate and that the concert services must make performers available to audience associations without reference to the management [\*\*\*3] of the artists. Paragraph VI (D) of the decree requires that each defendant make available "to any financially responsible concert service any artist managed by such defendant and reasonably available for the desired performance, at the same margin allowed to the defendant or its affiliate concert service by that artist for a performance for the same fee."

Columbia's standard contract with concert services contains a provision, which Columbia argues is required by a collective bargaining agreement among managers and the concert artists' union, prohibiting a concert service from booking an engagement at less than the artist's established fee without the consent of the artist. After Summy-Birchard protested against signing contracts containing this provision on the ground that it constituted illegal resale price maintenance, [\*\*1554] Columbia petitioned the District Court on July 18, 1963, for a construction of the 1955 consent decree, alleging in part that the decree specifically sanctioned this contract provision and thus insulated it from attack by a party to the decree. The Government and Summy-Birchard were joined as parties. The [\*350] District Court held that this [\*\*\*4] contract provision prevented competition among concert services, for it required all of them to be paid the same "margin" for each artist, and concluded that such a provision was illegal. After reargument, the District Court reaffirmed its prior opinion and stated in its final order:

"The provision in Columbia's contract . . . that each engagement before an audience association shall be performed [\*\*\*680] at the artist's established fee constitutes illegal resale price maintenance and is a *per se* violation of Section 1 of the Sherman Act ([15 U. S. C. § 1](#)). To the extent that the Final Judgment operates to allow Columbia to set such resale prices, it is illegal and void as contrary to the Sherman Act, and any continued reliance by Columbia upon such portion or portions of the Final Judgment will not be construed by the Court to be in any way valid."

Columbia appeals from this judgment claiming that it constitutes a modification of the 1955 consent decree and that the District Court is without power to modify the decree without Columbia's agreement.

I.

In our view there is substance to Columbia's contention that the District Court modified [\*\*\*5] the 1955 consent decree. As we read the District Court's opinion, that court held that the 1955 decree affirmatively sanctioned the use of the contract provision, and then went on to modify the decree, invalidating that portion of the decree which permitted Columbia to include the provision at issue in its contracts. The District Judge stated in his original opinion:

"The scheme of the concert service business conducted by Community and the Civic division of Summy-Birchard which is embodied in the decree [\*351] clearly envisions that the artist or his manager will be able to control the ultimate price paid by the 'consumer' -- audience association, impresario, or whoever assumes the risk of 'producing' a show. Were this not so, the definition of 'margin' in the decree would be meaningless. Since this court by its decree -- albeit a consent order -- has sanctioned *pro tanto* this structuring of the industry, it should not be slow to consider charges of illegality against the system."

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\* Summy-Birchard is successor to both the National Concert and Artists Corp. and its wholly owned subsidiary, Civic Concert Services, Inc.

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The District Judge suggested that Summy-Birchard's answer might be treated as a "petition for declaratory judgment" or a "petition for modification." After discussing whether or not [\*\*\*6] the contract provision constituted resale price maintenance, he concluded by stating:

"Thus, insofar as the decree-imposed requirement of margin operates to allow Columbia to set resale prices, the decree is illegal and void as contrary to the letter and policy of the Sherman Act, and this court will not construe Columbia's continued reliance upon that portion of the decree to be in any way valid."

The District Judge characterized what he had done as "invalidation of . . . part of the consent decree." The District Court's opinion on rehearing states, "The opinion of November 19 is accordingly reaffirmed," and the judgment of the District Court, set out above, states that "to the extent that the Final Judgment operates to allow Columbia to set such resale prices, it is illegal and void as contrary to the Sherman Act." In our view the language of the opinion and judgment of the District Court conclusively shows that the court modified [\*\*1555] the 1955 consent decree despite Columbia's opposition to such modification.

We believe that the modification of a previously entered consent decree under the circumstances present here raises [\*352] substantial questions of law. [\*\*\*7] This Court has held that a consent decree ordinarily may not be modified without the consent of the parties involved. In *United States v. Swift & Co., 286 U.S. 106, 119*, Mr. Justice Cardozo stated for the Court: "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." See *United States v. International Harvester Co., 274 U.S. 693*; *Ford Motor Co. v. United States, 335 U.S. 303*. While the Court has allowed modifications in consent decrees upon occasion, see *Chrysler Corp. v. United States, 316 U.S. 556*; cf. *Hughes v. United States, 342 U.S. 353*, a showing of changed circumstances is usually necessary. Whether a modification of the consent decree was proper in this case, where no changed circumstances were claimed, should not be determined by this Court summarily. Additionally, the District Court's determination that Columbia's contract provision constitutes resale price maintenance prohibited by the Sherman Act, 26 Stat. 209, raises [\*\*\*8] substantial issues of *antitrust law* which we believe also ought to be briefed and argued.

## II.

Apart from what has already been said, there is another reason why this case should not be dealt with summarily. If the District Court's action is not viewed as a modification of the decree, but rather [\*\*\*681] as a determination that the decree neither specifically sanctioned nor prohibited Columbia's contract provision, the court's judgment must be viewed as a declaratory judgment that Columbia's conduct violated the Sherman Act. In that event no appeal lies to this Court, for the Expediting Act, 32 Stat. 823, as amended, *15 U. S. C. § 29*, allows direct appeals to this Court only in civil actions "wherein the United States is complainant." If appellant is appealing from a declaratory [\*353] judgment, this case should be transferred to the Court of Appeals for the Second Circuit. If the Court is holding by its action that the case is properly here because of the fact that the 1955 action was commenced by the Government, then the case raises substantial questions as to the scope of the Expediting Act which should be resolved only after plenary consideration. [\*\*\*9] See *Shenandoah Valley Broadcasting, Inc. v. ASCAP, 375 U.S. 39*.

We would therefore "postpone jurisdiction" and set the case for argument.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.



## **Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.**

Supreme Court of the United States

April 29, 1965, Argued ; May 24, 1965, Decided

No. 291

### **Reporter**

381 U.S. 311 \*; 85 S. Ct. 1473 \*\*; 14 L. Ed. 2d 405 \*\*\*; 1965 U.S. LEXIS 2424 \*\*\*\*; 1965 Trade Cas. (CCH) P71,449

MINNESOTA MINING & MANUFACTURING CO. v. NEW JERSEY WOOD FINISHING CO.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

**Disposition:** [332 F.2d 346](#), affirmed.

## **Core Terms**

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proceedings, Insulation, decree, products, Wires, antitrust, manufacture, electrical, limitations, tolled, suits, legislative history, tolling provision, tolling statute, Clayton Act, statute of limitations, distributors, *prima facie* evidence, private litigant, anti trust law, final judgment, acquisition, conspiracy, suspend, criminal prosecution, criminal proceeding, instituted, violations, benefits, hearings

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

**[HN1](#)** [down arrow] **Antitrust & Trade Law, Clayton Act**

See [15 U.S.C.S. § 15b](#).

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

**[HN2](#)** [down arrow] **Antitrust & Trade Law, Clayton Act**

See [15 U.S.C.S. § 16\(b\)](#).

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Antitrust & Trade Law > Clayton Act > General Overview

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

See [15 U.S.C.S. § 16\(a\)](#).

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

### **HN4** [down] Antitrust & Trade Law, Clayton Act

[15 U.S.C.S. § 16\(b\)](#) is readily severable from [15 U.S.C.S. § 16\(a\)](#).

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Tolling

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

The limitation provision of [15 U.S.C.S. § 15b](#) is tolled by Federal Trade Commission proceedings to the same extent and in the same circumstances as it is by Justice Department actions.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

### **HN6** [down] Monopolies & Monopolization, Attempts to Monopolize

An attempt to monopolize may be illegal though not successful.

## **Lawyers' Edition Display**

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### **Summary**

In 1961 the plaintiff commenced an action in the United States District Court for the District of New Jersey for treble damages based on the defendant's alleged violations in 1956 of the Sherman Act and the Clayton Act. The defendant moved for dismissal of the action on the ground that it was barred by the 4-year period of limitations of 4B of the Clayton Act, but the plaintiff contended that the statute of limitations had been tolled under 5(b) of the Clayton Act because of an antitrust proceeding filed against the defendant in 1960 by the Federal Trade Commission. Section 5(b) provides that "a civil or criminal proceeding" instituted "by the United States" to prevent, restrain, or punish violations of any of the antitrust laws suspends the running of the statute of limitations during the pendency thereof and for one year thereafter with respect to a private antitrust action based on any "matter complained of" in the suit by the United States. The District Court denied the defendant's motion to dismiss, holding that the statute of limitations had been tolled and that the action was timely filed. ([216 F Supp 507](#).) The Court of Appeals for the Third Circuit affirmed. ([332 F2d 346](#).)

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On certiorari, the United States Supreme Court affirmed. In an opinion by Clark, J., expressing the views of five members of the Court, it was held that although the tolling provision of 5(b) does not expressly refer to Federal Trade Commission proceedings, the statute of limitations in 4B is tolled by Commission proceedings to the same extent and in the same circumstances as it is by Justice Department proceedings, and that since the same conduct of the defendant was involved in both the Commission's proceedings and the plaintiff's action, the plaintiff's action was based on a "matter complained of" in the Commission's proceedings, which proceedings therefore tolled the statute of limitations.

Black, J., and Goldberg, J., dissented, each in a separate opinion, on the ground that the institution of Federal Trade Commission proceedings does not toll the limitation period of 4B.

Harlan and Stewart, JJ., did not participate.

## Headnotes

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ACTIONS §223 > suspension -- antitrust proceedings -- > Headnote:

[LEdHN\[1\]](#) [1]

Under 5(b) of the Clayton Act ([15 USC 16\(b\)](#)), the tolling, by the United States' instituting a proceeding under the antitrust laws, of the statute of limitations on private antitrust actions does not depend upon whether a final judgment is entered in, or the government is successful in the prosecution of, the proceeding.

ACTIONS §223 > suspension -- antitrust proceedings -- > Headnote:

[LEdHN\[2\]](#) [2]

Whatever the applicability to Federal Trade Commission proceedings of 5(a) of the Clayton Act ([15 USC 16\(a\)](#)), dealing with the use of an antitrust judgment obtained by the government as prima facie evidence in a private antitrust action, it does not control the question whether such proceedings toll the statute of limitations on such private actions under 5(b) of the Act.

EVIDENCE §486 > 5(a) of Clayton Act -- purpose -- > Headnote:

[LEdHN\[3\]](#) [3]

The purpose of 5(a) of the Clayton Act ([15 USC 16\(a\)](#)), dealing with the use of an antitrust judgment as prima facie evidence in a subsequent action, is to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the government in antitrust actions and to permit them as large an advantage as the estoppel doctrine would afford had the government brought suit.

ACTIONS §223 > suspension -- antitrust proceedings -- > Headnote:

[LEdHN\[4\]](#) [4]

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The purpose of 5(b) of the Clayton Act ([15 USC 16\(b\)](#)), providing for the tolling, by the government's institution of antitrust proceedings, of the statute of limitations on private antitrust actions, is to assist private litigants in utilizing any benefits they might cull from government antitrust actions.

EVIDENCE §486 > ACTIONS §223 > 5(a) and 5(b) of Clayton Act -- interrelation -- > Headnote:

[LEdHN\[5\]](#) [5]

Section 5(a) of the Clayton Act ([15 USC 16\(a\)](#)), dealing with the effect of antitrust judgments obtained by the United States as *prima facie* evidence in private antitrust actions, and 5(b) of the act, providing for the tolling, by the government's institution of antitrust proceedings, of the statute of limitations on private actions, are not necessarily coextensive, and are governed by different considerations as well as congressional policy objectives.

ACTIONS §223 > suspension -- antitrust proceedings -- > Headnote:

[LEdHN\[6\]](#) [6]

Even though 5(b) of the Clayton Act ([15 USC 16\(b\)](#)), dealing with the tolling, by the government's institution of antitrust proceedings, of the statute of limitations on private antitrust actions, complements 5(a) of the act, dealing with the use of an antitrust judgment obtained by the government as *prima facie* evidence in a private antitrust action, by permitting a litigant to await the outcome of government proceedings and use any judgment rendered therein, it is not restricted to that effect.

ACTIONS §223 > 5(b) of Clayton Act -- applicability to FTC proceedings -- > Headnote:

[LEdHN\[7\]](#) [7]

Although 5(b) of the Clayton Act ([15 USC 16\(b\)](#)) provides for the tolling of the statute of limitations in the event of a "civil or criminal proceeding" instituted "by the United States," the necessity that the tolling provision also include proceedings by the Federal Trade Commission is implicit in the clearly expressed congressional objective that private parties be permitted the benefits of prior government actions, and the enjoyment of these intended benefits should not turn on the arbitrary allocation of antitrust enforcement responsibility between the Commission and the Justice Department.

STATUTES §100.5 > literal meaning -- > Headnote:

[LEdHN\[8\]](#) [8]

The literal wording of a statutory provision is not controlling where such an interpretation defeats its clearly expressed congressional purpose.

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ACTIONS §220 > tolling statute -- legislative intent -- > Headnote:

[LEdHN\[9\]](#) [9]

Whether, under a given set of facts, a statute of limitations is to be tolled, is a question of legislative intent whether the right shall be enforceable after the prescribed time; in order to determine that intent, the court must examine the purposes and policies underlying the limitation provision, the act containing it, and the remedial scheme developed for the enforcement of the rights given by the act.

ACTIONS §223 > tolling -- Clayton Act -- > Headnote:

[LEdHN\[10\]](#) [10]

Under 5(b) of the Clayton Act ([15 USC 16\(b\)](#)), providing for the tolling, by the United States' institution of antitrust proceedings, of the statute of limitations on private antitrust actions, the 4-year statute of limitations of 4B of the Act is tolled by the institution of Federal Trade Commission proceedings to the same extent and in the same circumstances as it is by Justice Department actions.

ACTIONS §223 > private antitrust action -- tolling by FTC proceedings -- > Headnote:

[LEdHN\[11\]](#) [11]

A private party's claim for treble damages under the Sherman Act is based, at least in part, on matters complained of in Federal Trade Commission proceedings against the same defendant, so that 5(b) of the Clayton Act, providing for the tolling, by the United States' institution of antitrust proceedings, of the statute of limitations on private antitrust actions, is applicable, where both suits set up substantially the same claims; that the Commission's Clayton Act proceeding required proof only of a potential anticompetitive effect while the Sherman Act carries the more onerous burden of proof of an actual restraint is immaterial, where the Commission's complaint alleged an actual as well as a potential lessening of competition and, moreover, the monopolization count was phrased in terms of an attempt to monopolize.

MONOPOLIES §9 > attempt to monopolize -- > Headnote:

[LEdHN\[12\]](#) [12]

Under the federal antitrust laws, an attempt to monopolize may be illegal though not successful.

## Syllabus

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Respondent filed this private antitrust suit in 1961, alleging violations of [§ 7](#) of the Clayton Act and [§§ 1 and 2](#) of the Sherman Act, arising out of petitioner's acquisition in 1956 of the assets of Insulation and Wires, Inc., which had been the primary distributor of electric insulation materials manufactured by respondent. Petitioner claimed that the action was barred by the four-year limitation provision of § 4B of the Clayton Act, but respondent asserted that the bar of the statute was tolled under § 5 (b) by a proceeding timely filed in 1960 against petitioner pursuant to [§ 7](#) of the Clayton Act by the Federal Trade Commission (FTC). That proceeding resulted in a consent order under which petitioner was directed to divest itself of the acquired assets. Section 5 (a) of the Clayton Act makes a final

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judgment or decree in any civil or criminal proceeding brought by or on behalf of the United States prima facie evidence in later private suits [\*\*\*\*2] as to all matters respecting which that judgment or decree would be an estoppel as between the parties. Section 5 (b) provides that a civil or criminal proceeding instituted by the United States to prevent, restrain or punish violations of the antitrust laws tolls the statute of limitations during the pendency thereof and for one year thereafter for private actions arising under those laws and based on any matter complained of in the government suit. The District Court held that the statute had been tolled by § 5 (b) and that the suit was timely filed, and the Court of Appeals affirmed. *Held:*

1. Sections 5 (a) and 5 (b) of the Clayton Act are not wholly interdependent or coextensive. Pp. 316-318.

(a) The words "final judgment or decree" are important in the application of § 5 (a), while § 5 (b), which applies to every private right of action based on any matter complained of in the government suit and is not limited to matters which would operate as an estoppel, tolls the statute of limitations regardless of whether a final judgment or decree is entered. Pp. 316-317.

(b) In § 5 (a) Congress was concerned with the narrow issue of the use of judgments or decrees as prima [\*\*\*\*3] facie evidence in private suits, whereas in § 5 (b) Congress meant to assist private litigants in obtaining all the benefits they might cull from government antitrust actions. P. 317.

2. Absent any specific legislative history on the inclusion of FTC actions within the tolling provision, the issue is resolved by reliance on the clear expression of congressional intention that private suitors be given the benefits of prior government actions, which would necessarily include FTC proceedings. The benefits of § 5 (b) should not depend on an arbitrary allocation of enforcement responsibility between the Department of Justice and the FTC. Pp. 320-322.

3. Petitioner's Sherman Act claims, arising from the asset acquisition which was the basis of the FTC proceeding, although requiring a greater burden of proof than the Clayton Act charges, clearly are based "in part on any matter complained of" in the FTC action. Pp. 322-324.

**Counsel:** Sidney P. Howell, Jr., argued the cause for petitioner. With him on the briefs were Charles C. Trelease and Edwin E. McAmis.

Albert G. Besser argued the cause and filed a brief for respondent.

Lewis C. Green and Gustav B. Margraf filed a brief for Reynolds [\*\*\*\*4] Metals Co., as amicus curiae, urging reversal.

Briefs of amici curiae, urging affirmance, were filed by Solicitor General Cox, Assistant Attorney General Orrick, Frank Goodman, Robert B. Hummel and Irwin A. Seibel for the United States, and by Alex Akerman, Jr., Thomas A. Ziebarth and Robert E. Staed for Highland Supply Corp.

**Judges:** Warren, Black, Douglas, Clark, Brennan, White, Goldberg; Harlan and Stewart did not participate in the decision of this case.

**Opinion by:** CLARK

## **Opinion**

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[\*312] [\*\*\*407] [\*\*1474] MR. JUSTICE CLARK delivered the opinion of the Court.

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This private treble-damage antitrust action was brought by the New Jersey Wood Finishing Company against Minnesota Mining and Manufacturing Company and the [\*313] Essex Wire Corporation.<sup>1</sup> Respondent's original complaint was filed on November 20, 1961.<sup>2</sup> It alleged violations [\*\*\*408] of § 7 of the Clayton Act,<sup>3</sup> a conspiracy to restrain commerce in electrical insulation products in violation of § 1 of the Sherman Act and an attempt to monopolize the same as prohibited by § 2.<sup>4</sup> The substance of the complaint concerned the acquisition in 1956 of all the assets of Insulation and Wires, Inc., a subsidiary [\*\*\*\*5] of Essex, by Minnesota Mining and an alleged conspiracy to restrain trade in electrical insulation products. The latter claimed that the suit was barred by the four-year limitation provision of the Clayton Act.<sup>5</sup> [\*\*\*7] [\*\*1475] However, New Jersey Wood asserted that the bar of the statute had been tolled by a proceeding filed in 1960 against Minnesota Mining by the Federal Trade Commission under § 7 of the Clayton Act. That action resulted in a consent order under which Minnesota Mining was directed to divest itself of the assets acquired. Section 5 (b) of the Clayton Act<sup>6</sup> provides [\*314] that a "civil or criminal proceeding . . . instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws" suspends the running of the statute of limitations during the pendency thereof and for one year thereafter with respect to private actions arising under those laws and based on any matter complained of in the government suit. The questions here are whether proceedings by the Federal Trade Commission toll the running of the § 4B statute of limitations to the same extent as do judicial proceedings and, if they do, whether the claim of New Jersey [\*\*\*6] Wood is based on "any matter complained of" in the Commission action. The District Court denied Minnesota Mining's motion to dismiss, holding that the four-year statute had been tolled by § 5 (b) and that this suit was timely filed. *216 F.Supp. 507*. The Court of Appeals affirmed. *332 F.2d 346*. We granted certiorari because of a conflict between circuits<sup>7</sup> and the importance of the question in the administration of the *Clayton Act*. 379 U.S. 877.

[\*\*\*8] I.

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<sup>1</sup> The case was considered on interlocutory appeal. *28 U. S. C. § 1292 (b) (1958 ed.)*. Essex did not appeal and is not a party here.

<sup>2</sup> During the pendency of the case in the District Court respondent filed an amended complaint. However, respondent's theories of recovery and the controlling legal questions are common to both pleadings.

<sup>3</sup> 38 Stat. 731, as amended, *15 U. S. C. § 18 (1964 ed.)*.

<sup>4</sup> 26 Stat. 209, as amended, *15 U. S. C. §§ 1, 2 (1964 ed.)*.

<sup>5</sup> Section 4B of the Clayton Act, 69 Stat. 283, *15 U. S. C. § 15b (1964 ed.)*, provides that:

**HN1** [↑] "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

<sup>6</sup> Section 5 (b), 38 Stat. 731, as amended, *15 U. S. C. § 16 (b) (1964 ed.)*, provides:

**HN2** [↑] "(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

<sup>7</sup> See *Highland Supply Corp. v. Reynolds Metals Co.*, *327 F.2d 725 (C. A. 8th Cir. 1964)*.

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New Jersey Wood is engaged in the manufacture of electrical insulation materials, some of which it sells to independent distributors who, in [\*\*\*409] turn, sell to wire and [\*315] cable manufacturers and fabricators. Minnesota Mining is a diversified company, with one of its divisions producing electrical insulation materials. Essex is a substantial consumer of electrical insulation material. It owned Insulation Wires which distributes that type of material.

In August 1956 Minnesota Mining bought all the assets of Insulation Wires and in 1960 the Federal Trade Commission filed a proceeding against it under § 7 of the Clayton Act which resulted in a consent order directing the divestiture by Minnesota Mining of the assets so acquired. This order was dated August 24, 1961. The Commission charged that prior to 1953 Minnesota Mining was the leading manufacturer of electrical insulation tape; that through five transactions in the years 1952 through 1956 it had also brought under its control substantial shares of other major electrical product lines; and that its subsequent acquisition of two of the three largest distributors of these products might have the effect of [\*\*\*9] actually or potentially lessening competition and tending to create a monopoly in various aspects of that commerce. One of the two distributors so acquired was Insulation Wires.

Thereafter, within a year, this suit was filed. We need not detail the allegations [\*\*1476] of the complaint. It is sufficient to say that the gist of it was that prior to August 1956 Insulation Wires was the primary distributor of New Jersey Wood products throughout the United States; that in August 1956 Minnesota Mining acquired all of the assets of Insulation Wires and during the next month notified New Jersey Wood that beginning in January 1957 Insulation Wires would no longer distribute its products. The complaint also charged Minnesota Mining and Essex with conspiring to restrain trade and commerce in the manufacture, sale and distribution of electrical insulation products beginning with the acquisition of Insulation [\*316] Wires and continuing until the filing of this suit. There were numerous overt acts alleged as being in furtherance of the conspiracy, the first of which was that acquisition.

## II.

LEdHN[1] [1] At the [\*\*\*10] outset it is necessary to examine § 5 (a) of the Clayton Act<sup>8</sup> and its relationship to § 5 (b). The former makes a final judgment or decree in any civil or criminal proceeding brought by or on behalf of the United States prima facie evidence in subsequent private suits "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto." Several distinctions between these sections are apparent and suggest that they are not wholly interdependent. First, the [\*\*\*410] words "final judgment or decree" are used in § 5 (a) and are of crucial significance in its application. However, § 5 (b) tolls the statute of limitations set out in § 4B from the time suit is instituted by the United States regardless of whether a final judgment or decree is ultimately entered. Its applicability in no way turns on the success of the Government in prosecuting its case. Moreover, under § 5 (a) the judgment or decree may be used only as to matters respecting which it would operate as an estoppel between the parties. No such limitation appears [\*317] in the tolling provision. It applies to every private right of action based in whole or in part [\*\*\*11] on "any matter" complained of in the government suit.

LEdHN[2] [2] [\*\*\*12] LEdHN[3] [3] LEdHN[4] [4] When we turn from the express language of these two statutory provisions to the congressional policies underlying them, it becomes even more apparent that the applicability of § 5 (a) to Federal Trade Commission actions should not control the question whether such proceedings toll the statute of limitations. We have discussed these policies at greater length below. At this juncture it is sufficient to say that in framing § 5 (a) Congress focused on the narrow issue of the use by private parties of judgments or decrees as prima facie evidence. This was recognized in *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951), where we stated that the purpose of § 5 (a) was "to minimize the burdens of

<sup>8</sup> Section 5 (a), 38 Stat. 731, as amended, 15 U. S. C. § 16 (a) (1964 ed.), provides:

HN3 [1] "(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title."

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litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions" and to permit them "as large an advantage as the estoppel doctrine would afford had the Government brought suit." *Id., at 568*. As we shall show, however, [\*\*\*\*13] its purpose in adopting § 5 (b) was not so limited, for it was not then dealing [\*\*1477] with the delicate area in which a judgment secured in an action between two parties may be used by a third. Whatever ambiguities may exist in the legislative history of these provisions as to other questions, it is plain that in § 5 (b) Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions. See S. Rep. No. 619, 84th Cong., 1st Sess., 6. The distinction was emphasized in *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (1962), where the court, after noting the analysis of § 5 (a) set out in *Emich Motors Corp.*, *supra*, stated that:

"The corollary purpose of the tolling provisions of the second paragraph of Section 5 [now § 5 (b)] is [\*318] to vouchsafe the intended benefits of related government proceedings by suspending the running of the statute of limitations until the termination of the government proceedings, and allowing the private suitor one year thereafter in which to prepare and file his suit. The competency of a government judgment in a private suit is necessarily [\*\*\*\*14] restricted to the requirements of due process. But the tolling of the statute during the pendency of the government litigation is not so limited." *Id., at 569*.

**LEdHN[5]** [5]In our view, therefore, the two sections are not necessarily coextensive; they are governed by different considerations as well as congressional policy objectives. This makes § 5 (b) **HN4** readily severable from § 5 (a). Even if we assumed *arguendo* that § 5 (a) is inapplicable to Commission proceedings -- a question [\*\*\*411] upon which we venture no opinion -- that conclusion would be immaterial in our consideration of § 5 (b) and § 4B. Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws. This construction will lend considerable impetus to that policy.

### III.

Section 5, later §§ 5 (a) and 5 (b), was passed in response to the plea of President Wilson. In a speech to the Congress on January 20, 1914, he urged that a law be enacted which [\*\*\*\*15] would permit victims of antitrust violations to have "redress upon the facts and judgments proved and entered in suits by the Government" and that "the statute of limitations . . . be suffered to run against such litigants only from the date of the conclusion of the Government's action." 51 Cong. Rec. 1964. The broad aim of this enactment was to use "private self-interest as a means of enforcement" of the antitrust laws. *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751 (**f<sup>319</sup>**) (1947). The "entire provision [was] intended to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws." H. R. Rep. No. 627, 63d Cong., 2d Sess., 14. See S. Rep. No. 619, *supra*, at 6.

**LEdHN[6]** [6]It may be, as Minnesota Mining contends, that when it was enacted the tolling provision was a logical backstop for the *prima facie* evidence clause of § 5 (a). But even though § 5 (b) complements § 5 (a) in this respect by permitting a litigant to await the outcome of government proceedings and use any judgment or decree [\*\*\*\*16] rendered therein -- a benefit which often is of limited practical value<sup>9</sup> -- it is certainly not restricted to that effect. As we have pointed out, the textual distinctions as well as the policy basis of § 5 (b) indicate that it was to serve a more comprehensive function in the congressional scheme of things. The Government's initial action may aid the private litigant in a number of other [\*\*1478] ways. The pleadings, transcripts of testimony, exhibits and documents are available to him in most instances. In fact, the rules of the Commission so provide. 16 CFR § 1.132 (e). See generally 16 CFR § 1.131 *et seq.* Moreover, difficult questions of law may be tested and definitively resolved before the private litigant enters the fray. The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed, so useful is this service that government proceedings are recognized as a major

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<sup>9</sup> See *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954).

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source of evidence for private parties. See Bicks, The Department of Justice and Private Treble Damage Actions, 4 Antitrust Bull. 5 (1959); [\*\*\*17] Loewinger, Handling a Plaintiff's Antitrust Damage Suit, 4 Antitrust Bull. 29 (1959).

[\*320] Admittedly, there is little in the legislative history to suggest that Congress consciously intended to include Commission actions within the sweep of the tolling provision. But neither is there any substantial evidence that it consciously intended to exclude them. The fact of the matter is that the record of the 1914 legislative proceedings reveals an almost complete absence of any discussion on the tolling problem. It seems that Congress simply did [\*\*\*412] not consider the extent of its coverage in the course of its deliberations.

LEdHN[7] [7]It is in light of this legislative silence that we must determine whether § 4B is tolled by Commission proceedings. In resolving this question we must necessarily rely on [\*\*\*18] the one element of congressional intention which is plain on the record -- the clearly expressed desire that private parties be permitted the benefits of prior government actions. Implicit in such an objective is the necessity that the tolling provision include Commission proceedings. Otherwise the benefits flowing from a major segment of the Government's enforcement effort would, in many cases, be denied to private parties. In this connection, and of crucial significance, is the fact that the potential advantages available to such litigants because of § 5 (b) reach far beyond the specific and limited benefits accruing to them under § 5 (a). Furthermore, the § 5 (b) advantages flow as naturally from Commission proceedings as they do from Justice Department actions. Yet petitioner contends that § 4B must be tolled in the latter but not in the former. Such a grudging interpretation of the interrelationship of § 5 (b) and § 4B, however, would collide head-on with Congress' basic policy objectives. Acceptance of petitioner's position would make enjoyment of these intended benefits turn on the arbitrary allocation of enforcement responsibility between the Department and the [\*\*\*19] Commission, and we must therefore reject it.

[\*321] LEdHN[8] [8] LEdHN[9] [9]It is true that the precise language of § 5 (b) does not clearly encompass Commission proceedings. But it is not the literal wording of such a provision that is controlling where, as here, Congress has evidenced neither acceptance nor rejection of either interpretation, yet one effects a clearly expressed congressional purpose while the other defeats it. We stated the pivotal question for determination in such an event only this Term in *Burnett v. New York Central R. Co.*, 380 U.S. 424, 427 (1965): "Whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." In order to determine that intent, we must examine "the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act." *Ibid.* Guided by these criteria, we think it clear that congressional policy sustaining § 5 (b) would be effectively served [\*\*\*20] only by tolling the statute of limitations in cases such as this, and we deem that policy controlling. This analysis is not a novel one. Mr. Justice Holmes, sitting on circuit, noted in *Johnson v. United States*, 163 F. 30, 32:

[\*\*1479] "A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."

[\*\*\*413] LEdHN[10] [10]We hold, therefore, that HN5 [5] the limitation provision of § 4B is tolled by Commission [\*\*\*21] proceedings to the same extent [\*322] and in the same circumstances as it is by Justice Department actions. In so holding we give effect to Congress' basic policy objectives in enacting § 5 (b) -- objectives which would be frustrated should we reach a contrary conclusion and thereby deprive large numbers of private litigants of the benefits of government antitrust suits simply because those suits were pursued by one governmental agency rather than the other.

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LEdHN[11] [11] Minnesota Mining further contends that even though § 5 (b) tolls Commission proceedings, the suit here, insofar as it asserts Sherman Act claims, is not based in part on any matter complained of in the Commission's proceeding. We cannot agree.

New Jersey Wood's Sherman Act claims rest on an alleged conspiracy to restrain and attempt to monopolize trade and commerce in the manufacture, sale and distribution of electrical insulation products. The purposes of the conspiracy were alleged to be: (1) to control Insulation Wires; (2) to prevent it from distributing New Jersey Wood products; (3) to insure that Insulation Wires' supplies [\*\*\*\*22] were purchased from a Minnesota Mining subsidiary; (4) to effect tie-in sales of electrical insulation products with other Minnesota Mining products; and (5) to have Essex deal only with Insulation Wires in purchasing electrical insulation products to the exclusion of competitive distributors handling New Jersey Wood products. The effect of the conspiracy was alleged to be the complete disruption of the pattern of manufacture, sale and distribution that New Jersey Wood had enjoyed with Insulation Wires and denial to it of access to substantial national markets for electrical insulation products.

LEdHN[12] [12] Certainly the allegations are based "in part" on the Commission action. It charged that the Insulation Wires acquisition, along with that of another distributor, placed [\*323] in the hands of Minnesota Mining, a manufacturer, two of the three largest distributors in the business; that following the acquisitions these distributors discontinued distribution of the products of a number of manufacturers who had used them prior to their acquisition by Minnesota Mining; and that the effect of such action by [\*\*\*\*23] Minnesota Mining was "the actual or potential lessening of competition" in the manufacture, sale and distribution of insulation products and the foreclosure of other manufacturers from a substantial share of the markets for said products. It appears to us that both suits set up substantially the same claims. It is true that the Commission's Clayton Act proceeding required proof only of a potential anticompetitive effect while the Sherman Act carries the more onerous burden of proof of an actual restraint. The Commission complaint, however, did allege an "actual" as well as a "potential" lessening of competition, *i. e.*, manufacturers "have been foreclosed from a substantial share of the markets." Moreover, [\*\*1480] the monopolization count was phrased in terms of HN6 [1] an "attempt to monopolize," which may be illegal though not successful. See United States v. Columbia Steel Co., 334 U.S. 495, 525, 531-532 (1948).

[\*\*\*414] Minnesota Mining's claim seems to be that the crucial difference between the Commission and the New Jersey Wood proceedings is that the former [\*\*\*\*24] alleges conduct that *may* substantially lessen competition while the latter asserts activity that has *actually* done so. We think that this is a distinction without a difference and does not deprive New Jersey Wood of the tolling effect of § 5 (b). That clause provides for tolling as long as the private claim is based "in part on any matter complained of" in the government proceedings. The fact that New Jersey Wood claims that the same conduct has a greater anticompetitive effect does not make the conduct challenged any less a matter complained of in the government action. [\*324] It merely requires it to meet a greater burden of proof as to the effect of the conspiracy before a Sherman Act claim can be sustained.

*Affirmed.*

MR. JUSTICE HARLAN and MR. JUSTICE STEWART did not participate in the decision of this case.

**Dissent by:** BLACK; GOLDBERG

## Dissent

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MR. JUSTICE BLACK, dissenting.

Section 4B of the Clayton Act bars a private antitrust damage suit unless brought within four years after the cause of action arises.<sup>1</sup> Section 5 (b) of the Act, as amended, 15 U. S. C. § 16 (b) (1964 ed.), however, suspends the

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<sup>1</sup> Section 4B of the Clayton Act, 69 Stat. 283, 15 U. S. C. § 15b (1964 ed.), provides that:

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running of this limitation period "whenever [\*\*\*25] any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws. . . ." I am unable to agree with the Court's holding that a purely administrative proceeding initiated by the Federal Trade Commission and decided by that same regulatory agency is the kind of "civil or criminal proceeding . . . instituted by the United States . . ." which tolls the statute of limitations under § 5 (b). The Court itself concedes that even as amended "the precise language of § 5 (b) does not clearly encompass Commission proceedings" and that "there is little in the legislative history to suggest that Congress consciously intended to include Commission actions within the sweep of the tolling provision." And the Solicitor General, while urging as *amicus curiae* the result the Court reaches today, candidly admits that this "result is difficult and perhaps impossible to justify in terms of conventional analysis of the text and legislative history . . . ." It is [\*325] because I think both the language of the statute and the legislative history persuasively, if not conclusively, show that Congress did not intend the construction [\*\*\*26] the Court gives § 5 (b) today, that I am unable to agree with its decision.

The whole of § 5, now divided into subdivisions (a) and (b), was passed in response to President Wilson's 1914 plea to Congress to enact a law designed to make it easier for antitrust victims to collect damages through private lawsuits since preparing an antitrust case against a major corporate defendant was a larger task than most injured persons could undertake. To accomplish [\*\*\*415] that single purpose he recommended to Congress, as the Court notes, two things -- that these victims be permitted to seek "redress upon the facts and judgments proved and entered in suits by the Government" and [\*\*1481] also that "the statute of limitations [\*\*\*27] . . . be suffered to run against such litigants only from the date of the conclusion of the Government's action." 51 Cong. Rec. 1964. Congress accepted the President's recommendation and passed § 5, a single section in two paragraphs, making "a final judgment or decree . . . rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States . . . prima facie evidence" against a civil antitrust defendant and tolling the statute of limitations during the pendency of "any suit or proceeding in equity or criminal prosecution . . . instituted by the United States . . ." This language of § 5 as it passed the Congress in 1914 clearly did not refer to administrative proceedings but to antitrust suits or criminal prosecutions instituted by the Government in civil or criminal courts. Moreover, the purpose and effect of the two parts of this provision were obviously complementary, permitting the injured party to utilize a final judgment obtained by the Government and also providing a means whereby the injured party could await the result of the government action [\*326] confident that his suit would not be barred by the statute [\*\*\*28] of limitations. In the words of one of the committee reports, the "*entire provision* is intended to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws." H. R. Rep. No. 627, 63d Cong., 2d Sess., 14. (Emphasis supplied.) See S. Rep. No. 698, 63d Cong., 2d Sess., 45. Therefore, both the language and the complementary nature of the two paragraphs of § 5 ought to show beyond any doubt that the whole section as passed was intended to apply to the same kind of proceeding in the same kind of tribunal -- that is a proceeding brought in a civil or criminal court, the only tribunal which in common understanding has power to render the kind of "final judgment or decree" mentioned in § 5 (a).<sup>2</sup> Furthermore, since the two paragraphs of § 5 when offered and when passed were regarded as an entity because of their identical language and purpose, it is not surprising that the Senators and Congressmen addressing themselves to § 5 did not specifically direct their remarks to the tolling provision as distinct from the effect to be given a court judgment or decree. Those discussing the measure naturally treated [\*\*\*29] the "suit or proceeding in equity" or "criminal prosecution" set out in both paragraphs in identical terms as referring to the same kind of proceeding in the same kind of tribunal, namely a court. It is true that the language was changed in 1955 from "suit or proceeding in equity" and "criminal [\*327] prosecution" to "civil [\*\*\*416] or criminal proceeding," the present language, but the legislative history of the 1955 amendment affirmatively shows that there was no intention to affect

"Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued."

<sup>2</sup> And of course, it is not at all clear that this is a suit "instituted by the United States." The Department of Justice brings suits and criminal prosecutions in the name of the United States, while an independent regulatory agency sues and is sued in its own name. And the United States does not initiate the proceedings before an administrative agency. Here for example the Federal Trade Commission filed the proceeding against petitioner. However, because of the view I take of the other language in the section, I find it unnecessary to decide this question.

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in any way the kind of court proceedings necessary to suspend the statute of limitations. Thus, I am unable to go along with the Court in construing the tolling provision of § 5 (b) as though it applies to both court and Trade Commission proceedings while treating § 5 (a) as though it may apply to court proceedings only. Such a holding would, in my judgment, run counter to the whole legislative history of the 1914 Act.

[\*\*\*\*30] I am setting out as an Appendix some of the legislative history of the original Act and of the 1955 amendment, which [\*\*1482] points out specifically something which does not surprise me at all: that while Congress was ready to make the *final judgment of a court* prima facie evidence against a defendant, it was at the same time entirely unwilling to give such effect to *administrative hearings and orders* and was also unwilling to toll the statute of limitations during the pendency of such proceedings. It is true that many administrative agencies now conduct hearings, make findings, and issue orders in a way more or less comparable to courts. I doubt, however, that the time has even yet come when Congress would be willing to compel judges and juries to treat administrative orders as *prima facie proof of a violation of law*, either civil or criminal, or to treat those proceedings as though they were conducted in a court of law with all the protections there afforded litigants.

I would reverse this judgment.

#### APPENDIX TO OPINION OF MR. JUSTICE BLACK, DISSENTING.

##### THE 1914 ACT.

Herewith for illustration are statements made about § 5 of the 1914 Clayton Act by Senators and [\*\*\*\*31] Congressmen [\*328] particularly interested in § 5, all of whom took part in the preparation and sponsorship of the 1914 bill or the discussions that took place as it went through the House and Senate.

Senator Walsh, the spokesman for the Judiciary Committee, led the fight for the House version of § 5 and defended it on the ground that the defendant "has had an opportunity to try out before a court, with all the forms of the law, every question involved in the *lawsuit*. . . ." 51 Cong. Rec. 13851. (Emphasis added.) And Senator Walsh later added that "Here the party has had his day in *court*. He has tried every issue, and it is simply a question, now that he has had it tried, whether he may insist upon a second *trial*." 51 Cong. Rec. 13857. (Emphasis added.) Opponents of the "conclusive evidence" proposal of the House bill never challenged the premise, implicit in the remarks of Senator Walsh and others, that only judgments rendered in judicial proceedings were contemplated by § 5. Not once did any member of Congress suggest that under the House version, administrative findings based upon evidence which would not be admissible in a court should be conclusive of [\*\*\*\*32] the defendant's liability in a later treble-damage action.

Senator Walsh, in arguing that his proposal would not violate the Constitution, again emphasized that § 5 did not apply to administrative orders, but only to judgments or decrees of the courts:

[\*\*\*417] "I want to say just a word with reference to the authorities to which the attention of the Senate has been invited . . . . Nobody questions them. They all lay down the rule that in an action brought against an individual who has never theretofore had his *day in court* you can not make a certificate or a recital or an order of an administrative board or anything of that kind conclusive evidence against him." 51 Cong. Rec. 13856-13857. (Emphasis added.)

[\*329] On the other hand, there were Senators who thought a judgment or decree for a defendant should be equally binding on a treble-damage plaintiff. In opposing this idea, Senator White argued:

"Then, Mr. President, as has been said, it is burdensome enough to require parties to the litigation themselves to be bound by the findings of a *court* or *jury* in a particular case. So many things that we can not at the time possibly foresee influence such [\*\*\*\*33] decisions. The way in which the evidence is produced may have its effect upon a *jury* or a *court*.

"The manner in which the case is handled by the lawyers employed may determine in the mind of a *jury* or a *court* what the *verdict* or the *judgment* shall be, and yet, Mr. President, those things should probably [\*\*1483] not have been controlling influences in the conclusions reached." 51 Cong. Rec. 13900. (Emphasis added.)

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And Senator Cummins said: "But when the suit is brought, then the judgment or decree of the *court* in the *suit* that has been brought by the Government would be *prima facie* evidence of violation of the *antitrust law* . . ." 51 Cong. Rec. 13850. (Emphasis added.)

When the bill left the conference committee and went back to the House, the managers were called on to defend the changes against charges that elimination of the criminal penalties had emasculated the bill. Chairman Webb of the House Judiciary Committee attempted to describe the proposed enforcement procedures in the strongest possible light. After reading the provision vesting enforcement responsibility in the Trade Commission, he stated:

"Now, the value of these two [\*\*\*\*34] sections is this: That they not only give the individual the right to sue for treble damages where he pleases, and we not only [\*330] suspend the statute of limitations against an individual if a *Government* suit is brought against a trust, but we also require the *Federal Trade Commission* to stop these practices and take those guilty of such practices into court.

"But that is not all. Some argue that after the Trade Commission takes jurisdiction that excludes individuals from pursuing these other remedies. The bill further provides:

"No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust acts.'

"So you have three or four distinct remedies, all of which may be invoked at the same time." 51 Cong. Rec. 16274. (Emphasis added.)

It is clear therefore that Chairman Webb distinguished between [\*\*\*418] suits by the "Government" -- the suits to which the tolling provision applied -- and proceedings of the Federal Trade Commission. He believed that the statute was suspended only when actions were brought under the direction of the Attorney General. [\*\*\*\*35] This was confirmed a few moments later by the following exchange:

"Mr. HARDY. Under the bill does the Government have the authority to bring suit for injunction as well as private parties?

"Mr. WEBB. Yes. Section 15 gives the district attorneys under the direction of the Attorney General the right to apply for an injunction." 51 Cong. Rec. 16276.

The day following Chairman Webb's remarks Representative Floyd, another of the House managers, again attempted to persuade the House that the enforcement scheme contemplated by the bill was strong:

"That is not all. Under section 5 of the bill any private litigant injured by the unlawful acts of any [\*331] corporation where the *Government of the United States* has proceeded against such corporation and obtained a judgment, either in a *court of law or equity*, is allowed the use of that judgment or decree to show the unlawful acts of the combination to the full extent that it would be an estoppel between the Government and the original offender. . . . That is a new remedy and a most efficient remedy. The *Government of the United States*, acting in behalf of all of its citizens, prosecutes a trust, convicts it either [\*\*\*\*36] in a *criminal court or a civil court*, and the private litigant, injured by the unlawful acts of such trust, has nothing to do in [\*\*1484] order to recover the three-fold damages except to prove the amount of damages and that the injury was done by this trust or corporation. . . .

....

"But that is not all. There are several other remedies provided in this bill. Under section 11 the violation of sections 2, 3, 7, and 8 may be enforced, respectively, by the *Trade Commission*, by the Interstate Commerce Commission, or by the Federal Reserve Board." 51 Cong. Rec. 16319. (Emphasis added.)

Another relevant discussion in the House is the following:

"Mr. MCKENZIE: If this section is left in the bill, do you not feel and believe that this decree that is mentioned in this section should be the decree of the court of last resort -- the Supreme Court of the land?"

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"Mr. VOLSTEAD. No.

....

"Mr. McKENZIE. You think it would be good policy to leave a matter of such great importance in the hands of an inferior court?

"Mr. VOLSTEAD. Yes." 51 Cong. Rec. 9079.

[\*332] As originally presented to the House, § 5 also made a "judgment or decree" rendered in a "suit or [\*\*\*\*37] proceeding in equity brought by or on behalf of the United States" conclusive against any prospective treble-damage plaintiff. Opponents of this clause vigorously challenged the constitutionality of binding a party who had never had his "day in court." The debates made it clear time and again that the proceeding contemplated was an action brought for the United States by [\*\*\*419] the Attorney General, not an administrative proceeding:

"Mr. SISSON. . . . Does the gentleman believe that his rights in the court should be determined upon the questions raised by the Attorney General of the United States?

"Mr. PROUTY. Why, certainly not; the Constitution expressly prohibits it. In other words, the Attorney General could go in and prevent my having a trial before a jury.

"Mr. SISSON. That is the point I had in mind.

"Mr. PROUTY. By instituting a proceeding in equity and having the case tried.

"Mr. SISSON. That is the point I had in mind, that the Attorney General, if he was disposed to do so -- we would not charge that of any particular Attorney General -- might cook up a case which would directly defeat the rights of every individual if he had been injured." 51 Cong. Rec. [\*\*\*\*38] 9492.

Defenders of the proposition, on the other hand, stated:

"Mr. CULLOP. My question is this: Supposing a collusive suit was brought and the defendant won on the issue, then is every outsider barred from any further suit? According to this language he is.

"Mr. FLOYD of Arkansas . . . .

". . . My answer to that proposition is that if the time ever comes in this Government when any Attorney [\*333] General will enter into collusive suits with corporations and combinations engaged in unlawful acts, it will be an evil day for our Republic, a day when every statute will become useless and justice will become a mockery." 51 Cong. Rec. 9489.

Furthermore, an amendment was in fact offered to the Senate which arguably would have resulted in bringing administrative proceedings within the scope of the phrase "suit or proceeding." The [\*\*1485] amendment met with opposition and was withdrawn. The House bill originally dealt only with a "suit or proceeding in equity," and did not apply to criminal proceedings. After the bill reached the Senate, Senator Bryan moved to strike out the words "in equity," so the provision would read simply "any suit or proceeding." As observed [\*\*\*\*39] by Senator Reed, "That would cover any kind of proceeding." Senator Culberson proposed a substitute adding the phrase "criminal prosecution or," and retaining the phrase "in equity." Senator Bryan withdrew his broader proposal and accepted Senator Culberson's limited substitute. 51 Cong. Rec. 13897-13898.

The House initially passed the Act with four substantive sections, each having a criminal penalty attached. All of the criminal penalties were removed in the Senate or in conference. Senator Reed of Missouri, leading the opposition to the bill, charged repeatedly that the Clayton Act had been stripped of all force and effectiveness:

"We end by providing a smooth and easy road which may be traveled through the years, until finally a *commission* shall issue an innocuous, nonenforceable decree, a decree that can be vitalized only by being affirmed by a court. At

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the conclusion of all the litigation we propose to impose no penalty, levy no fine, send no one to jail, and we permit the culprit to preserve his swag!" 51 Cong. Rec. 15867. (Emphasis added.)

[\*334] [\*\*\*420] Had the proponents of the measure contemplated the use of administrative findings as evidence [\*\*\*\*40] it appears that the obvious answer to Senator Reed would have been that the bill does have teeth for the Commission's order would be admissible as *prima facie* evidence against the "culprit," and private claimants would be able to reclaim "his swag," three times over. Neither this, nor any other answer challenging the accuracy of Senator Reed's statement, was heard on the Senate floor, although his complaint was repeatedly made. And in the House, Representative Nelson charged:

"Finally, the penalty is cut out; they can do all these things, and the Trade Commission can only say, 'You must not do it any more.' Then there is the long delay in an appeal to the courts; and they go through the courts. And then what? There may be an injunction issued, but they have got away with the loot with impunity." 51 Cong. Rec. 16325.

For further examples see 51 Cong. Rec. 9079, 9169, 9488-9490, 9492, 9494-9495, 12789-12790, 13850-13851, 13856-13857, 13897-13898, 13900, 14262, 14328, 15867, 15948, 15950, 16003, 16044, 16046, 16149, 16154, 16274, 16281, 16319, 16325.

#### THE 1955 AMENDMENT.

The committee reports on the amendment detailed carefully every change the bill would make, but there [\*\*\*\*41] is absolutely no evidence that there was any intent to amend § 5 (b) for the purpose of suspending the statute of limitations during the pendency of Federal Trade Commission hearings. See H. R. Rep. No. 422, 84th Cong., 1st Sess.; S. Rep. No. 619, 84th Cong., 1st Sess. And the debates and the hearings affirmatively show that no change was intended. For example, in the 1951 hearings Representative Patman appeared before the House subcommittee considering the bill and questioned whether § 5 had been changed to deny the right of a private [\*335] litigant to use a judgment obtained by the Government. Representative Wilson assured him that: "This doesn't change the present law." Representative Keating, the author of the bill, then commented: "I think there [\*\*1486] is a slight change in existing law where it refers to the subsequent numbers. There has to be a change in phraseology in that because of what we have done in section 4. I believe that is the only change." Hearings on H. R. 3408 before the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, 82d Cong., 1st Sess., Part 3, 98-100. And on the floor of the House in the discussion of the [\*\*\*42] bill which became the present law, Representative Quigley stated:

"It was the specific purpose of the committee in reporting this bill to in no way affect the substantive rights of individual litigants. It is simply a procedural change and suggested with the thought of setting up a uniform statute of limitations. That is the sole purpose." 101 Cong. Rec. 5131.

MR. JUSTICE GOLDBERG, dissenting.

With all deference, I dissent. I agree with the Court, *ante*, at 321, that, as we recently stated in *Burnett v. New York Central R. Co.*, 380 U.S. 424, 427, the pivotal question for determination is "whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." I cannot agree, however, that the Court has [\*\*\*421] correctly applied that test in this case. As my Brother BLACK has so well demonstrated in his dissenting opinion, both the language and legislative history of the statutes before us clearly show that Congress did not intend that the statute of limitations applicable to private antitrust actions be tolled by the institution of a Federal Trade Commission administrative proceeding. Cf. *United States v. Welden*, 377 U.S. 95. [\*\*\*\*43] It frustrates rather than effectuates congressional purpose to fail to honor the express intent of Congress in this given circumstance.

## References

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Annotation References:

Actions for threefold damages under Federal anti-trust act. 53 L ed 826.

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Who may be regarded as injured in his business or property within provisions of anti-trust acts as to person who may recover damages resulting from violation of the acts. 139 ALR 1017.

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## FTC v. Borden Co.

Supreme Court of the United States

January 19, 1966, Argued ; March 23, 1966, Decided

No. 106

**Reporter**

383 U.S. 637 \*; 86 S. Ct. 1092 \*\*; 16 L. Ed. 2d 153 \*\*\*; 1966 U.S. LEXIS 2909 \*\*\*\*; 1966 Trade Cas. (CCH) P71,716

FEDERAL TRADE COMMISSION v. BORDEN CO.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

**Disposition:** [339 F.2d 133](#), reversed and remanded.

### **Core Terms**

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brand, label, grade, premium, products, milk, customers, consumer, Robinson-Patman Act, differential, seller, chemical, advertised, retail, cases, competitor, purchasers, prices, price discrimination, tires, high prices, discriminatory, marketplace, preferences, selling

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Robinson-Patman Act > Claims

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

#### **[HN1](#)[] Robinson-Patman Act, Claims**

See Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, [15 U.S.C.S. § 13\(a\)](#).

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

Antitrust & Trade Law > ... > Private Actions > Standing > Robinson-Patman Act

#### **[HN2](#)[] Antitrust & Trade Law, Robinson-Patman Act**

Labels do not differentiate products for the purpose of determining grade or quality, even though the one label may have more customer appeal and command a higher price in the marketplace from a substantial segment of the public.

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Antitrust & Trade Law > Clayton Act > Defenses

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Exemptions & Immunities > Robinson-Patman Act Exemptions

Antitrust & Trade Law > Robinson-Patman Act > Defenses

## HN3 [] Clayton Act, Defenses

Subject to specified exceptions and defenses, § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, [15 U.S.C.S. § 13\(a\)](#), proscribes unequal treatment of different customers in comparable transactions, but only if there is the requisite effect upon competition, actual or potential. But if the transactions are deemed to involve goods of disparate grade or quality, the section has no application at all and the Federal Trade Commission never reaches either the issue of discrimination or that of anticompetitive impact. The court doubts that Congress intended to foreclose these inquiries in situations where a single seller markets the identical product under several different brands, whether his own, his customers' or both. Such transactions are too laden with potential discrimination and adverse competitive effect to be excluded from the reach of § 2 (a) by permitting a difference in grade to be established by the label alone or by the label and its consumer appeal.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

**HN4** [ ] Robinson-Patman Act, Claims

If two products, physically identical but differently branded, are to be deemed of different grade because the seller regularly and successfully markets some quantity of both at different prices, the seller could, as far as § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, [15 U.S.C.S. § 13\(a\)](#), is concerned, make either product available to some customers and deny it to others, however discriminatory this might be and however damaging to competition.

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

 Antitrust & Trade Law, Robinson-Patman Act

The economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory "like grade and quality' test."

# Lawyers' Edition Display

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## Summary

The respondent, a producer of evaporated milk sold under its name as a nationally advertised brand, also marketed evaporated milk under various private brands owned by its customers. Although this milk was physically and chemically identical with the milk distributed under respondent's own brand, it was sold at prices regularly below those obtained for the brand milk. The Federal Trade Commission found that the milk sold as respondent's own brand and that sold under private brands was of "like grade and quality" as required for the applicability of 2(a) of the Clayton Act as amended by the Robinson-Patman Act, held the price differential to be discriminatory, and issued a cease and desist order. The Court of Appeals for the Fifth Circuit set aside the order on the sole ground that, as a matter of law, the customer label milk was not of the same grade and quality as the milk sold under respondent's brand. ([339 F2d 133](#).)

On certiorari, the Supreme Court of the United States reversed the decision of the Court of Appeals and remanded the case to that court for determination of the remaining issues. In an opinion by White, J., expressing the view of seven members of the Court, it was held that labels do not differentiate products for the purpose of determining grade or quality, even though the one label may have more customer appeal and command a higher price in the marketplace from a substantial segment of the public.

Stewart, J., joined by Harlan, J., dissented on the ground that mere physical or chemical identity between premium and private label brands is, without more, not a sufficient basis for a finding of "like grade and quality" within the meaning of the statute.

## Headnotes

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MONOPOLIES §36 > price discrimination -- premium and private label brands -- > Headnote:

[LEdHN\[1\]](#) [1]

A producer's commodities are of "like grade and quality" within the meaning of 2(a) of the Clayton Act as amended by the Robinson-Patman Act ( [15 USC 13\(a\)](#)), prohibiting price discrimination between different purchasers of commodities "of like grade and quality," where the physical and chemical properties of the products are the same, even though some of them are marketed under the producer's name as a nationally advertised brand and the others under various private brands owned by its customers.

MONOPOLIES §36 > price discrimination -- labels -- > Headnote:

[LEdHN\[2\]](#) [2]

Under 2(a) of the Clayton Act as amended by the Robinson-Patman Act ( [15 USC 13\(a\)](#)), prohibiting price discrimination between different purchasers of commodities "of like grade and quality," labels do not differentiate products for the purpose of determining grade or quality, even though the one label may have more customer appeal and command a higher price in the marketplace from a substantial segment of the public.

STATUTES §158.8 > administrative construction -- > Headnote:

[LEdHN\[3\]](#) [3]

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Views of the Federal Trade Commission as to construction of the provisions against price discrimination of 2 of the Clayton Act both before and after its amendment by the Robinson-Patman Act ([15 USC 13\(a\)](#)) are entitled to respect.

MONOPOLIES §36 > price discrimination -- advertising expenses -- > Headnote:

[LEdHN\[4\]](#) [4]

That a producer spends more advertising money upon commodities marketed as a nationally advertised brand than upon commodities of like grade and quality marketed at a lower price under private brands is relevant only as to the defenses against price discrimination which is based on cost justification or otherwise permitted under the proviso of 2(a) of the Clayton Act as amended by the Robinson-Patman Act ([15 USC 13\(a\)](#)).

MONOPOLIES §36 > price discrimination -- advertising as factor -- > Headnote:

[LEdHN\[5\]](#) [5]

The economic factors inherent in brand names and national advertising should not be considered in an inquiry under the "like grade and quality" test of 2(a) of the Clayton Act as amended by the Robinson-Patman Act ([15 USC 13\(a\)](#)), which prohibits price discrimination between different purchasers of commodities of like grade and quality.

MONOPOLIES §86 > price discrimination -- functions of Federal Trade Commission -- > Headnote:

[LEdHN\[6\]](#) [6]

Transactions in which a producer charges higher prices for commodities sold as a nationally advertised brand than for commodities of like grade and quality sold as private brands may be examined by the Federal Trade Commission under 2(a) of the Clayton Act as amended by the Robinson- Patman Act ([15 USC 13\(a\)](#)); the Commission will determine, subject to judicial review, whether the differential under attack is discriminatory within the meaning of the Act, whether competition may be injured, and whether the differential is cost justified or is defensible as a good-faith effort to meet the price of a competitor.

MONOPOLIES §36 > price discrimination -- branded and unbranded commodities -- > Headnote:

[LEdHN\[7\]](#) [7]

Tangible consumer preferences as between branded and unbranded commodities should receive due legal recognition in the "injury" and "cost justification" provisions of 2(a) of the Clayton Act as amended by the Robinson- Patman Act ([15 USC 13 \(a\)](#)), prohibiting price discrimination between different purchasers of commodities of like grade and quality.

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COURTS §141 > relation to Congress -- price discrimination -- > Headnote:

[LEdHN\[8\]](#) [8]

Arguments for exempting private brand selling from 2(a) of the Clayton Act as amended by the Robinson-Patman Act ([15 USC 13\(a\)](#)), prohibiting price discrimination between different purchasers of commodities of like grade and quality, are more appropriately addressed to the Congress than to the United States Supreme Court.

## Syllabus

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Respondent produces and sells evaporated milk under its nationally advertised Borden name, and markets physically and chemically identical milk under various private brands owned by its customers. The FTC found the milk to be of like grade and quality as required for the applicability of § 2 (a) of the Robinson-Patman Act, held the price differential to be discriminatory, ascertained the requisite adverse effect on competition, rejected respondent's claim of cost justification and issued a cease-and-desist order. The Court of Appeals set aside the FTC order on the ground that as a matter of law private label milk was not of the same grade and quality as Borden brand milk. *Held*: Labels do not differentiate products for the purpose of determining grade or quality under § 2 (a) of the Act, even though one label may have more customer appeal and command a higher price in the marketplace. Pp. 639-647.

- (a) This has been the long-standing [\*\*\*2] view of the FTC, and its construction of the Act is entitled to respect. *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 391. P. 640.
- (b) This construction of the statute is supported by the legislative history and furthers the purpose and policy of the Act. Pp. 641-645.
- (c) Economic realities are not ignored, but economic factors inherent in brand names and national advertising are not to be considered in the jurisdictional inquiry under the statutory "like grade and quality" test. Pp. 645-646.
- (d) Transactions like those involved here may be examined by the FTC under § 2 (a) to determine, subject to judicial review, whether the price differential is discriminatory, whether competition may be injured, and whether the differential is cost-justified or is defensible as a good-faith effort to meet a competitor's price. P. 646.
- (e) The question of whether the FTC's rulings under § 2 (b) of the Act are inconsistent with its construction of § 2 (a) is not before this Court and is not passed upon. Pp. 646-647.

**Counsel:** Robert B. Hummel argued the cause for petitioner. With him on the brief were Solicitor General Marshall, Assistant Attorney [\*\*\*3] General Turner, Daniel M. Friedman, Gerald Kadish and James McL. Henderson. John E. F. Wood argued the cause for respondent. With him on the brief were Kent V. Lukingbeal, Robert C. Johnston, Philip S. Campbell and C. Brien Dillon.

**Judges:** Warren, Fortas, Harlan, Brennan, Black, Stewart, Clark, White, Douglas

**Opinion by:** WHITE

## Opinion

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[\*638] [\*\*\*155] [\*\*1094] MR. JUSTICE WHITE delivered the opinion of the Court.

The Borden Company, respondent here, produces and sells evaporated milk under the Borden name, a nationally advertised brand. At the same time Borden packs and markets evaporated milk under various private brands owned by its customers. This milk is physically and chemically identical with the milk it distributes under its own brand but

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is sold at both the wholesale and retail level at prices regularly below those obtained for the Borden brand milk. The Federal Trade Commission found the milk sold under the Borden and the private labels to be of like grade and quality as required for the applicability of § 2 (a) of the Robinson-Patman Act,<sup>1</sup> held the price differential to be discriminatory [**\*639**] within the meaning of the section, ascertained the requisite [\*\*\*\*4] adverse effect on commerce, rejected Borden's claim of cost justification and consequently issued a cease-and-desist order. The Court of Appeals set aside the Commission's order on the sole ground that as a matter of law, the customer label milk was not of the same grade and quality as the milk sold under the Borden brand. [339 F.2d 133](#). Because of the importance of this issue, which bears on the reach and coverage of the Robinson-Patman Act, we granted certiorari. *382 U.S. 807*. We now reverse the decision of the Court of Appeals and remand the case to that court for the determination of the remaining issues raised by respondent [**\*\*1095**] Borden in that court. Cf. [Federal Trade Comm'n v. Anheuser-Busch, Inc., 363 U.S. 536, 542](#). [\*\*\*156]

[\*\*\*\*5] The position of Borden and of the Court of Appeals is that the determination of like grade and quality, which is a threshold finding essential to the applicability of § 2 (a), may not be based solely on the physical properties of the products without regard to the brand names they bear and the relative public acceptance these brands enjoy -- "consideration should be given to all commercially significant distinctions which affect market value, whether they be physical or promotional." [339 F.2d, at 137](#). Here, because the milk bearing the Borden brand regularly sold at a higher price than did the milk with a buyer's label, the court considered the products to be "commercially" different and hence of different "grade" for the purposes of § 2 (a), even though they were physically identical and of equal quality. Although a mere [**\*640**] difference in brand would not in itself demonstrate a difference in grade, decided consumer preference for one brand over another, reflected in the willingness to pay a higher price for the well-known brand, was, in the view of the Court of Appeals, sufficient to differentiate chemically identical products and to place the price differential [\*\*\*\*6] beyond the reach of § 2 (a).

[LEdHN\[1\]↑](#) [1][LEdHN\[2\]↑](#) [2][LEdHN\[3\]↑](#) [3]We reject this construction of § 2 (a), as did both the examiner and the Commission in this case. The Commission's view is that [HN2↑](#) labels do not differentiate products for the purpose of determining grade or quality, even though the one label may have more customer appeal and command a higher price in the marketplace from a substantial segment of the public. That this is the Commission's long-standing interpretation of the present Act, as well as of § 2 of the Clayton Act before its amendment by the Robinson-Patman Act,<sup>2</sup> may be gathered from the Commission's decisions dating back to 1936. [Whitaker Cable Corp., 51 F. T. C. 958 \(1955\)](#); [Page Dairy Co., 50 F. T. C. 395 \(1953\)](#); [United States Rubber Co., 46 F. T. C. 998 \(1950\)](#); [United States Rubber Co., 28 F. T. C. 1489 \(1939\)](#); [\*\*\*\*7] [Hansen Inoculator Co., 26 F. T. C. 303 \(1938\)](#); [Goodyear Tire & Rubber Co., 22 F. T. C. 232 \(1936\)](#). These views of the agency are entitled to respect, [Federal](#)

<sup>1</sup> Section 2 (a) of the Clayton Act, 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, [15 U. S. C. § 13 \(a\) \(1964 ed.\)](#), provides in pertinent part:

"[HN1↑](#) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . ."

<sup>2</sup> A proviso to § 2 of the original Clayton Act excepted price discrimination "on account of differences in the grade, quality, or quantity of the commodity sold . . . ." 38 Stat. 730 (1914).

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Trade Comm'n v. Mandel Brothers, Inc., 359 U.S. 385, 391, and represent a more reasonable construction of the statute than that offered by the Court of Appeals.<sup>3</sup>

[\*\*\*\*8] [\*641] Obviously there is nothing in the language of the statute indicating that grade, as distinguished from quality, is not to be determined by the characteristics of the product itself, but by consumer preferences, brand acceptability or what customers think of it and are willing to [\*\*157] pay for it. Moreover, what legislative history there is concerning this question supports the Commission's construction [\*\*1096] of the statute rather than that of the Court of Appeals.

During the 1936 hearings on the proposed amendments to § 2 of the Clayton Act, the attention of the Congress was specifically called to the question of the applicability of § 2 to the practice of a manufacturer selling his product under his nationally advertised brand at a different price than he charged when the product was sold under a private label. Because it was feared that the Act would require the elimination of such price differentials, Hearings on H. R. 4995 before the House Committee on the Judiciary, 74th Cong., 2d Sess., p. 355, and because private brands "would [thus] be put out of business by the nationally advertised brands," it was suggested that the proposed § 2 (a) be amended [\*\*\*9] so as to apply only to sales of commodities of "like grade, quality and *brand*." (Emphasis added.) Id., at 421. There was strong objection to the amendment and it was not adopted by the Committee.<sup>4</sup> The rejection of this [\*642] amendment assumes particular significance since it was pointed out in the hearings that the legality of price differentials between proprietary and private brands was then pending before the Federal Trade Commission in *Goodyear Tire & Rubber Co.*, 22 F. T. C. 232. By the time the Committee Report was written, the Commission had decided *Goodyear*. The report quoted from the decision and interpreted it as holding that Goodyear had violated the Act because "at no time did it offer to its own dealers prices on Goodyear brands of tires which were comparable to prices at which respondent was selling tires of equal or comparable quality to Sears, Roebuck & Co." H. R. Rep. No. 2287, 74th Cong., 2d Sess., p. 4.

[\*\*\*\*10] [\*643] During the debates on the bill, Representative Patman, one of the bill's sponsors, was asked about the private label issue. His brief response is wholly consistent with the Commission's interpretation of § 2 (a), 80 Cong. Rec. 8115:

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<sup>3</sup>The commentators are somewhat divided on the dispute involved in this case. Supporting the Commission's view are the Report of The Attorney General's National Committee to Study the Antitrust Laws 158 (1955); Austin, Price Discrimination and Related Problems under the Robinson-Patman Act 39 (2d ed. 1959); Patman, The Robinson-Patman Act 27 (1938); Edwards, The Price Discrimination Law 31, 463-464 (1959); Seidman, Price Discrimination Cases, reprinted in 2 Hoffmann's Antitrust Law and Techniques 409, 424-428 (1963). Contrary views are expressed by a minority of the Attorney General's Committee; in Rowe, Price Discrimination Under the Robinson-Patman Act 75 (1962); and in Cassady & Grether, The Proper Interpretation of "Like Grade and Quality" within the Meaning of Section 2 (a) of the Robinson-Patman Act, 30 So. Cal. L. Rev. 241 (1957).

<sup>4</sup>Mr. H. B. Teegarden, who was then counsel to the United States Wholesale Grocers Association, and who apparently played a large part in drafting the bill, Hearings on H. R. 4995 before the House Committee on the Judiciary, 74th Cong., 1st Sess., p. 9, supplemented his oral testimony with a letter addressed in part to the proposed amendment:

"To amend the bill by inserting 'and brands,' after the words 'commodities of like grade and quality,' as suggested by Judge Watkins, although it may seem harmless at first sight, is a specious suggestion that would destroy entirely the efficacy of the bill against larger buyers. So amended, the bill would impose no limitation whatever upon price differentials, except as between different purchasers of the same brand. But where goods are put up under a private brand, there can only be one purchaser, namely the one for whom the brand is designed. Neither Kroger nor any independent could use an A. & P. private brand of canned fruit, for example; and to so amend the bill would leave every manufacturer free to put up his standard goods under a private brand for a particular purchaser and give him any price discount or discriminations that he might demand.

"Under the Patman bill as it stands, manufacturers are still free to put up their products under private brands; but if they do so for one purchaser under his private brand, then they must be ready to do so on the same terms, relative to their comparative costs, for a competing purchaser under his private brand; and unless that equality of treatment is required and assured, the discriminations at which the bill is aimed cannot be suppressed." Id., 2d Sess., at 469.

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"Mr. TAYLOR of South Carolina. There has grown up a practice on the part of manufacturers of [\*\*\*158] making certain brands of goods for particular chain stores. Is there anything in this bill calculated to remedy that situation?

"Mr. PATMAN. . . . I have not time to discuss that feature, but the bill will protect the independents in that way, because they will have to sell to the independents at the same price for the same product [\*\*1097] where they put the same quality of merchandise in a package, and this will remedy the situation to which the gentleman refers.

"Mr. TAYLOR of South Carolina. Irrespective of the brand.

"Mr. PATMAN. Yes; so long as it is the same quality. . . ."

The Commission's construction of the statute also appears to us to further the purpose and policy of the Robinson-Patman Act. HN3[<sup>5</sup>] Subject to specified exceptions [\*\*\*11] and defenses, § 2 (a) proscribes unequal treatment of different customers in comparable transactions, but only if there is the requisite effect upon competition, actual or potential. But if the transactions are deemed to involve goods of disparate grade or quality, the section has no application at all and the Commission never reaches either the issue of discrimination or that of anticompetitive impact. We doubt that Congress intended to foreclose these inquiries in situations where a single seller markets the identical product under several different brands, whether his own, his customers' or both. Such [\*644] transactions are too laden with potential discrimination and adverse competitive effect to be excluded from the reach of § 2 (a) by permitting a difference in grade to be established by the label alone or by the label and its consumer appeal.<sup>5</sup>

#### [\*\*\*12] HN4[<sup>6</sup>]

If two products, physically identical but differently branded, are to be deemed of different grade because the seller regularly and successfully markets some quantity of both at different prices, the seller could, as far as § 2 (a) is concerned, make either product available to some customers and deny it to others, however discriminatory this might be and however damaging to competition. Those who were offered only one of the two products would be barred from competing for those customers who want or might buy the other. The retailer who was permitted to buy and sell only the more expensive brand would have no chance to sell to those who always buy the cheaper product or to convince others, by experience or otherwise, of the fact which he and all other dealers already know -- that the cheaper product is actually identical with that carrying the more expensive label.

LEdHN4[<sup>7</sup>] [4]The seller, to escape the Act, would have only to succeed in selling some unspecified amount of each product to some unspecified portion of his [\*\*\*13] customers, however large or small the price differential might be. The seller's pricing and branding policy, by being successful, would apparently validate itself by creating a difference [\*645] in "grade" and thus [\*\*\*159] taking itself beyond the purview of the Act.<sup>6</sup>

<sup>5</sup> Borden argues that it spends large sums to ensure the high quality of its Borden brand milk on customers' shelves, inferring that there really is a difference between its own milk and the milk sold under private labels, at least by the time it reaches the consumer. Of course, if Borden could prove this difference, it is unlikely that the case would be here. The findings are to the contrary in this case and we write on the premise that the two products are physically the same at the time of consumer purchase. Borden's extra expenses in connection with its own milk are more relevant to the cost justification issue than to the question we have before us.

<sup>6</sup> The market acceptability test would hardly stop with insulating from inquiry the price differential between proprietary and private label sales. That test would also immunize from the Act sales at different prices of the same product under two different producer-owned labels, the one being less advertised and having less market acceptability than the other. And if it is "consumer preferences," dissenting opinion, p. 648, which create the difference in grade or quality, why should not Borden be able to discriminate between two purchasers of private label milk, as long as one label commands a higher price from consumers than the other and hence is of a different grade and quality? In this context perhaps the market acceptability test would be refined to preclude this differential on the grounds that Borden's customer, as distinguished from the consumer, will not pay more than his competitor for private label milk and therefore the milk sold by Borden under one private brand is really of the same grade and quality as the milk sold under the other brand even though ultimate consumers will pay more for one than the other. Taking this approach, if Borden packed for one wholesale customer under two private labels, one having more consumer appeal than the

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[\*\*\*\*14] [LEdHN\[5\]](#) [5] [LEdHN\[6\]](#) [6] [LEdHN\[7\]](#) [7] [LEdHN\[8\]](#) [8] Our [\\*\\*1098](#) holding neither ignores the economic realities of the marketplace nor denies that some labels will command a higher price than others, at least from some portion of the public. But it does mean that "[HN5](#)" the economic [\[\\*646\]](#) factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory 'like grade and quality' test." Report of The Attorney General's National Committee to Study the Antitrust Laws 158 (1955). And it does mean that transactions like those involved in this case may be examined by the Commission under § 2 (a). The Commission will determine, subject to judicial review, whether the differential under attack is discriminatory within the meaning of the Act, whether competition may be injured, [\[\\*\\*\\*\\*15\]](#) and whether the differential is cost-justified or is defensible as a good-faith effort to meet the price of a competitor. "Tangible consumer preferences as between branded and unbranded commodities should receive due legal recognition in the more flexible 'injury' and 'cost justification' provisions of the statute." [Id., at 159](#). This, we think, is precisely what Congress intended. The arguments for exempting private brand selling from § 2 (a) are, therefore, more appropriately addressed to the Congress than to this Court.<sup>7</sup>

The Court of Appeals suggested that the Commission's views of like grade and quality for the purposes of § 2 (a) cannot be squared with its rulings in cases where a seller presents [\[\\*\\*\\*160\]](#) the defense under § 2 (b)<sup>8</sup> [\[\\*\\*\\*\\*17\]](#) that he [\[\\*\\*\\*\\*16\]](#) is in good [\[\\*647\]](#) faith meeting the [\[\\*\\*1099\]](#) equally low price of a competitor.<sup>9</sup> In those cases, it is said, the Commission has given full recognition to the significance of the higher prices commanded by the nationally advertised brand "in holding that a seller who reduces the price of his premium product to the level of his non-premium competitors is not merely meeting competition, but undercutting it." [339 F.2d, at 138](#).

The Commission, on the other hand, sees no inconsistency between its present decision and its § 2 (b) cases. In its view, the issue under § 2 (b) of whether a seller's lower price is a good-faith meeting of competition involves considerations different from those presented by the jurisdictional question of "like grade and quality" under § 2 (a).

other because of the customer's own advertising program, Borden must sell both brands at the same price it charges other private label customers because all such milk is of the same grade and quality. At the same time, the customer buying from Borden under two labels could himself sell one label at a reduced price without inquiry under § 2 (a) because the milk in one container is no longer of the same grade and quality as that in the other, although both the milk and the containers came from Borden. Such an approach would obviously focus not on consumer preference as determinative of grade and quality but on who spent the advertising money that created the preference -- Borden's customer, not Borden, created the preference and hence the milk is of the same grade and quality in Borden's hands but not in its customer's. The dissent would exempt the effective advertiser from the Act. We think Congress intended to remit him to his defenses under the Act, including that of cost justification.

<sup>7</sup> This is not, of course, a helpful suggestion to those who think the congressional remedy would be "very difficult if not impossible" and who thus prefer the more "reasonable approach" through the courts. See Cassady & Grether, *supra*, n. 3, at 277.

<sup>8</sup> Section 2 (b), [15 U. S. C. § 13 \(b\) \(1964 ed.\)](#), provides as follows:

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

<sup>9</sup> The Court of Appeals relied upon *Callaway Mills Co., sub nom. Bigelow-Sanford Carpet Co.*, CCH Trade Reg. Rep. Transfer Binder, 1963-1965, para. 16,800; [Anheuser-Busch, Inc., 54 F. T. C. 277 \(1957\)](#); [Standard Oil Co., 49 F. T. C. 923 \(1953\)](#); and *Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351 (1948). Borden adds *Gerber Products Co. v. Beech-Nut Life Savers Co.*, [160 F.Supp. 916 \(D. C. S. D. N. Y. 1958\)](#).

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We need not resolve these contrary positions. The issue we have here relates to § 2 (a), not to § 2 (b), and we think the Commission has resolved it correctly. The § 2 (b) cases are not now before us and we do not venture to decide them. The judgment of the [\*\*\*\*18] Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

**Dissent by:** STEWART

## Dissent

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MR. JUSTICE STEWART, with whom MR. JUSTICE HARLAN joins, dissenting.

I cannot agree that mere physical or chemical identity between premium and private label brands is, without [\*648] more, a sufficient basis for a finding of "like grade and quality" within the meaning of § 2 (a) of the Robinson-Patman Act. The conclusion that a product that travels at a premium in the marketplace is of "like grade and quality" with products of inferior commercial value is not required by the language of the Robinson-Patman Act, by its logic, or by its legislative history.

It is undisputed that the physical attributes and chemical constituents of Borden's premium and private label brands of evaporated milk are identical. It is also undisputed that the premium and private label brands are not competitive at the same price, and that if the private label milk is to be sold at all, it must be sold at prices substantially below the price commanded by Borden's premium brand.<sup>1</sup> This simple market [\*\*\*161] fact no more than reflects the obvious [\*\*\*\*19] economic reality that consumer preferences can and do create significant commercial distinctions between otherwise similar products. By pursuing product comparison only so far as the result of laboratory analysis, the Court ignores a most relevant aspect of the inquiry into the question of "like grade and quality" under § 2 (a): Whether the products are different in the eyes of the consumer.<sup>2</sup>

[\*\*\*\*20] [\*649] There [\*\*1100] is nothing intrinsic to the concepts of grade and quality that requires exclusion of the commercial attributes of a product from their definition. The product purchased by a consumer includes not only the chemical components that any competent laboratory can itemize, but also a host of commercial intangibles that distinguish the product in the marketplace.<sup>3</sup> [\*\*\*\*22] The premium paid [\*650] for Borden brand milk reflects the

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<sup>1</sup> For example, one wholesaler, a witness for the Commission, stated:

"Private label merchandise is no good for nobody unless there is a price on it. . . . In the retail trade as a whole they haven't been too much interested in [private label evaporated milk] . . . frankly if it was the same price as advertised or 15 cents or 25 cents a case under, it wouldn't sell, they couldn't give it away. . . . It has got to have \$ 1.50 or \$ 2 a case spread to make it interesting."

<sup>2</sup> No suggestion is made that any of the private label brands involved in this case show significant commercial differentiation from one another. It is possible, of course, that by extensive promotion private label brands could achieve consumer acceptance equivalent to that of a premium brand. In that situation, the products would still be economically different under the market test of § 2 (a) elucidated in this opinion, since the relevant comparison would exclude promotional efforts by persons other than the producer of the premium brand. Thus, promotional activities by customers of Borden in the present case could not affect the determination of "like grade and quality" with regard to sales by Borden. Cf. Jordan, Robinson-Patman Act Aspects of Dual Distribution by Brand of Consumer Goods, 50 Cornell L. Q. 394, 406-407 (1965).

<sup>3</sup> Cf. Chamberlin, The Theory of Monopolistic Competition 56 (8th ed. 1962):

"A general class of product is differentiated if any significant basis exists for distinguishing the goods (or services) of one seller from those of another. Such a basis may be real or fancied, so long as it is of any importance whatever to buyers, and leads to a preference for one variety of the product over another. Where such differentiation exists, even though it be slight, buyers will be paired with sellers, not by chance and at random (as under pure competition), but according to their preferences.

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consumer's awareness, promoted through advertising, that these commercial attributes are part and parcel [\*\*\*162] of the premium product he is purchasing.<sup>4</sup> The record in the present case indicates that wholesale purchasers of Borden's private label brands continued to purchase the premium brand in undiminished quantities. The record also indicates that retail purchasers who bought the premium brand did so with the specific expectation of acquiring a product [\*\*1101] of premium quality.<sup>5</sup> [\*\*\*\*23] Contrary to the Court's suggestion, [\*651] *ante*, p. 644, this consumer expectation cannot accurately be characterized as a misapprehension. Borden took extensive precautions to insure that a flawed product did not reach the consumer. [\*\*\*\*21]<sup>6</sup> None of these precautions was taken for the private brand milk packed by Borden.<sup>7</sup> An important ingredient of the premium brand inheres in the consumer's belief, measured by past satisfaction and the market reputation established by Borden for its products, that tomorrow's can will contain the same premium product as that purchased today. To say, as the Court does, that these and other intangibles, which comprise an important part of the commercial value of a product, are not sufficient to confer on Borden's premium brand a "grade" or "quality" different from that of private label brands is to

"Differentiation may be based upon certain characteristics of the product itself, such as exclusive patented features; trade-marks; trade names; peculiarities of the package or container, if any; or singularity in quality, design, color, or style. . . . In so far as these and other intangible factors vary from seller to seller, the 'product' in each case is different, for buyers take them into account, more or less, and may be regarded as purchasing them along with the commodity itself."

See also Brown, Advertising and the Public Interest: Legal Protection of Trade Symbols, 57 Yale L. J. 1165, 1181 (1948):

". . . The buyer of an advertised good buys more than a parcel of food or fabric; he buys the pause that refreshes, the hand that has never lost its skill, the priceless ingredient that is the reputation of its maker. All these may be illusions, but they cost money to create, and if the creators can recoup their outlay, who is the poorer? Among the many illusions which advertising can fashion are those of lavishness, refinement, security, and romance. Suppose the monetary cost of compounding a perfume is trivial; of what moment is this if the ads promise, and the buyer believes, that romance, even seduction, will follow its use? The economist, whose dour lexicon defines as irrational any market behavior not dictated by a logical pecuniary calculus, may think it irrational to buy illusions; but there is a degree of that kind of irrationality even in economic man; and consuming man is full of it."

<sup>4</sup> For example, a grocer testified in the proceedings before the Commission that:

"People are going into a grocery store to pick up groceries, the majority of the people buy something that is advertised that they have known for years or heard of for years or see highly advertised. They know it is a good product, they know it is fancy merchandise or best quality."

Another grocer testified that:

"A. Some people say they want [Borden's] Silver Cow milk. In other words, for maybe a coupon on the side of the can or because they have been educated to want that brand. Some of them won't have anything but that. Some of them won't have anything except Carnation, and some of them don't want anything except Pet."

"Q. They don't care what price --

"A. If the doctor tells the woman to put the baby on Pet milk, that is all she wants, you couldn't interest her in something else."

"Q. You couldn't give her something else, could you?

"A. I doubt if I could."

<sup>5</sup> The results of a house-to-house survey conducted for Borden by National Analysts, Inc., indicated that consumers selected Borden's premium brand because of its superior quality. Comparable studies have reached a similar conclusion. Cf. "Mom Feels Quality, not Ad Cost, Makes Brand Item Costlier, 'Good House' Reports," Advertising Age, Dec. 7, 1964, p. 30.

<sup>6</sup> Borden's Food Products Division maintained a staff of field representatives who inspected code-datings on cans of Borden brand milk in retail stores, in order to insure that older milk was sold first off the retailer's shelves. A witness for Borden testified that the principal dangers of long storage were discoloration of the milk, precipitation of calcium and other minerals, and separation and hardening of fat from the milk. As a further precaution against sales of defective milk, Borden dispatched its milk to wholesalers and retailers under a first-packed, first-shipped rotation plan that occasionally involved high-cost shipments from distant plants or warehouses. In addition, before shipment from a cold storage warehouse, Borden "tempered" its premium brand milk in order to prevent condensation on the cans, which might have resulted in rust to the cans and damage to the labels.

<sup>7</sup> As counsel for the respondent candidly stated on oral argument to the Court, "The difference as to the private label brand packed by Borden is that, as to that product, the Borden Company washes its hands of it at the factory door."

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ignore the obvious market acceptance of that difference. "Commercially the 'advertised' brands had come in the minds of the public to mean a different grade of milk. The public may have [\*652] been wrong; . . . it may have been right . . . . But right or wrong, that is what it believed, and its belief [\*\*\*163] was the important thing." *Borden's Farm Products Co. v. Ten Eyck*, 11 F.Supp. 599, 601 (D. C. S. D. N. Y.) (opinion of L. Hand, J.).<sup>8</sup>

[\*\*\*24] The [\*\*1102] spare legislative history of the Robinson-Patman Act is in no way inconsistent with a construction of § 2 (a) that includes market acceptance in the test of "like grade and quality." That history establishes no more than that mere differences in brand or design, unaccompanied by any genuine physical, chemical, or market [\*653] distinction, are insufficient to negate a finding of "like grade and quality" under § 2 (a).<sup>9</sup> [\*\*\*25] Nothing that I have found in the legislative history speaks with precision to the sole issue before us here, the application of § 2 (a) to physically or chemically identical products that are in fact differentiated by substantial market factors.<sup>10</sup>

[\*\*\*164] Neither the remarks of Representative Patman, *ante*, p. 643, nor the letter of Mr. Teegarden, *ante*, p. 641, n. 4, supports the Court's conclusion that Congress intended physical and chemical identity to be the sole touchstone of "like grade and quality." Aside from the obviously casual nature of Mr. Patman's reply to the question concerning [\*654] the effect of the Act on private [\*\*\*26] label brands,<sup>11</sup> his remarks go embarrassingly further than the circumspect reading sought to be given them by the Court. On its face, Mr. Patman's statement makes the

<sup>8</sup>The Court's suggestion that the commentators are about equally divided upon the issue before us is somewhat misleading. It is true that the members of the Attorney General's National Committee to Study the Antitrust Laws, Report, pp. 156-159 (1955), were sharply divided as to whether significant consumer preferences should be taken into account under the "like grade and quality" test of § 2 (a). However, the very brief discussions of "like grade and quality" in Austin, Price Discrimination and Related Problems under the Robinson-Patman Act 39 (2d ed. 1959); Patman, Complete Guide to the Robinson-Patman Act 34-35 (1963); and Edwards, The Price Discrimination Law 31, 463-464 (1959), are not addressed to the relevance of significant consumer preferences, and the minimal discussion in Seidman is at best ambiguous, Price Discrimination Cases, reprinted in 2 Hoffmann's *Antitrust Law* and Techniques 409, 427-428 (1963). Those cursory treatments go no further than the view, with which I wholly agree, that no blanket exemption from § 2 (a) is available for private label brands. But that view in no sense disposes of the concrete issue presented in this case. Commentators who have in fact focussed on the significance of consumer preferences uniformly favor inclusion of commercial acceptance in the test of "like grade and quality." Rowe, Price Differentials and Product Differentiation: The Issues under the Robinson-Patman Act, 66 Yale L. J. 1 (1956); Rowe, Price Discrimination Under the Robinson-Patman Act 62-76 (1962); Cassady & Grether, The Proper Interpretation of "Like Grade and Quality" within the Meaning of Section 2 (a) of the Robinson-Patman Act, 30 So. Cal. L. Rev. 241 (1957); Jordan, Robinson-Patman Act Aspects of Dual Distribution by Brand of Consumer Goods, 50 Cornell L. Q. 394 (1965).

<sup>9</sup>The Court's suggestion, *ante*, p. 644, that a difference in label alone would exclude the reach of § 2 (a) if a market test were accepted for "like grade and quality" is no part of the present case and has never been offered as a serious interpretation of § 2 (a). Nor is there any issue raised here as to whether, under a market test of § 2 (a), a dubious pricing and branding policy adopted by a seller could "validate itself" and escape the Act by creating precarious distinctions in grade or quality. The price differential between Borden's premium and private label brands is concededly grounded upon a legitimate and stable market preference for the premium product. Moreover, the Commission's willingness to engage in the exhaustive analysis of injury to competition and cost justification under its "physical identity" test of § 2 (a) demonstrates that the Commission's resources would be more than adequate to determine the level of commercial preference sufficient to negate a finding of "like grade and quality" under a market test of § 2 (a).

<sup>10</sup>Certain general language in the congressional reports may be taken, however, as supporting the interpretation that market factors are relevant in the construction of § 2 (a). The Report of the House Committee on the Judiciary stated that the general object of the bill was "to amend section 2 of the Clayton Act so as to suppress more effectually discriminations between customers of the same seller *not supported by sound economic differences in their business positions . . .*" H. R. Rep. No. 2287, 74th Cong., 2d Sess., p. 7. (Emphasis added.) The Report of the Senate Committee on the Judiciary is phrased in substantially the same language. S. R. Rep. No. 1502, 74th Cong., 2d Sess., p. 3.

<sup>11</sup>The remarks of Representative Patman were even more offhand than the opinion of the Court indicates. Prefacing the portion of his remarks quoted by the Court, Mr. Patman said, "I only have a very short time, and I must finish my statement. I have not time to discuss that feature . . . ."

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blanket assertion that all products of the same quality must be sold at the same price. As thus stated, premium brands would have to be sold at the same price as private label brands, regardless of injury to competition, cost justification, or other available defenses under the Act. These undifferentiated remarks are therefore of little assistance in the determination of congressional intent. Far from supporting the Court's interpretation of § 2 (a), the final paragraph of the Teegarden letter suggests that Mr. Teegarden considered the bill to have no effect on a premium brand producer's decision to furnish private label brands to purchasers, so long as the private label brands were made available on the same terms to all purchasers. Mr. Teegarden's [\*\*1103] concern was with the prevention of discrimination between purchasers on the basis of artificial differences in brand.<sup>12</sup> That same concern, and no more, [\*655] is all that may legitimately be read into the rejection by Congress of the proposal to [\*\*\*27] add "and brands" to the "like grade and quality" provision in the bill. By rejecting that proposal, it can be inferred only that Congress contemplated "no blanket exemption . . . for 'like' products which differed *only* in brand . . . , leaving open the application of the Act to differentiated products reflecting more than a nominal or superficial variation." Rowe, Price Discrimination Under the Robinson-Patman Act 65 (1962).

[\*\*\*28] The references in the legislative hearings and the House Committee Report to the Commission's decision in *Goodyear Tire & Rubber Co.*, 22 F. T. C. 232, are equally inconclusive on the relevance of commercial acceptance to the determination of "like grade and quality." The striking aspect of that case is that Goodyear conceded that the differently branded tires involved in the proceeding were of like grade and quality, 22 F. T. C., at 290. Moreover, the tires purchased by Sears, Roebuck & Co. from Goodyear and sold under Sears' "All State" label were advertised by Sears as obtained from "the leading tire manufacturer" and "[\*\*\*165] the world's foremost tire manufacturer," so that the market independence of Sears' private brand was compromised. *Id.* at 295, 297.

The other administrative precedents relied on by the Court also fail to establish any consistently settled interpretation by the Federal Trade Commission that physical identity is the sole touchstone of "like grade and quality." Those decisions singularly fail to focus on the significance of consumer preference as a relevant factor in the test of grade and quality.<sup>13</sup> [\*\*\*30] [\*\*\*29] Moreover, the [\*656] Commission has itself explicitly resorted to consumer preference or marketability to resolve the issue of "like grade and quality" in cases where minor physical variations accompany a difference in product brand.<sup>14</sup> [\*\*1104] The [\*657] caprice of the Commission's present

<sup>12</sup> The predominant concern of Congress in enacting the Robinson-Patman amendments to the Clayton Act was to abolish the notorious price discriminations that infected the post-Depression economy, especially the blanket immunity then available for quantity discounts under § 2 of the Clayton Act. An obvious commercial evil at the time was the widespread practice of offering private label brands to favored customers at rates substantially lower than the rates offered to competing purchasers. The abortive attempt, vigorously opposed by Mr. Teegarden, to introduce "and brands" into the "like grade and quality" provision would have left that evil completely unremedied. Cf. 80 Cong. Rec. 8234-8236 (rejection of amendments proposing the addition of "and design" and "purchased under like conditions" to the "like grade and quality" clause).

<sup>13</sup> In *Hansen Inoculator Co.*, 26 F. T. C. 303, and the two *United States Rubber Co.* cases, 28 F. T. C. 1489; *46 F. T. C. 998*, the finding of "like grade and quality" was either conceded by the respondent or not challenged. In addition, in *Hansen Inoculator*, there was significant evidence that the private label product was in fact trading on the reputation of the premium product. Further, in *Hansen Inoculator*, as in *Page Dairy Co.*, 50 F. T. C. 395, it is doubtful that even the labels on the two products were distinguishable. In *Whitaker Cable Corp.*, 51 F. T. C. 958, the resale prices of both products were identical, so that no commercial preference could have been proved in any event. Finally, in the first *United States Rubber* case and in *Whitaker Cable Corp.*, there was substantial discrimination by the seller between various purchasers of the private label brands. In setting aside the order of the Commission in the present case, the Court of Appeals for the Fifth Circuit emphasized that in none of these cases was there any showing that the brand names affected the market price of the products sold.

<sup>14</sup> *Universal-Rundle Corp.*, CCH Trade Reg. Rep. Transfer Binder, 1963-1965, para. 16948, at pp. 22003-22005 (F. T. C. Dkt. 8070, June 12, 1964) (differences in plumbing fixtures); *Quaker Oats Co.*, CCH Trade Reg. Rep. Transfer Binder, 1963-1965, para. 17134, at p. 22215 (F. T. C. Dkt. 8112, Nov. 18, 1964) (differences in flour blends). Compare *E. Edelmann & Co.*, 51 F. T. C. 978 (differences in automobile replacement parts); *Bruce's Juices, Inc. v. American Can Co.*, 87 F.Supp. 985, aff'd *187 F.2d 919* (C. A. 5th Cir.) (differences in size of juice cans); *Champion Spark Plug Co.*, 50 F. T. C. 30 (differences in insulator and "ribs" of spark plugs). Cf. Comment, Like Grade and Quality: Emergence of the Commercial Standard, 26 Ohio State L. J. 294, 296-302 (1965). The Commission appears at one time to have held that brand identity may create a presumption of "like grade

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distinction thus invites Borden to incorporate slight tangible variations in its private label products, in order to bring itself within the Commission's current practice of considering market preferences in such cases.

[\*\*\*\*31] The Commission's determination of "like grade and quality" under § 2 (a) in this case is seriously inconsistent with the position it has taken under § 2 (b) in cases where a seller has presented the defense that he is in good faith meeting the equally low price of a competitor. The Commission decisions are clear that the "meeting competition" defense is not available to a seller who reduces the price of his premium product to the level of nonpremium products sold by his competitors. The Commission decisions under § 2 [\*\*\*166] (b) emphasize that market preference must be considered in determining whether a competitor is "meeting" rather than "beating" competition. In Standard Oil Co., 49 F. T. C. 923, 952, the Commission put it baldly:

"In the retail distribution of gasoline public acceptance rather than chemical analysis of the product is the important competitive factor." <sup>15</sup>

[\*\*\*\*32] [\*658] Could [\*1105] the Commission under § 2 (b) now prevent Borden from reducing the price of its premium milk to the level of private label milk? I can see no way that it could, short of maintaining a manifestly unstable equilibrium between § 2 (a) and § 2 (b). By adopting a keyhole approach to § 2 (a), the Court manages to escape resolution of the question, but it does so at the cost of casting grave doubt on what I had regarded as an important bulwark of § 2 (b) against a recognized competitive evil.

The Court gives no substantial economic justification for its construction of § 2 (a). <sup>16</sup> The principal rationale of the restriction of that section to commodities of "like" [\*659] grade and quality" is simply that it is not feasible to measure discrimination and injury to competition where different products are involved. That rationale is as valid for economic as for physical variation between products. Once a substantial economic difference between products is

and quality," regardless of the existence of physical differences between the products. General Foods Corp., 52 F. T. C. 798, 817; Atalanta Trading Corp., 53 F. T. C. 565, 571. In setting aside the Commission's order in *Atalanta*, the Court of Appeals for the Second Circuit stated that "The test of products of like grade and quality was evolved to prevent emasculation of the section by a supplier's making artificial distinctions in his product but this does not mean that all distinctions are to be disregarded." *Atalanta Trading Corp. v. FTC, 258 F.2d 365, 371*. In a footnote to that opinion, the Court of Appeals indicated that price differences were among the distinctions to be considered. Id. at 371, n. 5. Cf. Rowe, Price Discrimination Under the Robinson-Patman Act 71-72 (1962).

<sup>15</sup> See also *Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351, 396-397: "To accept [the contrary] proposition would mean that any seller of a commodity which generally sells at a premium price may freely discriminate among its customers so long as it does not undercut the prices of competitors"; Anheuser-Busch, Inc., 54 F. T. C. 277, 302: "It is evident that Budweiser could and did successfully command a premium price in the St. Louis market . . . . The test in such a case is not necessarily a difference in quality but the fact that the public is willing to buy the product at a higher price in a normal market"; *Callaway Mills Co., sub nom. Bigelow-Sanford Carpet Co.*, CCH Trade Reg. Rep. Transfer Binder, 1963-1965, para. 16,800, at p. 21755 (F. T. C. Dkt. 7634, Feb. 10, 1964): "Both the courts and the Commission have consistently denied the shelter of the [meeting competition] defense to sellers whose product, because of . . . intense public demand, normally commands a price higher than that usually received by sellers of competitive goods"; Standard Brands, Inc., 46 F. T. C. 1485, 1495; *Gerber Products Co. v. Beech-Nut Life Savers, Inc., 160 F.Supp. 916, 920, 921-922* (D. C. S. D. N. Y.). Cf. *Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F.2d 234, 237* (C. A. 2d Cir.). In the present case, the Court of Appeals for the Fifth Circuit specifically refused to "approve of the Commission's construing the Act inconsistently from one case to the next, as appears most advantageous to its position in a particular case." 339 F.2d 133, at 139. See the comment of Commissioner Mason: "First the Commission finds you guilty of price discrimination by disregarding popularity of goods, and finds the grade and quality of the commodities in question are the same; then they knock out your meeting of competition defense because your goods are more popular than others, even if the commodities in question are of like grade and quality." *Discriminate in Price between Different Purchasers of Commodities of Like Grade, Quality and Popularity*, Proc. Am. Bar Assn. Section of Antitrust Law 82, 91-92 (Aug. 1953). Cf. *Eine Kleine Juristische Schlummergegeschichte*, 79 Harv. L. Rev. 921, 928-929 (1966).

<sup>16</sup> The Court's brief discussion of the adverse economic effect of the Fifth Circuit's ruling is concerned primarily with the supposed injury to secondary line competition. The present proceeding arose as the direct result of the primary line injury caused to midwestern packers of private label evaporated milk when Borden expanded its plants in Tennessee and South Carolina to include private label operation, but the opinion of the Court nowhere discusses such competition.

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found, therefore, the inquiry of the Commission should be ended, just as it is ended when a [\*\*\*167] substantial physical difference is found.

[\*\*\*\*33] In spite of the assertion of the Attorney General's Report quoted by the Court, it is unlikely that economic differences between premium and private label brands can realistically be taken into account by the Commission under the "injury to competition" and "cost justification" provisions of § 2 (a).<sup>17</sup> Even if relevant cost data can be agreed upon, the cost ratio between Borden's premium and private label products is hardly the most significant factor in Borden's pricing decision and market return on those products. Moreover, even if price discrimination is found here, its effect on competition may prove even more difficult to determine than in more conventional [\*660] cases of price discrimination under § 2 (a). Cf. [FTC v. Morton Salt Co., 334 U.S. 37](#); *United Biscuit Co. v. FTC*, [350 F.2d 615](#) (C. A. 7th Cir.).

[\*\*\*\*34] The threat presented to primary line competition by Borden's distribution of premium and private label brands is unclear. No allegation was made that Borden has used its dominant position in the premium brand market to subsidize predatory price-cutting campaigns in the private label market. Borden packs its private label brands for national distribution, so that this case is essentially [\*\*1106] different from those in which geographical price discriminations are involved. Further, Borden's private label brands are aimed in part at a different, more price-conscious class of consumer. Because relevant economic factors differ in the premium and private label markets, conventional notions of price discrimination under the Robinson-Patman Act may not be applicable.<sup>18</sup> More important, Borden's extensive distribution of its private label brands has introduced significant low-cost competition for Borden's own premium product. Thus, the large retail chains and cooperative buyer organizations that are Borden's chief private label customers represent a significant source of countervailing power to the oligopoly pattern of evaporated milk production. The rise of this sort of competition [\*\*\*\*35] is well known in other parts of the food industry.<sup>19</sup> In these circumstances, the anticompetitive leverage against primary line competition available to Borden through its private label production is sharply curtailed. There is, therefore, no real resemblance in [\*\*\*168] this case to the serious discriminatory [\*661] practices that the Robinson-Patman Act was enacted to prevent.

The potential economic impact of Borden's distribution of private label brands on secondary line competition is equally ambiguous. It is true that a market test of "like grade and quality" would enable Borden, so far as § 2 (a) is concerned, to make private label brands selectively available to [\*\*\*\*36] customers of its premium brand. Not all wholesale and retail dealers who carry Borden's premium brand would be able, as of right, to take advantage of Borden's private label production. But the Commission could still apply § 2 (a) with full force against discriminations between private label customers. And the Government could still invoke § 2 of the Sherman Act or § 5 of the Federal Trade Commission Act to deal with other forms of price discrimination by Borden against its customers or competitors.

<sup>17</sup> It is not clear that the "injury to competition" and "cost justification" issues will be reached on the remand. As the opinion of the Court suggests, *ante*, p. 646, the existence of price discrimination is an issue that remains open in the Court of Appeals. If Borden is able to demonstrate that the price differential between its premium and private label brands is not a price discrimination, the inquiry by the Commission is at an end, and no issue of injury to competition or cost justification under § 2 (a) is reached. Nothing in [FTC v. Anheuser-Busch, Inc., 363 U.S. 536](#), a case concerned only with territorial price discrimination, requires an equation in all circumstances between a price differential and price discrimination. So long as Borden makes private label brands available to all customers of its premium milk, it is unlikely that price discrimination within the meaning of § 2 (a) can be made out. *Boss Mfg. Co. v. Payne Glove Co.*, [71 F.2d 768, 770-771](#) (C. A. 8th Cir.); Austin, Price Discrimination and Related Problems under the Robinson-Patman Act 21 (2d ed. 1959); Rowe, Price Discrimination Under the Robinson-Patman Act, *supra*, at 97-99.

<sup>18</sup> Cf. Adelman, Price Discrimination as Treated in the Attorney General's Report, 104 U. Pa. L. Rev. 222, 228-230 (1955).

<sup>19</sup> See Staff Report to the Federal Trade Commission, Economic Inquiry into Food Marketing, Part II, The Frozen Fruit, Juice and Vegetable Industry (1962); Jordan, *supra*, n. 8, at 413-417.

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Under the Court's view of § 2 (a), Borden must now make private label milk available to all customers of its premium brand.<sup>20</sup> But that interpretation of § 2 (a) is [\*\*662] hardly calculated to speed private label brands to the shelves of retailers. To avoid supplying a private label brand to a premium brand customer, Borden need only forgo further sales of its premium brand to that customer. It is, therefore, not unlikely that the Court's decision will foster a discrimination greater than that which it purports to eliminate, since retailers previously able to obtain the premium Borden brand but not a private label brand, may now find their access to the premium brand foreclosed [\*\*\*37] as well.

[\*\*\*38] In [\*\*1107] *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 63, this Court cautioned against construction of the Robinson-Patman Act in a manner that might "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." Today that warning goes unheeded. In the guise of protecting producers and purchasers from discriminatory price competition, the Court ignores legitimate market preferences and endows the Federal Trade Commission with authority to disrupt price relationships between products whose identity has been measured in the laboratory but rejected in the marketplace. I do not believe that any such power was conferred upon the Commission by Congress, and I would, therefore, affirm the judgment of the Court of Appeals.

## References

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What are "commodities" and "commodities of like grade and quality," within provision of Robinson-Patman Act prohibiting price discrimination between different purchasers of commodities of like grade and quality--federal cases

Annotation References:

Robinson-Patman Act as construed by Supreme Court. [\*\*\*39] 2 L ed 2d 1737, 8 L ed 2d 1033.

Construction of the cost-justification proviso of the Robinson- Patman Act. 9 L ed 2d 1138.

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<sup>20</sup> The Commission concedes that there is no evidence in the record that Borden refused to sell private label milk to any customer who specifically requested it. Borden's private label business in the period covered by these proceedings was substantial. In 1957, Borden sold 4,300,000 cases of its premium brand evaporated milk and 1,100,000 cases of private label milk (government and export business excluded); net sales of these products were \$ 27,600,000 and \$ 5,700,000, respectively. A major source of Borden's private label business was provided by cooperative associations of wholesalers and retailers, so that, in fact, there was an opportunity for large numbers of small retailers to compete in the sale of private label brands of evaporated milk obtained from Borden. One such group, whose purchases accounted for 11% of Borden's private label volume in 1957, had more than 1,000 retailer members. Not all retailers, however, availed themselves of the opportunity to market private label milk. One wholesaler testified that, a year after his private label brand had been offered to the 600 retail grocers in his service area, only 50 of the grocers had become regular customers.



## **United States v. General Motors Corp.**

Supreme Court of the United States

December 9, 1965, Argued ; April 28, 1966, Decided

No. 46

### **Reporter**

384 U.S. 127 \*; 86 S. Ct. 1321 \*\*; 16 L. Ed. 2d 415 \*\*\*; 1966 U.S. LEXIS 2960 \*\*\*\*; 1966 Trade Cas. (CCH) P71,750; 10 Fed. R. Serv. 2d (Callaghan) 1245

UNITED STATES v. GENERAL MOTORS CORP. ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

**Disposition:** [234 F.Supp. 85](#), reversed and remanded.

## **Core Terms**

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dealers, discounters, associations, conspiracy, sales, franchised, Sherman Act, customer, collaborative, unilateral, promise, prices, manufacturer, price competition, establishments, repurchase, antitrust, retailing, referral, concert, outlets

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

[\*\*HN1\*\*](#) **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

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

[\*\*HN2\*\*](#) **Antitrust & Trade Law, Sherman Act**

Explicit agreement is not a necessary part of a Sherman Act conspiracy, and certainly not where joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan.

Antitrust & Trade Law > Sherman Act > General Overview

384 U.S. 127, \*127; 86 S. Ct. 1321, \*\*1321; 16 L. Ed. 2d 415, \*\*\*415; 1966 U.S. LEXIS 2960, \*\*\*\*1

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

### **[HN3](#) Antitrust & Trade Law, Sherman Act**

There are statutory inhibitions on the right of an automobile manufacturer to terminate dealer franchises. [15 U.S.C.S. § 1222.](#)

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

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

Antitrust & Trade Law > Sherman Act > General Overview

### **[HN4](#) Per Se Rule & Rule of Reason, Per Se Violations**

Elimination, by joint collaborative action, of a group of automobile discounters from access to the market is a per se violation of the Sherman Act.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

### **[HN5](#) Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, the court need not inquire into the economic motivation underlying their conduct to find a violation of the Sherman Act.

## **Lawyers' Edition Display**

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### **Summary**

Upon complaint by its dealers in the Los Angeles area about sales by some of the dealers through discount houses, the defendant automobile manufacturer elicited from each dealer a promise not to do business with the discounters; three dealer associations, which were also defendants, undertook jointly to police the agreements so obtained; the associations, as requested by the manufacturer, supplied information to the manufacturer for use by it in bringing wayward dealers into line; and as a result of this collaborative effort, a number of dealers were induced to repurchase cars they had sold through discounters and to promise to abjure such sales in the future.

In the present civil action brought by the United States in the United States District Court for the Southern District of California to enjoin the defendants from participating in an alleged conspiracy to restrain trade in violation of 1 of the Sherman Act, the court concluded that the proof failed to establish the alleged violation, and entered judgment for the defendants. ([234 F Supp 85.](#))

Upon direct appeal, the Supreme Court of the United States reversed. In an opinion by Fortas, J., expressing the view of eight members of the Court, it was held that the joint activities of the defendants constituted "a classic conspiracy in restraint of trade," and that the evidence was sufficient to prove such a conspiracy.

Harlan, J., concurred in the result, feeling bound by a precedent even though he had dissented from its holding.

## Headnotes

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MONOPOLIES §30 > collaboration between manufacturer and dealers -- elimination of discounters -- > Headnote:

[LEdHN\[1\]](#) [1]

Joint collaborative action by an automobile manufacturer, its franchise dealers, and associations of these dealers to eliminate discount houses as competitors by terminating business dealings between them and a minority of the dealers and to deprive the dealers of their freedom to deal through discounters if they so choose, is a conspiracy in restraint of trade in violation of 1 of the Sherman Anti-Trust Act ([15 USC 1](#)), it being immaterial whether the clause in the franchise agreement which prohibits a dealer from moving to or establishing a new or different location without the manufacturer's prior written approval may be construed to prohibit the dealers from selling through discounters.

EVIDENCE §991.5 > sufficiency -- violation of antitrust laws -- > Headnote:

[LEdHN\[2\]](#) [2]

A conspiracy to restrain trade by eliminating discount houses is proved where the evidence shows that an automobile manufacturer to which its dealers had complained about sales through discounters elicited from every dealer in the area a promise not to do business with the discounters; that three associations of the dealers undertook jointly to police these agreements obtained and, as requested, supplied information to the manufacturer for use by it in bringing wayward dealers into line; and that as a result of this collaborative effort, a number of dealers were induced to re-purchase cars they had sold through discounters and to promise to abjure such sales in the future.

ERROR §1477 > review of findings -- antitrust action -- > Headnote:

[LEdHN\[3A\]](#) [3A] [LEdHN\[3B\]](#) [3B]

Federal Civil Procedure [Rule 52 \(a\)](#), under which findings of fact shall not be set aside unless clearly erroneous, has no application to a finding by the District Court that defendants' conduct did not constitute a combination in violation of the Sherman Act, where the District Court premised its finding on an erroneous interpretation of the standard to be applied.

MONOPOLIES §14 > test of combination -- > Headnote:

[LEdHN\[4\]](#) [4]

384 U.S. 127, \*127; 86 S. Ct. 1321, \*\*1321; 16 L. Ed. 2d 415, \*\*\*415; 1966 U.S. LEXIS 2960, \*\*\*\*1

For purposes of determining whether there has been a combination or conspiracy in violation of 1 of the Sherman Anti-Trust Act ([15 USC 1](#)) it is of no consequence that each party acted in its own lawful interest; nor is it of consequence, where an automobile manufacturer and its dealers are charged with collaborative action to eliminate discounters from access to the market, whether their franchise system and a clause contained in the franchise agreement prohibiting a dealer from moving to or establishing a new or different location without the manufacturer's prior consent are lawful or economically desirable.

MONOPOLIES §10 > conspiracy -- explicit agreement -- > Headnote:

[LEdHN\[5\]](#) [5]

An explicit agreement is not a necessary part of a conspiracy in violation of 1 of the Sherman Anti-Trust Act ([15 USC 1](#)), and certainly not where joint and collaborative action was pervasive in the initiation, execution, and fulfilment of the plan.

MONOPOLIES §29 > elimination of competition -- > Headnote:

[LEdHN\[6\]](#) [6]

Elimination, by joint collaborative action, of discounters from access to the market is a per se violation of the Sherman Anti-Trust Act.

EVIDENCE §343.5 > MONOPOLIES §30 > group boycotts -- > Headnote:

[LEdHN\[7\]](#) [7]

Group boycotts are a class of restraint of trade which, from their nature or character, are unduly restrictive and, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

MONOPOLIES §14 > economic motivation -- > Headnote:

[LEdHN\[8\]](#) [8]

Where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, the courts need not inquire into the economic motivation underlying the conduct.

MONOPOLIES §29 > exclusion of traders from market -- > Headnote:

[LEdHN\[9\]](#) [9]

Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Anti-Trust Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing goods, any more than by reference to the allegedly tortious conduct against which a combination or conspiracy may be directed.

MONOPOLIES §36 > price control -- > Headnote:

[LEdHN\[10\]](#) [10]

A substantial restraint upon price competition is a goal unlawful per se under the antitrust laws when sought to be effected by combination or conspiracy; the per se rule applies even when the effect upon prices is indirect.

MONOPOLIES §6 > purpose of antitrust laws -- > Headnote:

[LEdHN\[11\]](#) [11]

The protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws.

MONOPOLIES §29 > elimination of competitors -- > Headnote:

[LEdHN\[12\]](#) [12]

The Sherman Anti-Trust Act prohibits conspiracies or combinations to put competitors out of business entirely, as well as conspiracies to fix prices at which competitors may sell.

## Syllabus

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This is a civil action to enjoin General Motors Corporation (GM) and three associations of Chevrolet dealers in the Los Angeles area from participating in an alleged conspiracy to restrain trade in violation of [§ 1](#) of the Sherman Act by eliminating sales of new Chevrolets through "discount houses" and "referral services." The District Court found, among other things, that the Losor Chevrolet Dealers Association in the summer of 1960 complained to GM personnel about sales to discounters; that at a Losor meeting in November 1960 member dealers agreed to embark on a letter-writing campaign to enlist GM's aid; that in December and January GM personnel talked to every dealer in the area and obtained promises not to deal with discounters; that representatives of the three dealer associations met on December 15, 1960, and created a joint investigating committee; that the associations then undertook to police the agreements so obtained [\*\*\*\*2] by GM; that the associations supplied information to GM for use in bringing wayward dealers into line, and that the Chevrolet zone manager asked them to do so; that as a result a number of dealers were induced to repurchase cars they had sold to discounters and agreed to refrain from making such sales in the future; and that by spring 1961 sales through discounters seem to have ended. However, the District Court found no conspiracy in violation of the Sherman Act, holding that each alleged conspirator acted to promote its own self-interest and that in seeking to vindicate these interests the alleged conspirators entered into no "agreements" among themselves, although they may have engaged in "parallel action." *Held:* This is a classic conspiracy in restraint of trade: joint, collaborative action by dealers, associations, and GM to eliminate a class of

competitors by terminating dealings between them and a minority of Chevrolet dealers and to deprive franchised dealers of their freedom to deal through discounters if they so choose. Pp. 138-148.

(a) The District Court's conclusion that appellees' conduct did not amount to a conspiracy within the meaning of the Act was not the kind [\*\*\*3] of fact-finding shielded from review by the "clearly erroneous" test embodied in [Rule 52 \(a\) of the Federal Rules of Civil Procedure](#), since the question involved the application of a legal standard to undisputed facts and since the bulk of the case was presented to the trial judge in the form of documents, depositions, and written statements. P. 141, n. 16.

(b) In determining whether there has been a conspiracy or combination under [§ 1](#) of the Sherman Act it is of no consequence that each party acted in its own lawful interest or whether the franchise system is lawful or economically desirable. P. 142.

(c) Even if it were assumed that there had been no explicit agreement among the appellees and their alleged co-conspirators, such an agreement is not a necessary part of a Sherman Act conspiracy -- certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution and fulfillment of the plan. [United States v. Parke, Davis & Co., 362 U.S. 29, 43](#). Pp. 142-143.

(d) The joint and interrelated activities of GM and the co-conspirators in obtaining the agreements not to deal with discounters and in policing such agreements cannot [\*\*\*4] be described as "unilateral" or merely "parallel." Pp. 144-145.

(e) The elimination, by joint collaborative action, of businessmen from access to the market is a *per se* violation of the Act. [Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207](#). Pp. 145-146.

(f) The economic motivation of those who by concerted action seek to keep others from trading in the market is irrelevant. Pp. 146-147.

(g) Inherent in the success of the combination in this case was a substantial restraint upon price competition, a goal unlawful *per se* when sought to be effected by combination or conspiracy. [United States v. Parke, Davis & Co., supra](#). P. 147.

**Counsel:** Daniel M. Friedman argued the cause for the United States. On the brief were Solicitor General Marshall, Assistant Attorney General Turner, Lionel Kestenbaum, Richard A. Posner and Robert C. Weinbaum.

Homer I. Mitchell argued the cause for appellee General Motors Corp. With him on the brief were Warren M. Christopher, Marcus Mattson, Aloysius F. Power, Robert A. Nitschke, Nicholas J. Rosiello, Henry C. Thumann, Donald M. Wessling and Robert W. Culver. Victor R. Hansen argued the cause [\*\*\*5] for appellees Losor Chevrolet Dealers Association et al. With him on the brief were Glenn S. Roberts and Henry F. Walker.

Thomas A. Rothwell and William C. Hillman filed a brief for O. M. Scott & Sons Co. et al., as amici curiae.

**Judges:** Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Fortas

**Opinion by:** FORTAS

## Opinion

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[\*129] [\*\*\*417] [\*\*1322] MR. JUSTICE FORTAS delivered the opinion of the Court.

This is a civil action brought by the United States to enjoin the appellees from participating in an alleged conspiracy to restrain trade in violation of § 1 of the Sherman Act.<sup>1</sup> The United States District Court for the Southern District of California concluded that the proof failed to establish the alleged violation, and entered judgment for the defendants. The case is here on direct appeal under § 2 of the Expediting Act, 32 Stat. 823, 15 U. S. C. § 29 (1964 ed.). We reverse.

[\*\*\*\*6] I.

The appellees are the General Motors Corporation, which manufactures, among other things, the Chevrolet line of cars and trucks, and three associations of Chevrolet dealers in and around Los Angeles, California.<sup>2</sup> All of the Chevrolet dealers in the area belong to one or more of the appellee associations.

[\*130] Chevrolets are ordinarily distributed by dealers operating under a franchise from General Motors. The dealers purchase the cars from the manufacturer, and then retail them [\*\*\*418] to the public. The relationship between manufacturer and dealer is incorporated in a comprehensive uniform Dealer Selling Agreement. This agreement does not restrict or define those to whom [\*\*\*\*7] the dealer may sell. Nor are there limitations as to the territory within which the dealer may sell. Compare *White Motor Co. v. United States*, 372 U.S. 253. The franchise agreement does, however, contain a clause (hereinafter referred to as the "location clause") which prohibits a dealer from moving to or establishing "a new or different location, branch sales office, branch service station, or place [\*\*1323] of business including any used car lot or location without the prior written approval of Chevrolet."

Beginning in the late 1950's, "discount houses" engaged in retailing consumer goods in the Los Angeles area and "referral services"<sup>3</sup> began offering to sell new cars to the public at allegedly bargain prices. Their sources of supply were the franchised dealers. By 1960 a number of individual Chevrolet dealers, without authorization from General Motors, had developed working relationships with these establishments. A customer would enter one of these establishments and examine the literature and price lists for automobiles produced by several manufacturers. In some instances, floor models were available for inspection. Some of the establishments negotiated [\*\*\*\*8] [\*131] with the customer for a trade-in of his old car, and provided financing for his new-car purchase.

The relationship with the franchised dealer took various forms. One arrangement was for the discounter to refer the customer to the dealer. The car would then be offered to him by the dealer at a price previously agreed upon between the dealer and the discounter. In 1960, a typical referral agreement concerning Chevrolets provided that the price to the customer was not to exceed \$ 250 over the dealer's invoiced cost. For its part in supplying the customer, the discounter received \$ 50 per sale.

Another common arrangement was for the discounter [\*\*\*\*9] itself to negotiate the sale, the dealer's role being to furnish the car and to transfer title to the customer at the direction of the discounter. One dealer furnished Chevrolets under such an arrangement, charging the discounter \$ 85 over its invoiced cost, with the discounter getting the best price it could from its customer.

<sup>1</sup> The statute reads in relevant part: HN1 [↑] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . ." 26 Stat. 209, 15 U. S. C. § 1 (1964 ed.).

<sup>2</sup> Named as co-conspirators but not as defendants are "the officers, directors, and members of [the three associations], certain officers and employees of such members, certain officers and employees of General Motors, other Chevrolet dealers in the Southern California area, and others to the plaintiff unknown . . .".

<sup>3</sup> Since the evidence does not consistently distinguish between "discount houses" and "referral services," based either on the variety of goods offered to the public or on the nature of the arrangement between the establishment and the franchised dealer which supplied it with cars, we shall hereinafter use the term "discounter" to embrace all such establishments.

These were the principal forms of trading involved in this case, although within each there were variations,<sup>4</sup> [\*\*\*\*10] and there were schemes which fit neither pattern.<sup>5</sup> [\*132] By 1960 these methods for retailing new cars [\*\*\*419] had reached considerable dimensions. Of the 100,000 new Chevrolets sold in the Los Angeles area in that year, some 2,000 represented discount house or referral sales. One Chevrolet dealer attributed as much as 25% of its annual sales to participation in these arrangements, while another accounted for between 400 and 525 referral sales in a single year.

Approximately a dozen of the 85 Chevrolet dealers in the Los Angeles area were furnishing cars to discounters in [\*1324] 1960. As the volume of these [\*\*\*\*11] sales grew, the nonparticipating Chevrolet dealers located near one or more of the discount outlets<sup>6</sup> [\*\*\*\*12] began to feel the pinch. Dealers lost sales because potential customers received, or thought they would receive,<sup>7</sup> a more attractive deal from a discounter [\*133] who obtained its Chevrolets from a distant dealer. The discounters vigorously advertised Chevrolets for sale, with alluring statements as to price savings. The discounters also advertised that all Chevrolet dealers were obligated to honor the new-car warranty and to provide the free services contemplated therein; and General Motors does indeed require Chevrolet dealers to service Chevrolet cars, wherever purchased, pursuant to the new-car warranty and service agreement. Accordingly, nonparticipating dealers were increasingly called upon to service, without compensation, Chevrolets purchased through discounters. Perhaps what grated most was the demand that they "precondition" cars so purchased -- make the hopefully minor adjustments and do the body and paint work necessary to render a factory-fresh car both customer- and road-worthy.

[\*\*\*\*13] On June 28, 1960, at a regular meeting of the appellee Losor Chevrolet Dealers Association, member dealers discussed the problem and resolved to bring it to the attention of the Chevrolet Division's Los Angeles zone manager, Robert O'Connor. Shortly thereafter, a delegation from the association called [\*\*\*420] upon O'Connor, presented evidence that some dealers were doing business with the discounters, and asked for his assistance. O'Connor promised he would speak to the offending dealers. When no help was forthcoming, Owen Keown, a director of Losor, took matters into his own hands. First, he spoke to Warren Biggs and Wilbur Newman, Chevrolet dealers who were then doing a substantial business with discounters. According to Keown's testimony, Newman

<sup>4</sup> One dealer, for example, paid its referral service one-third of the gross profit on each sale, up to \$ 75, there being no fixed price at which the sale was to take place. The same dealer earlier had paid a flat fee of \$ 17.50 for every referral, whether or not the sale was consummated.

<sup>5</sup> At least one discount house actually purchased its cars from cooperative dealers, then resold them to its customers. In this situation, which in the trade is referred to as "bootlegging," the customer does not receive a new-car warranty. General Motors, while disapproving of the practice, does not assert that it violates the "location clause." In those arrangements against which General Motors and the associations did direct their efforts, title to the new car passed directly from dealer to retail customer, who thus obtained a new-car warranty and service agreement.

There must also be distinguished the ubiquitous practice of using "bird dogs" -- informal sources who steer occasional customers toward a particular dealer, in return for relatively small fees -- often a bottle of liquor. This practice is not only deemed by General Motors not to violate the "location clause," but has the corporation's endorsement as a desirable sales device.

<sup>6</sup> As the District Court found, 70% of the local Chevrolet dealers were located within five miles of one or more of the 23 discount house or referral outlets.

<sup>7</sup> There is evidence in the record that discount sales undercut the prices at which franchised dealers were able to, or chose to, compete. Two purchasers of Chevrolets, one on referral and the other in a discount house "sale," testified that they had "shopped" other dealers but found the discount and referral prices lower. Dealers and their salesmen complained to General Motors about sales lost through inability to meet the discounters' price. Moreover, the discounters advertised and actually provided auto loans at interest rates substantially lower than those offered by G. M. A. C., General Motors' financing subsidiary.

There is also evidence that it was not just price itself which induced customers to purchase Chevrolets through the discounters. One customer testified that he preferred the discount house because he thereby avoided the haggling over price which seems an inevitable facet of purchasing a car in the orthodox way. Others apparently assumed, without bothering to confirm by comparison shopping, that "discount" stores would offer lower prices. This assumption was fed by discount house advertising which promised "the lowest price anywhere" and "savings of hundreds of dollars."

told him that he would continue the practice "until . . . told not to by" Chevrolet, and that "when the Chevrolet Motor Division told him not to do it, he [**\*134**] knew that they wouldn't let some other dealer carry on with it."<sup>8</sup>

[\*\*\*\*14] Keown then reported the foregoing events at the association's annual meeting in Honolulu on November 10, 1960. The member dealers present agreed immediately [**\*\*1325**] to flood General Motors and the Chevrolet Division with letters and telegrams asking for help. Salesmen, too, were to write.<sup>9</sup>

Hundreds of letters and wires descended upon Detroit -- with telling effect. Within a week Chevrolet's O'Connor was directed to furnish his superiors in Detroit with "a detailed report of the discount house operations . . . as well as what action we in the Zone are taking to curb such sales."<sup>10</sup>

[\*\*\*\*15] By mid-December General Motors had formulated its response. On December 15, James M. Roche, then an executive vice president of General Motors, wrote to some of the complaining dealers. He noted that the [**\*135**] practices to which they were objecting "*in some instances* represent the establishment of a second and unauthorized sales outlet or location contrary to the provisions of the General Motors Dealers Selling Agreements." (Emphasis supplied.) Recipients of the letter were advised that General Motors personnel proposed to discuss that matter with each of the dealers.<sup>11</sup> O'Connor in Los Angeles was apprised of the letter's content and instructed to carry on the personal discussions referred to therein. With respect to the offending dealers, he was to work with Roy Cash, regional manager for the Chevrolet Division. Cash had been briefed on the subject in Detroit on December 14.

[\*\*\*\*16] General [**\*\*\*421**] Motors personnel proceeded to telephone all area dealers, both to identify those associated with the discounters and to advise nonparticipants that General Motors had entered the lists. The principal offenders were treated to unprecedeted individual confrontations with Cash, the regional manager. These brief meetings were wholly successful in obtaining from each dealer his agreement to abandon the practices in question. Some capitulated during the course of the four- or five-minute meeting, or immediately thereafter.<sup>12</sup> [\*\*\*\*17] One dealer, who met not with Cash but with the city sales manager for [**\*136**] Chevrolet, put off

<sup>8</sup> Dealer Biggs put the same sentiments into a letter to both Keown and Chevrolet's zone manager O'Connor, written on November 5, 1960. The day before, in O'Connor's presence, Keown had challenged Biggs to justify his dealings with the discounters. Biggs wrote: "We would be most reluctant to discard an account as good as this one without rather concrete assurance that it would not immediately be picked up by another Chevrolet dealer." Two weeks later, O'Connor forwarded Biggs' letter to General Motors officials in Detroit.

<sup>9</sup> In Keown's words, "We were seeking the assistance of the higher echelon officials of Chevrolet and General Motors in bringing about an end to the discount house sale of Chevrolets."

<sup>10</sup> O'Connor's report, dated November 22, recounted that "zone management" had talked with the offending dealers "in an attempt to have them desist," and that "our Dealer Associations have formed a committee to call on the supplying dealers and have asked them and have attempted to persuade them to discontinue this practice." Supported by a copy of dealer Biggs' letter, see n. 8, *supra*, O'Connor predicted that "many dealers will cease this type of business if they had any assurance that the account would not be picked up by some other dealer, immediately upon relinquishment."

<sup>11</sup> Roche wrote to those dealers who had complained directly to John Gordon, then president of General Motors. On December 29, 1960, a virtually identical letter went out to all General Motors dealers throughout the Nation, under the signature of the general sales managers for the respective divisions.

<sup>12</sup> One dealer testified that he abruptly terminated arrangements long maintained with two discount houses, despite the fact that one of these connections owed him \$ 20,000 and the other \$ 28,000. In the preceding four weeks the latter had reduced its indebtedness by \$ 52,000 and could reasonably have been expected to erase it completely within a few weeks. The dealer anticipated that upon cancellation of the accounts these debts would become uncollectible. His fears were justified. The accounts were terminated. The debts remained unpaid.

decision for a week "to make sure that the other dealers, or most of them, had stopped their business dealings with discount houses."<sup>13</sup>

There [\*\*1326] is evidence that unanimity was not obtained without reference to the ultimate power of General Motors. The testimony of dealer Wilbur Newman was [\*\*\*\*18] that regional manager Cash related a story, the relevance of which was not lost upon him, that in handling children, "I can tell them to stop something. If they don't do it . . . I can knock their teeth down their throats."

By mid-January General Motors had elicited from each dealer a promise not to do business with the discounters. But such agreements would require policing -- a fact which had been anticipated. General Motors earlier had initiated contacts with firms capable of performing such a function. This plan, unilaterally to police the agreements, was displaced, however, in favor of a joint effort between General Motors, the three appellee associations, and a number of individual dealers.

On December 15, 1960, representatives of the three appellee associations had met and appointed a joint committee to study the situation and to keep in touch with [\*137] Chevrolet's O'Connor.<sup>14</sup> Early in 1961, the three associations agreed [\*\*\*422] jointly to finance the "shopping" of the discounters to assure that no Chevrolet dealer continued to supply them with cars. Each of the associations contributed \$ 5,000, and a professional investigator was hired. He was instructed [\*\*\*\*19] to try to purchase new Chevrolets from the proscribed outlets, to tape-record the transactions, if any, and to gather all the necessary documentary evidence -- which the associations would then lay "at the doorstep of Chevrolet." These joint associational activities were both preceded and supplemented by similar "shopping" activities by individual dealers and by appellee Losor Chevrolet Dealers Association.

[\*\*\*\*20] General Motors collaborated with these policing activities. There is evidence that zone manager O'Connor and a subordinate, Jere Faust, actively solicited the help of individual dealers in uncovering violations. Armed with information of such violations obtained from the dealers or their associations, O'Connor or members of his staff would ask the offending dealer to come in and talk. The dealer then was confronted with the car purchased by the "shopper," the documents of sale, and in most cases a tape recording of the transaction. In every instance, the embarrassed dealer repurchased the car, sometimes at a substantial loss, and promised to stop such sales. At the direction of O'Connor or a subordinate, the checks with which the cars were repurchased were [\*138] made payable to an attorney acting jointly for the three defendant associations.

O'Connor testified that on no occasion did he "force" a dealer to repurchase; he merely made the opportunity available. But one dealer testified that when an assistant zone manager for the Chevrolet [\*\*1327] Division asked him to come in and talk about discount sales, "he specified a sum of money which I was to bring with me [\*\*\*\*21] when I came down and saw him. . . . I kept the appointment and brought a cashier's check. I knew when I came down to Los Angeles that I was going to repurchase an automobile . . ." Another dealer testified that upon being confronted with evidence that one of his cars had been purchased through a referral service, he not only bought it

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<sup>13</sup> According to Francis Bruder, a dealer who had been doing business with the discounters since 1957, "Cash told me that he felt certain that the other dealers would discontinue dealing with discount houses and referral services as well. I left this meeting with the impression that every dealer who had been doing business with a discount house or referral service would soon quit."

This was precisely the impression General Motors had intended to implant. As was explained in an inter-office memorandum to the general sales manager of General Motors' Chevrolet Division, "[All dealers were talked to] in order that every dealer with whom the subject was discussed would know that a similar discussion was being held with all other dealers so that, if certain dealers should elect to discontinue their cooperation with a discount house, we might be able to discourage some other dealer who might be solicited from starting the practice."

<sup>14</sup> The District Court characterized this December 15 meeting as the first between representatives of the three associations, pertaining to the problem of discount house and referral sales. However, as we have previously noted, n. 10, *supra*, O'Connor reported to General Motors three weeks earlier, on November 22, that the three associations had formed a committee which already had called upon nonconforming dealers. The record does not enable us to resolve this factual conflict, nor is its resolution important. On either version, the appellee associations entered into an explicit agreement to act together to eliminate the new mode of intrabrand competition.

384 U.S. 127, \*138; 86 S. Ct. 1321, \*\*1327; 16 L. Ed. 2d 415, \*\*\*422; 1966 U.S. LEXIS 2960, \*\*\*\*21

back (without questioning the correctness of the price exacted) but also fired the employee responsible for the transaction -- although the employee had been commended by the Chevrolet Division a few weeks earlier as the "number one fleet salesman" in the 11-state Pacific region.

By the spring of 1961, the campaign to eliminate the discounters from commerce in new Chevrolet cars was a success. Sales through the discount outlets seem to have come to a halt. Not until a federal grand jury commenced an inquiry into the matters which we have sketched does it appear that any Chevrolet dealer resumed its business association with the discounters.

## II.

On these basic facts, the Government first proceeded criminally. A federal grand jury in the Southern District of California returned an indictment. After trial, the defendants were found not guilty. [\*\*\*\*22] The present civil action, filed shortly after return of the indictment, was then brought to trial.

[\*139] Both the Government and the appellees urge the importance, for purposes of decision, of the "location clause" in the Dealer Selling Agreement which prohibits a franchised dealer from moving to or establishing [\*\*\*423] "a new or different location, branch sales office, branch service station, or place of business . . . without the prior written approval of Chevrolet." The appellees contend that this contractual provision is lawful, and that it justifies their actions. They argue that General Motors acted lawfully to prevent its dealers from violating the "location clause," that the described arrangements with discounters constitute the establishment of additional sales outlets in violation of the clause, and that the individual dealers -- and their associations -- have an interest in uniform compliance with the franchise agreement, which interest they lawfully sought to vindicate.

The Government invites us to join in the assumption, only for purposes of this case, that the "location clause" encompasses sales by dealers through the medium of discounters. But it urges [\*\*\*\*23] us to hold that, so construed, the provision is unlawful as an unreasonable restraint of trade in violation of the Sherman Act.<sup>15</sup>

LEdHN[1] [1]We need not reach these questions concerning the meaning, effect, or validity of the "location clause" or of any other provision in the Dealer Selling Agreement, and we do not. We do [\*\*\*\*24] not decide whether the "location [\*140] clause" may be construed to prohibit a dealer, party to it, from selling through discounters, or whether General Motors could by unilateral action enforce the clause, so construed. We have here a classic conspiracy in restraint of trade: joint, collaborative action by dealers, the appellee associations, and General Motors to eliminate a class of competitors by terminating [\*\*1328] business dealings between them and a minority of Chevrolet dealers and to deprive franchised dealers of their freedom to deal through discounters if they so choose. Against this fact of unlawful combination, the "location clause" is of no avail. Whatever General Motors might or might not lawfully have done to enforce individual Dealer Selling Agreements by action within the borders of those agreements and the relationship which each defines, is beside the point. And, because the action taken constitutes a combination or conspiracy, it is not necessary to consider what might be the legitimate interest of a dealer in securing compliance by others with the "location clause," or the lawfulness of action a dealer might individually take to vindicate this interest.

[\*\*\*\*25] The District Court decided otherwise. It concluded that the described events did not add up to a combination or conspiracy violative of the antitrust laws. But its conclusion cannot be squared with its own specific findings of fact. These findings include the essentials of a conspiracy within S.1 of the Sherman Act: That in the summer of 1960 the Losor Chevrolet Dealers Association, "through some of its dealer-members," complained to General Motors personnel about sales through discounters (Finding 34); that at a Losor meeting in November 1960 the dealers there present agreed to embark on a letter-writing campaign directed at enlisting [\*\*\*424] the aid of

<sup>15</sup> The Government's complaint contains no reference to the "location clause," and the Government concedes that its case was tried on a conspiracy theory, the defendants injecting the contractual issue by way of defense. Trial counsel for the Government did advert to the clause in the District Court, but it does not appear that he challenged its validity, as construed, in the same sense that the Government does here. See Trial Transcript, pp. 9, 17-18. In light of our disposition of the case, we have no occasion to consider whether the Government's argument directed to the clause, as construed, is properly before us.

384 U.S. 127, \*140; 86 S. Ct. 1321, \*\*1328; 16 L. Ed. 2d 415, \*\*\*424; 1966 U.S. LEXIS 2960, \*\*\*\*25

General Motors (Finding 35); that in December and January General Motors personnel discussed the matter with every Chevrolet dealer in the Los Angeles area and elicited from [\*141] each a promise not to do business with the discounters (Finding 39); that representatives of the three associations of Chevrolet dealers met on December 15, 1960, and created a joint investigating committee (Finding 40); that the three associations then undertook jointly to police the agreements obtained from each of the dealers by General [\*\*\*\*26] Motors; that the associations supplied information to General Motors for use by it in bringing wayward dealers into line, and that Chevrolet's O'Connor asked the associations to do so (Findings 41 and 42); that as a result of this collaborative effort, a number of Chevrolet dealers were induced to repurchase cars they had sold through discounters and to promise to abjure such sales in future (Finding 42).

LEdHN[2][↑] [2]LEdHN[3A][↑] [3A]These findings by the trial judge compel the conclusion that a conspiracy to restrain trade was proved.<sup>16</sup> [\*1329] The [\*142] error of the trial court lies in its failure to apply the correct and established standard for ascertaining the existence of a combination or conspiracy under § 1 of the Sherman Act. See United States v. Parke, Davis & Co., 362 U.S. 29, 44-45. The trial court attempted to justify its conclusion on the following reasoning: That each defendant and alleged co-conspirator acted to promote its own self-interest; that General Motors, as well as the defendant associations and [\*\*\*\*27] their members, has a lawful interest in securing compliance with the "location clause" and in thus protecting the franchise system of distributing automobiles -- business arrangements which the court deemed lawful and proper; and that in seeking to vindicate these interests the defendants and their alleged co-conspirators entered into no "agreements" among themselves, although they may have engaged in "parallel action."

### LEdHN[3B][↑] [3B]

[\*\*\*\*28] LEdHN[4][↑] [4] LEdHN[5][↑] [5]These factors do not justify [\*\*\*425] the result reached. It is of no consequence, for purposes of determining whether there has been a combination or conspiracy under § 1 of the Sherman Act, that each party acted in its own lawful interest. Nor is it of consequence for this purpose whether the "location clause" and franchise system are lawful or economically desirable. And although we regard as clearly erroneous and irreconcilable with its other findings the trial court's conclusory "finding" that there had been no "agreement" among the defendants and their alleged co-conspirators, it has long been settled that HN2[↑] explicit agreement is not a necessary part of a Sherman [\*143] Act conspiracy -- certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan. United States v. Parke, Davis & Co., supra, at 43; United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 722-723; [\*\*\*\*29] Federal Trade Comm'n v. Beech-Nut Packing Co., 257 U.S. 441, 455.

<sup>16</sup> We note that, as in United States v. Parke, Davis & Co., 362 U.S. 29, 44-45, the ultimate conclusion by the trial judge, that the defendants' conduct did not constitute a combination or conspiracy in violation of the Sherman Act, is not to be shielded by the "clearly erroneous" test embodied in Rule 52 (a) of the Federal Rules of Civil Procedure. That Rule in part provides: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." As in Parke Davis, supra, the question here is not one of "fact," but consists rather of the legal standard required to be applied to the undisputed facts of the case. See United States v. Singer Mfg. Co., 374 U.S. 174, 194, n. 9; United States v. Mississippi Valley Co., 364 U.S. 520, 526, and cases there cited.

Moreover, the trial court's customary opportunity to evaluate the demeanor and thus the credibility of the witnesses, which is the rationale behind Rule 52 (a) (see United States v. Oregon State Med. Soc., 343 U.S. 326, 331-332), plays only a restricted role here. This was essentially a "paper case." It did not unfold by the testimony of "live" witnesses. Of the 38 witnesses who gave testimony, only three appeared in person. The testimony of the other 35 witnesses was submitted either by affidavit, by deposition, or in the form of an agreed-upon narrative of testimony given in the earlier criminal proceeding before another judge. A vast number of documents were also introduced, and bear on the question for decision.

In any event, we resort to the record not to contradict the trial court's findings of *fact*, as distinguished from its conclusory "findings," but to supplement the court's factual findings and to assist us in determining whether they support the court's ultimate legal conclusion that there was no conspiracy.

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Neither individual dealers nor the associations acted independently or separately. The dealers collaborated, through the associations and otherwise, among themselves and with General Motors, both to enlist the aid of General Motors and to enforce dealers' promises to forsake the discounters. The associations explicitly entered into a joint venture to assist General Motors in policing the dealers' promises, and their joint proffer of aid was accepted and utilized by General Motors.

Nor did General Motors confine its activities to the contractual boundaries of its relationships with individual dealers. As the trial court found (Finding 39), General Motors at no time announced that it would terminate the franchise of any dealer which furnished cars to the discounters.<sup>17</sup> The evidence indicates that it had no intention of acting in this unilateral fashion.<sup>18</sup> On the contrary, overriding [\*\*1330] corporate policy with respect to [\*144] proper dealer relations<sup>19</sup> dissuaded General Motors from engaging in this sort of wholly unilateral conduct, the validity of which under the antitrust [\*\*\*30] laws was [\*\*\*426] assumed, without being decided, in *Parke Davis, supra*.

[\*\*\*31] As Parke Davis had done, General Motors sought to elicit from all the dealers agreements, substantially interrelated and interdependent, that none of them would do business with the discounters. These agreements were hammered out in meetings between nonconforming dealers and officials of General Motors' Chevrolet Division, and in telephone conversations with other dealers. It was acknowledged from the beginning that substantial unanimity would be essential if the agreements were to be forthcoming. And once the agreements were secured, General Motors both solicited and employed the assistance of its alleged co-conspirators in helping to police them. What resulted was a fabric interwoven by many strands of joint action to eliminate the discounters from participation in the market, to inhibit the free choice of franchised dealers to select their own methods of trade and to provide multilateral surveillance and enforcement. This process for achieving and enforcing the desired objective [\*145] can by no stretch of the imagination be described as "unilateral" or merely "parallel." See *Parke Davis, supra, at 46*; *Federal Trade Comm'n v. Beech-Nut Packing Co.*, 257 U.S. 441, 453; [\*\*\*32] *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 722-723; *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226; *United States v. Masonite Corp.*, 316 U.S. 265, 275; Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962).<sup>20</sup>

<sup>17</sup> The December letters to all dealers said only that "in effect, in some instances" the arrangements in question might violate the unauthorized location clause of the Dealer Selling Agreement. No dealer was told, either by letter or in person, that *its* conduct violated the franchise agreement, and no dealer was warned that continuance of discount house or referral sales would result in termination of its franchise. Zone manager O'Connor did not regard his instructions from Detroit as authorizing him to go that far, and he was of the view that "the general letter [to all dealers] didn't suggest any such thing."

<sup>18</sup> We refer to this without considering whether General Motors could lawfully have taken such action.

<sup>19</sup> James Roche testified, "It is not [General Motors'] practice to threaten dealers with termination of their franchise." Good dealers and dealer locations, he said, are hard to come by. In many dealerships, General Motors itself has invested substantial funds. Therefore, said Roche, "we would not want our people to go in and wave the franchise agreement, selling agreement, and threaten the dealer with termination in the event he didn't agree, after following -- after reading a letter he was violating our agreement and should change his practice. Instead we expected that this would be handled on a sound, calm, sensible business-like approach."

**HN3** [↑] There are also statutory inhibitions on the right of an automobile manufacturer to terminate dealer franchises. See Act of Aug. 8, 1956, c. 1038, § 2, 70 Stat. 1125, *15 U. S. C. § 1222 (1964 ed.)*; Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 Yale L. J. 1, 103-114 (1959).

<sup>20</sup> Compare *Klein v. American Luggage Works, Inc.*, 323 F.2d 787 (C. A. 3d Cir. 1963), and *Graham v. Triangle Publications, Inc.*, 233 F. Supp. 825 (D. C. E. D. Pa. 1964), aff'd per curiam, 344 F.2d 775 (C. A. 3d Cir. 1965), discussed in Fulda, *Individual Refusals to Deal: When Does Single-Firm Conduct Become Vertical Restraint?* 30 Law & Contemp. Prob. 590, 592-597 (1965).

384 U.S. 127, \*145; 86 S. Ct. 1321, \*\*1330; 16 L. Ed. 2d 415, \*\*\*426; 1966 U.S. LEXIS 2960, \*\*\*\*32

[LEdHN\[6\]](#) [6] [HN4](#) There [\*\*\*\*33] can be no doubt that the effect of the combination or conspiracy here was to restrain trade and commerce within the meaning of the Sherman Act. Elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Act.

[LEdHN\[7\]](#) [7] In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, [359 U.S. 207](#), the Court was confronted with the question whether "a group of powerful businessmen may act in concert to deprive a single merchant, like Klor, of the goods he needs to compete effectively." [359 U.S., at 210](#). The allegation was that manufacturers and distributors of electrical appliances had conspired among themselves and with a major retailer, Broadway-Hale, "either not to sell to Klor's [Broadway-Hale's next-door neighbor and competitor] or to sell to it only at discriminatory prices" [\*\*1331] and highly unfavorable terms." [359 U.S., at 209](#). The Court concluded that the alleged group boycott of even a single trader violated the statute<sup>21</sup> without regard to the [\*146] reasonableness [\*\*\*427] of the conduct in the circumstances. [\*\*\*\*34] Group boycotts of a trader, said the Court, are among those "classes of restraints which from their 'nature or character' were unduly restrictive . . ." [359 U.S., at 211](#). This was not new doctrine, for it had long been recognized that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use," and that group boycotts are of this character. *Northern Pac. R. Co. v. United States*, [356 U.S. 1, 5](#). See also *Fashion Originators' Guild of America, Inc. v. Federal Trade Comm'n*, [312 U.S. 457](#), and *Eastern States Retail Lumber Dealers' Assn. v. United States*, [234 U.S. 600, 613-614](#), neither of which involved price-fixing.

[\*\*\*\*35] [LEdHN\[8\]](#) [8] [LEdHN\[9\]](#) [9] The principle of these cases is that [HN5](#) where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct. See Barber, *Refusals To Deal Under the Federal Antitrust Laws*, 103 U. Pa. L. Rev. 847, 872-885 (1955). Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles, any more than by reference to the allegedly tortious conduct against which a combination or conspiracy may be directed -- as [\*147] in *Fashion Originators' Guild of America, Inc. v. Federal Trade Comm'n, supra, at 468*.

[LEdHN\[10\]](#) [10] [\*\*\*\*36] We note, moreover, that inherent in the success of the combination in this case was a substantial restraint upon price competition -- a goal unlawful *per se* when sought to be effected by combination or conspiracy. *E. g., United States v. Parke, Davis & Co.*, [362 U.S. 29, 47](#); *United States v. Socony-Vacuum Oil Co.*, [310 U.S. 150, 223](#). And the *per se* rule applies even when the effect upon prices is indirect. *Simpson v. Union Oil Co.*, [377 U.S. 13, 16-22](#); *Socony-Vacuum Oil Co., supra*.

There is in the record ample evidence that one of the purposes behind the concerted effort to eliminate sales of new Chevrolet cars by discounters was to protect franchised dealers from real or apparent price competition. The discounters advertised price savings. See n. 7, *supra*. Some purchasers found and others believed that discount prices were lower than those available through the franchised dealers. *Ibid.* Certainly, complaints about price competition were prominent in the letters and telegrams with which the individual dealers and salesmen bombarded General Motors in [\*\*1332] November 1960.<sup>22</sup> [\*\*\*\*37] (Finding 38.) And although the District Court found to the

<sup>21</sup> The complaint in *Klor's* charged a violation of [§ 2](#) of the Sherman Act, as well as of [§ 1](#). In the present case, the Government did not charge the appellees under [§ 2](#), which provides that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ." [15 U. S. C. § 2 \(1964 ed.\)](#).

<sup>22</sup> Evidence on this subject was admitted solely for the purpose of showing the dealers' state of mind, rather than to prove the existence of actual price-cutting by the discounters. But the collaborators' state of mind is of significance here.

contrary, there is evidence in the record that General Motors itself was not unconcerned about the effect [\*\*\*428] of discount sales upon general price levels.<sup>23</sup>

[\*\*\*\*38]

[\*148] [LEdHN\[11\]](#)<sup>↑</sup> [11] [LEdHN\[12\]](#)<sup>↑</sup> [12] The protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws. We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market, by combination or conspiracy, of a class of traders. Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely.

Accordingly, we reverse and remand to the United States District Court for the Southern District of California in order that it may fashion appropriate equitable relief. See [\*United States v. Parke, Davis & Co., supra, at 47-48.\*](#)

*It is so ordered.*

**Concur by:** HARLAN

## Concur

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MR. JUSTICE HARLAN, concurring in the result.

Although I consider that [\*United States v. Parke, Davis & Co., 362 U.S. 29,\*](#) decided in 1960, represents basically unsound antitrust doctrine, see my dissenting [\*\*\*\*39] opinion, [\*362 U.S., at 49,\*](#) I see no escape from the conclusion that it controls this case. *Parke Davis* held that a manufacturer cannot maintain resale prices by refusing to sell to those who do not follow his suggested prices if the refusal is attended by concerted action with his customers, even though he may unilaterally so conduct himself. See [\*United States v. Colgate & Co., 250 U.S. 300,\*](#) Although *Parke Davis* related to alleged price-fixing, I have been unable to discern any tenable reason for differentiating it from a case involving, as here, alleged boycotting. [\*149] The conclusion that *Parke Davis* governs the present case is therefore unavoidable, given the undisputed evidence that General Motors acted in concert with its dealers in enforcing the location clause. In my opinion, however, General Motors is not precluded from enforcing the location clause by unilateral action, and I find nothing in the Court's opinion to the contrary.

On this basis I concur in the judgment of the Court.

## References

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Annotation References:

Extent of trader's [\*\*\*\*40] right to exercise his own discretion as to persons with whom he will or will not deal. 68 L ed 448.

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<sup>23</sup> In an inter-office memorandum, circulated among General Motors officials immediately prior to formulation of corporate policy vis-a-vis the discounters, it was stated that "It would appear that one of the real hazards of condoning this type of operation is that discounted prices are freely quoted to a large portion of the public." Moreover, we note that some discounters advertised that they would finance new-car purchases at an interest rate of 5 1/2%, a rate substantially lower than that available at franchised Chevrolet dealers through G. M. A. C., a subsidiary of General Motors Corporation. See n. 7, *supra*. Finally, it is conceded that General Motors is intensely concerned that each of its dealers has an adequate "profit opportunity" (see Finding 17), a concern which necessarily involves consideration of the price realized by dealers.



## United States v. Von's Grocery Co.

Supreme Court of the United States

March 22, 1966, Argued ; May 31, 1966, Decided

No. 303

### **Reporter**

384 U.S. 270 \*; 86 S. Ct. 1478 \*\*; 16 L. Ed. 2d 555 \*\*\*; 1966 U.S. LEXIS 2823 \*\*\*\*; 1966 Trade Cas. (CCH) P71,780

UNITED STATES v. VON'S GROCERY CO. ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

**Disposition:** [233 F.Supp. 976](#), reversed.

## **Core Terms**

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merger, chains, Markets, concentration, Food, competitors, acquisitions, grocery, firms, Shopping, retail, largest, sales, single-store, top, market share, horizontal, Giant, lessen competition, grocery store, Clayton Act, combined, market-extension, monopoly, chain store, incipency, arresting, smaller, legislative history, large number

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Clayton Act > General Overview

**[HN1](#)** [down arrow] **Antitrust & Trade Law, Clayton Act**

See [15 U.S.C.S. § 18](#).

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

**[HN2](#)** [down arrow] **Antitrust & Trade Law, Clayton Act**

Section 7 of the Clayton Act, [15 U.S.C.S. § 18](#), as amended in 1950 by the Celler-Kefauver Anti-Merger Act, requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its

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impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their "incipiency."

## **Lawyers' Edition Display**

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### **Summary**

The United States brought an action in the United States District Court for the Southern District of California charging that the acquisition by a corporation of its direct competitor, both large retail grocery companies in Los Angeles, California, violated 7 of the Clayton Act, as amended in 1950, which proscribes the acquisition by one corporation of the assets of another corporation where the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly. After the District Court refused to grant the government's motion for a temporary restraining order, one of the corporations took over all of the other's capital stock and assets, including 36 grocery stores in the Los Angeles area. After hearing evidence, the District Court entered judgment for the defendants, concluding as a matter of law that there was not a reasonable probability that the merger would tend substantially to lessen competition or create a monopoly in violation of 7. ([233 F Supp 976](#).)

On the government's direct appeal, the Supreme Court of the United States reversed. In an opinion by Black, J., expressing the view of six members of the Court, it was held that the merger violated 7, in view of the merging companies' share of the market, the substantial decrease of the number of single-store grocery firms in the market, both before and after the merger, and the concentration of the grocery business into the hands of fewer and fewer owners. The District Court was directed to order divestiture without delay.

White, J., joined the Court's opinion in a separate concurring opinion, pointing out that the merger not only disposed of a substantial competitor but increased the concentration in the leading firms.

Stewart, J., joined by Harlan, J., dissented on the ground that it was not shown that the effect of the merger may be substantially to lessen competition, or to tend to create a monopoly, as required by 7.

Fortas, J., did not participate.

### **Headnotes**

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > merger of grocery chain stores --

> Headnote:

[LEdHN\[1\]](#) [1]

The prohibition in 7 of the amended Clayton Act ([15 USC 18](#)) of the acquisition by one corporation of the assets of another corporation where the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly is violated by a merger of two large retail grocery companies in Los Angeles, where the record showed that in the year of the merger (1960) the sales of the combined companies were 7.5 percent of the total \$ 2,500,000,000 of retail groceries sold in the Los Angeles market each year; the merger created the second largest grocery chain in Los Angeles, with sales of almost \$ 172,488,000 annually; the number of single-store grocery firms decreased from 5,365 in 1950 to 3,818 in 1961, and by 1963 had dropped still further to 3,590, while from 1953 to 1962 the number of chains with two or more grocery stores increased from 96 to 150; the small companies were continually being absorbed by the larger firms through mergers, 9 of the top 20 chains acquiring 126 stores from their smaller competitors in the period from 1949 to 1958.

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RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §6 > purpose of antitrust acts -- > Headnote: [LEdHN\[2\]](#) [2]

The purpose of the Sherman Antitrust Act and of the Clayton Act is to prevent economic concentration in the American economy by keeping a large number of small competitors in business.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > prohibition of mergers -- > Headnote: [LEdHN\[3\]](#) [3]

The 1960 Amendment (64 Stat 1125) of 7 of the Clayton Act ( [15 USC 18](#)) broadens its scope so as to prohibit not only mergers between competitors the effect of which "may be substantially to lessen competition or to tend to create a monopoly" but to prohibit all mergers having that effect; these terms look not merely to the actual present effect of a merger but instead to its effect upon future competition.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > mergers -- > Headnote: [LEdHN\[4\]](#) [4]

Where concentration is gaining momentum in a market, the Supreme Court of the United States must be alert to carry out Congress' intent to protect competition against ever increasing concentration through mergers.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > mergers -- > Headnote: [LEdHN\[5\]](#) [5]

If ever a merger of two already powerful companies in a way which makes them even more powerful than they were before would not violate 7 of the Clayton Act ( [15 USC 18](#)), it does when it takes place in a market characterized by a long and continuous trend toward fewer and fewer owner- competitors.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > merger -- impact on competition -- > Headnote: [LEdHN\[6\]](#) [6]

Determination of the question whether the effect of a merger "may be substantially to lessen competition" in the relevant market, so as to bring the merger within the prohibition of 7 of the Clayton Act ( [15 USC 18](#)), requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future.

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APPEAL §1701 > RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §78 > reversal of dismissal of complaint -- divestiture order -- > Headnote:

[LEdHN\[7\]](#) [7]

In a civil action charging a violation of 7 of the Clayton Act ([15 USC 18](#)) by one grocery company merging with another, wherein the defendants had knowledge of the antitrust charge prior to the effectuation of the merger, but the Federal District Court dismissed the complaint after a trial, the Supreme Court of the United States, determining that the merger violates 7, will not only reverse the District Court's judgment, but also direct it to order divestiture without delay.

## Syllabus

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The United States charged that the acquisition in 1960 by Von's Grocery Company of Shopping Bag Food Stores, a competitor in the retail grocery market in the Los Angeles area, violated § 7 of the Clayton Act. After a hearing the District Court concluded that there was "not a reasonable probability" that the merger would tend "substantially to lessen competition" or "create a monopoly" in violation of § 7 and entered judgment for the appellees. *Held*: The merger of two of the largest and most successful retail grocery companies in a market area characterized by a steady decline, before and after the merger, in the number of small grocery companies, combined with significant absorption of small firms by larger ones, is a violation of § 7 of the Clayton Act. Pp. 274-279.

- (a) By the enactment of the Celler-Kefauver amendment to § 7 in 1950 Congress sought to preserve competition among small businesses by halting a trend toward concentration **[\*\*\*\*2]** in its incipiency and thus the courts must be alert to protect competition against increasing concentration through mergers especially where concentration is gaining momentum in the market. Pp. 276-277.
- (b) This case presents the precise situation which Congress intended to proscribe, where two powerful companies merge to become more powerful in a market exhibiting a marked trend toward concentration. Pp. 277-278.
- (c) Section 7 requires not only an appraisal of the immediate impact of the merger on competition but a prediction of the merger's effect on competitive conditions in the future, to prevent the destruction of competition. [United States v. Philadelphia Nat. Bank, 374 U.S. 321, 362](#). P. 278.
- (d) Since the appellees were on notice of the antitrust charge, the judgment is reversed and the District Court is directed to order divestiture without delay. P. 279.

**Counsel:** Richard A. Posner argued the cause for the United States. With him on the brief were Solicitor General Marshall, Assistant Attorney General Turner, Robert B. Hummel, James J. Coyle and John F. Hughes.

William W. Alsup argued the cause for appellees. With him on the brief were Warren M. **[\*\*\*\*3]** Christopher and William W. Vaughn.

Henry J. Bison, Jr., argued the cause and filed a brief for the National Association of Retail Grocers of the United States, as amicus curiae, urging affirmance.

**Judges:** Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White; Fortas took no part in the consideration or decision of this case.

**Opinion by:** BLACK

## Opinion

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**[\*271] [\*\*\*557] [\*\*1479]** MR. JUSTICE BLACK delivered the opinion of the Court.

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On March 25, 1960, the United States brought this action charging that the acquisition by Von's Grocery Company of its direct competitor Shopping Bag Food Stores, both large retail grocery companies in Los Angeles, California, violated § 7 of the Clayton Act which, as amended in 1950 by the Celler-Kefauver Anti-Merger Act, provides in relevant part:

**HN1**[] "That no corporation engaged in commerce . . . shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."<sup>1</sup>

On March 28, 1960, three days later, the District Court refused to [\*\*\*\*4] grant the Government's motion for a temporary restraining order and immediately Von's took over all of Shopping Bag's capital stock and assets including 36 grocery stores in the Los Angeles area. After [\*272] hearing evidence on both sides, the District Court made findings of fact and concluded as a matter of law that there was "not a reasonable probability" that the merger would tend "substantially to lessen competition" or "create a monopoly" in violation of § 7. For this reason the District Court entered judgment for the defendants. [233 F.Supp. 976, 985](#). The Government appealed directly to this Court as authorized by § 2 of the Expediting Act.<sup>2</sup> The sole question here is whether the District Court properly concluded on the facts before it that the Government had failed to prove a violation of § 7.

[\*\*\*\*5] [LEdHN1](#)[] [1]The record shows the following facts relevant to our decision. The market involved here is the retail grocery market in the Los Angeles area. In 1958 Von's retail sales ranked third in the area and Shopping Bag's ranked sixth. In 1960 their sales together were 7.5% of the total two and one-half billion dollars of retail groceries sold in the Los Angeles market each year. For many years before the merger both [\*\*\*558] companies had enjoyed great success as rapidly growing companies. From 1948 to 1958 the number of Von's stores in the Los Angeles area practically doubled from 14 to 27, while at the same time the number of Shopping Bag's stores jumped from 15 to 34. During that same decade, Von's sales increased fourfold and its share of the market almost doubled while Shopping Bag's sales multiplied seven times and its share of the market tripled. The merger of these two highly successful, expanding and aggressive competitors created the second largest grocery chain in Los Angeles with sales of almost \$ 172,488,000 annually. In addition the findings of the District Court show that [\*273] [\*\*\*\*6] the number of owners operating single stores in the Los Angeles retail grocery market decreased from 5,365 in 1950 to 3,818 in 1961. By 1963, three years after the merger, the number of single-store owners had dropped still further to 3,590.<sup>3</sup> During roughly the same period, [\*\*1480] from 1953 to 1962, the number of chains with two or more grocery stores increased from 96 to 150. While the grocery business was being concentrated into the hands of fewer and fewer owners, the small companies were continually being absorbed by the larger firms through mergers. According to an exhibit prepared by one of the Government's expert witnesses, in the period from 1949 to 1958 nine of the top 20 chains acquired 126 stores from their smaller competitors.<sup>4</sup> Figures

<sup>1</sup> 38 Stat. 731, as amended by 64 Stat. 1125, [15 U. S. C. § 18 \(1964 ed.\)](#).

<sup>2</sup> 32 Stat. 823, as amended by 62 Stat. 989, [15 U. S. C. § 29 \(1964 ed.\)](#).

<sup>3</sup> Despite this steadfast concentration of the Los Angeles grocery business into fewer and fewer hands, the District Court, in Finding of Fact No. 80, concluded as follows:

"There has been no increase in concentration in the retail grocery business in the Los Angeles Metropolitan Area either in the last decade or since the merger. On the contrary, economic concentration has decreased . . . ."

This conclusion is completely contradicted by Finding No. 23 which makes plain the steady decline in the number of individual grocery store owners referred to above. It is thus apparent that the District Court, in finding No. 80, used the term "concentration" in some sense other than a total decrease in the number of separate competitors which is the crucial point here.

<sup>4</sup> Appellees, in their brief, claim that 120 and not 126 stores changed hands in these acquisitions:

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of a principal defense witness, set out below, illustrate the many acquisitions and mergers in the Los Angeles grocery industry from 1954 through 1961 including acquisitions made by Food Giant, Alpha Beta, Fox, and [\*274] Mayfair, all among the 10 leading chains in the area.<sup>5</sup> Moreover, a table prepared by the Federal Trade Commission appearing in the Government's reply brief, but not a part of the record here, shows that [\*\*\*\*7] acquisitions and mergers in the Los Angeles retail grocery market have continued at a rapid rate since the merger.<sup>6</sup> These facts alone are enough to cause us to conclude contrary to the District Court that the Von's-Shopping Bag merger did violate § 7. Accordingly, we reverse.

From this country's beginning there has been an abiding and widespread fear of the evils which flow from monopoly -- that is the concentration of economic power in the hands of a few. On the basis of this fear, Congress in 1890, when many of the Nation's industries [\*\*559] were already concentrated into what it deemed too few hands, passed the Sherman Act in an attempt to prevent further concentration and to preserve competition among a large number of sellers. Several years later, in 1897, this Court emphasized this policy of the Sherman Act by calling attention to the tendency of powerful business combinations to restrain competition "by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves in their altered surroundings." *United States v. Trans-Missouri Freight Assn., 166 U.S. 290, 323.* [\*\*\*9] <sup>7</sup> The Sherman Act failed to protect the smaller businessmen [\*275] from elimination through the monopolistic pressures of large combinations which used mergers to grow ever more powerful. As a result in 1914 [\*\*1481] Congress, viewing mergers as a continuous, pervasive threat to small business, passed § 7 of the Clayton Act which prohibited corporations under most circumstances from merging by purchasing the stock of their competitors. Ingenious businessmen, however, soon found a way to avoid § 7 and corporations began to merge simply by purchasing their rivals' assets. This Court in 1926, over the dissent of Justice Brandeis, joined by Chief Justice Taft and Justices Holmes and Stone approved this device for avoiding § 7<sup>8</sup> and mergers continued to concentrate economic power into fewer and fewer hands until 1950 when Congress passed the Celler-Kefauver Anti-Merger Act now before us.

[LEdHN\[2\]](#) [↑] [2][LEdHN\[3\]](#) [↑] [3][LEdHN\[4\]](#) [↑] [4]Like the Sherman Act in 1890 and the Clayton Act in 1914, the basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business.<sup>9</sup> In stating the purposes of their bill, both of its sponsors, Representative Celler and Senator Kefauver, emphasized their fear, widely shared by other members of Congress, that this concentration was rapidly driving the small businessman out of the market.<sup>10</sup> The period from 1940 to

"It should also be noted here that the exhibit is in error in showing an acquisition by Food Giant *from itself* of six stores doing an annual volume of \$ 31,700,000. Actually this was simply a change of name by Food Giant . . . ."

<sup>5</sup> [\*\*\*\*8] These figures as they appear in a table in the Brief for the United States show acquisitions of retail grocery stores in the Los Angeles area from 1954 to 1961: See Appendix, Table 1, substantially reproducing the above-mentioned table.

<sup>6</sup> See Appendix, Table 2.

<sup>7</sup> Later, in 1945, Judge Learned Hand, reviewing the policy of the antitrust laws and other laws designed to foster small business, said, "Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." *United States v. Aluminum Co. of America, 148 F.2d 416, 429.*

<sup>8</sup> [\*\*\*\*10] *Thatcher Manufacturing Co. v. Federal Trade Commission, 272 U.S. 554, 560.*

<sup>9</sup> See, e. g., *U.S. v. Philadelphia Nat. Bank, 374 U.S. 321, 362-363; United States v. Alcoa, 377 U.S. 271, 280.*

<sup>10</sup> Representative Celler, in introducing the bill on the House floor, remarked:

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1947, which was at [\*276] the center of attention throughout the hearings and debates on the Celler-Kefauver bill, had been characterized [\*\*\*560] by a series of mergers between large corporations and their smaller competitors resulting in the steady [\*\*\*11] erosion of the small independent business in our economy.<sup>11</sup> As we said in *Brown Shoe Co. v. United States*, 370 U.S. 294, 315, "The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy." To arrest this "rising tide" toward concentration into too few hands and to halt the gradual demise of the small businessman, Congress [\*\*1482] decided to clamp down with vigor on mergers. It both revitalized § 7 of the Clayton Act by "plugging its loophole" and broadened its scope so [\*277] as not only to prohibit mergers between competitors, the effect of which "may be substantially to lessen competition, or to tend to create a monopoly" but to prohibit all mergers having that effect. By using these terms in § 7 which look not merely to the actual present effect of a merger but instead to its effect upon future competition, Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big [\*\*\*12] companies. Thus, where concentration is gaining momentum in a market, we must be alert to carry out Congress' intent to protect competition against ever-increasing concentration through mergers.<sup>12</sup>

LEdHN[5] [5] [\*\*\*14] The facts of this case present exactly the threatening trend toward concentration which Congress wanted to halt. The number of small grocery companies in the Los Angeles retail grocery market had been declining rapidly before the merger and continued to decline rapidly afterwards. This rapid decline in the number of grocery store owners moved hand in hand with a large number of significant absorptions of the small companies by the larger ones. In the midst of this steadfast trend toward concentration, Von's and Shopping Bag, two of the most successful and largest companies in the area, jointly owning 66 grocery stores merged to become the second largest chain in Los Angeles. This merger cannot be defended on the ground that one of the companies was about to fail or that the two had to merge to save themselves from destruction by some larger and more powerful competitor.<sup>13</sup> What we have on the contrary [\*278] is simply the case of two already powerful companies merging in a way which makes them even more powerful than they were before. [\*\*\*561] If ever such a merger would not [\*\*\*15] violate § 7, certainly it does when it takes place in a market characterized by a long and continuous trend toward fewer and fewer owner-competitors which is exactly the sort of trend which Congress, with power to do so, declared must be arrested.

"Small, independent, decentralized business of the kind that built up our country, of the kind that made our country great, first, is fast disappearing, and second, is being made dependent upon monster concentration." 95 Cong. Rec. 11486.

Senator Kefauver expressed the same fear on the Senate floor:

"I think that we are approaching a point where a fundamental decision must be made in regard to this problem of economic concentration. Shall we permit the economy of the country to gravitate into the hands of a few corporations . . . ? Or on the other hand are we going to preserve small business, local operations, and free enterprise?" 96 Cong. Rec. 16450.

References to a number of other similar remarks by other Congressmen are collected in *Brown Shoe Co. v. United States*, 370 U.S. 294, 316, n. 28.

<sup>11</sup> [\*\*\*13] H. R. Rep. No. 1191, 81st Cong., 1st Sess., p. 3, described this characteristic of the merger movement as follows:

". . . the outstanding characteristic of the merger movement has been that of large corporations buying out small companies, rather than smaller companies combining together in order to compete more effectively with their larger rivals. More than 70 percent of the total number of firms acquired during 1940-47 have been absorbed by larger corporations with assets of over \$ 5,000,000. In contrast, fully 93 percent of all the firms bought out held assets of less than \$ 1,000,000. Some 33 of the Nation's 200 largest industrial corporations have bought out an average of 5 companies each, and 13 have purchased more than 10 concerns each."

<sup>12</sup> See, e. g., *Brown Shoe Co. v. United States*, 370 U.S., at 346; U.S. v. *Philadelphia Nat. Bank*, 374 U.S., at 362. See also *United States v. du Pont & Co.*, 353 U.S. 586, 597, interpreting § 7 before the Celler-Kefauver Anti-Merger amendment.

<sup>13</sup> See *Brown Shoe Co. v. United States*, 370 U.S., at 319.

LEdHN[6] [6]Appellees' primary argument is that the merger between Von's and Shopping Bag is not prohibited by § 7 because the Los Angeles grocery market was competitive before the merger, has been since, and may continue to be in the future. Even so, § 7 HN2 "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency.'" *U.S. v. Philadelphia Nat. Bank*, 374 U.S. 321, 362, [\*\*\*\*16] It is enough for us that Congress feared that a market marked at the same time by both a continuous decline in the number of small businesses and a large number of mergers would slowly but inevitably gravitate from a market of many small competitors to one dominated by one or a few giants, and competition would thereby be destroyed. Congress passed the Celler-Kefauver Act to prevent such a destruction of competition. Our cases since the passage of that Act have faithfully endeavored to enforce **[\*\*1483]** this congressional command.<sup>14</sup> We adhere to them now.

[\*279] LEdHN[7] [7] [\*\*\*\*17] Here again as in *United States v. El Paso Gas Co.*, 376 U.S. 651, 662, since appellees "have been on notice of the antitrust charge from almost the beginning . . . we not only reverse the judgment below but direct the District Court to order divestiture without delay." See also *United States v. du Pont & Co.*, 366 U.S. 316; *United States v. Alcoa*, 377 U.S. 271, 281.

Reversed and remanded.

[\*\*\*562] MR. JUSTICE FORTAS took no part in the consideration or decision of this case.

#### APPENDIX TO OPINION OF THE COURT.

TABLE 1.

*Food store acquisitions in the Los Angeles metropolitan area 1954-61*

Year	Acquiring firm	Acquired firm	Number of stores acquired
1957	Piper Mart	Bi-Right & Big Bear	3
1958	Mayfair	Bob's Supermarket	7
1961	Better Foods	Border's Markets	3
1954	Kory's Markets	Carty Brothers	8
1958	Food Giant	Clark Markets	10
1956	Fox	Desert Fair	4
1959	Lucky	Hiram's	6
1958	Fox	Iowa Pork Shops	11
1961	Food Giant (and others)	McDaniel's Markets	16
1957	Food Giant	Panorama Markets	3
1958	Pix	Patton's Mkts	3
1958	Alpha Beta	Raisin Markets	13
1960	Piggly Wiggly	Rankins Markets	4
1959	Pix	S & K Markets	2
1960	Von's	Shopping Bag	37

<sup>14</sup> See, e. g., *Brown Shoe Co. v. United States*, 370 U.S. 294; *U.S. v. Philadelphia Nat. Bank*, 374 U.S. 321; *United States v. El Paso Gas Co.*, 376 U.S. 651; *United States v. Alcoa*, 377 U.S. 271; *United States v. Continental Can Co.*, 378 U.S. 441; *FTC v. Consolidated Foods*, 380 U.S. 592.

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TABLE 1.

*Food store acquisitions in the Los Angeles metropolitan area 1954-61*

Year	Acquiring firm	Acquired firm	Number of stores acquired
1959	Pix	Shop Right Markets	3
1958	Yor-Way	C. S. Smith	5
1957	Food Giant	Toluca Marts	2
1957	Mayfair	U-Tell-Em Markets	10
	Total		150

[\*\*\*\*18] [\*280]

TABLE 2.

*¹ Food store acquisitions in the Los Angeles metropolitan area 1961-64*

Year	Acquiring company	Acquired company (or stores)	Type of acquisition			
			Name	Number of stores	Sales (thousands) <sup>2</sup>	Horizontal Other
1961	Acme Markets	Alpha Beta Food Markets		45	\$ 79,042	X
1961	Boys Markets	Korys Markets		5	10,000	X
	Food Giant Markets	McDaniels Markets		9	21,500	X <sup>3</sup>
	Mayfair Markets	Yorway Markets		1	1,500	X
		Alpha Beta Food Markets		1	1,700	X
1962	Mayfair Markets	Schaubs Market		1	1,800	X
		Fox Markets		1	2,200	X
	Ralph's Grocery Co	Imperial Supreme Markets		1	916	X
1963	Food Fair Stores	Fox Markets		22	44,419	X
	Kroger	Market Basket		53	110,860	X
	Mayfair Markets	Bi Rite Markets		1	2,569	X

<sup>1</sup> Consists of Los Angeles and Orange Counties. (1963 census defined the Los Angeles metropolitan area as Los Angeles County only.)

<sup>2</sup> In most cases, sales are for the 12-month period prior to acquisition.

<sup>3</sup> According to a statement made by Von's counsel at oral argument, this acquisition did not take place in 1961, but instead Food Giant bought seven of McDaniel's stores in 1964. The acquisition in 1964 is listed in this table.

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TABLE 2.

<sup>1</sup> *Food store acquisitions in the Los Angeles metropolitan area 1961-64*

Year	Acquiring company	Acquired company (or stores)	Type of acquisition			
			Name	Number of stores	Sales (thousands) <sup>2</sup>	Horizontal
1964	Albertson's, Inc	Dales Food Market		1	2,200	X
		Food Giant Markets		1	1,700	X
		Greater All American		14	30,308	X
		Mayfair Markets	Gateway Market	4	8,000	X
			Pattons Markets	4	10,400	X
		Ralph's Grocery Co	Cracker Barrel Super-	1	1,000	X
			market.			
		Food Giant Markets	McDaniels Markets	7	18,350	X
		Total horizontal		38	83,835	
		mergers.				
		Total market		134	264,629	
		extension mergers.				

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Concur by: WHITE

## Concur

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[\*\*563] [\*\*1484] MR. JUSTICE WHITE, concurring.

As I read the Court's opinion, which I join, it does not hold that in any industry exhibiting a decided trend towards concentration, any merger between competing firms violates § 7 unless saved by the failing company doctrine; nor does it declare illegal each and every merger in such an industry where the resulting firm has as much [\*281] as a 7.5% share of the relevant market. But here, in 1958 before the merger, the largest firm had 8% of the sales, Von's was third with 4.7% and Shopping [\*\*\*\*20] Bag was sixth with 4.2%. The four largest firms had 24.4% of the market, the top eight had 40.9% [\*\*\*564] and the top 12 had 48.8% as compared with 25.9%, 33.7% and 38.8% in 1948. All but two of the top 10 firms in 1958 were very probably also among the top 10 in 1948 or had acquired a firm that was among the top 10. Further, all but three of the top 10 had increased their market share between 1948 and 1958 and those which gained gained more than the three lost. Also, although three companies declined in market share their total sales increased in substantial amounts.

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Given a trend towards fewer and fewer sellers which promises to continue, it [\*\*1485] is clear to me that where the eight leading firms have over 40% of the market, any merger between the leaders or between one of them and a lesser company is vulnerable under § 7, absent some special proof to the contrary. Here Von's acquired Shopping Bag. Both were among the eight largest companies, both had grown substantially since 1948 and they were substantial competitors. After the merger the four largest firms had 28.8%, the eight largest had 44% and the 12 largest had 50%. The merger not only disposed of a substantial [\*\*\*\*21] competitor but increased the concentration in the leading firms. In my view the Government sufficiently proved that the effect of this merger may be substantially to lessen competition or to tend to create a monopoly.

**Dissent by:** STEWART

## Dissent

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MR. JUSTICE STEWART, with whom MR. JUSTICE HARLAN joins, dissenting.

We first gave consideration to the 1950 amendment of § 7 of the Clayton Act in *Brown Shoe Co. v. United States*, [370 U.S. 294](#). The thorough opinion THE CHIEF JUSTICE wrote for the Court in that case made two [\*282] things plain: First, the standards of § 7 require that every corporate acquisition be judged in the light of the contemporary economic context of its industry.<sup>1</sup> [\*\*\*\*22] Second, the purpose of § 7 is to protect competition, not to protect competitors, and every § 7 case must be decided in the light of that clear statutory purpose.<sup>2</sup> Today the Court turns its back on these two basic principles and on all the decisions that have followed them.

The Court makes no effort to appraise the competitive effects of this acquisition in terms of the contemporary economy of the retail food industry in the Los Angeles area.<sup>3</sup> Instead, through a simple exercise [\*\*\*565] in sums, it finds that the number of individual competitors in the market has decreased over the years, and, apparently on the theory that the degree of competition is invariably proportional to the number of competitors, it holds that [\*283] this historic reduction in the number of competing units is enough under § 7 to invalidate a merger within the market, with no need to examine the economic concentration of the market, the level of competition in the market, or the potential adverse effect of the merger on that competition. This startling *per se* rule [\*\*\*\*23] is contrary not only to our previous decisions, but contrary to the language of § 7, contrary to the legislative history of the 1950 amendment, and contrary to economic reality.

Under § 7, as amended, a merger can be invalidated if, and only if, "the effect [\*\*1486] of such acquisition may be substantially to lessen competition, [\*\*\*\*24] or to tend to create a monopoly." No question is raised here as to the tendency of the present merger to create a monopoly. Our sole concern is with the question whether the effect of the merger may be substantially to lessen competition.

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<sup>1</sup> "[A] merger had to be functionally viewed, in the context of its particular industry." *Brown Shoe Co. v. United States*, [370 U.S. at 321-322](#). "Both the Federal Trade Commission and the courts have, in the light of Congress' expressed intent, recognized the relevance and importance of economic data that places any given merger under consideration within an industry framework almost inevitably unique in every case." [Id. at 322, n. 38](#).

<sup>2</sup> "Taken as a whole, the legislative history illuminates congressional concern with protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." *Brown Shoe Co. v. United States*, [supra, at 320](#).

<sup>3</sup> This is the first case to reach the Court under the 1950 amendment to § 7 that involves a merger between firms engaged solely in retail food distribution. Kaysen & Turner, Antitrust Policy 40 (1959), have discussed this industry in the following terms:

"As a guess, we can say that the most important distributive trades, especially the food trades, are structurally unconcentrated in the metropolitan areas . . . . The significance of structural oligopoly in terms of policy is far different in [these trades] than in manufacturing and mining. . . . The traditional view that the local market industries are essentially competitive in character is probably correct . . . ."

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The principal danger against which the 1950 amendment was addressed was the erosion of competition through the cumulative centripetal effect of acquisitions by large corporations, none of which by itself might be sufficient to constitute a violation of the Sherman Act. Congress' immediate fear was that of large corporations buying out small companies.<sup>4</sup> A major aspect of that fear was the perceived trend toward absentee ownership of local business.<sup>5</sup> Another, more generalized, congressional [\*284] purpose revealed by the legislative history was to protect small businessmen and to stem the rising tide of concentration in the economy.<sup>6</sup> These goals, Congress thought, could be achieved by "arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency." *Brown Shoe Co. v. United States, supra, at 317.*

The concept of arresting restraints of trade in their "incipiency" was not [\*\*\*26] an innovation of the 1950 amendment. The notion of incipiency was part of the report on the original Clayton Act by the Senate Committee on the Judiciary in 1914, and it was reiterated in the [\*\*\*566] Senate report in 1950.<sup>7</sup> That notion was not left [\*\*1487] undefined. [\*285] The legislative history leaves no doubt that the applicable standard for measuring the substantiality of the effect of a merger on competition was that of a "reasonable probability" of lessening competition.<sup>8</sup> The standard was thus more stringent than that of a "mere possibility" on the one hand and more

<sup>4</sup> See, e. g., H. R. Rep. No. 1191, 81st Cong., 1st Sess., p. 3, quoted in footnote 11 of the Court's opinion. Mention of the retail food industry is notably absent in the legislative history. Although it is clear that, in addition to the already highly oligopolized industries, Congress was also concerned with trends toward concentration in industries that were still highly fragmented, this case involves not even a remote approach to the "monster concentration" of which Representative Celler spoke in introducing the 1950 amendment in the House of Representatives. 95 Cong. Rec. 11486.

<sup>5</sup> [\*\*\*25] See, e. g., Hearing before Subcommittee No. 3 of the House Committee on the Judiciary on H. R. 2734, 81st Cong., 1st Sess., p. 12 (remarks of Senator Kefauver).

<sup>6</sup> Much of the fuel for the congressional debates on concentration in the American economy was derived from a contemporary study by the Federal Trade Commission on corporate acquisitions between 1940 and 1947. See Report of the Federal Trade Commission on the Merger Movement: A Summary Report (1948). A critical study of the FTC report, published while the 1950 amendment was pending in Congress, concluded that the effect of the recent merger movement on concentration had been slight. Lintner & Butters, Effect of Mergers on Industrial Concentration, 1940-1947, 32 Rev. of Econ. & Statistics 30 (1950). Two economists for the Federal Trade Commission later acquiesced in that conclusion. Blair & Houghton, The Lintner-Butters Analysis of the Effect of Mergers on Industrial Concentration, 1940-1947, 33 Rev. of Econ. & Statistics 63, 67, n. 12 (1951).

<sup>7</sup> See S. Rep. No. 698, 63d Cong., 2d Sess., p. 1:

"Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890 [the Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."

See also S. Rep. No. 1775, 81st Cong., 2d Sess., pp. 4-5: "The intent here, as in other parts of the Clayton Act, is to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding;" *id.*, p. 6: "The concept of reasonable probability conveyed by these words ['may be'] is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act."

Thus, the Senate Reports on both the original Clayton Act and the 1950 amendment carefully delineate the "incipiency" with which the provisions are concerned as that of monopolization or classical restraints of trade under the Sherman Act. The notion that "incipiency" might be expanded to refer also to a lessening of competition first appeared in *Brown Shoe Co. v. United States, 370 U.S. 294, 317.*

<sup>8</sup> [\*\*\*27] The Senate Report is clear on this point:

"The use of these words ['may be substantially to lessen competition'] means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed [sic] effect . . . . The words 'may be' have been in section 7 of the Clayton Act since 1914. The concept of reasonable probability conveyed by these words is a necessary element in any

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lenient than that of a "certainty" on the other.<sup>9</sup> I cannot agree that the retail grocery [\*286] business in Los Angeles is in an incipient or any other stage of a trend toward a lessening of competition, or that the effective level of concentration in the industry has increased. Moreover, there is no indication that the present merger, or the trend in this industry as a whole, augurs any danger whatsoever for the small businessman. The Court has substituted bare conjecture for the statutory standard of a reasonable probability that competition may be lessened.

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The [\*\*\*567] Court rests its conclusion on the "crucial point" that, in the 11-year period between 1950 and 1961, the number of single-store grocery firms in Los Angeles decreased 29% from 5,365 to 3,818.<sup>11</sup> Such a decline [\*287] should, of course, [\*\*1488] be no more [\*\*\*29] than a fact calling for further investigation of the competitive trend in the industry. For the Court, however, that decline is made the end, not the beginning, of the analysis. In the counting-of-heads game played today by the Court, the reduction in the number of single-store operators becomes a yardstick for automatic disposition of cases under § 7.

[\*\*\*30] I believe that even the most superficial analysis of the record makes plain the fallacy of the Court's syllogism that competition is necessarily reduced when the bare number of competitors has declined.<sup>12</sup> In any

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statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act." S. Rep. No. 1775, 81st Cong., 2d Sess., p. 6.

See also 96 Cong. Rec. 16453 (remarks of Senator Kefauver). Cf. 51 Cong. Rec. 14463-14464 (amendment of Senator Reed).

<sup>9</sup> Although Congress eschewed exclusively mathematical tests for assessing the impact of a merger, it offered several generalizations indicative of the sort of merger that might be proscribed, e. g.: Whether the merger eliminated an enterprise that had been a substantial factor in competition; whether the increased size of the acquiring corporation threatened to give it a decisive advantage over competitors; whether an undue number of competing enterprises had been eliminated. H. R. Rep. No. 1191, 81st Cong., 1st Sess., p. 8. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 321, n. 36. Only the first of these generalizations is arguably applicable to the present merger; the market-extension aspects of the merger, as well as the evidence of Shopping Bag's declining profit margin and weak price competition, suggest that any conclusion under this test would be equivocal. See *infra*, pp. 295-296; 298, n. 30. Senator Kefauver stated explicitly on the Senate floor that the mere elimination of competition between the merged firms would not make the acquisition illegal; rather, "the merger would have to have the effect of lessening competition generally." 96 Cong. Rec. 16456.

<sup>10</sup> [\*\*\*28] Eighteen years ago, a dictum in *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 46, adverted to a "reasonable possibility" as the appropriate standard for the corresponding language ("may be to substantially lessen competition") under § 3 of the Clayton Act, 15 U. S. C. § 14. The dictum provoked a sharp dissent in that case, id. at 55, 57-58, and the Court subsequently withdrew it, *Standard Oil Co. v. United States*, 337 U.S. 293, only to reinstate it again today. This issue, which appeared settled at the time of the 1950 amendment, provoked an acrimonious exchange during the Senate hearings. Hearings before a Subcommittee of the Senate Committee on the Judiciary on H. R. 2734, 81st Cong., 1st & 2d Sess., pp. 160-168.

<sup>11</sup> The decline continued at approximately the same rate to 1963, the last year for which data are available, when there were 3,590 single-store grocery firms in the area. The record contains no breakdown of the figures on single-store concerns. In an extensive study of the retail grocery industry on a national scale, the Federal Trade Commission found that between 1939 and 1954 the total number of grocery stores in the United States declined by 109,000, or 28%. The entire decrease was suffered by stores with annual gross sales of less than \$ 50,000. During the same period, the number of stores in all higher sales brackets increased. The Commission noted that the census figures, from which its data were taken, included an undetermined number of grocery firms liquidating after 1948 that merely closed their grocery operations and continued their remaining lines of business, such as nongrocery retailing, food wholesaling, food manufacturing, etc. Staff Report to the Federal Trade Commission, Economic Inquiry Into Food Marketing, Part I, Concentration and Integration in Retailing 48, 54 (1960).

<sup>12</sup> The generalized case against the Court's numerical approach is stated in Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 312, n. 261:

"There are serious problems connected with the use of this yardstick. First, not every firm contributes equally to competition. In particular, there may be a fringe of firms too small to be able to affect price and production policies in the market as a whole. Alternatively, certain firms may be marginal in the sense that their costs and financial situations preclude them from having much, if any, impact on market conditions; indeed they may be able to remain in operation only because excessive profits are

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meaningful sense, the structure of the Los Angeles grocery market remains unthreatened by concentration. Local competition is vigorous to a fault, not only among chain stores [\*288] themselves but also between chain stores and single-store operators. The continuing population explosion of the Los Angeles area, which has outrun the expansion plans of even the largest chains, offers a surfeit of business opportunity for stores of all sizes.<sup>13</sup> Affiliated [\*\*\*568] with cooperatives that give the smallest store the buying strength of its largest competitor, new stores have taken full advantage of the remarkable ease of entry into the market. And, most important of all, the record simply cries out that the numerical decline in the number of single-store owners is the result of transcending social and technological changes that positively preclude the inference that competition has suffered because of the attrition of competitors.

Section 7 was never intended by Congress for use by the Court as a charter to roll back the supermarket revolution. Yet the Court's opinion is hardly more than a requiem for the so-called "Mom and Pop" grocery stores -- the bakery and butcher shops, the vegetable and fish markets -- that are now economically and technologically obsolete in many parts of the country. No action by this Court can resurrect the old single-line Los Angeles food stores that have been run over by the automobile or obliterated by the freeway. The transformation of American society since the Second World War has not completely shelved these specialty stores, but it has relegated them to a much less central role in our food economy. Today's [\*\*\*\*32] dominant enterprise in food [\*\*1489] retailing is the supermarket. Accessible to the housewife's automobile from a wide radius, it houses under a single roof [\*289] the entire food requirements of the family. Only through the sort of reactionary philosophy that this Court long ago rejected in the Due Process Clause area can the Court read into the legislative history of § 7 its attempt to make the automobile stand still, to mold the food economy of today into the market pattern of another era.<sup>14</sup>

being earned by the stronger firms. An [exit] of companies of this sort would have much less significance than a counting of corporate heads would imply."

<sup>13</sup> [\*\*\*31] Between 1953 and 1961, the population of the Los Angeles metropolitan area increased from 4,300,000 to 6,800,000 and the average population per grocery store increased from 695 to 1,439. Additional opportunity for new stores in the area results from the geographical division of the city into numerous suburbs, as well as from the lack of specific store loyalty among new residents.

<sup>14</sup> Cf. *Ferguson v. Skrupa*, 372 U.S. 726. In criticizing a recent decision of the Federal Trade Commission, one commentator has stated, in terms applicable *mutatis mutandis* to the Court's decision in the present case:

"... Any child alive in the 1950's could see that a restructuring of food retailing was then going on. The business was adjusting itself, through market mechanisms that included merger, to vast and profound changes in the American way of life. There is not a word in the FTC majority opinion that relates changes in the number of stores and chains to the proliferation of suburbs, the construction of shopping centers, and the final triumph of the supermarket -- an innovation in retailing that has since spread across the Western world. The most important single cause of these changes was the automobile revolution . . . which not even the FTC can stop.

...

"... Plenty of living American men and women remember an era when virtually all groceries were sold through very small stores none of which had 'any significant market share.' Was this era the high point of competition in food retailing? Many little towns had, in fact, only one place where a given kind of food could be bought. In a typical city neighborhood, defined by the range of a housewife's willingness to lug groceries home on foot, there might be three or four relaxed 'competitors.' If she did not like the price or quality offered by them, she could take her black-string market bag, board a trolley car, and try her luck among the relaxed 'competitors' of some other neighborhood." Ways, A New "Worst" in Antitrust, Fortune, April 1966, pp. 111-112.

In the present case, the District Court found that in the era preceding the rise of the supermarkets, "the area from which the typical store drew most of its customers was limited to a block or two in any direction and if a particular grocery store happened to be the only one in its immediate neighborhood, it had a virtual monopoly of local trade." Thus, the Court's aphorism in *U.S. v. Philadelphia Nat. Bank*, 374 U.S. 321, 363 -- that "competition is likely to be greatest when there are many sellers, none of which has any significant market share" -- is peculiarly maladroit in the historic context of the retail food industry. See also Hampe & Wittenberg, The Lifeline of America: Development of the Food Industry 313-372 (1964); Lebhar, Chain Stores in America 1859-1962, pp. 348-390 (1963).

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[\*\*\*33] [\*290] This [\*\*\*569] is not a case in which the record is equivocal with regard to the status of competition in the industry in question. To the contrary, the record offers abundant evidence of the dramatic history of growth and prosperity of the retail food business in Los Angeles.

The District Court's finding of fact that there was no increase in market concentration before or after the merger is amply supported by the evidence if concentration is gauged by any measure other than that of a census of the number of competing units. Between 1948 and 1958, the market share of Safeway, the leading grocery chain in Los Angeles, declined from 14% to 8%. The combined market shares of the top two chains declined from 21% to 14% over the same period; for the period 1952-1958, the combined shares of the three, four, and five largest firms also declined. It is true that between 1948 and 1958, the combined shares of the top 20 firms in the market increased from 44% to 57%. The crucial fact here, however, is that seven of these top 20 firms in 1958 were not even in existence as chains in 1948. Because of the substantial turnover in the membership of the top 20 firms, the increase [\*\*\*34] in market share of the top 20 as a group is hardly a reliable indicator [\*\*1490] of any tendency toward market concentration.<sup>15</sup>

[\*291] In addition, statistics in the record for the period 1953-1962 strongly suggest that the retail grocery industry in Los Angeles is less concentrated today than it was a decade ago. During this [\*\*\*35] period, the number of chain store firms in the area rose from 96 to 150, or 56%. That increase occurred overwhelmingly among chains of the very smallest size, those composed of two or three grocery stores. Between 1953 and 1962, the number of such "chains" increased from 56 to 104, or 86%. Although chains of 10 or more stores increased from 10 to 24 during the period, seven of these 24 chains were not even in existence as chains in Los Angeles in 1953.<sup>16</sup>

Yet even these dramatic statistics do not fully reveal the dynamism and vitality of competition in the retail grocery business in Los Angeles during the period. The record shows that at various times during [\*\*\*36] the period 1953-1962, no less than 269 separate chains were doing business in Los Angeles, of which 208 were two- or three-store chains. During that period, therefore, 173 new chains made their appearance in the market area, and 119 chains went out of existence as [\*\*\*570] chain stores.<sup>17</sup> The vast majority of this market turbulence represented turnover in chains of two or three stores; 143 of the 173 new chains born during the period were chains of this [\*292] size. Testimony in the record shows that, almost without exception, these new chains were the outgrowth of successful one-store operations.<sup>18</sup> There is no indication that comparable turmoil did not equally permeate single-store

<sup>15</sup> See Joskow, Structural Indicia: Rank-Shift Analysis as a Supplement to Concentration Ratios, VI Antitrust Bulletin 9 (1961). In addition, the overall market share of the top 20 firms in fact showed a slight decline between 1958 and 1960. The statement in the concurring opinion in the present case, that "All but two of the top 10 firms in 1958 were very probably also among the top 10 in 1948 or had acquired a firm that was among the top 10," is based on conjecture. The record demonstrates only that the top four firms in 1948 were among the top 10 firms in 1958; the record neither identifies the remaining six of the top 10 firms in 1948 nor charts their subsequent history.

<sup>16</sup> For a similar study of the retail food industry at the national level, see Lebhar, Small Chain Virility a Bar to Monopoly, Chain Store Age, Jan. 1962, p. E20. See also Gould, The Relation of Sales Growth to the Size of Multi-Store Food Retailers 6 (1966) (inverse correlation found between sales growth and size of chains with four or more stores).

<sup>17</sup> Of these latter 119 chains, 66 went out of business altogether, 28 reduced their operations to a single store, and 25 were eliminated as separate competitors as a result of acquisitions by other chains.

<sup>18</sup> [\*\*\*37] On the basis of these facts, one witness concluded:

"The apparent willingness and ability of grocers to expand and create new chain entities at the staggering rate of more than 17 a year, and the growth potential of new chains, precludes in my opinion the possibility that the retail grocery business in Los Angeles will become either monopolistic or oligopolistic in the foreseeable future. It must be remembered that in 1953, only 10 chains with as many as 10 stores each were operating in the area. These chains are recognized as being among the best managed, most successful and most aggressive supermarket operators in the country. They themselves have engaged in expansion programs of significant proportions since 1953. Yet, 10 years later, instead of having swept aside all competition and being left alone to compete among themselves, these same 10 chains are now faced with the necessity of competing against no less than 14 new chains of 10 or more stores each, a significantly greater number of smaller chains and a host of successful single store operators, of whom many are affiliated with powerful voluntary chains or other cooperative groups. . . . The growth

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operations in the **[\*\*1491]** area.<sup>19</sup> In fashioning its *per se* rule, based on the net arithmetical decline in the number of single-store operators, the Court completely disregards the obvious procreative vigor of competition in the market as reflected in the turbulent history of entry and exit of competing small chains.

To support its conclusion the Court invokes three sets of data regarding absorption of smaller firms by merger with larger firms. In each of the acquisitions detailed **[\*293]** in the Appendix, Tables 1 and 2 of the Court's opinion, the acquired units were grocery *chains*. Not one of these acquisitions was of a firm operating only a single store.<sup>20</sup> The Court cannot have it both ways. It is only among single-store operators that the decline in the unit number of competitors, so heavily relied upon by the Court, has taken place. Yet the tables reproduced in the Appendix show not a trace of merger activity involving the acquisition of single-store operators. And the number of *chains* in the area has in fact shown a substantial net increase during the period, in spite of the fact that some of the chains **[\*\*\*\*39]** have been absorbed by larger firms. How then can the Court rely on these acquisitions as evidence of a tendency toward market concentration in the area?

The Court's use of market-acquisition data for the period 1954-1961,<sup>21</sup> prepared by the Government from **[\*\*\*571]** the work sheets of a defense witness, is also questionable for another reason. During that period, Food Giant, Alpha Beta, Fox, and Mayfair were ranked 7th, 8th, 9th, and 10th, respectively, on the basis of the percentage of their sales in Los Angeles in 1958, so that the impact of their acquisitions, made in the face of competition by the top six chains, is considerably blunted. The remarkable feature disclosed by **[\*\*\*\*40]** these data is that none of the top six firms in the area expanded by acquisition during the period.<sup>22</sup>

**[\*294]** The Court's reliance on the fact that nine of the top 20 chains acquired 120 stores in the Los Angeles area between 1949 and 1958 does not withstand analysis in light of the complete record. Forty percent of these acquisitions, representing 48 stores with gross sales of more than \$ 71,000,000, were made by Fox, Yor-Way, and McDaniels, which ranked 9th, 11th, and 20th, respectively, according to 1958 sales in the market. Each **[\*\*\*\*41]** of these firms subsequently went into bankruptcy as a result of overexpansion, undercapitalization, or inadequate managerial experience. This substantial postacquisition demise of relatively large chains hardly comports with the Court's tacit portrayal of the inexorable march of the market toward oligopoly.

Further, the table relied on by the Court to sustain its view that acquisitions have continued in the Los Angeles area at a rapid rate in the three-year period following this merger indiscriminately lumps together horizontal and **[\*\*1492]** market-extension mergers.<sup>23</sup> Only 29 stores, representing 13 acquisitions, were acquired in horizontal mergers, and the record reveals that nine of these 29 stores were acquired in the course of dispositions in bankruptcy. Such acquisitions of failing companies, of course, are immune from the Clayton Act. *International Shoe Co. v. Federal Trade Commission*, 280 U.S. 291, 301-303. Thus, at a time when the number of single-store concerns was well over 3,500, horizontal mergers over a three-year period between going concerns achieved at

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of independents into chains and of small chains into larger ones . . . demonstrates convincingly that small concerns don't have to remain small in Los Angeles."

<sup>19</sup> **[\*\*\*38]** Data for 1960, the only year for which such figures are available in the record, reveal a comparable agitation of entry and exit among operators of single stores. Although there was a net loss of 132 single-outlet stores in 1960, 128 new single-outlet stores opened during the year.

<sup>20</sup> As to Table 1 in the Appendix of the Court's opinion, this fact is obvious on the face of the table. As to Table 2 in the Appendix, examination of the record discloses that each of the nine acquisitions listed as involving a single store represented purchases of single stores from chains ranging in size from two to 49 stores.

<sup>21</sup> See Table 1 in the Appendix of the Court's opinion.

<sup>22</sup> Table 1 in the Appendix of the Court's opinion is somewhat misleading in that it weights the data from which it is drawn in favor of the acquisition by grocery chains of other chains consisting of relatively larger numbers of store units. The complete data of the witness included several acquisitions of one- and two-store concerns, together with the disposition of one ten-store chain to various individuals.

<sup>23</sup> See Table 2 in the Appendix of the Court's opinion. This table, not a part of the record, was submitted by the Government in its reply brief, filed on the eve of oral argument.

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most only the *de minimis* level of 10 acquisitions involving 20 stores. It cannot [\*\*\*42] seriously be maintained that [\*295] the effect of the negligible market share foreclosed by these horizontal mergers may be substantially to lessen competition within the meaning of § 7. Cf. *Brown Shoe Co. v. United States*, 370 U.S. 294, 329.

The great majority of the post-merger acquisitions detailed in Table 2 in the Appendix of the Court's opinion, *ante*, were of the market-extension type, involving neither the elimination of direct competitors in the Los Angeles market nor increased concentration of the market. There are substantial economic distinctions between such market-extension mergers and classical horizontal mergers.<sup>24</sup> Whatever the wisdom or logic of the Court's assumed [\*\*\*572] arithmetic proportion between the number of single-store concerns and the level of competition within the [\*\*\*43] meaning of § 7 as applied to horizontal mergers, it is simply not possible to make the further assumption that the mere occurrence of market-extension mergers is adequate to prove a tendency of the local market toward decreased competition.

Moreover, contrary to the assumption on which the Court proceeds, the record establishes that the present merger itself has substantial, even predominant, market-extension overtones. The District Court found that the Von's stores were located in the southern and western portions of [\*\*\*44] the Los Angeles metropolitan area, and that the Shopping Bag stores were located in the northern and eastern portions. In each of the areas in which Von's and Shopping Bag stores competed directly, there were also at least six other chain stores and several [\*296] smaller stores competing for the patronage of customers. On the basis of a "housewife's 10-minute driving time" test conducted for the Justice Department by a government witness, it was shown that slightly more than half of the Von's and Shopping Bag stores were not in a position to compete at all with one another in the market.<sup>25</sup> Even among those stores which competed at least partially with one another, the overlap in sales represented only approximately 25% of the combined sales of the two chains in the overall Los Angeles area. The present merger was thus three parts market-extension and only one part horizontal, but the Court nowhere recognizes this market-extension aspect that exists within the local market itself. The actual market share foreclosed by the elimination of Shopping Bag as an independent competitor was thus slightly less than 1% of the total grocery store sales in the [\*\*1493] area. The [\*\*\*45] share of the market preempted by the present merger was therefore practically identical with the 0.77% market foreclosure accepted as "quite insubstantial" by the Court in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 331-333.

The irony of this case is that the Court invokes its sweeping new construction of § 7 to the detriment of a merger between two relatively successful, local, largely family-owned concerns, each of which had less than 5% of the local market and neither of which had any prior history of growth by acquisition.<sup>26</sup> In [\*\*\*573] a sense, the defendants [\*297] are being punished for the sin of aggressive competition.<sup>27</sup> The Court is inaccurate in its suggestions, *ante*,

<sup>24</sup> See *Foremost Dairies, Inc.*, 60 F. T. C. 944; Beatrice Foods Co., F. T. C. Docket No. 6653 (April 26, 1965); *National Tea Co.*, F. T. C. Docket No. 7453 (March 4, 1966). Cf. *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158; *Procter & Gamble Co.*, F. T. C. Docket No. 6901 (Nov. 26, 1963), rev'd *358 F.2d 74* (C. A. 6th Cir.); Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313.

<sup>25</sup> Evidence introduced by the defendants indicated that the overlap between the Von's and Shopping Bag stores was significantly smaller than that proposed by the government witness.

<sup>26</sup> At the time of the merger in 1960, Von's operated 28 retail grocery stores in the Los Angeles area. It commenced operation as a partnership of the Von der Ahe family in 1932, during the depression, with a food concession in a small grocery store. Shopping Bag operated 36 stores in Los Angeles at the time of the merger; it commenced operation as a partnership in a small grocery store in 1930. So far as the record reveals, the competitive behavior of these firms was impeccable throughout their expansion, which took place solely by internal growth. In discussing the success of comparable firms *vis-a-vis* the Sherman Act, Judge Learned Hand stated, "The Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins." *United States v. Aluminum Co. of America*, 148 F.2d 416, 430.

<sup>27</sup> [\*\*\*47] Nor is it altogether easy to escape the feeling that it is not so much this merger, but Los Angeles itself, that is being invalidated here. Cf. Adelman, Antitrust Problems: The Antimerger Act, 1950-60, 51 Am. Econ. Rev. 236, 243 (May 1961): "In

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pp. 277-278, that the merger makes these firms more "powerful" than they were before, and that Shopping [\*\*\*46] Bag was itself a "powerful" competitor at the time of the merger. There is simply no evidence in the record, and the Court makes no attempt to demonstrate, that the increment in market share obtained by the combined stores can be equated with an increase in the market power of the combined firm. And, although Shopping Bag was not a "failing company" within the meaning of our decision in *International Shoe Co. v. Federal Trade Commission, 280 U.S. 291, 301-303*, the record at [\*298] least casts strong doubt on the contention that it was a powerful competitor.<sup>28</sup> The District Court found that Shopping Bag suffered from a lack of qualified executive personnel<sup>29</sup> [\*\*1494] and that, although overall sales of the chain had been increasing, its earnings and profits were declining.<sup>30</sup> Further, the merger clearly comported with "the desirability of retaining 'local control' over industry" that the Court noted in *Brown Shoe Co. v. United States, 370 U.S. 294, 315-316*.

With regard to the "plight" of the small businessman, the record is unequivocal that his competitive position is strong and secure in the Los Angeles retail grocery industry. The most aggressive competitors against the larger retail chains are frequently the operators of single stores.<sup>31</sup> The vitality of these independents is directly [\*299] attributable to [\*\*\*574] the recent and spectacular growth in California of three large cooperative buying organizations. Membership in these groups is unrestricted; [\*\*\*49] through them, single-store operators are able to purchase their goods at prices competitive with those offered by suppliers even to the largest chains.<sup>32</sup> The rise

the antitrust dictionary, 'powerful' has no necessary connection with monopoly power or market control or even market share. It means . . . one four-letter word: size." Los Angeles is, to be sure, a big place. Although Shopping Bag's share of the Los Angeles market was only 4.2%, its sales in 1958 totaled \$ 84,000,000. Compare the Court's statement in *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 333-334*:

"It is urged that the present contract pre-empts competition to the extent of purchases worth perhaps \$ 128,000,000, and that this 'is, of course, not insignificant or insubstantial.' While \$ 128,000,000 is a considerable sum of money, even in these days, the dollar volume, by itself, is not the test . . . ."

<sup>28</sup>This is not a "merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market," *Brown Shoe Co. v. United States, 370 U.S. 294, 319*; cf. House Hearing, *supra*, n. 5, pp. 40-41; Senate Hearings, *supra*, n. 10, pp. 6, 51; 95 Cong. Rec. 11486, 11488, 11506; 96 Cong. Rec. 16436; H. R. Rep. No. 1191, 81st Cong., 1st Sess., pp. 6-8; S. Rep. No. 1775, 81st Cong., 2d Sess., p. 4. However, the Court today in a gratuitous dictum, *ante*, p. 277, undercuts even that principle by confining it to cases in which competitors are obliged to merge to save themselves from destruction by a larger and more powerful competitor.

<sup>29</sup> [\*\*\*48] Mr. Hayden, the president and principal stockholder of Shopping Bag, was advanced in years and was concerned over the absence of a strong management staff that could take over his responsibilities.

<sup>30</sup>Von's was a considerably more successful competitor than Shopping Bag. Shopping Bag's net income as a percentage of total sales declined from 1.6% in 1957 to 0.9% in 1959, and its net profit as a percentage of total assets declined from 6.6% to 3.2%. During the same period, the net income of Von's increased from 2.1% to 2.3%, and its net profits declined from 12.7% to 10.8%.

<sup>31</sup>One single-store operator, located adjacent to one supermarket and within a mile of two others, testified, "I have often been asked if I could compete successfully against this sort of competition. My answer is and always has been that the question is not whether I can compete against them, but whether they can compete against me."

Another single-store operator testified, "Competition in the grocery business is on a store-by-store basis and any aggressive and able operator like myself can out-compete the store of any of the chains because of personalized service, better labor relations, and being in personal charge of the store and seeing that it is run properly."

A third single-store operator testified, "The chains in this area are good operators, but when they grow too large, they are actually easier to compete with from an independent's viewpoint. If I had a choice, I would rather operate a store near a chain unit than near another independent."

<sup>32</sup> [\*\*\*50] See generally Staff Report to the Federal Trade Commission, Economic Inquiry Into Food Marketing, Part I, Concentration and Integration in Retailing, c. VI, "Retailer-owned Cooperative Food Wholesalers"; c. VII, "Wholesaler-sponsored Voluntary Retail Groups" (1960). The annual sales of Certified Grocers of California, Ltd., a retailer-owned cooperative whose members do business principally in the Los Angeles area, rose fourfold from \$ 87,000,000 in 1948 to \$ 345,000,000 in 1962,

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of these cooperative organizations has introduced a significant new source of countervailing power against the market power of the chain stores, without in any way sacrificing the advantages of independent operation. In the face of [\*300] the substantial assistance available to independents through membership in such cooperatives, the Court's implicit equation between the market power and the market share resulting from the present merger seems completely invalid.

Moreover, it is clear that there are no substantial barriers [\*\*\*\*51] to market entry. The record contains references to numerous highly successful instances of entry with modest initial investments. Many of the stores opened by new entrants were obtained through the disposition of unwanted outlets by chains; frequently the new competitors were themselves chain-store executives who had resigned to enter the market on their own. Enhancing [\*\*1495] free access to the market is the absence of any such restrictive factors as patented technology, trade secrets, or substantial product differentiation.

Numerous other factors attest to the pugnacious level of grocery competition in Los Angeles, all of them silently ignored by the Court in its emphasis solely on the declining number of single-store competitors in the market. Three thousand five hundred and ninety single-store firms is a lot of grocery stores. The large number of separate competitors and the frequent price battles between them belie any suggestion that price competition in the area is even remotely threatened by a descent to the sort of consciously interdependent pricing that is characteristic of a market turning the corner toward oligopoly. The birth [\*\*\*575] of dynamic new competitive [\*\*\*\*52] forces -- discount food houses and food departments in department stores, bantams and superettes, deli-liquor stores and drive-in dairies -- promises unremitting competition in the future. In the more than four years following the merger, the District Court found not a shred of evidence that competition had been in any way impaired by the merger. Industry witnesses testified overwhelmingly [\*301] to the same effect. By any realistic criterion, retail food competition in Los Angeles is today more intense than ever.

The harsh standard now applied by the Court to horizontal mergers may prejudice irrevocably the already difficult choice faced by numerous successful small and medium-sized businessmen in the myriad smaller markets where the effect of today's decision will be felt, whether to expand by buying or by building additional facilities.<sup>33</sup> And by foreclosing future sale as one attractive avenue of eventual market exit, the Court's decision may over the long run deter new market entry and tend to stifle the very competition it seeks to foster.

[\*\*\*53] In a single sentence and an omnibus footnote at the close of its opinion, the Court pronounces its work consistent with the line of our decisions under § 7 since the passage of the 1950 amendment. The sole consistency that I can find is that in litigation under § 7, the Government always wins. The only precedent that is even within sight of today's holding is *U.S. v. Philadelphia Nat. Bank*, 374 U.S. 321. In that case, in the interest of practical judicial administration, the Court proposed a simplified test of merger illegality: "We think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *U.S. v. Philadelphia Nat. Bank, supra, at 363.*<sup>34</sup> The merger [\*302] between Von's and Shopping

and the volume of its purchases exceeded that of all but the largest national chains doing business in Los Angeles. Most of the leading chains in the area began development in association with Certified Grocers, called the "mother" of the industry. In some cases the cooperatives were able to offer even lower prices to their members than competing chains could obtain. The District Court found that the cooperatives also provided their members with assistance in merchandising, advertising, promotions, inventory control, and even the financing of new entry.

<sup>33</sup> See Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 302-303 (1960).

<sup>34</sup> In a footnote, the Court emphasized the corollary principle that, "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *U.S. v. Philadelphia Nat. Bank*, 374 U.S. 321, 365, n. 42. That corollary, of course, has no application here, since the Los Angeles retail grocery market can in no sense be characterized as one in which "concentration is already great." Compare *United States v. Aluminum Co. of America*, 377 U.S. 271; *United States v. Continental Can Co.*, 378 U.S. 441. The importance of a trend toward concentration in the particular industry in question was recognized in *Brown Shoe Co. v. United States*, 370

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[\*\*1496] Bag produced a firm with 1.4% of the grocery stores and 7.5% of grocery sales in Los Angeles, and resulted in an [\*\*\*\*54] increase of 1.1% in the market share enjoyed by the two largest firms in the market and 3.3% in the market share of the six largest firms. The former two figures are hardly the "undue percentage" of the market, nor are the latter [\*\*\*576] two figures the "significant increase" in concentration, that would make this merger inherently suspect under the standard of *Philadelphia Nat. Bank*. Instead, the circumstances of the present merger fall far outside the simplified test established by that case for precisely the sort of merger here involved.<sup>35</sup>

[\*\*\*\*56] [\*303] The tests of illegality under § 7 were "intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act." H. R. Rep. No. 1191, 81st Cong., 1st Sess., p. 8. In *Philadelphia Nat. Bank*, the Court was at pains to demonstrate that its conclusion was consistent with cases under § 3 of the Clayton Act. See *U.S. v. Philadelphia Nat. Bank*, 374 U.S. 321, 365-366. The Court disdains any such effort today. Untroubled by the language of § 7, its legislative history, and the cases construing either that section or any other provision of the antitrust laws, the Court grounds its conclusion solely on the impressionistic assertion that the Los Angeles retail food industry is becoming "concentrated" because the number of single-store concerns has declined.

[\*304] The emotional impact of a merger between the third and sixth largest competitors in a given market, however fragmented, is understandable, but that impact cannot substitute for the analysis of the effect of the merger on competition that Congress required by the 1950 amendment. Nothing in the present record indicates [\*\*\*\*57] that there is more than an ephemeral possibility that the effect of this merger may be substantially to lessen competition. Section 7 clearly takes "reasonable probability" as its standard. That standard has not been met here, and I would therefore affirm the judgment of the District Court.

## References

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Annotation References:

Construction, by Supreme Court of the United States, of 7 of the Clayton Act ([15 USC 18](#)), dealing with acquisition by one corporation of stock of another. 14 L ed 2d 784.

Right of one corporation to acquire stock in another as affected by the anti-trust acts. 74 L ed 431.

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[U.S. 294, 332](#). See also [Pillsbury Mills, Inc., 50 F. T. C. 555, 572-573](#); [United States v. Bethlehem Steel Corp., 168 F.Supp. 576, 604-607](#) (D. C. S. D. N. Y.); U.S. Atty. Gen. Nat. Comm. to Study the Antitrust Laws, Report 124 (1955).

<sup>35</sup> [\*\*\*\*55] As a result of the merger, the market share of the two largest firms increased from 14.4% to 15.5%, and the share of the six largest firms increased from 32.1% to 35.4%. The merger involved in *Philadelphia Nat. Bank* produced a single firm controlling 30% of the market, and resulted in an increase from 44% to 59% in the market share of the two largest firms in the market. The Court's opinion is remarkable for its failure to support its conclusion by reference to even a single piece of economic theory. I shall not dwell here on the barometers of competition that have been suggested by the commentators. But it seems important to note that the present merger falls either outside, or at the very fringe, of the various mechanical tests that have been proposed. See, e. g., Kayser & Turner, Antitrust Policy 133-136 (1959) (horizontal merger with direct competitor is *prima facie* unlawful where acquiring company accounts for 20% or more of the market, or where merging companies together constitute 20% or more of the market; acquisitions producing less than 20% market control unlawful only where special circumstances are present, such as serious barriers to entry or substantial influence on prices by the acquired company); Stigler, Mergers and Preventive Antitrust Policy, 104 U. Pa. L. Rev. 176, 179-182 (1955) (acquisition unlawful if it produces a combined market share of 20% or more; acquisition permitted if the combined share is less than 5-10%); Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 308-329 (1960) (no merger by the dominant firm in an industry if its market share is increased by more than 2-3%; no merger by other large firms in the industry where the combined market shares of the two-to-eight largest firms after the merger are increased by 7-8% or more over the shares that existed at any time during the preceding 5-10 years; no merger where acquired firm has 5% market share or more). See also Markham, Merger Policy Under the New Section 7: A Six-Year Appraisal, 43 Va. L. Rev. 489, 521-522 (1957). The 40% rule promoted by the concurring opinion in the present case seems no more than an *ad hoc* endeavor to rationalize the holding of the Court.

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## FTC v. Brown Shoe Co.

Supreme Court of the United States

April 25, 1966, Argued ; June 6, 1966, Decided

No. 118

**Reporter**

384 U.S. 316 \*; 86 S. Ct. 1501 \*\*; 16 L. Ed. 2d 587 \*\*\*; 1966 U.S. LEXIS 2948 \*\*\*\*; 1966 Trade Cas. (CCH) P71,785

FEDERAL TRADE COMMISSION v. BROWN SHOE CO., INC.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

**Disposition:** [339 F.2d 45](#), reversed.

## **Core Terms**

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shoes, unfair, franchise, dealers, retail, customers, franchise agreement, practices, declare, Federal Trade Commission Act, competitors, lines

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

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

### **[HN1](#)[] Public Enforcement, US Federal Trade Commission Actions**

Section 5(a)(6) of the Federal Trade Commission Act, [15 U.S.C.S. § 45 \(a\)\(6\)](#), empowers and directs the Federal Trade Commission to prevent persons, partnerships, or corporations from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. [15 U.S.C.S. § 45\(a\)\(6\)](#).

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

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Antitrust & Trade Law > Federal Trade Commission Act > Scope

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

## **[HN2](#) [] Trade Practices & Unfair Competition, Federal Trade Commission Act**

See [15 U.S.C.S. § 45\(a\)\(1\)](#).

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

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

The Federal Trade Commission (Commission) has broad powers to declare trade practices unfair. This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws.

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

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

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

## **[HN4](#) [] Remedial Powers, Federal Trade Commission Act**

The Federal Trade Commission has power under § 5 of the Federal Trade Commission Act, [15. U.S.C.S. § 45](#), to arrest trade restraints in their incipiency without proof that they amount to an outright violation of [§ 3](#) of the Clayton Act, [15 U.S.C.S. § 14](#), or other provisions of the antitrust laws.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

## **[HN5](#) [] US Federal Trade Commission Actions, Remedial Powers**

The Federal Trade Commission acted well within its authority in declaring a franchise program unfair whether it was completely full blown or not.

## **Lawyers' Edition Display**

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### **Summary**

The Federal Trade Commission enjoined a large manufacturer of shoes from entering into franchise contracts with retail shoestore operators which obligated the manufacturer to give to the dealer, but not to the manufacturer's

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other customers, valuable services, and in return required the dealers not to purchase conflicting lines of shoes from the manufacturer's competitors. On review, the Court of Appeals for the Eighth Circuit set aside the Commission's order on the ground that the manufacturer's practice was not an unfair method of competition in violation of 5 of the [Federal Trade Commission Act. \(339 F2d 45.\)](#)

On certiorari, the Supreme Court of the United States reversed. In an opinion by Black, J., expressing the unanimous view of the Court, it was held that the Commission acted well within its authority in declaring the manufacturer's franchise program unfair.

## Headnotes

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PRACTICES §56 > order of FTC -- review of findings -- > Headnote:

[LEdHN\[1\]](#) [1]

A general conclusionary statement--made by a Court of Appeals in setting aside an order of the Federal Trade Commission which enjoined, as an unfair method of competition, a shoe manufacturer's entering into franchise contracts with retail shoestores requiring them not to purchase conflicting lines of shoes from competitors--that there was a complete failure to prove an exclusive dealing agreement which might be held violative of 5 of the Federal Trade Commission Act ([15 USC 45](#)) cannot be treated by the Supreme Court of the United States as intended to be a rejection of the Commission's findings of fact, where neither this statement nor any other statement in the opinion of the Court of Appeals indicates a purpose to hold that the evidence failed to show an exclusive dealing agreement as alleged in the complaint of the Commission, and moreover the crucial facts were admitted in the manufacturer's formal answer to the complaint.

PRACTICES §48 > unfair methods of competition -- powers of FTC -- > Headnote:

[LEdHN\[2\]](#) [2]

Subject to judicial review, the Federal Trade Commission has power to find a shoe manufacturer guilty of an unfair method of competition in violation of 5(a)(6) of the Federal Trade Commission Act ([15 USC 45 \(a\)\(6\)](#)) upon a record showing that the manufacturer admitted to have entered into exclusive franchise agreements with a substantial number of retail shoestore operators and that the trial examiner found that the manufacturer's franchise program effectively foreclosed its competitors from selling to a substantial number of retail shoe dealers.

PRACTICES §44 > powers of FTC -- > Headnote:

[LEdHN\[3\]](#) [3]

The Federal Trade Commission has broad powers to declare trade practices unfair, including trade practices which conflict with the basic policies of the Sherman ([15 USC 1 et seq.](#)) and Clayton ([15 USC 14](#)) Acts, even though such practices may not actually violate these laws.

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MONOPOLIES §54 > PRACTICES §48 > exclusive franchise agreements -- > Headnote:

[LEdHN\[4\]](#) [4]

A shoe manufacturer's program of making exclusive franchise agreements with retail shoestore operators requiring them not to purchase conflicting lines of shoes from the manufacturer's competitors, while conflicting with the central policy of both 1 of the Sherman Act ([15 USC 1](#)) and 3 of the Clayton Act ([15 USC 14](#)) against contracts which take away freedom of purchasers to buy in an open market, can be enjoined under 3 of the Clayton Act only upon proof by the government that the effect of the program may be to substantially lessen competition or tend to create a monopoly; however, no such proof is necessary where the government proceeds to enjoin this program as an unfair method of competition under 5 of the Federal Trade Commission Act ([15 USC 45](#)).

PRACTICES §44 > powers of FTC -- > Headnote:

[LEdHN\[5\]](#) [5]

Under 5 of the Federal Trade Commission Act ([15 USC 45](#)), dealing with unfair methods of competition and unfair trade practices, the Federal Trade Commission has power to arrest trade restraints in their incipiency without proof that they amount to an outright violation of 3 of the Clayton Act ([15 USC 14](#)) or other provisions of the antitrust laws.

PRACTICES §43 > Trade Commission Act -- function -- > Headnote:

[LEdHN\[6\]](#) [6]

The Federal Trade Commission Act is designed to supplement and bolster the Sherman Act and the Clayton Act by stopping incipient acts and practices which when full blown would violate those acts, as well as to condemn as "unfair methods of competition" existing violations of them.

PRACTICES §48 > unfair methods of competition -- > Headnote:

[LEdHN\[7\]](#) [7]

The Federal Trade Commission acts well within its authority in declaring that a shoe manufacturer's franchise program is an unfair method of competition violating 5 of the Federal Trade Commission Act ([15 USC 45](#)), where under that program the manufacturer entered into franchise contracts with retail shoestore operators which obligated the manufacturer to give to the dealer, but not to the manufacturer's other customers, valuable services, and in return require the dealers not to purchase conflicting lines of shoes from the manufacturer's competitors.

## Syllabus

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The FTC filed a complaint against respondent, the country's second largest shoe manufacturer, under § 5 of the Federal Trade Commission Act, charging unfair trade practices by the use of a "Franchise Stores Program" through which respondent sells its shoes to more than 650 retail stores. In return for special benefits from Brown Shoe Company, the franchise stores agree to buy Brown shoe lines and to refrain from buying competitive lines. After hearings the FTC concluded that the restrictive contract program was an unfair method of competition and ordered

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respondent to cease and desist from its use. The Court of Appeals set aside the FTC's order, holding that there was "complete failure to prove an exclusive dealing agreement" violative of § 5 of the Act. *Held:* The FTC acted well within its authority under the Act in declaring respondent's franchise program an unfair trade practice. Pp. 319-322.

(a) On this record the FTC has power to find [\*\*\*2] such anticompetitive practice unfair. *Federal Trade Comm'n v. Gratz, 253 U.S. 421*, relied on by the Court of Appeals, has been rejected by this Court. Pp. 320-321.

(b) The franchise program conflicts with the policy of § 1 of the Sherman Act and § 3 of the Clayton Act against contracts which remove freedom of purchasers to buy in an open market. P. 321.

(c) Under § 5 of the Federal Trade Commission Act the FTC has power to arrest restraints of trade in their incipiency without proof that they are outright violations of § 3 of the Clayton Act or other antitrust provisions. *F. T. C. v. Motion Picture Adv. Co., 344 U.S. 392, 394-395*. Pp. 321-322.

**Counsel:** Ralph S. Spritzer argued the cause for petitioner. On the brief were Solicitor General Marshall, Assistant Attorney General Turner, Robert S. Rifkind, Howard E. Shapiro, Milton J. Grossman, James McL. Henderson, Thomas F. Howder and Gerald J. Thain.

Robert H. McRoberts argued the cause for respondent. With him on the brief were Gaylord C. Burke and Edwin S. Taylor.

**Judges:** Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Fortas

**Opinion by:** BLACK

## Opinion

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[\*317] [\*589] [\*\*\*3] [\*\*1502] MR. JUSTICE BLACK delivered the opinion of the Court.

Section 5 (a)(6) of the Federal Trade Commission Act [HN1](#) [↑] empowers and directs the Commission "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." <sup>1</sup> [\*\*\*6] Proceeding under the authority of § 5, the Federal Trade Commission filed a complaint against the Brown Shoe Co., Inc., one of the world's largest manufacturers of shoes with total sales of \$ 236,946,078 for the year ending October 31, 1957. The unfair practices charged against Brown revolve around the "Brown Franchise Stores' Program" through which Brown sells its shoes to some 650 retail stores. The complaint alleged that under this plan Brown, a corporation engaged in interstate commerce, had "entered into contracts or franchises with a substantial number of its independent retail shoe store operator customers which require said customers to restrict their purchases of shoes for resale to the Brown lines and which prohibit them from purchasing, stocking or reselling shoes manufactured by competitors of Brown." Brown's customers who entered into these restrictive [\*\*\*4] franchise agreements, so the complaint charged, were given in return special treatment and valuable benefits which were not granted to Brown's customers who [\*318] did not enter into the agreements. In its answer to the Commission's complaint Brown admitted that approximately 259 of its retail customers had executed written franchise agreements and that over 400 others had entered into its franchise program without execution of the franchise agreement. Also in its answer Brown attached as an exhibit an unexecuted copy of the "Franchise Agreement" which, when executed by Brown's representative and a retail shoe dealer, obligates Brown to give to the dealer but not to other customers certain valuable services, including among

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<sup>1</sup> 38 Stat. 719, as amended, [15 U. S. C. § 45 \(a\)\(6\) \(1964 ed.\)](#).

Section 5 (a)(1) of the Federal Trade Commission Act provides that [HN2](#) [↑] "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

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others architectural plans, costly merchandising records, services of a Brown field representative, and a right to participate in group insurance at lower rates than the dealer could obtain individually. In return, according to the franchise agreement set out in Brown's answer, the retailer must make this promise:

"In return I will:

"1. Concentrate my business within the grades and price lines of shoes **[\*\*1503]** representing Brown Shoe Company Franchises **[\*\*\*\*5]** of the Brown **[\*\*\*590]** Division and will have no lines conflicting with Brown Division Brands of the Brown Shoe Company."

Brown's answer further admitted that the operators of "such Brown Franchise Stores in individually varying degrees accept the benefits and perform the obligations contained in such franchise agreements or implicit in such Program," and that Brown refuses to grant these benefits "to dealers who are dropped or voluntarily withdraw from the Brown Franchise Program . . . ." The foregoing admissions of Brown as to the existence and operation of the franchise program were buttressed by many separate detailed fact findings of a trial examiner, one of which findings was that the franchise program **[\*319]** effectively foreclosed Brown's competitors from selling to a substantial number of retail shoe dealers.<sup>2</sup> Based on these findings and on Brown's admissions the Commission concluded that the restrictive contract program was an unfair method of competition within the meaning of § 5 and ordered Brown to cease and desist from its use.

On review the Court of Appeals set aside the Commission's order. In doing so the court said:

"By passage of the Federal Trade Commission Act, particularly § 5 thereof, we do not believe that Congress meant to prohibit or limit sales programs such as Brown Shoe **[\*\*\*\*7]** engaged in in this case. . . . The custom of giving free service to those who will buy their shoes is widespread, and we cannot agree with the Commission that it is an unfair method of competition in commerce." [339 F.2d 45, 56.](#)

**LEdHN[1]↑** [1]**LEdHN[2]↑** [2]In addition the Court of Appeals held that there was a "complete failure to prove an exclusive dealing agreement which might be held violative of § 5 of the Act." We are asked to treat this general conclusion as though the court intended it to be a rejection of the Commission's findings of fact. We cannot do this. Neither this statement of the court nor any other statement in the **[\*320]** opinion indicates a purpose to hold that the evidence failed to show an agreement between Brown and more than 650 franchised dealers which restrained the dealers from buying competing lines of shoes from Brown's competitors. Indeed, in view of the crucial admissions in Brown's formal answer to the complaint we cannot attribute to the Court of Appeals a purpose to set aside the Commission's findings **[\*\*\*\*8]** that these restrictive agreements existed and that Brown and most of the franchised dealers in varying degrees lived up to their obligations. Thus the question we have for decision is whether the Federal Trade Commission can declare it to be an unfair practice for Brown, the second largest manufacturer of shoes in the Nation, to pay a valuable consideration to hundreds of retail **[\*\*\*591]** shoe purchasers in order to secure a contractual promise from them that they will deal primarily with Brown and will not purchase conflicting lines of shoes from Brown's competitors. We hold that the Commission has power to find, on the record here, such an anticompetitive **[\*\*1504]** practice unfair, subject of course to judicial review. See *Atlantic Rfg. Co. v. FTC*, [381 U.S. 357, 367.](#)

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<sup>2</sup> In its opinion the Commission found that the services provided by Brown in its franchise program were the "prime motivation" for dealers to join and remain in the program; that the program resulted in franchised stores purchasing 75% of their total shoe requirements from Brown -- the remainder being for the most part shoes which were not "conflicting" lines, as provided by the agreement; that the effect of the plan was to foreclose retail outlets to Brown's competitors, particularly small manufacturers; and that enforcement of the plan was effected by teams of field men who called upon the shoe stores, urged the elimination of other manufacturers' conflicting lines and reported deviations to Brown who then cancelled under a provision of the agreement. Compare *Brown Shoe Co. v. United States*, [370 U.S. 294](#).

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[\[1\]](#) [3][\[2\]](#) [3][\[4\]](#) [4][\[5\]](#) [5][\[6\]](#) [6][\[7\]](#) [7]In holding [\*\*\*9] that the Federal Trade Commission lacked the power to declare Brown's program to be unfair the Court of Appeals was much influenced by and quoted at length from this Court's opinion in [Federal Trade Comm'n v. Gratz, 253 U.S. 421](#). That case, decided shortly after the Federal Trade Commission Act was passed, construed the Act over a strong dissent by Mr. Justice Brandeis as giving the Commission very little power to declare any trade practice unfair. Later cases of this Court, however, have rejected the *Gratz* view and it is now recognized in line with the dissent of Mr. Justice Brandeis in *Gratz* that [HN3](#) the Commission has [\*321] broad powers to declare trade practices unfair.<sup>3</sup> This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws.<sup>4</sup> The record in this case shows beyond doubt that Brown, the country's second largest manufacturer of shoes, has a program, which requires shoe retailers, unless faithless to their contractual obligations with Brown, substantially to limit their trade [\*\*\*10] with Brown's competitors. This program obviously conflicts with the central policy of both [§ 1](#) of the Sherman Act and [§ 3](#) of the Clayton Act against contracts which take away freedom of purchasers to buy in an open market.<sup>5</sup> [\*\*\*12] Brown nevertheless contends that the Commission had no power to declare the franchise program unfair without proof that its effect "may be to substantially lessen competition or tend to create a monopoly" [\*322] which of course would have to be proved if the Government were proceeding against Brown under [§ 3](#) of the Clayton Act rather than § 5 of the Federal Trade Commission Act. We reject the argument that proof of this [§ 3](#) element must be made for as we [\*\*\*592] pointed out above our cases<sup>6</sup> hold that [HN4](#) the Commission has power under § 5 to arrest trade restraints in their incipiency without proof that they amount to an outright violation of [§ 3](#) of the Clayton Act or other provisions of the antitrust laws. This power of the Commission was emphatically stated in *F. T. C. v. Motion Picture Adv. Co., 344 U.S. 392, at pp. 394-395*:

"It is . . . clear that the Federal Trade Commission Act was designed to supplement and bolster [\*\*\*11] the Sherman [\*\*1505] Act and the Clayton Act . . . to stop in their incipiency acts and practices which, when full blown, would violate those Acts . . . as well as to condemn as 'unfair methods of competition' existing violations of them."

We hold that the [HN5](#) Commission acted well within its authority in declaring the Brown franchise program unfair whether it was completely full blown or not.

Reversed.

## References

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Annotation References:

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<sup>3</sup> See, e. g., [Federal Trade Comm'n v. R. F. Keppel & Bro., Inc., 291 U.S. 304, 310](#); [Trade Comm'n v. Cement Institute, 333 U.S. 683, 693](#); [Atlantic Rfg. Co. v. FTC, 381 U.S. 357, 367](#).

<sup>4</sup> See, e. g., [Fashion Guild v. Trade Comm'n, 312 U.S. 457, 463](#); [Atlantic Rfg. Co. v. FTC, 381 U.S. 357, 369](#).

<sup>5</sup> [Section 1](#) of the Sherman Act, 26 Stat. 209, [15 U. S. C. § 1 \(1964 ed.\)](#), declares illegal "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . .".

[Section 3](#) of the Clayton Act, 38 Stat. 731, [15 U. S. C. § 14 \(1964 ed.\)](#), provides in relevant part:

"It shall be unlawful for any person engaged in commerce . . . to . . . make a . . . contract for sale of goods . . . for . . . resale within the United States . . . on the condition, agreement, or understanding that the . . . purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller, where the effect of such . . . condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

<sup>6</sup> See cases cited in note 4, *supra*.

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Validity and construction of statute creating Federal Trade Commission. 6 ALR 366, 11 ALR 797, 18 ALR 549, 30 ALR 1129, 32 ALR 792, 51 ALR 331, 68 ALR 847, 79 ALR 1200.

What constitutes false, misleading, or deceptive advertising or promotional practices subject to action by Federal Trade Commission. 65 ALR2d 225.

Validity, under 3 of the Clayton Act ([15 USC 14](#)), of contract by purchaser of goods to take his entire requirements from the seller. 5 L ed 2d 1105.

Contract by one party to sell his entire output to or to take his entire requirements of a commodity from the other party as contrary to public policy or anti-monopoly statute . 83 ALR 1173.

Right to enjoin business competitor from illegal acts or practices. 90 ALR2d 7.

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## **FTC v. Dean Foods Co.**

Supreme Court of the United States

March 28, 1966, Argued ; June 13, 1966, Decided

No. 970

### **Reporter**

384 U.S. 597 \*; 86 S. Ct. 1738 \*\*; 16 L. Ed. 2d 802 \*\*\*; 1966 U.S. LEXIS 2985 \*\*\*\*; 1966 Trade Cas. (CCH) P71,788

FEDERAL TRADE COMMISSION v. DEAN FOODS CO. ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**Disposition:** [356 F.2d 481](#), reversed and remanded.

## **Core Terms**

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court of appeals, merger, Writs, district court, injunction, proceedings, cases, preliminary injunction, enjoin, Clayton Act, appellate jurisdiction, preliminary relief, courts, acquisition, temporary, merits, orders, consummation, restraining, appeals, parties, administrative agency, appellate court, antitrust, decisions, vested, staff, authorization, vertical, milk

## **LexisNexis® Headnotes**

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Civil Procedure > Remedies > Writs > All Writs Act

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

### **HN1[] Writs, All Writs Act**

The All Writs Act, [28 U.S.C.S. § 1651\(a\)](#), empowers the federal courts to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. The exercise of this power is in the nature of appellate jurisdiction where directed to an inferior court, and extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected.

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

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## [\*\*HN2\*\*](#) Remedies, Writs

Where a case is within the appellate jurisdiction of the higher court a writ may issue in aid of the appellate jurisdiction which might otherwise be defeated.

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

## [\*\*HN3\*\*](#) Remedies, Writs

The authority of the appellate court is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

## [\*\*HN4\*\*](#) Reviewability, Jurisdiction & Venue

There is a limited judicial power to preserve the court's jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels. Such power has been deemed merely incidental to the courts' jurisdiction to review final agency action.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Exclusive Jurisdiction

Banking Law > Types of Banks & Financial Institutions > National Banks > Affiliates & Subsidiaries

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Primary Jurisdiction

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Mergers & Acquisitions Law > Antitrust > General Overview

## [\*\*HN5\*\*](#) Jurisdiction, Exclusive Jurisdiction

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Section 11(c) of the Clayton Act, [15 U.S.C.S. § 21\(c\)](#), gives exclusive jurisdiction to review final orders by the Federal Trade Commission against illegal mergers, on application of any person required by such order to cease and desist from any such violation, to the courts of appeals for any circuit within which such violation occurred or within which such person resides or carries on business. This grant includes the traditional power to issue injunctions to preserve the status quo while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction.

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

## [\*\*HN6\*\*](#) **US Federal Trade Commission Actions, Remedial Powers**

The ancillary power to bring contempt actions in the appropriate court of appeals when the court's enforcement orders were violated have always been treated as essential to the effective discharge of the Federal Trade Commission's responsibilities.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

## [\*\*HN7\*\*](#) **Separation of Powers, Legislative Controls**

Courts do not draw the inference that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress. Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigation. Courts do not construe such requests by government agencies and the resulting nonaction of the Congress as affirmative evidence of no authority.

## **Lawyers' Edition Display**

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### **Summary**

The Federal Trade Commission, which had commenced administrative action to determine whether a merger of two companies violated 7 of the Clayton Act, applied to the United States Court of Appeals for the Seventh Circuit for a temporary restraining order and a preliminary injunction to maintain the status quo until it determined the legality of the merger, alleging that if the merger was allowed to be completed, an effective remedial order would be virtually impossible, and the Court of Appeals would be deprived of its appellate jurisdiction over final Commission orders. The Court of Appeals entered a temporary restraining order, but after a hearing for a preliminary injunction, dissolved the restraining order and dismissed the petition, on the ground that the Commission had no authority to institute the proceedings. ([356 F2d 481](#).)

On certiorari, the Supreme Court of the United States reversed and remanded. In an opinion by Clark, J., expressing the views of five members of the Court, it was held that (1) the Court of Appeals had the power under the All Writs Act to issue a preliminary injunction upon a showing of the allegations in the Commission's petition, and (2) notwithstanding the absence of express statutory authority to request preliminary relief from a Court of Appeals under the All Writs Act, the Commission had standing to seek such relief under the circumstances alleged in the case at bar.

Fortas, J., joined by Harlan, Stewart, and White, JJ., dissented, expressing the view that the Commission had no power to seek a temporary injunction in any court, and that the Court of Appeals had no jurisdiction under the All Writs Act, or otherwise, with regard to such relief.

### **Headnotes**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §68 > injunction against merger -- power of Court of Appeals -- All Writs Act -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B]

A Court of Appeals has the power under the All Writs Act ([28 USC 1651\(a\)](#)), which authorizes the federal courts to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law, to temporarily enjoin the consummation of a merger of two companies upon the Federal Trade Commission's application for an injunction to maintain the status quo until the Commission determined the legality of the merger in proceedings before the Commission attacking the merger as violative of 7 of the Clayton Act ([15 USC 18](#)), upon a showing that an effective remedial order would be virtually impossible if the merger was allowed to be completed, thus rendering the enforcement of any final decree of divestiture futile and depriving the court of its appellate jurisdiction over final Commission orders.

APPEAL §1293 > dismissal of application for injunction -- considering allegations as true -- > Headnote:

[LEdHN\[2\]](#) [2]

The Supreme Court of the United States must take as true the allegations of the Federal Trade Commission's application to a Court of Appeals for a preliminary injunction against the consummation of a merger, where the case comes to the Supreme Court from the lower court's dismissal on jurisdictional grounds.

COURTS §505 > All Writs Act -- appellate jurisdiction -- > Headnote:

[LEdHN\[3\]](#) [3]

The exercise of the power under the All Writs Act, which authorizes the federal courts to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law ([28 USC 1651\(a\)](#)), is in the nature of appellate jurisdiction where directed to an inferior court, and extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §68 > injunction against merger -- power of Courts of Appeals -- > Headnote:

[LEdHN\[4\]](#) [4]

The grant of exclusive jurisdiction to the Courts of Appeals, under 11(c) of the Clayton Act ([15 USC 21\(c\)](#)), to review final orders by the Federal Trade Commission against illegal mergers on application of any person required by such an order to cease and desist from any such violation, includes the traditional power to issue injunctions to preserve the status quo while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction.

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §70 > temporary injunction against merger -- Federal Trade Commission's power to seek -- > Headnote:

[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B] [5B]

Notwithstanding the absence of an express statutory grant of authority to the Federal Trade Commission to request preliminary relief under the All Writs Act ([28 USC 1651\(a\)](#)), the Commission, which has been entrusted with the enforcement of the Clayton Act, has the incidental power to seek such preliminary relief from a Court of Appeals, which has jurisdiction to review final Commission action, where the Commission alleges that a temporary injunction against the merger of companies to maintain the status quo until the Commission determines the legality of the merger under 7 of the Clayton Act ([15 USC 18](#)) is necessary to allow entry of an effective divestiture order and to insure effective judicial review; the fact that Congress had not acted on requests of the Commission for statutory authority to issue preliminary relief itself, or to proceed in the District Courts for such purpose, has no relevance, since Congress gave no attention to the exercise of judicial power by the Courts of Appeals under the All Writs Act, leaving that power intact and the standing of the Commission to invoke it undiminished.

ADMINISTRATIVE LAW §109 > PARTIES §3.5 > temporary injunction -- agency's power to seek -- > Headnote:

[LEdHN\[6\]](#) [6]

Absent explicit direction from Congress, a federal agency charged with protecting the public interest can request that a Court of Appeals having jurisdiction to review administrative orders, exercise its express authority under the All Writs Act ([28 USC 1651\(a\)](#)) to issue such temporary injunctions as may be necessary to protect its own jurisdiction.

EVIDENCE §167 > inference -- Congressional intent -- > Headnote:

[LEdHN\[7\]](#) [7]

It cannot be inferred from the fact that Congress took no action on the Federal Trade Commission's request to grant the Commission or a District Court the power to issue a preliminary injunction against the merger of companies as violative of the Clayton Act that Congress thereby expressed an intent to circumscribe traditional judicial remedies.

## Syllabus

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Respondents, two substantial competitors in the sale of packaged milk in the Chicago area, signed a merger agreement following meetings with representatives of the Federal Trade Commission (FTC) who indicated that the merger would raise serious questions under the antitrust laws. At the time of the merger one of the respondents was the third or fourth largest packaged milk distributor in the area, the other at least the second largest, and together they accounted for 23% of area sales of packaged milk. The FTC filed a complaint charging that the agreement violated § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act. Thereafter the FTC, under the All Writs Act, [28 U. S. C. § 1651 \(a\)](#), petitioned the Court of Appeals for a temporary restraining order and a preliminary injunction to maintain the *status quo* until the FTC determined the merger's legality. The FTC alleged the probability of its [\*\*\*2] finding an antitrust violation and that the need for injunctive relief was "compelling" since under the merger one of the respondents would no longer exist, its milk routes and certain of its plants and equipment would be sold and its remaining assets would be consolidated, precluding its restoration as a viable independent company if the merger were subsequently ruled illegal. The petition alleged that the Court of Appeals would consequently be deprived of its appellate jurisdiction over final FTC orders and the opportunity to enter a

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meaningful order of its own. The Court of Appeals on the hearing for a preliminary injunction dismissed the petition on the ground that the FTC had not entered a cease-and-desist order and had no authority to institute the proceeding, Congress having failed to enact bills introduced for such a purpose. The contract was then closed. MR. JUSTICE CLARK on application issued a preliminary injunction against material corporate changes in the acquired company and subsequently this Court granted certiorari. *Held:*

1. The Court of Appeals has jurisdiction to issue a preliminary injunction to prevent consummation of the merger agreement upon a showing [\*\*\*3] that an effective remedial order would otherwise be virtually impossible once the merger had been implemented, thus rendering a final divestiture decree futile. Pp. 603-605.

(a) The All Writs Act extends to the potential jurisdiction of an appellate court where an appeal is not then pending but may later be perfected. Pp. 603-604.

(b) The grant in § 11 (c) of the Clayton Act to courts of appeals of jurisdiction to review final orders of the FTC against illegal mergers on application of any person required thereby to cease and desist such violations includes the traditional power to preserve the *status quo* while administrative proceedings are in progress to prevent impairment of the effective exercise of appellate jurisdiction. Cf. *Whitney Nat. Bank v. New Orleans Bank*, 379 U.S. 411. Pp. 604-605.

2. The FTC, under the circumstances alleged in this case, has standing to seek preliminary relief under the All Writs Act. Pp. 605-612.

(a) It would stultify Congress' purpose in entrusting the FTC with enforcement of the Clayton Act and granting it the power to order divestiture if the FTC did not have the incidental power to ask the courts of appeals to [\*\*\*4] exercise their authority under the All Writs Act. Pp. 606-612.

(b) The power of the courts of appeals to grant preliminary relief here derives from the All Writs Act, not the Clayton Act. P. 608.

(c) Congress' failure to enact proposals that the FTC be empowered itself to issue preliminary relief or to proceed in district courts for that purpose reflects no intent to circumscribe traditional judicial remedies. Pp. 608-611.

**Counsel:** Solicitor General Marshall argued the cause for petitioner. With him on the brief were Assistant Attorney General Turner, Richard A. Posner, Howard E. Shapiro and James McL. Henderson.

Hammond E. Chaffetz argued the cause for respondents and filed a brief for respondent Dean Foods Co.

L. Edward Hart, John Paul Stevens and Edward I. Rothschild filed a brief for respondent Bowfund Corp.

**Judges:** Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Fortas

**Opinion by:** CLARK

## **Opinion**

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[\*599] [\*\*\*804] [\*\*1740] MR. JUSTICE CLARK delivered the opinion of the Court.

At issue here is the power of the Court of Appeals under the All Writs Act, *28 U. S. C. § 1651 (a) (1964 ed.)*, to temporarily enjoin the consummation of a [\*\*\*5] merger that is under attack before the Federal Trade Commission as violative of § 7 of the Clayton Act, as amended, 64 Stat. 1125, *15 U. S. C. § 18 (1964 ed.)*. This case arose on the application of the Commission for a temporary restraining order and a preliminary injunction against respondents Dean Foods Company and Bowman Dairy Company to maintain the *status quo* until the Commission determined the legality of their merger. The Commission alleged that it had issued a complaint against respondents under § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 52 Stat. 111,

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15 U. S. C. § 45 (1964 ed.), and that from the facts underlying the complaint "it is probable that the Federal Trade Commission will enter an order finding a violation of these laws." The petition stated that there was a "compelling" need for preliminary relief since the "acquisition itself" will split Bowman in two -- Dean will acquire fixed assets, receivables and good will; Bowman will retain all cash, government and other marketable securities, and some real estate investments" for distribution to its stockholders.<sup>1</sup> In [\*\*\*6] addition, it was alleged that Dean planned to dispose of most of Bowman's retail milk routes, certain of its plants and equipment, and to consolidate the remaining assets. The Commission thus argued that if the merger were [\*\*805] allowed to be completed, "Bowman as an entity will no longer exist," and that it "will be 'extremely difficult and very probably impossible' [\*\*600] to restore Bowman as "a viable independent" company if the merger were subsequently ruled illegal. In other words, consummation of the agreement would "prevent the Commission from devising, or render it extremely difficult for the Commission to devise, any effective remedy after its decision on the merits." As grounds for issuance of an extraordinary writ, the Commission asserted that the Court of Appeals "will, in effect, be deprived of its appellate jurisdiction [over final Commission orders] and of the opportunity to enter a meaningful final order of its own in respect to this acquisition, since the *res in custodia legis* -- Bowman -- will have vanished."

[\*\*\*7] The Court of Appeals entered a temporary restraining order against respondents, as prayed. On the hearing for a preliminary injunction, however, it dissolved the temporary restraining order and dismissed the petition for the reasons that "no cease and desist order has been entered by the Commission relative to the subject matter in the case at bar and . . . we now hold that the Commission did not have authority to institute this proceeding in this court . . ." In its final judgment the Court of Appeals supported [\*\*1741] its refusal to grant relief at the request of the Commission by reference to the fact that:

"in the 84th Congress and in the 89th Congress bills sponsored by the said Commission were introduced, which bills if enacted into law would have conferred upon the Commission such authority as it is attempting to exercise in the case now before this court, but that said measures were not enacted into law and Congress has not provided otherwise for bestowing this authority upon said Commission." [356 F.2d 481, 482](#).

#### LEdHN[1A] [↑] [1A]

A few hours after the Court of Appeals entered its [\*\*\*8] order on January 19, 1966, the contract was closed and Dean acquired legal title to Bowman's operating assets. [\*601] Upon application by the Solicitor General on behalf of the Commission, MR. JUSTICE CLARK, after consulting the other members of this Court, entered a preliminary injunction on January 24, 1966, restraining respondents from making any material changes with respect to Bowman's corporate structure or the assets purchased. This order provided that Dean might sell Bowman's retail home delivery routes upon terms and conditions acceptable to the Commission, but that any milk supplied by Dean to the purchasers of the routes must continue to be delivered under the Bowman label and from former Bowman plants. We granted certiorari on February 18, 1966, 383 U.S. 901, and expedited consideration of this case. We conclude that the Court of Appeals erred and reverse its judgment.

I.

LEdHN[2] [↑] [2] Since the case comes to us from a dismissal on jurisdictional grounds we must take the allegations of the Commission's application for a preliminary injunction as true. We need not detail the facts [\*\*\*9] further than to say that Dean and Bowman were substantial competitors in the sale of packaged milk in the Chicago area, one of the largest markets in the United States for packaged milk. On November 2, 1965, attorneys for Dean and Bowman [\*\*806] met with representatives of the Commission to discuss a proposal by Dean to purchase all

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<sup>1</sup> Since consummation of the merger all assets of Bowman, with the exception of cash and marketable securities which were exempted from the purchase agreement, have been transferred to Dean. Bowman has ceased dairy operations and now acts as an investment fund, having received and invested the proceeds of the sale.

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of Bowman's plants and equipment, the Bowman name, all customer and supplier lists together with the benefit of their relationships, and various other assets, all of which were situated in the Chicago area. Bowman would consequently cease doing a dairy business there. It was emphasized that the inquiry was merely to ascertain the views of the staff of the Commission and not to secure a formal advisory opinion. After investigation, on December 3, 1965, the Commission's staff advised Dean's counsel that it believed the acquisition would raise serious questions under the [\*602] antitrust laws, and that on the basis of existing information the staff would recommend that the Commission issue a complaint against the acquisition if consummated. After further meetings, Dean's counsel informed the Commission's staff on December 14, 1965, that the agreement [\*\*\*\*10] had been signed. A week later the Commission issued a formal complaint charging that the agreement violated § 7 of the Clayton Act and § 5 of the Federal Trade Commission Act.

It appears that at the time of the merger Dean was the third or fourth largest distributor of packaged milk in the Chicago area; Bowman was at least the second largest in that market; and together they enjoyed approximately 23% of the sales of packaged milk in the same area, while the four largest dairy companies had a 43% share thereof. Affidavits attached to the Commission's application alleged that between 1954 and 1965 the number of packaged milk sellers in the Chicago market had declined from 107 to 57, and that in the four months prior to the filing of the complaint four more firms had been eliminated by acquisitions. From these statistics it was concluded that the effect of Dean's acquisition of Bowman would be to substantially [\*\*1742] lessen competition. We place in the margin the Commission's summation of its complaint.<sup>2</sup>

[\*\*\*11] [\*603] II.

LEdHN[3] [3]HN1 The All Writs Act, 28 U. S. C. § 1651 (a), empowers the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. [\*\*\*807] " The exercise of this power "is in the nature of appellate jurisdiction" where directed to an inferior court, *Ex parte Crane*, 5 Pet. 190, 193 (1832) (Marshall, C. J.), and extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected. Cf. *Ex parte Bradstreet*, 7 Pet. 634 (1833) (Marshall, C. J.). These holdings by Chief Justice Marshall are elaborated in a long line of cases, including *McClellan v. Carland*, 217 U.S. 268 (1910), where Mr. Justice Day held: "we think it the true rule that HN2 where a case is within the appellate jurisdiction of the higher court a writ . . . may issue in aid of the appellate jurisdiction which might otherwise [\*\*\*12] be defeated . . ." At 280. And in *Roche v. Evaporated Milk Assn.*, 319 U.S. 21 (1943), Chief Justice Stone stated that HN3 the authority of the appellate court "is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." [\*604] At 25. Likewise, decisions of this Court

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<sup>2</sup> The Federal Trade Commission alleged:

- "(a) Actual or potential competition in the sale and distribution of packaged milk in the Chicago Area will be eliminated or prevented;
- "(b) Dean, a major competitive factor in the sale and distribution of packaged milk in the Chicago Area, will eliminate Bowman, another major competitive factor in the sale and distribution of packaged milk in the Chicago Area;
- "(c) Concentration in the sale and distribution of packaged milk in the Chicago Area will be increased and deconcentration will be prevented;
- "(d) The restraining influence on non-competitive behavior in the sale and distribution of packaged milk in the Chicago Area, which existed by reason of the independent operation of Bowman, will be eliminated;
- "(e) The acquisition will contribute to the over-all trend toward concentration in the sale and distribution of packaged milk in the United States . . . thereby tending to bring about the adverse competitive effects described [elsewhere in the complaint];
- "(f) The emergence or growth of smaller packaged milk companies in the Chicago Area will be retarded, discouraged or prevented;
- "(g) The members of the consuming public, in the Chicago Area and throughout the United States, will be denied the benefits of free and open competition in the sale and distribution of packaged milk."

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"have recognized [HN4](#) a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels. . . . Such power has been deemed merely incidental to the courts' jurisdiction to review final agency action . . ." *Arrow Transp. Co. v. Southern R. Co.*, 372 U.S. 658, 671, n. 22 (1963). There the Court cited such authority as *Scripps-Howard Radio, Inc. v. Federal Communications Comm'n*, [316 U.S. 4 \(1942\)](#); *West India Fruit & S. S. Co. v. Seatrain Lines, Inc., [170 F.2d 775 \(C. A. 2d Cir. 1948\)](#); and *Board of Governors v. Transamerica Corp.*, [184 F.2d 311 \(C. A. 9th \[\\*\\*\\*\\*13\] Cir.\), cert. denied, 340 U.S. 883 \(1950\)](#).*

LEdHN[4] [4]Section 11 (c) of the Clayton Act, as amended, 73 Stat. 243, 15 U. S. C. § 21 (c), HNS gives exclusive jurisdiction to review final orders by the Commission against illegal mergers, on application of "any person required by such order . . . to cease and desist from any such violation," to the courts of appeals "for any circuit within which such **[\*\*1743]** violation occurred or within which such person resides or carries on business." This grant includes the traditional power to issue injunctions to preserve the *status quo* while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction. Cf. Continental III. Nat. Bank v. Chicago, R. I. & P. R. Co., 294 U.S. 648, 675 (1935). A recent case involving a similar statutory proceeding is dispositive of this issue. Whitney Nat. Bank v. New Orleans Bank, 379 U.S. 411 (1965), raised the **[\*\*\*\*14]** question whether holding companies were "lawfully entitled" to operate subsidiary banks within Louisiana, a question we held should be determined in the first instance by the Federal Reserve Board. We further concluded that the Board should reconsider its initial approval of such a plan in light of **[\*605]** an intervening Louisiana statute, and so gave the parties, who had sought review of the Board's order before the Court of Appeals for the Fifth Circuit, an opportunity to move that the case be remanded to the Board. It was noted that the **[\*\*\*808]** Court of Appeals had authority "to issue such orders as will protect its jurisdiction pending final determination of the matter," at 415, and that § 1651 (a) empowered it to stay "the order of approval of the Federal Reserve Board pending final disposition of the review proceeding." At 425. In response to the argument that the stay would not be sufficient because the Comptroller of Currency nonetheless intended to issue a certificate to the bank, we stated that if "the Court of Appeals should find it necessary to take direct action to maintain the *status quo* and prevent the opening of the bank, it has ample power to do so" by **[\*\*\*\*15]** an injunction against the applicants before the Federal Reserve Board themselves. At 426. Such action would be analogous to the relief requested here by the Commission.<sup>3</sup>

LEdHN[1B] [↑] [1B]

These decisions furnish ample precedent to support jurisdiction of the Court of Appeals to issue a preliminary injunction preventing the consummation of this agreement upon a showing that an effective remedial order, once the merger was implemented, would otherwise be virtually impossible, thus rendering the enforcement of any final decree of divestiture futile.

III.

[\*\*\*\*\*16] LEdHN[5A] [↑] [5A]

Dean and Bowman insist, however, that as a creature of statute the Commission may exercise only those functions delegated to it by Congress, and that Congress has [\*606] failed to give the Commission express statutory authority to request preliminary relief under the All Writs Act.<sup>4</sup> [\*\*\*\*18] But the Commission is a [\*\*1744]

<sup>3</sup> Of course, the courts of appeals have traditionally framed § 1651 (a) writs in the form of compulsory injunctions aimed at private parties. E. g., *Application of President & Directors of Georgetown College*, 118 U. S. App. D. C. 80, 331 F.2d 1000, cert. denied, 377 U.S. 978 (1964). See Recent Cases, 77 Harv. L. Rev. 1539, 1542 (1964).

<sup>4</sup> For the proposition that the Commission must have express statutory authority to seek injunctions in the courts of appeals two cases are cited. The first, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), has no relevance to our problem. And the other, *Federal Trade Comm'n v. Eastman Kodak Co.*, 274 U.S. 619, 623-625 (1927), even though apposite, has been repudiated. It held that in fashioning a final decree the Commission "exercises only the administrative functions delegated to it

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governmental agency to which Congress has entrusted, *inter alia*, the enforcement of the Clayton Act, granting it the power to order divestiture in appropriate cases. At the same time, Congress has given the courts of appeals jurisdiction to review final Commission action. It would stultify congressional purpose to say that the Commission did not have the incidental power to ask the courts of appeals to exercise their authority derived from the All Writs Act.<sup>5</sup> Indeed, [\*\*\*809] the opinions [\*607] in *Arrow Transp. Co.* and *Whitney Nat. Bank* necessarily recognized the standing of administrative agencies to seek such preliminary relief to ensure effective judicial review. Both decisions referred to *Board of Governors v. Transamerica Corp., supra*, [\*\*\*17] where the Court of Appeals stayed a merger on application by the Federal Reserve Board. See also *Public Utilities Comm'n v. Capital Transit Co.*, 94 U. S. App. D. C. 140, 214 F.2d 242 (1954), and *West India Fruit & S. S. Co. v. Seatrain Lines, Inc.*, 170 F.2d 775, 779 (C. A. 2d Cir. 1948). There is no explicit statutory authority for the Commission to appear in judicial review proceedings, but no one has contended it cannot appear in the courts of appeals to defend its orders. Nor has it ever been asserted that the Commission could not bring contempt actions in the appropriate court of appeals when the court's enforcement orders were violated, though it has no statutory authority in this respect.  Such ancillary powers have always been treated as essential to the effective discharge of the Commission's responsibilities.

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[\*608] **LEdHN[6]** [6]It must be remembered that the courts of appeals derive their power to grant preliminary relief here not from the Clayton Act, but from the All Writs Act and its predecessors dating back to the first Judiciary Act of 1789. Congress has never restricted the power which the courts of appeals may exercise under that Act. Nor has it withdrawn from the Commission its inherent standing as a suitor to seek preliminary relief in courts of appropriate jurisdiction.<sup>6</sup> In the absence **\*\*1745** of explicit direction from Congress we have no basis to say that an agency charged with protecting the public interest cannot request that a court of appeals, having jurisdiction to review administrative orders, exercise its express authority under the All Writs Act to issue such temporary injunctions as may be necessary to protect its own jurisdiction.

by the Act," and, therefore, could not order divestiture of laboratories acquired through a stock purchase. This view was rejected in *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 312-313, nn. 17-18 (1963), the Court holding that "the power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority," citing *Gilbertville Trucking Co. v. United States*, 371 U.S. 115 (1962).

<sup>5</sup> Such a holding would especially interfere with the functions Congress has given the Commission in the merger field. As THE CHIEF JUSTICE stated in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), the Congress "sought to assure the Federal Trade Commission and the courts the power to brake this force [business concentration] at its outset and before it gathered momentum." At 317-318. But without standing to secure injunctive relief, and thereby safeguard its ability to order an effective divestiture of acquired properties, the Commission's efforts would be frustrated. As MR. JUSTICE DOUGLAS said in *United States v. Crescent Amusement Co.*, 323 U.S. 173, 186 (1944):

"The acquisition of a competing theatre terminates at once its competition. . . . And where businesses have been merged or purchased and closed out it is commonly impossible to turn back the clock."

Here the plan of merger itself contemplates the sale of the acquired home delivery milk routes and certain milk plants. In addition, Bowman has retained its cash and securities, with the intention ultimately to distribute them to its stockholders. If consummation of the merger is not restrained, the restoration of Bowman as an effective and viable competitor will obviously be impossible by the time a final order is entered. This is not unusual. Administrative experience shows that the Commission's inability to unscramble merged assets frequently prevents entry of an effective order of divestiture. *E. g., Ekco Products Co., Trade Reg. Rep. para. 16,879 (1964) (1963-1965 Transfer Binder), aff'd, 347 F.2d 745 (C. A. 7th Cir. 1965); Foremost Dairies, Inc., 60 F. T. C. 944*, order modified per stipulation (C. A. 5th Cir. 1965) (Docket No. 18,815).

<sup>6</sup>Cf. *Public Utilities Comm'n v. Capital Transit Co.*, 94 U. S. App. D. C. 140, 214 F.2d 242, 245 (1954), where the Court of Appeals for the District of Columbia Circuit gave as one of its reasons for granting an injunction the fact that "the moving party in the litigation was the Public Utilities Commission of the District of Columbia, a governmental agency clothed by Congress with special responsibility in the matters involved."

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[\*\*\*\*20] Respondents point -- as did the Court of Appeals -- to the fact that the Commission sought authority from the Eighty-fourth through the Eighty-ninth Congresses to grant preliminary injunctions itself or to [\*\*\*810] proceed in the district court as the Department of Justice can under the Clayton Act.<sup>7</sup> [\*\*\*\*21] Both former Chairman Gwynne and Chairman Dixon appeared in support of the measures,<sup>8</sup> and referred to Federal Trade Comm'n v. International [\*609] Paper Co., 241 F.2d 372 (C. A. 2d Cir. 1956), which held the Commission had no standing to seek preliminary injunctions from the courts of appeals.<sup>9</sup> [\*\*\*\*22] In addition, several Congressmen made statements regarding the need for statutory amendment.<sup>10</sup> However, no proposal was put before the Congress relating to the authority of the Commission to secure preliminary relief before the courts of appeals in accordance with § 1651 (a). The proposals concerned only the power of the Commission itself to issue preliminary relief or to proceed in the district courts for that purpose.

LEdHN7 [↑] [7]Congress neither enacted nor rejected these proposals; it simply did not act on them.<sup>11</sup> Even if it had, the legislation as proposed would have had no effect whatever on the power that Congress granted the courts by the All Writs Act. We cannot infer from the fact that Congress took no action at all on the request of the Commission [\*610] to grant it or a district court power to enjoin a merger that Congress thereby expressed an intent to circumscribe traditional judicial remedies. Cf. *Scripps-Howard Radio, Inc. v. Federal Communications Comm'n*, 316 U.S. 4, 11 (1942). The decision in *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), [\*\*\*\*23] is apposite. Following an adverse decision in *Eisler v. \*\*\*17461 Clark*, 77 F.Supp. 610 (D. D. C. 1948), the Department of Justice asked Congress for legislation exempting the Immigration Service from the Administrative Procedure Act. 60 Stat. 237, *5 U. S. C. § 1001 (1964 ed.)*. As was the case here, the appropriate committees of both Houses reported the proposal favorably but Congress adjourned without taking any action. The Department nonetheless insisted in *Wong Yang Sung* that hearings in deportation cases did not have to conform to the requirements of the Administrative Procedure Act. In [\*\*\*811] his discussion of legislative history, Mr. Justice Jackson wrote for a unanimous Court that HNT [↑] "we will not draw the inference, urged by petitioner, that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress. Public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations." At p. 47. This Court has consistently refused to construe [\*\*\*\*24] such requests by government agencies and the

<sup>7</sup> E. g., H. R. 9424 and S. 3341 and 3424, 84th Cong., 2d Sess. (1956); H. R. 49 and 1574, 89th Cong., 1st Sess. (1965).

<sup>8</sup> Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 2d Sess., ser. No. 15, p. 35 (1956); Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on S. 198, S. 721, S. 722 and S. 3479, 85th Cong., 2d Sess., 42-45 (1958) (testimony of Chairman Gwynne). Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. No. 5, pp. 85-86 (1961) (testimony of Chairman Dixon).

<sup>9</sup> They also directed attention to the denial of injunctive relief in *Federal Trade Comm'n v. Farm Journal, Inc.* (C. A. 3d Cir. 1955) (unreported). Both men failed to mention the contrary decision in *Board of Governors v. Transamerica Corp.*, 184 F.2d 311 (C. A. 9th Cir.), cert. denied, 340 U.S. 883 (1950). In *Ekco Products Co., Trade Reg. Rep.* para. 16,879 (1964) (1963-1965 Transfer Binder), aff'd, 347 F.2d 745 (C. A. 7th Cir. 1965), Commissioner Elman stated that the question of the Commission's ability to obtain a preliminary injunction under the All Writs Act "has not been authoritatively answered." At 21,905, n. 10.

<sup>10</sup> Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on S. 198, S. 721, S. 722 and S. 3479, 85th Cong., 2d Sess., 156-157 (1958) (testimony of Congressman Celler). Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. No. 5, pp. 42-45 (1961) (statement of Congressman Patman).

<sup>11</sup> Cf. *Helvering v. Hallock*, 309 U.S. 106, 120 (1940), where it was said that to give weight to the nonaction of Congress was to "venture into speculative unrealities."

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resulting nonaction of the Congress as affirmative evidence of no authority.<sup>12</sup> Thus, in *United States v. du Pont & Co.*, 353 U.S. 586 (1957), MR. JUSTICE BRENNAN held:

"During the 35 years before this action was brought [in 1949], the Government did not invoke § 7 against vertical acquisitions. The Federal Trade Commission has said that the section did not apply to vertical acquisitions. See F. T. C., Report on [\*611] Corporate Mergers and Acquisitions, 168 (1955), H. R. Doc. No. 169, 84th Cong., 1st Sess. Also, the House Committee considering the 1950 revision of § 7 stated that '... it has been thought by some that this legislation [the 1914 Act] applies only to the so-called horizontal mergers. . . .' H. R. Rep. No. 1191, 81st Cong., 1st Sess. 11. The House Report adds, however, that the 1950 amendment was purposed '... to make it clear that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal . . .' (Emphasis added.)

"This Court has the duty to reconcile administrative interpretations with the broad antitrust policies laid down by [\*\*\*\*25] Congress. . . . The failure of the Commission to act is not a binding administrative interpretation that Congress did not intend vertical acquisitions to come within the purview of the [1914] Act." At p. 590.

Despite the representations of the Commission that the 1914 Act did not apply to vertical mergers, its sponsorship of legislation to so enlarge its coverage, and the passage of the 1950 Act by the Congress for this purpose, this Court nonetheless held that the 1914 Act included vertical mergers from its very inception, and thus required du Pont to divest its interest in General Motors stock, which had been acquired in 1915.

LEdHN[5B] [↑] [5B]

[\*\*\*\*26] It is therefore clear that the "proceedings" in the Congress with reference to the authority of the Commission itself to issue or apply to the district courts for the issuance of preliminary injunctions in merger cases have no relevance whatever to the question before us. In short, Congress gave no attention to the exercise of judicial power by the courts of appeals under the All Writs Act, leaving that power intact and the standing of the Commission to invoke it undiminished. We thus hold [\*612] that the Commission has standing to seek preliminary relief from the Court of Appeals under the circumstances alleged. As stated earlier, we must take the allegations of the Commission as true, and so do not pass upon whether a preliminary injunction should be issued. That is for the Court of Appeals [\*\*1747] to decide on remand, as it would decide any application to it for relief under the All Writs Act.

*Reversed and remanded.*

**Dissent by:** FORTAS

## Dissent

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[\*\*\*812] MR. JUSTICE FORTAS, with whom MR. JUSTICE HARLAN, MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

The Court today decides that the courts of appeals must entertain original applications by the Federal [\*\*\*\*27] Trade Commission for the issuance of preliminary injunctions to restrain mergers alleged to violate § 7 of the Clayton Act, [15 U. S. C. § 18 \(1964 ed.\)](#), pending proceedings before the Commission to determine whether such mergers violate that section.

In so deciding, the Court determines that the Commission -- an administrative agency with defined and circumscribed powers -- is authorized to seek such relief in the courts of appeals; and that the courts of appeals,

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<sup>12</sup> Cf. [United States v. Philadelphia Nat. Bank](#), 374 U.S. 321, 348-349 (1963).

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under the All Writs Act, [28 U. S. C. § 1651 \(a\) \(1964 ed.\)](#), have power to entertain the Commission's petition and to grant the injunctive relief.

This decision cannot be supported. Not a single one of the prior decisions of this Court cited as authority sustains it, either specifically or indirectly, or by principle or analogy. No statute of the Congress can be appropriately summoned to the Court's aid. The plain, unmistakable intent of the Congress in defining the Commission's powers and the jurisdiction of the courts of appeals is that no such threshold injunctive power is available at the Commission's behest. The Act plainly and explicitly vests the governmental power [\*\*\*28] to restrain and enjoin violations of the Act in the district courts, [\*613] not in the court of appeals; and it plainly and explicitly empowers the United States attorneys "under the direction of the Attorney General" -- and not the Federal Trade Commission - - to institute such proceedings. [15 U. S. C. § 25 \(1964 ed.\)](#).

Since 1956, the Federal Trade Commission has persistently requested the Congress to enact legislation giving the Commission itself the power to enjoin, or alternatively, to seek a district court order to enjoin mergers pending the outcome of the Commission's proceedings. Congress has just as persistently refused to do so.

Beginning in 1956, at least 37 bills have been introduced in the Congress, directed to providing the Commission with a threshold, temporary remedy. None has been enacted, despite the unequivocal statements of the three chairmen of the Commission who served during those years that the agency presently has no power to seek relief ancillary to its administrative proceedings. This Court now bestows what the Congress has withheld.

The statements in the Court's opinion indicating that its result is necessary unless we are [\*\*\*29] to "stultify congressional purpose" fly in the teeth of the record, plainly written and repeatedly reiterated. Congress is keenly interested in enforcement of § 7. But it has demonstrated over and over again that it has no interest in arming the Commission with the power today conferred upon it. It created and equipped the Commission with administrative and quasi-judicial powers to serve a function quite distinct from that of a prosecutor or litigant. It has repeatedly declined the urgent request to revise the Commission's role and function. Indeed, Congress has refused to empower the Commission to ask for this relief in an otherwise suitable forum -- the district [\*\*\*813] courts. But the Court today gives this agency, which Congress obviously regards as unsuitable for the purpose, power to resort to an unsuitable forum -- the courts of appeals -- for the same purpose.

[\*614] The Commission, the Executive Branch of the Government, the Congress and all courts which have passed upon the point have until today proceeded on the expressed [\*\*1748] premise that the Federal Trade Commission has no authority to seek such relief.<sup>1</sup> [\*\*\*31] I have not found a single commentator [\*\*\*30] in this much-

<sup>1</sup> See [Federal Trade Comm'n v. International Paper Co., 241 F.2d 372 \(C. A. 2d Cir. 1956\)](#); [Federal Trade Comm'n v. Farm Journal, Inc.](#) (C. A. 3d Cir. 1955). In *In the Matter of A. G. Spalding & Bros., Inc.* (F. T. C. Docket No. 6478), the Commission failed to obtain preliminary relief in the First Circuit, but did get respondent's commitment not to alter the *status quo* save on 30 days' notice. See *A. G. Spalding & Bros., Inc. v. F. T. C.*, [301 F.2d 585 \(C. A. 3d Cir. 1962\)](#).

The sole instance where injunctive relief was obtained is [Board of Governors v. Transamerica Corp., 184 F.2d 311 \(C. A. 9th Cir. 1950\)](#), cert. denied, [340 U.S. 883](#). In *Transamerica* the threatened action would have defeated the Board's jurisdiction entirely. The Board (whose role in § 7 enforcement is like the FTC's) argued both in the Court of Appeals and in opposition to the petition for certiorari, that if *Transamerica* were not restrained from disposing of stock holdings the legality of whose acquisition was in issue in the administrative proceedings, the effect under the pre-1950 version of § 7, as construed by this Court in *Arrow-Hart & Hegeman Electric Co. v. F. T. C.*, [291 U.S. 587](#), would be to "oust the Board of its jurisdiction under Section 11 of the Clayton Act . . . [and to] defeat the exclusive jurisdiction of the Court of Appeals to enforce or affirm such order as the Board might make . . ." Government's Brief in Opposition in *Transamerica Corp. v. Board of Governors* (Nos. 322 and 323, October Term, 1950), at pp. 5, 8-9, 15. See also [United States v. Philadelphia Nat. Bank](#), [374 U.S. 321, 339, n. 17](#), where *Transamerica* appears to have been distinguished from [International Paper, supra](#), precisely on the ground that the writ there was necessary to protect the "jurisdiction" both of the agency and of the Court of Appeals -- a conventional use of the All Writs Act.

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discussed field of law who has suggested that the Commission has such authority, and none is cited in the Court's opinion or in the briefs of the parties.<sup>2</sup>

[\*615] I can only assume that the majority is motivated by a desire to lend all assistance to the Federal Trade Commission in its administration of § 7. However commendable this motivation may be in general, it is here entirely misdirected. Indulgence in this generous spirit unjustifiably burdens the courts of appeals with a fact-finding duty which they are unable to perform; disrupts the statutory division of functions between the Commission and the Department of Justice; and deprives parties of the opportunity for fair and careful consideration of their proposals which is promised by our law, by the decisions of this Court and the economic needs of the Nation.

The Clayton [\*\*\*32] Act contains specific and comprehensive enforcement provisions. There is no vacuum to be filled by ingenuity. There is no room for improvisation. The Act is fully armed with a triple arsenal. Enforcement powers with respect to mergers under § 7 are vested in the Department of Justice, the Federal Trade Commission and private persons who claim injury as a result of the merger. Both the Department [\*\*\*814] of Justice and private litigants are authorized to seek injunctive relief in the district courts. But the role and function of the Federal Trade Commission is differently conceived.

The powers of the Commission and the manner of their exercise and of review and enforcement of Commission orders are set out in meticulous detail. Whenever the Commission "shall have reason to believe that any person is violating or has violated" § 7, it shall issue a complaint. The complaint is to be served upon "such person and the Attorney General." [\*\*1749] The Attorney General may intervene in the Commission's proceeding. He may institute actions in the district court for injunctive relief. [\*616] The Commission is to hold a hearing; testimony is to be taken; the Commission is [\*\*\*33] to "make a report in writing"; and it is empowered to issue an order to cease and desist and to compel the respondent to "divest itself of the stock . . . or assets . . . held . . . contrary to the provisions of [§ 7]." [15 U. S. C. § 21 \(b\) \(1964 ed.\)](#). (Emphasis supplied.) The respondent may obtain review of the order in an appropriate court of appeals in the manner and with the consequences meticulously defined in the Act, as hereinafter discussed.

There is no question -- I submit that there can be no question -- that Congress from the outset intended that the Federal Trade Commission should not have other or different or supplementary or additional power to enforce § 7.<sup>3</sup> [\*\*\*35] The Commission was created in the same [\*617] year that the Clayton Act was adopted. It was

<sup>2</sup> On the contrary, the common view is that such authority is entirely lacking. See, e. g., Kayser & Turner, Antitrust Policy 258 (1959); Duke, Scope of Relief Under Section 7 of the Clayton Act, 63 Col. L. Rev. 1192, 1206, n. 85 (1963); Note, 79 Harv. L. Rev. 391, 404 (1965); Note, 40 N. Y. U. L. Rev. 771 (1965); Comment, 32 N. Y. U. L. Rev. 1297 (1957).

<sup>3</sup> The Court's opinion asserts, in alleged demonstration of the "ancillary powers" which have been inferred on the Commission's behalf, that it may bring "contempt actions in the appropriate court of appeals when the court's enforcement orders were violated, though it has no statutory authority in this respect." The Court errs. The Commission's powers in this respect are not "implied." The machinery by which the Commission procures compliance with its orders is, and always has been, spelled out by statute. Until 1959, one could with impunity violate an FTC Clayton Act order. Such an order was not final until the respondent sought judicial review and a Court of Appeals granted enforcement. Disobedience thereafter was a contempt of court. In the event the respondent did not seek review, the Commission was required to ascertain that he was violating its order and then proceed, pursuant to express statutory provision ([15 U. S. C. § 21](#)), to seek enforcement in the courts of appeals. See [28 U. S. C. § 2112 \(1964 ed.\)](#), authorizing the courts of appeals to promulgate rules for enforcement proceedings; and see, e. g., [1st Cir. R. 16](#). Cf. [Fed. Rule Civ. Proc. 70](#). A violation thereafter constituted contempt of court. The courts declined to infer any more convenient substitute for this three-step process. See [Federal Trade Comm'n v. Henry Broch & Co.](#), 368 U.S. 360, 365; [Federal Trade Comm'n v. Ruberoid Co.](#), 343 U.S. 470, 477-479.

The statute was amended in 1959. An FTC order under the Clayton Act is now final upon expiration of the time allowed respondent to seek judicial review. If he does not appeal the order and violates its terms after it becomes final, the Government may proceed, pursuant to statute ([15 U. S. C. §§ 21 \(g\)](#) and (l)), to seek civil penalties of up to \$ 5,000 per violation.

In short, and contrary to the suggestion in the Court's opinion, the Commission's power to enforce compliance with its orders is and has been wholly statutory. Nothing has been left to implication.

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supposed to be an expert, administrative agency. It was not intended to be a litigation arm of the United States except as its own final orders might be involved.<sup>4</sup> It was not intended to have power to seek or deliver the quick result, even in emergencies. This power, so far as the Government is concerned, was explicitly, carefully confined to the district courts on application [\*\*\*34] of the [\*\*\*815] United States attorney "under the direction of the Attorney General."

Section 15 of the Clayton Act, [15 U. S. C. § 25](#), expressly authorizes the Department of Justice to proceed in the district courts of the United States to obtain preliminary relief against allegedly unlawful mergers. [Section 16](#) makes the same remedy available on application of private litigants. [15 U. S. C. § 26 \(1964 ed.\)](#). Nowhere is such power given to the Commission. It would be incredible to suggest that this omission was an oversight -- or even an error. It was by design -- and, I suggest, by rational design.

The Commission was not intended to -- it has no power to -- it should not -- [\*\*1750] make a judgment on the merits prior to notice and hearing. To sanction its doing so is to strike a devastating blow at the fundamental theory upon which the exercise of both prosecutorial and adjudicatory functions by an administrative agency is based. Cf. [\*618] § 5 (c) of the [\*\*\*36] Administrative Procedure Act of 1946, [5 U. S. C. § 1004 \(c\) \(1964 ed.\)](#).

The Commission, prior to taking evidence and writing a report, is supposed to make only a very limited judgment: that there is "reason to believe" the law is being violated. But to obtain a preliminary injunction, it must -- without hearing the other side, and ordinarily merely on its staff's recommendation, necessarily based upon a quick exposure of the facts -- file affidavits or produce evidence with the calculated purpose of demonstrating to the court of appeals that consummation of the merger will have such adverse effects that it must be halted *in limine*. In fact, and in all realism, it must take positions and establish, with sufficient positiveness to overcome strenuous opposition, that the merger will tend substantially to lessen competition or create danger of monopoly, that it is harmful to the economy, immediately threatening in its consequences, and that it is unlawful. There must be Commission conclusions, not merely the views of the staff. Their assertion and necessarily stout advocacy make a mockery of a subsequent quasi-judicial proceeding in which the Commission [\*\*\*37] is supposed objectively to consider the same issues on the basis solely of the record.

The clear design of the statute is that the authority to decide, on behalf of the Government, to seek the powerful remedy of preliminary injunction, and the power to do so, are vested in the Attorney General. That is his business -- his type of function. It is deliberately withheld from the Commission. That is not its business. The Commission is supposed to be an expert agency, acting deliberately, bringing to bear upon the complex economic problems of a merger, that judgment and experience which can emerge only from careful factual inquiry, the taking of evidence and the formulation of a report. The Federal Trade Commission was not intended [\*619] to be a gun,<sup>5</sup> [\*\*\*38] a carbon copy of the Department of Justice.<sup>6</sup>

[\*\*\*816] It has steadily been acknowledged by spokesmen for the Commission, by leading members of the Congress, and by officials of the Executive Branch that the FTC has no basis in statute to seek the relief the Court today makes available to it. In the Appendix to this opinion, I refer to these acknowledgments and I describe the

<sup>4</sup> See 51 Cong. Rec. 1963, 13047, 8977 (1914); Rublee, The Original Plan and Early History of the Federal Trade Commission, 11 Acad. Pol. Sci. Proc. 666 (1925).

<sup>5</sup> Where Congress has determined that it is appropriate for the Commission to seek threshold relief in order to protect the public, it has expressly so provided -- directing that the Commission proceed in an appropriate tribunal, the United States District Courts. See § 13 (a) of the Federal Trade Commission Act (Wheeler-Lea amendments), [15 U. S. C. § 53 \(a\) \(1964 ed.\)](#); § 302 of the Food, Drug, and Cosmetic Act, [21 U. S. C. § 332 \(1964 ed.\)](#); § 7 (b) of the Wool Products Labeling Act, [15 U. S. C. § 68e \(b\) \(1964 ed.\)](#); § 9 (b) of the Fur Products Labeling Act, [15 U. S. C. § 69g \(b\) \(1964 ed.\)](#); § 6 (a) of the Flammable Fabrics Act, [15 U. S. C. § 1195 \(a\) \(1964 ed.\)](#); and § 8 of the Textile Fiber Products Identification Act, [15 U. S. C. § 70f \(1964 ed.\)](#).

<sup>6</sup> See Elman, Rulemaking Procedures in the FTC's Enforcement of the Merger Law, 78 Harv. L. Rev. 385, 387-388 (1964).

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unsuccessful, oft-repeated efforts of the Commission to obtain legislation to give it the power it has now successfully obtained from this Court.<sup>7</sup>

[\*\*\*\*39] [\*620] In [\*\*1751] short, the Commission has no power to decide that a proposed merger should be enjoined *pendente lite*; it has no authority to seek such relief, temporary or permanent, in any court -- trial or appellate; and Congress has repeatedly turned a deaf ear to its requests for such power.

It should not be given such jurisdiction by fiat of this Court. It should do what Congress intended it to do -- upon determining that it has "reasonable cause to believe" that § 7 is being or has been violated, it should issue a complaint, hold a hearing, make a report, and issue an order. If exigencies require, it may refer the matter to the Attorney General for consideration as to whether the Department of Justice should seek a preliminary injunction in the appropriate district court.<sup>8</sup> If [\*621] the merger is consummated, [\*\*\*817] the Commission should, if warranted, exercise the enormous power that the statute expressly gives it: to require the offender to "divest itself of the stock, or other share capital, or assets, held . . . contrary to the provisions" of § 7. It is a cliche of doubtful truth in this situation that an omelette cannot be unscrambled. [\*\*\*\*40] This Court, as well as the Commission, has entered such orders of divestiture after -- and sometimes long after -- the merger has been consummated. See, e. g., *United States v. Von's Grocery Co.*, *ante*, p. 270 (decree six years after merger); *United States v. El Paso Gas Co.*, [376 U.S. 651](#) (decree seven years after merger). Unscrambling may be difficult; but Congress may well have been justified in the view that the extra effort is warranted in the interests of securing what it hoped would be careful administrative consideration of the merits of proposed mergers. Not every merger deserves sudden death. In many situations, mergers serve no purpose except the pursuit of bigness. But some are distinctly beneficial to the achievement of a competitive economy.<sup>9</sup> [\*\*\*\*42] [\*\*1752] I respectfully submit that this Court should not encourage the machinegun approach to the vastly important and difficult merger problem. It should indulge the

<sup>7</sup> The Court declares that these materials are irrelevant because Congress had before it proposals to authorize the Commission itself to issue restraining orders *pendente lite* or to apply to the district courts for such relief. But the fact that no one proposed and Congress did not consider providing that the Commission might have recourse to the courts of appeals merely emphasizes the extreme and extraordinary nature of the device which the Court today creates. The plain fact, and the short answer, is that Congress refused to authorize preliminary restraints at the command of the Commission. Its refusal to authorize such relief in the district courts demonstrates, *a fortiori*, that it would not create such a remedy in the courts of appeals.

The Court also suggests that it would be improper to draw conclusions from congressional inaction. The inference that I draw from congressional refusal to make preliminary injunctive relief available to the FTC is that such inaction confirms (a) that Congress in devising the statutory plan did not intend the Commission to have such power, and (b) that the relief sought is not consonant with the congressional plan for administering § 7. In fact, this is not a situation where the agency went to Congress in the belief that its authority was unclear, or to remove doubts concerning it. Compare *United States v. Speers*, [382 U.S. 266, 274-275](#); *United States v. du Pont & Co.*, [353 U.S. 586, 590](#); *Wong Yang Sung v. McGrath*, [339 U.S. 33, 47-48](#). Here, there is no doubt that the agency sought additional powers, not clarification. It admitted -- it asserted -- that it had no present authority to obtain preliminary relief (see Appendix to this opinion). It sought what it confessedly did not have. It sought this not once, but repeatedly, over a period of 10 years. Congress did not grant its request. Nor should we. See *Fribourg Navig. Co. v. Commissioner*, [383 U.S. 272, 279-286](#); *Blau v. Lehman*, [368 U.S. 403, 412-413](#).

<sup>8</sup> Spokesmen for the FTC have frequently acknowledged the availability of such a course. See, e. g., Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. No. 5, pp. 101-102 (testimony of Paul Rand Dixon) (1961); Kintner, *The Federal Trade Commission in 1960 -- Apologia Pro Vita Nostra*, 1961 *Antitrust Law Symposium* 21, 41.

The Commission also has on occasion successfully employed the technique of obtaining an agreement of the parties to segregate assets so as to facilitate divestiture should it be decreed. See, e. g., *A. G. Spalding & Bros., Inc. v. F. T. C.*, [301 F.2d 585, 588 \(C. A. 3d Cir. 1962\)](#).

<sup>9</sup> For example, in some situations the merger of relatively small competitors may result in creation of an enterprise capable of meaningful competition with a company otherwise in unchallenged domination of an industry. See *Brown Shoe Co. v. United States*, [370 U.S. 294, 319](#), and legislative materials therein cited.

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Congress in its desire that at least the Federal Trade Commission should be required to move with caution and deliberation. A "preliminary" injunction, in effect during the years required to complete the Commission's proceedings, [\*\*\*41] often -- probably usually -- means that [\*622] the plans to merge will be abandoned.<sup>10</sup> We should not beguile ourselves by ignoring this point. "Preliminary" here usually means final. And I respectfully suggest that it is permissible for Congress to insist that the merits of mergers should be carefully considered.

I come now to the second phase of the Court's opinion. Having satisfied itself that the Commission may apply to the courts of appeals for preliminary injunctions, the Court turns to the question of the jurisdiction of the appellate courts to entertain such applications. It finds jurisdiction in the courts of appeals by reason of the All Writs Act: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." [28 U. S. C. § 1651 \(a\)](#).

This is, in my opinion, a totally unjustified employment of the All Writs Act. That Act is an implementing statute, designed to authorize the courts to supply deficiencies in procedure so as to enable them effectively to exercise their jurisdiction. The Act is abused where, as here, it is contorted to confer jurisdiction where Congress has plainly withheld it. [\*\*\*43] The reason why this Court may not command or vindicate the exercise of [\*\*\*818] jurisdiction by the courts of appeals to issue, as an original matter, injunctions against claimed violations of § 7 are overwhelming. In summary, they are:

1. The courts of appeals have no jurisdiction with respect to § 7 except to review an order entered by the Commission after statutory proceedings. Until such an order is entered, they have no jurisdiction, either existing or potential, which an injunctive order may implement.
  - [\*623] 2. By express statutory provision, even after a Commission order has been entered, the courts of appeals have no jurisdiction as to the merits of the merger, on application of the Commission. Only a party affected by the Commission's order may file a petition to review. If one does not, the Commission's sole remedy is to seek penalties in the district courts under [15 U. S. C. § 21 \(l\)](#).<sup>11</sup>
  3. The statute contains its own "all writs" [\*\*\*44] provision which is clearly and specifically limited to instances in which the court of appeals' jurisdiction has already attached upon petition to review a Commission order filed by a person who is the target of that order.
  4. There is not a single precedent of this Court which supports the Court's conclusion. None of the cases of this Court cited in the majority opinion lends it the slightest support.
  5. Exclusive jurisdiction to issue preliminary injunctions against mergers is vested in the district courts, upon application of the Department of Justice or a private person. The courts of appeals have no jurisdiction to enter such orders.
  6. The courts of appeals are not equipped to make the original, complex factual determinations necessary to decide whether a prospective merger should [\*\*1753] be enjoined. To burden them with this task is to distort their function; to saddle them with a function which they cannot perform; to load upon them the necessity of twice passing upon a challenged merger; and to deprive the parties of an opportunity for a hearing in a forum equipped to make original factual determinations.
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The jurisdiction and powers of the courts of [\*\*\*45] appeals with respect to Commission proceedings under § 7 are defined by the statute in specific and exhaustive detail. [\*624] A petition to review may be filed with an appropriate court of appeals by "any person required by [an] order of the commission" to cease or desist or to divest itself of

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<sup>10</sup> See Kaysen & Turner, Antitrust Policy 248 (1959); Note, 40 N. Y. U. L. Rev. 771, 772, n. 7 (1965), and cases cited therein.

<sup>11</sup> See note 3, *supra*.

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stock or assets. [15 U. S. C. § 21 \(c\)](#). The Court's jurisdiction attaches upon the filing of the petition, *ibid.*, and becomes exclusive upon filing of the record with it. [15 U. S. C. § 21 \(d\)](#). The Commission's findings as to the facts are conclusive if supported by substantial evidence. [15 U. S. C. § 21 \(c\)](#). If additional evidence is to be taken, the Court must remand to the Commission; it cannot itself take evidence. *Ibid.* The Court may affirm, modify or set aside the Commission's order. It may enforce the Commission's order as affirmed and may "issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite." *Ibid.*

The Court does not -- it could not -- contend that these provisions lend the slightest support [\*\*\*\*46] to its conclusion. [\*\*\*819] They clearly, emphatically, and pointedly contradict it. The courts of appeals have jurisdiction when and if, and only if and when, a Commission order has been entered and a petition for review is filed -- not by the Commission but by the aggrieved person.<sup>12</sup> When a petition for review [\*625] is filed, the court of appeals has "plenary" jurisdiction, implemented by the self-contained all-writs provision; and when the record is filed, that jurisdiction is exclusive. Prior to the entry of the Commission's order, the courts of appeals simply have no jurisdiction, existing or potential. The general All Writs Act is limited to writs "in aid of their respective jurisdictions." It is not a charter to be used at the behest of an administrative agency in order to supply it with a weapon which Congress has withheld. This is clear enough; and nothing in our prior decisions expands the meaning of the All Writs Act to cover the present situation.

[\*\*\*\*47] The Court cites a number of cases to prove that an appeal need not have been perfected to call into play the power of the appellate courts to issue protective writs. This is clear and obvious as applied in those cases. Each of them involved issuance of a writ to prevent action or inaction by a trial court which would otherwise mean that the case would not be adjudicated on its merits and therefore could not be reviewed on appeal. The typical case involves the issuance of mandamus to the trial court to compel it to proceed with the adjudication of a pending [\*\*1754] case. In this category are the first three cases cited on the point by the Court.<sup>13</sup>

[\*\*\*\*48] The fourth case cited by the Court clearly demonstrates the correct principle and the error of the Court's decision in the present case. In [Roche v. Evaporated Milk Assn., 319 U.S. 21 \(1943\)](#), the respondent was [\*626] indicted for price fixing. It filed a plea in abatement based upon an alleged fault in the authorization of the indictment. The District Court dismissed the plea. On application for a writ of mandamus, the Court of Appeals reversed, but this Court reversed the Court of Appeals because whatever might have been the merits of the District Court's dismissal of the plea in abatement, that dismissal did not defeat appellate jurisdiction. The District Court would proceed to adjudicate the [\*\*\*\*820] merits of the case, and appellate jurisdiction would thereafter be available. The Court (per Chief Justice Stone) stated that "while a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute." [\*Id. at 26\*](#). The Court said that "The traditional use of the writ in aid of appellate jurisdiction [\*\*\*\*49] . . . has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Ibid.* Since the District Court was proceeding to adjudicate the case, and any error it might have committed would come to the appellate courts upon appeal, the Court held that the Court of Appeals erred in issuing the writ.

<sup>12</sup> Indeed, there is no certainty that the particular court of appeals selected by the FTC on its application for preliminary relief will ever undertake to review an ultimate cease-and-desist order. Section 11 (c) of the Clayton Act, [15 U. S. C. § 21 \(c\)](#), provides that a person against whom such an order is entered may appeal "in the court of appeals . . . for any circuit within which such violation occurred or within which such person resides or carries on business." In the present case, review of any final FTC order might lie not in the Court of Appeals for the Seventh Circuit, but in the Sixth or Eighth Circuit where both Dean and Bowman carry on business. See [Transamerica Corp. v. Board of Governors, 206 F.2d 163 \(C. A. 3d Cir. 1953\)](#), cert. denied, [346 U.S. 901](#), setting aside an injunction issued by the Ninth Circuit; [A. G. Spalding & Bros., Inc. v. F. T. C., 301 F.2d 585 \(C. A. 3d Cir. 1962\)](#), enforcing an FTC order as to which an injunction unsuccessfully had been sought in the First Circuit seven years earlier.

<sup>13</sup> [Ex parte Crane, 5 Pet. 190, 193](#); [Ex parte Bradstreet, 7 Pet. 634](#); [McClellan v. Carland, 217 U.S. 268](#). From its excerpt from *McClellan*, the Court omits the italicized portion: "[A] writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below." [\*217 U.S., at 280\*](#).

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These decisions, therefore, are far from supporting the Court's decision in the present case. They are to the precise contrary. They demonstrate the obvious meaning of the language of the All Writs Act: that it is to be employed "in aid of" appellate jurisdiction -- not to vest general restraining power in the courts of appeals, but to authorize them to overcome action or inaction which would prevent the case from proceeding to judgment and then to appellate review in the ordinary course. Nothing of the sort -- nothing resembling it -- appears in the present situation. The Commission may proceed with its hearings, as provided by statute. As provided by [\*627] statute, it may enter an order requiring respondents to divest themselves of the acquired assets. It may even -- although [\*\*\*\*50] I express no opinion on the issue -- require action by the respondents, if they have irretrievably disposed of some or all of the assets, to take additional action to make available assets, customers, etc., for purchase by others so as to re-create a competitor, perhaps even if such action involves disposition of nonacquired assets.<sup>14</sup> And the appropriate court of appeals and this Court will have full, complete appellate jurisdiction with respect to its order.

The Court cites four of its prior decisions involving the availability of the All Writs Act in connection with administrative proceedings. These provide no assistance to it. First, it refers to *Arrow Transp. Co. v. Southern R. Co.*, 372 U.S. 658. [\*\*\*\*51] This case is precisely *contra* to the Court's conclusion here. After a "brief and informal" hearing which led to a tentative conclusion that the increase was "unreasonable," [\*\*1755] the ICC suspended respondent's proposed rate increase and instituted a formal proceeding to adjudicate the reasonableness of the increase. The proceeding was still in progress when the maximum time provided by statute for suspension of the increase expired. Petitioner sued in the District Court, seeking an injunction pending the Commission's decision. This Court sustained denial of the injunction. It held that the Commission's jurisdiction was exclusive of any power in the courts to grant the relief, and that Congress' action in vesting power in the Commission left no latitude for court action even though it might mean that the small shipper could not continue in business under the higher rate. MR. JUSTICE BRENNAN, speaking for [\*628] the Court, observed, in words that are [\*\*\*821] applicable here, that if the courts were to entertain petitioner's application for an injunction against the effectiveness of the rates pending Commission decision, they would in effect be prejudging the [\*\*\*\*52] case and prejudicing administrative action. "Such consideration," he said, "would create the hazard of forbidden judicial intrusion into the administrative domain." *Id.*, at 670. Correspondingly, I suggest that it is unlikely in the real world that if the Federal Trade Commission made representations to a court of appeals that a merger should be enjoined pending Commission proceedings, and if the court issued such an injunction, the Commission's ultimate determination would be uninfluenced by these powerful factors. I respectfully suggest that this is not a tolerable result.<sup>15</sup>

[\*\*\*\*53] I come now to the case which the Court's opinion characterizes as "dispositive" of "this issue." *Whitney Bank v. New Orleans Bank*, 379 U.S. 411.<sup>16</sup> It is indeed a [\*629] square holding on an issue that is not anywhere near the problem of this case. *Whitney* holds that a court of appeals may enter such orders as will protect its

<sup>14</sup> Compare *United States v. Aluminum Co. of America*, 247 F.Supp. 308, 316 (D. C. E. D. Mo. 1965), aff'd, 382 U.S. 12, with *Reynolds Metals Co. v. F. T. C.*, 114 U. S. App. D. C. 2, 309 F.2d 223 (1962). See Duke, *op. cit. supra*, note 2.

<sup>15</sup> The Court's opinion today eschews the result in *Arrow Transportation* and fastens instead on footnote 22, **372 U.S., at 671**, which merely reserves judgment as to "decisions which have recognized a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels. . . ." The footnote adds that "such power has been deemed merely incidental to the courts' jurisdiction to review *final* agency action, and has *never* been recognized in derogation of such a clear congressional purpose to oust judicial power as that manifested in the Interstate Commerce Act." (Emphasis supplied.) The cases cited demonstrate the conventional use of the extraordinary writs referred to in the footnote. In *Scripps-Howard Radio, Inc. v. F. C. C.*, 316 U.S. 4, a stay was issued ancillary to an appeal already taken pursuant to statute. Its purpose was to suspend, pending action by the court in which the appeal was lodged, changes authorized by completed agency action. For the thoroughly conventional nature of *Transamerica*, also cited in the footnote, see note 1, *supra*.

<sup>16</sup> *Continental Ill. Nat. Bank v. Chicago, R. I. & P. R. Co.*, 294 U.S. 648, 675, cited by the Court in connection with its assertion that courts have power to preserve the *status quo* while administrative proceedings are in progress, relates instead to the power of a bankruptcy court to enjoin the sale of collateral pledged by a debtor.

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jurisdiction -- *its jurisdiction having fully attached by a prior appeal from a final order of the Federal Reserve Board, in accordance with statute.* Briefly stated, the Federal Reserve Board had entered an order permitting a New Orleans bank to operate a subsidiary in Louisiana through a holding company. A petition to review that order was duly filed, pursuant to statute, in the Court of Appeals for the Fifth Circuit. While this was pending, Louisiana enacted a statute bearing on the problem. Meanwhile, the Comptroller of the Currency indicated that he would issue a certificate to the new bank. Competing banks filed in the District Court for the District of Columbia an action for injunction [\*\*1756] against the Comptroller. The injunction was granted and the Court of Appeals for the District of Columbia Circuit [\*\*\*54] affirmed. It was the latter action that was before this Court, on certiorari. This Court held that the District Court had no jurisdiction to pass on the merits of the controversy by enjoining the Comptroller; that exclusive jurisdiction as to the authorization of the new bank was vested in the Federal Reserve Board. But it stayed its mandate for 60 days to [\*\*\*822] give the parties time to move in the Fifth Circuit for a remand to the Federal Reserve Board for reconsideration of its order in light of the subsequent Louisiana statute. On remand, the Court stated, "the Fifth Circuit's power to protect its jurisdiction is beyond question," *id., at 426* -- this in a case which had been in the Court of Appeals for three years following final agency action.

[\*\*\*55] [\*630] This is entirely in accord with the traditional and established construction of the All Writs Act, and with the statute governing proceedings of the Federal Reserve Board. Jurisdiction had properly been acquired by the Court of Appeals for the Fifth Circuit. Of course, it had power to issue whatever orders were necessary to preserve its jurisdiction, pending remand or otherwise. The Court's statement that it is "analogous" to the relief requested by the Commission is simply in error. It is analogous only if we disregard the facts that in *Whitney*, a final order had been entered by the administrative agency, appeal taken and the jurisdiction of the Court of Appeals had attached. Whereas in the present case none of these has occurred and we are bluntly asked to vest the courts of appeals with authority to consider issuing an injunction as a matter of original jurisdiction -- without an agency order, without an appeal, and without statutory jurisdiction.

The net of the matter is simply, plainly and clearly that the decision of the Court in this case is novel -- totally novel. It is in direct contravention of the careful, specific plan and directions of the Congress [\*\*\*56] with respect to the administration of § 7 of the Clayton Act. It is in direct conflict with the purpose and office of the All Writs Act. It is totally unsupported by prior decisions of this Court and contrary to both *Roche, supra*, and *Arrow Transportation, supra*. It is unwise in terms of the administration of § 7. It places an unwise, unjustified and disruptive burden on the courts of appeals and saddles them with original jurisdiction which they cannot properly exercise and a fact-finding function in elaborate, complex situations, which they should not be asked to undertake.

The courts of appeals are not courts of original jurisdiction. They have neither the facilities nor the institutional aptitude for determining in the first instance [\*631] whether a particular merger should be halted. This is always intensely a question of fact -- hotly controverted -- turning upon factual-economic problems such as the ascertainment of facts as to the "line of commerce," the "section of the country" and the probable effect upon competition. And these are questions committed in the first instance to the FTC and not to the courts. See *Whitney Bank v. New Orleans Bank, supra, at 421*. [\*\*\*57]

Without any findings of the Commission or a court, the courts of appeals are now burdened with the task of deciding these questions. The fact of the matter is that the Court's decision commands the courts of appeals to be trial courts for purposes of those § 7 cases which the Commission chooses to bring before them. I share the view expressed by my Brother BLACK and joined by my Brother DOUGLAS that:

"The business of trial courts is to try cases. That of appellate courts is to review the records of cases coming from trial courts below. In my judgment it is bad for appellate courts to be compelled to interrupt [\*\*\*823] and delay [\*\*1757] their pressing appellate duties in order to hear and adjudicate cases which trial courts have been specially created to handle as a part of their daily work." *United States v. Barnett, 376 U.S. 681, 724* (dissenting opinion).

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Yet the responsibility today imposed upon appellate courts requires them to try cases. This is precisely what is required in determining whether a merger should be restrained during the years required to complete an FTC hearing on the merits.<sup>17</sup> [\*\*\*\*59] Frequently, perhaps generally, [\*632] [\*\*\*\*58] to enjoin a merger "temporarily" is equivalent to entering a final order. The financial and commercial commitments involved in an agreement to acquire or to merge are apt to be so restrictive of the managerial flexibility of the parties, and so dependent upon transient circumstances, that they cannot be maintained in limbo while an FTC proceeding wends its leisurely way toward a wearying conclusion. Because the result of the application for temporary relief may be conclusive for all time, there is a discernible and understandable tendency on the part of the parties to put in a full case.<sup>18</sup>

Few § 7 cases are so simple that summary treatment is appropriate. See, e. g., *United States v. Bethlehem Steel Corp.*, 157 F.Supp. 877, 879 (summary judgment denied), 168 F.Supp. 576 (D. C. S. D. N. Y. 1958) (merger enjoined after full factual hearing). The risk involved in deciding an application for "preliminary" injunction on affidavits is so great that to invite it, as the Court here does, is to invite the administration of justice which is rough and ready, to say the least. On the other hand, to impel the courts of appeals to take testimony in these cases is an anomaly [\*\*\*\*60] that should not be tolerated.

[\*633] This Court has recognized that there is no quick and easy, short and simple way to resolve the complexities of most antitrust litigation. In *White Motor Co. v. United States*, 372 U.S. 253, the Court reversed summary judgment for the Government. It held that summary judgment was inappropriate and a trial should be had with respect to the Government's charge of illegal vertical territorial limitations. It specifically relied upon the "analogy from the merger field that leads us to conclude that a trial should be had." *Id.*, at 263. The Court said (per DOUGLAS, J.) that in cases "involving the question whether a particular merger will tend 'substantially to lessen competition'" or whether "the acquired [\*\*\*824] company was a failing one," "a trial rather than the use of the summary judgment is normally necessary." *Id.*, at 264. See also *United States v. Diebold, Inc.*, 369 U.S. 654, where factual issues paralleling those in the present case were held unsuitable for summary judgment.

[\*\*1758] Similarly, in *La Buy v. Howes Leather Co.*, 352 U.S. 249, [\*\*\*\*61] this Court refused to permit reference of antitrust cases to a master. It held (per CLARK, J.) that "most litigation in the antitrust field is complex," and that this is "an impelling reason for trial before a regular, experienced trial judge" rather than a master. *Id.*, at 259.

By its decision today, however, this Court commands that these admittedly difficult, complex cases be heard and adjudicated by the courts of appeals on original applications for "temporary" injunctions. I cannot reconcile this result with the facts, with this Court's awareness of the complexity of the task, or with proper regard for the courts of appeals. Apart from the judicial problem which this invention creates, we must recognize that the interposition of the courts, without congressional direction, at the threshold of the administrative process [\*634] is contrary to the congressional plan and the reiterated holdings of this Court. As the Court said in *Arrow Transportation, supra*, judicial "consideration," prior to final administrative adjudication, "would create the hazard of forbidden judicial intrusion into the administrative domain." 372 U.S., at 670. [\*\*\*\*62] This Court's insistence upon the "primary jurisdiction" of administrative agencies illustrates its sensitivity to the point. The Court has even insisted that "Dismissal of antitrust suits, where an administrative remedy has superseded the judicial one, is the usual course."

<sup>17</sup> The Commission's estimate in the present case that its proceedings would endure for at least one year seems unprecedently optimistic. In *A. G. Spalding & Bros., Inc. v. F. T. C.*, 301 F.2d 585 (C. A. 3d Cir. 1962), where the FTC unsuccessfully sought an injunction *pendente lite*, more than seven years elapsed between complaint and enforcement. *Pillsbury Mills, Inc.* (FTC Docket No. 6000) was in the Commission for eight and one-half years; *Crown Zellerbach Corp. v. F. T. C.*, 296 F.2d 800 (C. A. 9th Cir. 1961), for nearly four years, and it was another four years before the Commission's order was affirmed. These delays were not unknown to Congress. See Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. No. 5, p. 86 (1961).

<sup>18</sup> See *United States v. Ingersoll-Rand Co.*, 218 F.Supp. 530 (D. C. W. D. Pa.), aff'd, 320 F.2d 509 (C. A. 3d Cir. 1963), where the hearing on an application for preliminary relief took five days. See also *United States v. FMC Corp.*, 218 F.Supp. 817 (D. C. N. D. Cal.), appeal dismissed, 321 F.2d 534 (C. A. 9th Cir.), application for preliminary injunction denied, 84 Sup. Ct. 4 (1963) (Goldberg, J., in chambers).

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Pan American World Airways v. United States, 371 U.S. 296, 313, n. 19; see also United States v. Western Pac. R. Co., 352 U.S. 59; Far East Conference v. United States, 342 U.S. 570; United States Nav. Co. v. Cunard S. S. Co., 284 U.S. 474.

The present case illustrates the profound difficulties that the Court of Appeals will face in reaching a decision, within the practical limits of its available time and procedures, as to whether it should issue a "preliminary" injunction. There are here sharp factual disputes concerning the financial status of Bowman and the availability to it of the so-called "failing company" defense. There is a claim that Dean Foods is about to lose its largest customer and that as a result the merged company will be smaller than Bowman was before the merger. And the bona fides of the "interested" prospective [\*\*\*\*63] purchaser uncovered by the Commission's staff is in dispute.

The Court of Appeals will have to make a judgment concerning these issues, as well as the other, complex factors that are determinative. It will get little comfort from the label of the relief sought as "preliminary" because it will know that the patient may die while the "temporary" anesthesia is in effect. And it will know that, realistically, it has no control over the length of the proceedings -- whether the Commission's hearings will [\*635] last a year or eight years, or something in between. [\*\*\*825] By contrast, when the Department of Justice or a private person seeks a "preliminary" injunction in a district court, as provided by statute, the proceedings on the merits are in the same court. That court controls the proceedings, and it is admonished by the statute to proceed "as soon as may be, to the hearing and determination of the case." 15 U. S. C. § 25. This is an essential admonition, insisted upon by the Congress to mitigate the consequences of preliminary restraints imposed by the district courts upon effectuation of mergers. The courts of appeals will be in the unhappy position [\*\*\*\*64] of either attempting to supervise Commission proceedings in the predictably vain effort to secure expedition, or accepting the fact that the "preliminariness" of their order is totally subject to the destructive delays characteristic of Commission procedures. See Kaysen & Turner, Antitrust Policy 248-249 (1959).

In effect, today's decision represents radical surgery upon the administration [\*\*1759] of § 7 of the Clayton Act. This is done contrary to statute, without basis in law or precedent, and is motivated by reasons, which while they may have superficial appeal, are unwise and disruptive. In effect, the Court condones and encourages the Commission to turn aside from its designated function as an expert, administrative agency to become a prosecutor and litigant.

When the Commission was established in 1914, it was not intended to duplicate the functions of existing agencies, but rather to bring to bear on the problems of antitrust and unfair competition the "specialized knowledge and expert judgment, continuity of experience and political independence, flexible procedures and efficient fact-finding methods -- [hopefully] characteristic of the administrative process." Elman, [\*\*\*\*65] Rulemaking Procedures [\*636] in the FTC's Enforcement of the Merger Law, 78 Harv. L. Rev. 385, 387 (1964).

Every conceivable merger case involves the danger that the merger, unless enjoined, will be effectuated, and the incentive to the Commission to shop among the statutorily available courts of appeals and to seek "preliminary" injunctions will be great. This, I repeat, is a radical change from the pattern that Congress has ordered, and one which is profoundly undesirable in its effects upon the parties, the courts of appeals, and upon the national interest in a careful assessment of mergers for the purpose of tolerating those which are permissible and liquidating those which violate the national policy expressed in § 7.

I would affirm the decision below.

#### APPENDIX TO OPINION OF MR. JUSTICE FORTAS, DISSENTING.

The FTC first solicited the assistance of Congress in 1956. In January of that year it submitted to the appropriate committees of the Eighty-fourth Congress a staff study containing various legislative proposals. The study observed that "A very serious loophole in the Antimerger Act [§ 7] is the lack of a provision which enables the Federal Trade [\*\*\*\*66] Commission either to take action to prevent mergers prior to consummation or, after

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consummation, to take action to preserve the status quo until completion of administrative proceedings before the Commission."<sup>1</sup>

[\*\*\*826] The study informed the committees that in 1955 the FTC had twice sought to secure preliminary injunctions from courts of appeals, but that the courts had found [\*637] no basis in existing law to authorize such applications.<sup>2</sup> In hearings conducted upon proposals of the FTC and others, the Commission through its then chairman, John W. Gwynne, urged Congress to enact legislation which would empower it in § 7 cases to apply to United States District Courts for preliminary relief.<sup>3</sup> [\*\*\*68] Chairman Gwynne was pessimistic [\*\*1760] about the prospects for success under the all-writs statute, noting that it "is a very general statute and is designed to protect [\*\*\*67] not the jurisdiction of the Federal Trade Commission but the jurisdiction of the circuit court of appeals to which the case might finally get."<sup>4</sup>

Both Senate and House Judiciary Committees accepted the view, repeatedly stated by spokesmen for the FTC, [\*638] that it lacked any authority to enjoin or seek a court order to enjoin mergers prior to an FTC adjudication of their illegality, and that this gap in the Commission's arsenal was crippling its efforts to enforce § 7. Both Committees reported out H. R. 9424, which contained an amendment to § 15 of the Clayton Act authorizing the FTC to seek preliminary relief in the United States District Courts. S. Rep. No. 2817, 84th Cong., 2d Sess. (1956); H. R. Rep. No. 1889, 84th Cong., 2d Sess. (1956).<sup>5</sup> The bill passed the House, but failed of passage in the Senate.

Similar legislative proposals have been introduced in subsequent sessions, but always with less success than in 1956. In all of these legislative [\*\*\*69] proceedings, the position of the FTC has been steadfast: consistently, it has insisted that without new legislation it lacks authority to enjoin mergers pending completion of agency action. In March of 1957, FTC Chairman Gwynne informed the appropriate Committees of the decision in *Federal Trade Comm'n v. International Paper Co.*, 241 F.2d 372 (C. A. 2d Cir. 1956), that the all-writs statute would not support an FTC application for preliminary relief. To the House Committee he forwarded a copy of the opinion, describing it as "even more conclusive" than the earlier unreported decisions of the Courts of Appeals for the First and Third Circuits.<sup>6</sup> [\*\*\*70] In [\*\*\*827] the Senate, Chairman Gwynne characterized his Commission's application in *International Paper* as "something of a forlorn hope."<sup>7</sup> When Senator Kefauver, the Committee Chairman, asked

<sup>1</sup> Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 2d Sess., ser. No. 15, p. 29 (1956).

<sup>2</sup> The cases referred to were *Federal Trade Comm'n v. Farm Journal, Inc.* (C. A. 3d Cir. 1955) (unreported); and *In the Matter of A. G. Spalding & Bros., Inc.* (C. A. 1st Cir. 1955) (unreported). They are discussed in H. R. Rep. No. 486, 85th Cong., 1st Sess., 8-9 (1957); Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on S. 198, S. 721, S. 722 and S. 3479, 85th Cong., 2d Sess., 42-45 (testimony of FTC Chairman Gwynne), 156-157 (testimony of Congressman Celler) (1958).

<sup>3</sup> The FTC proposed that § 11 of the Clayton Act be amended to read: "Whenever the Federal Trade Commission has reason to believe --

"(1) That any corporation is acquiring, has acquired or is about to acquire the stock or assets of another corporation in violation of the provisions of section 7 of this Act, and

"(2) That the enjoining thereof pending the issuance of a complaint by the Commission under this section and until such complaint is dismissed by the Commission or set aside by the court on review, would be to the interest of the public,

"the Commission . . . may bring suit in a district court of the United States . . . to prevent and restrain violation of section 7 of this Act. Upon proper showing a temporary injunction or restraining order shall be granted without bond. . ." Hearings, *supra*, note 1, at 29-30.

<sup>4</sup> *Id.*, at 35.

<sup>5</sup> H. R. 9424, although worded in greater detail, was in substance like the FTC proposal.

<sup>6</sup> Letter to Chairman Celler, in Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 85th Cong., 1st Sess., ser. No. 2, p. 103 (1957).

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him whether the FTC had sought [\*639] review of the decision in this Court, Chairman Gwynne answered: "No, we did not. We talked that over. I could not help but agree with the court, frankly. I think the remedy is to amend the law. . . ." The Senator replied, "I think you are right about it." <sup>8</sup>

Nor was Gwynne the only FTC spokesman to represent to Congress that legislation was essential if the Commission, like the Department of Justice and private parties, was to be able to maintain the *status quo* pending determination of a merger's legality. The present chairman, Paul Rand Dixon, who as committee counsel had participated in Senate proceedings on this matter since 1956, informed the Eighty-seventh Congress that "It is clear that the Commission has no such authority," citing *International Paper*.<sup>9</sup> [\*\*\*\*71] Leading Members of Congress<sup>10</sup> [\*\*1761] and key representatives of the Executive Branch<sup>11</sup> expressed the same view.

A third FTC Chairman, Earl Kintner, explained to the bar rather than directly to Congress, that in 1960 the FTC had intervened as *amicus curiae* in a private suit to enjoin a merger,<sup>12</sup> which suit paralleled a pending [\*640] Commission inquiry. This was done, he said, because the FTC was "lacking any statutory authority to seek a temporary injunction." Kintner, The Federal Trade Commission in 1960 -- *Apologia Pro Vita Nostra*, 1961 *Antitrust Law* Symposium 21, 38. He noted that the FTC was pressing for legislative authorization, and that until the effort succeeded the FTC would be confined to intervention in occasional private suits and to reliance upon the Justice Department "where a temporary [\*\*\*\*72] restraining order is peculiarly appropriate." *Id., at 41.*<sup>13</sup>

## References

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Annotation References:

Construction, by Supreme Court of the United States, of 7 of the Clayton Act ([15 USC 18](#)), dealing with acquisition by one corporation of stock of another. 14 L ed 2d 784.

Right of one corporation to acquire stock in another, as affected by the antitrust acts. 74 L ed 431.

Administrative or practical construction of statute as precedent for judicial construction. 73 L ed 322, 84 L ed 28.

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<sup>7</sup> Hearings, *supra*, note 2, at 45.

<sup>8</sup> *Ibid.*

<sup>9</sup> Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. No. 5, pp. 87, 107 (1961). It was in this session that the FTC abandoned its prior advocacy of proposals that it seek relief in the district courts, urging instead that it be given power to issue its own injunctions and restraining orders. *Id., at 88, 91.* Compare testimony of FTC Chairman Gwynne, Hearings, *supra*, note 2, at 49-59.

<sup>10</sup> See, e. g., statement of Congressman Celler, Hearings, *supra*, note 2, at 156-160; statement of Congressman Patman, Hearings, *supra*, note 9, at 45; statement of Senator Kefauver, *id.*, at 46.

<sup>11</sup> E. g., The President's Economic Report, submitted to Congress on January 23, 1957, p. 51; Letter from Attorney General Kennedy, May 2, 1961, in Hearings, *supra*, note 9, at 58.

<sup>12</sup> *Briggs Mfg. Co. v. Crane Co.*, [185 F.Supp. 177](#) (D. C. E. D. Mich.), aff'd, [280 F.2d 747 \(C. A. 6th Cir. 1960\)](#).

<sup>13</sup> FTC Chairman Dixon utilized the same forum the following year to plead for legislation which would authorize the Commission to issue its own temporary relief. See Dixon, The Federal Trade Commission in 1961, 1962 *Antitrust Law* Symposium 16, 19-21.

## Denver & R. G. W. R. Co. v. United States

Supreme Court of the United States

March 16, 1967, Argued ; June 5, 1967, Decided

No. 305

**Reporter**

387 U.S. 485 \*; 87 S. Ct. 1754 \*\*; 18 L. Ed. 2d 905 \*\*\*; 1967 U.S. LEXIS 2783 \*\*\*\*; 1967 Trade Cas. (CCH) P72,116

DENVER & RIO GRANDE WESTERN RAILROAD CO. ET AL. v. UNITED STATES ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

**Disposition:** [255 F.Supp. 704](#), reversed and remanded.

### **Core Terms**

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stock, public interest, railroads, carrier, Clayton Act, anticompetitive, shares, acquisition, issuance, antitrust, transport, consolidations, approving, district court, defer, stockholders, acquire, circumstances, deferral, controlling issue, additional share, questions, immunity, effects, merger, lawful object, authorize, ownership, proposed transaction, anti trust law

### **LexisNexis® Headnotes**

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Securities Law > ... > Registration of Securities > Exemptions > Exempt Classes of Securities

Transportation Law > Interstate Commerce > Federal Powers

#### **[HN1](#) [down arrow] Exemptions, Exempt Classes of Securities**

49 U.S.C.S. § 20a.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

#### **[HN2](#) [down arrow] Regulated Industries, Transportation**

49 U.S.C.S. § 5(2)(a)(i) authorizes any carrier, with the approval and authorization of the Interstate Commerce Commission, to acquire control of another through ownership of its stock or otherwise.

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Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Civil Procedure > Judgments > Relief From Judgments > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

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

15 U.S.C.S. § 18, provides in pertinent part that no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Antitrust & Trade Law > Clayton Act > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

### **HN4** [PDF] Antitrust & Trade Law, Clayton Act

The Clayton Act, § 5(11), 49 U.S.C.S. § 5(11), provides that any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized shall be and they are relieved from the operation of the antitrust laws.

Antitrust & Trade Law > Clayton Act > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

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

The Clayton Act § 11, 15 U.S.C.S. § 21, provides in pertinent part that: (a) authority to enforce compliance with the Clayton Act § 7 by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; and (b) whenever the Commission shall have reason to believe that any person is violating § 7, the Commission shall issue a complaint containing a notice of a hearing. The person so complained of shall have the right to show cause why an order should not be entered by the Commission requiring such person to cease and desist from the violation.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

## [\*\*HN6\*\*](#) Regulated Industries, Transportation

The Interstate Commerce Commission is required, as a general rule, under its duty to determine that the proposed transaction is in the "public interest" and for a "lawful object," to consider the control and anticompetitive consequences before approving stock issuances.

Antitrust & Trade Law > Clayton Act > General Overview

## [\*\*HN7\*\*](#) Antitrust & Trade Law, Clayton Act

A company need not acquire control of another company in order to violate the Clayton Act.

## **Lawyers' Edition Display**

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### **Summary**

An express company and a motor carrier entered into an agreement, subject to Interstate Commerce Commission approval, whereby the express company agreed to issue 500,000 shares of its stock to the motor carrier at \$ 20 per share and the motor carrier offered, for 60 days following its acquisition of the 500,000 shares, to purchase an additional 1,000,000 shares of the express company's outstanding stock at the same price. The Interstate Commerce Commission approved the issuance without hearing, ruling that investigation of the "control" and "anticompetitive" issues would be deferred. A three-judge United States District Court for the District of Colorado sustained the Commission's order. ([255 F Supp 704](#).)

On direct appeal, the Supreme Court of the United States reversed. In an opinion by Brennan, J., expressing the views of six members of the court, it was held that while the possibility that the motor carrier might not increase its holdings within the 60-day period might justify deferring resolution of the control issue, it did not justify delay in considering the anticompetitive effects of the acquisition of the 500,000 shares.

White, J., concurring in part and dissenting in part, stated his agreement that a hearing as to competitive factors should have been held before approval of the stock issuance, but also stated that the Commission may approve a carrier's stock issuance even if there would be a probable lessening of competition.

Harlan, J., joined by Stewart, J., dissented on the grounds that antitrust matters are inapposite in a proceeding for approval of a stock issuance, and that in any event consideration of the antitrust issues was properly postponed.

## **Headnotes**

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INTERSTATE COMMERCE COMMISSION §41 > issuance of securities -- investigation -- > Headnote:

[\*\*LEdHN\[1A\]\*\*](#) [1A] [\*\*LEdHN\[1B\]\*\*](#) [1B] [\*\*LEdHN\[1C\]\*\*](#) [1C]

Under 20a of the Interstate Commerce Act (49 USC 20a), which forbids any carrier to issue capital stock until investigation by the Interstate Commerce Commission of the purposes and uses of the proposed issue and the proceeds thereof and issuance of a Commission order authorizing the issue after findings that the issue is for some "lawful object" and is compatible with the "public interest," the Commission's consideration is not limited to an inquiry into fiscal manipulation; the Commission is not required to close its eyes to facts indicating that the

transaction may exceed limitations imposed by other relevant laws, and must give at least some degree of consideration to control and anticompetitive consequences when suggested by the circumstances surrounding the particular transaction.

INTERSTATE COMMERCE COMMISSION §39 > merger -- authorization -- > Headnote:

LEdHN[2A] [2A] LEdHN[2B] [2B]

The Interstate Commerce Commission is required to weigh anticompetitive effects in approving applications for merger or control under § 5 of the Interstate Commerce Act (49 USC 5), which authorizes the Commission to grant such applications only if "consistent with the public interest."

INTERSTATE COMMERCE COMMISSION §41 > stock issues -- duties -- > Headnote:

LEdHN[3] [ ] [3]

The foundations of the Interstate Commerce Commission's obligation under 5 of the Interstate Commerce Act (49 USC 5), which authorizes the Commission to grant applications for merger or control only if "consistent with the public interest," are largely applicable as well to 20a of the statute (49 USC 20a), which empowers the Commission to permit stock issues only for some "lawful object" compatible with the "public interest."

INTERSTATE COMMERCE COMMISSION §39 > mergers -- stock issues -- > Headnote:

LEdHN[4] [  ] [4]

Both 5 of the Interstate Commerce Act (49 USC 5), which authorizes the Interstate Commerce Commission to grant applications for merger or control only if "consistent with the public interest," and 20a of the statute (49 USC 20a), which empowers the Commission to permit stock issues only for some "lawful object" compatible with the "public interest," must be read in the context of overall Commission responsibilities, including the responsibility under 11 of the Clayton Act ([15 USC 21](#)) to enforce that statute's provisions and the responsibility to advance the National Transportation Policy.

INTERSTATE COMMERCE COMMISSION §41 > stock issue -- principles -- > Headnote:

LEdHN[5] [ ] [5]

In a proceeding before the Interstate Commerce Commission under 20a of the Interstate Commerce Act (49 USC 20a) for approval of an issuance of stock, the same broad principles apply as in a proceeding under 20a(12) for authority for an interlocking directorate and under 5 (2) for authority for a merger.

INTERSTATE COMMERCE COMMISSION §13 > stock issuances -- hearing -- review -- > Headnote:

LEdHN[6] [  ] [6]

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Under the general rule that the Interstate Commerce Commission must, before approving stock issuances pursuant to 20a of the Interstate Commerce Act (49 USC 20a), consider the control and anticompetitive consequences of the issuance, the Commission need not grant a hearing in every case and may defer consideration of issues which arise when special circumstances are present, but when the Commission exercises its discretion to approve issuances without first considering important control and competition issues, the reviewing court must closely scrutinize its action in light of the Commission's statutory obligations to protect the public interest and to enforce the antitrust laws.

INTERSTATE COMMERCE COMMISSION §179 > discretion -- stock issuance -- > Headnote:

[LEdHN\[7\]](#) [7]

In a proceeding under 20a of the Interstate Commerce Act (49 USC 20a) for Interstate Commerce Commission approval of a stock issuance, the question whether the Commission has abused its discretion in approving an issuance without first considering important control and competition issues depends upon the transaction approved, its possible consequences, and any justifications for the deferral.

INTERSTATE COMMERCE COMMISSION §39 > control -- > Headnote:

[LEdHN\[8\]](#) [8]

Under 5 of the Interstate Commerce Act (49 USC 5), which authorizes the Interstate Commerce Commission to approve applications for merger or control only if consistent with the public interest, control must be judged realistically, and is a matter of degree.

INTERSTATE COMMERCE COMMISSION §39 > control -- deferral -- > Headnote:

[LEdHN\[9\]](#) [9]

When a carrier's application for Interstate Commerce Commission approval of its issuance of 500,000 shares of its stock to a second carrier, which agrees that within 60 days of its acquisition of the 500,000 shares it will offer to purchase an additional 1,000,000 shares of the first carrier's outstanding stock at the same price, the Interstate Commerce Commission does not exceed its discretion in deferring consideration, for the 60-day period, of the question whether control of the first carrier's operations might pass to the second carrier.

INTERSTATE COMMERCE COMMISSION §39 > control -- public interest -- > Headnote:

[LEdHN\[10A\]](#) [10A] [LEdHN\[10B\]](#) [10B]

Under 5 of the Interstate Commerce Act (49 USC 5), which authorizes the Interstate Commerce Commission to approve applications for merger or control only if "consistent with the public interest," resolution of the "public interest" issue, requiring consideration of anticompetitive and other consequences, is required when the threshold fact of control or merger is established.

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INTERSTATE COMMERCE COMMISSION §39 > control -- tentative stock acquisition -- > Headnote:  
[LEdHN\[11\]](#) [11]

The Interstate Commerce Commission reasonably concludes that allowing a motor carrier tentatively to acquire a 20 percent stock interest in a railroad express service and motor common carrier whose other stock is entirely owned by railroads will not prejudice protestors to the transaction as to the issue of the acquiring carrier's acquisition of control of the other carrier, where the railroad stockholders refuse to sell any stock to the acquiring carrier and the acquiring carrier is unable to control the board of directors of the other carrier.

INTERSTATE COMMERCE COMMISSION §41 > stock issuance -- anticompetitive effects -- > Headnote:  
[LEdHN\[12\]](#) [12]

On a carrier's application for Interstate Commerce Commission approval of an issue of stock for sale to another carrier, the Commission's action in deferring consideration of the anticompetitive issues under 7 of the Clayton Act ([15 USC 18](#)), which forbids stock acquisitions substantially lessening competition, stands on a different footing from the control issue under 5 of the Interstate Commerce Act (49 USC 5), which requires Commission authorization before one carrier may acquire control of another; the Commission's responsibility under 5 and under the Clayton Act differ markedly, the reasons which support an exercise of discretion as to the control issue are wholly inapplicable to the anticompetitive questions, and there is no reasonable justification for deferring the Clayton Act questions.

INTERSTATE COMMERCE COMMISSION §41 > stock acquisitions -- anticompetitive effect -- > Headnote:  
[LEdHN\[13\]](#) [13]

No preliminary finding of control need be made to trigger the Interstate Commerce Commission's duty under the Clayton Act to prevent stock acquisitions which may have the effect substantially to lessen competition.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34 > control -- > Headnote:  
[LEdHN\[14\]](#) [14]

A company need not acquire control of another company in order to violate the Clayton Act.

INTERSTATE COMMERCE COMMISSION §39 > control -- antitrust immunity -- > Headnote:  
[LEdHN\[15\]](#) [15]

Section 5 of the Interstate Commerce Act (49 USC 5), which authorizes the Interstate Commerce Commission to approve a carrier's application for merger or control, is designed to enable carriers to seek and obtain approval of consolidations with other carriers, with immunity from the antitrust laws.

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INTERSTATE COMMERCE COMMISSION §39 > consolidations -- > Headnote:

[LEdHN\[16\]](#) [16]

The carrier must initiate consolidations under 5 of the Interstate Commerce Act (49 USC 5), which authorizes the Interstate Commerce Commission to approve a carrier's application for merger or control.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §35 > stock acquisitions -- carriers --

> Headnote:

[LEdHN\[17\]](#) [17]

Section 7 of the Clayton Act ([15 USC 18](#)), forbidding stock acquisitions the effect of which may be substantially to lessen competition, requires that a carrier's acquisition of 20 percent of the stock of another carrier be stopped in its incipency if the result is likely to be immediate and continuing co-operation between the carriers which would be detrimental to competitors and against the public interest.

INTERSTATE COMMERCE COMMISSION §41 > stock issuance -- factors -- > Headnote:

[LEdHN\[18\]](#) [18]

On an application under 20a of the Interstate Commerce Act (49 USC 20a) for approval of an express company's issuance of stock to be purchased by a motor common carrier, where it is shown that the domination of the express company by railroads has led to operation of the express company and the railroads' own interests without regard to the express company's best interests or the public interest, the Interstate Commerce Commission must at least consider whether the special action to be approved may operate to the detriment of the express company or the public interest before using the express company's need for funds and for independence from the railroads to justify a diversification of ownership.

INTERSTATE COMMERCE COMMISSION §41 > stock issuance -- anticompetitive issues -- > Headnote:

[LEdHN\[19\]](#) [19]

Considerations of administrative convenience do not support the Interstate Commerce Commission's deferral of anticompetitive issues in a proceeding for Commission approval of a carrier's issuance of 500,000 shares of its stock to be acquired by another carrier under an agreement whereby the purchasing carrier agrees to offer within 60 days following the acquisition to purchase an additional 1,000,000 shares of the first carrier's outstanding stock at the same price.

INTERSTATE COMMERCE COMMISSION §41 > stock issuance -- anticompetitive impact -- > Headnote:

[LEdHN\[20\]](#) [20]

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In a proceeding for Interstate Commerce Commission approval of a carrier's issuance to another carrier of 500,000 shares of the first carrier's stock at \$ 20 per share under an agreement whereby the second carrier offers to buy an additional 1,000,000 shares of the first carrier's stock at the same price, the offer to be open for 60 days following the acquisition of the 500,000 shares, the possibility that the second carrier may not increase its holdings within the 60-day period may justify deferral of resolution of the control issue but it does not justify delay in consideration of the anticompetitive effects of the acquisition of the 500,000 shares.

## **Syllabus**

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Railway Express Agency (REA) applied to the Interstate Commerce Commission (ICC) for authorization under § 20a of the Interstate Commerce Act to sell 500,000 authorized but unissued shares of its stock to Greyhound Corporation. Greyhound agreed, upon acquisition of these shares, to offer for 60 days to purchase up to 1 million shares of outstanding REA stock, all of which is owned by railroads which have the right of first refusal. REA and Greyhound had entered into a "Memorandum of Understanding" which contemplated efficiencies and savings through consolidation of terminal facilities, garages, communications, advertising, and sales forces. Section 20a (2) of the Act provides for ICC authorization of a carrier's stock issuance if "for some lawful object within [the applicant's] corporate purposes, and compatible with the public interest." Finding the issuance of the 500,000 shares for sale to Greyhound to be urgently needed, the [\*\*\*2] ICC authorized the issuance under § 20a without a hearing, and declined to decide, pending the outcome of Greyhound's 60-day offer, the questions of control under § 5 of the Interstate Commerce Act or anticompetitive effect under § 7 of the Clayton Act. A three-judge District Court sustained the ICC order. *Held:*

1. The ICC is required, as a general rule, under its duty to determine that the proposed transaction is in the "public interest" and for a "lawful object," to consider control and anticompetitive consequences before approving a stock issuance under § 20a (2) of the Interstate Commerce Act. Pp. 492-498.
2. The ICC did not exceed its discretion in deferring consideration of the issue of REA's control by Greyhound, as radical changes in the relevant facts might take place in the 60-day period, and it is highly unlikely that any harm could flow to appellants or to the public interest from a deferral limited to that issue. Pp. 499-501.
3. The ICC exceeded its discretion in deferring consideration of the anticompetitive issues. Pp. 501-507.
  - (a) While the ICC's duty to consider anticompetitive issues under the public interest standard of § 5 of the Interstate Commerce [\*\*\*3] Act arises only after a threshold finding of control, no such preliminary finding need be made to trigger the ICC's duty under the Clayton Act. P. 501.
  - (b) With respect to at least some of the anticompetitive issues presented by REA's application the relevant facts will not change significantly during the 60-day period. Pp. 502-503.
  - (c) With Greyhound's holding of 500,000 shares (20%) of REA's stock there is likely to be immediate and continuing cooperation between the companies, which appellants claim will be to their detriment and which the Government concedes may be against the public interest. If such an alliance would in fact be against the public interest, § 7 of the Clayton Act requires that it be stopped in its incipiency. P. 504.
  - (d) Before the ICC can justify a diversification of ownership on the grounds that REA has an urgent need for funds and would be better off more independent of the railroads, it must consider whether the action approved would operate to the detriment of REA or the public interest. Pp. 505-506.
  - (e) There is little merit to the Government's contention that deferral of the anticompetitive issues is strongly supported by considerations of administrative [\*\*\*4] convenience. Pp. 506-507.

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**Counsel:** William H. Dempsey, Jr., argued the cause for appellants. With him on the briefs were Jeremiah C. Waterman, Royce D. Sickler, C. W. Fiddes, David Axelrod, Eugene T. Liipfert, Benjamin W. Boley, Martin J. Flynn, Giles Morrow, Peter T. Beardsley, Harry Jordan and R. Edwin Brady.

Robert S. Rifkind argued the cause for the United States et al. With him on the brief were Solicitor General Marshall, Assistant Attorney General Turner, Howard E. Shapiro, Robert W. Ginnane and Betty Jo Christian. Thomas D. Barr argued the cause for appellees Railway Express Agency, Inc., et al. Mr. Barr filed a brief for Railway Express Agency, Inc. Owen Jameson filed a brief for appellee Greyhound Corp.

**Judges:** Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Fortas

**Opinion by:** BRENNAN

## Opinion

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[\*487] [\*\*\*909] [\*\*1756] MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question in this case is whether the Interstate Commerce Commission complied with its statutory responsibilities under § 20a of the Interstate Commerce Act<sup>1</sup> when it approved without consideration of control or anticompetitive consequences the issuance to appellee Greyhound [\*\*\*\*5] Corporation of 500,000 shares of the common stock of appellee Railway Express Agency, Inc. (REA).

[\*\*\*6] REA provides railroad express service and is also a motor common carrier. The approximately 2,000,000 shares of REA common stock outstanding are entirely owned by railroads and no railroad stockholder may dispose of its shares without first offering them to the other railroad stockholders. REA also is authorized, however, to issue 500,000 additional shares of common stock without first offering them to its stockholders. [\*\*1757] Greyhound, which operates an express carrier service through its wholly owned subsidiary Greyhound Lines, Inc., a motor carrier of passengers and express subject to the Interstate [\*488] Commerce Act, agreed to purchase these 500,000 [\*\*\*910] shares. REA thereupon applied to the ICC for an order under § 20a approving the transaction. Minority railroad REA stockholders, motor bus competitors of Greyhound, motor carriers, and freight forwarders intervened in the proceeding to protest against approval of the transaction. They alleged, among other things, the necessity of a hearing on the questions whether Greyhound's acquisition of the stock was in the "public interest" and for a "lawful object" as those terms are used in § 20a. The ICC approved [\*\*\*7] the acquisition without a hearing. A three-judge District Court for the District of Colorado sustained the ICC order. [255 F.Supp. 704](#). We noted probable jurisdiction. [385 U.S. 897](#). We reverse with direction to the District Court to enter a new judgment remanding the case to the ICC for further proceedings consistent with this opinion.

I.

REA was organized in 1929 and until 1961 operated on a nonprofit basis under a pooling agreement with the railroads. See *Securities and Acquisition of Control of Railway Express Agency, Inc.*, 150 I. C. C. 423. Financial

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<sup>1</sup> Section 20a of the Interstate Commerce Act, as amended, 41 Stat. 494, 49 U. S. C. § 20a, provides in pertinent part:

"(2) [HN1](#) It shall be unlawful for any carrier to issue any share of capital stock . . . even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, . . . the Commission by order authorizes such issue . . . . The Commission shall make such order only if it finds that such issue . . . (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

Common carriers by motor vehicle are made subject to the provisions of § 20a (2) by § 214 of the Act, as amended, 49 Stat. 557, 49 U. S. C. § 314.

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difficulties forced abandonment of the nonprofit operation and REA was converted to a profit and loss basis in order to effect more efficient and economic operation. See *Express Contract*, 1959, 308 I. C. C. 545, 549-550. In addition, REA was released from restrictions against use of carriers other than railroads. In 1963 REA's bylaws were amended to eliminate a limitation against stock ownership except by railroads; the disposition of shares by a railroad, however, was made subject to the right of first refusal of the other railroad stockholders. The issuance of 500,000 [\*\*\*\*8] additional shares not subject to the right of first refusal was also authorized, but only upon the consent of two-thirds of the railroad stockholders.

[\*489] Greyhound, principally a passenger carrier, became interested in expanding its growing express business. In January 1964 Greyhound offered to purchase, subject to ICC approval, at least 67% of REA's stock, of which Greyhound intended to offer 16% to major airlines. Greyhound also agreed to finance part of REA's capital requirements as part of a plan to coordinate the express services of both companies. This proposal was defeated by railroad stockholders.

REA and Greyhound persisted in their efforts to coordinate their operations. Greyhound proposed to acquire a 20% interest in REA through acquisition of REA's 500,000 authorized but unissued shares, stating that its "interest in REA . . . stems primarily from our views as to the improvements . . . which could be realized through combination and correlation of certain of our facilities and services." Greyhound offered to pay \$ 16 per share if permitted to name one-fifth of the REA Board of Directors and if the REA Board would declare its intention "to consider seriously [\*\*\*9] and work toward a long-term agreement between REA and Greyhound to consolidate operating functions and facilities . . . , and if, further, the REA Board would agree "to consider seriously at a later time . . ." the sale of REA stock to airlines and the general public. Finally, Greyhound offered, if permitted to acquire the 500,000 shares, to purchase enough additional shares at \$ 25 each to give it 50% of the stock of REA, the offer to remain open for 60 days following Greyhound's [\*\*911] acquisition of the 500,000 shares. It expressed willingness, however, to purchase the 500,000 shares and leave "to the future the question of the acquisition of additional shares by Greyhound and [\*\*1758] giving the railroads an opportunity to reconcile their views on this question."

REA countered with an offer to sell the 500,000 shares at \$ 20 per share provided Greyhound would agree to [~~490~~] offer within the 60-day period to purchase an additional 1,000,000 shares of the outstanding stock at the same price. The agreement was consummated on this basis subject to ICC approval.

REA's application to the ICC sought approval only of the issuance to Greyhound of the 500,000 shares. [\*\*\*\*10] The application was supplemented with detailed data reviewing the negotiations, a statement of REA's financial condition and a statement of the purposes to which the \$ 10,000,000 realized from the sale of the 500,000 shares would be applied. The burden of the protests of numerous intervenors was that the transaction was not in the "public interest" and for a "lawful object," but rather was the first step toward establishing a virtual monopoly of express transportation, and would result in "control" by Greyhound of REA, necessitating a hearing under § 5 of the Act.<sup>2</sup> [\*\*\*\*11] The Department of Justice also intervened. It urged the ICC to conduct a hearing to determine whether the transaction would violate § 7 of the Clayton Act,<sup>3</sup> suggesting that, while a § 5 proceeding might be

<sup>2</sup> Section 5 (2) (a) (i) of the Act, as amended, 41 Stat. 480, 482, 49 U. S. C. § 5 (2) (a) (i), HN2<sup>↑</sup> authorizes any carrier, with the approval and authorization of the Commission, "to acquire control of another through ownership of its stock or otherwise . . . ." Upon application of a carrier seeking such authority, the Commission "shall afford reasonable opportunity for interested parties to be heard," and if "the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) . . . and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable . . ." § 5 (2) (b).

<sup>3</sup> Section 7 of the Clayton Act, as amended, 38 Stat. 731, [15 U. S. C. § 18, HN3](#) provides in pertinent part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock . . . of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

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[\*491] unnecessary, one might be instituted and consolidated with the recommended Clayton Act § 7 proceeding, since the anticompetitive issues involved would be virtually identical.

Division Three of the ICC approved the application without hearing, ruling that investigation into the "control" and "anticompetitive" issues "would not be appropriate at this time . . . ." After the ICC denial of petitions for reconsideration this action to enjoin and set aside the ICC order was filed. The full Commission meanwhile reconsidered and affirmed the action of Division Three but postponed the effective date of the order pending the conclusion of judicial proceedings.

In the District Court the parties adhered basically to the positions [\*\*\*\*12] maintained before the ICC, except that the Department of Justice abandoned its position urging a hearing on the § 7 question and declined either to support or to oppose [\*912] the ICC order. In sustaining the order the District Court reasoned that, while the ICC might be required in some circumstances to consider "control" and "anticompetitive" issues before approving a stock issuance under § 20a, the ICC properly exercised discretion to defer consideration of such questions in this case until after it was determined whether and to what extent Greyhound would succeed in purchasing additional shares from railroad stockholders; only then would the "chain of events started by the stock issuance . . . [be] ascertainable [\*\*1759] rather than conjectural." [255 F.Supp. 704, 709](#).

In this Court the Government concedes, and the other appellees assume *arguendo*, that important issues of "control" and "anticompetitive" effects were involved in the application before the ICC. The Government has completely reversed its position from what it was before [\*492] the ICC, arguing here that § 20a was designed to accomplish only the limited objective of protecting [\*\*\*13] stockholders and the public from fiscal manipulation, and that, in any event, postponement of consideration of "control" and "anticompetitive" issues was justified in this case because the facts relevant to both issues might be wholly different at the end of the 60-day period, and because no prejudice to any party's interests could result from the delay.

## II.

[LEdHN\[1A\]](#) [1A] [LEdHN\[2A\]](#) [2A] We do not agree that Congress limited ICC consideration under § 20a to an inquiry into fiscal manipulation.<sup>4</sup> Even if Congress' primary concern was to prevent such manipulation, the broad terms "public interest" and "lawful object" negate the existence of a mandate to the ICC to close its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws. Common sense and sound administrative policy point to the conclusion that such broad statutory standards require at least some degree of consideration of control and anticompetitive consequences when suggested by the circumstances surrounding a particular transaction. Both the ICC [\*\*\*\*14] and this Court have read terms such as "public interest" broadly, to require consideration of all important consequences including anticompetitive effects. Thus the ICC is required to weigh anticompetitive effects in approving applications for merger or control under § 5 of the Act, authorizing the ICC to grant such applications [\*493] only if "consistent with the public interest." [McLean Trucking Co. v. United States, 321 U.S. 67](#). And similarly broad responsibilities are encompassed within like broad directives addressed to other agencies. E. g., [National Broadcasting Co. v. United States, 319 U.S. 190, 224](#); [FCC v. RCA Communications, Inc., 346 U.S. 86, 94](#); [California v. FPC, 369 U.S. 482, 484-485](#).

[\*\*\*\*15] [LEdHN\[3\]](#) [3] [LEdHN\[4\]](#) [4] It is true that the requirement [\*\*\*913] that the ICC consider anticompetitive effects is more readily found under § 5, since § 5 (11) enables the ICC to confer immunity from the antitrust laws for transactions approved under § 5 (2).<sup>5</sup> But the foundations of the ICC's obligation under § 5 are

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<sup>4</sup> Section 20a was originally § 437 (1) of H. R. 10453, 66th Cong., which was almost identical to earlier legislation passed by the House in 1910 and 1914. See 58 Cong. Rec. 8317-8318 (1919). The 1910 version led to a study which condemned as a "public evil" intercorporate holdings of railroad stock. Report of the Railroad Securities Commission, H. R. Doc. No. 256, 62d Cong., 2d Sess., 21 (1911). These findings were part of the background against which Congress eventually passed § 20a, along with the Federal Trade Commission and Clayton Acts.

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largely applicable to § 20a as well. Section 20a, like § 5, must after all be read in the context of overall ICC responsibilities. The responsibility under § 11 of the Clayton Act<sup>6</sup> to enforce **[\*\*1760]** that Act's provisions is one of them. The responsibility to advance the National Transportation Policy, read into the "public interest" standard of § 5, is another persistent and overriding duty, equally applicable to § 20a. In sum, as we said in *McLean Trucking, supra*, while transportation "legislation constitutes the immediate frame of reference within **[\*494]** which the Commission operates . . . and the policies expressed in it must be the basic determinants of its action . . . , in executing those policies the **[\*\*\*\*16]** Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore the latter." *321 U.S., at 80*.

**[\*\*\*\*17]** In proceedings under § 20a (2), the ICC itself has not acted as though it lacks the power or responsibility to weigh anticompetitive consequences. In *Columbia Terminals Co. -- Issuance of Notes*, 40 M. C. C. 288, 293, an application to issue notes under § 20a (2) was granted in part only on the condition that the notes be made the subject of competitive bidding. The ICC explicitly rejected the argument that § 10 of the Clayton Act, *15 U. S. C. § 20*, requiring competitive bidding in certain situations, was superseded by § 20a. In *Stock of New Jersey, I. & I. R. Co.*, 94 I. C. C. 727, 729, the Commission said, in considering an application to issue stock: "It can not be said that in the performance of the broad duty imposed upon us by the statute we must confine our investigation and consideration to the effect of proposed issues upon the carrier immediately involved. In any application to us for authority to issue securities we are bound to measure the proposal by the test of public interest in whatever phase that interest may appear to be affected."

**LEdHN[5]↑** [5] **[\*\*\*\*18]** This "broad duty" was significantly adhered to in *Chesapeake & O. R. Co. Purchase*, 271 I. C. C. 5. There, the C & O sought modification of an earlier order so as to enable it to acquire and exercise 400,000 shares of New York Central, and two of C & O's directors sought authority under § 20a (12) to hold seats simultaneously on the Central **[\*\*914]** Board. C & O and its directors alleged, in terms strikingly similar to the claims in this case, that Central **[\*495]** needed funds and new management, and that the two companies were contemplating plans of mutual advantage and ultimately a merger under § 5 (2). The ICC took a broad view of its power and responsibility. It found, as to the § 20a (12) issue, that an insufficient showing had been made that "neither public nor private interests . . ." would be adversely affected by the proposed interlocking directorate, citing its own cases to the effect that authority would be granted under § 20a (12) only where no lessening of competition or independence occurred, 271 I. C. C., at 18, and pointing out that, even if the Central were strengthened, an interlocking directorate might injure other railroads **[\*\*\*\*19]** in which the "public has just as great an interest . . .," 271 I. C. C., at 40. In treating the request that it approve the stock acquisition, the ICC referred in great detail to the facts that (1) the acquisition, when considered along with long-range plans, would result in C & O control of Central; (2) extensive competition between C & O and Central would be eliminated; and (3) cooperation between C & O and Central would **[\*\*1761]** pose a substantial threat to another railroad, 271 I. C. C., at 24-29. It refused to authorize the acquisition, concluding that it was in effect being asked "to sanction a violation of the provisions of section 5 (4) [requiring carriers to request authority under § 5 (2) before acquiring control of another carrier] and also a violation of section 7 of the Clayton Antitrust Act." 271 I. C. C., at 39, 43. It stated that, if the applicants were so confident that their long-run aims would be in the public interest, they should seek authority for control under § 5 (2). These principles and arguments relied upon by the ICC in rejecting C & O's application are equally applicable here. The

<sup>5</sup> Section 5 (11), 49 U. S. C. § 5 (11), **HN4↑** provides that "any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized . . . shall be and they are relieved from the operation of the antitrust laws . . . ."

<sup>6</sup> Section 11 of the Clayton Act, *15 U. S. C. § 21*, **HN5↑** provides in pertinent part: "(a) Authority to enforce compliance with . . . [§ 7] by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended . . . . (b) Whenever the Commission . . . shall have reason to believe that any person is violating . . . [§ 7] it shall issue . . . a complaint . . . containing a notice of a hearing . . . . The person so complained of shall have the right to . . . show cause why an order should not be entered by the Commission . . . requiring such person to cease and desist from the violation . . . ."

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economic consequences [\*\*\*\*20] do not differ because we are concerned here with the issuance of stock rather than an acquisition on the open market.

[\*496] Appellees argue, with some ambivalence, that it would be anomalous to require the ICC to consider anticompetitive issues under § 20a (2). The ICC is authorized under § 5 to grant antitrust immunity for consolidations. No such power exists under § 20a,<sup>7</sup> and the Government contends therefore that to require consideration of § 7 issues under § 20a would lead to the "anomalous conclusion that a securities issue may have to be disallowed even though it might be the first step in an acquisition of control that the Commission could, on proper findings, authorize under section 5 notwithstanding antitrust considerations." REA advances a variant of this argument pointing out that the Sixty-sixth Congress, which passed both § 5 and § 20a, would not have "adopted the erratic policy of relaxing enforcement of the antitrust [\*\*\*915] laws when competition was eliminated but requiring strict enforcement when lesser competitive harm might occur."

[\*\*\*\*21] First, it is by no means true that greater competitive harm necessarily results from consolidations than from stock issuances under § 20a. A particular consolidation may be in the public interest because it increases competition in some respects, while a stock issuance, even though not involving control, may have no similar redeeming feature. Second, any anomaly which may be created by the juxtaposition of §§ 5 and 20a stems, not [\*497] from the fact that no immunity may be granted under § 20a, but from the ICC's special power under § 5. The obligation to enforce the Clayton Act is the rule, and § 5 is the exception. Finally, there are good reasons upon which Congress may have relied in providing that immunity might be conferred under § 5 but not under § 20a. Congress recognized in the Transportation Act of 1940, 54 Stat. 898, as it had in the Act of 1920, that railroad consolidations often result in benefits for the national transportation system as well as for the railroads involved. Consequently, it authorized the ICC to approve consolidations and to immunize them from the antitrust laws when they were found to be in the public interest. The special benefits sometimes [\*\*\*\*22] realized from carrier consolidations are less likely to come about through the mere issuance of stock, unless the issuance results in control or merger; and when control or merger does result, the party acquiring control may invoke the Commission's [\*\*1762] power under § 5 to immunize the consolidation from the antitrust laws.

Appellees' reliance upon *Alleghany Corp. v. Breswick & Co.*, 353 U.S. 151, 355 U.S. 415, is misplaced. That litigation stands at most for the proposition that the ICC has discretion in some circumstances to consider § 20a issues without coming to grips with the question whether control of one carrier by another may be unlawful. Alleghany had acquired control of the New York Central without ICC approval. It applied to the ICC rather than to the Securities and Exchange Commission for approval of an issue of preferred stock. The ICC took jurisdiction on the ground that, while Alleghany was an investment company normally under the jurisdiction of the SEC, its control of Central made it a carrier subject to ICC regulation. The District Court set aside the order approving the issuance on the ground [\*498] that ICC jurisdiction to [\*\*\*\*23] act under § 20a could not rest upon a control it had not approved. This Court reversed, pointing out that it would be contrary to the policy of the statute to oust the ICC of regulatory jurisdiction because a noncarrier had failed to abide by the law. On remand the District Court considered the illegality of Alleghany's control as relevant to the merits of the issuance under § 20a, and we reversed again, stating simply that the only issue left open on remand was whether the stock issue "as approved" was unlawful. *355 U.S. 415, 416*. However this litigation may be interpreted, it wholly fails to support the proposition that, because § 20a was designed primarily to protect against fiscal manipulation, the ICC is relieved of the necessity of considering other issues germane to the transaction.

LEdHN[1B][↑] [1B] LEdHN[6][↑] [6] LEdHN[7][↑] [7] We conclude, therefore, that HN6[↑] the ICC is required, [\*\*\*\*24] as a general [\*\*\*916] rule, under its duty to determine that the proposed transaction is in the "public

<sup>7</sup> In *Pan American World Airways v. United States*, 371 U.S. 296, we held that Congress had entrusted the narrow questions there presented to the CAB; but the violations alleged were of the Sherman Act, which unlike the Clayton Act, *15 U. S. C. § 21*, *supra*, n. 6, contains no provision imposing an affirmative duty upon the agency to enforce the Act's provisions. The industry there was one "regulated under a regime designed to change the prior competitive system," *id., at 301*, and the CAB could have retained power and granted antitrust immunity for the actions involved had they occurred after passage of § 411 of the Civil Aeronautics Act of 1938, 52 Stat. 1003, *id., at 312*.

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interest" and for a "lawful object," to consider the control and anticompetitive consequences before approving stock issuances under § 20a (2). This does not mean the ICC must grant a hearing in every case, or that it may never defer consideration of issues which arise when special circumstances are present. But it does mean that, when the ICC exercises its discretion to approve issuances without first considering important control and competition issues, the reviewing court must closely scrutinize its action in light of the ICC's statutory obligations to protect the public interest and to enforce the antitrust laws. Whether or not an abuse of discretion is present must ultimately depend upon the transaction approved, its possible consequences, and any justifications for the deferral. We turn now to this question, first with respect to the deferral of the control issue, and second with respect to the deferral of the anticompetitive issues.

### [\*499] III.

LEdHN[8] [8]REA's proposed issuance of a 20% stock [\*\*\*\*25] interest to Greyhound undoubtedly raised a serious question whether control of its operations might pass to Greyhound. Control under § 5 must be judged realistically, and is a matter of degree. See *Rochester Tel. Corp. v. United States*, 307 U.S. 125. Even the 20% acquisition standing alone might raise an issue of control necessitating greater consideration than given it by the ICC, but it is clear from REA's own evidence that the purpose of its negotiations with Greyhound was to bring the two companies into a joint alignment. The 20% stock issuance was treated by both as the first step of a more ambitious project, and as evidence of the seriousness of each other's intentions to that end.

LEdHN[9] [9]What the ICC has done must, however, be placed in perspective. It has [\*\*1763] not denied that a substantial issue of control is present, and it has not refused to consider the issue. It has held only that consideration should be deferred for the 60-day period during which Greyhound has agreed to extend to REA stockholders an offer to purchase up to 1,000,000 shares. We have stressed the [\*\*\*\*26] unsatisfactory consequences which often occur when agencies defer action and leave parties uncertain as to their rights and obligations. *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 510. We might also observe that the ICC apparently could have avoided the deferral by requiring REA and Greyhound to reform their contract so that all the facts relevant to the control issue could be ascertained before approval was given under § 20a (2).<sup>8</sup> Nevertheless, we cannot say that the [\*500] ICC exceeded its discretion when it deferred consideration of the control issue; radical changes in the relevant facts may take place during the 60-day period, and it is highly unlikely that any harm can flow to appellants or to the public interest from a deferral limited to that issue.

[\*\*\*\*27] LEdHN[10A] [10A]Resolution of the "public interest" issue under § 5, requiring [\*\*\*917] consideration of anticompetitive and other consequences, is required when the threshold fact of control or merger is established. But in this case, even assuming that the 20% purchase may amount to "control" under the existing stock distribution, events may occur during the 60-day period which might negate this possibility. Some railroads have indicated their intention to sell their REA holdings, but whether Greyhound or the dissident railroads wind up in a controlling position may depend on the extent to which the latter exercise their right of first refusal. The dissident railroads have made clear their intention to prevent Greyhound from acquiring any additional shares, but even if they obtain one-third of REA's stock they will be able to determine the composition of REA's Board of Directors. In either case, the added power in the hands of the dissident roads may, depending on the circumstances, lead the ICC to find that Greyhound had not acquired control.<sup>9</sup> Thus the control question can more realistically be resolved [\*\*\*\*28] with finality after the 60-day period.

LEdHN[11] [11]Moreover, the ICC reasonably concluded that allowing Greyhound tentatively to acquire the 20% stock interest would not prejudice appellants as to the control issue [\*501] in light of the dissident railroads'

<sup>8</sup> A change in the agreement providing that Greyhound should offer to purchase the stock held by the railroads before the issuance of the 500,000 shares would have developed the relevant facts, and made unnecessary postponement of the determination of either the control or competition issue.

<sup>9</sup> If the dissident REA railroad stockholders exercised their right of first refusal to buy the 1,000,000 shares the other railroad stockholders might sell, their combined stockholdings would be increased to over 50% of the REA shares. See Brief for the United States and ICC, p. 18, n. 9.

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position that Greyhound would not acquire "one additional share under the offer to purchase up to one million shares . . . , and because Greyhound would be unable under REA's bylaws to control the board, since its five directors would be faced by 18 railroad directors, any 13 of whom would have the power to prevent any action proposed by Greyhound.

#### IV.

LEdHN[12]<sup>[12]</sup> [\*\*\*\*29] The action of the Commission in deferring consideration of the anticompetitive issues stands on a different footing. The Commission's responsibility under § 5 and under the Clayton Act differs markedly, and the reasons which support an exercise of discretion as to the control issue are wholly inapplicable [\*\*1764] to the anticompetitive questions. There is, in short, no reasonable justification for deferring the Clayton Act questions.

LEdHN[1C]<sup>[1]</sup> [1C] LEdHN[2B]<sup>[1]</sup> [2B] LEdHN[10B]<sup>[1]</sup> [10B] LEdHN[13]<sup>[1]</sup> [13] LEdHN[14]<sup>[1]</sup> [14] LEdHN[15]<sup>[1]</sup> [15] LEdHN[16]<sup>[1]</sup> [16] The Commission is, of course, required to consider anticompetitive issues under the public interest standard of § 5, just as it must under the public interest standard of § 20a. But the duty [\*\*\*\*30] under § 5, as we point out above, arises only after the threshold fact of control is established. No such preliminary finding need be made to trigger the ICC's duty under the Clayton Act. HNT<sup>[1]</sup> A company need not acquire control of another company in order to violate the Clayton Act. See, e. g., United States v. du Pont & Co., 353 U.S. 586; American Crystal Sugar Co. v. Cuban-American Sugar Co., 152 F.Supp. 387 (D. C. S. D. N. Y. 1957), aff'd, 259 F.2d 524 (C. A. 2d Cir. 1958). Section 7 proscribes acquisition of "any part" of a company's stock where the effect "may be substantially to lessen competition, or to tend to create a monopoly." Moreover, the purpose of § 5 is significantly different from that of the Clayton Act. Section 5 is designed [\*\*\*918] to enable carriers to seek and obtain approval of consolidations with other carriers, with immunity from the antitrust [\*502] laws. When a carrier effects a consolidation without ICC authority, the Commission can of course act under § 5 (4). But, as the Commission has often held, [\*\*\*\*31] the carrier must initiate consolidations under § 5, and it is reasonable to expect that carriers will seek the benefits of that provision. In contrast, the Clayton Act is prohibitive, and imposes a positive obligation upon the ICC to act. The Commission is directed, whenever it has reason to believe any carrier within its jurisdiction is violating § 7, to "issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing . . ." 15 U. S. C. § 21 (b). Section 16, 15 U. S. C. § 26, excepts from the power of private persons to bring § 7 suits for injunctive relief all cases involving matters subject to ICC jurisdiction. By thus limiting the authority of private persons to institute court proceedings to enjoin § 7 violations, this provision underscores the ICC's responsibility to act when such violations are brought to its attention.

One of the principal justifications advanced for the ICC's deferral of the control issue is that the facts relevant to that issue may change so significantly during the 60-day period that the control question could be settled [\*\*\*\*32] either way. No such possibility exists with respect to at least some of the anticompetitive issues presented by REA's application. We need not accept the argument of appellants, based upon the distinction between "express" and other forms of transport, see, e. g., Railway Express Agency, Inc., Extension -- Nashua, N. H., 91 M. C. C. 311, 322, sustained *sub nom.* Auclair Transportation, Inc. v. United States, 221 F.Supp. 328 (D. Mass.), aff'd, 376 U.S. 514, that the 20% stock acquisition would itself violate § 7 because REA controls 88% and Greyhound 7% of the "express" market. For if appellees REA and Greyhound are correct that, because of the increasing cross-competition among groups carrying [\*503] transport, it is impossible to categorize REA as a carrier of "express," then the claims of appellant truck lines, freight forwarders and trucking associations take on added significance. It is precisely the increasing diversification of REA's transport activity, together with Greyhound's considerable capacity and the economies and efficiencies the two companies intend to effectuate jointly, that concerns these appellants.

[\*\*\*\*33] It is clear that REA and Greyhound contemplate major changes in their operation which could have a significant impact upon competition for express and other types of transport which they seek to carry. The "Memorandum of Understanding" into which the companies entered about three weeks before REA [\*\*1765] agreed to Greyhound's 20% stock acquisition contemplates efficiencies and savings through consolidation of facilities for terminal service, of garages, and of communications, advertising and sales forces. These changes

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might therefore realize large savings for both REA and Greyhound, and in this way and other ways significantly strengthen their competitive position. And the Memorandum expresses a determination to engage in aggressive action to capture larger shares of express and transport business, especially by utilizing Greyhound's bus operations as a complement to [\*\*\*919] REA's air and rail service. "The consolidation of effort by the two companies," the Memorandum states, "would create a new market with revenue opportunity arising from a complete package express service to the public." The "new ability" of the air express service to reach off-airline points would [\*\*\*34] add significantly to REA and Greyhound revenues, and the new market would have an estimated growth potential of 10% per year. Similarly, rail-bus service was expected to generate millions in "new business," and to "create a new capability for the two carriers to compete in the ltl [less-than-load] market. The only foreseeable limitation to the [\*504] growth of this service would be the physical space limitations of Greyhound's fleet."

There is nothing in the record to rebut the allegations of many of the appellants that cooperation between Greyhound and REA of the sort contemplated by the Memorandum aided by the 20% stock acquisition will result in serious harm to appellants individually and to the public interest which they serve. The freight forwarders fear a great reduction in their business, as do the bus companies. Some of the bus companies, which engage in commuter transport, claim that Greyhound-REA cooperation would deprive them of their express business, and that, since that business makes economically feasible their commuter operations, would compel the termination of services essential to the public interest.

LEdHN[17] [17] [\*\*\*35] It cannot be said with assurance that deferral of consideration of the anticompetitive issues will in no way prejudice appellants or the public interest. The fact that the railroads presently control the REA Board of Directors is hardly relevant to that question. It is not the possibility of control that may prejudice appellants and the public interest, but simply the fact that with Greyhound holding 20% of REA's stock there is likely to be immediate and continuing cooperation between the companies, cooperation which appellants claim will be to their detriment and which the Government concedes may be against the public interest. If appellants are correct, and if such an alliance would in fact be against the public interest, then § 7 of the Clayton Act requires that it be stopped in its incipency. Cf. [FTC v. Dean Foods Co., 384 U.S. 597, 606, n. 5.](#)

We are told that REA is in need of funds, and that ICC approval of the 20% stock acquisition assures that REA will obtain capital and gain a measure of independence from the railroads. There is certainly support for the position that REA needs to free "itself from the [\*505] control and domination previously [\*\*\*36] exercised by its railroad shareholders over its operations." 80 ICC Ann. Rep., p. 22 (1966). The strong ties between REA and the railroads led to the operation of REA in the railroads' own interests, without regard to their coincidence with REA's best interests or the public interest. Prior to a 1959 agreement, generated in large part by REA losses, see *Express Contract*, 1959, *supra*, 308 I. C. C., at 546, REA was required to distribute traffic among carriers on the basis of existing traffic patterns, and the consent of rail carriers operating between given points was required before REA could utilize carriers other than railroads between those points. Changes in these limitations have enabled REA to finance [\*\*1766] some improvements and steadily to increase its corporate surplus. Study of REA Express, [\*920] Staff Liaison Group V-C, CAB, FMC & ICC 24-26 (1965). But it does not follow that REA will be any better off in the long run, or that the public interest will be advanced, if its ownership shifts in part or entirely to Greyhound.

LEdHN[18] [18] While the history of [\*\*\*37] REA does not in itself provide a blueprint for its future, it does "afford a basis for considering the lawfulness of REA's status and activities, and the economic desirability of its apparent direction of growth." Study, *op. cit. supra*, at 3. That history indicates that there may be some relationship between REA's depressed state and its close ties with railroads. Before acting on this premise, however, the ICC must at least consider the question whether a given course of action will in fact alleviate the problem. If railroad ownership operated in the past to deprive REA of an opportunity to prosper and serve the public interest, it is not inconceivable that partial ownership by Greyhound will have the same result. Greyhound, presumably, is no less likely to act in its own interest. If the railroads operated REA, as appellees contend, to minimize competition for [\*506] transport generally between REA and the railroads, and for express between the railroads themselves and between railroads and other modes of transport, how will partial or complete ownership by Greyhound change

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things? Even if only partial ownership results, may Greyhound and the railroad owners operate [\*\*\*38] REA so as to minimize competition between REA and themselves for transport generally? What effect, for example, would partial ownership by Greyhound have upon the recent efforts of REA to add to its express operations the hauling of larger and more varied volumes of freight, efforts which bring it into competition with Greyhound and other bus lines as well as with truck lines and freight forwarders? Moreover, what assurance is there that REA will not tend to route shipments via Greyhound in preference to more efficient or economical carriers or modes, just as the railroads bound REA to use their lines as opposed to other modes, absent their approval? We assume that REA needs funds and would be better off more independent from the railroads, but before the ICC can use these reasons to justify a diversification of ownership it must at least consider whether the specific action approved may operate to the detriment of REA or the public interest.

**LEdHN[19]** [19] There is, finally, little merit to the Government's argument that deferral of the anticompetitive issues is strongly supported by considerations of administrative [\*\*\*39] convenience. The only circumstance in which the anticompetitive issues may be eliminated from the case is if Greyhound, thwarted at the end of the 60 days in its plans to control REA, were to dispose of its 20% interest. But the ICC can hardly justify deferral of consideration of the consequences of a transaction on the possibility that the problems its approval creates may shortly vanish by a reversal of the transaction itself. Of course, if, as appellees claim, it is most likely that Greyhound will [\*507] acquire no further stock, then consideration of those consequences now would not be wasted effort. And the argument of wasted effort is still less persuasive if appellees are proved wrong and Greyhound does acquire more stock. For the most significant question which the ICC must face is whether it is in the public interest that REA continue to be owned by other transport companies, [\*\*\*921] and specifically by Greyhound. Once this question is resolved as to the 20% stock acquisition, and the consequences of that acquisition are fully weighed, the ICC's task in any subsequent proceeding if Greyhound enlarges its stock interest will be far more manageable.

**LEdHN[20]** [20] We therefore conclude that, although the possibility that Greyhound may not increase its holdings within the 60-day [\*1767] period may justify deferral of resolution of the control issue, it does not justify delay in consideration of the anticompetitive effects of the 20% transaction. The Government was correct in its position before the ICC that this record placed "before the Commission serious questions under section 7 of the Clayton Act," requiring a hearing.

The judgment of the District Court is reversed with direction to enter a new judgment remanding the case to the Interstate Commerce Commission for further proceedings consistent with this opinion.

*It is so ordered.*

**Concur by:** WHITE (In Part)

**Dissent by:** WHITE (In Part); HARLAN

## Dissent

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MR. JUSTICE WHITE, concurring in part and dissenting in part.

I agree with most of the Court's opinion, with its holding that competitive factors must be considered in a § 20a proceeding and with its ruling that a hearing should have been held by the Commission in this case before approving the issuance of the securities by Railway Express Agency, Inc., to Greyhound Corporation. [\*\*\*41]

[\*508] But I am doubtful about those parts of the Court's opinion which indicate that although the public interest requires the consideration of competitive factors in connection with the issuance of stock under § 20a, the public interest also demands that if a lessening of competition is found or threatened within the meaning of § 7 of the Clayton Act, the issuance must be disapproved. Under § 5 of the Interstate Commerce Act, competitive factors must also be considered in determining the public interest, but there a balanced view of the public interest permits the approval of a merger or consolidation despite any actual or probable competitive impact. Mergers which would

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violate § 7 are thus permissible under § 5 if found in the public interest but only those acquisitions of stock which are not suspect under § 7 of the Clayton Act are permissible under § 20a.

In the last analysis the Court rests this rather odd distinction on the Act itself -- that is, Congress is said to have intended this very result because it provided in § 5 (11) that the approval of a transaction under § 5 relieves the parties from antitrust liability and did not so provide in connection with [\*\*\*\*42] § 20a transactions. I do not think, however, that this ends the matter, and I find unconvincing the speculative reasons the Court gives for suggesting that Congress intended any such result.

Much more persuasive to me is the approach of *Pan American World Airways v. United States*, 371 U.S. 296. That case involved the Civil Aeronautics Act of 1938, 52 Stat. 973, re-enacted as the Federal Aviation Act of 1958, 72 Stat. 731, 49 U. S. C. § 1301 et seq., which provided antitrust immunity for transactions approved by the Civil Aeronautics Board under §§ 408, 409, and 412. The course of conduct attacked by the United States under § 1 of the Sherman Act in *Pan American* was not, however, within any of these sections. [\*\*\*922] The Court, nevertheless, held that the conduct was clearly of the kind [\*509] specifically committed to regulation by the Board under other sections of the Act and was unassailable in an independent civil action brought by the United States under § 1 of the Sherman Act.

In the case before us, § 20a (2) provides that it shall be unlawful for any carrier to issue securities unless approved by the Commission [\*\*\*\*43] after finding that the issuance:

"(a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

[\*\*1768] The Commission may grant an application under § 20a in whole or in part with such modifications and on such terms and conditions as the Commission may deem appropriate, and it may from time to time make such supplemental orders with respect to the transaction as it may deem necessary. § 20a (3). Moreover, it is expressly provided that "the jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein." § 20a (7).

Having these powers conferred upon it in the name of the public interest, the Commission may, in my view, approve the issuance of stock [\*\*\*\*44] by a carrier if it deems the public interest requires it even though there may be a probable lessening of competition which otherwise would violate § 7 of the Clayton Act. This seems to be precisely what Congress intended by expressly providing in § 7 of the Clayton Act itself that "Nothing contained in this [\*510] section shall apply to transactions duly consummated pursuant to authority given by the . . . Interstate Commerce Commission . . . under any statutory provision vesting such power in such Commission . . ." 15 U. S. C. § 18.

It makes very little sense to me to hold that a stock acquisition involving control may be approved if the public interest requires it, despite any actual anticompetitive impact, and yet to forbid the approval of an acquisition which falls short of control but which "may" injure competition within the meaning of the Clayton Act.

Thus while I agree that a hearing should be required before the Commission approves the issuance of the securities in this case, I would make it clear that competitive considerations are only some of the factors to be weighed in reaching a decision concerning the public interest, much as the Court [\*\*\*\*45] has viewed the proceedings under § 5. *McLean Trucking Co. v. United States*, 321 U.S. 67. At the very least I would not now decide that the Commission is powerless to approve the issuance of securities under § 20a if it determines that the impact on competition would otherwise be barred by the Clayton Act.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

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This case involves a proposed stock issue by appellee Railway Express Agency, Inc. (REA), of 500,000 [\*\*\*923] shares of previously authorized but unissued shares of its common stock. Under § 20a (2) of the Interstate Commerce Act, 49 U. S. C. § 20a (2), this type of stock transaction must be authorized by the Interstate Commerce Commission, which must determine whether the issue is "for some lawful object within . . . [the applicant's] corporate purposes, and compatible with the public interest . . . ."

[\*511] Under the proposed transactions REA contracted to sell this block of shares for \$ 10,000,000 to the Greyhound Corporation, which would then offer to purchase within a 60-day period an additional 1,000,000 shares from existing stockholders, all of whom [\*\*\*46] are railroads and all of whom hold rights of first refusal as to the sale of existing REA shares. Some of these railroad-stockholders have been opposed to Greyhound's entry into REA and have expressed their intention to exercise their pre-emptive rights. It is undisputed that if Greyhound nevertheless succeeds in purchasing these additional shares it would be in a position to exercise a substantial degree of control over REA, cf. *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 145, and that such control would require the approval of the ICC under § 5 (2) of the Interstate Commerce Act, 49 U. S. C. § 5 (2). It was also alleged by the United States as an intervenor before the ICC that the possible exercise of control by Greyhound over REA and an anticipated [\*\*1769] co-ordination of certain services by the two carriers<sup>1</sup> raised serious antitrust questions under § 7 of the Clayton Act, 15 U. S. C. § 18, which the ICC is bound to enforce as to regulated carriers, Clayton Act § 11, 15 U. S. C. § 21.

[\*\*\*47] The Interstate Commerce Commission did not deal with the substance of these "control" and "antitrust" issues. It found that REA "urgently needs the proceeds of \$ 10,000,000 . . .,"<sup>2</sup> and that it was not necessary, given [\*512] the uncertainty as to the future relationship of Greyhound and REA, to deal with the control issue at that time. The Commission noted specifically that "if in the future the acquisition of control or power to control, or other matter or transaction to which section 5 of the act applies, becomes imminent or apparent, the opportunity will be available for all interested persons to interpose their opposition . . . ."

[\*\*\*48] On review, a three-judge District Court for the District of Colorado sustained the Commission's order, 255 F.Supp. 704. It read the ICC's decision, as does this Court, as saying only "that in the circumstances presented the public interest requires the issuance of the stock and [\*\*\*924] that determination of the competitive effects will be appropriate for consideration after the chain of events started by the stock issuance is ascertainable rather than conjectural." *Id., at 709*. The District Court then held that "in the circumstances it is not our prerogative to interfere with what we deem to be a reasonable exercise by the Commission of its discretionary powers." *Id., at 710*.

I would affirm this judgment of the District Court, and therefore must dissent from today's decision. The Court holds that "the ICC is required, as a general rule, under its duty to determine that the proposed transaction is in the 'public interest' and for a 'lawful object,' to consider the control and anticompetitive consequences before approving stock issuances under § 20a (2)." *Ante*, p. 498. The Court notes, however, that "this does not [\*513] [\*\*\*49] mean the ICC must grant a hearing in every case, or that it may never defer consideration of issues which arise when special circumstances are present," *ibid.*, but concludes that while it was not an abuse of discretion to defer consideration of the "control" question raised by the intervenors, it was improper to refuse to deal with the "anticompetitive" issues at this stage. I believe that this decision misapplies the relevant statutes and seriously impedes sound administrative practice.

<sup>1</sup>The Commission found that REA had agreed "to consider seriously and work toward a long-term agreement between applicant [REA] and Greyhound to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage . . . ." A "Memorandum of Understanding" between an official of each of the two companies contained some suggested methods for achieving these goals.

<sup>2</sup>The ICC's order dealing with the legitimacy of this transaction said: ". . . applicant urgently needs the proceeds of \$ 10,000,000 in its program of acquiring and modernizing terminals and equipment in order to keep operating costs at a reasonable level; that it is handicapped in borrowing to finance capital improvements because of its unfavorable debt-equity ratio; that the proposed issue will improve its ratio as well as reduce to some extent the amount of future borrowing required; that the price of \$ 20 per share is fair and reasonable; and that the expenses of the issue are estimated at \$ 15,000 . . . ."

## I.

Section 20a (2) of the Interstate Commerce Act is concerned with new stock issues. Congress' dominant concern was "to maintain a sound structure for the . . . support of railroad credit," [\[\\*\\*1770\]](#) 1 Sharfman, The Interstate Commerce Commission 190 (1931),<sup>3</sup> and nothing in the legislative background of the section indicates that the words "for some lawful object within its corporate purposes, and compatible with the public interest" were intended to encompass issues of antitrust law. Of course the phrase "the public interest" is broad, and in the context of other legislation comparable terms [\[\\*514\]](#) have been held to embrace antitrust matters. E. g., Federal Communications Act, [\[\\*\\*\\*\\*50\] § 307](#), 48 Stat. 1083, [47 U. S. C. § 307](#), as construed in [FCC v. RCA Communications, Inc., 346 U.S. 86](#). But the mere inclusion of such language in this instance is not the end of our inquiry, for § 20a must be read in its entirety and interpreted in conjunction with other sections of the Act.

[\[\\*\\*\\*\\*51\]](#) In contrast to § 20a, which by its detailed and explicit terms deals only with the problem of fiscal responsibility,<sup>4</sup> [\[\\*\\*\\*\\*52\]](#) § 5 of the Act, enacted [\[\\*\\*\\*925\]](#) at the same time,<sup>5</sup> deals specifically with problems of "control." Indeed, the standards laid out in § 5 are directly relevant to the various factual issues hypothesized by the Court in Part IV of its opinion. Section 5 does not deal solely with transfers of shares, but with any lease or contract between two carriers for the operation of their properties, §§ 5 (2) (a)(i), 5 (4); see [\[\\*515\] Gilbertville Trucking Co. v. United States, 371 U.S. 115, 125](#). It would thus appear that any type of agreement between Greyhound and REA for the integration of their operations would -- with or without the sale of shares -- fall within the purview of § 5.

Section 5 not only deals explicitly with problems of control, but it establishes the public interest criteria which the ICC is bound to use in making that type [\[\\*\\*1771\]](#) of inquiry. For example, the Commission must consider "(1) The effect of the proposed transaction upon adequate transportation service to the public; . . . (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." § 5 (2) (c). This Court has recognized that standards of market control in the transportation industry are different from those governing other business transactions: the ICC must take account of antitrust policy in judging the control questions under § 5, [McLean Trucking Co. v. United States, 321 U.S. 67](#), but this interest is simply one of the relevant criteria, and if on balance the Commission finds a proposed undertaking to be in the public interest the statute authorizes a grant of antitrust immunity to the transaction. § 5 (11); [\[\\*\\*\\*\\*53\] Seaboard Air Line R. Co. v. United States, 382 U.S. 154; Minneapolis & St. L. R. Co. v. United States, 361 U.S. 173; McLean Trucking Co. v. United States, supra.](#) Section 5 thus covers fully the problems of control; likewise, the antitrust issues are dealt with

<sup>3</sup>The "public interest" of concern to Congress was the problem of watered stock. See, e. g., statement of Congressman Rayburn: ". . . if we write into the law of the land a statute to the effect that before a railroad can issue new securities, before it can put them on the market, it must come before the properly constituted governmental agency, lay the full facts of its financial situation before that body, tell that body what it intends to do with the money derived from the sale of the issue of securities, and after it has received the approval of that regulating body and it goes out and puts those securities on the market, then the Interstate Commerce Commission by this law is empowered at any time to call it to account and have it tell to that regulating body that it expended the money, the proceeds of the sale of securities, for the purposes for which it had made the application." 58 Cong. Rec. 8376 (1919). See also statement of Congressman Esch, *id.*, at 8317-8318. See generally MacVeagh, The Transportation Act of 1920, at 486-492 (1923).

<sup>4</sup>Section 20a (2) reads in its entirety: "It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

<sup>5</sup>Both sections were parts of the Transportation Act of 1920, 41 Stat. 480, 494.

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specifically in § 11 of the Clayton Act, which authorizes the ICC to enforce § 7 of that Act, forbidding the acquisition of stock the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." Hence these sections, and not § 20a, are the substantive provisions governing the Commission's jurisdiction in respect to the anticompetitive aspects of this case.

[\*516] For procedural reasons, too, § 20a seems inappropriate as a vehicle to [\*\*\*926] replace or augment § 5 of the Interstate Commerce Act and §§ 7 and 11 of the Clayton Act. When a carrier applies for authorization to issue stock, the Commission must give notice to the various States in which the carrier operates so that relevant state regulatory agencies, which also supervise the finances and corporate structure of these companies, may raise objections to the proposed [\*\*\*\*54] transaction. The Commission need not, however, hold a hearing before approving the transaction. § 20a (6). In contrast, when the ICC deals with problems of control under § 5, it is bound not only to notify the various state authorities but also to "afford reasonable opportunity for interested parties to be heard." § 5 (2)(b). And § 11 of the Clayton Act requires the Commission to notify the Attorney General if it believes that any carrier is violating § 7, and the Attorney General has the statutory right to intervene in the mandatory hearing on the question.

Given the complexities of control and antitrust problems in the transportation field, and given the specific and detailed provisions of the statute in § 5, and in § 11 of the Clayton Act, devoted particularly to them, it seems to me quite evident that the sounder view of the statutory scheme is to regard § 20a as being limited to matters of corporate financing and § 5 and § 7 as being the source of the Commission's authority and duty to deal with these other matters.

None of the Commission cases cited by the Court in support of its position that § 20a was envisioned as also encompassing control and antitrust considerations [\*\*\*55] is apposite. *Columbia Terminals Co. -- Issuance of Notes*, 40 M. C. C. 288, dealt, as the Court notes, with § 10 of the Clayton Act, 15 U. S. C. § 20, which specifically requires common carriers in certain situations to sell securities "by competitive bidding under regulations to be prescribed by [\*517] rule or otherwise by the Interstate Commerce Commission." The ICC merely held that this statute had not been repealed by § 20a. The general language cited by the Court from *Stock of New Jersey, I. & I. R. Co.*, 94 I. C. C. 727, was written in a case in which the issue was whether the applicant railroad could pay an indebtedness to its sole stockholder, another railroad, through a distribution of stock as a dividend. The ICC held this method of financing acceptable; antitrust considerations were in no way involved.

[\*\*1772] The third ICC decision cited by the Court, *Chesapeake & O. R. Co. Purchase*, 271 I. C. C. 5, would seem, if anything, inconsistent with its view of § 20a. There the Commission was requested to approve an interlocking directorate, which is forbidden unless authorized by the Commission [\*\*\*56] pursuant to § 20a (12) of the Interstate Commerce Act, 49 U. S. C. § 20a (12). In making its decision the Commission did not incorporate § 5 control standards into § 20a (12). Quite the contrary, it noted that "the policy of the Congress as to consolidations, mergers, and other forms of corporate unification and association is now to be found in the provisions of section 5," *id.*, at 12; that no application under § 5 (2) had been filed; and that "it follows that the evidence pertaining to control of the New York Central or ultimate unification of the two carriers is irrelevant to the principal issues before us, and may not be considered in disposing of those issues." *Ibid.* The Commission then determined, under its established standards for judging the acceptability of an interlocking [\*\*\*927] directorate, *id.*, at 18, that such an authorization would be improper, but observed that "if the applicants are firmly of the opinion that the proposed association will result in the benefits to the carriers and to the public which they contend we should find on the showing that they have made in this proceeding, there is [\*\*\*57] no reason why they should not [\*518] file an application for some form of association under section 5 (2) of the act." *Id.*, at 41-42.

The lack of authority for the Court's view of § 20a is not limited to administrative decisions. In the complex *Alleghany Corp.* litigation, summarized by the Court, *ante*, pp. 497-498, this Court sustained the ICC's determination that it could act upon a § 20a application without involving itself in difficult issues of intercorporate control as the District Court had ordered. The protracted and tangled character of that litigation, until resolved in the interests of simplicity by this Court's affirmance of the ICC's approach, should be a warning of the unfortunate consequences that may follow judicial requirements complicating and proliferating administrative hearings in

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unfamiliar fields; this is especially so where there are, as here, numerous parties some of whom have a strong interest in achieving delay.

## II.

Although not accepting the reading of the Act which I have urged, the Court nonetheless appears to recognize that the issue of "control" is a separate one from that of financial regularity, and one that [\*\*\*\*58] can appropriately be dealt with in a separate and subsequent proceeding. Since the Court also acknowledges, as it must, that at this later hearing REA and Greyhound may request a § 5 (11) exemption, and thus bring into play all the standards of § 5, I find the Court's insistence that this issue falls within the purview of § 20a rather than § 5 essentially an academic one. The ICC will still be able to conduct its hearings just as it wished to do here, except that its subsequent "§ 5 proceeding" will henceforth be labeled a "§ 20a and § 5 proceeding."

Given the Court's recognition that the ICC has discretion to postpone the "control" determination, I find [\*519] it difficult to accept its argument that "antitrust" factors may not similarly be postponed.

It should be recalled that the only matter raised in this application is REA's desire to issue 500,000 shares of its stock to "a non-railroad purchaser," which concededly would bring to the issuer capital funds required for investment purposes. Under the proposed transaction, after Greyhound purchases these shares it will extend an offer to purchase within 60 days an additional 1,000,000 shares, as to which other shareholders [\*\*\*\*59] hold rights of first refusal. All parties are in agreement that control and antitrust problems will be raised if Greyhound is ultimately successful in effecting these [\*\*1773] additional purchases. The only question is whether the Commission can leave these questions for a later determination. Because of the uncertainty as to the outcome of the further stock purchase offer, the Court agrees that postponement of the control issue was proper. But this uncertainty is equally crucial to the Clayton Act issues. The likelihood of a Clayton Act violation will of course be increased if Greyhound obtains these additional shares and is in a position to control, and to consolidate operations with, REA. On [\*\*\*928] the other hand, if the shares are bought by some of the appellants whose interests appear to be adverse to Greyhound, the possibility of substantial harm to competition will be minimal. The core of the Clayton Act question, then, is inexorably tied to the control question, and the Court does not deny that these problems overlap. In these circumstances I find it impossible to follow the Court in holding, on the one hand, that the control hearing was permissibly postponed, [\*\*\*\*60] but, on the other, that the ICC abused its discretion in similarly deferring any Clayton Act hearing.

To require such a proliferation of hearings as to a single transaction -- one involving a straightforward business [\*520] transaction negotiated in terms of existing market conditions and the existing needs of the parties -- is bound to obstruct the smooth workings of the administrative process. The penetrating observations of Professor Jaffe seem to me especially pertinent in this situation:

"I gather the impression that some judges who quite insistently display a 'correct' attitude of deference on substantive issues apply a different standard to procedural decisions: they do not hesitate to protract and to complicate the administrative process. Their premise may be that the considerations that dictate deference to substantive decisions are inapplicable to procedural ones. This is only partly true. . . . Since procedural decisions should be made to serve the substantive task, it follows that expertness in matters of substance are relevant to the exercise of procedural discretion.

". . . [An agency] must ration its limited resources of time, energy and money. It [\*\*\*\*61] must devote them to those exigent and soluble problems which are most nearly related to its core responsibility. What problems are most exigent, how they can best be solved . . . are questions the solution to which peculiarly demands a feeling for the whole situation. . . . If a court is not as well fitted to solve substantive problems as the agency, if on this level intermittent, disjunct criticism disperses accountability, how much more is this true where the deployment of forces is involved." Jaffe, *Judicial Control of Administrative Action* 566-567 (1965).

The courts have traditionally permitted busy agencies substantial flexibility in formulating their internal procedures, and encouraged their efforts to eliminate duplicative action and repetitive hearings. See, e. g., *Chicago & N. W. R. Co. v. Atchison, T. & S. F. R. Co., ante*, pp. 341-343; [\*521] [\*Federal Power Comm'n v. Tennessee Gas Co., 371\*](#)

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U.S. 145, 153-155, where the Court approved a "two-step procedure" as "not only entirely appropriate but in the best tradition of effective administrative practice"; United States v. Pierce Auto Lines, 327 U.S. 515, 534-536; [\*\*\*62] Baltimore & O. R. Co. v. United States, 386 U.S. 372, 459 (dissenting opinion); cf. Fahey v. Mallonee, 332 U.S. 245; Opp Cotton Mills v. Administrator, 312 U.S. 126, 152-154; United States v. Illinois Central R. Co., 291 U.S. 457.

[\*\*1774] The allowance of such flexibility, and the exercise of prudence by the courts, is especially appropriate where, as here, the issue is not [\*\*\*929] whether to hold a hearing but when to do so, and where there has been no showing that harm would come from deferring consideration of the antitrust issues. This is not a case in which a merger is about to be consummated, and in which it might be feared that the integration of two businesses will be impossible to "unscramble" at some future time. Compare FTC v. Dean Foods Co., 384 U.S. 597. These issues concern, as the Court's parade of speculative examples indicates, *ante*, pp. 505-506, the implications of a possible future co-ordination of some carrier services between REA and Greyhound. But these matters will only crystallize for purposes of legal analysis when it is ascertained [\*\*\*\*63] (1) what type of control, if any, Greyhound will have over REA; and (2) what type of co-ordinated activities are planned. None of these issues has been prejudged, and provisional relief can be granted by the Commission, if necessary, §§ 5 (2), (7), (9); cf. Gilbertville Trucking Co. v. United States, 371 U.S. 115, 129-131. The district courts likewise have authority to grant injunctive relief on application of the Commission. § 5 (8).

In these circumstances I do not believe it was an abuse of discretion for the ICC to authorize the issuance [\*522] of stock, postponing consideration of the control and antitrust issues until the transaction was completed some 60 days later. It is regrettable that the Court's preoccupation with the future antitrust possibilities of this situation, fully acknowledged by all but still entirely speculative, should have led it to interfere, so unnecessarily, with the obviously sensible course of procedure adopted by the Commission.

I would affirm the judgment of the District Court.

## References

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13 Am Jur 2d, Carriers 36

US Digest Anno, Interstate Commerce Commission 39, 41

ALR [\*\*\*64] Digests, Interstate Commerce Commission 2, 5-8

L ed Index to Anno, Interstate Commerce Commission

ALR Quick Index, Carriers

Annotation References:

Construction, by Supreme Court of the United States, of 7 of the Clayton Act (15 USC 18), dealing with acquisition by one corporation of stock of another. 14 L ed 2d 784.



## Kaplan v. Lehman Bros.

Supreme Court of the United States

November 13, 1967, Decided

No. 197

### **Reporter**

389 U.S. 954 \*; 88 S. Ct. 320 \*\*; 19 L. Ed. 2d 365 \*\*\*; 1967 U.S. LEXIS 2997 \*\*\*\*; 1967 Trade Cas. (CCH) P72,272

KAPLAN ET AL. v. LEHMAN BROTHERS ET AL.

**Prior History:** [\*\*\*\*1] C. A. 7th Cir. Reported below: [371 F.2d 409](#).

## **Core Terms**

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rates, anti trust law, Stock, Securities Exchange Act, shares

**Counsel:** Anthony Bradley Eben and Peyton Ford for petitioners. Hammond E. Chaffetz for respondents Lehman Brothers et al., and John T. Chadwell and Richard M. Keck for respondent New York Stock Exchange.

## **Opinion**

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[\*954] [\*\*\*365] Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.

**Dissent by:** WARREN

## **Dissent**

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MR. CHIEF JUSTICE WARREN, dissenting.

This is no ordinary case. It is of utmost importance to millions of investors, and concerns practices which have an impact on the entire economy of the Nation. It presents for consideration basic principles of antitrust law not previously decided by this Court, and, consequently, is not controlled by precedent. It comes here without representation of the public interest by an agency charged with enforcement of the antitrust laws.

This case draws into question the legality under the Sherman Act of the practice of the New York Stock Exchange in adopting rules fixing minimum rates for the commissions charged by Exchange members for the purchase and sale of securities on the Exchange. Petitioners brought this action pursuant [\*\*\*\*2] to § 4 of the Clayton Act, 38 Stat. 731, [15 U. S. C. § 15](#), derivatively on behalf of five mutual fund investment companies of which they are shareholders and representatively on behalf of other shareholders against the New York Stock Exchange and five of its member firms. Their complaint charges that the practice of the Exchange in fixing minimum commission rates for transactions in securities listed on the Exchange constitutes a price-fixing conspiracy under [§ 1](#) of the Sherman Act, 26 Stat. 209, as amended, [15 U. S. C. § 1](#). They sought treble damages, a declaratory judgment, and an injunction, the effect of which would be to restrain the Exchange from interfering with the rights of individual Exchange members to set their [\*955] own competitive rates of commission. The District Court granted summary judgment for the Exchange and member firms. The Court of Appeals for the Seventh Circuit affirmed.

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Members of the New York Stock Exchange transact over 90% of all brokerage business in stocks in the United States. Based on the current trading volume, the investing public is now paying over \$ 1,200,000,000 annually, at the uniform [\*\*\*3] minimum rate, for the privilege of trading on the Exchange. More than 12,000,000 persons own shares listed on the Exchange. Mutual investment funds pay about \$ 100,000,000 annually in commissions to trade on the Exchange, and over 3,000,000 persons own shares in mutual funds.

Only members can trade on the New York Stock Exchange, and its constitution severely limits membership. Exchange rules set uniform minimum commission rates to be charged by members for transactions on the Exchange. The same commission rate is charged, based [\*\*322] on the value of the round lot (100 shares), for each transaction regardless of size; the commission on an order for 10,000 shares is 100 times that on an order for 100 shares. Exchange rules prohibit any "member, [\*\*\*366] allied member, member firm or member corporation" from making "a proposition for the transaction of business at less than the minimum rates of commission." Before a member is allowed trading privileges he must sign a pledge to abide by the constitution and rules of the Exchange, and any member or allied member adjudged guilty of violating the constitution or a rule may be suspended or expelled by the Board of Governors.

[\*\*\*4] This Court has long held that rates fixed by agreement are unreasonable *per se*. *United States v. National Assn. of Real Estate Boards*, 339 U.S. 485, 489 (1950); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-398 [\*9561] (1927). Therefore, the Exchange practice here attacked, just as that in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), would, "had it occurred in a context free from other federal regulation, constitute a *per se* violation of § 1 of the Sherman Act." *Id.*, at 347. Here, as in *Silver*, the other federal regulatory scheme is the Securities Exchange Act of 1934, and the clear question presented is whether there is anything "built into the regulatory scheme which performs the antitrust function . . ." *Id.*, at 358.

Section 19 (b) of the Securities Exchange Act, 48 Stat. 898, 15 U. S. C. § 78s (b), authorizes the SEC by certain procedures "to alter or supplement the rules" of the Exchange "in respect of such matters as . [\*\*\*5] . . (9) the fixing of reasonable rates of commission . . ." Respondents contend that this provision sufficiently demonstrates the SEC performs a supervisory function in respect of the Exchange's rate-fixing to exempt the practice from review under the antitrust laws. Petitioners claim that for many reasons the possibility of SEC review is an insufficient substitute for application of the antitrust laws. For example, the SEC's review of rates is discretionary. Further, the regulatory scheme fails specifically to enjoin the SEC, in determining what rates are reasonable, to "enforce the competitive standard," *United States v. Philadelphia National Bank*, 374 U.S. 321, 351 (1963), and furthermore neither the SEC nor the Exchange has ever articulated any standard of reasonableness. Petitioners also claim that the underlying data used by the SEC in reviewing each of the five rate increases since 1934 have been essentially those supplied by the Exchange, and have been very limited in scope and content. Finally, they claim that if and when the SEC exercises its discretion to review rates, it is not required to hold a hearing, and because the matter is committed to [\*\*\*6] the [\*957] SEC's discretion, there is no effective [\*\*\*367] judicial remedy to require it to initiate a rate proceeding.

If, as petitioners claim, the regulatory scheme provides no assurance that antitrust policy will be implemented, perhaps a repeal of the antitrust law may be implied "if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." *Silver v. New York Stock Exchange, supra, at 357*. However, "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored." *United States v. Philadelphia National Bank, supra, at 350*. Moreover, petitioners claim that nothing about the Securities Exchange Act or the workings of the Exchange requires that the Exchange set minimum rates.

The court below, in a two-page opinion, held that a repeal of the antitrust laws was required to make the Securities Exchange Act work, and that "the self-regulatory function of the exchange has been exercised by virtue of § 19 (b)," *371 F.2d, at 411*. In my view, this blunderbuss approach falls far short of the close analysis and delicate weighing process mandated [\*\*\*7] by this Court's opinion in *Silver*.

The importance of the New York Stock Exchange in the functioning and livelihood of this Nation cannot be gainsaid. Ever-increasing millions of persons and billions of dollars are affected by the Exchange's practices. Without

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expressing any final view on the merits of the controversy, I am concerned that the law on this subject is to be permitted to lie where it has aimlessly fallen by virtue of the scanty opinion below. In my judgment, the claims advanced by petitioners raise important questions not only as to the compatibility of the Exchange's rate-fixing practice with this Nation's commitment, embodied in the antitrust laws, to competitive pricing, [\*958] but also as to the fulfillment of the goal of investor protection embodied in the securities laws.

I would grant certiorari and invite the Solicitor General to participate in argument so that the public interest may be fully explored.

End of Document

## **United States v. Third Nat'l Bank**

Supreme Court of the United States

December 11, 1967, Argued ; March 4, 1968, Decided

No. 86

**Reporter**

390 U.S. 171 \*; 88 S. Ct. 882 \*\*; 19 L. Ed. 2d 1015 \*\*\*; 1968 U.S. LEXIS 2904 \*\*\*\*; 1968 Trade Cas. (CCH) P72,372

UNITED STATES v. THIRD NATIONAL BANK IN NASHVILLE ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE.

**Disposition:** [260 F.Supp. 869](#), reversed and remanded.

### **Core Terms**

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merger, district court, banks, convenience, public interest, bank merger, antitrust, Clayton Act, merging, anticompetitive, factors, largest, lessen competition, outweighed, benefits, consummated, managerial, weighing, courts, loans, Sherman Act, recruiting, appraised, deposits, effects, judging, lending

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

**[HN1](#)**  **Regulated Industries, Financial Institutions**

See [12 U.S.C.S. § 1828\(c\)](#).

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Antitrust & Trade Law > Sherman Act > Defenses

Banking Law > Commercial Banks > Bank Expansions > General Overview

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

## **HN2** Financial Institutions, Bank Mergers

The Bank Merger Act, [12 U.S.C.S. § 1828\(c\)](#), provides for continued scrutiny of bank mergers under the Sherman Act and the Clayton Act, but creates a new defense, with the merging banks having the burden of proving that defense.

Banking Law > Regulators > General Overview

Mergers & Acquisitions Law > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Banking Law > Commercial Banks > Bank Expansions > General Overview

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

## **HN3** Banking Law, Regulators

The task of the district courts, in scrutinizing a bank merger under the Bank Merger Act, [12 U.S.C.S. § 1828\(c\)](#), is to inquire de novo into the validity of a bank merger approved by the relevant bank regulatory agency to determine, first, whether the merger offended the antitrust laws and, second, if it did, whether the banks had established that the merger was nonetheless justified by the convenience and needs of the community to be served.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > Commercial Banks > Bank Expansions > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

## **HN4** Financial Institutions, Bank Mergers

Congress intended bank mergers under the Bank Merger Act, [12 U.S.C.S. § 1828\(c\)](#), first to be subject to the usual antitrust analysis; if a merger fails that scrutiny, it is to be permissible only if the merging banks can establish that the merger's benefits to the community would outweigh its anticompetitive disadvantages.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > Commercial Banks > Bank Expansions > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

#### [\*\*HN5\*\*](#) **Financial Institutions, Bank Mergers**

The purpose of the Bank Merger Act, [12 U.S.C.S. § 1828](#), is to permit certain bank mergers even though they tend to lessen competition in the relevant market.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

#### [\*\*HN6\*\*](#) **Regulated Industries, Financial Institutions**

If a merger poses a choice between preserving competition and satisfying the requirements of convenience and need, the injury and benefit are to be weighed and decision is to rest on which alternative better serves the public interest.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > Commercial Banks > Bank Expansions > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

#### [\*\*HN7\*\*](#) **Financial Institutions, Bank Mergers**

Under the Bank Merger Act, [12 U.S.C.S. § 1828](#), a much smaller risk of failure than that required by the failing company doctrine is sufficient to justify the rather radical preventive step of an anticompetitive merger.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

**HN8** [down] **Regulated Industries, Financial Institutions**

Securing better banking service for the community is a proper element for consideration in weighing convenience and need against the loss of competition.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > Commercial Banks > Bank Expansions > General Overview

**HN9** [down] **Regulated Industries, Financial Institutions**

The Bank Merger Act, [12 U.S.C.S. § 1828](#), directs the agencies and the courts to consider managerial as well as financial resources in weighing a proposed merger.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > Commercial Banks > Bank Expansions > General Overview

**HN10** [down] **Regulated Industries, Financial Institutions**

The Bank Merger Act, [12 U.S.C.S. § 1828](#), requires that the "future prospects of the existing and proposed institutions" be appraised. Part of such appraisal, where managerial deficiencies exist, is determining whether the merging bank is capable of obtaining its own improved management.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Mergers & Acquisitions Law > General Overview

**HN11** [down] **Regulated Industries, Financial Institutions**

Before a merger injurious to the public interest is approved, a showing must be made that the gain expected from the merger cannot reasonably be expected through other means.

## **Lawyers' Edition Display**

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### **Summary**

Under the Bank Merger Act of 1966, which authorizes approval of a merger having anticompetitive effects if it is determined that such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, the Comptroller of the Currency approved a merger between the second and fourth largest banks of Nashville, Tennessee. Thereafter, the United States instituted an action in the United States District Court for the Middle District of Tennessee, challenging the merger under 7 of the Clayton Act. The District Court upheld the merger on the basis that the merger would not tend substantially to lessen competition and also that any anticompetitive effect would be outweighed by the convenience and needs of the community, finding, *inter alia*, that the smaller bank had a high percentage of unsound loans, that its rating had been changed from "satisfactory" to "fair," and that its problems resulting from unsatisfactory and backward management would be solved by the merger. ([260 F Supp 869](#).)

On direct appeal, the Supreme Court of the United States reversed and remanded the case for further proceedings. In an opinion by White, J., expressing the view of five members of the court, it was held that (1) the lower court erred in concluding that the merger did not offend antitrust standards, since it was established that the merged bank had 40 percent of the city's banking business and that the smaller bank, which had been operating profitably and was not shown to be a failing company, had previously been an important competitive element in certain facets of city banking, (2) the District Court had misunderstood the weight to be given the relevant factors under the convenience-and-need provision of the Bank Merger Act of 1966, and had erred in holding that the anti-competitive effects of the merger were outweighed by the benefits to the community, since there were no findings of the unavailability of alternative solutions other than merger for solving the problems of the smaller bank, and (3) the case should be remanded for reconsideration of the application of the Bank Merger Act to the facts, particularly since the District Court had erroneously concluded that the merger would not tend to lessen competition and a proper conclusion as to the merger's anticompetitive effect was necessary to weigh adequately such effect against the asserted benefits to the community.

Harlan, J., joined by Stewart, J., concurred in part and dissented in part, agreeing that a violation of the Clayton Act by the merger was established, and that the case should be remanded for a new application of the balancing process under the Bank Merger Act, but concluding that the District Court had made adequate findings that the benefits to the community from the merger could not reasonably have been achieved in other ways, and that the only question for the District Court on remand should be whether the antitrust violation should yield to other factors bearing on public convenience and needs.

Fortas and Marshall, JJ., took no part in the consideration or decision of the case.

## Headnotes

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BANKS §3.5 > mergers -- > Headnote:

[LEdHN\[1\]](#) [1]

The Bank Merger Act of 1966 ([12 USC 1828\(c\)](#)) was passed to make substantial changes in the law applicable to bank mergers, the statute being more clear, however, in prescribing new procedures for testing mergers than in expounding the new standard by which they should be judged.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §93 > bank merger -- scope of review --

> Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

In an action by the government challenging under 7 of the Clayton Act ([15 USC 18](#)) a merger of two banks that had been approved by the Comptroller of the Currency under the Bank Merger Act of 1966 ([12 USC 1828\(c\)](#)), which provides that a bank merger having anticompetitive effects shall not be approved unless it is determined that such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, the District Court must review the issues in the case de novo, rather than by a determination of whether the Comptroller's findings are supported by substantial evidence.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §20 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > bank mergers -- antitrust standard -- relevant market --

> Headnote:

[LEdHN\[3A\]](#) [3A] [LEdHN\[3B\]](#) [3B]

Under the Bank Merger Act of 1966 ([12 USC 1828\(c\)](#)), which provides that a bank merger having anticompetitive effects shall not be approved unless it is determined that such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, there is no intention to adopt a different "antitrust standard" for bank cases than that used generally in the law, and no intention to alter the traditional methods of defining relevant markets in which to appraise the anticompetitive effect of a merger; Congress intended bank mergers first to be subject to the usual antitrust analysis, and if a merger fails that scrutiny, it is permissible only if the merging banks can establish that the merger's benefits to the community will outweigh its anticompetitive disadvantages.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > bank merger -- relevant market --

> Headnote:

[LEdHN\[4A\]](#) [4A] [LEdHN\[4B\]](#) [4B]

In an action by the government challenging under 7 of the Clayton Act ([15 USC 18](#)) a merger of two banks that had been approved by the Comptroller of the Currency under the Bank Merger Act of 1966 ([12 USC 1828\(c\)](#)), which provides that a bank merger having anticompetitive effects shall not be approved unless it is determined that such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, commercial banking in the county where the banks are located is the relevant market for appraising the anticompetitive effect of the merger.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > bank merger -- anticompetitive effect -

- > Headnote:

[LEdHN\[5\]](#) [5]

In an action by the government challenging under 7 of the Clayton Act ([15 USC 18](#)) a merger of two banks that had been approved by the Comptroller of the Currency under the Bank Merger Act of 1966 ([12 USC 1828\(c\)](#)), which provides that a bank merger having anticompetitive effects shall not be approved unless it is determined that such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, the District Court errs in concluding that the merger does not offend antitrust standards, and the tendency of the merger substantially to lessen competition is established, where (1) the city's only middle-sized bank was absorbed by the second largest of the city's three big banks, giving the merged bank 40 percent of the city's banking business and increasing the market share of the three largest banks from 93 to 98 percent, (2) the middle-sized bank had been an important competitive element in certain, though not in all, facets of city banking, having offered somewhat different services at somewhat different rates, and (3) during a period of approximately 8 years before the merger, the middle-sized bank had been operated profitably, the absolute size of its business increasing steadily, and there being nothing to permit a conclusion that it was in any way a "failing" company.

APPEAL §1692.2 > APPEAL §1699 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR, TRADE PRACTICES §34.5  
 > bank merger -- benefit to community -- > Headnote:

[LEdHN\[6A\]](#) [6A] [LEdHN\[6B\]](#) [6B]

In an action by the government challenging under 7 of the Clayton Act ([15 USC 18](#)) a merger of two banks that had been approved by the Comptroller of the Currency under the Bank Merger Act of 1966 ([12 USC 1828\(c\)](#)), which provides that a bank merger having anticompetitive effects shall not be approved unless it is determined that such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, the District Court misapplies the convenience-and-need provision of the Act, misunderstands the weight to be given the relevant factors, and errs in holding that any anticompetitive effects of the merger were sufficiently outweighed by the benefits to the community from the merger, where (1) the finding that the combined bank would have a greater lending capacity is entitled to very little weight, absent findings showing the beneficial consequences for the community, (2) although the District Court found that the smaller bank involved in the merger had a high percentage of unsound loans and that its rating had been changed from "satisfactory" to "fair," there were no findings as to the feasibility of curative measures short of merger or as to whether there was any danger of failure of the bank in the foreseeable future, the court's general finding that the merger was "a business necessity" not establishing the possibility of eventual failure, and (3) although the smaller bank had significant problems resulting from unsatisfactory and backward management, which problems would probably be ended by the merger, it was incumbent upon those seeking to merge to demonstrate that they had made reasonable efforts to solve the management problems by steps short of merger or that such efforts would have been unlikely to succeed, and the findings did not establish the unavailability of alternative solutions; the case must be remanded so that the District Court may consider again the application of the Bank Merger Act to the facts of the merger, particularly where the court had erroneously concluded that the merger would not tend to lessen competition, a proper conclusion as to the merger's anticompetitive effect being necessary to weigh adequately such effect against the asserted benefits to the community from the merger.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > Bank Merger Act of 1966 -- purpose --> Headnote:

[LEdHN\[7\]](#) [7]

The purpose of the Bank Merger Act of 1966 ([12 USC 1828\(c\)](#)), which provides that a bank merger having anticompetitive effects shall not be approved unless it is determined that such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, is to permit certain bank mergers even though they tend to lessen competition in the relevant market, the public interest being the ultimate test imposed.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > bank merger -- better service for community -- > Headnote:

[LEdHN\[8\]](#) [8]

In an action challenging the validity of a merger of banks under 7 of the Clayton Act ([15 USC 18](#)), securing better banking service for the community is a proper element for consideration in weighing convenience and need against the loss of competition under the Bank Merger Act of 1966 ([12 USC 1828\(c\)](#)), which provides that a bank merger having anticompetitive effects shall not be approved unless it is determined that such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served; if the gains in better service outweigh the anticompetitive detriment and the merger is essential to secure such net gain to the public interest, the merger should be approved, but if the injury to the public

interest flowing from the loss of competition can be avoided and the convenience and needs of the community benefited in ways short of merger but within the competence of reasonably able businessmen, the merger should not be approved.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > bank merger -- managerial deficiencies -- > Headnote:

[LEdHN\[9\]](#) [9]

In an action by the government challenging under 7 of the Clayton Act ([15 USC 18](#)) a merger of two banks that had been approved by the Comptroller of the Currency under the Bank Merger Act of 1966 ([12 USC 1828\(c\)](#)), which provides that a bank merger having anticompetitive effects shall not be approved unless it is determined that such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, taking into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, appraisal of the factor that managerial deficiencies of the merging bank will be cured by the merger includes determining whether the merging bank is capable of obtaining its own improved management, and before a merger is approved, a showing must be made that the gain expected from the merger cannot reasonably be expected through other means.

EVIDENCE §343.5 > EVIDENCE §979 > antitrust action -- bank merger -- burden and sufficiency of proof -- > Headnote:

[LEdHN\[10\]](#) [10]

In an action by the government challenging under 7 of the Clayton Act ([15 USC 18](#)) a merger of two banks that had been approved by the Comptroller of the Currency under the Bank Merger Act of 1966 ([12 USC 1828\(c\)](#)), which provides that a bank merger having anticompetitive effects shall not be approved unless it is determined that such effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served, the burden of showing that the anticompetitive merger would be in the public interest because of the benefits it would bring to the convenience and needs of the community to be served rests on the merging banks, and a showing that one bank needed more efficient management, absent a showing that the alternative means for securing such management without a merger would present unusually severe difficulties, does not satisfy such burden.

## Syllabus

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Third National Bank in Nashville and Nashville Bank and Trust Co., the second and fourth largest banks in Davidson County, Tennessee, merged on August 18, 1964. After the merger the three largest banks had 97.9% of the total bank assets in the county, and the two largest banks had 76.7%. The Government's suit challenging the merger had not come to trial when the Bank Merger Act of 1966 took effect, on February 21, 1966. The Act did not provide antitrust immunity for the merger but did state that courts "shall apply the substantive rule of law set forth" in the Act to pending cases. Section 5 of the Act prohibits approval of a merger whose effect "may be substantially to lessen competition" unless the anticompetitive effects "are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." The District Court asserted that the Act altered [\*\*\*\*2] the standards used in determining whether a merger violated § 7 of the Clayton Act and [§ 1](#) of the Sherman Act and mandated a return to [United States v. Columbia Steel Co., 334 U.S. 495 \(1948\)](#). The court found that Nashville Bank and Trust was a "stagnant and floundering bank," suffering from lack of young and aggressive officers. It held that the merger would not tend substantially to lessen competition and also

that any anticompetitive effect would be outweighed by benefits to the "convenience and needs of the community." *Held:*

1. The Bank Merger Act of 1966 requires *de novo* inquiry by the district courts into the validity of bank mergers to determine whether the merger offends the antitrust laws, and, if it does, whether the banks have established that the merger is justified by benefits to the "convenience and needs of the community." *United States v. First City National Bank of Houston*, 386 U.S. 361 (1967). P. 178.
2. The Act, which adopted the language of § 7 of the Clayton Act, "substantially to lessen competition," did not provide a different antitrust standard for bank cases, and therefore the District Court applied [\*\*\*\*3] an erroneous Clayton Act standard to the merger. Pp. 181-182.
3. On the facts of this case, the merger did tend substantially to lessen competition in the Nashville commercial banking market. P. 183.
4. The lower court misapprehended the meaning of the phrase "convenience and needs of the community," and misunderstood the weight to be given the relevant factors in determining whether the anticompetitive effects are "clearly outweighed in the public interest" by the effects on the convenience and needs of the community. Pp. 184-192.
  - (a) While the District Court noted the increased loan capacity of the merged bank, it was not specific in describing the beneficial consequences thereof to the Nashville community, or in defining the value of such increase, especially as compared with less desirable results of the merger. P. 186.
  - (b) The District Court's analysis did not explore possible ways of satisfying the community's convenience and needs without merger. It was incumbent on the banks to demonstrate that they made reasonable efforts to solve Nashville Bank and Trust's management dilemma short of merger with a major competitor. P. 189.
  - (c) The findings of the District Court do [\*\*\*\*4] not sufficiently establish the unavailability of alternative solutions to Nashville Bank and Trust's problems. Pp. 190-192.
5. The case is remanded so that the lower court can consider again the Act's application to the facts of this merger; and since the District Court heard this case before *Houston Bank, supra*, was decided, it may wish to consider reopening the record to permit the presentation of new evidence in light of the intervening interpretations of the Act. P. 192.

**Counsel:** Daniel M. Friedman argued the cause for the United States. On the brief were Solicitor General Griswold, Assistant Attorney General Turner, Richard A. Posner and Barry Grossman.

E. William Henry argued the cause for appellees Third National Bank in Nashville et al. With him on the brief were Paul A. Porter, Dennis G. Lyons, Frank M. Farris, Jr., Edwin F. Hunt and John J. Hooker, Jr. Joseph J. O'Malley argued the cause for appellee Camp, Comptroller of the Currency. With him on the brief were Robert Bloom and Charles H. McEnerney, Jr.

**Judges:** Warren, Black, Douglas, Harlan, Brennan, Stewart, White; Fortas and Marshall took no part in the consideration or decision of this case.

**Opinion by:** WHITE

## **Opinion**

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[\*\*\*\*5] [\*173] [\*\*\*1019] [\*\*885] MR. JUSTICE WHITE delivered the opinion of the Court.

In this case the United States appeals from a District Court decision <sup>1</sup> upholding the merger of Third National Bank in Nashville and Nashville Bank and Trust Company against challenge under § 7 of the Clayton Act. The court below concluded that the merger, which joined the second largest and the **[\*\*\*1020]** fourth largest banks in Davidson County, Tennessee, into a bank which immediately after the merger was the county's largest bank but since has become the second largest, would not tend substantially to lessen competition and also that any anticompetitive effect would be outweighed by the "convenience and needs of the community to be served." We disagree with the District Court on both issues. We hold that the United States established that this merger would tend to lessen competition, and also that the District Court did not point to community benefits in terms of "convenience and needs" sufficient to outweigh the anticompetitive impact.

**[\*\*\*6] I.**

Like other urban centers in the Southeast, Nashville has grown steadily since World War II in both population and economic activity. Commercial banks, as "the intermediaries in most financial transactions," <sup>2</sup> grew **[\*174]** along with their city. From 1955 to 1964, for example, total assets of all banks located in Davidson County increased from \$ 548,300,000 to \$ 1,053,700,000, an increase of 92.2%. The number of banks hardly changed. Indeed, since 1927 there has been only one new bank in the county, Capital City Bank, and at the time of this merger it had achieved only .9% of the county's bank assets. The other banks at the time of the merger, and their percentage of total bank assets in Davidson County, were First American National, 38.3%; Third National, 33.6%; Commerce Union, 21.2%; Nashville Bank, 4.8%; and three small banks, two of them located in Davidson County towns outside Nashville, .6%, .3%, and .3%. <sup>3</sup> The merger before us thus joined one of the three very large banks in Nashville and the one middle-sized bank. Its result was to increase from 93.1% to 97.9% the percentage of total assets held by the three largest banks and from 71.9% to 76.7% the percentage **[\*\*\*7]** held by the two largest institutions.

The two merging banks played significantly different roles in Nashville banking. Third National was characterized by the Comptroller of the Currency as one of the strongest and best managed banks in the Nation and by the District Court as "strong, dynamic and aggressive." <sup>4</sup> **[\*\*886]** It had "a history of innovating services or promptly providing new services," <sup>5</sup> a recruitment program at local universities, a continuous audit program, and a legal lending limit of \$ 2,000,000. It had 14 branches at the **[\*175]** time of the merger and served **[\*\*\*8]** as correspondent for smaller banks located throughout the central south.

Nashville Bank and Trust approached the merger with a more checkered history and a less dynamic present. Until 1956 it was largely a trust institution. In that year, under the direction of W. S. Hackworth, it changed its name from Nashville Trust Company and embarked on a drive to become a full-service commercial bank. This program enjoyed considerable success. **[\*\*\*1021]** Between 1955 and 1964, Nashville Bank's deposits grew from \$ 20,800,000 to \$ 45,500,000, and its loans and discounts from \$ 8,100,000 to \$ 22,800,000. In both categories it grew faster than the county average and faster than Third National. This growth, however, occurred at a substantially faster rate before 1960 than after that year. Before 1960 it was growing more rapidly than the other banks in the county, and after that year more slowly. Its share of total Nashville banking business thus **[\*\*\*9]** declined from a high of 5.72% on June 30, 1960, to 4.83% on June 30, 1964.

<sup>1</sup> The opinion of the District Court is reported at [260 F.Supp. 869 \(D. C. M. D. Tenn. 1966\)](#). Its findings of fact and conclusions of law are unreported. Probable jurisdiction was noted at [388 U.S. 905 \(1967\)](#).

<sup>2</sup> [United States v. Philadelphia National Bank, 374 U.S. 321, 326 \(1963\)](#).

<sup>3</sup> We cite percentages of total assets for convenience, not because they are alone a valid indication of a bank's market share. The percentages of total deposits and of total loans held by the eight Davidson County banks varied insignificantly from the percentages of total assets. See the District Court's Finding of Fact No. 66.

<sup>4</sup> [260 F.Supp., at 881](#).

<sup>5</sup> Finding of Fact No. 91.

The District Court made elaborate findings as to why Nashville Bank and Trust "reached a plateau on which it remained until the date of the merger" and why in this period "it was a stagnant and floundering bank."<sup>6</sup> From those findings, and from the broad picture of Nashville Bank's history and operations which emerges from the testimony and exhibits in this case, it appears that the principal reason was that key members of its management, the men who had been responsible for the bank's progress in the late 1950's, had advanced in age and either retired or slowed their activities. The bank's officials nonetheless made but scant efforts to recruit and advance young talent. Nashville Bank paid substantially [\*176] lower salaries than the other Nashville banks, had no funded pension plan, and conducted no systematic recruiting program. On January 1, 1964, the bank's board of directors had 13 members, of whom four were 75 or over, nine were 65 or older, and 11 were 63 or older. Of the six department heads four were 65 or older and the other two were 59. The average age of the 15 officers working outside [\*\*\*\*10] the trust department was over 60. The District Court painted in somber hues the banking policies and the economic results which seemed to flow from the failure to hire young talent. Essentially, Nashville Bank was not aggressive or efficient, and it had stopped growing, so that it could not open branches (it had only one) or embark on a correspondent banking program. It was nevertheless an institution of substantial size, with assets of \$ 50,900,000 and deposits of \$ 45,500,000. It was profitable, and it offered somewhat different services, occasionally at somewhat lower rates, than its competitors.

In January 1964, the individuals who had owned controlling shares of Nashville Bank and Trust decided to sell 10,845 shares, a controlling interest, to a group of prominent Nashville citizens headed by William Weaver. The price was \$ 350 per share. In February 1964, the Weaver group opened negotiations looking to a merger with Commerce Union Bank, Nashville's third largest. The negotiations [\*\*\*\*11] were unsuccessful, however, because Weaver demanded \$ 460 per share while Commerce Union offered only \$ 360. Weaver then negotiated the sale to Third [\*887] National, at a price of about \$ 420 per share. The merger was approved by the boards of directors of both banks on March 12, 1964, and, after approval by the Comptroller of the Currency, was consummated on August 18, 1964.

[\*177] II.

LEdHN[1] [1]The legislative history of the Bank Merger Act of 1966<sup>7</sup> [\*\*\*\*13] leaves no [\*\*\*1022] doubt that the Act was passed to make substantial changes in the law applicable to bank mergers. Congress was evidently dissatisfied with the 1960 Bank Merger Act as that Act was interpreted in United States v. Philadelphia National

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<sup>6</sup> Finding of Fact No. 134.

<sup>7</sup> 80 Stat. 7, 12 U. S. C. § 1828 (c) (1964 ed., Supp. II). The Act provides, in relevant part:

HN1 [1] "(5) The responsible agency shall not approve --

"(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

"(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

"In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

....

"(7) ....

"(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than [§ 2 of the Sherman Act], the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5)."

Bank, 374 U.S. 321 (1963), and in United States v. First National Bank & Trust Co. of Lexington, 376 U.S. 665 (1964), and wished to alter both the procedures by which the Justice Department challenges bank mergers and the legal standard which courts apply in judging [\*\*\*\*12] those mergers. The resulting [\*178] statute, however, as some members of Congress recognized,<sup>8</sup> was more clear and more specific in prescribing new procedures for testing mergers than in expounding the new standard by which they should be judged.

Last Term, in United States v. First City National Bank of Houston, 386 U.S. 361 (1967), this Court interpreted the procedural provisions of the 1966 Act, holding that HN2[<sup>↑</sup>] the Bank Merger Act provided for continued scrutiny of bank mergers under the Sherman Act and the Clayton Act, but had created a new defense, with the merging banks having the burden of proving that defense. HN3[<sup>↑</sup>] The task of the district courts was to inquire *de novo* into the validity of a bank merger approved by the relevant bank regulatory agency to determine, first, whether the merger offended the antitrust laws and, second, if it did, whether the banks had established that the merger was nonetheless justified by "the convenience and needs of the community to be served." *Houston Bank* reserved "all questions" concerning the substantive meaning of the [\*\*\*\*14] "convenience and needs" defense. See 386 U.S. at 369, n. 1.

### III.

The proceedings that have occurred until now regarding validity of the merger here before us have been scrambled and confused, largely because the relevant statute, the 1966 Bank Merger Act, became law just prior to the trial and did not receive its first interpretation [\*\*888] by this Court, in *Houston Bank*, until the decision below had been rendered.

The two banks agreed to merge on March 12, 1964. On April 27, 1964, they applied to the Comptroller [\*\*\*1023] of the Currency for approval, as the 1960 Bank Merger Act required. Pursuant to that Act, the Federal Reserve [\*179] Board, the Federal Deposit Insurance Corporation, and the Department of Justice reported to the Comptroller of the Currency on "the competitive factors involved." The Federal Reserve Board reported that the merger "would have clearly adverse effects on competition" by "eliminat[ing] direct competition which exists between participants and . . . increas[ing] significantly . . . already heavy concentration . . ." The Federal Deposit Insurance Corporation reported that "the effect of the proposed merger on competition [\*\*\*15] would be unfavorable." The Department of Justice reported that the merger "would have severe anticompetitive effects upon banking competition in Metropolitan Nashville." The Comptroller of the Currency, however, concluded that the merger would not lessen competition and would "improve the charter bank's ability to serve the convenience and needs of the Nashville public." On August 4, 1964, he approved the merger.

On August 10, 1964, the United States, as this Court's decision in *Philadelphia Bank* authorized, sued in federal district court charging that the proposed merger was in violation of § 7 of the Clayton Act<sup>9</sup> and § 1 of the Sherman Act.<sup>10</sup> On August 18, 1964, the District Court refused the Government's request for a preliminary injunction staying consummation, and on that day the two banks merged.

[\*\*\*\*16] The antitrust suit against the merger had not come to trial when, on February 21, 1966, the Bank Merger Act of 1966 took effect. Congress had devoted much attention to the impact of that Act on bank mergers still in the process of litigation. In § 2 of the Act, 80 [\*180] Stat. 10, Congress excluded from all antitrust liability<sup>11</sup> [\*\*\*\*17] mergers which had been consummated before June 17, 1963, the date of this Court's *Philadelphia Bank* decision, and those consummated between June 17, 1963, and February 21, 1966, as to which the Attorney General had not

<sup>8</sup> See, e. g., 112 Cong. Rec. 2447 (remarks of Congressman Fino).

<sup>9</sup> 38 Stat. 731, as amended, 64 Stat. 1125, 15 U. S. C. § 18.

<sup>10</sup> 26 Stat. 209, 15 U. S. C. § 1. The United States appealed to this Court only from the dismissal of the § 7 Clayton Act charge. The § 1 Sherman Act count is therefore not before us.

<sup>11</sup> Liability for monopolization under § 2 of the Sherman Act was not excluded.

begun litigation on February 21, 1966. However, although Congress considered amendments which would have provided antitrust immunity also for those bank mergers<sup>12</sup> consummated after June 17, 1963, and already the subject of litigation, a decision was made to leave those mergers subject to liability, apparently<sup>13</sup> because the merging parties had known, from *Philadelphia Bank*, that their consummation was with the risk of an eventual order to dissolve. Congress did provide, in § 2 (c) of the Act, that courts hearing such cases "shall apply the substantive rule of law set forth" in the Act.

LEdHN[2A][] [2A] Since the trial had been held after the 1966 Act took effect, and since the Comptroller of the Currency and other witnesses, directed by counsel, had addressed themselves to the statutory language [\*\*\*1024] contained in that Act, the District Court saw no need to remand to the Comptroller for a new opinion in [\*\*889] light of the Act, as was ordered in United States v. Crocker-Anglo National Bank, 263 F.Supp. 125 (D. C. N. D. Cal. 1966). Proceeding to decide the case, the District Judge held that under the new Act, violation of antitrust standards was "primarily [\*181] a legal issue . . . [on which courts should make] an [\*\*\*\*18] independent determination," while "convenience and needs of the community is, in the language of the *Crocker-Anglo* opinion, 'plainly and unquestionably a legislative or administrative determination' . . . [on which] the Comptroller's findings should not be disturbed unless they are unsupported by substantial evidence."<sup>14</sup> The court concluded that the merger did not offend antitrust standards and that the Comptroller's conclusion that it would benefit the community was supported by substantial evidence. The relief sought by the Justice Department was denied.

LEdHN[2B][] [2B]

[\*\*\*\*19] IV.

LEdHN[3A][] [3A]LEdHN[4A][] [4A] The District Court asserted that one effect of the Bank Merger Act of 1966 was to alter the standards used in determining whether a merger is in violation of § 7 of the Clayton Act and § 1 of the Sherman Act. Essentially, the District Court mandated a return to United States v. Columbia Steel Co., 334 U.S. 495 (1948), which this Court has held to be "confined to its special facts." Lexington Bank, 376 U.S., at 672. In later cases, especially Philadelphia Bank, supra; Lexington Bank, supra; United States v. Aluminum Co. of America, 377 U.S. 271 (1964); and United States v. Continental Can Co., 378 U.S. 441 (1964), this Court has rejected the *Columbia Steel* approach to determining whether a merger will tend "substantially to lessen competition." We find in the 1966 Act, which adopted precisely that § 7 Clayton Act phrase, as well as the "restraint of trade" [\*182] language of Sherman Act § 1, no [\*\*\*\*20] intention to adopt an "antitrust standard" for bank cases different from that used generally in the law.<sup>15</sup> Only one conclusion can be drawn from the exhaustive legislative deliberations that preceded passage of the Act: HN4[] Congress intended bank mergers first to be subject to the usual antitrust analysis; if a merger failed that scrutiny, it was to be permissible only if the merging banks could

<sup>12</sup> Three mergers are in this category: the Nashville merger at issue here; a California merger, see United States v. Crocker-Anglo National Bank, 263 F.Supp. 125 (D. C. N. D. Cal. 1966); and a St. Louis merger. See H. R. Rep. No. 1221, 89th Cong., 2d Sess., 4.

<sup>13</sup> See, e. g., 112 Cong. Rec. 2465 (remarks of Congressman Ashley).

<sup>14</sup> 260 F.Supp., at 874. If the District Court failed to review the issues in the case *de novo*, as this quotation suggests, it committed error. Houston Bank, supra. Other statements in the opinion and findings below suggest that a *de novo* judgment may also have been reached by the District Court. Our disposition of the case makes it unnecessary to decide whether undue deference was paid to the Comptroller's judgment.

<sup>15</sup> We also find in the Act an intention to alter the traditional methods of defining relevant markets in which to appraise the anticompetitive effect of a merger, and so agree with the District Court that commercial banking in Davidson County was the relevant market for appraising this merger.

establish that the merger's benefits to the community would outweigh its anticompetitive disadvantages. See Houston Bank, *supra*. Congressman Minish spoke in tune with the language of the Act and the statements of his colleagues when he said:

"It should also be clear from the language of paragraph (5)(b) of this bill, which establishes this single [\*\*\*1025] standard, that the competitive factor to be used is drawn directly from Clayton Act section 7 and Sherman Act section 1. Thus, all of the principles developed over the last 75 years in regard to these statutes, such as the definition of relevant market and the failing company doctrine are [\*\*890] carried forward unchanged by this proposed [\*\*\*\*21] legislation."<sup>16</sup>

LEdHN[3B][] [3B] LEdHN[4B][] [4B]

LEdHN[5][] [5] We therefore hold that the District Court employed an erroneous standard in applying § 7 of the Clayton Act to the merger. In addition we hold that, appraised by the test enunciated in recent Clayton Act [\*\*\*\*22] cases, the [\*183] tendency of the merger substantially to lessen competition is apparent. Nashville had three large banks and one of middle size. In this merger the bank of middle size was absorbed by the second largest of the big banks. By the merger the market share of the three largest banks rose from 93% to 98%; the merged bank alone had almost 40% of the Nashville banking business. In addition, the record is replete with evidence that Nashville Bank and Trust was in fact an important competitive element in certain, though not in all, facets of Nashville banking. It offered somewhat different services, at somewhat different rates, from those offered by other banks, and some customers found those services desirable. Although Nashville Bank failed to increase its percentage share of the Nashville banking market after 1960, the absolute size of its business increased steadily from 1956, when it entered seriously into the commercial banking market, to the date of the merger. Throughout this period it was profitable. The record permits no conclusion that Nashville Bank was in any way a "failing" company. See *International Shoe Co. v. FTC, 280 U.S. 291 (1930)*. [\*\*\*\*23] On these facts, the conclusion is inescapable that the merger of Third National Bank in Nashville with Nashville Bank and Trust Co. tended to lessen competition in the Nashville commercial banking market. Philadelphia Bank, *supra*.

V.

LEdHN[6A][] [6A] Because the District Court erroneously concluded that the merger would not tend to lessen competition, its conclusion upon weighing the competitive effect against the asserted benefits to the community is suspect. To weigh adequately one of these factors against the other requires a proper conclusion as to each. Having decided that the court below erred in assessing competitive impact, we should remand, so that the District Court [\*184] can perform again the balancing process mandated by the Act.<sup>17</sup>

[\*\*\*\*24] There is, however, an additional reason to remand. In our view, the [\*\*\*1026] District Court misapprehended the meaning of the phrase "convenience and needs of the community"; it misunderstood the weight to be given the relevant factors when seeking to determine whether the anticompetitive effects of a merger are "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."

LEdHN[7][] [7]HN5[] The purpose of the Bank Merger Act was to permit certain bank mergers even though they tended to lessen competition in the relevant market. Congress felt that the role of banks in a community's economic life was such that the public interest would sometimes be served by a bank merger even though [\*\*891]

<sup>16</sup> 112 Cong. Rec. 2451. See also 112 Cong. Rec. 2441-2442 (remarks of Congressman Patman); 112 Cong. Rec. 2455 (remarks of Congressman Annunzio); 112 Cong. Rec. 2452 (remarks of Congressman Reuss); 112 Cong. Rec. 2655 (statement of Senator Robertson).

<sup>17</sup> Although the District Court erroneously determined the antitrust impact of the merger, its judgment that the merger was not unlawful under the Act may nevertheless have resulted from a sufficient weighing of the evidence before it. Some of the findings below suggest the view that the merger would tend to lessen competition but that this anticompetitive effect would be outweighed by benefits to the community. The argument need not be pursued, however, since we hold that the District Court also misapplied the Act's convenience-and-needs provision.

the merger lessened competition. The public interest was the ultimate test imposed. This is clear not only from the language of the Act but from the statements of those who supported it while the Act was under consideration:

"Mr. ASHLEY. [\*\*\*\*25] . . . In other words, the merger must be shown to be sufficiently beneficial in meeting the convenience and needs of the community to be served that, on balance, it may properly be regarded as in the public interest.

....

[\*185] "Mr. MULTER. . . . I believe it was the intention of the Congress originally in 1960 when we enacted the Bank Merger Act that the public interest should be paramount in making any determination with reference to a merger. The words 'in the public interest' are again written into this bill now and will remain in the law so that there will be no question but that the courts and the agencies must take the public interest into account.

....

"Mr. ASHLEY. Is the gentleman saying, as I believe he is, that it is the consensus of the committee, in drafting this bill, that the public interest is to be considered as combining the consideration both of the anticompetitive factors of a particular merger on the one hand, and, on the other, the needs and convenience of the community that may derive from that merger, which, as I say, may result in a diminution of competition; in other words, that the public interest has got to involve a consideration of both [\*\*\*\*26] of these rather considerable factors?

"Mr. STEPHENS. That is correct . . ." 112 Cong. Rec. 2446, 2449, 2450.

It is plain that Congress considered both competition in commercial banking and satisfaction of "the convenience and needs of the community" to be in the public interest. It concluded that a merger should be judged in terms of its overall effect upon the public interest. [HN6](#) If a merger posed a choice between preserving competition and satisfying the requirements of convenience and need, the injury and benefit were to be weighed and decision was to rest on which alternative better served the public interest.

The necessity of choosing is most clearly posed where the proposed merger would create an institution with [\*186] capabilities for serving the public interest not possessed by either of the two merging institutions alone and where the potential could be realized only through merger. Thus, it might be claimed, as it is in this case, that a combined bank would have a greater [\*\*\*1027] lending capacity and hence be better equipped to serve the financial needs of the community. [\*\*\*\*27] In [Philadelphia Bank, 374 U.S., at 370-371](#), this Court, acting under the 1960 Bank Merger Act, rejected the relevance of the combined bank's ability to serve Philadelphia by making large loans that could otherwise only be obtained in New York. The Court found no statutory authorization for considering such a benefit in appraising the legality of a merger. Expressions in Congress during consideration of the 1966 Act suggest that one purpose of that Act was to give this factor, not previously relevant in appraising bank mergers, suitable weight in judging their validity.<sup>18</sup> In the case before us the District Court's findings of fact suggest that the new bank, with a 20% greater lending limit than Third National Bank previously had, was able to make larger loans, for which Nashville area companies had previously gone to Chicago or New York. The District Court also stated that because Third National Bank operated with a higher loans-to-deposits ratio than Nashville Bank and Trust, combining their deposits [\*\*892] and applying the Third National Bank ratio to the total increased available lending capacity in Nashville by about \$ 2,800,000. But the District Court [\*\*\*\*28] was not specific in describing the beneficial consequences of such results for the Nashville community, or in defining the value of these additions, especially as compared with the other, and less desirable, results of the merger. Absent such findings, the increased lending capacity of the new bank weighs very little in the balance.

[\*187] Congress was also concerned about banks in danger of collapse -- banks not so deeply in trouble as to call forth the traditional "failing company" defense, but nonetheless in danger of becoming before long financially unsound institutions.<sup>19</sup> [\*\*\*\*30] Congress seems to have felt that a bank failure is a much greater community

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<sup>18</sup> See, e. g., 112 Cong. Rec. 2663 (remarks of Senator Robertson).

catastrophe than the failure of an industrial or retail enterprise, and that HN7<sup>19</sup> a much smaller risk of failure than that required by the failing company doctrine should be sufficient to justify the [\*\*\*\*29] rather radical preventive step of an anticompetitive merger. The Findings of Fact of the District Court included the information that Nashville Bank and Trust Company had a higher than usual percentage of unsound loans, the result of unsatisfactory procedures for investigating and judging credit risks, and that its "rating" had been changed in 1962 from "satisfactory" to "fair." The District Court drew no conclusion about the extent of the danger these conditions posed for Nashville Bank and Trust's future, about the feasibility of curative measures short of merger, or about whether other healthy aspects of the bank's condition -- for instance its steady profitability, including after-tax earnings of \$ 368,000 in 1963<sup>20</sup> -- removed [\*\*\*1028] any danger of failure in the foreseeable future. Absent findings and conclusions of this nature,<sup>21</sup> [\*188] the District Court seemed to be holding that the merger should be approved simply because Nashville Bank and Trust Company could be a better bank and could render better banking services.

The District Court, it appears, considered the merger beneficial to the community because Nashville Bank and Trust had only one branch, because it had no program of correspondent banking, because its operations were not computerized, because it emphasized real estate loans rather than commercial loans, because its management was old and unable [\*\*\*31] to render sound business advice to borrowers, because it was not recruiting new talent, and because its salary scale was low. Hence a merger was justified because it would solve these problems and produce an institution which, in the words of the House Report, would be capable of

"furnishing better overall service to the community, even though the reduction in the number of competing units, or the concentration in the share of the market in one or more lines of commerce, might result *under general antitrust law criteria* in a substantial lessening of competition." H. R. Rep. No. 1221, 89th Cong., 2d Sess., 3. (Emphasis in original.)

[\*\*893] LEdHN8<sup>22</sup> [8]Undeniably, Nashville Bank and Trust had significant problems of the kind outlined in the findings of the District Court, problems which were primarily rooted in unsatisfactory and backward management. Just as surely, HN8<sup>23</sup> securing better banking service for the community is a proper element for consideration in weighing convenience and need against the loss [\*\*\*32] of competition. Nor is there any doubt on this record that merger with Third National would very probably end the managerial problems of Nashville Bank and Trust and secure the better [\*189] use of its assets in the public interest. Thus if the gains in better service outweighed the anticompetitive detriment and the merger was essential to secure this net gain to the public interest, the merger should be approved.

But this analysis puts aside possible ways of satisfying the requirement of convenience and need without resort to merger. If the injury to the public interest flowing from the loss of competition could be avoided and the convenience and needs of the community benefited in ways short of merger but within the competence of reasonably able businessmen, the situation is radically different. In such circumstances, we seriously doubt that Congress intended a merger to be authorized by either the banking agencies or the courts. If, for example, just prior to this merger, an experienced banker with competent associates had offered to take over the active management of the bank or another competent businessman with a willingness to tackle the management problems of the bank [\*\*\*33] had offered to buy out the Weaver interests at an acceptable price, it seems obvious that the Weaver group, which seeks to justify the merger in terms of producing an institution rendering better banking service, should not be permitted to merge and to ignore an available alternative. Otherwise, the benefits of [\*\*\*1029] competition,

<sup>19</sup> See, e. g., 112 Cong. Rec. 2459-2460 (remarks of Congressman Multer).

<sup>20</sup> In Finding of Fact No. 181 the District Court concluded that the bank's "apparently good earnings record" would have been diminished, absent a merger, by "the expenditures which needed to be made for the proper maintenance of the bank." Among these expenditures were increased salaries, automation, and establishment of additional branch offices. There is no reason to think that such investment of accrued profits would not have been rewarded with a fair return in the form of increased future profits.

<sup>21</sup> The District Court did conclude, in Finding of Fact No. 184, that the merger was "a business necessity" for Nashville Bank and Trust Co. This general conclusion, without supporting findings, hardly establishes the possibility of eventual failure.

acknowledged by Congress, would be sacrificed needlessly. For the same reasons, we think it was incumbent upon those seeking to merge in this case to demonstrate that they made reasonable efforts to solve the management dilemma of Nashville Bank short of merger with a major competitor but failed in these attempts, or that any such efforts would have been unlikely to succeed.

LEdHN[9]<sup>1</sup> [9] This seems to us the most rational reading of the Act, which was a compromise and satisfied none of the protagonists [\*190] in this extended controversy. HN9<sup>1</sup> The Act directs the agencies and the courts to consider managerial as well as financial resources in weighing a proposed merger. However, [\*\*\*\*34] HN10<sup>1</sup> the Act requires as well that the "future prospects of the existing and proposed institutions" be appraised. Part of such appraisal, where managerial deficiencies exist as they do in this case, is determining whether the merging bank is capable of obtaining its own improved management. This test does not demand the impossible or the unreasonable. It merely insists that HN11<sup>1</sup> before a merger injurious to the public interest is approved, a showing be made that the gain expected from the merger cannot reasonably be expected through other means.

The question we therefore face is whether the findings of the District Court sufficiently or reliably establish the unavailability of alternative solutions to the woes of Nashville Bank and Trust Company. In our view, they do not. The District Court described the nature and extent of the bank's managerial shortcomings. It noted that the Weaver group had discussed these matters extensively with a number of persons, including bankers, and had learned that recruiting new management would be "extremely [\*\*\*\*35] difficult" at the salaries paid by Nashville Bank. And it concluded that management procurement was difficult for banks in general and an "almost insoluble" problem for Nashville Bank and Trust.

Just how insoluble was not made clear. The District Court did not ask [\*\*894] whether the Weaver group had made concrete efforts to recruit new management, especially a chief executive officer, who was needed most. The record seems clear that they made no proposals to any individual prospects in or outside of Nashville, save one rather casual letter to a banking acquaintance in New York, and that they neither sought nor cared to seek the help of firms specializing in finding or [\*191] furnishing new management.<sup>22</sup> The court made no reference to the possibility that the new owners themselves might have taken active charge of the bank. None of them was a banker, but their successful predecessor Hackworth had not been one before becoming president of Nashville Bank.<sup>23</sup> [\*\*\*\*37] Nor did the [\*\*\*1030] court assess the possibility of a sale to others who might have been willing to face up to the management difficulties over a more extended period. We find nothing in the findings indicating [\*\*\*\*36] that a bank with assets of \$ 50,000,000 was simply too small to attract competent management<sup>24</sup> [\*192] or that the Weaver group, the new owners, were intransigently insisting on unreasonably conservative managerial policies. Indeed, the Weaver group included competent and experienced men who realized the

<sup>22</sup> An official of a company specializing in recruitment of executives did testify for the banks at the trial. In his opinion, recruiting executives for Nashville Bank and Trust would have been extremely difficult.

<sup>23</sup> The record contains the revealing statement by William C. Weaver, Jr., the leading member of the group which owned the bank at the time of the merger:

"We finally concluded before we agreed to the merger agreement with the Third National Bank that, if one of us, one of our group, was unable to go down there to the Trust Company and devote full time to its affairs -- I would like to say right here that none of us in the group had any commercial banking experience, and that was a serious problem."

"But we concluded that if we were unable to devote our full time to the affairs of the bank, it would be in the best interests of the customers of the bank, the employees of the bank, the stockholders of the bank, and the Nashville community, for us to merge with the Third National Bank."

Mr. Weaver seems to have felt that one or more members of the new ownership group would have been able to furnish satisfactory executive leadership for the bank.

<sup>24</sup> Capital City Bank, founded in 1960 and but one-fourth the size of Nashville Bank and Trust Co., was apparently flourishing.

In this regard, a recent study concluded that "the small bank can compete successfully with the large bank -- if it has the will to do so." Kohn, Competitive Capabilities of Small Banks, 60 Banking, January 1968, at 64, reporting on the New York State Banking Department's research study, The Future of Small Banks.

desirability of improving an unsatisfactory situation. Rather than making serious efforts to do so themselves or to sell to others who would, they preferred to merge with a competing bank -- a step which produced a profit of \$ 750,000 on a two-month investment of \$ 3,800,000.

**LEdHN[10]** [10]The burden of showing that an anticompetitive bank merger would be in the public interest because of the benefits it would bring to the convenience and needs of the community to be served rests on the merging banks. *Houston Bank, supra*. A showing that one bank needed more lively and efficient management, absent a showing that the alternative means for securing such management without a merger would present unusually severe difficulties, cannot be considered to satisfy that burden.

We therefore conclude that the District Court was in error in holding that the factors [\*\*\*38] it cited as ways in which this merger benefited the Nashville community were sufficient

**LEdHN[6B]** [6B] to outweigh the anticompetitive effects of the merger. The case must be remanded so that the District Court can consider again the application of the Bank Merger Act to the facts of this merger. Because the [\*\*895] District Court heard this case before *Houston Bank* was decided, it may wish to consider reopening the record, so that the parties will have an opportunity to present new evidence in light of the intervening interpretations of the Act. The judgment below is reversed and the case is remanded for proceedings consistent with this opinion.

*It is so ordered.*

MR. JUSTICE FORTAS and MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

**Concur by:** HARLAN (In Part)

**Dissent by:** HARLAN (In Part)

## Dissent

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[\*193] MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

My understanding of the procedural structure of the Bank Merger Act of 1966,<sup>1</sup> based on our decision last Term in *United States v. First \*\*\*10311 City National Bank of Houston*, 386 U.S. 361, 364, [\*\*\*39] is that the Act requires the District Court to engage in a two-step process. First, the District Court must decide whether the merger, considered solely from an antitrust viewpoint, would violate the Clayton Act standard embodied in the Bank Merger Act. If it would not, the inquiry is over. If there would be a violation, then the District Court must go on to decide whether "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."<sup>2</sup> In making the latter decision, the District Court must again evaluate the antitrust factor, this time in a less polar way. For a comparatively minor violation of the Clayton Act, like that in this case, obviously may be more readily outweighed by factors relating to "convenience and needs" than may a relatively serious infraction.

[\*\*\*40] Turning to the application of the Act to this case, the first question is whether the merger, as an antitrust matter, would violate the Clayton Act. I continue to disagree, particularly in the banking field, with the "numbers game" test for determining Clayton Act violations which was adopted by this Court in *United States v. Philadelphia National Bank*, 374 U.S. 321. However, I consider myself bound by that decision, and under its dictates I concur in the Court's finding that this merger would violate the Act.

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<sup>1</sup> 80 Stat. 7, *12 U. S. C. § 1828 (c) (1964 ed., Supp. II)*.

<sup>2</sup> Bank Merger Act of 1966, amending *§ 18 (c)(5)(B)* of the Federal Deposit Insurance Act, *12 U. S. C. § 1828 (c)(5)(B) (1964 ed., Supp. II)*.

[\*194] I also concur in the Court's decision that this case must be remanded so that there may be a new application of the second-step balancing process. In this case, which was decided before our decision in Houston Bank, supra, the District Court either omitted the first of the two indicated procedural steps or concluded, incorrectly, that the merger would not violate the Clayton Act.<sup>3</sup> In either event, the error may have caused the District Court to misconceive the antitrust "threshold" at which the second-step balancing process was intended to come into play. This, in turn, may have led the court to give the "anticompetitive effect" of [\*\*\*\*41] the merger a different weight in the balance than was intended by the framers of the Bank Merger Act. Hence, the case must be remanded to the District Court so that it may reweigh the competing factors in light of the correct antitrust threshold.

With regard to the "convenience and needs" side of the balance, I am in accord with the Court's ruling that a merger should not be approved under the 1966 Act unless the District Court finds that [\*\*896] the benefits conferred upon the community by the merger could not reasonably have been achieved in other ways. Unlike the Court, however, I conclude from the record that the District Court *did* make adequate findings on this issue. The record reveals that many witnesses testified that Nashville Bank had problems of real magnitude, the greatest being to find replacements for key executives. Mr. Weaver, the leader of the [\*\*\*\*42] group which purchased control of the bank not long before the merger, testified that initially his group had intended to operate the [\*\*\*\*1032] bank themselves, but that talks with many bankers had convinced him that his group could not solve the bank's problems. The head of an executive-placement firm [\*195] testified that he did not believe that he could have found new executives for Nashville Bank, in light of its overall situation.<sup>4</sup> Although there was testimony in rebuttal, including that of another recruiter of executives, to the effect that the problems were not unsolvable, I cannot conclude that the District Court committed error when it held that

"While there is some conflict, the preponderance of the evidence is that it would have been practically impossible within any reasonable period of time to obtain adequate managerial replacements either from within the bank or from the outside, a product of the bank's failure . . . to provide itself with the facilities, procedures and equipment required to maintain a competitive posture." 260 F.Supp. 869, 881.

[\*\*\*\*43] In sum, what I would consider to be the scope of the proceedings on remand is this. In light of our holding that a Clayton Act violation has been made out, further consideration of the first-step antitrust issue by the District Court is foreclosed. Believing, as I do but contrary to the Court, that the findings already made by the District Court as to the alternatives to merger are adequate, in my view the only question for the District Court to consider respecting the second step is whether, because of its character in light of the antitrust standard now set forth, the antitrust violation should yield to other factors bearing on public "convenience and needs."

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Annotation References:

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<sup>3</sup>The District Court's opinion is unclear as to whether the court considered it necessary to make a discrete finding under the Clayton Act.

<sup>4</sup>An account of Nashville Bank's overall situation appears in the Court's opinion, *ante*, at 175-176.

Construction, by Supreme Court of the United States, of 7 of [\*\*\*\*44] the Clayton Act ([15 USC 18](#)), dealing with acquisition by one corporation of stock of another. 14 L ed 2d 784.

Application to banks and banking institutions of antimonopoly or antitrust laws. 83 ALR2d 374.

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## **Perma Life Mufflers v. International Parts Corp.**

Supreme Court of the United States

April 22-23, 1968, Argued ; June 10, 1968, Decided

No. 733

### **Reporter**

392 U.S. 134 \*; 88 S. Ct. 1981 \*\*; 20 L. Ed. 2d 982 \*\*\*; 1968 U.S. LEXIS 3168 \*\*\*\*; 1968 Trade Cas. (CCH) P72,486

PERMA LIFE MUFFLERS, INC., ET AL. v. INTERNATIONAL PARTS CORP. ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**Disposition:** [376 F.2d 692](#), reversed and remanded.

## **Core Terms**

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pari delicto, antitrust, damages, provisions, dealers, anti trust law, mufflers, franchise, terms, manufacturer, participated, cases, illegal scheme, treble damages, resale price, conspiracy, violations, parties, fault, franchise agreement, Sherman Act, restrictions, franchisees, territorial, selling, prices, deter, source of a supply, public interest, anticompetitive

## **LexisNexis® Headnotes**

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

Civil Procedure > ... > Defenses, Demurrsers & Objections > Affirmative Defenses > General Overview

### **[HN1](#) [down arrow] Private Actions, Remedies**

There is nothing in the language of the antitrust acts which indicates that Congress wanted to make the common-law in pari delicto doctrine a defense to treble-damage actions. Although in pari delicto literally means "of equal fault," the doctrine has been applied, correctly or incorrectly, in a wide variety of situations in which a plaintiff seeking damages or equitable relief is himself involved in some of the same sort of wrongdoing. The United States Supreme Court has often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes. A plaintiff in an antitrust suit can not be barred from recovery by proof that he had engaged in an unrelated conspiracy to commit some other antitrust violation.

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

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

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

## **HN2** [down] **Private Actions, Remedies**

The purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of anti-trust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct.

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

## **HN3** [down] **Price Fixing & Restraints of Trade, Vertical Restraints**

The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the anti-trust laws.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

## **HN4** [down] **Price Discrimination, Defenses**

The doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action.

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

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

## **HN5** [down] **Complaints, Requirements for Complaint**

Pleadings must be construed as to do substantial justice. [Fed. R. Civ. P. 8\(f\)](#).

## **Lawyers' Edition Display**

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### **Summary**

In a private antitrust action instituted in the United States District Court for the Northern District of Illinois, Eastern Division, to recover treble damages from the defendants, who manufactured automobile mufflers and exhaust system parts, the plaintiffs, who had entered into dealership sales contracts, alleged that the defendants had violated the Robinson-Patman Act by granting discriminations in prices and services to some of their other customers, and that the defendants had conspired to restrain competition in violation of the Sherman Act and the Clayton Act under certain provisions of the dealership agreements obligating the dealers to purchase all mufflers and parts from the defendants, requiring that the dealers sell at fixed resale prices, tying the sale of mufflers to the sale of other products in the defendants' line, and prohibiting the dealers from selling outside their designated exclusive sales territories. The District Court entered summary judgment for the defendants on the ground that the plaintiffs' claims were barred by the doctrine of *in pari delicto*. The Court of Appeals for the Seventh Circuit reversed

the judgment with regard to the claim under the Robinson-Patman Act, but affirmed the ruling that the other claims were barred under the doctrine of *in pari delicto* ([376 F2d 692](#)).

On certiorari, the Supreme Court of the United States reversed the judgment of the Court of Appeals, with directions to reverse the District Court's judgment and to remand the case for trial. In an opinion by Black, J., expressing the view of five members of the court, it was held that (1) the doctrine of *in pari delicto* was not to be recognized as a defense to a private antitrust action, (2) the plaintiffs therefore were not barred from recovery on the ground that they had sought their franchises with knowledge of the terms and had enjoyed profits as dealers and sought to acquire additional franchises, since their participation was not voluntary in any meaningful sense in view of the agreement clauses, which were clearly detrimental to their interests and to which they allegedly had continually objected, (3) the possible beneficial byproducts of a restriction in the agreements from a plaintiff's point of view could be taken into consideration in computing damages, and (4) there was no merit in the defendants' contention that the plaintiffs were barred from recovery, wholly apart from the idea of *pari delicto*, on the ground that the plaintiffs actively supported the entire restrictive program as such, since the record refuted such contention and showed, to the contrary, that the illegal scheme had been thrust upon the plaintiffs by the defendants.

White, J., concurring, joined the opinion of the court with the observation that the *in pari delicto* defense in its historic formulation was not a useful concept for determining whether a plaintiff should be barred because of his own conduct, that the determination of whether a party to an illegal venture was entitled to damages from the other participants should be made by hewing closer to the aims and purposes of the Clayton Act, which gives treble damage recovery to a private plaintiff injured by conduct violating the antitrust laws, and that in general, recovery should be denied where the plaintiff and the defendant were substantially equally responsible for the injury resulting to one of them, whereas recovery should be permitted in favor of the one least responsible where one was more responsible than the other.

Fortas, J., concurred in the result, stating that the doctrine of *in pari delicto* had a significant yet limited role in private **antitrust law**, barring recovery if the fault of the parties was reasonably within the same scale, but that the plaintiffs in the case at bar were not barred under the doctrine, although they should not be allowed to recover damages based upon any clause in the franchise agreements if they were chargeable with responsibility for the particular clause, because it was in substance their own act.

Marshall, J., concurred in the result, expressing the view that a limited application of the basic principle behind the *in pari delicto* doctrine was both proper and desirable in the antitrust field, barring recovery where the plaintiff was substantially equally at fault, that summary judgment for the defendants in the instant case was not proper, since the record indicated that the plaintiffs had not sought out or supported all the anticompetitive restrictions in the franchises, that if the defendants showed that certain provisions were inserted in the franchise agreements at the behest and for the benefit of the plaintiffs and their fellow franchisees, the plaintiffs should be barred from contending that they were damaged by the existence and enforcement of such provisions, and that if it was established that the plaintiffs actually participated in the formulation of the entire agreement, trading off anticompetitive restraints on their own freedom of action for anticompetitive restraints intended for their benefit, the plaintiffs should be barred from seeking damages as to the agreement as a whole.

Harlan, J., joined by Stewart, J., concurred in part and dissented in part, stating that the defense of *in pari delicto*, properly applied, should be permitted in antitrust cases, that plaintiffs who were truly in *pari delicto* were those who had themselves violated the law in co-operation with the defendant, that the lower courts had erred in holding that the plaintiffs were in *pari delicto* merely because they had voluntarily entered into the franchise agreements and accepted benefits therefrom, and that the case should be remanded for consideration of the motion for summary judgment upon proper standards, requiring the determination of whether any agreement allegedly in restraint of trade was one for which the plaintiffs were substantially as much responsible, and as much legally liable, as the defendants.

## Headnotes

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RERAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §36 > RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §42 > RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §50 > exclusive dealership agreements -- defense -- doctrine of in pari delicto -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B]

In a private antitrust action to recover treble damages from the defendants, who manufactured automobile mufflers and exhaust system parts, wherein the plaintiffs, who had entered into dealership sales contracts, alleged that the defendants had violated the Robinson-Patman Act ([15 USC 13](#)) by granting discriminations in prices and services to some of their other customers, and that the defendants had conspired to restrain and lessen competition in violation of 1 of the Sherman Act ([15 USC 1](#)) and 3 of the Clayton Act ([15 USC 14](#)) under provisions of the dealership agreements obligating the dealers to purchase all mufflers and parts from the defendants, requiring that they sell at fixed resale prices, tying the sale of mufflers to the sale of other products in the defendants' line, and prohibiting dealers from selling outside their designated exclusive sales territories, the doctrine of in pari delicto is not available as a defense, and recovery is not barred on the ground that the plaintiffs had sought their franchises with knowledge of the terms of the agreements and had enjoyed profits as dealers and sought to acquire additional franchises, where their participation was not voluntary in any meaningful sense, since the plaintiffs had not sought each and every clause of the agreements, many of which were clearly detrimental to their interests and to which they allegedly had continually objected, and since the plaintiffs' acquiescence was necessary to obtain an otherwise attractive business opportunity.

PLEADING §48.5 > summary judgment -- private antitrust action -- > Headnote:

[LEdHN\[2\]](#) [2]

In a private antitrust action to recover treble damages from the defendants, who manufactured automobile mufflers and exhaust system parts, wherein the plaintiffs, who had entered into dealership sales contracts, alleged that the defendants had violated the Robinson-Patman Act ([15 USC 13](#)) by granting discriminations in prices and services, and that the defendants had conspired to restrain and lessen competition in violation of 1 of the Sherman Act ([15 USC 1](#)) and 3 of the Clayton Act ([15 USC 14](#)) under provisions of the dealership agreements obligating the dealers to purchase all mufflers and parts from the defendants, requiring that they sell at fixed resale prices, tying the sale of mufflers to the sale of other goods in the defendants' line, and prohibiting the dealers from selling outside their designated exclusive sales territories, the defense that the restraints were permissible as reasonable means to protect the defendants' registered trade and service marks cannot be decided as a summary judgment question, but must be resolved along with all the other issues by a trial on the merits.

APPEAL §910.6 > grant of certiorari -- > Headnote:

[LEdHN\[3\]](#) [3]

The Supreme Court of the United States will grant certiorari where the rulings by the Court of Appeals in a private antitrust action to recover treble damages seem to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States.

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ACTIONS §18 > defenses -- > Headnote:

[LEdHN\[4\]](#) [4]

Broad common-law barriers to relief should not be invoked where a private suit serves important public purposes.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §6 > private action -- > Headnote:

[LEdHN\[5\]](#) [5]

The purposes of the antitrust laws are best served by insuring that a private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §14 > private antitrust action -- effect of violation by plaintiff -- > Headnote:

[LEdHN\[6\]](#) [6]

Although the plaintiff who reaps the reward of treble damages in a private antitrust action may be no less morally reprehensible than the defendant, nevertheless the law encourages his suit to further the overriding public policy in favor of competition; permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position, since they remain fully subject to civil and criminal penalties for their own illegal conduct.

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §14 > private antitrust action -- plaintiffs' participation in illegal arrangement -- > Headnote:

[LEdHN\[7\]](#) [7]

In private antitrust actions, the courts do not have power to undermine the antitrust acts by denying recovery to injured parties merely because they have participated to the extent of utilizing illegal arrangements formulated and carried out by others.

DAMAGES §159 > RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §36 > RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §41 > RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §42 > private antitrust action -- plaintiffs' participation in violation -- > Headnote:

[LEdHN\[8\]](#) [8]

In a private antitrust action to recover treble damages from the defendants, who manufactured automobile mufflers and exhaust system parts, wherein the plaintiffs, who had entered into dealership sales contracts, alleged that the defendants had violated the Robinson-Patman Act ([15 USC 13](#)) by granting discriminations in prices and services to some of their other customers, and that the defendants had conspired to restrain and lessen competition in violation of 1 of the Sherman Act ([15 USC 1](#)) and 3 of the Clayton Act ([15 USC 14](#)) under provisions of the dealership agreements obligating the dealers to purchase all mufflers and parts from the defendants, requiring that the dealers sell at fixed resale prices, tying the sale of mufflers to the sale of other products in the defendants' line, and prohibiting the dealers from selling outside their designated exclusive sales territories, the possible beneficial

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byproducts of a restriction in the agreement from a plaintiff's point of view can be taken into consideration in computing damages, but once it is shown that the plaintiff did not aggressively support and further the monopolistic scheme as a necessary part and parcel of it, his understandable attempts to make the best of a bad situation by operating under the agreement are not a ground for completely denying him the right to recover which the antitrust acts give him.

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §14 > private antitrust action -- defense -- doctrine of in pari delicto -- > Headnote:

[LEdHN\[9\]](#) [9]

The doctrine of in pari delicto, with its complex scope, contents, and effect, is not to be recognized as a defense to a private antitrust action.

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §36 > RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §41 > RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §42 > RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §50 > private antitrust action -- plaintiffs' participation in violation -- > Headnote:

[LEdHN\[10\]](#) [10]

In a private antitrust action to recover treble damages from the defendants, who manufactured automobile mufflers and exhaust system parts, wherein the plaintiffs, who had entered into dealership sales contracts, alleged that the defendants had violated the Robinson-Patman Act ([15 USC 13](#)) by granting discriminations in prices and services to some of their other customers, and that the defendants had conspired to restrain and lessen competition in violation of 1 of the Sherman Act ([15 USC 1](#)) and 3 of the Clayton Act ([15 USC 14](#)) under provisions of the dealership agreements obligating the dealers to purchase all mufflers and parts from the defendants, requiring that the dealers sell at fixed resale prices, tying the sale of mufflers to the sale of other products in the defendants' line, and prohibiting the dealers from selling outside their designated exclusive sales territories, there is no merit in the defendants' contention that the plaintiffs are barred from recovery, wholly apart from the idea of pari delicto, on the ground that the plaintiffs actively supported the entire restrictive program as such, participating in its formulation and encouraging its continuation, where the record refuted such contention and showed, to the contrary, that the illegal scheme had been thrust upon the dealers by the defendants, neither of the most strenuously challenged provisions, requiring the dealers to purchase their supplies exclusively from the defendants and to carry the defendants' full line of parts, being in a dealer's self-interest, since they obligated the dealer to buy from the defendants regardless of whether more favorable prices could be obtained from other sources and regardless of whether the dealer needed certain parts at all, and it being shown that the defendants had repeatedly refused, with warnings and threats, numerous requests by the plaintiffs for permission to purchase from other sources of supply.

RESTRAINTS OF TRADE, MONOPOLIES AND TRADE PRACTICES §34 > private antitrust action -- common ownership of corporate defendants -- > Headnote:

[LEdHN\[11\]](#) [11]

In a private antitrust action to recover treble damages from the defendants, who manufactured automobile mufflers and exhaust system parts, wherein the plaintiffs, who had entered into dealership sales contracts with one of the defendant corporations, alleged that the defendants had conspired to restrain competition in violation of the

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Sherman Act under provisions of the dealership agreements which imposed restrictions upon the dealers, the fact of common ownership of the defendants, who were a parent corporation, three of its subsidiaries, and some of the officers and agents of the corporations, does not save the defendants from any of the obligations that the law imposes on separate entities, under the asserted theory that because the defendants were all part of a single business entity they were entitled to co-operate without creating an illegal conspiracy.

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §31 > private antitrust action -- dealership franchise agreements -- > Headnote:

[LEdHN\[12\]](#) [down] [12]

In a private antitrust action to recover treble damages from the defendants, who were commonly owned corporations and some of their officers and agents, and who manufactured automobile mufflers and exhaust system parts, wherein the plaintiffs, who had entered into dealership franchise agreements with one of the defendant corporations, asserted a violation of the Sherman Act under provisions of the franchise agreements which imposed restrictions upon the dealers, each plaintiff can charge a combination between himself and the corporation with which the agreements were made, as of the day the plaintiff unwillingly complied with the restrictive franchise agreements, or between such corporation and other franchise dealers, whose acquiescence in the corporation's firmly enforced restraints was induced by the communicated danger of termination of the franchise.

PLEADING §176 > private antitrust action -- sufficiency of complaint -- > Headnote:

[LEdHN\[13\]](#) [down] [13]

In a private antitrust action to recover treble damages from the defendants, who were commonly owned corporations and some of their officers and agents, and who manufactured automobile mufflers and exhaust system parts, wherein the plaintiff, who had entered into dealership sales contracts with one of the defendant corporations, alleged that the defendants had conspired to restrain competition in violation of the Sherman Act under certain provisions of the dealership agreements which imposed restrictions upon the dealers and which the defendants had refused to eliminate, there is no merit in the defendants' contention that the complaint failed to allege with sufficient specificity certain alternative theories of conspiracy which were asserted by the plaintiffs and which were based on charges of combinations between each plaintiff and the corporation with which the agreements were made, and between such corporation and other franchise dealers, in view of the rules providing for trying cases to serve the ends of justice and particularly the requirement of [Rule 8 \(f\) of the Federal Rules of Civil Procedure](#) that pleadings be construed as to do substantial justice, the gist of the plaintiffs' cause of action having been clear from the outset, and the defendants not being prejudiced if the plaintiffs were permitted to rely on the alternative theories of conspiracy.

## Syllabus

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Petitioners, dealers who had operated "Midas Muffler Shops," brought this antitrust action for treble damages against respondent Midas, Inc., its parent corporation (International), two other subsidiaries, and corporate officers and agents, charging an illegal conspiracy in violation of [§ 1](#) of the Sherman Act, and violations of § 3 of the Clayton Act and § 2 as amended by the Robinson-Patman Act. Petitioners attacked provisions of the sales agreements which they had made with Midas including those which barred petitioners from purchasing from other sources, prevented them from selling outside designated territories, tied muffler sales to other Midas-line products, and required petitioners to sell at fixed retail prices. The District Court entered summary judgment for respondents. The

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Court of Appeals reversed the judgment on the Robinson-Patman claim but affirmed the District Court's ruling that petitioners' other claims were barred [\*\*\*\*2] by the doctrine of *in pari delicto*, noting that petitioners, with full knowledge of the restrictions, had enthusiastically sought and enormously profited from the Midas franchises and had sought additional franchises. The court also held that petitioners' Sherman Act claim was barred because Midas and International were part of a single business entity and therefore entitled to cooperate without creating an illegal conspiracy. *Held*:

1. There is nothing in the language of the antitrust laws indicating a congressional intent that the doctrine of *in pari delicto* should constitute a defense to a private antitrust action, and such application of the doctrine would undermine the important function performed by the private antitrust action in enforcing the antitrust laws. Pp. 138-140.
2. The record refutes respondents' argument that petitioners actively participated in formulating the restrictive plan and encouraged its continuation. Pp. 140-141.
3. Common ownership does not relieve separate corporate entities of the obligations which the antitrust laws impose; and in any event each petitioner can charge a combination between Midas and himself or other acquiescing franchisees. [\*\*\*\*3] Pp. 141-142.

**Counsel:** Robert F. Rolnick argued the cause for petitioners. With him on the briefs were Raymond R. Dickey and Bernard Gordon.

Glenn W. McGee argued the cause for respondents. With him on the brief were John T. Chadwell, David J. Gibbons, John C. Berghoff, Jr., David Silbert, and Jay Erens.

**Opinion by:** BLACK

## Opinion

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[\*135] [\*\*\*988] [\*\*1982] MR. JUSTICE BLACK delivered the opinion of the Court.

LEdHN[1A] [1A] LEdHN[2] [2] LEdHN[3] [3]The principal question presented is whether the plaintiffs in this private antitrust action were barred from recovery by a doctrine known by the Latin phrase *in pari delicto*, which literally means "of equal fault." The plaintiffs, petitioners here, were all dealers who had operated "Midas Muffler Shops" under sales agreements granted by respondent [\*\*1983] Midas, Inc. Their complaint charged that Midas had entered into a conspiracy with the other named defendants -- its parent corporation International Parts Corp., two other subsidiaries, [\*\*\*\*4] and six individual defendants who were officers or agents of the corporations -- to restrain and substantially lessen competition in violation of § 1 of the Sherman Act <sup>1</sup> and § 3 of the Clayton Act.<sup>2</sup> They also charged that the defendants had violated § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act,<sup>3</sup> by granting discriminations in prices and services to some of their customers without offering the same advantages to the plaintiffs. The District Court entered summary judgment for respondents with respect to all of petitioners' [\*136] claims. On appeal the Court of Appeals reversed the judgment for respondents on the Robinson-Patman claim but, over Judge Cummings' dissent, affirmed the District Court's ruling that the other claims were barred by the doctrine of *in pari delicto*. The court also held that petitioners' Sherman Act claim was barred because Midas and International, while functioning as separate corporations, had a common ownership and therefore could cooperate without creating an illegal conspiracy.<sup>4</sup> 376 F.2d 692 (1967). Because these rulings by

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<sup>1</sup> 26 Stat. 209, 15 U. S. C. § 1.

<sup>2</sup> 38 Stat. 731, 15 U. S. C. § 14.

<sup>3</sup> 49 Stat. 1526, 15 U. S. C. § 13.

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the Court of Appeals seemed to threaten the effectiveness of the private action [\*\*\*5] as a vital means for enforcing the antitrust policy of the United States, we granted certiorari. 389 U.S. 1034 (1968). For reasons to be stated, we reverse.

[\*\*\*6] The economic arrangements that led to this lawsuit have a long history. Respondent International Parts has been in the business of [\*\*989] manufacturing automobile mufflers and other exhaust system parts since 1938. In 1955 the owners of International initiated a detailed plan for promoting the sale of mufflers by extensively advertising the "Midas" trade name and establishing a nation-wide chain of dealers who would specialize in selling exhaust system equipment. Each prospective dealer was offered a sales agreement prepared by Midas, Inc., a wholly owned subsidiary of International. The agreement [\*137] obligated the dealer to purchase all his mufflers from Midas, to honor the Midas guarantee on mufflers sold by any dealer, and to sell the mufflers at resale prices fixed by Midas and at locations specified in the agreement. The dealers were also obligated to purchase all their exhaust system parts from Midas, to carry the complete line of Midas products, and in general to refrain from dealing with any of Midas' competitors. In return Midas promised to underwrite the cost of the muffler guarantee and gave the dealer permission to use the registered trademark "Midas" [\*\*\*7] and the service mark "Midas Muffler Shops." The dealer was also granted the exclusive right to sell "Midas" products within his defined territory. He was not required to pay a franchise fee or to purchase or lease substantial capital equipment from Midas, and the agreement was cancelable by either party on 30 days' notice.

Petitioners' complaint challenged as illegal restraints of trade numerous provisions of the agreements, such as the terms barring them from purchasing [\*\*1984] from other sources of supply, preventing them from selling outside the designated territory, tying the sale of mufflers to the sale of other products in the Midas line, and requiring them to sell at fixed retail prices. Petitioners alleged that they had often requested Midas to eliminate these restrictions but that Midas had refused and had threatened to terminate their agreements if they failed to comply. Finally they alleged that one of the plaintiffs had had his agreement canceled by Midas for purchasing exhaust parts from a Midas competitor, and that the other plaintiff dealers had themselves canceled their agreements. All the plaintiffs claimed treble damages for the monetary loss they had suffered [\*\*\*8] from having to abide by the restrictive provisions.

The Court of Appeals, agreeing with the District Court, held the suit barred because petitioners were *in pari* [\*138] *delicto*. The court noted that each of the petitioners had enthusiastically sought to acquire a Midas franchise with full knowledge of these provisions and had "solemnly subscribed" to the agreement containing the restrictive terms. Petitioners had all made enormous profits as Midas dealers, had eagerly sought to acquire additional franchises, and had voluntarily entered into additional franchise agreements, all while fully aware of the restrictions they now challenge. Under these circumstances, the Court of Appeals concluded, "it would be difficult to visualize a case more appropriate for the application of the *pari delicto* doctrine." [376 F.2d, at 699](#).

[LEdHN\[4\]](#) [4] [LEdHN\[5\]](#) [5] [LEdHN\[6\]](#) [6] We find ourselves in complete disagreement with the Court of Appeals. [HN1](#) There is nothing in the language of [\*\*\*9] the antitrust acts which indicates that Congress wanted to make the common-law *in pari delicto* doctrine a defense to treble-damage actions, and the facts of this case suggest no basis for applying such a doctrine even if it did exist. Although [\*\*\*990] *in pari delicto* literally means "of equal fault," the doctrine has been applied, correctly or incorrectly, in a wide variety of situations in which a plaintiff seeking damages or equitable relief is himself involved in some of the same sort of wrongdoing. We have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes. It was for this reason that we held in *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S.

<sup>4</sup> In their motion for summary judgment respondents also argued that the restraints were permissible as reasonable means to protect their registered trade and service marks, but because they had failed to answer interrogatories pertinent to this defense, the district judge ordered it stricken, without prejudice to renewal if respondents promptly answered the relevant interrogatories. Because of its disposition of the case, the Court of Appeals reached neither the merits of this defense nor the question whether respondents had ever properly renewed it. In the circumstances of this case, we think the merits of this defense cannot be decided as a summary judgment question but must be resolved, along with all the other issues, by a trial on the merits.

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[211 \(1951\)](#), that a plaintiff in an antitrust suit could not be barred from recovery by proof that he had engaged in an unrelated conspiracy to commit some other antitrust violation. Similarly, in [Simpson v. Union Oil Co., 377 U.S. 13 \(1964\)](#), we held that a dealer whose consignment agreement was canceled for failure to adhere to a fixed resale price could bring suit under the antitrust laws [\*\*\*\*10] even though by signing the agreement he had to that extent [\*139] become a participant in the illegal, competition-destroying scheme. Both *Simpson* and *Kiefer-Stewart* were premised on a recognition that [HN2](#) the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of anti-trust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct. *Kiefer-Stewart, supra.*

[LEdHN\[1B\]](#) [1B] [LEdHN\[7\]](#) [7] [\*\*\*\*11] [LEdHN\[8\]](#) [8] [LEdHN\[9\]](#) [9] In light of these considerations, we cannot accept the Court of Appeals' idea that courts have power to undermine [\*\*1985] the antitrust acts by denying recovery to injured parties merely because they have participated to the extent of utilizing illegal arrangements formulated and carried out by others. Although petitioners may be subject to some criticism for having taken any part in respondents' allegedly illegal scheme and for eagerly seeking more franchises and more profits, their participation was not voluntary in any meaningful sense. They sought the franchises enthusiastically but they did not actively seek each and every clause of the agreement. Rather, many of the clauses were quite clearly detrimental to their interests, and they alleged that they had continually objected to them. Petitioners apparently accepted many of these restraints solely because their acquiescence was necessary to obtain an otherwise attractive business opportunity. The argument that such [\*140] conduct by petitioners defeats their right [\*\*\*\*12] to sue is completely refuted by the following statement from *Simpson*: "[HN3](#) The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the anti-trust laws." [377 U.S., at 16](#). Moreover, even if petitioners actually favored and supported some of the other restrictions, they cannot be blamed for seeking to minimize the disadvantages of the agreement [\*\*\*991] once they had been forced to accept its more onerous terms as a condition of doing business. The possible beneficial byproducts of a restriction from a plaintiff's point of view can of course be taken into consideration in computing damages, but once it is shown that the plaintiff did not aggressively support and further the monopolistic scheme as a necessary part and parcel of it, his understandable attempts to make the best of a bad situation should not be a ground for completely denying him the right to recover which the antitrust acts give him. We therefore hold that [\*\*\*\*13] [HN4](#) the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action.

[LEdHN\[10\]](#) [10] Respondents, however, seek to support the judgment below on a considerably narrower ground. They picture petitioners as actively supporting the entire restrictive program as such, participating in its formulation and encouraging its continuation. We need not decide, however, whether such truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of *in pari delicto*, for barring a plaintiff's cause of action, for in the present case the factual picture respondents attempt to paint is utterly refuted by the record. One of the restrictions which petitioners most strenuously challenge is the requirement that dealers purchase their supplies exclusively from Midas. Another is the requirement that dealers carry Midas' full line of parts. Neither of these provisions could be in a dealer's self-interest since they obligate [\*141] him to buy from Midas regardless of whether more favorable prices [\*\*\*\*14] can be obtained from other sources of supply and regardless of whether he needs certain parts at all.<sup>5</sup> In addition, the depositions refer to

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<sup>5</sup> Respondents suggest that these requirements were beneficial to a dealer because they helped him win customers who had confidence in the "Midas" brand, and some dealers evidently did try to reap some benefit from these requirements by advertising, "You get only nationally-advertised Midas products." It seems highly unlikely, however, that benefits of this kind could do more than mitigate very slightly the losses that a dealer would suffer when forced to buy higher-priced Midas products, particularly since dealers would have bought the higher-priced Midas products voluntarily if they thought customer preferences for the brand would be sufficiently strong to offset the higher price.

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numerous instances in which petitioners asked Midas for permission to purchase from some other source of supply. The record shows that these requests were repeatedly refused by Midas representatives, [\*\*1986] who underscored the refusals by describing the very requests as "heresy" and by commenting that dealers who bought from outside sources of supply were "asking for trouble" or "were going to be punished." A Midas official warned petitioner Pierce, who had been buying some exhaust parts from other manufacturers, "Joe, this is just like cheating on your wife; it is grounds for divorce."

[\*\*\*\*15] These statements completely refute respondents' argument that petitioners were active participants and show, to the contrary, that the illegal scheme was thrust upon them by Midas.

LEdHN[11] [11]LEdHN[12] [12]LEdHN[13] [13]There remains for consideration only the Court of Appeals' alternative holding that the Sherman Act claim should be dismissed because respondents were all part of a single business entity and [\*\*\*992] were therefore entitled to cooperate without creating an illegal conspiracy. But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not [\*142] save them from any of the obligations that the law imposes on separate entities. See *Timken Co. v. United States*, 341 U.S. 593, 598 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947). In any event each petitioner can clearly charge a combination between [\*\*\*\*16] Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements, *Albrecht v. Herald Co.*, 390 U.S. 145, 150, n. 6 (1968); *Simpson v. Union Oil Co., supra*, or between Midas and other franchise dealers, whose acquiescence in Midas' firmly enforced restraints was induced by "the communicated danger of termination," *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 372 (1967); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). Although respondents object that these particular theories of conspiracy now pressed by petitioners were not alleged with sufficient specificity in their complaint, this suggestion is completely without merit. Our modern rules provide for trying cases to serve the ends of justice and require that HN5 pleadings "be so construed as to do substantial justice." *Rule 8 (f), Fed. Rules Civ. Proc.* The gist of petitioners' cause of action has been clear from the outset, and respondents will in no way be prejudiced if petitioners are permitted to rely [\*\*\*\*17] on these alternative theories of conspiracy.

It follows that the judgment of the Court of Appeals must be reversed. The case is remanded to that court with directions to reverse in full the judgment of the District Court and to remand the case for trial.

*It is so ordered.*

**Concur by:** WHITE; FORTAS; MARSHALL; HARLAN (In Part)

## Concur

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MR. JUSTICE WHITE, concurring.

I join the opinion and judgment of the Court with the following observations.

As long ago as 1927, in *Eastman Kodak Co. of N. Y. v. Southern Photo Materials Co.*, 273 U.S. 359, the Court [\*143] recognized that participation in an unlawful course of conduct would not bar recovery where the defendant's superior bargaining power led to plaintiff's participation in the unlawful arrangement. In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), where plaintiff was said to have participated in an illegal scheme other than the one charged in his complaint, the Court made it clear that a plaintiff's own delinquency under the antitrust laws would not always bar his treble-damage suit. See also *Bales v. Kansas City Star Co.*, 336 F.2d 439, 444 (C. A. 8th Cir. 1964); [\*\*\*\*18] *Jewel Tea Co.* [\*\*1987] v. *Local Unions*, 274 F.2d 217, 223 (C. A. 7th Cir.), cert. denied, 362 U.S. 936 (1960). These cases are enough to warrant reversal in this case, once it is concluded that the illegal arrangement in which petitioners participated [\*\*\*993] was thrust on them by respondents. This is the conclusion reached by the Court and I agree with it.

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I also agree that the *in pari delicto* defense in its historic formulation is not a useful concept for sorting out those situations in which the plaintiff might be barred because of his own conduct from those in which he may have been a party to an illegal venture but is still entitled to damages from other participants. Judgments like these would be better made by hewing closer to the aims and purposes of § 4 of the Clayton Act, 38 Stat. 731, [15 U. S. C. § 15](#), which gives treble-damage recovery to the private plaintiff injured by conduct which violates the antitrust laws.

Under § 4, plaintiff must show not only that the defendant violated the antitrust laws but that his conduct caused the damages alleged in the complaint. Normally, it would be enough [\*\*\*\*19] with respect to causation if the defendant "materially contributed" to plaintiff's injury, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, [370 U.S. 690, 702 \(1962\)](#); or "substantially" [\*144] contributed, notwithstanding other factors contributed also," *Moman v. Universal Film Exchanges, Inc.*, [172 F.2d 37, 43 \(C. A. 1st Cir. 1948\)](#), cert. denied, [336 U.S. 967 \(1949\)](#). The plaintiff need not show that the illegality was a more substantial cause than any other. *Haverhill Gazette Co. v. Union Leader Corp.*, [333 F.2d 798, 805-806](#) (C. A. 1st Cir.), cert. denied, [379 U.S. 931 \(1964\)](#).

Under this rule, a third party proving an illegal undertaking between two defendants may recover for all damages caused by the combination. Those damages normally may be had from either or both defendants without regard to their relative responsibility for originating the combination or their different roles in effectuating its ends. This is because neither defendant, if he acted alone, could be charged with the violation; some degree of participation by both is essential to create a combination within the [\*\*\*\*20] reach of [§ 1](#) of the Sherman Act. Either defendant is therefore deemed to have been a material cause of the damages, sufficient to permit a third party to recover.

This may be the result required under § 4 when conspirators are sued by an injured outsider. But what is the situation when one party to the combination sues the other? Assume three situations: first, A, a manufacturer, sells to B, a retailer. A, over B's objection, insists on B's adhering to specified resale prices. B agrees since A's product is an important part of his business and he can get it nowhere else. B suffers a decline in business because of an inability to match or better the price for competing products. B sues A. He is obviously in a position to prove that A was a substantial cause of his injury.

Second, suppose that when B maintains the suggested prices on A's product, he simply sells more of C's competing product, which he also handles. B is not hurt, but A is. A sues B.

[\*145] Third, suppose that D and E, competitors, combine to fix higher prices. D's best customer sets up his own source of supply to D's great damage. D sues E, claiming that E was a substantial cause of his injury.

[\*\*\*\*21] It is arguable that in each supposed situation recovery should be [\*\*\*994] denied because the plaintiff was a party to the illegality and wrongdoers should be left where they are found. In terms of the deterrent aims of the statute permitting injured plaintiffs to recover treble damages, however, this undiscriminating approach [\*\*1988] makes little sense. When those with market power and leverage persuade, coerce, or influence others to cooperate in an illegal combination to their damage, allowing recovery to the latter is wholly consistent with the purpose of § 4, since it will deter those most likely to be responsible for organizing forbidden schemes. The principles of *Eastman Kodak Co. of N. Y. v. Southern Photo Materials Co., supra*, clearly permit recovery by the less responsible, but injured, party. In the first hypothetical case, therefore, B should recover from A in order to deter A and others like him from imposing resale price maintenance schemes on their customers.

In the second case, where manufacturer A, contrary to his expectations, was injured and retailer B was not, there is no reason, based on the deterrent purposes of § 4, to permit [\*\*\*22] recovery from B, even though his cooperation was essential to the combination and even though had a third party been injured he could have recovered from either A or B, or from both. A, the moving force, should not be rewarded for his efforts to further an unlawful price arrangement and in effect to take from B the profits, trebled, that B made by selling the products of A's competitor. B was unwilling to enter the illegal scheme, was motivated principally by what he thought was economic necessity -- the need to avoid losing business by being unable to offer a major [\*146] product line -- and would have been only marginally deterred by the prospect of antitrust liability.

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In the third case, where D and E are competitors, if D simply proves the agreement and the resulting loss, should he recover from E, absent some believable showing that E was the more responsible for the illegal scheme? No doubt E was a substantial factor in the combination and hence in the injury; a judgment for damages might deter him and others from violating the law. But D is equally responsible for his own damages. To permit him a recovery may be a counterdeterrent. By assuring him illegal profits [\*\*\*\*23] if the agreement in restraint of trade succeeds, and treble damages if it fails, it may encourage what the Act was designed to prevent. In this situation, it is doubtful that the ends of § 4 would be measurably served by permitting D's recovery. If judge or jury finds the parties equally responsible for the conduct which caused injury, D's recovery under § 4 should be denied for failure of proof that E was the more substantial cause of the injury.

No simple formula can encompass the infinite variety of possible situations. Generally speaking, however, I would deny recovery where plaintiff and defendant bear substantially equal responsibility for injury resulting to one of them but permit recovery in favor of the one less responsible where one is more responsible than the other. This rule would simply pose the issue of causation in particularized form. There will be little mystery as to what evidence would be relevant proof: facts as to the relative responsibility for originating, negotiating, and implementing the scheme; evidence as to who might reasonably have been expected to benefit from the [\*\*\*995] provision or conduct making the scheme illegal under § 1; proof of [\*\*\*\*24] whether one party attempted to terminate the arrangement and encountered resistance or counter-measures from the other; facts showing [\*147] who ultimately profited or suffered from the arrangement.

As I view the record in the case before us, the evidence is insufficient to show that petitioners were as responsible as respondents, or more so, for the admittedly illegal scheme. The evidence before us does not suggest that petitioners were equal partners with respondents with respect to the origin and implementation of this scheme for distributing respondents' mufflers, or in terms of benefits from the scheme. In such circumstances summary judgment for respondents was improper.

[\*\*1989] MR. JUSTICE FORTAS, concurring in the result.

I agree with the result in this case. Petitioners' right to recover in their own interest and as "private attorneys general" to enforce the antitrust laws cannot be denied on the basis of the doctrine of *in pari delicto*. [Simpson v. Union Oil Co., 377 U.S. 13 \(1964\)](#).

The doctrine has, however, a significant if limited role in private **antitrust law**. If the fault of the parties is reasonably within the same scale -- if the [\*\*\*\*25] "*delictum*" is approximately "par" -- then the doctrine should bar recovery. This might be the case, for example, if a manufacturer of mufflers and a manufacturer of other parts had combined to formulate and operate a collusive scheme. One co-adventurer could not sue the other for discriminatory or restrictive practices which allegedly diminished its take from the enterprise.

But equality of position of this general nature is necessary before *in pari delicto* may apply to bar an antitrust remedy. Unless the doctrine is so limited, the private remedy provided by the antitrust laws is nullified to a significant extent. The owner of a gas station may enter into an arrangement with the distributor and may benefit from its restrictive provisions. But this less-than-equal participation in the crime must not bar him [\*148] from recovering in his own and the public interest if he can show that he has suffered compensable harm. Our decision in *Simpson* indicates this quite clearly. The antitrust laws are intended to protect individuals "from combinations fashioned by others and offered to [them] . . . as the only feasible method by which [they] may do business. [\*\*\*\*26] " [Ring v. Spina, 148 F.2d 647, 653 \(1945\)](#).

As the Court points out, it is possible that the franchisee may be proved to be a collaborator, or coadventurer, or a true *particeps criminis* with respect to a particular aspect of the plan -- for example, if he originated and insisted upon the inclusion of a territorial exclusivity clause which was not in the franchise as drafted by the franchisor. He could not recover damages based upon this, if, essentially, it is his own act.

Clearly, petitioners here are not co-adventurers or partners in the franchise arrangement as a whole, and they are not barred by *in pari delicto*. On remand, as the Court orders, if petitioners are chargeable with responsibility for a

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particular clause of the agreement or restrictive covenant because it is, in substance, their own act, they should not be allowed to recover for injury [\*\*\*996] they may have suffered because of it.

MR. JUSTICE MARSHALL, concurring in the result.

While I agree with the result and much of the reasoning in the opinion of the Court in this case, I find myself unable to accept what I take to be the holding that the doctrine of *in pari delicto* [\*\*\*27] has no place in a treble-damage antitrust action. Not only is it unnecessary to pass on such a broad proposition on the facts of this case, as the Court's opinion reveals, but the holding itself is, in my opinion, incorrect.

I agree that the "complex scope, contents, and effects" of the doctrine as it has grown up in the common law should not be applied mechanically to private antitrust [\*149] actions under the relevant federal statutes. On the other hand, I believe that a limited application of the basic principle behind the doctrine of *in pari delicto* is both proper and desirable in the antitrust field. As the Court notes, *ante*, at 138, the literal meaning of *in pari delicto* is of equal fault. I would hold that where a defendant in a private antitrust suit can show that the plaintiff actively participated in the formation and implementation of an illegal scheme, and is substantially equally at fault, the plaintiff should [\*\*1990] be barred from imposing liability on the defendant.

Such an approach would still require reversal of the decision of the Court of Appeals in this case. As this Court's opinion makes perfectly clear, the mere fact that a party enters [\*\*\*28] into an agreement containing provisions that are violative of the antitrust laws with the intent to make money by operating under the agreement is not in itself sufficient to show that he is equally responsible for the existence of the illegal provisions. *Simpson v. Union Oil Co., 377 U.S. 13 (1964)*. Furthermore, the Court is certainly correct in concluding that the record is replete with evidence, relating to the tying and exclusive-dealing provisions of the franchise agreement, which indicates, with sufficient probative force to withstand respondents' motion for summary judgment, that the petitioners did not actively seek out or support all the anticompetitive restraints embodied in the franchise.

However, the inquiry should not stop here. The franchise agreement also contains provisions requiring both resale price maintenance and the observance of territorial restrictions on sales by franchisees. Both of these sets of restrictions are ones which, at least on their face, would ordinarily be expected to benefit the franchisees more than Midas. Both restrict competition between franchisees, not between Midas and other suppliers competing to sell parts to [\*\*\*29] Midas franchisees. If Midas can [\*150] make an adequate showing that those provisions were inserted into the franchise agreement at the behest and for the benefit of petitioners and their fellow franchisees, petitioners should, in my opinion, be barred from contending that they were damaged by the existence and enforcement of the provisions.

I agree with the Court that petitioners should not be barred from recovering damages attributable to the enforcement of the tying and exclusive dealing provisions against them on the sole ground that they participated in the formulation of other anticompetitive provisions in the agreement. Cf. *Moore v. Mead Service Co., 340 U.S. 944* [\*\*\*997] (1951), vacating *184 F.2d 338 (C. A. 10th Cir. 1950)*. However, if Midas could show, which it has quite clearly not done at this stage of the litigation, that petitioners actually participated in the formulation of the entire agreement, trading off anticompetitive restraints on their own freedom of action (such as the tying and exclusive dealing provisions) for anticompetitive restraints intended for their benefit (such as resale price maintenance or exclusive territories), [\*\*\*30] petitioners should be barred from seeking damages as to the agreement as a whole.

It may be argued that the course I propose unduly complicates private antitrust litigation. A holding that a party who voluntarily enters into an agreement containing provisions that violate the antitrust laws is barred from any recovery on that agreement altogether (as the Court of Appeals has held here) or, at the other extreme, is absolutely free to recover any damages that he can show to stem from his operations under the agreement (as this Court's opinion seems to hold) would presumably be considerably easier to apply in most cases. It seems to me, however, that neither holding would represent a satisfactory resolution of the difficult problems concerning the administration of the antitrust laws raised by [\*151] agreements such as the one involved in the present case.

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The reasons for rejecting the approach taken by the Court of Appeals are, as I have said, persuasively set forth in the opinion of the Court. The reasons I see for rejecting the approach taken by this Court are, perhaps, less related to the public interest in eliminating all forms of anticompetitive business conduct and more [\*\*\*\*31] related to the equities as between the parties. The principle that [\*\*1991] a wrongdoer shall not be permitted to profit through his own wrongdoing is fundamental in our juris-prudence. The traditional doctrine of *in pari delicto* is itself firmly based on this principle. I nevertheless agree, because of the strong public interest in eliminating restraints on competition, that many of the refinements of moral worth demanded of plaintiffs by such traditional legal and equitable doctrines as *volenti non fit injuria*, unclean hands, and many of the variations of *in pari delicto* should not be applicable in the antitrust field. However, I cannot agree that the public interest requires that a plaintiff who has actively sought to bring about illegal restraints on competition for his own benefit be permitted to demand redress -- in the form of treble damages -- from a partner who is no more responsible for the existence of the illegality than the plaintiff.

The possible added deterrence to violations of the antitrust laws that would be produced by the Court's holding may well be equaled, if not surpassed, by the new incentive it will create to commit such violations, for [\*\*\*\*32] a potential violator will have less to lose if he can attempt to recover his losses from his partner should the scheme not work out to his benefit.

The Court's opinion appears to seek to minimize the consequences of doing away with the *in pari delicto* defense by suggesting that a defendant will be able to have the "beneficial byproducts of a restriction" (*ante*, at 140) to the plaintiff taken into account in the computation [\*152] of damages. This, of course, is to some extent already true in any antitrust case. Illegal conduct does not *per* [\*\*\*998] se result in a money judgment for a plaintiff; injury must always be shown. However, a defendant might also be permitted to show that the plaintiff's financial rewards from some of the illegal provisions of an agreement outweighed the harm suffered from other illegal provisions, and accordingly on some sort of offset theory the plaintiff would recover nothing.

If such an offset approach on the issue of damages is envisioned by the Court, it hardly seems an adequate means of preventing unjust enrichment. First, that approach clearly permits damages to be awarded when injury is shown to outweigh benefit regardless [\*\*\*33] of the nature of the plaintiff's participation in the scheme. Second, it adds an unnecessarily speculative element to the factual inquiry required in an antitrust case. While a trier of fact may have some difficulty in allocating responsibility between the parties to an agreement, the allocation can be made for the most part on the basis of hard evidence as to the facts surrounding the making of the agreement. The determination of damages in an antitrust suit, however, almost invariably requires a certain amount of speculation, no matter how informed. Cf. [Bigelow v. RKO Pictures, Inc., 327 U.S. 251, 264-266 \(1946\)](#). Such speculation is ordinarily unavoidable if damages are to be provable. Here there is no necessity for permitting additional speculation as to offsetting benefits in order to prevent unjust enrichment because the same goal can be achieved by a factual evaluation of the parties' respective fault.

For example, it is obviously much easier to determine in this case whether petitioners actively participated in the formulation and implementation of the various illegal provisions of the franchise agreement than it is to decide whether the monetary [\*\*\*\*34] benefits that petitioners obtained [\*153] through the resale price maintenance and exclusive territorial provisions surpassed the losses they suffered from the exclusive dealing and tying arrangements. Since I regard a respective-fault approach as superior to a damage-offset approach on principle, the complications inherent in the latter inquiry merely reinforce my conviction that the Court is being unwise in broadly rejecting the doctrine of *in pari delicto*.

**Dissent by:** HARLAN (In Part)

## **Dissent**

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[\*\*1992] MR. JUSTICE HARLAN, with whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

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The variety of views this case has engendered seems to me to stem from lack of agreement on a definition of the term "*in pari delicto*," as well as a disagreement, perhaps, on the standards that should govern the use of the defense to which that term is properly applied. I believe that the courts below misused the term, but that properly used it refers to a defense that should be permitted in antitrust cases. Consequently, I would remand this case not for immediate trial but for fresh consideration of the motion for summary judgment upon proper standards.

Plaintiffs who [\*\*\*35] are truly *in pari delicto* are those who have themselves violated the law in cooperation with the defendant.<sup>1</sup> If the law is the [\*\*\*999] Sherman Act, both are, in principle, liable equally to criminal prosecution. For example, two manufacturers who agree on a price at which they will sell are "of equal fault," as are a manufacturer and a dealer who strike a bargain whereby each accepts an illegal restriction that benefits the other.

[\*154] When a person suffers losses as a result [\*\*\*36] of activities the law forbade *him* to engage in, I see no reason why the law should award him treble damages from his fellow offenders. It seems to me a bizarre way to "further the overriding public policy in favor of competition," *ante*, at 139, to pay violators three times their losses in doing what public policy seeks to deter them from doing. Even if the threat of intra-conspiracy treble damages had some deterrent effect, however, I should not think it a too "fastidious regard for the relative moral worth of the parties," *ibid.*, to decline to sanction a kind of antitrust enforcement that rests upon a principle of well-compensated dishonor among thieves.

There are, however, three situations quite distinct from that to which I think the term *in pari delicto* is properly applied. The first is the "consent" situation in which the Latin maxim "*volenti non fit injuria*" is sometimes invoked. Where X and Y conspire to fix prices at which they will sell, they are *in pari delicto*. If Z, *knowing of the conspiracy*, nevertheless purchases from X, he is not *in pari delicto*. He has committed no offense: the most that can be said is that he knowingly allowed [\*\*\*37] an offense to be committed against him. I would agree, for many of the reasons stated in the opinions of MR. JUSTICE BLACK, MR. JUSTICE FORTAS, and MR. JUSTICE MARSHALL, that there should be no defense in such a situation, where the plaintiff has done nothing the law told him not to do.

A second situation distinguishable from true *in pari delicto* is illustrated by *Kiefer-Stewart Co. v. Seagram & Sons*, [340 U.S. 211](#), relied on by the Court. It was there alleged in defense to a treble-damage action that the defendants' illegal actions were taken in reprisal against altogether independent illegal actions by the plaintiff. Here again, I accept the decision that this is no defense. Our law frowns on vigilante justice. Since the plaintiff is in part enforcing the public interest against the defendants' violations, I would permit him to do so, and [\*155] leave punishment for any independent violation by him to proper means of enforcement.

The third distinguishable situation may or may not be illustrated by [Simpson v. Union Oil Co., 377 U.S. 13](#), [\*\*1993] and [Albrecht v. Herald Co., 390 U.S. 145](#), two cases [\*\*\*38] that I find it quite difficult to understand.<sup>2</sup> In each of them, the plaintiff had been offered a dealership, on terms that he did not participate in formulating, and in each case he at first "accepted" such a dealership. Since neither case stated satisfactorily where the alleged combination in restraint of trade was to be found, it is not clear whether the plaintiff's acceptance of a dealership was itself a forbidden act. If it was [\*\*\*1000] not, then these cases fall under the heading of "consent" cases. A person who engaged in a lawful business on the terms offered should not be prevented from suing merely by his knowledge that others violated the law in contriving those terms. If, however, those plaintiffs were doing something the law told them not to do, I suggest that recovery in those cases can best be understood on the theory of a "coercion" exception to the *in pari delicto* doctrine. That is, although a large business with the power to dictate terms and a small business that can only accept them or cease doing business may both, in principle, be liable to

<sup>1</sup>This is at least the traditional use of the term. See, e. g., *Williams v. Hedley*, 8 East 378, 381-382, 103 Eng. Rep. 388, 389. See generally Note, In Pari Delicto and Consent as Defenses in Private Antitrust Suits, 78 Harv. L. Rev. 1241, distinguishing the two defenses. The present case is as good an illustration as any of the usefulness of maintaining distinct terms for the distinct situations properly characterized by "*in pari delicto*," "consent," "unclean hands," and so forth.

<sup>2</sup>See my dissenting opinion in [Albrecht, 390 U.S., at 156](#).

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legal sanctions for the contract that results from the offer and acceptance, it is considered that the liability [\*\*\*39] is not "par," and that the business accepting dictation is only minimally blameworthy.

In my view, the District Court and the Court of Appeals did not apply the true *in pari delicto* standard to this case. The District Court said that "each plaintiff voluntarily entered into the franchise agreement . . . and accepted the benefits therefrom. They are . . . [therefore?] *in pari delicto* with defendants . . ." <sup>3</sup> [\*\*\*40] At another [\*156] point the court said, "We have repeatedly held that a person who freely assents to an act suffers 'no legal injury' if harm results therefrom." <sup>4</sup> Although the District Court made a passing distinction of the "coercion" and "unclean hands" doctrines, it is not clear that it meant to hold that the violation of the Sherman Act, if any, was one for which plaintiffs were subject to public-law sanctions along with the defendants.

The Court of Appeals decision was similar. That court relied on the District Court's language quoted above, adding that each of the plaintiffs had made a substantial profit from selling auto parts, a fact that might bear on the measure of any damages but which, apart from illegal action on the part of the plaintiffs, should not afford an absolute defense. <sup>5</sup>

It is by no means clear on this record, however, that the plaintiffs may not be said to have been *in pari delicto* in the proper sense of that term. This question is rendered more difficult by the complexity of the record history of plaintiffs' activities, and by the formidable obscurity of the law of dealer liability for vertical restraints, an obscurity fostered by *Simpson, supra*, *Albrecht, supra*, and above all by *United States v. Parke, Davis & Co., 362 U.S. 29*. [\*\*\*41] Although I make no attempt to drain the bog at this point, I am of the view that before this case goes to trial the lower courts should be given another opportunity to consider the *in pari delicto* defense. I would remand this case to determine whether any agreement alleged to be in restraint of trade was one for which the plaintiffs were substantially as much responsible, and as much legally liable, as the defendants. I would permit the lower courts to consider this question upon the existing affidavits and such additional material as either side may wish to adduce.

## References

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Am Jur, Monopolies, Combinations, and Restraints of Trade (1st ed 28, 29, 32-36, 181-189)

14 Am Jur Pl & Pr Forms, Monopolies, Combinations, and Restraints of Trade, Forms 14:311, 14:312

11 Am Jur Legal Forms, Sales, Forms 11:1207 et seq.

US L Ed Digest, Restraints of Trade and Monopolies 14, 36, 41, 42, 50

ALR Digests, Restraints of Trade and Monopolies 10, 14, 15, 20, 24, 31, 32

L Ed Index to Anno, Restraints of Trade and Monopolies

ALR Quick Index, Restraints of Trade and Monopolies

[\*\*\*42] Annotation References:

Validity under federal antitrust laws of agreement conferring exclusive sales agency for designated territory. *9 L Ed 2d 1235*.

Validity, under 3 of the Clayton Act (*15 USC 14*), of contract by purchaser of goods to take his entire requirements from the seller. *5 L Ed 2d 1105*.

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<sup>3</sup> 1966 Trade Cases para. 71,801, at 82,705.

<sup>4</sup> *Id.*, at 82,706.

<sup>5</sup> See *376 F.2d 692, at 693, 695*.

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Robinson-Patman Act as construed by Supreme Court. [2 L Ed 2d 1737.](#)

Validity, construction, and application of provisions of Robinson- Patman Act regarding furnishing of services or facilities. [89 L Ed 1336](#); 13 ALR 2d 362.

Actions for threefold damages under [Federal Antitrust Act. 53 L Ed 826.](#)

Right of manufacturer, producer, or wholesaler to control resale price. 7 ALR 449, 19 ALR 925, 32 ALR 1087, 103 ALR 1331, 125 ALR 1335.

Participation in illegal combination as defense to action under Anti-trust Act. 160 ALR 381.

Contract by one party to sell his entire output to, or to take his entire requirements of a commodity from, the other as contrary to public policy or antimonopoly statutes. 83 ALR 1173 .

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## Hanover Shoe v. United Shoe Mach. Corp.

Supreme Court of the United States

March 5, 1968, Argued ; June 17, 1968, Decided \*

No. 335

### **Reporter**

392 U.S. 481 \*; 88 S. Ct. 2224 \*\*; 20 L. Ed. 2d 1231 \*\*\*; 1968 U.S. LEXIS 3147 \*\*\*\*; 1968 Trade Cas. (CCH) P72,490

HANOVER SHOE, INC. v. UNITED SHOE MACHINERY CORP.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

**Disposition:** 377 F.2d 776, affirmed in part, reversed in part, and remanded.

## **Core Terms**

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leasing, machines, manufacturer, shoe, damages, monopolization, decree, overcharge, buyer, cases, competitors, shoe machinery, monopoly power, Sherman Act, profits, antitrust, customers, machinery, practices, anti trust law, violations, factories, bought, taxes, *prima facie* evidence, Clayton Act, treble-damage, predatory, charges, effects

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > Clayton Act > General Overview

### [HN1](#) [] **Clayton Act, Penalties**

Section 5(a) of the Clayton Act, 38 Stat. 731, as amended, 69 Stat. 283, [15 U.S.C.S. § 16\(a\)](#), makes a final judgment or decree in any civil or criminal suit brought by the United States under the antitrust laws *prima facie* evidence as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.

Antitrust & Trade Law > Clayton Act > General Overview

Torts > Business Torts > General Overview

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

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\* Together with No. 463, United Shoe Machinery Corp. v. Hanover Shoe, Inc., also on certiorari to the same court.

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

Section 4 of the Clayton Act, 38 Stat. 731, [15 U.S.C.S. § 15](#), provides that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor and shall recover threefold the damages by him sustained. The court thinks it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a *prima facie* case of injury and damage within the meaning of [§ 4](#).

Antitrust & Trade Law > Clayton Act > General Overview

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > False Charges & Rebates

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

A person whose property is diminished by a payment of money wrongfully induced is injured in his property.

**Lawyers' Edition Display**

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**Summary**

The plaintiff, a manufacturer of shoes and customer of the defendant manufacturer of shoe machinery, brought, in the United States District Court for the Middle District of Pennsylvania, the present treble damage antitrust action based on defendant's monopolization of the shoe machinery market by offering its machines only for leasing but not for sale. In support of its action, plaintiff relied solely on a decree in favor of the United States in a former action against defendant as *prima facie* evidence under [15 USC 16\(a\)](#). The District Court awarded damages, in the amount of \$ 4,239,609. (245 F Supp 258.) On appeal, the Court of Appeals for the Third Circuit affirmed the finding of liability but disagreed with the District Court on certain questions relating to the damage award. (377 F2d 776.)

On writs of certiorari, the Supreme Court reversed the judgment of the Court of Appeals on questions relating to the damage award. In an opinion by White, J., expressing the views of seven members of the court, it was held that (1) the decree in the government's suit determined the illegality of defendant's "lease only" policy and hence was *prima facie* evidence on that issue, (2) the plaintiff made out a *prima facie* case by showing the illegality of defendant's "lease only" practice and the amount of defendant's overcharge, (3) defendant was not entitled to assert a "passing on" defense, (4) plaintiff was entitled to damages for the entire period of the applicable Pennsylvania statute of limitations, and (5) the District Court, in computing damages, properly refused to reduce the amount of recovery by the amount of alleged tax advantages to plaintiff, and properly deducted a loan credit interest component of 2.5 percent from the profits that it thought plaintiff would have earned by purchasing machines.

Stewart, J., dissented, expressing the view that the decree in the government's suit was not *prima facie* evidence of the illegality of defendant's "lease only" practice, and that, in the absence of other evidence, defendant's liability to plaintiff was not established.

Marshall, J., did not participate.

**Headnotes**

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CASES AND QUESTIONS CERTIFIED §9 > time for certification -- > Headnote:

[LEdHN\[1\]](#) [1]

A Federal District Court acts within its discretion in denying as untimely certification to another District Court of a question of the construction of the latter court's opinion and decree in a former case, where the District Court, in the instant case, had already ruled upon the question.

EVIDENCE §486 > JUDGMENT §141 > in government's antitrust action -- estoppel -- prima facie evidence -- > Headnote:

[LEdHN\[2\]](#) [2]

In determining the extent of estoppel resulting from a decree in favor of the government in its civil antitrust action, the court is not limited to the decree; if by reference to the findings, opinion, and decree it is determined that an issue was actually adjudicated in the government's antitrust suit, the private plaintiff in a subsequent action against the same defendant for treble damages can treat the outcome of the government's case as prima facie evidence on that issue.

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §75 > scope of relief -- > Headnote:

[LEdHN\[3\]](#) [3]

A provision in a decree rendered in favor of the government in its civil antitrust action which requires that defendant no longer offer for lease its machine type unless it also offers such type for sale, is a justifiable remedy even if the practice that it bans was not instrumental in the monopolization of the market.

EVIDENCE §486 > JUDGMENT §141 > antitrust action -- estoppel -- prima facie evidence -- > Headnote:

[LEdHN\[4\]](#) [4]

The portions of the court's opinion in favor of the government in its civil antitrust action which, supported by the court's findings of fact, condemn defendant's practice of making its machines available by lease only, estop defendant as against the government, and therefore constitute prima facie evidence in a private plaintiff's subsequent antitrust action against the same defendant for treble damages.

JUDGMENT §65 > antitrust action -- construction -- > Headnote:

[LEdHN\[5\]](#) [5]

Under the applicable standard for determining monopolization under 2 of the Sherman Act ([15 USC 2](#)), it is not error for the courts below to conclude--in a private party's antitrust action for treble damages--that defendant's practice of only leasing and refusing to sell its major machines was determined to be illegal monopolization in a judgment rendered in favor of the government in its former civil antitrust action against defendant, where the court, in the government's case, both in its opinion with respect to violation and in its opinion with respect to remedy, not only dealt with the objectionable clauses in defendant's standard lease but also addressed itself to the consequences of only leasing machines and to the manner in which that practice related to the maintenance of defendant's monopoly

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power, and where the court's relevant findings in the government's case were sufficient to show that the "lease only" system played a significant role in defendant's monopolization of the shoe machinery market, and those findings were not limited to the particular provisions of defendant's leases, but dealt as well with defendant's policy of leasing but not selling its important machines, with the advantages of that practice to defendant, and with its impact on potential and actual competition.

APPEAL §1512.5 > concurrent findings of courts below -- > Headnote:

[LEdHN\[6\]](#) [6]

The United States Supreme Court will not disturb--in a treble damage antitrust action based on defendant's monopolization of the shoe machinery market by offering its machinery only for lease but not for sale--the findings of the District Court, affirmed by the Court of Appeals, that plaintiff would have bought rather than leased from defendant had it been given the opportunity to do so.

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §67 > damages -- refusal to sell -- necessity of demand -- > Headnote:

[LEdHN\[7\]](#) [7]

The plaintiff, in an action based on defendant's monopolization of the shoe machinery market by offering its machinery only for lease but not for sale, is not required to prove an explicit demand for the purchase of machines during the damage period, where, as stated by the Court of Appeals, plaintiff had been a customer of defendant in the leasing of machinery for many years, and was well aware of defendant's power as a supplier of machinery and of its policy against sales, and where in such circumstances it would be ironic as well as idle to require the victim of the monopoly to meet an explicit demand the denial of which was implicit in the continuance of the monopoly.

EVIDENCE §343.5 > antitrust suit -- treble damages -- prima facie case -- > Headnote:

[LEdHN\[8\]](#) [8]

Under 4 of the Clayton Act ([15 USC 15](#)), providing for the recovery of treble damages by any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws, the plaintiff buyer has made out a prima facie case of injury and damage, where he shows that the price paid by him for materials purchased for use in his business was illegally high and where he also shows the amount of the overcharge.

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §67 > treble damages -- seller's overcharges -- > Headnote:

[LEdHN\[9\]](#) [9]

A buyer who was overcharged by the seller in violation of the federal antitrust laws is entitled to treble damages not only where, in the face of the overcharge, he does nothing and absorbs the loss, or maintains his own price and takes steps to increase his volume or to decrease other costs, but also where he raises the price for his own product.

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EVIDENCE §395 > inferences -- damages -- > Headnote:

[LEdHN\[10\]](#) [10]

The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged.

SALE §78 > unlawful price -- damages -- > Headnote:

[LEdHN\[11\]](#) [11]

If a cost rise is merely the occasion for a price increase that a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from the businessman without being liable for damages.

ACTION OR SUIT §2 > right of action -- > Headnote:

[LEdHN\[12\]](#) [12]

The possessor of a right can recover for its unlawful deprivation whether or not he was previously exercising it.

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §67 > damages -- "passing on" defense -- > Headnote:

[LEdHN\[13\]](#) [13]

In a treble damage action based on defendant's monopolization of the shoe machinery market by offering its machines only for lease but not for sale, in which action plaintiff proved injury and the amount of its damages by proving that defendant had overcharged plaintiff during the damage period and by showing the amount of the overcharge, the defendant is not entitled to assert a "passing on" defense by contending that plaintiff suffered no legally cognizable injury because the illegal overcharge during the damage period was reflected in the price charged for shoes sold by plaintiff to its customers and that plaintiff, if it had bought machines at lower prices, would have charged less and made no more profit than it made by leasing.

COURTS §777.5 > retrospective operation of decision -- > Headnote:

[LEdHN\[14\]](#) [14]

Cursory and conclusory statements in a decision do not provide sufficiently strong proof of a prevailing opinion as to the law to permit the sort of justifiable reliance thereon which alone could generate an argument that the decision should be given only prospective effect.

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COURTS §777.5 > retrospective or prospective operation of decision -- in antitrust suit -- > Headnote:

[LEdHN\[15\]](#) [15]

The decision in [\*American Tobacco Co. v United States \(1946\) 328 US 781, 90 L Ed 1575, 66 S Ct 1125\*](#), holding that proof of predatory practices is not essential to a finding of monopolization in violation of 2 of the Sherman Antitrust Act ([15 USC 2](#)), does not fundamentally change the law of monopolization in a way which should be given only prospective effect.

DAMAGES §170 > time for which recoverable -- > Headnote:

[LEdHN\[16\]](#) [16]

The plaintiff in a treble damage antitrust action who has proved defendant's monopolization of the shoe machinery market by offering its machine only for leasing but not for sale, is entitled to damages for the entire period of the applicable statute of limitations.

LIMITATION OF ACTION §201.5 > antitrust suit -- damages -- > Headnote:

[LEdHN\[17\]](#) [17]

Even though plaintiff's cause of action--defendant's monopolization of the above machinery market, in violation of 2 of the Sherman Antitrust Act ([15 USC 2](#))--arose outside the applicable state statute of limitations, plaintiff is not barred from claiming treble damages for injury occurring within the statutory period, since defendant's conduct is not the kind of violation which, if it occurs at all, must occur within some specific and limited timespan, and since defendant's conduct constitutes a continuing violation of the Act, inflicting continuing and accumulating harm on plaintiff.

DAMAGES §7 > deduction of tax benefits -- > Headnote:

[LEdHN\[18\]](#) [18]

In computing plaintiff's damages resulting from defendant's monopolization of the shoe machinery market by offering its machines only for leasing but not for sale, the fact that plaintiff would have had to pay additional taxes, had he purchased machines instead of renting them during the years in question, cannot be considered in reducing the amount of plaintiff's recovery.

DAMAGES §159 > loss of profits -- cost of capital -- > Headnote:

[LEdHN\[19\]](#) [19]

In computing damages resulting from defendant's monopolization of the shoe machinery market by offering its machines only for leasing but not for sale, the District Court properly deducts an interest component of 2.5 percent

from the profits that it thought plaintiff would have earned by purchasing machines, and the court's determination is not subject to attack on the ground that it did not properly take account of the cost of capital to plaintiff, where the court found that in the years in question plaintiff was able to borrow money for between 2 percent and 2.5 percent per annum, and that had plaintiff bought machines it would have obtained the necessary capital by borrowing it at about this rate.

## Syllabus

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Following this Court's affirmance of a district court judgment in a civil action against United Shoe Machinery Corp. (United), a manufacturer and distributor of shoe machinery, which the Government had brought under § 4 of the Sherman Act, Hanover Shoe, Inc. (Hanover), a shoe manufacturer and customer of United's, brought this private treble-damage suit against United for its alleged monopolization of the shoe machinery industry in violation of § 2 of the Sherman Act, by means of its practice of leasing and refusing to sell its shoe machinery. Hanover, relying on § 5 (a) of the Clayton Act (making a final judgment or decree in a Government antitrust suit prima facie evidence as to all matters respecting which the judgment or decree would be an estoppel between the parties thereto), submitted the court's findings, opinion, and decree in the Government's case as its evidence that United had monopolized the shoe [\*\*\*\*2] machinery industry and that its refusal to sell the machines was an instrument of the monopolization. In 1965 the District Court rendered judgment for Hanover, holding that it was entitled to damages for the period from July 1, 1939 (the earliest date permitted by the statute of limitations), to September 21, 1955, when this suit was filed, in an amount equal to three times the difference between what Hanover had paid in rentals and what it would have paid had United been willing to sell the machines, plus interest. The Court of Appeals affirmed as to liability, but disagreed with the District Court on certain aspects of the damage award, including the relevant damage period. It fixed that period's end date somewhat earlier and ruled that its start was June 10, 1946, when this Court decided *American Tobacco Co. v. United States*, 328 U.S. 781, and endorsed the views in *United States v. Aluminum Co. of America*, 148 F.2d 416 (C. A. 2d Cir.), prior to which the Court of Appeals concluded it had been necessary in an action for violation of § 2 to prove the existence of predatory practices as well as monopoly power. Both parties were granted [\*\*\*\*3] review of the Court of Appeals decision. United contends that the decision in the Government's suit against it did not determine that United's leasing practice was an instrument of monopolization; that Hanover sustained no injury since any excess cost of leasing over cost of ownership was not absorbed by Hanover but passed on to its customers; and that the District Court's damage calculations which the Court of Appeals upheld were erroneous because they did not properly allow for the cost of capital to Hanover as an element of the cost of acquiring the shoe machinery, the District Court having made an adjustment only to the extent of deducting a 2.5% interest component from the profits it thought Hanover would have earned by buying the machines. Hanover contends that the Court of Appeals erred in changing the start of the damage period and in ordering the District Court on remand to reduce its damage calculations by whatever tax advantages Hanover might have obtained by leasing as compared with buying the shoe machinery. *Held:*

1. The courts below did not err in holding that United's practice of leasing and refusing to sell its major machines was determined to be illegal monopolization [\*\*\*\*4] in the Government's case, as reference to the court's findings and opinion, as well as decree, in that case makes clear. Pp. 483-487.
2. Hanover proved injury and the amount of its damages within the meaning of § 4 of the Clayton Act when it proved that United had overcharged it during the damage period and showed the amount of the overcharge; and the possibility that it might have recouped the overcharge by "passing it on" to its customers was not relevant in the assessment of its damages. Pp. 487-494.
3. Hanover is entitled to damages for the entire period of the applicable statute of limitations, since the *Alcoa-American Tobacco* decisions did not fundamentally alter the law of monopolization in a way which should be given only prospective effect. Pp. 495-502.
4. The District Court did not otherwise err in its computation of damages. Pp. 502-504.

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**Counsel:** James V. Hayes argued the cause for petitioner in No. 335 and respondent in No. 463. With him on the briefs were Breck P. McAllister and Robert F. Morten.

Ralph M. Carson argued the cause for respondent in No. 335 and petitioner in No. 463. With him on the briefs were Robert D. Salinger, Philip C. Potter, Jr., and [\*\*\*\*5] Roland W. Donnem.

**Opinion by:** WHITE

## Opinion

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[\*483] [\*\*\*1235] [\*\*2226] MR. JUSTICE WHITE delivered the opinion of the Court.

Hanover Shoe, Inc. (hereafter Hanover) is a manufacturer of shoes and a customer of United Shoe Machinery Corporation (hereafter United), a manufacturer and distributor of shoe machinery. In 1954 this Court affirmed the judgment of the *District Court for the District of Massachusetts*, *110 F.Supp. 295 (1953)*, in favor of the United States in a civil action against United under § 4 of the Sherman Act, 26 Stat. 209, *15 U. S. C. § 4. United Shoe Machinery Corp. v. United States*, *347 U.S. 521*. In 1955, Hanover brought the present treble-damage action against United in the District Court for the Middle District of Pennsylvania. In 1965 the District Court rendered judgment for Hanover and awarded trebled damages, including interest, of \$ 4,239,609, as well as \$ 650,000 in counsel fees. *245 F.Supp. 258*. On appeal, the Court of Appeals for the Third Circuit affirmed the finding of liability but disagreed with the District Court on [\*\*\*1236] certain questions relating to the damage award. [\*\*\*6] *377 F.2d 776 (1967)*. Both Hanover and United sought review of the Court of Appeals' decision, and we granted both petitions. *389 U.S. 818 (1967)*.

I.

Hanover's action against United alleged that United had monopolized the shoe machinery industry in violation of § 2 of the Sherman Act; that United's practice of leasing and refusing to sell its more complicated and important shoe machinery had been an instrument of the unlawful monopolization; and that therefore Hanover [\*484] should recover from United the difference between what it paid United in shoe machine rentals and what it would have paid had United been willing during the relevant period to sell those machines.

LEdHN1[1] [1]Section 5 (a) of the Clayton Act, 38 Stat. 731, as amended, 69 Stat. 283, *15 U. S. C. § 16 (a)*, HN1[1] makes a final judgment or decree in any civil or criminal suit brought by the United States under the antitrust laws "prima facie evidence . . . as to all matters respecting which said judgment [\*\*\*7] or decree would be an estoppel as between the parties thereto . . ." Relying on this provision, Hanover submitted the findings, opinion, and decree rendered by Judge Wyzanski in the Government's case as evidence that United monopolized and that the practice of refusing to sell machines was an instrument of the monopolization. United does not contest that prima facie weight is to be given to the judgment in the Government's case. It does, however, contend that Judge Wyzanski's decision did not determine that the practice of leasing and refusing to sell was an instrument of monopolization. This claim, rejected by the courts below, is the threshold issue in No. 463. If the 1953 judgment is not prima facie evidence of the illegality of [\*\*2227] the practice from which Hanover's asserted injury arose, then Hanover, having offered no other convincing evidence of illegality, should not have recovered at all.<sup>1</sup>

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<sup>1</sup> Following the District Court's rejection of United's construction of Judge Wyzanski's opinion and decree, United filed a motion requesting that the District Court certify the question of construction to Judge Wyzanski. United contends that the District Court erred in denying this motion, but we need not pass upon the merits of United's novel request, for the District Court clearly acted within its proper discretion in denying as untimely certification to another court of a question upon which it had already ruled.

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[\*\*\*\*8] [LEdHN\[2\]](#) [2] Both the District Court and the Court of Appeals concluded that the lease only policy had been held illegal in [\*485] the Government's suit. We find no error in that determination. It is true that § 4 of the decree<sup>2</sup> on which United relies condemned only certain clauses in the standard lease and that nowhere in the decree was any other aspect of United's leasing system expressly described or characterized as illegal monopolization. It is also arguable that § 5 of the decree, which required that United thenceforward not "offer for lease any machine type, unless it also offers such type" [\*1237] for sale," was included merely to insure an effective remedy to dissipate the accumulated consequences of United's monopolization. We are not, however, limited to the decree in determining the extent of estoppel resulting from the judgment in the Government's case. If by reference to the findings, opinion, and decree it is determined that an issue was actually adjudicated in an antitrust suit brought by the Government, the private plaintiff can treat the outcome of the Government's case as *prima facie* [\*\*\*\*9] evidence on that issue. See *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 566-569 (1951).

[LEdHN\[3\]](#) [3] [LEdHN\[4\]](#) [4] [LEdHN\[5\]](#) [5] Section 5 of the decree would have been a justifiable remedy even if the practice it banned had not been instrumental in the monopolization of the market. But in our view the trial court's findings and opinion put on firm ground the proposition [\*\*\*\*10] that the Government's case involved condemnation of the lease only system as such. In both its opinion with respect to violation and its opinion with respect to remedy, the court not only dealt with the objectionable clauses in the standard [\*486] lease but also addressed itself to the consequences of only leasing machines and to the manner in which that practice related to the maintenance of United's monopoly power.<sup>3</sup> [\*\*\*\*12] These [\*\*2228] portions of the court's opinion are well supported by its findings of fact, which also estop United as against the Government and which therefore constitute *prima facie* evidence in this case. We have set out the relevant findings in an Appendix to this opinion. They are themselves sufficient to show that the lease only system played a significant role in United's monopolization of the shoe machinery market. Those findings were not limited to the particular provisions of United's [\*487] leases. They dealt as well with United's policy of leasing but not selling its important machines, with the advantages of that practice to United, and with its impact on potential and actual competition. When the applicable standard for determining monopolization [\*\*\*\*11] under § 2 is applied to these facts, it must be concluded that the District [\*\*\*\*1238] Court and the Court of Appeals did not err in holding that United's practice of leasing and refusing to sell its major machines was determined to be illegal monopolization in the Government's case.<sup>4</sup>

<sup>2</sup> "4. All leases made by defendant which include either a ten-year term, or a full capacity clause, or deferred payment charges, and all leases under which during the life of the leases defendant has rendered repair and other service without making them subject to separate, segregated charges, are declared to have been means whereby defendant monopolized the shoe machinery market." [110 F.Supp., at 352](#).

<sup>3</sup> In its opinion on remedy, in answering United's objection to its conclusion that the decree should require United to offer machines for sale as well as for lease, the court plainly said that United "has used its leases to monopolize the shoe machinery market. And if leasing continues without an alternative sales system, United will still be able to monopolize that market." [110 F.Supp., at 350](#). Clearly, if after purging the leases of objectionable clauses United would still be monopolizing by leasing but not selling its machines, the lease only policy must also have made a substantial contribution to United's monopolization of the market during the period prior to the entry of the judgment. Moreover, in its opinion on violation, where the three principal sources of United's market power were identified, the court pointed to "the magnetic ties inherent in its system of leasing, and not selling, its more important machines" and to the "partnership" aspects of leasing but not selling those machines. [110 F.Supp., at 344](#). The leases assured "closer and more frequent contacts between United and its customers than would exist if United were a seller and its customers were buyers." [Id., at 343](#). A shoe manufacturer by leasing was "detected more than if he owned that same United machine, or if he held it on a short lease carrying simple rental provisions and a reasonable charge for cancellation before the end of the term." [Id., at 340](#). The lease system had "aided United in maintaining a pricing system which discriminates between machine types," [id., at 344](#), discrimination which the court later said had evidenced "United's monopoly power, a buttress to it, and a cause of its perpetuation . . ." [Id., at 349](#).

<sup>4</sup> In its brief on appeal from the judgment and decree rendered in the Government's case, United recognized that "the principal practices which the [District] Court stressed were that defendant offered important complicated machines only for lease and not for sale and that defendant serviced the leased machines without a separate charge." Brief for Appellant 6, *United Shoe*

II.

[LEdHN6](#) [↑] [6] [LEdHN7](#) [↑] [7] The District Court found that Hanover would have bought rather than leased from United had it been given the opportunity to do so.<sup>5</sup> [\*\*\*\*14] The District Court determined that if United had sold its important machines, the cost to Hanover would have been less than the rental paid for leasing [\*\*\*\*13] these same machines. This difference in cost, trebled, is the judgment awarded to Hanover in the District Court. United claims, however, that Hanover suffered no legally cognizable injury, contending [\*488] that the illegal overcharge during the damage period was reflected in the price charged for shoes sold by Hanover to its customers and that Hanover, if it had bought machines at lower prices, would have charged less and made no more profit than it made by leasing. At the very least, United urges, the District Court should have determined on the evidence offered whether these contentions were correct. The Court of Appeals, like the District Court, rejected this assertion of the so-called "passing-on" defense, and we affirm that judgment.<sup>6</sup>

[\*\*\*\*15] [LEdHN8](#) [↑] [8] Section \*\*\*1239 4 of the Clayton Act, 38 Stat. 731, [15 U. S. C. § 15](#), [HN2](#) [↑] provides that any person "who shall be injured [\*489] in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and [\*\*2229] shall recover threefold the damages by him sustained . . ." We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a *prima facie* case of injury and damage within the meaning of [§ 4](#).

[LEdHN9](#) [↑] [9] If in the face of the overcharge the buyer does nothing and absorbs the loss, he is entitled to treble damages. This much seems conceded. The reason is that he has paid more than he should and his property has been illegally diminished, for had the price paid been lower his profits would have been higher. It is also clear that [\*\*\*\*16] if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed. Though he may manage to maintain his profit level, he would have made more if his purchases from the defendant had cost him less. We hold that the buyer is equally entitled to damages if he raises the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower.

Fundamentally, this is the view stated by Mr. Justice Holmes in [Chattanooga Foundry & Pipe Works v. City of Atlanta](#), 203 U.S. 390 (1906), where Atlanta sued the defendants for treble damages for antitrust violations in

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*Machinery Corp. v. United States*, 347 U.S. 521 (1954). United also said that "evidently the Court below regarded the fact that United distributes its more important machines only by lease and not by sale as the basic objection to the system." *Id.*, at 170.

<sup>5</sup> The Court of Appeals affirmed this finding and we do not disturb it. See also n. 16, *infra*. We also agree with the courts below that in the circumstances of this case it was unnecessary for Hanover to prove an explicit demand during the damage period. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

<sup>6</sup> The chronology of events with respect to this issue in the lower courts was as follows: After the pretrial conference, a separate issue which was thought might determine the action was set for trial pursuant to [Fed. Rule Civ. Proc. 42 \(b\)](#). The general question was whether, assuming that Hanover had paid illegally high prices for machinery leased from United, Hanover had passed the cost on to its customers, and if so whether it had suffered legal injury for which it could recover under the antitrust laws. After evidence had been taken on the issue, Judge Goodrich, sitting by designation, ruled that when Hanover had been forced to pay excessive prices for machinery leased from United, it had suffered a legal injury: "This excessive price is the injury." [185 F.Supp. 826, 829 \(D. C. M. D. Pa. 1960\)](#). He also rejected the argument "that the defendant is relieved of liability because the plaintiff passed on its loss to its customers." *Ibid.* In his view it was unnecessary to determine whether Hanover had passed on the illegal burden because Hanover's injury was complete when it paid the excessive rentals and because "the general tendency of the law, in regard to damages at least, is not to go beyond the first step" and to exonerate a defendant by reason of remote consequences. [Id., at 830](#) (quoting from *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918)). The Court of Appeals heard an interlocutory appeal pursuant to [28 U. S. C. § 1292 \(b\)](#) and affirmed. [281 F.2d 481 \(C. A. 3d Cir. 1960\)](#). Certiorari was denied. [364 U.S. 901 \(1960\)](#). United preserved the issue and presented it again to the Court of Appeals in appealing the treble-damage judgment entered after trial of the main case. The Court of Appeals adhered to the principles of its prior decision. United brought the question here.

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connection with the city's purchases of pipe for its waterworks system. The Court affirmed a judgment in favor of the city for an amount measured by the difference between the price paid and what the market or fair price would have been had the sellers not combined, [\*490] the Court saying [\*\*\*\*17] that the city "was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. [HN3](#)<sup>↑</sup> A person whose property is diminished by a payment of money wrongfully induced is injured in his property." [Id.](#), [at 396](#). The same approach was evident in [\*Thomsen v. Cayser, 243 U.S. 66 \(1917\)\*](#), another treble-damage antitrust case.<sup>7</sup> [\*\*\*\*18] [\*\*2230] With respect to overcharge cases arising under the transportation laws, similar views were expressed by Mr. Justice Holmes in *Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533 (1918)*, [\*\*\*1240] and by Mr. Justice Brandeis in [\*Adams v. Mills, 286 U.S. 397, 406-408 \(1932\)\*](#). In those cases the possibility that plaintiffs had recouped the overcharges from their customers was held irrelevant in assessing damages.<sup>8</sup>

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<sup>7</sup> "It is, however, contended that even if it be assumed the facts show an illegal combination, they do not show injury to the plaintiffs by reason thereof. The contention is untenable. Section 7 of the act gives a cause of action to any person injured in his person or property by reason of anything forbidden by the act and the right to recover three-fold the damages by him sustained. The plaintiffs alleged a charge over a reasonable rate and the amount of it. If the charge be true that more than a reasonable rate was secured by the combination, the excess over what was reasonable was an element of injury. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 436*. The unreasonableness of the rate and to what extent unreasonable was submitted to the jury and the verdict represented their conclusion." [243 U.S., at 88](#).

<sup>8</sup> *Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531 (1918)*, involved an action for reparations brought by shippers against a railroad. The shippers alleged exaction of an unreasonably high rate. To the claim that the shippers should not recover because they were able to pass on to their customers the damage they sustained by paying the charge, the Court said that the answer was not difficult:

"The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. . . . The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. . . . Probably in the end the public pays the damages in most cases of compensated torts." [245 U.S., at 533-534](#). [\*Adams v. Mills, 286 U.S. 397 \(1932\)\*](#), is to the same effect. See also *I. C. C. v. United States, 289 U.S. 385 (1933)*.

[\*Keogh v. Chicago & N. W. R. Co., 260 U.S. 156 \(1922\)\*](#), is relied upon by United as stating a contrary rule. There the Court affirmed a judgment on the pleadings in a shipper's action under the antitrust laws charging a conspiracy among railroads to set unreasonably high rates. Because the rates had been approved as reasonable after a proceeding before the Interstate Commerce Commission, the shipper was held to have no cause of action under the antitrust laws. After giving this and other reasons for its judgment, the Court ended its opinion by saying that it would have been impossible for the shipper to have proved damages since no court could say that if the rate had been lower the shipper would have enjoyed the difference; the benefit might have gone to his customers. The Court, however, was careful to say earlier in its opinion that the result would have been different had the rate been unreasonably high, an approach confirmed by Mr. Justice Brandeis in [\*Adams v. Mills, supra\*](#). We ascribe no general significance to the *Keogh* dictum for cases where the plaintiff is free to prove that he has been charged an illegally high price. It should also be noted that the Court, in speaking of the impossibility of proving damages, indicated no intention to preclude recovery in cases such as *Chattanooga Foundry* or [\*Thomsen v. Cayser, supra\*](#).

That is where the matter stood in this Court when the issue came to be pressed with some regularity in the lower federal courts in treble-damage suits brought by customers of vendors who were charged with violating the Sherman Act by price fixing or monopolization. Some courts sustained the defense, both where the plaintiff complained of overcharging for materials or services used by him to produce his own product, e. g., [\*Wolfe v. National Lead Co., 225 F.2d 427\*](#) (C. A. 9th Cir.), cert. denied, [\*350 U.S. 915 \(1955\)\*](#), and where the price fixing concerned articles purchased for resale, e. g., [\*Miller Motors, Inc. v. Ford Motor Co., 252 F.2d 441 \(C. A. 4th Cir. 1958\)\*](#); [\*Twin Ports Oil Co. v. Pure Oil Co., 119 F.2d 747\*](#) (C. A. 8th Cir.), cert. denied, [\*314 U.S. 644 \(1941\)\*](#). Others, beginning with Judge Goodrich's 1960 decision in the case before us, deemed it irrelevant that the plaintiff may have passed on the burden of the overcharge. Recently, for example, the defense was rejected in the cases brought against manufacturers of electrical equipment by local utilities who purchased equipment at unlawfully inflated prices and used it

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[\*\*\*\*19] [\*491] United [\*\*\*1241] seeks to limit the general principle that the victim of an overcharge is damaged within the meaning of S 4 [\*\*2231] to the extent of that overcharge. The rule, United argues, should be subject to the defense that economic [\*492] circumstances were such that the overcharged buyer could only charge his customers a higher price *because* the price to him was higher. It is argued that in such circumstances the buyer suffers no loss from the overcharge. This situation might be present, it is said, where the overcharge is imposed equally on all of a buyer's competitors and where the demand for the buyer's product is so inelastic that the buyer and his competitors could all increase their prices by the amount of the cost increase without suffering a consequent decline in sales.

LEdHN[10] [10] LEdHN[11] [11] LEdHN[12] [12] We are not impressed with the argument that sound laws of economics require recognizing this defense. A wide range of factors influence [\*\*\*\*20] a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, [\*493] had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually [\*\*\*\*21] unascertainable figures, the task would normally prove insurmountable.<sup>9</sup> On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories.

[\*\*\*\*22] [\*494] In [\*\*2232] addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to *their* customers. These ultimate consumers, [\*\*\*1242] in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.

LEdHN[13] [13] Our conclusion is that Hanover proved injury and the amount of its damages for the purposes of its treble-damage suit when it proved that United had overcharged it during the damage period and showed the amount of the overcharge; United was not entitled to assert a passing-on defense. We recognize that there might be situations -- for instance, when an overcharged buyer has a pre-existing [\*\*\*\*23] "cost-plus" contract, thus making it easy to prove that he has not been damaged -- where the considerations requiring that the passing-on

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to produce electricity sold to the ultimate consumer. *E. g., Atlantic City Electric Co. v. General Electric Co.*, 226 F.Supp. 59 (D. C. S. D. N. Y.), interlocutory appeal refused, 337 F.2d 844 (C. A. 2d Cir. 1964).

Concerning the passing-on defense generally, see Clark, The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits, 52 Mich. L. Rev. 363 (1954); Pollock, Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine, 32 A. B. A. Antitrust L. J. 5 (1966); Note, Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business, 80 Harv. L. Rev. 1566, 1584-1586 (1967).

<sup>9</sup> The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for his price rise earlier; if a cost rise is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages. This statement merely recognizes the usual principle that the possessor of a right can recover for its unlawful deprivation whether or not he was previously exercising it.

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defense not be permitted in this case would not be present. We also recognize that where no differential can be proved between the price unlawfully charged and some price that the seller was required by law to charge, establishing damages might require a showing of loss of profits to the buyer.<sup>10</sup>

[\*495] III.

The District Court held that Hanover was entitled to damages for the period commencing July 1, 1939, and terminating September 21, 1955. [\*\*\*24] The former date represented the greatest retrospective reach permitted under the applicable statute of limitations, and the latter date was that upon which Hanover filed its suit. In addition to somewhat shortening the forward reach of the damage period,<sup>11</sup> the Court of Appeals ruled that June 10, 1946, rather than July 1, 1939, marked the commencement of the damages period. June 10, 1946, was the date this Court decided *American Tobacco Co. v. United States*, 328 U.S. 781, which endorsed the views of the Court of Appeals for the Second Circuit in *United States v. Aluminum Co. of America*, 148 F.2d 416 (1945). In the case before us the Court of Appeals concluded that the decisions in *Alcoa-American Tobacco* fundamentally altered the law of monopolization -- that prior to them it was necessary to prove the existence of predatory practices as well as monopoly power, whereas afterwards proof of predatory practices was not essential. The Court of Appeals was also of the view that because in prior litigation United's leases had escaped condemnation as predatory practices illegal under § 1, United's conduct should not be held to have violated [\*\*\*25] [\*\*\*1243] § 2 at any time prior to June 10, 1946. 377 F.2d, at 790. This holding has been challenged, and we reverse it.

[\*496] The [\*\*2233] theory of the Court of Appeals seems to have been that when a party has significantly relied upon a clear and established doctrine, and the retrospective application of a newly declared doctrine would upset that justifiable reliance to his substantial injury, considerations of justice and fairness require that the new rule apply [\*\*\*26] prospectively only. Pointing to recent decisions of this Court in the area of the criminal law, the Court of Appeals could see no reason why the considerations which had favored only prospective application in those cases should not be applied as well as in the civil area, especially in a treble-damage action. There is, of course, no reason to confront this theory unless we have before us a situation in which there was a clearly declared judicial doctrine upon which United relied and under which its conduct was lawful, a doctrine which was overruled in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful. Because we do not believe that this case presents such a situation, we have no occasion to pass upon the theory of the Court of Appeals.

LEdHN[14] [14] Neither the opinion in *Alcoa* nor the opinion in *American Tobacco* indicated that the issue involved was novel, that innovative principles were necessary to resolve it, or that the issue had been settled in prior cases in a manner contrary to the view held by those courts. In ruling that it was [\*\*\*27] not necessary to exclude competitors to be guilty of monopolization, the Court of Appeals for the Second Circuit relied upon a long line of cases in this Court stretching back to 1912. 148 F.2d, at 429. The conclusion that actions which will show monopolization are not "limited to manoeuvres not honestly industrial" was also premised on earlier opinions of this Court, particularly *United States v. Swift & Co.*, 286 U.S. 106, 116 (1932). In the *American Tobacco* case, this Court noted [\*497] that the precise question before it had not been previously decided, 328 U.S., at 811, and gave no indication that it thought it was adopting a radically new interpretation of the Sherman Act. Like the Court of Appeals, this Court relied for its conclusion upon existing authorities.<sup>12</sup> [\*\*\*29] These cases make it clear that

<sup>10</sup> Some courts appear to have treated price discrimination cases under the Robinson-Patman Act as in this category. See, e. g., *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38 (C. A. 8th Cir. 1951); *American Can Co. v. Bruce's Juices*, 187 F.2d 919, opinion modified, 190 F.2d 73 (C. A. 5th Cir.), petition for cert. dismissed, 342 U.S. 875 (1951).

<sup>11</sup> The Court of Appeals held that Hanover was entitled to damages only up to June 1, 1955, the date upon which Judge Wyzanski approved United's plan for terminating all outstanding leases and converting the lessee's rights to ownership. Because Hanover could have legally required United to convert from leasing to selling as of June 1, 1955, the Court of Appeals held it was not entitled to damages for United's failure to offer machines for sale after that date. This determination has not been challenged in this Court.

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[\*\*2234] there was no accepted [\*498] interpretation [\*\*\*1244] of the Sherman Act which conditioned a finding of monopolization under § 2 upon a showing of predatory practices by the monopolist.<sup>13</sup> In neither case was there such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which [\*\*\*\*28] in effect replaced an older one. Whatever [\*499] development in antitrust law was brought about was based to a great extent on existing authorities and was an extension of doctrines which had been growing and developing over the years. These cases did not constitute a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks. We cannot say that prior to those cases potential antitrust defendants would have been justified in thinking that then current antitrust doctrines permitted

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<sup>12</sup> Although the defendants in *American Tobacco* had been found guilty of conspiracy to restrain trade and of attempt and conspiracy to monopolize as well as of monopolization itself, the grant of certiorari was "limited to the question whether actual exclusion of competitors is necessary to the crime of monopolization under § 2 of the Sherman Act." **324 U.S. 836 (1945)**. After noting that "§§ 1 and 2 of the Sherman Act require proof of conspiracies which are reciprocally distinguishable from and independent of each other . . . ," [328 U.S., at 788](#), the Court determined that the jury could have found that the defendants had combined and conspired to monopolize, [id., at 797](#), and that it would be "only in conjunction with such a combination or conspiracy that these cases will constitute a precedent," [id. at 798](#). The Court stated that "the *authorities* support the view that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so," [328 U.S., at 811](#) (emphasis added), and quoted with approval from [United States v. Patten, 187 F. 664, 672](#) (C. C. S. D. N. Y. (1911)), reversed on other grounds, [226 U.S. 525 \(1913\)](#), that for there to be monopolization "it is not necessary that the power thus obtained should be exercised. Its existence is sufficient." The Court also said:

"A correct interpretation of the statute *and of the authorities* makes it the crime of monopolizing, under § 2 of the Sherman Act, for parties, as in these cases, to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a power that they are able, as a group, to exclude actual or potential competition from the field and provided that they have the intent and purpose to exercise that power. See [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226, n. 59](#) and authorities cited.

"It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful." [328 U.S., at 809](#). (Emphasis added.)

The Court also welcomed the opportunity to endorse, [328 U.S., at 813-814](#), the following views of Chief Judge Hand in *Alcoa*, 148 F.2d., at 431-432:

"[Alcoa] insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret 'exclusion' as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not 'exclusionary.' So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent.

....

"In order to fall within § 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any 'specific,' intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing."

<sup>13</sup> Any view of the earlier law of monopolization which would attempt, erroneously in our opinion, to find a requirement of predatory practices must rely heavily on certain dicta in [United States v. United States Steel Corp., 251 U.S. 417, 451 \(1920\)](#) (Mr. Justice McKenna for a four-to-three Court), and [United States v. International Harvester Co., 274 U.S. 693, 708 \(1927\)](#) (Mr. Justice Sanford reiterating the dicta in *U.S. Steel*). The commentators cited by United for the proposition that predatory practices were required prior to *Alcoa-American Tobacco* place major reliance on these dicta. In any event, the cursory and conclusory nature of these writings clearly does not provide sufficiently strong proof of a prevailing opinion as to the law to have permitted the sort of justifiable reliance which alone could generate a prospectivity argument.

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them to do all acts conducive to the creation or maintenance of a monopoly, so long as they avoided direct exclusion of competitors or other predatory acts.<sup>14</sup>

[\*\*\*30] United [\*\*\*1245] relies heavily on three Sherman Act cases brought against it or its predecessors by the United States and decided by this Court. United argues that these cases demonstrate both that before *Alcoa-American Tobacco* the law was substantially different and that its leasing practices had been deemed by this Court not to be instruments of monopolization. [United States v. Winslow, 227 U.S. 202 \(1913\)](#); [United States v. United Shoe \[\\*\\*2235\] Machinery Co. of New Jersey, 247 U.S. 32 \(1918\)](#); [United Shoe Machinery Corp. v. United States, 258 U.S. 451 \(1922\)](#). In our opinion, however, United overreads and exaggerates the significance of these three cases. In *Winslow*, the Government charged the three groups of companies which had merged to form United with a violation of § 1. The trial court construed the indictment to pertain only to the merger of the companies and not to business practices which resulted from the merger; most significantly, it excluded United's leasing policies [\*500] from consideration. The Court specifically stated that "the validity of the leases or of a combination [\*\*\*31] contemplating them cannot be passed upon in this case." [227 U.S., at 217](#).

The third case, decided in 1922, was brought under § 3 of the Clayton Act rather than [§ 2](#) of the Sherman Act. This Court affirmed a decree enjoining United from making leases containing certain clauses, terms, and conditions. Nothing in that case indicates that predatory practices had to be shown to prove a [§ 2](#) monopoly charge or that the leases, or the clauses in them which were left undisturbed, would not adequately demonstrate monopolization by an enterprise with monopoly power.

Of the three cases, the 1918 case most strongly supports United. It involved a civil action by the United States charging violations of §§ 1 and 2 of the Sherman Act. The Government contended that United's machinery leases and license agreements had been used to consummate both violations. A three-judge court dismissed the bill and this Court affirmed by a vote of 4 to 3. There is no question but that the leases as they were then constituted were held unassailable under § 1; the reasons for this ruling are not clear. As for the [§ 2](#) charge, we cannot read the opinion as specifying what course of conduct would [\*\*\*32] amount to monopolization under [§ 2](#) if engaged in by a concern with monopoly power. At most the holding was that the leases themselves did not prove a [§ 2](#) charge -- did not themselves prove monopoly power as well as monopolization. But the issue in the case before us now is not whether United's leasing system proves monopoly power but whether, once monopoly power is shown, leasing the way United leased sufficiently shows an intent to exercise that power. There is little, if anything, in the 1918 opinion which is illuminating on this issue. Indeed, it may fairly be read as holding that United did not have monopoly power over the market at all, for in rejecting the claim that United's practice of [\*501] leasing was illegal when used by a corporation [\*\*\*1246] dominant in the market, the Court said:

"This, however, is assertion and relies for its foundation upon the assumption of an illegal dominance by the United Company that has been found not to exist. This element, therefore, must be put to one side and the leases regarded in and of themselves and by the incentives that induced their execution . . ." [247 U.S., at 60](#).

Any comfort United might have [\*\*\*33] received from the 1918 case with respect to the legality of its leasing system when employed by one with monopoly power should have been short-lived. In the third case, which was brought under § 3 of the Clayton Act, and in which all the remaining Justices making up the majority in the 1918 case except Mr. Justice McKenna voted with the Court, the opinion for the Court described the 1918 decision as follows:

<sup>14</sup> United makes the independent argument that Judge Wyzanski's decision in the Government's case so fundamentally altered the law of monopolization that it should not be held liable for damages prior to the date the decision was handed down, February 18, 1953. We reject this contention for the reasons set forth in the textual discussion of *Alcoa-American Tobacco* and the previous *United* cases.

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"That the leases were attacked under the former bill as violative of the Sherman Act is true, but they were sustained as valid and binding agreements within the rights of holders of patents." [258 U.S., at 460.](#)

[\*\*2236] This view was supported by other references to the 1918 opinion which described the question at issue there as being whether United's leases went beyond the exercise of a lawful monopoly.

One might possibly disagree with this reading of the 1918 opinion, but it was an authoritative gloss. After 1922 and after the expiration of the patents on its major machines, there was no sound basis to justify reliance by United on the 1918 case as a definitive pronouncement that its leasing system provided legally insufficient evidence of monopolization, [\*\*\*\*34] once United's power over the market was satisfactorily shown. The prior cases immunized United's monopoly insofar as it originated [\*502] in a merger of allegedly competing companies and perhaps are of some help to United in other respects. But they do not establish either that prior to 1946 there was a well-defined interpretation of the Sherman Act which was abruptly overruled in *Alcoa-American Tobacco* or that United's leasing system could not be considered an instrument for the exercise and maintenance of monopoly power.

[LEdHN\[15\]](#) [↑] [15] [LEdHN\[16\]](#) [↑] [16] [LEdHN\[17\]](#) [↑] [17] In these circumstances, there is no room for argument that Hanover's damages should reach back only to the date of the *American Tobacco* decision. Having rejected the contention that *Alcoa-American Tobacco* changed the law of monopolization in a way which should be given only prospective effect, it follows that Hanover is entitled to damages for the entire period permitted by the applicable statute of limitations. [\*\*\*\*35] <sup>15</sup>

#### IV.

[\*\*\*1247] [LEdHN\[18\]](#) [↑] [18] Two questions are raised here about the [\*\*\*\*36] manner in which damages were computed by the courts below. Hanover argues that the Court of Appeals erred in requiring the District Court, on remand, to take account of the additional taxes Hanover would have paid, had it purchased machines instead of renting them during the years in question. The Court of Appeals evidently [\*503] felt that since only after-tax profits can be reinvested or distributed to shareholders, Hanover was damaged only to the extent of the after-tax profits that it failed to receive. The view of the Court of Appeals is sound in theory, but it overlooks the fact that in practice the Internal Revenue Service has taxed recoveries for tortious deprivation of profits at the time the recoveries are made, not by reopening the earlier years. See [Commissioner v. Glenshaw Glass Co., 348 U.S. 426 \(1955\)](#). As Hanover points out, since it will be taxed when it recovers damages from United for both the actual and the trebled damages, to diminish the actual damages by the amount of the taxes that it would have paid had it received greater profits in the years it was damaged would be to apply a double deduction for taxation, leaving Hanover with [\*\*\*\*37] less income than it would have had if United had not injured it. It is true that accounting for taxes in the year when damages are received rather than the year when profits were lost can change the amount of taxes the Revenue Service collects; as United [\*\*2237] shows, actual rates of taxation were much higher in some of the years when Hanover was injured than they are today. But because the statute of limitations frequently will bar the Commissioner from recomputing for earlier years, and because of the policy underlying the statute of limitations -- the fact that such recomputations are immensely difficult or impossible when a long period has

<sup>15</sup> United has also advanced the argument that because the earliest impact on Hanover of United's lease only policy occurred in 1912, Hanover's cause of action arose during that year and is now barred by the applicable Pennsylvania statute of limitations. The Court of Appeals correctly rejected United's argument in its supplemental opinion. We are not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span. Cf. *Emich Motors Corp. v. General Motors Corp.*, [229 F.2d 714 \(C. A. 7th Cir. 1956\)](#), upon which United relies. Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955.

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intervened -- the rough result of not taking account of taxes for the year of injury but then taxing recovery when received seems the most satisfactory outcome. The District Court therefore did not err on this question, and the Court of Appeals should not have required a recomputation.

**L****E****dHNJ19** [19]United contends that if Hanover had bought machines instead of leasing them, it would have had to invest its own capital in the machines. United argues that the District [\*\*\*\*38] Court erred in computing damages because it did not properly take account of the cost of capital to [\*504] Hanover. The District Court found that in the years in question Hanover was able to borrow money for between 2% and 2.5% per annum, and that had Hanover bought machines it would have obtained the necessary capital by borrowing at about this rate. It therefore deducted an interest component of 2.5% from the profits it thought Hanover would have earned by purchasing machines. Our review of the record convinces us that the courts below did not err in these determinations; on the basis of the determinations of fact, Hanover's damages were properly computed.<sup>16</sup>

[\*\*\*39] The [\*\*\*1248] judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

*It is so ordered.*

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

## APPENDIX TO OPINION OF THE COURT.

Excerpts From Judge Wyzanski's Opinion in *United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295, 323-325 (D. Mass. 1953).

### *Effects of the Leasing System.*

The effect of United's leasing system as it works in practice may be examined from the viewpoints of United, of the shoe manufacturers, and of competitors potential or actual.

[\*505] For United these are the advantages. (a) United has enjoyed a greater stability of annual revenues than is customary among manufacturers of other capital goods. But this is not due exclusively to the practice of leasing as distinguished from selling. It is attributable to the effects of leasing when, as is the case with United, the lessor already has a predominant share of the market. (b) United has been able to conduct research activities more favorably than if it sold its machines outright. [\*\*\*\*40] The leasing system, especially the service aspect of that system, has given United constant access to shoe manufacturers and their problems. This has promoted United's knowledge of their problems and has stimulated United's shoe machinery development. This research knowledge would not be diminished substantially if United's service activities covered fewer factories. But if all access to shoe factories were denied the diminution would [\*\*2238] be of great consequence to research. (c) The steadiness of revenues, attributable, as stated above, not to the leases alone, but to leases in a market dominated by the lessor, has tended to promote fairly steady appropriations to research. But these appropriations declined in the 1929 depression. Research expenditures might or might not be increased if competition were increased. The experience of United when faced with Compo's cement process suggests that declining revenues, no less than steady revenues, may promote research expenditures. (d) United has kept its leased machines in the best possible condition. (e) Under the leasing system United has enjoyed a wide distribution of machinery in a relatively narrow market. But this [\*\*\*\*41] is merely another way of saying that United's market position, market power, lease provisions, and lease practices give it an advantage over competitors.

<sup>16</sup> United also says that because Hanover's managers would have computed their capital costs differently, they would not in fact have decided to stop leasing machines and to begin purchasing them. The District Court found, however, that Hanover, had it been given the opportunity, would have bought rather than leased the machines offered by United. This finding, affirmed by the Court of Appeals, is supported by the evidence, and we do not disturb it.

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Upon shoe manufacturers, United's leasing system has had these effects. It has been easy for a person with modest capital and of something less than superior efficiency [**\*506**] to become a shoe manufacturer. He can get machines without buying them; his machines are serviced without separate charges; he can conveniently exchange an older United model for a new United model; he can change from one process to another; and his costs of machinery per pair of shoes produced closely approximate the machinery costs of every other manufacturer using the same machinery to produce shoes by the same process. [**\*\*\*1249**] Largely as a consequence of these factors, there were in 1950, 1,300 factories each having a daily production capacity of 3,000 pairs a day or less; 100 factories each having a capacity of 3,000 to 8,000 pairs; and 40 larger manufacturers. Many of these larger manufacturers, who collectively account for 40% of the shoe production of the United States, started in a small way and flourished under United's leasing system. [**\*\*\*\*42**] Moreover the testimony in this case indicates virtually no shoe manufacturers who are dissatisfied with the present system. It cannot be said whether this absence of expressed dissatisfaction is due to lack of actual dissatisfaction, to practical men's preference for what they regard as a fair system, even if it should be monopolistic, or to fear, inertia, or reluctance to testify.

However, while United's system has made it easier to enter the shoe manufacturing industry than to enter many, perhaps most, other manufacturing industries, it has not necessarily promoted in the shoe manufacturing field the goals of a competitive economy and an open society. Without attempting to make findings that are more precise than the evidence warrants, this much can be definitely stated. If United shoe machinery were available upon a sale basis, then --

(a) Some shoe manufacturers would be able to secure credit whether by conditional sales, chattel mortgages, or other devices.

[**\*507**] (b) Under such a system, there is no reason to suppose that a purchaser's first installment on a machine would significantly exceed the deposit now often required of a new shoe manufacturer by United.

[**\*\*\*\*43**] (c) A few shoe manufacturers would be able to borrow at rates of interest comparable to the interest rates at which United borrows, or raises capital.

(d) Some shoe manufacturers would be able to provide for themselves service at a cost less than the average cost to United of supplying service to all lessees of its machines.

(e) Those manufacturers who bought United machines would not be subject, as are those manufacturers who lease United machines, to the unilateral decision of United whether or not to continue or modify those informal policies which are not written in the leases and to which United is not expressly committed [**\*\*2239**] for any specific future period. While there is no evidence that United plans any change in its informal policies, and while United has not heretofore proceeded to alter its informal policies on the basis of its approval or disapproval of individual manufacturers, United has not expressly committed itself to continue, for example, its 1935 plan for return of machines, its right of deduction fund, its waiver for 4 months of unit charges, or its present high standard of service. United's reserved power with respect to these matters gives it some [**\*\*\*\*44**] greater degree of psychological, and some greater degree of economic control, than a seller of machinery would have.

(f) Some manufacturers who had bought machinery would find that financial and psychological considerations made them more willing than lessees would be, to dispose of already acquired United machines and to take on competitors' machines in their place.

In looking at United's leasing system from the viewpoint of potential and actual competition, it must be [**\*508**] confessed at the outset, that any [**\*\*\*1250**] system of selling or leasing one company's machines will, of course, impede to some extent the distribution of another company's machines. If a shoe manufacturer has already acquired one company's machinery either by outright purchase, by conditional purchase, or on lease on any terms whatsoever, the existence of that machine in the factory is a possible impediment to the marketing of a competitive machine.

Yet as already noted, a shoe manufacturer may psychologically or economically be more impeded by a leasing than by a selling system. And this general observation is buttressed by a study of features in the United leasing system

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which have a special deterrent [\*\*\*45] effect. Though these features are stated separately, and some of them alone are important impediments, they must be appraised collectively to appreciate the full deterrent effect.

(a) The 10 year term is a long commitment.

(b) A shoe manufacturer who already has a United leased machine which can perform all the available work of a particular type may be reluctant to experiment with a competitive machine to the extent he would wish. He may hesitate to ask for permission to avoid the full capacity clause. If permission is given for an experimental period he may find the experimental period too short. Thus a competitor may not get a chance to have his machine adequately tried out by a shoe manufacturer. If a shoe manufacturer prefers a competitive machine to a United machine on hand, he may not know the exact rate at which future payments may be commuted. If he knows, he may find that a fresh outlay to make those commuted payments (which admittedly are not solely for revenue but also are for protection against competition, and which admittedly discriminate in favor of a lessee who takes a new United machine and not a competitor's machine) plus the rentals he has already [\*509] [\*\*\*46] paid cost him more than if he had bought a similar machine in the first place and were now to dispose of it in trade or in a second-hand market. Thus for a maker of competitive machines he may be a less likely customer than if United had initially allowed him to buy the machine.

(c) United's lease system makes impossible a second-hand market in its own machines. This has two effects. It prevents United from suffering that kind of competition which a second-hand market offers. Also it prevents competitors from acquiring United machines with a view to copying such parts of the machines as are not patented, and with a view to experimenting with improvements without disclosing them to United.

(d) United's practice of rendering repair service only on its own machines and without separate charge has brought about a situation in which there are almost no large scale independent repair [\*\*2240] companies. Hence when a typical small shoe manufacturer is considering whether to acquire a complicated shoe machine, he must look to the manufacturer of that machine for repair service. And a competitor of United could not readily market such a complicated machine unless in addition to offering [\*\*\*47] the machine he was prepared to supply service. As the experience of foreign manufacturers indicates, this has proved to be a serious stumbling block to those who have sought to compete with United.

(e) If a shoe manufacturer is deciding [\*\*\*1251] whether to introduce competitive machines, (either for new operations or as replacements for United machines on which the lease has not expired), he faces the effect of those decisions upon his credit under the Right of Deduction Fund. If he already has virtually all United machines, and if he replaces few of them by competitive machines, the Fund will take care of substantially all his so-called deferred charges, and may cover some of his minimum payments. This is because credit to the Fund earned [\*510] by a particular machine enures to the benefit of all leased machines in the factory, and the maximum advantage to the shoe manufacturer is to have a large number of United machines to which the credit can be applied. This advantage to the shoe manufacturer of acquiring and keeping a full line of United machines deters, though probably only mildly, the opportunities of a competing shoe manufacturer.

**Dissent by:** STEWART

## **Dissent**

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MR. JUSTICE [\*\*\*48] STEWART, dissenting.

Hanover sued United under the Clayton Act for damages allegedly flowing from United's practice of offering its machines for lease but not for sale. Hanover did not attempt to prove as an original matter that this practice violated the antitrust laws. Instead, it relied exclusively upon § 5 (a) of the Clayton Act, 38 Stat. 731, as amended, which provides:

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"A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . ." [15 U. S. C. § 16 \(a\)](#).

Hanover recovered an award of treble damages solely upon the theory that the 1953 judgment and decree in [United States v. United Shoe Machinery Corp., 110 F.Supp. 295](#), aff'd *per curiam*, [347 U.S. 521](#), had established the unlawfulness [\*\*\*49] of United's practice of making its machines available by lease only. So it follows, as the Court says, "if the 1953 judgment is not prima facie evidence of the illegality of the practice from which [\*511] Hanover's asserted injury arose, then Hanover, having offered no other convincing evidence of illegality, should not have recovered at all." *Ante*, at 484.

I think that the 1953 judgment did not have the broad effect the Court attributes to it today. On the contrary, that judgment, it seems evident to me, held unlawful only particular kinds of leases with particular provisions, not United's general practice of leasing only.<sup>1</sup>

The only precedent cited by the Court for its expansive application of § 5 (a) is *Emich Motors Corp. v. General Motors Corp.*, [340 U.S. 558](#). That case [\*\*\*50] dealt with the estoppel effect of a general jury verdict in a criminal case. [\*\*2241] We deal here with a civil case which was [\*\*\*1252] tried to a federal judge, who rendered a thoroughly considered opinion and carefully precise decree.

One section of the decree, [§ 2](#), broadly set out what the court found United's antitrust violations to be:

"Defendant violated [§ 2](#) of the Sherman Act, [15 U. S. C. A. § 2](#), by monopolizing the shoe machinery trade and commerce among the several States. Defendant violated the same section of the law by monopolizing that part of the interstate trade and commerce in tacks, nails, eyelets, grommets, and hooks, which is concerned with supplying the demand for those products by shoe factories within the United States. . . ." [110 F.Supp., at 352](#).

Another section of the decree, [§ 4](#), clearly specified the unlawful means by which these antitrust violations had been accomplished, and United's general leasing practice was not one of those means:

"All leases made by defendant which include either a ten-year term, or a full capacity clause, or deferred [\*512] payment charges, and all leases under [\*\*\*51] which during the life of the leases defendant has rendered repair and other service without making them subject to separate, segregated charges, are declared to have been means whereby defendant monopolized the shoe machinery market." *Ibid.*

In addition to these two sections setting forth the violations found, the decree contained some 20 remedial sections. Section 3 enjoined the violations found in [§ 2](#). Section 6 prohibited the particular types of leases found to be unlawful in [§ 4](#). Another section of the decree, § 5, went further and provided that in the future United's machines must be offered for sale as well as for lease. But it is a commonplace that "relief, to be effective, must go beyond the narrow limits of the proven violation," [United States v. Gypsum Co., 340 U.S. 76, 90](#). [United States v. Loew's Inc., 371 U.S. 38, 53](#); [United States v. Bausch & Lomb Co., 321 U.S. 707, 724](#).

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<sup>1</sup> I am not alone in this view. See [Cole v. Hughes Tool Co., 215 F.2d 924, 932-933](#); [Laitram Corp. v. King Crab, Inc., 244 F.Supp. 9, 18](#). See also n. 2, *infra*.

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I can find nothing in Judge Wyzanski's written opinion in the 1953 case to suggest that he found United's lease-only practice, as such, to be a violation of the antitrust laws or illegal in any way.<sup>2</sup> [\*\*\*\*53] To the contrary, that opinion [\*\*\*\*52] repeatedly emphasized the anticompetitive effects of the particular types of leases held illegal, and carefully explained that the purpose of requiring that customers [\*513] in the future be given an option to purchase was to create an eventual second-hand market in United's machines and to make the machines available to United's competitors, so that they might study and copy them. [110 F.Supp., at 349-350](#). The opinion specifically stated that the reason for ordering United to offer its machines for sale was *not* to [\*\*\*1253] widen the choices available to customers.<sup>3</sup>

The Court today adds as an Appendix to its opinion -- like a *deus ex machina* -- [\*\*2242] Judge Wyzanski's findings of fact. But it is irrelevant with respect to § 5 (a) that the 1953 findings describe United's lease-only practice, when neither the decree nor the opinion held that practice to be unlawful.

The real key to why the Court has gone astray in this case is to be found, I think, in the concluding sentence of Part I of the Court's opinion. For there the Court reveals that it is really not trying to determine what Judge Wyzanski decided in 1953, but is determining instead how this Court would decide the issues if the 1953 case were before it as an original matter today.<sup>4</sup>

[\*\*\*\*54] In my view the 1953 *United Shoe* decision does not establish United's liability to Hanover. I do not reach, therefore, the other questions dealt with in the Court's opinion.

I would reverse the judgment of the Court of Appeals.

## References

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Am Jur, Judgments (Rev ed 69, 70); Monopolies, Combinations, and Restraints of Trade (1st ed 156, 181-183, 185, 188)

14 Am Jur PI & Pr Forms, Monopolies, Combinations, and Restraints of Trade, Forms 14:311-14:314, 14:327, 14:328

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ALR Digests, Damages 14, 252, 365; Evidence 631; Judgment 68, 69, 102.5; Limitation of Actions 213; Restraints of Trade and Monopolies 13, 15

L Ed Index to Anno, Damages; Restraints of Trade and Monopolies

ALR Quick Index, Damages; Punitive Damages; Restraints of Trade and Monopolies

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<sup>2</sup> Neither, apparently, could Judge Wyzanski. After the trial court in this action filed its opinion holding that the 1953 decree had condemned United's lease-only practice, United applied to Judge Wyzanski for a construction of his decree. While denying the application upon grounds of comity, Judge Wyzanski indicated a willingness to construe his decree if officially requested by the trial judge in the present case, Judge Sheridan. During the course of the hearing before Judge Wyzanski, he made his own views clear to government counsel:

"Now that you are here, are you not aware from being here on previous occasions that the government never contended, and I never ruled, as Judge Sheridan supposes the matter was decided?"

<sup>3</sup> [110 F.Supp., at 349-350](#). The language quoted by the Court, *ante*, at 486, n. 3, is not a statement of why the District Court in 1953 ordered United to offer its machines for sale, but rather part of the court's answer to United's argument that it would be unfair to make United sell while its competitors continued only to lease. [110 F.Supp., at 350](#).

<sup>4</sup> "When the *applicable standard* for determining monopolization under § 2 is applied to these facts, it must be concluded that the District Court and the Court of Appeals did not err in holding that United's practice of leasing and refusing to sell its major machines was determined to be illegal monopolization in the Government's case." (Emphasis added.)

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Annotation References:

Punitive damages for business tort as subject to federal income tax. [99 L Ed 491 at page 495.](#)

Actions for threefold damages under [Anti-trust Act. 53 L Ed 826.](#) [\*\*\*\*55]

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## Zenith Radio Corp. v. Hazeltine Research

Supreme Court of the United States

January 22, 1969, Argued ; May 19, 1969, Decided

No. 49

### **Reporter**

395 U.S. 100 \*; 89 S. Ct. 1562 \*\*; 23 L. Ed. 2d 129 \*\*\*; 1969 U.S. LEXIS 3305 \*\*\*\*; 161 U.S.P.Q. (BNA) 577; 1969 Trade Cas. (CCH) P72,800

ZENITH RADIO CORP. v. HAZELTINE RESEARCH, INC., ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**Disposition:** [388 F.2d 25](#), affirmed in part, reversed in part, and remanded.

## **Core Terms**

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patent, pool, license, royalty, licensee, patentee, Radio, district court, injunction, products, manufacture, Automatic, patent misuse, monopoly, infringement, merchandise, parties, damages, anti trust law, injunctive relief, trial court, conditioning, invention, percentage-of-sales, distributors, conspiracy, royalty payment, importation, provisions, insisted

## **LexisNexis® Headnotes**

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Civil Procedure > Judgments > Entry of Judgments > Nonparties Affected by Judgment

### [\*\*HN1\*\*](#) **[ Entry of Judgments, Nonparties Affected by Judgment**

One is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant.

Civil Procedure > Remedies > Injunctions > Contempt

Civil Procedure > Judgments > Entry of Judgments > Nonparties Affected by Judgment

Civil Procedure > Remedies > Injunctions > General Overview

### [\*\*HN2\*\*](#) **[ Injunctions, Contempt**

Although injunctions issued by federal courts bind not only the parties defendant in a suit, but also those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, [Fed. R. Civ. P. 65\(d\)](#), a nonparty with notice cannot be held in contempt until shown to be in concert or participation.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Evidence > Burdens of Proof > General Overview

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

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

### [HN3](#) Remedies, Damages

It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4 of the Clayton Act, [15 U.S.C.S. § 15](#).

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Factual Issues

Governments > Courts > Authority to Adjudicate

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > General Overview

### [HN4](#) Province of Court & Jury, Factual Issues

In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under [Fed. R. Civ. P. 52 \(a\)](#) is not whether it would have made the findings the trial court did, but whether on the entire evidence it is left with the definite and firm conviction that a mistake has been committed.

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

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Patent Law > Remedies > Damages > General Overview

### [HN5](#) Private Actions, Remedies

Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a

market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.

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

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

#### **HN6** [down arrow] **Private Actions, Remedies**

In the absence of more precise proof, the factfinder may conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.

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

Patent Law > Remedies > Damages > General Overview

#### **HN7** [down arrow] **Private Actions, Remedies**

Although the factfinder is not entitled to base a judgment on speculation or guesswork, the jury may make a just and reasonable estimate of the damage based on relevant data and render its verdict accordingly. In such circumstances, juries are allowed to act upon probable and inferential, as well as direct and positive proof.

Patent Law > Remedies > Equitable Relief > Injunctions

#### **HN8** [down arrow] **Equitable Relief, Injunctions**

See [15 U. S. C. § 26](#).

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

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

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

Patent Law > Remedies > Equitable Relief > Injunctions

#### **HN9** [down arrow] **Clayton Act, Remedies**

The purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws. Section 16 of the Clayton Act, [15 U.S.C.S. § 26](#), should be construed and applied with this purpose in mind, and with the knowledge that the remedy

it affords, like other equitable remedies, is flexible and capable of nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. Its availability should be conditioned by the necessities of the public interest which Congress has sought to protect.

Labor & Employment Law > Wrongful Termination > Remedies > Reinstatement

Patent Law > Remedies > Equitable Relief > Injunctions

#### **HN10**[ Remedies, Reinstatement

In exercising its equitable jurisdiction, a federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past.

Patent Law > Remedies > Equitable Relief > Injunctions

#### **HN11**[ Equitable Relief, Injunctions

When one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts.

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

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

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

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

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

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

#### **HN12**[ Conveyances, Assignments

A patentee has the exclusive right to manufacture, use, and sell his invention. The heart of his legal monopoly is the right to invoke the state's power to prevent others from utilizing his discovery without his consent. The law also recognizes that he may assign to another his patent, in whole or in part, and may license others to practice his invention.

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

International Trade Law > General Overview

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

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

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

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

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

Patent Law > Ownership > Conveyances > General Overview

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

Patent Law > Remedies > Equitable Relief > Injunctions

#### [HN13](#) [] **Conveyances, Licenses**

There are established limits which the patentee must not exceed in employing the leverage of his patent to control or limit the operations of the licensee. Among other restrictions upon him, he may not condition the right to use his patent on the licensee's agreement to purchase, use, or sell, or not to purchase, use, or sell, another article of commerce not within the scope of his patent monopoly. His right to set the price for a license does not extend so far, whatever privilege he has to exact royalties as high as he can negotiate. And just as the patent's leverage may not be used to extract from the licensee a commitment to purchase, use, or sell other products according to the desires of the patentee, neither can that leverage be used to garner as royalties a percentage share of the licensee's receipts from sales of other products; in either case, the patentee seeks to extend the monopoly of his patent to derive a benefit not attributable to use of the patent's teachings.

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

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

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

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

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

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

Patent Law > Ownership > Conveyances > General Overview

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

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

#### [HN14](#) [] **Inequitable Conduct, Anticompetitive Conduct**

It is not per se a misuse of patents to measure the consideration by a percentage of the licensee's sales.

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

Patent Law > Ownership > General Overview

Patent Law > Ownership > Conveyances > General Overview

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

### **HN15** [Defenses, Misuse]

If convenience of the parties rather than patent power dictates the total-sales royalty provision, there is no misuse of the patents and no forbidden conditions attached to the license.

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

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

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

Patent Law > Ownership > General Overview

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

### **HN16** [Conveyances, Licenses]

Patent misuse inheres in a patentee's insistence on a percentage-of-sales royalty, regardless of use, and his rejection of licensee proposals to pay only for actual use. Unquestionably, a licensee must pay if he uses the patent. Equally, however, he may insist upon paying only for use, and not on the basis of total sales, including products in which he may use a competing patent or in which no patented ideas are used at all. There is nothing in the right granted the patentee to keep others from using, selling, or manufacturing his invention which empowers him to insist on payment not only for use but also for producing products which do not employ his discoveries at all.

## **Lawyers' Edition Display**

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### **Summary**

In a patent infringement suit by a research company in the United States District Court for the Northern District of Illinois, the defendant, a radio and television set manufacturer, counterclaimed for treble damages and injunctive relief, alleging antitrust violations consisting of both misuse of the research company's patents and a conspiracy in restraint of trade by the research company, its parent corporation, and Canadian, English, and Australian patent pools. Holding that the research company had misused its patents, the District Court awarded the manufacturer treble damages and injunctive relief against the research company; and further holding that the research company and its parent corporation had conspired in restraint of trade, the District Court, relying upon a pretrial stipulation that the research company and its parent corporation were to be considered as an entity for purposes of the litigation, awarded the manufacturer treble damages and injunctive relief against both the research company and its parent corporation ([239 F Supp 51](#)). On appeal, the Court of Appeals for the Seventh Circuit, affirming the treble damage award for patent misuse, but otherwise reversing the judgment of the District Court, (1) held that the District Court lacked jurisdiction over the research company's parent corporation, and that the stipulation relied upon by the District Court was an insufficient basis for entering judgment against the parent corporation, (2) modified in certain respects the District Court's injunction against patent misuse, (3) held that the manufacturer had failed to prove that it had sustained damage as a result of the conspiracy in restraint of trade, and (4) struck the injunction against the research company's participation in conspiracies restricting the manufacturer's trade in foreign markets ([388 F2d 25](#)).

On certiorari, the United States Supreme Court affirmed in part, reversed in part, and remanded the case to the Court of Appeals. In an opinion by White, J., it was held, expressing the view of seven members of the court, that the question of injunctive relief against misuse of the research company's patents should be remanded for further

proceedings, and it was held, expressing the unanimous view of the court, that (1) the District Court lacked jurisdiction over the research company's parent corporation, (2) the manufacturer had failed to prove that it sustained damage as a result of the conspiracy affecting the English and Australian markets, but had proved that it sustained damage as a result of the conspiracy affecting the Canadian market, and (3) the District Court had properly granted injunctive relief against the research company's participation in conspiracies restricting the manufacturer's trade in foreign markets.

Harlan, J., although concurring in the other parts of the court's opinion, dissented from the court's holding, with respect to the issue of injunctive relief against misuse of patents, that a patent license provision which measures royalties by a percentage of the licensee's total sales is lawful if included for the convenience of both parties but unlawful if insisted upon by the patentee.

## Headnotes

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JUDGMENT §244 > affiliated corporations -- > Headnote:

[LEdHN\[1\]](#) [1]

Despite a pretrial stipulation by the parties that one of the parties and its parent corporation would be considered as an entity for purposes of the litigation, a judgment for damages and injunctive relief cannot properly be entered against the parent corporation where it did not execute the stipulation, was not named as a party, was never served, and did not formally appear at the trial; and the fact that the subsidiary may have executed the stipulation to avoid litigating the alter ego issue cannot foreclose the parent corporation, which never had its day in court on the question whether it and its subsidiary should be considered the same entity for purposes of the litigation.

JUDGMENT §208 > nonparties -- > Headnote:

[LEdHN\[2\]](#) [2]

A person is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.

COURTS §26 > jurisdiction -- > Headnote:

[LEdHN\[3\]](#) [3]

A court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant.

JUDGMENT §244 > affiliated corporations -- > Headnote:

[LEdHN\[4\]](#) [4]

If it is shown that a parent corporation, through its officers, in fact controlled litigation on behalf of a subsidiary, and if the claim is made that a judgment against the subsidiary is res judicata against the parent because of this control, such claim can be finally adjudicated against the parent only in a court with jurisdiction over the parent.

ESTOPPEL AND WAIVER §55 > failure to repudiate stipulation -- > Headnote:

[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B]

Even if some attorneys of a parent corporation were present during part of the trial of antitrust claims against a subsidiary, and failed to repudiate a pretrial stipulation made by the subsidiary to the effect that the subsidiary and the parent would be treated as an entity for purposes of the litigation, the parent corporation is not estopped to deny that it is bound by such stipulation.

INJUNCTION §139 > persons bound -- > Headnote:

[LEdHN\[6\]](#) [6]

Although injunctions issued by federal courts bind not only the parties- defendant in a suit, but also those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise, a nonparty with notice cannot be held in contempt until shown to be in concert or participation, and it is error to enter an injunction against the parent corporation of a company which is a party without making such determination in a proceeding to which the parent corporation itself is a party.

APPEARANCE §7 > effect of special appearance -- > Headnote:

[LEdHN\[7A\]](#) [7A] [LEdHN\[7B\]](#) [7B]

The fact that a parent corporation enters a special appearance to contest jurisdiction, in an antitrust case involving a patent pool conspiracy in restraint of trade, does not indicate that it was found to be in active concert and participation with its subsidiary, which was a party, nor does the entry of such a special appearance indicate that the parent corporation has consented to be bound by such a finding.

RESTRAINTS OF TRADE AND MONOPOLIES §61 > conspiracy -- patent pool -- > Headnote:

[LEdHN\[8A\]](#) [8A] [LEdHN\[8B\]](#) [8B]

The provision of the Sherman Antitrust Act proscribing conspiracies in restraint of trade ([15 USC 1](#)) is violated where a research company and its parent corporation conspire with a Canadian patent pool to deny patent licenses to companies seeking to export American-made goods to Canada.

RESTRAINTS OF TRADE AND MONOPOLIES §67 > treble damages -- > Headnote:

[LEdHN\[9A\]](#) [9A] [LEdHN\[9B\]](#) [9B]

Although patent rights are involved, once a manufacturer demonstrates that its exports from the United States have been restrained by the activities of a Canadian patent pool, an American research company participating in the patent pool conspiracy is subject to treble damage liability.

RESTRAINTS OF TRADE AND MONOPOLIES §67 > treble damages -- > Headnote:

[LEdHN\[10A\]](#) [10A] [LEdHN\[10B\]](#) [10B]

With respect to a claim for treble damages for conspiracy in restraint of trade, the claimant's burden of proving the fact of damage is satisfied by its proof of some damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount, and not the fact of damage; it is enough that the illegality is shown to be a material cause of the injury; and a claimant need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury.

EVIDENCE §958 > sufficiency -- damages -- > Headnote:

[LEdHN\[11\]](#) [11]

With respect to a claim for treble damages for conspiracy in restraint of trade, the evidence is sufficient to sustain the inference that a manufacturer of radio and television sets has in fact been injured to some extent by a Canadian patent pool's restraints upon imports of radio and television sets, where there is evidence that (1) the pool's efforts to prevent importation of radio and television sets from the United States were highly organized and effective, agents, investigators, and manufacturer and distributor trade associations having systematically policed the market, warning notices and advertisements having advised distributors, dealers, and even consumers against selling or using unlicensed equipment, and infringement suits or threats thereof having been regularly and effectively employed to dissuade dealers from handling American-made sets; (2) the pool's past conduct interfered with and made more difficult the distribution of the manufacturer's products during subsequent years for which damages were sought, and the manufacturer suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed; (3) the pool continued after the beginning of the damage period, and the manufacturer was deprived of a license on pool patents permitting it to sell American-made merchandise in Canada; (4) a formal request by the manufacturer for a pool license would have been futile; (5) the manufacturer continued to operate without a patent license unburdened by conspiratorial conduct and granted on terms which would satisfy the antitrust laws, and such deprivation in itself had an impact on the manufacturer and constituted an injury to its business; (6) although the manufacturer was able to obtain independent distributors in certain parts of Canada, it was unable to do so in other parts of Canada, and its poorer performance in Canada than in the United States was attributed to the discouraging and repressive effects of the Canadian patent pool; (7) without a pool license, the manufacturer encountered distribution difficulties which prevented its securing a share of the market comparable to that which it enjoyed in the United States and which its demonstrated business proficiency dictated that it should have obtained in Canada; and (8) the pool was an established organization with a long history of successfully excluding imported merchandise, and in view of its continued existence during the damage period, the injury alleged by the manufacturer was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause.

EVIDENCE §209 > presumption -- continuance of conspiracy -- > Headnote:

[LEdHN\[12\]](#) [12]

A court is entitled to assume the continuance of a conspiracy in restraint of trade, in the absence of clear evidence of its termination.

APPEAL AND ERROR §1464 > review -- findings of fact -- > Headnote:

[LEdHN\[13\]](#) [13]

In applying the standard of [\*Rule 52\(a\) of the Federal Rules of Civil Procedure\*](#), which provides that the findings of fact of a Federal District Court sitting without a jury shall not be set aside unless clearly erroneous, appellate courts must constantly have in mind that their function is not to decide factual issues de novo; the authority of an appellate court, when reviewing the findings of a judge, as well as those of jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence; and the question for the appellate court under [\*Rule 52\(a\)\*](#) is not whether it would have made the findings the trial court did, but whether, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed.

EVIDENCE §343.5 > burden of proof -- damages for antitrust violation -- > Headnote:

[LEdHN\[14\]](#) [14]

Trial and appellate courts alike must observe the practical limits of the burden of proof which may be demanded of a plaintiff, in an antitrust action for treble damages, who seeks recovery for injuries from partial or total exclusion from a market, damage issues in such cases being rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.

EVIDENCE §958 > sufficiency -- damages -- > Headnote:

[LEdHN\[15\]](#) [15]

In the absence of more precise proof in an antitrust action for treble damages, a finder of fact may conclude as a matter of just and reasonable inference from the proof of a defendant's wrongful acts and their tendency to injure the plaintiff's business, and from the evidence of the decline in prices, profits, or values, not shown to be attributable to other causes, that the defendant's wrongful acts had caused damage to the plaintiff, and although not entitled to base a judgment on speculation or guesswork, the finder of fact may make a just and reasonable estimate of the damage based on relevant data, acting upon probable and inferential, as well as direct and positive, proof.

EVIDENCE §958 > sufficiency -- damages -- > Headnote:

[LEdHN\[16\]](#) [16]

With respect to a claim for treble damages for conspiracy in restraint of trade, the evidence is not sufficient to sustain the inference that a manufacturer of radio and television sets has sustained any damage as a result of an English patent pool's restraints upon imports of radio and television sets, where there is evidence that (1) obstacles for which the patent pool was not responsible discouraged the manufacturer's entry into the English market, (2) the manufacturer was waiting for a change in the type of scanning signals used for English television and did not intend to promote the sale of its television sets in England until such a signal change occurred, and if such a change had

occurred, neither the absence of a patent pool license nor patent pool threats against it or its customers would have deterred it from a major effort to penetrate the English market, and (3) the manufacturer's own business calculus, rather than restraints by the patent pool, led it to await more favorable conditions before attempting to enter the English market.

EVIDENCE §958 > sufficiency -- damages -- > Headnote:

[LEdHN\[17\]](#) [17]

With respect to a claim for treble damages for conspiracy in restraint of trade, the evidence is not sufficient to sustain the inference that a manufacturer of radio and television sets has sustained any damage as a result of an Australian patent pool's restraints upon imports of radio and television sets, where there is evidence that (1) the manufacturer had exported no products to Australia and had not requested a patent pool license, (2) a government embargo had foreclosed importation into Australia of the manufacturer's American-made merchandise, and high tariffs and shipping costs, as well as the prospect of vigorous competition, were additional barriers, and (3) the manufacturer neither intended nor was prepared to enter the Australian market during the period for which damages were sought.

RESTRAINTS OF TRADE AND MONOPOLIES §61 > conspiracy -- patent pool -- > Headnote:

[LEdHN\[18\]](#) [18]

If a conspiracy by a research company and its parent corporation with an Australian patent pool had effectively kept an American manufacturer of radio and television sets from the Australian market, a compensable violation of the antitrust laws would have occurred.

RESTRAINTS OF TRADE AND MONOPOLIES §68 > injunctive relief -- > Headnote:

[LEdHN\[19\]](#) [19]

The remedy of injunctive relief, available under 16 of the Clayton Act ([15 USC 26](#)) upon demonstration of threatened loss or damage by a violation of the antitrust laws, is available even though the plaintiff has not yet suffered actual injuries; he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.

RESTRAINTS OF TRADE AND MONOPOLIES §67 > RESTRAINTS OF TRADE AND MONOPOLIES §68 > remedies for antitrust violation -- injunctive relief -- > Headnote:

[LEdHN\[20\]](#) [20]

The purpose of giving private parties treble damage and injunctive remedies for violations of the antitrust laws is not merely to provide private relief, but is to serve as well the high purpose of enforcing the antitrust laws; 16 of the Clayton Act ([15 USC 26](#)), authorizing injunctive relief against threatened loss or damage by a violation of the antitrust laws, should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice adjustment and reconciliation between the

public interest and private needs, as well as between competing private claims, and its availability should be conditioned by the necessities of the public interest which Congress has sought to protect.

RESTRAINTS OF TRADE AND MONOPOLIES §77 > injunctive relief -- patent pool -- > Headnote:

[LEdHN\[21A\]](#) [21A] [LEdHN\[21B\]](#) [21B]

Injunctive relief against a conspiracy in restraint of trade is proper where (1) the defendant research company and its parent corporation conspired with a Canadian patent pool to exclude the plaintiff, a manufacturer of radio and television sets, and others from the Canadian market, (2) there is nothing indicating that the conspiracy has terminated or that the threat to the plaintiff inherent in the conduct will cease in the foreseeable future, (3) neither the relative quiescence of the pool during the litigation nor claims that objectionable conduct will cease with the judgment negates the threat to the plaintiff's foreign trade, and (4) the parent corporation's abandonment of its participation in the Canadian patent pool has occurred after, and apparently in response to, the court's judgment and decree.

APPEAL AND ERROR §1672 > RESTRAINTS OF TRADE AND MONOPOLIES §81 > modification of injunction --

> Headnote:

[LEdHN\[22A\]](#) [22A] [LEdHN\[22B\]](#) [22B]

Although a defendant who has been enjoined from conspiring with a Canadian patent pool in violation of the antitrust laws is free to attempt to demonstrate in the future that the need for injunctive relief with respect to Canada has been eliminated, or that a change of circumstances elsewhere justifies additional modifications of the injunction, the United States Supreme Court will not, on direct review of the decree granting injunctive relief, undertake a reappraisal of the injunction in light of posttrial developments.

RESTRAINTS OF TRADE AND MONOPOLIES §77 > injunctive relief -- patent pools -- > Headnote:

[LEdHN\[23A\]](#) [23A] [LEdHN\[23B\]](#) [23B]

A radio and television set manufacturer which is interested in expanding its foreign commerce and which has suffered restraints of trade at the hands of a research company and its coconspirators in a Canadian patent pool is entitled to injunctive relief broadly barring the research company from conspiring with others to restrict or prevent the manufacturer from entering any other foreign market, and findings that the research company and its parent corporation were conspiring with English and Australian patent pools which refused to license imports, and that the manufacturer intended to expand its export business, are sufficient foundation for the conclusion that continued participation by the research company and its parent corporation in the English and Australian pools poses a significant threat of loss or damage to the manufacturer's business, even if such business has not previously been damaged as a result of the activities of the English and Australian pools.

INJUNCTION §138 > extent of relief -- > Headnote:

[LEdHN\[24\]](#) [24]

In exercising its equitable jurisdiction, a federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past.

RESTRAINTS OF TRADE AND MONOPOLIES §75 > injunction -- extent of relief -- > Headnote:

[LEdHN\[25\]](#) [25]

The federal courts, in exercising the traditional equitable powers extended to them by 16 of the Clayton Act ([15 USC 26](#)), authorizing injunctive relief against threatened loss or damage by a violation of the antitrust laws, should respond to the salutary principle that when one has been found to have committed acts in violation of a law, he may be restrained from committing other related unlawful acts.

RESTRAINTS OF TRADE AND MONOPOLIES §75 > injunction -- extent of relief -- > Headnote:

[LEdHN\[26\]](#) [26]

Although a Federal District Court may not enjoin all future illegal conduct of a defendant, or even all future violations of the antitrust laws, however unrelated to the antitrust violation found by the court, when the defendant's purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed, and this is particularly true in treble-damage cases, which are brought for private ends, but which also serve the public interest in that they effectively pry open to competition a market which has been closed by the defendant's illegal restraints.

PATENTS §232 > misuse -- royalties -- > Headnote:

[LEdHN\[27\]](#) [27]

Conditioning the grant of a patent license upon payment of royalties on products which do not use the teaching of the patent amounts to patent misuse.

PATENTS §5 > rights of patentee -- > Headnote:

[LEdHN\[28\]](#) [28]

A patentee has the exclusive right to manufacture, use, and sell his invention; the heart of his legal monopoly is the right to invoke the state's power to prevent others from utilizing his discovery without his consent; and the law recognizes that he may assign to another his patent, in whole or in part, and may license others to practice his invention.

PATENTS §225 > PATENTS §232 > licenses -- conditions -- royalties -- > Headnote:

[LEdHN\[29\]](#) [29]

There are established limits which a patentee must not exceed in employing the leverage of his patent to control or limit the operations of a licensee; among other restrictions upon him, he may not condition the right to use his patent on the licensee's agreement to purchase, use, or sell, or not to purchase, use, or sell, another article of commerce not within the scope of the patent monopoly, and his right to set the price for a license does not extend so far, whatever privilege he has to exact royalties as high as he can negotiate; and just as the patent's leverage may not be used to extract from the licensee a commitment to purchase, use, or sell other products according to the desires of the patentee, neither can that leverage be used to garner as royalties a percentage share of the licensee's receipts from sales of other products, since, in either case, the patentee seeks to extend the monopoly of his patent to derive a benefit not attributable to use of the patent's teachings.

PATENTS §5 > rights of patentee -- > Headnote:

[LEdHN\[30\]](#) [30]

A patentee may not use the power of his patent to levy a charge for making, using, or selling products not within the reach of the monopoly granted by the government.

PATENTS §232 > misuse -- royalties -- > Headnote:

[LEdHN\[31\]](#) [31]

If the provision of a license agreement basing royalty payments on the licensee's total sales is dictated by the convenience of the parties rather than by the patent power of the patentee, such a royalty arrangement involves neither misuse of the patents nor forbidden conditions attached to the license.

PATENTS §232 > royalties -- > Headnote:

[LEdHN\[32\]](#) [32]

If a licensee negotiates for the privilege to use any or all of the patents and developments as he desires to use them, he cannot complain that he must pay royalties if he chooses to use none of them, and he cannot then charge that the patentee has refused to license except on the basis of a total-sales royalty.

PATENTS §232 > royalties -- > Headnote:

[LEdHN\[33\]](#) [33]

A patentee is not authorized to use the power of his patent to insist on a total-sales royalty from a licensee and to override protestations of the licensee that some of his products are unsuited to the patent or that for some lines of his merchandise he has no need or desire to purchase the privileges of the patent, since, in such event, not only would royalties be collected on unpatented merchandise, but the obligation to pay for nonuse would have its source in the leverage of the patent.

PATENTS §232 > misuse -- royalties -- > Headnote:

[LEdHN\[34\]](#) [34]

Patent misuse inheres in a patentee's insistence on a licensee's payment of a percentage-of-sales royalty, regardless of use, where the patentee rejects the licensee's proposals to pay only for actual use; a licensee must pay if he uses a patent, but he may insist upon paying only for use, and not on the basis of total sales, including products in which he may use a competing patent or in which no patented ideas are used at all; and there is nothing in the right granted the patentee to keep others from using, selling, or manufacturing his invention which empowers him to insist on payment not only for use, but also for producing products which do not employ his discoveries at all.

PATENTS §232 > royalties -- > Headnote:

[LEdHN\[35\]](#) [35]

A licensee cannot expect to obtain a license, giving him the privilege of use and insurance against infringement suits, without at least footing the patentee's expenses in dealing with him; he cannot insist upon paying on use alone and perhaps, as things turn out, pay absolutely nothing because he finds he can produce without using the patent; if the risks of infringement are real and he would avoid them, he must anticipate some minimum charge for the license--enough to insure the patentee against loss in negotiating and administering his monopoly, even if in fact the patent is not used at all; but there is no basis in the statutory monopoly granted the patentee for his using that monopoly to coerce an agreement to pay a percentage royalty on merchandise not employing the discovery which the claims of the patent define.

RESTRAINTS OF TRADE AND MONOPOLIES §58 > RESTRAINTS OF TRADE AND MONOPOLIES §77 > misuse of patent -- license -- conditions -- > Headnote:

[LEdHN\[36\]](#) [36]

If there is a patent misuse consisting of a patentee's conditioning the grant of patent licenses upon the payment of royalties on unpatented products, it does not necessarily follow that such misuse embodies the ingredients of an antitrust law violation under either 1 or 2 of the Sherman Act ([15 USC 1, 2](#)), or that the licensee has been threatened by an antitrust law violation so as to entitle it to an injunction under 16 of the Clayton Act ([15 USC 26](#)).

APPEAL AND ERROR §1692.1 > remand -- > Headnote:

[LEdHN\[37\]](#) [37]

The United States Supreme Court will remand an antitrust case to a Federal Court of Appeals for a determination in the first instance whether findings and evidence of a Federal District Court, sitting without a jury, are sufficient to make out an actual or threatened violation of the antitrust laws so as to justify an injunction issued by the District Court, where such matter has not been considered by the Court of Appeals.

## Syllabus

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[579] Upon the expiration in 1959 of petitioner, Zenith's, license agreement with Hazeltine Research, Inc. (HRI), which permitted Zenith to use all of HRI's domestic radio and television patents under HRI's so-called standard package license, Zenith refused to renew, asserting that it no longer required a license. HRI brought a patent infringement suit in November 1959. Zenith's answer alleged invalidity of the patent, noninfringement, patent misuse by HRI, and HRI's unclean hands through conspiracy with foreign patent pools. In May 1963 Zenith counterclaimed against HRI for treble damages and injunctive relief, alleging Sherman Act violations by misuse of HRI patents, including the one in suit, as well as by conspiracy among HRI, its parent Hazeltine Corp. (Hazeltine), and patent pools in Canada, England, and Australia. Zenith contended that the patent pools refused to license the foreign patents, including Hazeltine's, [\*\*\*\*2] placed within their exclusive licensing authority, to Zenith and others seeking to export American-made radios and television sets into those foreign markets. HRI and Zenith had stipulated before trial that HRI and Hazeltine were to be considered as one entity for purposes of the litigation. Hazeltine was not served with the counterclaim or named as a party, and made no appearance until Zenith proposed that judgment be entered against it, at which time Hazeltine filed a "special appearance." The District Court, sitting without a jury, ruled for Zenith on the infringement action, and on the counterclaim held that (1) HRI had misused its domestic patents by attempting to coerce Zenith's acceptance of a five-year package license and by insisting on extracting royalties from unpatented products, and (2) HRI and Hazeltine conspired with foreign patent pools to exclude Zenith from the Canadian, English, and Australian markets. With respect to patent misuse, judgment was entered for Zenith for treble the actual damages of approximately \$ 50,000, and injunctive relief given against further misuse. Treble damages for almost \$ 35,000,000 were awarded Zenith on the conspiracy claim, together [\*\*\*\*3] with injunctive relief against further participation [\*101] in any arrangement to prevent Zenith from exporting electronic equipment into any foreign market. Relying on the "one entity" stipulation, the court entered the judgments for treble damages and injunctive relief against Hazeltine as well as HRI. The Court of Appeals set aside the judgments against Hazeltine, ruling that the lower court lacked jurisdiction over that company and that the stipulation was an insufficient basis for entering judgment against Hazeltine. On the patent misuse claim, the treble-damage award against HRI was affirmed, but the injunction against further misuse was modified. The conspiracy treble-damage award was reversed, the Court of Appeals holding that Zenith had failed to prove it had in fact been injured during the relevant four-year period preceding the filing of its counter-claim. That court also struck down the injunction against HRI's participation in conspiracies restricting Zenith's foreign trade. *Held:*

1. One is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. [\*\*\*\*4] Pp. 108-112.

(a) The judgments against Hazeltine were properly vacated as Hazeltine was not named as a party or served, and did not formally appear at the trial; and the stipulation executed by HRI was not an adequate substitute for the normal means of obtaining jurisdiction over Hazeltine. P. 110.

(b) It was error to enter an injunction against Hazeltine without determining that it was "in active concert or participation" with HRI in a proceeding in which Hazeltine was a party. P. 112.

2. The Court of Appeals erred in setting aside the District Court's decision with respect to the fact of damage in Canada. Pp. 114-125.

(a) The evidence was sufficient to sustain a finding that the Canadian patent pool refused to license imported goods, thus excluding foreign manufacturers like Zenith from the Canadian market for radio and television products. P. 118.

(b) The evidence clearly warrants the inference that the Canadian patent pool's past conduct interfered with and made more difficult the distribution of Zenith products in the relevant 1959-1963 period; and it could rationally be found that Zenith suffered damage during the pertinent period from having a smaller share of the [\*\*\*\*5] market than it would have had if the pool had never existed. Pp. 118-119.

[\*102] (c) The evidence is sufficient to support a finding of damage resulting from events occurring after the damage period began. Pp. 119-123.

(d) In applying the clearly erroneous standard of [Fed. Rule Civ. Proc. 52 \(a\)](#) to the findings of a district court sitting without a jury, the appellate court must determine whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed," and not whether it would have made the same findings the trial court did. P. 123.

(e) Where a treble-damage plaintiff seeks recovery for injuries from a total or partial market exclusion, a court may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." [Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264](#). Pp. 123-124.

(f) The trial court was entitled to infer from the [\*\*\*\*6] circumstantial evidence that the necessary causal relation between the Canadian patent pool's conduct and the claimed damage existed. Pp. 124-125.

3. The Court of Appeals properly set aside the District Court's judgment with respect to injury to Zenith by the English patent pool, as the only permissible inference from the record is that Zenith did not enter the English television market because it was awaiting a change in the English line-scanning signal and not because of the activities of the patent pool. Pp. 125-128.

4. The Court of Appeals correctly reversed the lower court's damages award with respect to the Australian market as nothing in the record permits the inference that Zenith either intended or was prepared to enter the Australian market during the relevant period. Pp. 128-129.

5. Injunctive relief under § 16 of the Clayton Act is available even though the plaintiff has not suffered actual injury as long as he demonstrates a significant threat of injury from an impending antitrust violation or from a contemporary violation likely to continue or recur. Pp. 129-133.

(a) Injunctive relief against HRI with respect to the Canadian market was wholly proper, as the trial [\*\*\*\*7] court found that HRI and the Canadian patent pool were conspiring to exclude Zenith [\*103] and others from the Canadian market, and there was nothing to indicate that this clear violation of the antitrust laws had terminated or that the threat to Zenith would cease in the foreseeable future. Pp. 131-132.

(b) The injunction which barred HRI from conspiring with others to restrict or prevent Zenith from entering any other foreign markets is also reinstated, in light of HRI's antitrust violation by its conspiring with the Canadian pool, its participation in similar pools in England and Australia, and Zenith's interest in expanding its foreign markets. Pp. 132-133.

6. Conditioning the grant of a patent license upon payment of royalties on products which do not use the teaching of the patent amounts to patent misuse. Pp. 133-140.

(a) If convenience of the parties rather than patent power dictates a percentage-of-total-sales royalty provision there is no misuse of the patents. [Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827](#). Pp. 137-138.

(b) A licensee, who obtains the privilege of using the patent and insurance against infringement suits, [\*\*\*\*8] must anticipate some minimum charge for the license, enough to insure the patentee against loss in negotiating and administering his monopoly, even if in fact the patent is not used at all, but the patentee's statutory monopoly cannot be used to coerce an agreement to pay a percentage royalty on goods not using the patent. Pp. 139-140.

7. The matter is remanded to the Court of Appeals for it to consider whether the trial court correctly determined that HRI conditioned the grant of licenses upon the payment of royalties on unpatented products, and, if so, whether such misuse embodies the ingredients of a violation of either [§ 1](#) or [§ 2](#) of the Sherman Act, or whether Zenith was threatened by a violation so as to entitle it to an injunction under § 16 of the Clayton Act. Pp. 140-141.

**Counsel:** Thomas C. McConnell argued the cause for petitioner. With him on the briefs were Philip J. Curtis and Francis J. McConnell.

John T. Chadwell and Victor P. Kayser argued the cause for respondents. With them on the briefs for respondent Hazeltine Research, Inc., were C. Lee Cook, Jr., [\*104] Joseph V. Giffin, M. Hudson Rathburn, and Laurence B. Dodds. With Messrs. Chadwell and Kayser on [\*\*\*\*9] the brief for Hazeltine Corp. were Messrs. Cook and Giffin.

Solicitor General Griswold, Assistant Attorney General Zimmerman, and Harris Weinstein filed a brief for the United States as amicus curiae.

**Judges:** Warren, Black, Douglas, Harlan, Brennan, Stewart, White, Marshall

**Opinion by:** WHITE

## Opinion

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[\*\*\*137] [\*\*1566] MR. JUSTICE WHITE delivered the opinion of the Court.

Petitioner Zenith Radio Corporation (Zenith) is a Delaware Corporation which for many years has been successfully engaged in the business of manufacturing radio and television sets for sale in the United States and foreign countries. A necessary incident of Zenith's operations has been the acquisition of licenses to use patented devices in the radios and televisions it manufactures, and its transactions have included licensing agreements with respondent Hazeltine Research, Inc. (HRI), an Illinois corporation which owns and licenses domestic patents, principally in the radio and television fields. HRI is the wholly owned subsidiary of respondent Hazeltine Corporation (Hazeltine), a substantially larger and more diversified company that has among its assets numerous foreign patents -- including the foreign counterparts [\*\*\*10] of HRI's domestic patents -- which it licenses for use in foreign countries.

Until 1959, Zenith had obtained the right to use all HRI domestic patents under HRI's so-called standard package license. In that year, however, with the expiration of Zenith's license imminent, Zenith declined to accept HRI's offer to renew, asserting that it no longer required a license from HRI. Negotiations proceeded to a stalemate, and in November 1959, HRI brought suit in the Northern District of Illinois, claiming that [\*\*1567] Zenith television sets infringed HRI's patents on a particular automatic control system. Zenith's answer alleged invalidity of the patent asserted and noninfringement, [\*105] and further alleged that HRI's claim was unenforceable because of patent misuse as well as unclean hands through conspiracy with foreign patent pools. On May 22, 1963, more than three years after its answer had been filed, Zenith filed a counterclaim against HRI for treble damages and injunctive relief, alleging violations of the Sherman Act by misuse of HRI patents, including the one in suit, as well as by conspiracy among HRI, Hazeltine, and patent pools in Canada, England, and Australia. Zenith [\*\*\*11] contended that these three patent pools had refused to license the patents placed within their exclusive licensing authority, including Hazeltine patents, to Zenith and others seeking to export American-made radios and televisions into those foreign markets.

[\*\*\*138] The District Court, sitting without a jury, ruled for Zenith in the infringement action, 239 F.Supp. 51, 68-69, and its judgment in that respect, which was affirmed by the Court of Appeals, 388 F.2d 25, 30-33, is not in issue here. On the counterclaim, the District Court ruled, first, that HRI had misused its domestic patents by attempting to coerce Zenith's acceptance of a five-year package license, and by insisting on extracting royalties from unpatented products. 239 F.Supp., at 69-72, 76-77. Judgment was entered in Zenith's favor for treble the amount of its actual damages of approximately \$ 50,000, and injunctive relief against further patent misuse was awarded. Second, HRI and Hazeltine were found to have conspired with the foreign patent pools to exclude Zenith from the Canadian, English, and Australian markets. Hazeltine had granted the pools the exclusive right [\*\*\*12] to license Hazeltine patents in their respective countries and had shared in the pools' profits, knowing that each pool refused to license its patents for importation and that each enforced its ban on imports with threats of infringement suits. HRI, along with its coconspirator, Hazeltine, was therefore held to have conspired [\*106] with the pools to restrain the trade or commerce of the United States, in violation of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, and was liable for injury caused Zenith's foreign business by the operation of the pools.

239 F.Supp., at 77-78. Total damages with respect to the three markets, when trebled, amounted to nearly \$ 35,000,000.<sup>1</sup> [\*\*1568] Judgment in this [\*107] [580] amount was awarded Zenith, along with injunctive relief

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<sup>1</sup> In its initial findings, handed down on January 25, 1965, 239 F.Supp., at 76, the District Court concluded that Zenith had suffered actual damages of \$ 16,238,872 as a result of the restraints imposed by the three pools upon Zenith's export business during the four-year damage period:

Canada:

Television

\$ 5,826,896

Radio

470,495

England:

Television

8,079,859

Radio

1,169,067

Australia:

Television

625,786

Radio

66,769

Total

16,238,872

On April 5, 1965, the District Court entered partial judgment, awarding Zenith treble damages for patent misuse and treble damages with respect to Canada, but reserving jurisdiction for further hearings on damages in the English and Australian markets. The further proceedings were held in October and November 1965, after which the District Court amended its findings on damages for England and Australia:

England:

Television

\$ 4,312,924

Radio

against further participation in any arrangement to prevent Zenith from exporting electronic equipment into any foreign market.

[\*\*\*13] Relying [\*\*\*139] upon its finding that HRI and Zenith had stipulated before trial that HRI and Hazeltine were to be considered as one entity for purposes of the litigation, see [239 F.Supp., at 69](#), the court entered judgments for treble damages and injunctive relief, both with respect to patent misuse and conspiracy, against Hazeltine as well as against the named counter-defendant, HRI.

On appeal by HRI and Hazeltine, the Court of Appeals set aside entirely the judgments for damages and injunctive relief entered against Hazeltine, ruling that the District Court lacked jurisdiction over that company and that the stipulation relied upon by the District Court was an insufficient basis for entering judgment against Hazeltine. [388 F.2d, at 28-30](#). With respect to Zenith's patent misuse claim, the Court of Appeals affirmed the treble-damage award against HRI, but modified in certain respects the District Court's injunction against further misuse. [388 F.2d, at 33-35, 39](#).

The Court of Appeals also reversed the treble-damage award for conspiracy to restrain Zenith's export trade. Without reaching any of the other issues presented by the appeal [\*\*\*14] on this phase of the case, the court held that Zenith had failed to sustain its burden under § 4 of the [\*108] Clayton Act, 38 Stat. 731, [15 U. S. C. § 15](#), to prove the fact of damage -- injury to its business -- within the relevant four-year period preceding May 22, 1963, the date Zenith's counterclaim was filed.<sup>2</sup> Finally, the Court of Appeals struck the injunction against HRI's participation in conspiracies restricting Zenith's trade in foreign markets.

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745,102

Australia:

Television

223,508

Radio

24,952

Total

5,306,486

These revisions reflect the proof submitted at the further proceedings, showing that government embargoes in England and Australia, in effect until 1959 and 1960 respectively, precluded entry by Zenith into the English and Australian markets. The District Court found, with respect to England, that because of the embargoes, Zenith's damages were zero for the first year of the damage period, 50% of the figure initially accepted by the court for the second year, 75% for the third, and 100% for the fourth. With respect to Australia, the District Court adopted a similar 0-50-75-100% revision of the original figures used by the court in computing the damage findings of January 25, 1965.

<sup>2</sup> The record discloses that Zenith, HRI, and the courts below all considered the damage period to be the four years prior to the date on which Zenith filed its counterclaim. No argument was made that the counterclaim, in whole or in part, related back to an earlier pleading, thereby expanding the damage period to include years prior to 1959. Cf. [Bull v. United States, 295 U.S. 247, 262 and n. 10 \(1935\)](#); [Cold Metal Process Co. v. E. W. Bliss Co., 285 F.2d 231 \(C. A. 6th Cir. 1960\)](#), cert. denied, [366 U.S. 911 \(1961\)](#). Cf. **Fed. Rule Civ. Proc. 15 (c)** (amended pleading relates back to date of original pleading if the "claim or defense

[\*\*\*\*15] We granted certiorari, 391 U.S. 933, to consider among other things the question whether the Court of Appeals properly discharged its appellate function under [Rule 52 \(a\) of the Federal Rules of Civil Procedure](#), which specifies that the findings of fact made by a District Court sitting without a jury are not to be set aside unless "clearly erroneous."

## I. THE JUDGMENTS AGAINST HAZELTINE.

The named plaintiff in the patent infringement complaint which began this litigation was HRI, not its parent, Hazeltine; Zenith's counterclaim named only HRI as the "counter-defendant," identifying HRI and Hazeltine as "counter-defendant and its parent." After Zenith had filed its answer and had delivered a draft of its counter-claim to HRI's attorneys -- both the answer and [581] the counterclaim alleging that HRI had unlawfully [\*\*1569] conspired with Hazeltine and foreign patent pools -- HRI and Zenith [\*109] stipulated that "for purposes of this litigation Plaintiff and its parent Hazeltine Corporation will be considered to be one and the same company."

[\*\*\*140] On May 22, 1963, two weeks after the stipulation had been signed, Zenith filed its counterclaim, seeking money [\*\*\*16] damages from HRI and an injunction against HRI and those "in privity" with it. Hazeltine was not served with the counterclaim and was not named as a party, although it was alleged to be a coconspirator with HRI and the foreign patent pools. Hazeltine made no appearance in the litigation until Zenith proposed that judgment be entered against it, at which time Hazeltine filed a "special appearance." Insofar as the record reveals, Hazeltine did not formally participate in the proceedings until after the District Court had entered its initial findings of fact and conclusions of law. On April 5, 1965, after Hazeltine's special appearance, the trial judge entered judgment against Hazeltine as well as HRI, thereby rejecting Hazeltine's objection that the court was without jurisdiction over it. Apparently, the trial court based its decision on the pretrial stipulation<sup>3</sup> and its earlier finding that:

"The parties stipulated that for the purposes of this litigation Hazeltine Research, Inc. and its parent, [\*110] Hazeltine Corporation, would be considered as one entity operating as a patent holding and licensing company, engaged in the exploitation of patent rights in the electronics [\*\*\*17] industry in the United States and in foreign countries." [239 F.Supp., at 69.](#)

[\*\*\*18] [LEdHN\[1\]](#) [↑] [1] [LEdHN\[2\]](#) [↑] [2] [LEdHN\[3\]](#) [↑] [3] The Court of Appeals was quite right in vacating the judgments against Hazeltine. It is elementary that [HN1](#) [↑] one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. [Hansberry v. Lee, 311 U.S. 32, 40-41 \(1940\).](#) The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. E.g., [Pennoyer v. Neff, 95 U.S. 714 \(1878\); Vanderbilt v. Vanderbilt, 354 U.S. 416, 418 \(1957\).](#)

Here, Hazeltine was not named as a party, was never served and did not formally appear at the trial. Nor was the stipulation an adequate substitute for the normal methods of obtaining jurisdiction over [\*\*\*19] a person or a corporation. The stipulation represented HRI's agreement to be bound by and to be liable for the acts of its parent,

asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading").

<sup>3</sup> During the proceedings before the District Court on April 2, 1965, the trial judge noted: "Well, of course, Hazeltine Corporation wasn't a party to the lawsuit." The court's reliance upon the stipulation as a basis for its decision to enter judgment against Hazeltine as well as HRI is reflected by the interchanges between the court and counsel for Hazeltine during those proceedings. An example is the following:

"Mr. Kayser [counsel for Hazeltine]: . . . Could anyone really believe for a minute that if he had any thought of bringing the parent into this lawsuit that he would not have named them and that he would be relying on this stipulation which was intended to simplify and expedite the trial? Would any lawyer who has been practicing for two years expect to hold somebody liable on a judgment when he didn't even name them? He relied on some pretrial stipulation.

"The Court: You mean that pretrial stipulations are worthless?"

but it was signed only by HRI, through its attorney, Dodds. Hazeltine did not execute the stipulation, and Dodds, [\*\*\*141] although an officer of Hazeltine, did not purport to be signing on its behalf. The trial court apparently viewed the stipulation as binding Hazeltine, as equivalent to an entry of appearance, or as consent to entry of judgment against it. The stipulation [\*\*1570] on its face, however, hardly warrants this construction, and if there were other circumstances which justified the trial court's conclusion, the findings do not reveal them.

[\*111] Perhaps Zenith could have proved and the trial court might have found that HRI and Hazeltine were *alter egos*; but absent jurisdiction over Hazeltine, that determination would bind only HRI. If the *alter ego* issue had been litigated, and if the trial court had decided that HRI and Hazeltine were one and the same entity and that jurisdiction over HRI gave the court jurisdiction over Hazeltine, perhaps Hazeltine's appearance before judgment with full opportunity to contest [\*\*\*20] jurisdiction would warrant entry of judgment against it. But that is not what occurred here. The trial court's judgment against Hazeltine was based wholly on HRI's stipulation. HRI may have executed the stipulation to avoid litigating the *alter ego* issue,<sup>4</sup> [582] but this fact cannot foreclose Hazeltine, which has never had its day in court on the question of whether it and its subsidiary should be considered the same entity for purposes of this litigation.

[LEdHN\[4\]](#) [↑] [4] [LEdHN\[5A\]](#) [↑] [5A] [\*\*\*21] Likewise, were it shown that Hazeltine through its officer, Dodds, in fact controlled the litigation on behalf of HRI, and if the claim were made that the judgment against HRI would be *res judicata* against Hazeltine because of this control, that claim itself could be finally adjudicated against Hazeltine only in a court with jurisdiction over that company.<sup>5</sup> See [G. & C. Merriam Co. \[\\*1121\] v. Saalfeld, 241 U.S. 22 \(1916\)](#); [Schnell v. Peter Eckrich & Sons, Inc., 365 U.S. 260 \(1961\)](#).

[LEdHN\[5B\]](#) [↑] [5B]

[\*\*\*22] [LEdHN\[6\]](#) [↑] [6] [LEdHN\[7A\]](#) [↑] [7A] Neither the judgment for damages nor the injunction against Hazeltine was proper. [HN2](#) [↑] Although injunctions issued by federal courts bind not only the parties defendant [\*\*\*142] in a suit, but also those persons "in active concert or participation with them who receive actual notice of the order by personal service or otherwise," [Fed. Rule Civ. Proc. 65 \(d\)](#), a nonparty with notice cannot be held in contempt until shown to be in concert or participation. It was error to enter the injunction against Hazeltine, without having made this determination in a proceeding to which Hazeltine was a party.<sup>6</sup>

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<sup>4</sup> There is some indication that the genesis of the stipulation was a pretrial conference, when a question was raised as to whether or not a subpoena served upon HRI could reach certain records of Hazeltine relating to the latter's foreign patents. Hazeltine, of course, argues that the stipulation's only purpose and effect were to facilitate discovery and trial by obviating the necessity of litigating whether or not Zenith could "pierce the corporate veil" between HRI and its parent.

<sup>5</sup> In its brief in this Court, Zenith seems to argue that Hazeltine is estopped to deny that it is bound by the stipulation. Not only was HRI's counsel, Dodds, an officer of Hazeltine, but also Ruestow and Westermann, Hazeltine's general patent counsel and general counsel, were present during trial and failed to "repudiate" the construction allegedly given the stipulation by the parties at trial to the effect that it bound Hazeltine to any adjudication on the counterclaim. We find this theory untenable on the record of this case, for the references during trial to the stipulation are equally consistent with the interpretation advanced by Hazeltine that the stipulation merely eliminated the necessity for Zenith to perform the time-consuming task of piercing the corporate veil in proving its counterclaim against HRI. Also, Ruestow and Westermann were called as witnesses during trial, and assuming they were present throughout the trial -- a fact which is neither proved nor disproved by the record -- their failure to repudiate Zenith's proposed construction of the stipulation is entirely consistent with the proposition that they were present only as witnesses, and not as authorized representatives for a person who might be bound by the litigation.

<sup>6</sup> Just as the *alter ego* issue was not litigated after Hazeltine had made its special appearance and while it had an opportunity to be heard, see [supra, at 111](#), so the District Court evidently did not rely upon anything more than the stipulation as a basis for entering the injunction against Hazeltine as well as HRI. The record does not support the contention, implicit in Zenith's brief, that when Hazeltine appeared to contest jurisdiction it was found by the District Court to be "in active concert or participation"

LEdHN[7B] [↑] [7B]

[\*\*\*\*23] [\*113] II. [\*\*1571] THE FOREIGN PATENT POOLS.

A. *The Treble-Damage Award.*

LEdHN[8A] [↑] [8A] LEdHN[9A] [↑] [9A] HRI's major points in the Court of Appeals were that no injury to Zenith's business during the damage period had been proved; that if Zenith had suffered injury, it resulted wholly or partly from conduct prior to May 22, 1959, and to this extent was barred by the statute of limitations and by Zenith's 1957 settlement of certain antitrust litigation against RCA, General Electric, and Western Electric, which had the effect of releasing HRI from all liability for pre-settlement acts of the foreign patent pools;<sup>7</sup> that the Hazeltine companies had not illegally conspired with foreign pools; and that the damage award was excessive. Passing the other issues pressed by HRI, including the limitations defense, the Court of Appeals held that Zenith had failed to prove any injury to its export business during the damage period which resulted from pool activities either before or after the beginning of the damage period, and that the District Court's [\*\*\*\*24] finding to the contrary was clearly erroneous.<sup>8</sup>

LEdHN[8B] [↑] [8B] LEdHN[9B] [↑] [9B]

[583] [\*\*\*\*25]

[\*114] LEdHN[10A] [↑] [10A] We [\*\*\*143] have concluded that the Court of Appeals erred in setting aside the District Court's decision with respect to the fact of damage in Canada. Zenith's evidence, although by no means conclusive, was sufficient to sustain the inference that Zenith had in fact been injured to some extent<sup>9</sup> by the Canadian pool's [\*\*1572] restraints upon imports of radio and television sets. On the other hand, we agree with the Court of Appeals that the District Court erred as to the English and Australian markets.

LEdHN[10B] [↑] [10B]

[\*\*\*\*26] 1. *The Canadian Pool.*

with HRI and that, by entering its special appearance, Hazeltine consented to be bound by such a finding. See generally Dobbs, *The Validation of Void Judgments: The Bootstrap Principle* (pts. 1 and 2), 53 Va. L. Rev. 1003, 1241 (1967).

<sup>7</sup> Although HRI and Hazeltine were not parties to this prior litigation and did not enter the settlement agreement, HRI urged that all joint tortfeasors, including HRI and Hazeltine, were released from liability for injuries flowing from the pre-settlement acts of the pools. The 1957 release appears to be relevant only to Zenith's claim for injury to its Canadian trade; the embargoes in England and Australia were thought by the District Court to preclude any injury from acts of the English and Australian pools, and the embargoes were not lifted until well after the settlement was executed.

<sup>8</sup> The Court of Appeals did not disturb, nor do we, the findings of the District Court that HRI and Hazeltine conspired with the Canadian pool to deny patent licenses to companies seeking to export American-made goods to Canada. Accepting these findings, we have no doubt that the Sherman Act was violated. See, e. g., *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 599 (1951); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962). Once Zenith demonstrated that its exports from the United States had been restrained by pool activities, the treble-damage liability of the domestic company participating in the conspiracy was beyond question. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, *supra*. Cf. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (C. A. 2d Cir. 1945). Although patent rights are here involved, the same conclusions follow. See, for example, *United States v. Line Material Co.*, 333 U.S. 287, 305-315 (1948); *United States v. Singer Mfg. Co.*, 374 U.S. 174, 196-197 (1963).

<sup>9</sup> Zenith's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of some damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. HN3 [↑] It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, *supra*, at 702 (1962); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 143-144 (1968) (concurring opinion).

LEdHN[11] [11] The findings of the District Court with respect to the operations of the Canadian pool may be briefly summarized. The Canadian patent pool, Canadian Radio Patents, Ltd. (CRPL), was formed in 1926 by the General Electric Company of the United States through its subsidiary, Canadian General Electric Company, and [\*115] by Westinghouse through its Canadian subsidiary. The pool was made up largely of Canadian manufacturers, most of which were subsidiaries of American companies. The pool for many years had the exclusive right to sublicense the patents of its member companies and also those of Hazeltine and a number of other foreign concerns. About 5,000 patents were available to the pool for licensing, and only package licenses were granted, covering all patents in the pool and strictly limited to manufacture in Canada. No license to importers was available. The chief purpose of the pool was to protect the manufacturing members and licensees from competition by American and other foreign companies seeking to export their products into Canada.

CRPL's efforts to prevent [\*\*\*27] importation of radio and television sets from the United States were highly organized and effective. Agents, investigators, and manufacturer and distributor trade associations systematically policed the market; warning notices and advertisements advised distributors, dealers, and even consumers against selling or using unlicensed equipment. Infringement suits or threats thereof were regularly and effectively employed to dissuade dealers from handling American-made sets.

For many years Zenith attempted to establish distribution in Canada, but distributors were warned off by the pool, and Zenith's efforts to secure a license for American-made goods were unsuccessful. Zenith then brought an antitrust suit against RCA, General Electric, and Western Electric.<sup>10</sup> This litigation was favorably settled, Zenith receiving, among other things, worldwide [\*\*\*144] licenses on patents owned by the named defendants. [\*116] Armed with these and other licenses, Zenith in 1958 began exporting radio and television products to Canada. It was promptly informed by CRPL that to continue business in Canada, Zenith would be required to sign CRPL's standard license, which did not permit importation, [\*\*\*28] and that to sell in Canada it must manufacture there. Zenith was notified at the time that it was infringing at least one of Hazeltine's patents which had been placed with CRPL for licensing in Canada. Soon after this demand by CRPL, HRI began its infringement suit against Zenith.

Some of the trial court's findings describing the operations of the Canadian pool and its "drastic" impact upon Zenith's foreign commerce did not date the events or state whether they had occurred before or after May 22, 1959. The damage award was confined to injuries sustained during the statutory period, [584] but the trial court apparently deemed it immaterial whether the damage-causing acts occurred before or after the start of the damage period. Damages [\*\*1573] were awarded on the assumption that Zenith, absent the conspiracy, would have had 16% of the Canadian television [\*\*\*29] market on May 22, 1959, and throughout the damage period rather than its actual 3% share.<sup>11</sup> Since the failure to have 16% of the market on the first day of the damage period was ascribed to pool operations, those operations must have occurred prior to May 22, 1959. Some part of the damages [\*117] awarded, therefore, necessarily resulted from pre-damage period conduct.<sup>12</sup>

[\*\*\*30] The Court of Appeals reversed the District Court because it considered the evidence insufficient to prove the fact of any damage to Zenith after May 22, 1959. Having put aside HRI's statute of limitations defense, belatedly raised in the District Court and pressed in the Court of Appeals,<sup>13</sup> the import of the court's [\*\*\*145]

<sup>10</sup> Zenith's antitrust claim was asserted as a counterclaim in a patent infringement suit brought by RCA against Zenith and its subsidiary, the Rauland Corporation.

<sup>11</sup> The computation of damages, prepared by Zenith's experts and accepted by the District Court, see *239 F.Supp., at 76*, reflects a comparison between Zenith's percentage share of the United States television market, ranging from 15.6% in 1959 to 21.7% in 1963, and Zenith's actual share of the Canadian market during the same period, ranging from 3.1% in 1959 to 5.2% in 1961 and down to 3.2% in 1963. Although we discuss only the measure of damages utilized for computing Zenith's injury in the Canadian television market, a comparable method was employed to determine Zenith's lost radio sales.

<sup>12</sup> On November 22, 1965, during the further proceedings held to consider damages for England and Australia, Zenith's executive vice-president and treasurer, Kaplan, testified:

"In Canada, our assumption was that we commenced the period starting June 1, 1959 as if we had a full blown organization, and had enjoyed the benefits of doing business there for years prior to that date."

decision [\*118] was that Zenith had not been damaged after May 22, 1959, by any act of the pool, whether occurring before or after that date. The Court of Appeals' overriding judgment -- as it had to be if its no-injury rationale were to meet claims of damage period injury from pre-damage period conduct -- was that Zenith would have done no more business in Canada after May 22, 1959, had the patent pool never operated in that country.

[\*\*\*\*31] The Court of Appeals was clearly in error. The evidence was quite sufficient to sustain a finding that competing business concerns and patentees joined together to pool their Canadian patents, granting only package licenses and refusing to license imported goods. Their [\*1574] clear purpose was to exclude concerns like Zenith from the Canadian market unless willing to manufacture there. Zenith, consequently, was never able to obtain a license. This fact and the pool's vigorous campaign to discourage importers, distributors, dealers, and consumers from selling, handling, or using unlicensed foreign merchandise effectively prevented Zenith from making any headway in the Canadian market until after the 1957 settlement with RCA and its codefendants. And even in 1958, when Zenith undertook in earnest to establish its distribution system in Canada and to market its merchandise, Zenith was met with further pool advertisements threatening action against imported goods and further notifications, continuing past May 22, 1959, that its products were infringing pool patents and that no license was available [585] unless Zenith manufactured in Canada.

This evidence clearly warrants the inference [\*\*\*\*32] that CRPL's past conduct interfered with and made more difficult the distribution of Zenith products in 1959 and later years. The District Court could reasonably conclude that the cumulative effects of the pool's campaign against imported goods had consequences lasting well into the damage period. It could also rationally [\*119] be found from the evidence that Zenith, beginning in 1958, could not have reached its maximum potential by May 22, 1959, that the pool had effectively prevented an earlier beginning, and that Zenith therefore suffered damage during the damage period from having a smaller share of the market than it would have had if the pool had never existed.

[LEdHN\[12\]](#) [12]We also conclude that the record evidence is sufficient to support a finding of damage resulting from events occurring after the beginning of the damage period. We need not merely assume that the Canadian pool continued throughout the period of this suit, as we are entitled to do in the absence of clear evidence of its termination. See, e. g., [Local 167 v. United States, 291 U.S. 293, 297-298](#) [\*\*\*\*146] (1934); [\*\*\*\*33] [United States v. Oregon State Medical Society, 343 U.S. 326, 333](#) (1952). HRI frankly conceded the continuation of the pool before the District Court,<sup>14</sup> and it appears sufficiently clear that throughout this time Zenith was deprived of

<sup>13</sup> HRI's answer to Zenith's counterclaim did not plead a statute of limitations defense. However, in the course of proceedings after entry of the District Court's initial findings of fact and conclusions of law, but before judgment, the trial court granted the oral motion of HRI's new counsel for "leave to file" defenses based on the statute of limitations and on the release given by Zenith pursuant to the 1957 settlement agreement. The thrust of the former was primarily that the findings as to Canada had erroneously included damages resulting from conduct occurring prior to May 22, 1959. The trial court, without further mention of these defenses, forthwith refused to set aside or amend the damage award as to Canada, thus either rejecting the statute of limitations defense or considering it to have been waived under [Fed. Rule Civ. Proc. 12 \(h\)](#), as urged by Zenith in both the District Court and the Court of Appeals.

Zenith itself had requested damages only for the four-year period prior to the filing of its counterclaim, and the findings of the District Court expressly limited the damages awarded to those occurring "during the 4-year statutory damage period." [239 F.Supp., at 76](#). The Court of Appeals, although not purporting to pass on the statute of limitations defense, referred to the "four year damage period" and identified it as "four years prior to the May 22, 1963, filing date of Zenith's counterclaim. [15 U. S. C. Sec. 15b.](#) [388 F.2d, at 35](#) and n. 4. The parties have not argued the matter here, and we make no further effort to penetrate the confusion surrounding this issue or to deal with the question of whether damage period injury from pre-damage period conduct is recoverable where an unwaived statute of limitations defense is properly asserted.

<sup>14</sup> On April 1, 1965, during the further proceedings held by the District Court before judgment, counsel for HRI stated:

"Now, what [counsel for Zenith] is really trying to sell this court is the idea that if he can show that these pools continued after 1957 and, as he defines the pools, yes, yes, they did. There is no question about it, that these arrangements in relation to patents -- that characterized necessarily as he characterizes them, but that these arrangements have continued and, so far as I know, are in existence today. There is no question about that."

what had always been refused it -- a license on pool patents permitting it to sell American-made merchandise in Canada.

[\*\*\*\*34] On May 12, 1959, the pool manager conferred with Zenith's vice president, informing him that Zenith was infringing pool patents and would require a license, [\*120] but that licenses were granted only for local manufacture. This was followed on June 5, 1959, by a letter stating without reservation that Zenith receivers were infringing, and enclosing the pool's standard license form. This was nothing more nor less than a demand during the damage period that Zenith either manufacture in Canada and take the standard package license or cease its [\*\*1575] activities in that country.<sup>15</sup> There is no evidence that the pool ever retreated from that position during the next four years.

[\*\*\*\*35] Zenith thus continued to operate without a patent license unburdened by conspiratorial conduct and granted on terms which would satisfy the antitrust laws. This deprivation in itself necessarily had an impact on Zenith and constituted an injury to its business. We find singularly unpersuasive the argument that Zenith was as well off without a license as with one. This is little more than an assertion that pool licenses, from which CRPL and its participants enjoyed substantial income, were without value. Without the license, doing business in Canada obviously involved weighty risks for Zenith itself, besides requiring it to convince the trade that it could legally and effectively do business without clearance from CRPL.<sup>16</sup>

[586] [\*\*\*\*36] [\*121] Of [\*\*\*147] course, Zenith determined to take these risks, serious as they were. Although HRI brought the instant litigation claiming infringement of an HRI domestic patent, the foreign counterpart of which had been made available to the Canadian pool by Hazeltine, Zenith persevered in its Canadian efforts. The claim is now pressed, and the Court of Appeals held, that the pool bothered neither Zenith nor its distributors after mid-1959 and that Zenith ran the gantlet so successfully that not having a license made no difference whatsoever.

It is true that the record discloses no specific instance of subsequent infringement suits or threats against Zenith's existing or potential distributors or dealers. But there is evidence that the pool was not dormant after May 1959. The record contains a letter from the pool to a distributor of Motorola products containing clear warnings against handling unlicensed, imported merchandise.<sup>17</sup> [\*\*\*\*38] More significant, the fair import of the testimony [\*122] by

HRI does contend, however, that the ties between the Canadian pool and the Hazeltine companies were broken in December 1965, when Hazeltine secured an early termination of its licensing agreement with CRPL. See n. 25, *infra*.

<sup>15</sup> That Zenith failed to make a formal request for a CRPL license during the damage period can properly be attributed to Zenith's recognition that such a request would have been futile. The pool had made its position entirely clear, and under these circumstances the absence of a formal request is not fatal to Zenith's case. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699-702 (1962); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 487, n. 5 (1968).

<sup>16</sup> In 1960, the Report of the Royal Commission on Patents, Copyright and Industrial Designs was published. This Report described the magnitude of the risk taken by Zenith and its distributors in selling imported products in Canada:

"The portfolio in respect of which CRPL had the right to grant licences consisted of 5,000 patents, and in the absence of a licence from CRPL it is doubtful if anyone could sell in Canada a radio or television receiver."

"CRPL indicated that it does not grant a licence to any importer of radio or television receivers . . . . It is particularly in respect of the policy of CRPL in precluding importers from bringing into Canada radio and television receivers that the complaint was made to this Commission."

"It was stated to be the policy of CRPL to enforce its patent rights against any person who sells in Canada an imported radio or television receiver which infringes any one or more of the patents in its portfolio . . . ."

<sup>17</sup> This letter, brought to Zenith's attention by an ex-Zenith dealer, warned the Motorola dealer that his importation of American-made television sets and FM radios probably infringed pool patents. The dealer not only was cautioned that CRPL remained willing to litigate infringements, describing two recent and successful suits, but also was reminded of CRPL's policy against licensing imports:

Zenith officers was that the pool remained active during the damage period and prevented Zenith from establishing [\*\*1576] an effective distribution system throughout [\*\*\*\*37] Canada. Zenith was able to obtain independent distributors in the Western Provinces, but it was unable to do so in the Central and the Maritime Provinces, where it necessarily relied on its own subsidiaries for distribution. These officers, experienced businessmen, also testified to the similarities between the Canadian and American markets, attributing Zenith's much poorer Canadian performance to the discouraging and repressive effects of the pool. The Court of Appeals did not refuse to credit this testimony, as HRI insists we should do,<sup>18</sup> [\*\*\*148] but accepting it as some evidence of damage, considered it of insufficient weight to prove injury to Zenith's business. In this respect the Court of Appeals both gave insufficient deference to the findings of the trial judge [\*123] and failed to adhere to the teachings of *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), and other cases dealing with the standard of proof in treble-damage actions.

[\*\*\*\*39] [LEdHN\[13\]](#) [↑] [13] [HN4](#) [↑] In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under [Rule 52 \(a\)](#) is not whether it would have made the findings the trial court did, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). See also *United States v. National Assn. of Real Estate Boards*, 339 U.S. 485, 495-496 (1950); *Commissioner v. Duberstein*, 363 U.S. 278, 289-291 (1960).

[\*\*\*\*40] [LEdHN\[14\]](#) [↑] [14] [LEdHN\[15\]](#) [↑] [15] [HN5](#) [↑] Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are [587] rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that [HN6](#) [↑] in the absence of more precise proof, the factfinder may "conclude [\*\*1577] as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage [\*124] to the plaintiffs." *Bigelow v. RKO Pictures, Inc., supra, at 264*. [\*\*\*\*41] See also *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 377-379 (1927); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 561-566 (1931).

In *Bigelow*, a treble-damage plaintiff claimed injury from a conspiracy among film distributors to deny him first-run pictures. He offered evidence comparing his profits with those of a competing theater granted first-run showings and also measuring his current profits against those earned when first-run films had been available to him. This

"In closing, I wish to inform you that we would be most happy to issue a license to you to make or have made in Canada any equipment coming within the ambit of our patents."

<sup>18</sup> HRI urges that the trial testimony as to Canada of each of two Zenith officers, Wright and Kaplan, was inconsistent with his own testimony on recall, inconsistent with the testimony of the other, and inconsistent with documentary evidence, and that we should therefore disregard their testimony. It is true that the trial judge's views as to credibility are not completely impervious, but [Rule 52 \(a\)](#) admonishes due regard for the trial court's opportunity to assess the credibility of witnesses. The Court of Appeals clearly took into account this evidence, and we see no adequate basis in the record for refusing to accept the testimony of the two Zenith officers as probative evidence. See *United States v. United Shoe Machinery Co.*, 247 U.S. 32, 37-38 (1918); *Walling v. General Industries Co.*, 330 U.S. 545, 550 (1947); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605, 609-612 (1950); *United States v. Oregon State Medical Society*, 343 U.S. 326, 332 (1952); *Orvis v. Higgins*, 180 F.2d 537, 539-540 (C. A. 2d Cir.), cert. denied, 340 U.S. 810 (1950); *Ruth v. Utah Construction & Mining Co.*, 344 F.2d 952 (C. A. 10th Cir. 1965). HRI relies heavily in this respect on Zenith's annual reports for the years 1957-1962, but aside from the fact that these reports, except for 1962, were never admitted into evidence, we find them quite insufficient to undermine the credibility of Wright and Kaplan.

Court, reversing the Court of Appeals, found the evidence sufficient to sustain an award of damages. [HNT↑](#)  
Although the factfinder is not entitled to base a judgment on speculation or guesswork,

"the jury may make a just and reasonable estimate [\*\*\*149] of the damage based on relevant data, and render its verdict accordingly. In such circumstances, 'juries are allowed to act upon probable and inferential, as well as direct and positive proof.' [\*Story Parchment Co. v. Paterson Co., supra, 561-4; Eastman Kodak \[\\*\\*\\*421\] Co. v. Southern Photo Co., supra, 377-9.\*](#) Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery." [\*327 U.S. at 264-265.\*](#)

Here, Zenith was denied a valuable license and submitted testimony that without the license it had encountered distribution difficulties which prevented its securing a share of the market comparable to that which [\*125] it enjoyed in the United States, and which its business proficiency, demonstrated in the United States, dictated it should have obtained in Canada. CRPL was an established organization with a long history of successfully excluding imported merchandise; and in view of its continued existence during the damage period, the injury alleged by Zenith was precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause. The trial court was entitled to infer [\*\*\*43] from this circumstantial evidence that the necessary causal relation between the pool's conduct and the claimed damage existed. See [\*Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696-701 \(1962\).\*](#)

## 2. The English Pool.

[LEdHN\[16\]↑](#) [16]Hazeltine patents were made available to the English pool in 1930. The pool issued only package licenses, restricted to local manufacture. Although pool radio patents had expired prior to the beginning of the damage period, the trial court found, and we assume, that the pool held television patents which would not be licensed for television sets made in the United States.<sup>19</sup> Zenith was interested [\*\*1578] in the English market and made exclusive arrangements with one distributor desiring to handle its merchandise. At no time during or before the damage period, however, did Zenith make available or offer for sale a substantial number of television sets suitable for the English market or make any other serious efforts to [\*126] enter that market. It attained no appreciable position in the English television market.

[\*\*\*44] Having initially found the patent pool responsible over the years for Zenith's failure to participate in the English market, the trial court, after further proceedings, held that a government embargo, not the patent pool, was the sole reason for Zenith's not entering the English market prior to the beginning of the damage period in 1959; until then, the [\*\*\*150] District Court found, the pool "[was] not called upon to exercise the type of conduct that [it] exercised in Canada." It did not, however, retreat from its conclusion that restraints imposed by the pool had foreclosed Zenith [588] during the damage period.<sup>20</sup> In this respect we agree with the Court of Appeals that the trial court clearly erred. Based on our own examination of the record, we are convinced that even with the ending of the embargo in mid-1959, Zenith faced other obstacles which effectively discouraged its entry into the English market and for which the pool was not responsible.

<sup>19</sup> Wright testified that in mid-1955 a representative of the English pool had confirmed his understanding that "the policy of the Pool . . . required that [radio and television] sets be made in England, and that nothing would be licensed if it was imported from abroad." Wright further testified that the pool representative "saw no possibility" that this restrictive policy would be changed in the future. Subsequently, during its dealings with its English radio distributor, Zenith was "given to understand that television was just out of the question."

<sup>20</sup> Because the embargo precluded any recovery by Zenith for the first year of the damage period, the trial court modified its initial measure of damages to reflect the time it would have taken Zenith, starting with the removal of the embargo, to build up its market share. See n. 1, *supra*.

[\*\*\*\*45] Positing that Zenith could not get a license from the English pool and that it did not enter the British market before or during the damage period, the issue is whether, once the embargo was lifted, Zenith wanted and intended to enter, had the capacity to do so, and was prevented from entering by its inability to secure a patent license and by other operations of the English patent pool. Section 4 of the Clayton Act required that Zenith show an injury to its "business or property by reason of anything forbidden in the antitrust laws." If Zenith's failure to enter the English market was attributable to its lack of desire, its limited production capabilities, or to other [\*127] factors independent of HRI's unlawful conduct, Zenith would not have met its burden under § 4.<sup>21</sup>

[\*\*\*\*46] Zenith was interested in the English market; this much is clear. But its standard domestic television set was manufactured to operate on 525- and 625-line-per-second scanning signals, whereas the 405-line signal was standard in England until after the damage period. Similarly, while FM transmission was utilized in the United States for the audio portion, AM signals were used in England. Zenith's regular product thus was not salable in the English market. To succeed at all, Zenith had either to produce a differently equipped set or to provide for the mass conversion of its standard receivers. Unquestionably, the company had the facilities and the ability to follow either course. But it is equally clear that it pursued neither.<sup>22</sup> A change in the standard [\*\*\*151] British broadcast to include [\*\*1579] a 625-line signal was under [\*128] consideration, even imminent, during the damage period. Zenith's merchandise would in any event have sold at prices substantially higher than those prevailing in the English market; tariffs and freight costs tended to widen the differential. Producing a new set for the English market, or modifying existent models on a large-scale [\*\*\*\*47] basis, would have involved substantial costs.

Based on the evidence before us, [\*\*\*\*48] including the correspondence between Zenith and its British representative, we think the Court of Appeals correctly rejected the inference that "Zenith intended to and was prepared to enter the English television market during the damage period," and correctly concluded that Zenith was in fact "waiting for a change in English standards to a 625-line system." [388 F.2d, at 37](#). It clearly emerges from the evidence that Zenith had every intention to promote the sale of its television sets if and when the signal change occurred. Given that event, neither the absence of a pool license nor pool threats against it or its customers would have deterred Zenith from a major effort to penetrate the British market. Why the existence of the pool, which as far as the record shows was quiescent during the damage period, should be credited with the power to discourage Zenith's entry before the signal change but not after is difficult to grasp. But the question at hand is not whether, if Zenith had decided to enter the market, the pool would have been a deterrent and inflicted damage. Rather, it is [589] whether Zenith was in fact constrained by the pool to stay out of England during the [\*\*\*\*49] damage period or whether Zenith's own business calculus led it to await more favorable conditions. As we have said, the latter is the only permissible inference from this record.

### 3. The Australian Pool.

[LEdHN\[17\]](#) [17] [LEdHN\[18\]](#) [18] The Australian patent pool, which had exclusive rights to license Hazeltine patents, also granted licenses only [\*129] for local manufacture. Had HRI and Hazeltine's conspiracy with the Australian pool effectively kept Zenith from that market, a compensable violation of the antitrust laws unquestionably would have occurred. But the findings of the District Court are wholly silent as to how the Australian

<sup>21</sup> See [American Banana Co. v. United Fruit Co. 166 F. 261, 264 \(C. A. 2d Cir. 1908\)](#), affirmed without specific reference to this issue, [213 U.S. 347 \(1909\)](#); [Stearns v. Tinker & Raso, 252 F.2d 589, 606 \(C. A. 9th Cir. 1958\)](#); [Volasco Products Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383, 395-396 \(C. A. 6th Cir. 1962\)](#), cert. denied, [372 U.S. 907 \(1963\)](#). Cf. [Pennsylvania Sugar Rfg. Co. v. American Sugar Rfg. Co., 166 F. 254, 260 \(C. A. 2d Cir. 1908\)](#).

<sup>22</sup> During trial, Wright and Kaplan testified that adjustments could be made by Zenith's English distributor in his shop to adapt Zenith television sets to the English transmission system. However, the fair import of their testimony, both during trial and in November 1965 on recall, was that conversion of Zenith sets to the English system, whether done before shipment to England or in the distributor's shop, had in fact been carried out only occasionally in the past and was of questionable utility on a commercial basis. Wright and Kaplan stated that Zenith could have manufactured a television set suitable for English use without appreciably more difficulty than Zenith faced in producing a new model for the American market, but the record does not indicate that Zenith took any steps in this direction before the end of the damage period, except in anticipation of the British changeover to the 625-line-per-second transmission system.

pool had any impact on Zenith's business. An officer of Zenith revealed that Zenith had exported no products to Australia since the 1920's or early 1930's. Zenith had not requested a pool license during the 20-year period preceding the trial. A government embargo was found by the District Court to have foreclosed Zenith's American-made merchandise until well into the damage period. High tariffs and shipping [\*\*\*50] costs were additional barriers, as well as the prospect of vigorous competition. Nothing in the record before us would permit the inference that Zenith either intended or was prepared to enter the Australian market during the damage period. The Court of Appeals was correct in reversing the District Court's award of damages with respect to the Australian market.

[\*\*1580] *B. The Injunction.*

In setting aside the District Court's grant of injunctive relief [\*\*\*152] against continued participation by HRI and Hazeltine in any patent pool or similar association restricting Zenith's export trade,<sup>23</sup> the Court of Appeals stated, without more:

"It follows from our conclusion with respect to the foreign patent pools that injunctive relief against [\*130] 'threatened loss or damage' directed at those pools, alleged by Zenith to be unlawful conspiracies, cannot be justified under [15 U. S. C. Sec. 26](#). Paragraph C of the injunction granted must be stricken." [388 F.2d, at 39](#).

[\*\*\*51] [LEdHN\[19\]](#)<sup>↑</sup> [19]The evident premise for striking Paragraph C was that Zenith's failure to prove the fact of injury barred injunctive relief as well as treble damages. This was unsound, for § 16 of the Clayton Act, [15 U. S. C. § 26](#), which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of "threatened" injury.<sup>24</sup> That remedy is characteristically available even though the plaintiff has not yet suffered actual injury, see [Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn., 274 U.S. 37, 54-55 \(1927\)](#); he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur. See [Swift & Co. v. United States, 196 U.S. 375, 396 \(1905\)](#); [Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn., supra, at 54](#); [United States v. Oregon State Medical Society, 343 U.S. 326, 333 \(1952\)](#); [\*\*\*52] [United States v. W. T. Grant Co., 345 U.S. 629, 633 \(1953\)](#).

[LEdHN\[20\]](#)<sup>↑</sup> [20]Moreover, [HN9](#)<sup>↑</sup> the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide [\*131] [\*\*\*53] private relief, but was to serve as well the high purpose of enforcing the antitrust laws. *E. g.*, [United States v. Borden Co., 347 U.S. 514, 518 \(1954\)](#). Section 16 should be construed and applied with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice "adjustment and reconciliation between the public interest and private needs as well as between competing private claims." [Hecht Co. v. Bowles, 321 U.S. 321, 329-330 \(1944\)](#). Its availability should be "conditioned by the necessities of the [590] public interest which Congress has sought to protect." [Id., at 330](#).

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<sup>23</sup> Paragraph C of the District Court's injunction prohibits HRI from

"Entering into, adhering to, enforcing or claiming any rights under any contract, agreement, understanding, plan or program, with any other person, company, patent pool, organization, association, corporation or entity which directly or indirectly restricts or prevents defendant-counterclaimant, Zenith Radio Corporation, or any of its subsidiaries, from exporting any electronic apparatus from the United States into any foreign market."

<sup>24</sup> Section 16 provides:

[HN8](#)<sup>↑</sup> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, *against threatened loss or damage by a violation of the antitrust laws, . . .* when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings . . ." (Emphasis added.) [15 U. S. C. § 26](#).

[\*\*\*153] [LEdHN\[21A\]](#)<sup>↑</sup> [21A] [LEdHN\[22A\]](#)<sup>↑</sup> [22A] Judged by the proper standard, the record before us warranted the injunction with respect to Canada. The findings of the District Court were that HRI and CRPL were conspiring to exclude Zenith and others from the Canadian **[\*\*1581]** market; there was nothing indicating that this clear violation of the antitrust laws **[\*\*\*\*54]** had terminated or that the threat to Zenith inherent in the conduct would cease in the foreseeable future. Neither the relative quiescence of the pool during the litigation nor claims that objectionable conduct would cease with the judgment negated the threat to Zenith's foreign trade.<sup>25</sup> **[\*132]** That threat was too clear for argument, and injunctive relief against HRI with respect to the Canadian market was wholly proper.

[LEdHN\[21B\]](#)<sup>↑</sup> [21B] [LEdHN\[22B\]](#)<sup>↑</sup> [22B]

**[\*\*\*\*55]** [LEdHN\[23A\]](#)<sup>↑</sup> [23A] [LEdHN\[24\]](#)<sup>↑</sup> [24] [LEdHN\[25\]](#)<sup>↑</sup> [25] [LEdHN\[26\]](#)<sup>↑</sup> [26] We also reinstate the injunction entered by the District Court insofar as it more broadly barred HRI from conspiring with others to restrict or prevent Zenith from entering any other foreign market. [HN10](#)<sup>↑</sup> In exercising its equitable jurisdiction, "[a] federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past." [\*NLRB v. Express Publishing Co., 312 U.S. 426, 435 \(1941\)\*](#). See also [\*United States v. National Lead Co., 332 U.S. 319, 328-335 and n. 4 \(1947\)\*](#). Given the findings that HRI was conspiring with the Canadian pool, its purpose **[\*\*\*\*56]** to exclude Zenith from Canada and its violation of the Sherman Act were clearly established. Its propensity for arrangements of this sort was also indicated by the findings revealing its participation in similar pools operating in England and Australia.<sup>26</sup> Zenith, a company interested in expanding its foreign commerce and having suffered at the hands of HRI and its coconspirators in the Canadian market, was entitled to injunctive relief against like conduct by HRI in other **[\*133]** world markets. **[\*\*\*154]** We see no reason that the federal courts, in exercising the traditional equitable powers extended to them by § 16, should not respond to the "salutary principle that [HN11](#)<sup>↑</sup> when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts." [\*NLRB v. Express Publishing Co., supra, at 436\*](#). Although a district court may not enjoin all future illegal conduct of the defendant, or even all future violations of the antitrust laws, **[\*\*1582]** however unrelated to the violation found by the court, e. **[\*\*\*\*57]** g., [\*New York, N. H. & H. R. Co. v. ICC, 200 U.S. 361, 401 \(1906\)\*](#), "when the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." [\*International Salt Co. v. United States, 332 U.S. 392, 400 \(1947\)\*](#). This is particularly true in treble-damages cases, which are brought for private ends, but which also serve the public interest in that "they effectively pry open to competition a market that has been closed by defendants' illegal restraints." [\*Id. at 401\*](#).

[LEdHN\[23B\]](#)<sup>↑</sup> [23B]

<sup>25</sup> HRI informs us that Hazeltine, having obtained an early termination of its licensing agreement with CRPL, is now prepared to license any one or more of its Canadian patents "with no restrictions on imports." Since Hazeltine's abandonment of its participation in the Canadian pool occurred only after -- and, apparently, in response to -- the District Court's judgment and decree, we cannot agree with the suggestion that injunctive relief as to Canada has been rendered unnecessary and inappropriate. See [\*United States v. Oregon State Medical Society, 343 U.S. 326, 333 \(1952\)\*](#); [\*United States v. Concentrated Phosphate Export Assn., 393 U.S. 199, 202-203 \(1968\)\*](#). Although HRI is free to attempt to demonstrate in the future that the need for injunctive relief with respect to Canada has been eliminated, or that a change of circumstances elsewhere justifies additional modifications of the injunction, see, e. g., [\*United States v. W. T. Grant Co., 345 U.S. 629, 633-636 \(1953\)\*](#), we are not willing at this time to undertake a reappraisal of the injunction in light of post-trial developments.

<sup>26</sup> Having not disturbed the District Court's findings that HRI and Hazeltine were conspiring with English and Australian patent pools which refused to license imports, the Court of Appeals in any event should have sustained the injunction with respect to the English and Australian markets. These findings, together with Zenith's demonstrated intent to expand its export business, were sufficient foundation for the conclusion that continued participation by HRI and Hazeltine in the English and Australian pools posed a significant threat of loss or damage to Zenith's business.

[\*\*\*\*58] III. THE PATENT-MISUSE ISSUE.

Since the District Court's treble damage award for patent misuse was affirmed by the Court of Appeals, and HRI has not challenged that award in this Court, the only misuse issue we need consider at length is whether the Court of Appeals was correct in striking the last clause from Paragraph A of the injunction,<sup>27</sup> [\*\*\*\*59] which enjoined HRI from

[591] "A. Conditioning directly or indirectly the grant of a license to defendant-counterclaimant, Zenith Radio Corporation, or any of its subsidiaries, under any [\*134] domestic patent upon the taking of a license under any other patent *or upon the paying of royalties on the manufacture, use or sale of apparatus not covered by such patent.*" (Emphasis added.)

This paragraph of the injunction was directed at HRI's policy of insisting upon acceptance of its standard five-year package license agreement, covering the 500-odd patents within its domestic licensing portfolio and reserving royalties on the licensee's total radio and television sales, irrespective of whether the licensed patents were actually used in the products manufactured.<sup>28</sup>

LEdHN[27] [27] In [\*\*\*155] striking the last clause of Paragraph A the Court of Appeals, in effect, made two determinations. First, under its view of *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827 (1950)*, conditioning the grant of a patent license upon payment of royalties on unpatented products was not misuse of the patent. Second, since such conduct did not constitute [\*135] patent misuse, neither could it be violative of the antitrust laws [\*\*\*60] within the meaning of § 16 of the Clayton Act, under which Zenith had sought and the District Court had granted the injunction. With respect to the first determination, we reverse the Court of Appeals. We hold that conditioning the grant of a patent license upon [\*\*1583] payment of royalties on products which do not use the teaching of the patent does amount to patent misuse.

The trial court's injunction does not purport to prevent the parties from serving their mutual convenience by basing royalties on the sale of all radios and television sets, irrespective of the use of HRI's inventions. The injunction reaches only situations where the patentee directly or indirectly "conditions" his license upon the payment of royalties on unpatented products -- that is, where the patentee refuses to license on any other basis and leaves the licensee with the choice between a license so providing and no license at all. Also, the injunction takes effect only if the license is conditioned upon the payment of royalties "on" merchandise not covered by the patent -- where the express provisions of the license or their necessary effect is to employ the patent monopoly to collect royalties, not [\*\*\*61] for the use of the licensed invention, but for using, making, or selling an article not within the reach of the patent.

<sup>27</sup> The District Court's injunction also included a paragraph barring HRI from continuing to coerce acceptance of its package license through the mechanism of offering a much lower royalty rate for those licensees who take a license on the entire package of patents rather than a license on merely a few of them. Paragraph B enjoined HRI from

"Conditioning directly or indirectly the grant of any license to defendant-counterclaimant, Zenith Radio Corporation, or any of its subsidiaries, under any domestic patent upon the payment of the same or greater royalty rate than the rate at which licenses have been granted or offered to others under a group of domestic patents which includes said patent."

The Court of Appeals modified this paragraph in certain respects, [388 F.2d, at 39](#), but we do not disturb these modifications.

<sup>28</sup> The District Court concluded:

"Plaintiff's demands that royalties be paid on admittedly unpatented apparatus constitute misuse of its patent rights and plaintiff cannot justify such use of the monopolies of its patents, by arguing the necessities and convenience to it of such a policy. While parties in an arms-length transaction are free to select any royalty base that may suit their mutual convenience, a patentee has no right to demand or force the payment of royalties on unpatented products." [239 F.Supp., at 77](#).

[LEdHN\[28\]](#) [28] [LEdHN\[29\]](#) [29] [HN12](#) A patentee has the exclusive right to manufacture, use, and sell his invention. See, e. g., *Bement v. National Harrow Co.*, 186 U.S. 70, 88-89 (1902). The heart of his legal monopoly is the right to invoke the State's power to prevent others from utilizing his discovery without his consent. See, e. g., *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405 (1908); *Crown Die & Tool Co. v. Nye Tool & Machine Works*, 261 U.S. 24 (1923). The law also recognizes that he may assign to another his patent, in whole or in part, and may license others to practice his invention. See, [\*136] e. g., *Waterman v. Mackenzie*, 138 U.S. 252, 255 (1891). But [\*\*\*\*62] [HN13](#) there are established limits which the patentee must not exceed in employing the leverage of his patent to control or limit the operations of the licensee. Among other restrictions upon him, he may not condition the right to use his patent on the licensee's agreement to purchase, use, or sell, or not to purchase, use, or sell, another article of commerce not within the scope of his patent monopoly. E. g., *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 455-459 (1940); *International Salt Co. v. United States*, 332 U.S. 392, 395-396 (1947). His right [592] to set the price for a license does not extend so far, whatever privilege he has "to exact royalties as high as he can negotiate." *Brulotte v. Thys Co.*, 379 U.S. 29, 33 (1964). [\*\*\*156] And just as the patent's leverage may not be used to extract from the licensee a commitment to purchase, use, or sell other products according to the desires of the patentee, neither can that leverage be used to garner as royalties a percentage share of the licensee's receipts from sales of other products; in either case, the patentee seeks to extend the monopoly of his patent to [\*\*\*\*63] derive a benefit not attributable to use of the patent's teachings.

[LEdHN\[30\]](#) [30] In *Brulotte v. Thys Co.*, *supra*, the patentee licensed the use of a patented machine, the license providing for the payment of a royalty for using the invention after, as well as before, the expiration date of the patent. Recognizing that the patentee could lawfully charge a royalty for practicing a patented invention prior to its expiration date and that the payment of this royalty could be postponed beyond that time, we noted that the post-expiration royalties were not for prior use but for current use, and were nothing less than an effort by the patentee to extend the term of his monopoly beyond that granted by law. *Brulotte* thus articulated in a particularized context the principle that a patentee may [\*137] not use the power of his patent to levy a charge for making, using, [\*\*1584] or selling products not within the reach of the monopoly granted by the Government.

*Automatic Radio* is not to the contrary; it is not authority for the proposition that patentees have *carte blanche* authority [\*\*\*\*64] to condition the grant of patent licenses upon the payment of royalties on unpatented articles. In that case, *Automatic Radio* acquired the privilege of using all present and future HRI patents by promising to pay a percentage royalty based on the selling price of its radio receivers, with a minimum royalty of \$ 10,000 per year. HRI sued for the minimum royalty and other sums. *Automatic Radio* asserted patent misuse in that the agreement extracted royalties whether or not any of the patents were in any way used in *Automatic Radio* receivers. The District Court and the Court of Appeals approved the agreement as a convenient method designed by the parties to avoid determining whether each radio receiver embodied an HRI patent. The percentage royalty was deemed an acceptable alternative to a lump-sum payment for the privilege to use the patents. This Court affirmed.

Finding the tie-in cases such as *International Salt Co. v. United States*, 332 U.S. 392 (1947), inapposite, and distinguishing *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948), as involving a conspiracy between patentee and licensees to eliminate competition, the Court [\*\*\*\*65] considered reasonable the "payment of royalties according to an agreed percentage of the licensee's sales," since "sound business judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement." *339 U.S.*, at 834. It found nothing "inherent" in such a royalty provision which would extend the patent monopoly. Finally, the holding by the Court was stated to be that in licensing the use [\*138] of patents [HN14](#) "it is not *per se* a misuse of patents to measure the consideration by a percentage of the licensee's sales." *Ibid.*

[LEdHN\[31\]](#) [31] Nothing in the foregoing is inconsistent with the District [\*\*\*157] Court's injunction against conditioning a license upon the payment of royalties on unpatented products or with the principle that patent leverage may not be employed to collect royalties for producing merchandise not employing the patented invention. The Court's opinion in *Automatic Radio* did not deal [\*\*\*\*66] with the license negotiations which spawned the royalty formula at issue and did not indicate that HRI used its patent leverage to coerce a promise to pay royalties on radios not practicing the learning of the patent. No such inference follows from a mere license provision

measuring royalties by the licensee's total sales even if, as things work out, only some or none of the merchandise employs the patented idea or process, or even if it was foreseeable that some undetermined portion would not contain the invention. It could easily be, as the Court indicated in *Automatic Radio*, that the licensee as well as the patentee would find it more convenient and efficient from several standpoints to base royalties on total sales than to face the burden of figuring royalties based on actual use.<sup>29</sup> [HN15](#) If convenience of the parties rather than patent power dictates the total-sales royalty provision, there are no misuse of the patents and no forbidden conditions attached to the license.

[\*\*\*\*67] [LEdHN\[32\]](#) [32]The Court also said in *Automatic Radio* that if the licensee bargains for the privilege of using the patent in all of [593] his products and agrees [\*\*1585] to a lump sum or a percentage-of-total-sales royalty, he cannot escape payment [\*139] on this basis by demonstrating that he is no longer using the invention disclosed by the patent. We neither disagree nor think such transactions are barred by the trial court's injunction. If the licensee negotiates for "the privilege to use any or all of the patents and developments as [he] desire[s] to use them," [339 U.S., at 834](#), he cannot complain that he must pay royalties if he chooses to use none of them. He could not then charge that the patentee had refused to license except on the basis of a total-sales royalty.

[LEdHN\[33\]](#) [33]But we do not read *Automatic Radio* to authorize the patentee to use the power of his patent to insist on a total-sales royalty and to override protestations of the licensee that some of his products are unsuited to the patent or that [\*\*\*\*68] for some lines of his merchandise he has no need or desire to purchase the privileges of the patent. In such event, not only would royalties be collected on unpatented merchandise, but the obligation to pay for nonuse would clearly have its source in the leverage of the patent.

[LEdHN\[34\]](#) [34]We also think [HN16](#) patent misuse inheres in a patentee's insistence on a percentage-of-sales royalty, regardless of use, and his rejection of licensee proposals to pay only for actual use. Unquestionably, a licensee must pay if he uses the patent. Equally, however, he may insist upon paying only for use, and not on the basis of total sales, including products in which he may use a competing patent or in which no patented ideas are used at all. There is nothing in the right granted the patentee to keep others [\*\*\*158] from using, selling, or manufacturing his invention which empowers him to insist on payment not only for use but also for producing products which do not employ his discoveries at all.

[LEdHN\[35\]](#) [35] [\*\*\*\*69] Of course, a licensee cannot expect to obtain a license, giving him the privilege of use and insurance against infringement suits, without at least footing the patentee's [\*140] expenses in dealing with him. He cannot insist upon paying on use alone and perhaps, as things turn out, pay absolutely nothing because he finds he can produce without using the patent. If the risks of infringement are real and he would avoid them, he must anticipate some minimum charge for the license -- enough to insure the patentee against loss in negotiating and administering his monopoly, even if in fact the patent is not used at all. But we discern no basis in the statutory monopoly granted the patentee for his using that monopoly to coerce an agreement to pay a percentage royalty on merchandise not employing the discovery which the claims of the patent define.

[LEdHN\[36\]](#) [36] [LEdHN\[37\]](#) [37]Although we have concluded that *Automatic Radio* does not foreclose the injunction entered by the District Court, it does not follow that the injunction was otherwise proper. [\*\*\*\*70] Whether the trial court correctly determined that HRI was conditioning the grant of patent licenses upon the payment of royalties on unpatented products has not yet been determined by the Court of Appeals. And if there was such patent misuse, it does not necessarily follow that the misuse embodies the ingredients of a violation of either [§ 1](#) or [§ 2](#) of the Sherman Act, or that Zenith was threatened by a violation so as to entitle it to an injunction under § 16 of the Clayton Act. See, e. g., [Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 490 \(1942\)](#); [Transparent-Wrap Machine Corp. v. Stokes & Smith Co., 329 U.S. 637, 641 \(1947\)](#); [Laitram Corp. v. King Crab, Inc., 245 F.Supp. 1019 \(D. C. Alaska 1965\)](#). See also Report of the Attorney General's National Committee to Study

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<sup>29</sup> The record and oral argument in *Automatic Radio* disclose no basis for the conclusion that *Automatic Radio* was forced into accepting the total-sales royalty rate by HRI's use of its patent leverage.

the Antitrust Laws 254 (1955); R. Nordhaus & E. Jurow, Patent-***Antitrust Law*** 122-123 (1961); Frost, Patent Misuse As A Per Se Antitrust Violation, in Conference on the Antitrust Laws and the [\*\*1586] Attorney General's Committee Report 113-123 (J. Rahl & E. Zaidins ed., 1955). [\*141] Cf. Staff of Antitrust Subcommittee of House Committee [\*\*\*\*71] on the Judiciary, 84th Cong., 2d Sess., Antitrust Problems in the Exploitation of Patents 23 (Comm. Print. 1956); Schueler, The New Antitrust Illegality Per Se: Forestalling and Patent Misuse, 50 Col. L. Rev. 170, 184-200 (1950). Whether the findings and the evidence are sufficient to make out an actual or threatened violation of the antitrust laws so as to justify the injunction issued by the District Court has not been considered by the Court of Appeals, and we leave the matter to be dealt with by that court in the first instance.

Accordingly, the judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded to that court for further proceedings consistent with this opinion.

*It is so ordered.*

**Concur by:** HARLAN (In Part)

**Dissent by:** HARLAN (In Part)

## Dissent

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[\*\*\*159] MR. JUSTICE HARLAN, concurring in part and dissenting in part.

I concur in Parts I and II of the Court's opinion. However, I do not join Part III, in which the Court holds that a patent license provision which measures royalties by a percentage of the [594] licensee's total sales is lawful if included for the "convenience" of both parties but unlawful if "insisted upon" [\*\*\*\*72] by the patentee.

My first difficulty with this part of the opinion is that its test for validity of such royalty provisions is likely to prove exceedingly difficult to apply and consequently is apt to engender uncertainty in this area of business dealing, where certainty in the law is particularly desirable. In practice, it often will be very hard to tell whether a license provision was included at the instance of both parties or only at the will of the licensor. District courts will have the unenviable task of deciding whether the course of negotiations establishes "insistence" upon the suspect provision. Because of the uncertainty inherent [\*142] in such determinations, parties to existing and future licenses will have little assurance that their agreements will be enforced. And it may be predicted that after today's decision the licensor will be careful to embellish the negotiations with an alternative proposal, making the court's unravelling of the situation that much more difficult.

Such considerations lead me to the view that any rule which causes the validity of percentage-of-sales royalty provisions to depend upon subsequent judicial examination of the parties' [\*\*\*\*73] negotiations will disserve rather than further the interests of all concerned. Hence, I think that the Court has fallen short in failing to address itself to the question whether employment of such royalty provisions should invariably amount to patent misuse.<sup>1</sup>

My second difficulty with this part of the Court's opinion is that in reality it overrules an aspect of a prior decision of this Court, *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950), without offering more than a shadow of a reason in law or economics for departing from that earlier ruling. Despite the Court's efforts to distinguish *Automatic Radio*, it cannot be denied that the Court there sustained a Hazeltine patent license of precisely the same tenor as the one involved here, on the ground that "this royalty provision does not create another monopoly; it [\*\*\*\*74] creates no restraint of competition beyond the legitimate grant of the patent." 339 U.S., at 833.

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<sup>1</sup> I find it unnecessary to consider the further question whether inclusion of such a provision should be held to violate the antitrust laws.

In finding significance for present purposes in some of the qualifying language [\*\*1587] in *Automatic Radio*, I believe that the Court today has misconstrued that opinion. A reading of the opinion as a whole satisfies me that the [\*143] *Automatic Radio* Court did not consider it relevant whether Hazeltine Research had "insisted" upon inclusion of the disputed provision, and that in emphasizing that the royalty terms had no "inherent" tendency to extend the patent monopoly [\*\*\*160] and were not a "*per se*" misuse of patents, the Court was simply endeavoring to distinguish prior decisions in which patent misuse was found when the patent monopoly had been employed to "create another monopoly or restraint of competition." [339 U.S., at 832](#).<sup>2</sup> [\*\*\*\*75] (Emphasis added.) Until now no subsequent decision has in any way impaired this aspect of *Automatic Radio*.<sup>3</sup>

Since the Court's decision finds little if any support in the prior case law, one would expect from the Court an exposition of economic reasons for doing away with the *Automatic Radio* doctrine. However, the nearest thing to an economic rationale is the Court's declaration that:

"just as the patent's leverage may not be used to extract from the licensee a commitment to purchase, use, or sell other products according to the desires of the patentee, neither can that leverage be used to garner as royalties a percentage share of the licensee's receipts from sales of other products; in either case, the patentee seeks to extend the monopoly of his patent to derive a benefit not attributable to use of the patent's teachings." *Ante*, at 136.

The Court then finds in the patentee a heretofore nonexistent right to "insist upon paying only for use, and not on the basis [\*\*\*\*76] of total sales . . ." *Ante*, at 139.

[\*144] What the Court does not undertake to explain is *how* insistence upon a percentage-of-sales royalty enables a patentee to obtain an economic "benefit not attributable to use of the patent's teachings," thereby involving himself in patent misuse. For it must be remembered that all the patentee has to license [595] is the right to use his patent. It is solely for that right that a percentage-of-sales royalty is paid, and it is not apparent from the Court's opinion why this method of determining the *amount* of the royalty should be any less permissible than the other alternatives, whether or not it is "insisted" upon by the patentee.

One possible explanation for the Court's result, which seems especially likely in view of the Court's exception for cases where the provision was included for the "convenience" of both parties, is a desire to protect licensees against overreaching. But the Court does not cite, and the parties have not presented, any evidence that licensees as a class need such protection.<sup>4</sup> Moreover, the Court does not explain why a royalty based simply upon use could not be equally overreaching.

[\*\*\*\*77] Another possible justification for the Court's result might be that a royalty based directly upon use of the patent will tend to spur the licensee to "invent around" the patent or otherwise acquire a substitute which costs less, while a percentage-of-sales royalty can have no [\*\*\*161] such effect because of the licensee's knowledge that he must pay the royalty regardless of actual patent use. No hint of [\*\*1588] such a rationale appears in the Court's opinion. Moreover, under this theory a percentage-of-sales royalty would be objectionable largely because of resulting damage to the rest of the economy, through less efficient allocation of resources, rather than because of possible harm to the licensee. Hence, the theory might not [\*145] admit of the Court's exception for provisions included for the "convenience" of both parties.

Because of its failure to explain the reasons for the result reached in Part III, the Court's opinion is of little assistance in answering the question which I consider to be the crux of this part of the case: whether percentage-of-

<sup>2</sup> The *Automatic Radio* Court explicitly distinguished a number of cases of that kind, including [United States v. United States Gypsum Co., 333 U.S. 364 \(1948\)](#), and [Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661 \(1944\)](#). See [339 U.S., at 832-833](#).

<sup>3</sup> [Brulotte v. Thys Co., 379 U.S. 29 \(1964\)](#), involved a different question: whether a royalty based solely upon use of the invention could be collected for use occurring after the patent's expiration.

<sup>4</sup> Cf. [American Photocopy Equip. Co. v. Rovico, 359 F.2d 745 \(1966\)](#).

sales royalty provisions should be held without exception to constitute patent misuse. A recent economic analysis [\*\*\*\*78]<sup>5</sup> argues that such provisions may have two undesirable consequences. First, as has already been noted, employment of such provisions may tend to reduce the licensee's incentive to substitute other, cheaper "inputs" for the patented item in producing an unpatented end-product. Failure of the licensee to substitute will, it is said, cause the price of the end-product to be higher and its output lower than would be the case if substitution had occurred.<sup>6</sup> Second, it is suggested that under certain conditions a percentage-of-sales royalty arrangement may enable the patentee to garner for himself elements of profit, above the norm for the industry or economy, which are properly attributable not to the licensee's use of the patent but to other factors which cause the licensee's situation to differ from one of "perfect competition," and that this cannot occur when royalties are based upon use.<sup>7</sup>

[\*\*\*\*79] If accepted, this economic analysis would indicate that percentage-of-sales royalties should be entirely outlawed. However, so far as I have been able to find, there has as yet been little discussion of these matters either by lawyers or by economists. And I find scant illumination on this score in the briefs and arguments of the parties in this case. The Court has pointed out both today and in [\*146] *Automatic Radio* that percentage-of-sales royalties may be administratively advantageous for both patentee and licensee. In these circumstances, confronted, as I believe we are, with the choice of holding such royalty provisions either valid or invalid across the board, I would, as an individual member of the Court, adhere for the present to the rule of *Automatic Radio*.

## References

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Am Jur, Monopolies, Combinations, and Restraints of Trade (1st ed 102, 174, 181); Patents (1st ed 145, 149)

10 Am Jur Legal Forms, Patents, Forms 10:865, 10:867, 10:1054-10:1102

US L Ed Digest, Evidence 958; Judgment 208, 244; Patents 225, 232; Restraints of Trade and Monopolies 55, 58, 61, 67, 68, 77

ALR Digests, Patents 19; Restraints [\*\*\*\*80] of Trade and Monopolies 15, 18

L Ed Index to Anno, Patents; Restraints of Trade and Monopolies

ALR Quick Index, Patents; Restraints of Trade and Monopolies

Annotation References:

Cross licensing or pooling of patents as violation of antitrust laws. [75 L Ed 926](#).

Validity of agreement to pay royalties for use of patented articles beyond patent expiration date. 3 ALR 3d 770.

Who may be regarded as injured in his business or property within provisions of antitrust acts as to person who may recover damages resulting from violation of the acts. 139 ALR 1017.

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<sup>5</sup> Baxter, Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis, 76 Yale L. J. 267 (1966).

<sup>6</sup> See [id., at 299-301, 302-306](#).

<sup>7</sup> See [id., at 300-301, 302-306, 331-332](#).

## Zenith Radio Corp. v. Hazeltine Research

Supreme Court of the United States

November 10, 1970, Argued ; February 24, 1971, Decided

No. 80

**Reporter**

401 U.S. 321 \*; 91 S. Ct. 795 \*\*; 28 L. Ed. 2d 77 \*\*\*; 1971 U.S. LEXIS 153 \*\*\*\*; 1971 Trade Cas. (CCH) P73,484; 14 Fed. R. Serv. 2d (Callaghan) 1169

ZENITH RADIO CORP. v. HAZELTINE RESEARCH, INC.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**Disposition:** [418 F.2d 21](#), reversed and remanded.

## **Core Terms**

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damages, defenses, limitations, conspiracy, tolling, pool, statute of limitations, parties, reopen, trial judge, merits, waived, markets, counterclaim, patent, cause of action, district court, trial court, four year, conspiratorial, coconspirator, antitrust, accrues, future damage, conspirators, infringement, four-year, settlement, pleadings, rights

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Defenses, Demurrsers & Objections > Affirmative Defenses > Releases

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Civil Procedure > ... > Defenses, Demurrsers & Objections > Affirmative Defenses > General Overview

Governments > Legislation > Statute of Limitations > General Overview

### **[HN1](#)[**

[Fed. R. Civ. P. 8\(c\)](#) requires that in pleading to a preceding pleading, a party shall set forth affirmatively release, statute of limitations, and any other matter constituting an avoidance or affirmative defense.

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Waiver & Preservation of Defenses

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > General Overview

### **[HN2](#)[**

401 U.S. 321, \*321; 91 S. Ct. 795, \*\*795; 28 L. Ed. 2d 77, \*\*\*77; 1971 U.S. LEXIS 153, \*\*\*\*1

[Fed. R. Civ. P. 12\(h\)](#) provides that a party waives all defenses and objections that he does not present either by motion or in answer or reply.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

### [HN3](#) **Amendment of Pleadings, Leave of Court**

*Fed. R. Civ. P. 15(a)* provides that leave to amend an answer shall be freely given when justice so requires.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

### [HN4](#) **Judges, Discretionary Powers**

The grant of leave to amend the pleadings pursuant to *Fed. R. Civ. P. 15 (a)* is within the discretion of the trial court, but the trial court is required to take into account any prejudice that the opposing party would suffer as a result.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Civil Procedure > Pleading & Practice > Pleadings > Supplemental Pleadings

### [HN5](#) **Judges, Discretionary Powers**

A motion to reopen a case to submit additional proof is addressed to the trial court's sound discretion.

Civil Procedure > ... > Defenses, Demurrs & Objections > Affirmative Defenses > General Overview

### [HN6](#) **Defenses, Demurrs & Objections, Affirmative Defenses**

Where a plaintiff has no reason to anticipate that a claim of limitations will be raised against him, he need not set forth his claim of tolling until the limitations claim is raised.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > General Overview

### [HN7](#) **Antitrust & Trade Law, Clayton Act**

The language of [15 U.S.C.S. § 16\(b\)](#) expressly provides for tolling of the statute of limitations in respect of every private right of action based in whole or in part on any matter complained of in the proceeding instituted by the government.

Antitrust & Trade Law > Clayton Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

#### [HN8](#) [] Antitrust & Trade Law, Clayton Act

On the face of [15 U.S.C.S. § 16\(b\)](#), a private party who brings suit for a conspiracy against which the government has already brought suit is undeniably basing its claim in whole or in part upon the matter complained of in the government suit, even if the defendant named in the private suit is named neither as a defendant nor as a coconspirator by the government. If the government sues only certain conspirators, but also alleges and proves during trial that others were conspirators, the fact of the tolling of the statute against those so proved but not sued can hardly be denied. Nor could tolling be denied if a defendant is never shown to be a conspirator by the evidence offered in the earlier government suit, but then is proved to be such in the subsequent private suit.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Tolling

#### [HN9](#) [] Antitrust & Trade Law, Clayton Act

Damages are recoverable under the federal antitrust acts only if suit therefor is commenced within four years after the cause of action accrued, under [15 U.S.C.S. § 15\(b\)](#), plus any additional number of years during which the statute of limitations was tolled.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

#### [HN10](#) [] Antitrust & Trade Law, Clayton Act

An antitrust cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. In the context of a continuing conspiracy to violate the antitrust laws, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act. However, each separate cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

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

If a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. To recover those damages, he must sue within the requisite number of years from the accrual of the action. On the other hand, in antitrust actions as in others, even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable.

Antitrust & Trade Law > Regulated Industries > Sports > Football

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

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

### **HN12** [L] Sports, Football

In antitrust and treble-damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted. Otherwise future damages that could not be proved within four years of the conduct from which they flowed would be forever incapable of recovery, contrary to the congressional purpose that private actions serve as a bulwark of antitrust enforcement, and that the antitrust laws fully protect the victims of the forbidden practices as well as the public.

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Discharge, Release & Satisfaction

Copyright Law > ... > Civil Infringement Actions > Secondary Liability > General Overview

### **HN13** [L] Grounds for Relief from Final Judgment, Order or Proceeding, Discharge, Release & Satisfaction

A release, which clearly intends to save the releasor's rights against a past contributory infringer, does not automatically surrender those rights.

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Discharge, Release & Satisfaction

### **HN14** [L] Grounds for Relief from Final Judgment, Order or Proceeding, Discharge, Release & Satisfaction

The straightforward rule is that a party releases only those other parties whom he intends to release.

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Discharge, Release & Satisfaction

## **HN15** [blue icon] **Grounds for Relief from Final Judgment, Order or Proceeding, Discharge, Release & Satisfaction**

Entirely apart from any release, a plaintiff who has recovered any item of damage from one coconspirator may not again recover the same item from another conspirator, as the law does not permit a plaintiff to recover double payment.

### **Lawyers' Edition Display**

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#### **Summary**

In a patent infringement suit in the United States District Court for the Northern District of Illinois, the defendant filed an antitrust counterclaim in 1963 seeking damages suffered by it in the 1959-1963 period for its exclusion from the Canadian, British, and Australian markets by reason of the plaintiff's participation in patent pools there. The plaintiff claimed that there was no conspiracy and that the defendant had suffered no damage, but the evidence showed the plaintiff's participation in an antitrust conspiracy, including participation in a Canadian patent pool with various other American companies against whom the government had brought a civil antitrust suit in 1958. The government suit was terminated as to all parties on November 1, 1962. The District Court, sitting without a jury, entered preliminary findings of fact and conclusions of law that the defendant had been damaged in stated amounts in all three foreign markets. The plaintiff then moved to amend its reply to the defendant's counterclaim, and to reopen the record for the taking of additional evidence, seeking to assert the defenses that (1) part or all of the damages awarded for the 1959-1963 period were barred by the 4-year statute of limitations governing antitrust claims (4B of Clayton Act), in that they resulted from pre-1959 conspiratorial conduct; and (2) the defendant's release executed in 1957 to certain other American companies, and their parents and subsidiaries, precluded recovery for damages resulting from pre-1957 conduct. The District Court permitted the limitations and release defenses to be filed, and heard further evidence with respect to the British and Australian markets, as a result of which it reduced its damage award for those markets, but it refused to reopen the record for other purposes or to modify its findings or conclusions as to the Canadian market ([239 F Supp 51](#)). Putting aside other issues, the United States Court of Appeals for the Seventh Circuit reversed on the ground that the defendant had failed to prove injury to its business in any of the three markets ([388 F2d 25](#)). The Supreme Court of the United States affirmed as to the British and Australian markets but reversed as to the Canadian market ([395 US 100, 23 L Ed 2d 129, 89 S Ct 1562](#)). On remand, the Court of Appeals ruled that the District Court had not rejected the limitations and release defenses on waiver grounds; that the 4-year statute of limitations on the counterclaim was not tolled during the pendency of the government antitrust suit, because the plaintiff was not a party to that suit; that the plaintiff was entitled to the benefit of the release because the defendant had failed to reserve expressly any right against the plaintiff; and that the trial court should take further evidence to determine the extent to which damages should be reduced by virtue of these defenses ([418 F2d 21](#)).

On certiorari, the Supreme Court of the United States reversed and remanded with instructions to reinstate the District Court's judgment with respect to the Canadian market. In an opinion by White, J., expressing the views of seven members of the court, it was held that (1) if the District Court ruled that the limitations and release defenses were waived by the untimeliness of their presentation, it did not abuse its discretion, because allowing those defenses to be litigated would have entitled the defendant to perfect its proof as to damages resulting from pool operations during the 1959-1963 period, and thus would have required a virtual retrial of the damage issue; (2) if the District Court rejected the limitations defense on the merits, it did not err, because (a) the statute of limitations was tolled during the 1958-1963 period, by virtue of the tolling provisions of 5(b) of the Clayton Act suspending the statute of limitations on private antitrust actions during the pendency of government antitrust proceedings and for one year thereafter, even though the plaintiff was not named by the government as a defendant or as a coconspirator, and (b) damages suffered during the 1959-1963 period as a result of the pre-1954 conduct of the conspiracy were not barred, since the cause of action for such damages had not accrued before 1954; and (3) if the

District Court rejected the release defense on the merits, it did not err, because the release of other companies and their parents and subsidiaries was not intended to benefit the plaintiff.

Harlan, J., joined by Stewart, J., concurred in the result on the grounds that the trial judge properly rejected the limitations and release defenses as too belatedly raised, and that it was unnecessary to reach the other issues.

## Headnotes

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WAIVER §82 > pleading -- damages -- > Headnote:

[LEdHN\[1\]](#) [1]

A defendant's statement, in his motion for leave to file a counterclaim, that the counterclaim arose out of the plaintiff's conduct "occurring since the filing of the answer," does not preclude the defendant from recovering damages resulting from pre-answer conduct where the counterclaim itself is not so limited and the defendant makes his position on damages absolutely clear by the opening of trial, so that the plaintiff is given both ample notice of the substance of the defendant's claim and ample opportunity to respond, but makes no effort during trial to do so.

PLEADING §87 > reply -- amendment -- > Headnote:

[LEdHN\[2\]](#) [2]

If, after the evidence is closed and the trial court has entered preliminary findings of fact and conclusions of law favoring the defendant on his counterclaim, the court gives the plaintiff 5 days to file amendments to assert certain defenses to the counterclaim "nunc pro tunc as of" the date of the argument on the plaintiff's posttrial motion to amend his reply to the counterclaim, the defenses are technically filed before the entry of judgment and the taking of appeal, while the trial court still retains jurisdiction over the suit.

PLEADING §71 > amendments -- discretion -- > Headnote:

[LEdHN\[3\]](#) [3]

The grant of leave to amend the pleadings pursuant to *Rule 15(a) of the Federal Rules of Civil Procedure* is within the discretion of the trial court.

PLEADING §87 > amendments -- time -- > Headnote:

[LEdHN\[4\]](#) [4]

Under *Rule 15(a) of the Federal Rules of Civil Procedure*, which deals with amendments of pleadings, the trial court must take into account any resulting prejudice to the defendant in deciding whether to permit a post-trial amendment of the plaintiff's reply to an antitrust counterclaim to include the defenses of limitations and release.

401 U.S. 321, \*321; 91 S. Ct. 795, \*\*795; 28 L. Ed. 2d 77, \*\*\*77; 1971 U.S. LEXIS 153, \*\*\*\*1

PLEADING §87 > amendment -- terms -- > Headnote:

[LEdHN\[5\]](#) [5]

Where a defendant proves damages under its antitrust counterclaim during a 4-year period on the theory that all of its damages suffered during the 4- year period are recoverable whether or not caused by conduct preceding the 4-year period--without the plaintiff's pleading its defenses that limitations and release bar damages caused by conduct preceding the 4-year period, or objecting to the defendant's evidence on that ground, or otherwise hinting until long after the record is closed that damages are barred as to conduct preceding the 4-year period--the court's permitting the plaintiff then to amend his pleadings to add such defenses and sustaining the defenses, so as to deny the defendant an opportunity to prove his recoverable damages, do not comport with the letter or spirit of *Rule 15(a) of the Federal Rules of Civil Procedure*, dealing with amendments of pleadings; if the defenses are to be entertained and deemed to bar damages resulting from conduct preceding the 4-year period, the defendant is entitled, at a minimum, to perfect his proof of damages resulting from conduct during the 4-year period, and also to prove, if he can, what damages he may suffer in the future from those acts.

TRIAL §25.5 > reopening -- > Headnote:

[LEdHN\[6\]](#) [6]

A trial court may permit reopening the record to allow additional evidence as to damages resulting from conduct during a 4-year period if it permits a party to amend his pleadings after trial to include defenses that damages are barred, even though suffered during the 4-year period, because caused by conduct preceding the 4-year period.

TRIAL §25.5 > reopening -- > Headnote:

[LEdHN\[7\]](#) [7]

A motion to reopen to submit additional proof is addressed to the trial court's sound discretion.

TRIAL §25.5 > reopening -- > Headnote:

[LEdHN\[8\]](#) [8]

In a patent infringement suit in which the defendant files an antitrust counterclaim for damages suffered during a 4-year period and proves damages suffered during that period as a result of conduct preceding the period, without the plaintiff's pleading the defenses of limitations or release as to such conduct, or objecting to the defendant's evidence, or otherwise hinting of those defenses until long after the record is closed, while claiming throughout that there was no conspiracy and that the defendant had suffered no damage, the trial court does not abuse its discretion in refusing to reopen the trial to litigate the defenses of limitations and release.

ACTIONS §223 > suspension -- antitrust proceedings -- > Headnote:

[LEdHN\[9\]](#) [9]

Under 5(b) of the Clayton Act ([15 USC 16\(b\)](#)), which suspends the running of the statute of limitations on any private antitrust claim based in whole or in part on any matter complained of in a government antitrust proceeding "during the pendency thereof and for one year thereafter," the running of the statute of limitations on an antitrust claim against a nonparty to the government action is tolled until one year after the entry of a consent decree against the last defendant named in the government action.

ACTIONS §223 > suspension -- antitrust proceedings -- > Headnote:

[LEdHN\[10\]](#) [10]

If a government antitrust proceeding commenced on November 24, 1958 is terminated on November 1, 1962, and by virtue of 5(b) of the Clayton Act ([15 USC 16\(b\)](#)) the running of the 4-year limitations period of 4B of the Clayton Act ([15 USC 15b](#)) is suspended during the pendency thereof and for one year thereafter, the private antitrust claimant is entitled to sue before November 1, 1963 for any damage to his business occurring by reason of conspiratorial conduct at any time after November 24, 1954.

PLEADING §134 > tolling -- statute of limitations -- > Headnote:

[LEdHN\[11\]](#) [11]

Where a plaintiff has no reason to anticipate that a claim of limitations will be raised against him, he need not set forth his claim of tolling until the limitations claim is raised.

PLEADING §134 > tolling -- statute of limitations -- > Headnote:

[LEdHN\[12\]](#) [12]

An antitrust claimant's failure to enter a formal plea that the running of the statute of limitations on his claim was tolled does not preclude him from raising such a claim where the statute of limitations was first pleaded by a posttrial amendment of his opponent's pleadings, the antitrust claimant could not be blamed for reading the trial judge's remarks as a rejection of the limitations defense on the ground of waiver, and he was never unambiguously called upon to submit a formal plea.

PLEADING §1 > nature -- > Headnote:

[LEdHN\[13\]](#) [13]

Pleading is not a game of skill in which one misstep by counsel may be decisive to the outcome.

ACTIONS §223 > suspension -- antitrust proceedings -- > Headnote:

[LEdHN\[14\]](#) [14]

Under 5(b) of the Clayton Act ([15 USC 16\(b\)](#)), which provides for tolling of the statute of limitations in respect of every private antitrust right of action "based in whole or in part on any matter complained of" in a government antitrust proceeding, a private party who sues for a conspiracy in whole or in part against which the government has already brought suit bases his claim in whole or in part upon the matter complained of in the government suit, even if the defendant in the private suit was not named in the government suit as a defendant or as a coconspirator and was not shown to be a coconspirator by the evidence in the government suit, but was proved to be such in the subsequent private suit.

STATUTES §136 > reenactment -- interpretation -- > Headnote:

[LEdHN\[15\]](#) [15]

Congressional silence in reenactment of a statute does not necessarily show congressional approval of the lower federal courts' interpretation of the statute.

ACTIONS §223 > suspension -- antitrust proceedings -- > Headnote:

[LEdHN\[16\]](#) [16]

The purpose of 5(b) of the Clayton Act ([15 USC 16\(b\)](#)), providing for the tolling, by the government's institution of antitrust proceedings, of the statute of limitations on private antitrust actions, is to assist private litigants in utilizing any benefits they might cull from government antitrust actions.

ACTIONS §157 > antitrust claims -- > Headnote:

[LEdHN\[17\]](#) [17]

Damages are recoverable under the federal antitrust acts only if suit therefor is commenced within 4 years after the cause of action accrued, plus any additional number of years during which the statute of limitations was tolled.

ACTIONS §153.5 > antitrust claim -- accrual -- > Headnote:

[LEdHN\[18\]](#) [18]

Generally, a private antitrust cause of action accrues and the statute of limitations begins to run when a defendant commits an act which injures a plaintiff's business.

ACTIONS §153.5 > antitrust conspiracy -- accrual of claim -- > Headnote:

[LEdHN\[19\]](#) [19]

401 U.S. 321, \*321; 91 S. Ct. 795, \*\*795; 28 L. Ed. 2d 77, \*\*\*77; 1971 U.S. LEXIS 153, \*\*\*\*1

In the context of a continuing conspiracy to violate the antitrust laws, each time a plaintiff is injured by an act of the defendants, a cause of action accrues to him to recover the damages caused by that act, and as to those damages the statute of limitations runs from the commission of the act.

DAMAGES §170 > antitrust conspiracy -- prospective damages -- > Headnote:

[LEdHN\[20\]](#) [20]

Where there is a continuing conspiracy to violate the antitrust laws, giving rise to a separate cause of action for damages accrued each time a plaintiff is injured by an act of the defendants, each separate cause of action which so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial.

DAMAGES §170 > future damages -- > Headnote:

[LEdHN\[21\]](#) [21]

Even if injury and a cause of action have accrued as of a certain date, future damages which might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature are unprovable.

ACTIONS §153.5 > antitrust claim -- accrual -- > Headnote:

[LEdHN\[22\]](#) [22]

In antitrust and treble damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered; in such instances, the cause of action for future damages, if they ever occur, accrues only on the date they are suffered, and thereafter the plaintiff may sue to recover them at any time within 4 years from the date they were inflicted.

DAMAGES §170 > future damages -- > Headnote:

[LEdHN\[23\]](#) [23]

Ordinarily, the recoverability of future damages depends very much on the trial court's informed discretion.

ERROR §1667.5 > findings by appellate court -- > Headnote:

[LEdHN\[24\]](#) [24]

401 U.S. 321, \*321; 91 S. Ct. 795, \*\*795; 28 L. Ed. 2d 77, \*\*\*77; 1971 U.S. LEXIS 153, \*\*\*\*1

On certiorari, the Supreme Court of the United States lacks power to make findings, if the trial court has made no such findings, as to whether damages sustained by an antitrust claimant resulted from conspiratorial conduct as of a certain time.

DAMAGES §170 > ACTIONS §153.5 > antitrust claim -- accrual -- > Headnote:

[LEdHN\[25\]](#) [25]

An antitrust claimant who could not have convinced a District Court sitting in 1954 that it would still be suffering from provable injury more than 5 years later could not recover such damages in 1954; and since it could not recover such damages in 1954, its cause of action did not accrue then for such damages so as to begin the running of the statute of limitations on that claim.

DEBTORS §8 > release -- > Headnote:

[LEdHN\[26\]](#) [26]

Under the ancient common-law rule, which was grounded upon a formalistic doctrine that a release extinguishes the cause of action to which it relates, a release of one joint tortfeasor released all other parties jointly liable, regardless of the intent of the parties.

DEBTORS §8 > release -- > Headnote:

[LEdHN\[27\]](#) [27]

The effect of a release upon antitrust coconspirators must be determined in accordance with the intentions of the parties.

EVIDENCE §551 > RELEASE §3 > parol evidence rule -- nonparty -- > Headnote:

[LEdHN\[28\]](#) [28]

In determining whether the parties to a release intended to release a nonparty, resort may be had to the parties' underlying contract to exchange releases, because the parol evidence rule is operative only as to parties to a document.

DEBTORS §8 > release -- > Headnote:

[LEdHN\[29\]](#) [29]

A release executed pursuant to a contract for releases "to bind or benefit" the party and "the parent and subsidiaries of the party giving or receiving such release" does not release one who is an antitrust coconspirator with the parties thereto but is not a party to the release or a party's parent or subsidiary.

DAMAGES §7 > double recovery -- > Headnote:

LEdHN[30] [30]

Entirely apart from any release, a plaintiff who has recovered any item of damage from one antitrust coconspirator may not again recover the same item from another coconspirator; that is, the law does not permit a plaintiff to recover double payment.

## Syllabus

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Respondent (HRI) brought a patent infringement suit against petitioner (Zenith) in 1959, and in 1963 Zenith counterclaimed for damages alleging violations of the Sherman and Clayton Acts by HRI's participation in patent pools in Canada, Great Britain, and Australia, restricting Zenith's operations in those countries. A year after evidence was closed, the trial judge entered preliminary findings of fact and conclusions of law favoring Zenith. HRI then moved to amend its reply to the counterclaim and to reopen the record for taking additional evidence. HRI sought to assert defenses of the statute of limitations, and release, claiming that part of the damages awarded Zenith for 1959-1963 were caused by pre-1959 conduct and thus barred by the statute of limitations, or were barred by a 1957 release given by Zenith to certain American companies in settlement of a civil treble-damage action. The trial judge permitted the defenses to be filed [\*\*\*\*2] but refused to reopen the record or modify his findings and conclusions concerning the Canadian market. The Court of Appeals reversed on the ground that Zenith had failed to prove injury to its business. This Court reversed with respect to Canada, holding that there was ample evidence of damage in the Canadian market and noting that the trial judge had either rejected the limitations and release defenses on the merits or deemed them waived, [395 U.S. 100](#). On remand the Court of Appeals held that the trial judge erroneously rejected the defenses on their merits. That court, while doubting that Zenith's claim that the statute of limitations was tolled (by reason of a Government antitrust suit pending from 1958 to 1963 against various companies participating along with HRI in the Canadian patent pool), was properly before it, since no formal plea had been entered, rejected the tolling argument, concluding that tolling takes place only with respect to parties to a Government suit and HRI was not such a party. The court further ordered evidence to determine the extent of reduction of damages by virtue of the defenses it sustained. *Held*:

1. Under the circumstances [\*\*\*\*3] of this case, the trial judge did not abuse his discretion if his rejection of the limitations and release defenses was based on HRI's waiver due to untimeliness of their presentation. Pp. 328-333.
2. The Court of Appeals erroneously rejected Zenith's claim that the statute of limitations was tolled during the pendency of the Government's antitrust suit against the other participants in the patent pool. Pp. 333-338.
  - (a) Where, as here, a plaintiff has no reason to anticipate that a claim of limitations will be raised against him, he need not set forth his claim of tolling until the limitations claim is raised. P. 334.
  - (b) Under 28 U. S. C. § 16 (b) the statute of limitations is tolled against all participants in a conspiracy that is the object of a Government suit, whether or not they are named as defendants or conspirators therein. Pp. 335-338.
3. A plaintiff in an antitrust action may recover damages occurring within the statutory limitation period that are the result of conduct occurring prior to that period if, at the time of the conduct, those damages were speculative, uncertain, or otherwise incapable of proof. Pp. 338-342.
4. The effect of a release [\*\*\*\*4] upon coconspirators is to be determined in accordance with the intention of the parties, and here HRI, which was neither a party to the 1957 release nor a parent or subsidiary of a party, is not entitled to the benefit of the release, as the agreement to exchange releases provided expressly that they were "to

bind or benefit" the party and "the parent and subsidiaries of the party giving or receiving such release." Pp. 342-348.

**Counsel:** Thomas C. McConnell argued the cause for petitioner. With him on the briefs were Philip J. Curtis and Francis J. McConnell.

Victor P. Kayser argued the cause for respondent. With him on the briefs were John T. Chadwell, C. Lee Cook, Jr., Joseph V. Giffin, Robert F. Ward, and Laurence B. Dodds.

**Judges:** White, J., delivered the opinion of the Court, in which Burger, C. J., and Black, Douglas, Brennan, Marshall, and Blackmun, JJ., joined. Harlan, J., filed an opinion concurring in the result, in which Stewart, J., joined, post, p. 349.

**Opinion by:** WHITE

## Opinion

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[\*323] [\*\*\*83] [\*\*798] MR. JUSTICE WHITE delivered the opinion of the Court.

This is the second time this marathon litigation has been before us. It began in 1959 as a suit for patent [\*\*\*\*5] infringement brought by Hazeltine Research, Inc. (hereafter HRI), against Zenith. In 1963, Zenith filed a counterclaim against HRI alleging violations of the Sherman and Clayton Acts, as amended, 26 Stat. 209, 38 Stat. 731, 737, [15 U. S. C. §§ 1, 2, 15, 26](#), by reason of HRI's participation in patent pools in Canada, Great Britain, and Australia. These pools, it was claimed, operated to exclude Zenith from those foreign markets by refusing to grant patent licenses to American manufacturers seeking to export American-made radio and television sets. Trial was had without a jury. Zenith submitted telling evidence as to the existence and operation of the conspiracy and HRI's participation in each of the markets. Zenith demonstrated the fact and extent of its business injury by estimating the percentage of the foreign market it would have enjoyed absent the conspiracy during the four years prior to 1963 and showing the portion it actually enjoyed during those years. The difference between the profits it actually made and the profits it would have made in a free market during the four years was the measure of the damages demanded.

[\*\*799] A year after evidence [\*\*\*\*6] was closed, the trial judge entered preliminary findings of fact and conclusions of law favoring Zenith. He concluded that Zenith had been damaged \$ 6,297,371 in the Canadian market, \$ 9,248,926 in the English, and \$ 692,555 in the Australian, a total of \$ 16,238,872 before trebling. HRI then moved to amend its reply to Zenith's counterclaim and to reopen the record for the taking of additional evidence. The motion sought leave to assert the defenses of limitations and release; the claim was that part or all of the damages [\*324] awarded to Zenith for the four years 1959-1963 were caused by pre-1959 [\*\*\*84] conduct and to that extent were barred by the statute of limitations, [15 U. S. C. § 15b](#), or by a release given by Zenith to certain American companies in 1957. HRI also sought leave to prove that until specified dates Zenith's exclusion from the English and Australian markets had been due, not to the operation of the alleged patent pools, but to such matters as official embargoes, tariffs, and technical factors. The trial judge agreed to take additional evidence with respect to England and Australia but refused to reopen the record for other [\*\*\*7] purposes or to modify his findings and conclusions concerning the Canadian market. He did, however, permit the limitations and release defenses to be filed and, after hearing evidence with respect to the English and Australian markets, reduced his award of damages with respect to them. [239 F.Supp. 51 \(1965\)](#).

In the Court of Appeals, HRI asserted error on various grounds. Putting aside other issues, the Court of Appeals reversed on the ground that Zenith had failed to prove injury to its business in any of the three markets. [388 F.2d 25 \(1967\)](#). We, in turn, affirmed the judgment denying recovery for the alleged injury in the English and Australian markets, but reversed with respect to Canada, holding that Zenith's evidence amply demonstrated the fact of damage in the Canadian market. [395 U.S. 100 \(1969\)](#). We also noted that some portion of the damages proved

and awarded resulted from conspiratorial conduct prior to 1959 and that the trial judge had either rejected on the merits the defenses of limitations and release or deemed them waived. *Id.*, at 117 n. 13. We went no further, however, with respect to the issues surrounding [\*\*\*\*8] either defense.

The Court of Appeals on remand accepted as duly proved that absent the conspiracy Zenith would have [\*325] enjoyed a 16% share of the Canadian market and that the difference between 16% and the share it actually had was the measure of the total damages inflicted by the conspiracy during the four years 1959-1963. But recognizing that some portion of Zenith's business injury resulted from conspiratorial conduct prior to 1959, the court went on to hold that the trial judge had not rejected the defenses of limitations and release on waiver grounds but had erroneously rejected them on their merits, and further that Zenith's claim that the statute had been tolled had been waived by Zenith and was in any event unsound. Finally, the court ordered further evidence to be taken in the trial court to determine the extent to which, if any, the damages awarded by the trial court should be reduced by virtue of the defenses sustained in the Court of Appeals. *418 F.2d 21 (1969)*.

We granted certiorari. 397 U.S. 979 (1970). Zenith's principal contentions here are that the trial judge properly deemed the limitations and release defenses to have been [\*\*\*\*9] waived, that if not waived, the defenses were without merit, and that in any event the statute of limitations was tolled by the pendency of a Government suit against HRI's coconspirators. We need not decide whether the trial judge held the defenses waived or rejected them on the merits, since in our view, either course would have been legally sound. We therefore reverse the Court of Appeals.

[\*\*800] I

We deal first with Zenith's claim that the defenses of limitations and [\*\*\*85] release were properly held by the trial court to have been waived. To do so it is essential briefly to outline the course of the trial and evidence. Zenith's 1963 counterclaim alleged the existence of the conspiracy and the impact on its business and prayed for damages and injunctive relief, but made no allegations as to the time period as to which damages were sought. [\*326] These latter matters became clear during the pretrial proceedings and during the course of the trial itself. In its pretrial brief and opening statement Zenith asserted that the illegal pools had existed for many years; that Zenith had conspiratorially been refused a license to import into Canada; and that litigation had [\*\*\*\*10] been threatened and potential distributors discouraged. The conspiracy was said to have been not only a longstanding but also a worldwide one, against certain members of which the United States Government had brought an antitrust action and Zenith itself had recovered \$ 10,000,000 in 1957 in settlement of a civil treble-damage action. But Zenith disclosed that, although the conspiracy had been worldwide and long existing, it would seek to recover damages for restraint of its trade in the three foreign markets only during the "four-year statutory damage period."

At trial Zenith introduced voluminous evidence with respect to the operations of the conspiracy and its impact on its business. The testimony with respect to Canada was that in a free market Zenith would have had the same share of the Canadian market as it enjoyed in the United States and that the existence and operation of the conspiracy had restricted its Canadian business. Specifically, Zenith claimed that in the four years after June 1, 1959, it had lost profits aggregating some \$ 6,300,000 as the result of conspiratorial conduct by the Canadian patent pool during and prior to that period. Counsel made Zenith's position [\*\*\*\*11] perfectly clear in his summation and post-trial brief: except for the Canadian pool, Zenith would have had a 16% share of the Canadian market, but as a result of the pool it had only a 3% share. Zenith thus argued that it was entitled to the full difference between 16% and 3% for the entire four-year period. It also made similar claims with respect to the English and Australian markets.

[\*327] *LEdHN[1]* [1]Although Zenith's counterclaim on its face sought to recover all damages suffered in past years without restriction,<sup>1</sup> [\*\*\*\*13] HRI pleaded neither limitations nor release in its reply to the counterclaim.

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<sup>1</sup> It is true that in its motion for leave to file its counterclaim, Zenith stated that the counterclaim arose out of conduct of HRI "occurring since the filing of the answer" in 1960. On the basis of this statement, HRI argues that Zenith precluded itself from recovering damages resulting from pre-answer conduct. This argument is not persuasive. The counterclaim itself was not so limited, and Zenith made its position on damages absolutely clear by the opening of trial. HRI was thereby given both ample notice of the substance of Zenith's claim and ample opportunity to respond, but made no effort during trial to do so.

Zenith instead revealed its own awareness of the statutory limitation period during the trial and expressly restricted its proof to damages suffered during the statutory four-year damage period. However, Zenith sought to recover all damages suffered during those years even though it was unmistakably clear that some of this damage had been [\*\*\*86] caused by conspiratorial action prior to 1959. Yet, at no time during the trial did HRI suggest that the statute barred Zenith's recovery of any part of its total [\*\*\*\*12] damage suffered during that period. HRI did challenge Zenith's claim that it would have had a 16% share of the Canadian market on the ground that the evidence was speculative -- indeed, that it was so speculative that Zenith had failed entirely to sustain its burden of proving damage, but it interposed no objection to Zenith's demand for all damages sustained during the four-year period, no [\*\*801] matter when the operative acts had occurred. Not until one year after trial, when it learned that the judge's findings and conclusions were unfavorable, did HRI assert that part of the post-1959 damage was the result of pre-1959 conduct and was barred either by the statute of limitations or by the [\*328] release given by Zenith in 1957 in settlement of its suit against other American companies.<sup>2</sup>

Other than a general attack on the sufficiency of Zenith's proof of damages and a demand that the matter be relitigated, HRI's post-trial motion had three principal branches. First, it sought leave to file the defense of limitations. The motion in effect asserted that the conspiracy, even if it had continued during the damage period, had committed no damaging overt acts during that period, all of Zenith's damage being caused by pre-1959 operations of the pool. HRI asserted [\*\*\*\*14] as a legal matter that the statute of limitations would therefore bar Zenith's entire claim on the record then before the Court. Second, HRI sought to interpose the defense of release. The argument was that some or all of Zenith's post-1959 damages were the consequence of pool activity occurring prior to the date of a 1957 release given to American companies which were coconspirators of HRI in the Canadian pool. That release, it was claimed, also released HRI. Third, HRI sought to reopen the record to show that until well into the four-year damage period Zenith's inability to enter the English and Australian markets was due to official embargoes, other governmental policies and technical difficulties rather than to the operations of the patent pools.

LEdHN21 [2]The motion was thoroughly and extensively argued. With respect to the defenses of limitations and release, [\*329] the trial court's ruling, after Zenith objected to them as being "too late," was expressed as follows: "Well, the record will show that leave is given to file them at this time, after proofs are closed and after findings have been made. [\*\*\*\*15]"<sup>3</sup> This ruling was immediately followed by the court's refusal either to reopen the record for additional evidence with respect to Canada or [\*\*\*87] to modify its judgment in any way as to that market. The record as to England and Australia, however, was reopened for further proof as to the operative forces other than the patent pools which in fact had prevented importation of Zenith's products into those markets.

Arguably, since the trial judge permitted the limitations and release defenses to be filed but then rejected them by refusing to amend the judgment with respect to Canada, rejection was necessarily on the merits. But the record also yields to the construction that the two defenses [\*\*\*\*16] were overruled because a just and sensible ruling on their merits would have required a reopening of the record for a virtual retrial of the issue of damages, an eventuality which the trial court deemed unwarranted in view of HRI's delinquency in raising the defenses. If this was the course the trial judge took, we would not disturb his judgment.

At the time of the trial Rule 8 (c) of the Federal Rules of Civil Procedure HN1[<sup>1</sup>] required that "in pleading to a [\*\*802] preceding pleading, a party shall set forth affirmatively . . . release . . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense." Rule 12 (h) at that time provided that HN2[<sup>2</sup>] "[a]

<sup>2</sup> Zenith similarly limited its claim for damages in the English and Australian markets to the years 1959-1963 and similarly sought to recover all damages suffered in those years without regard to the date of the conduct causing the damages. HRI again did not plead or argue that Zenith was not entitled to its full damages during those years in the two markets, until it moved after trial to set aside the judge's findings and to reopen the proof so that it could show that Zenith's exclusion from the markets prior to 1959 was a consequence of governmental restrictions and technical difficulties rather than of pool conduct.

<sup>3</sup> The District Court gave HRI five days to file its amendments to the pleadings "nunc pro tunc as of" the date of the argument on HRI's motion. As a result, the defenses were technically filed prior to the entry of judgment and the taking of appeal, while the District Court still retained jurisdiction over the suit.

party waives all defenses and objections which he does not present" [\*330] either by motion or in answer or reply. Based on these rules, Zenith claims that the trial court was required to, and did, hold the two defenses waived.

HRI contends that the District Court should have granted it leave to amend its answer [\*\*\*\*17] under [HN3](#)<sup>↑</sup> Rule 15 (a), which provides that such "leave shall be freely given when justice so requires." HRI's position is that the evidence in the record at the time it offered its defenses showed that all of the acts causing damage during the 1959-1963 period had occurred prior to 1959; from this it follows that Zenith had failed, according to HRI, to offer any evidence upon which an award of damages could have been sustained. In the alternative, HRI argues that the record showed that it had been released from all liability for damages flowing from pre-1957 acts.<sup>4</sup> In either case, HRI urges that the damage award be set aside.

[\*\*\*\*18] [LEdHN\[3\]](#)<sup>↑</sup> [3][LEdHN\[4\]](#)<sup>↑</sup> [4][LEdHN\[5\]](#)<sup>↑</sup> [5]It is settled that [HN4](#)<sup>↑</sup> the grant of leave to amend the pleadings pursuant to Rule 15 (a) is within the discretion of the trial court. [Foman v. Davis, 371 U.S. 178, 182 \(1962\)](#) (dictum). In a matter as substantial and complex as this one, where HRI claimed it had been misled or at the very least asked to be relieved of mistake or oversight, it might have been within the discretion of the trial judge to have permitted HRI to amend its pleadings to include therein the defenses of limitations and release. But, in deciding whether to permit such an amendment, [\*331] the trial court was required to take into account any prejudice that [\*\*\*88] Zenith would have suffered as a result, see [Kanelos v. Kettler, 132 U. S. App. D. C. 133, 136-137, n. 15, 406 F.2d 951, 954-955, n. 15 \(1968\)](#); [United States v. 47 Bottles, More or Less, 320 F.2d 564, 573-574 \(CA3 1963\)](#); [\*\*\*\*19] [Caddy-Imler Creations v. Caddy, 299 F.2d 79, 84 \(CA9 1962\)](#); 3 J. Moore, Federal Practice para. 15.08 [4] (2d ed. 1968), and here the prejudice to Zenith would have been substantial. Zenith's theory that all of its damages suffered during the four-year period were legally recoverable had been made quite clear during the trial, and Zenith had proved up its damages in accordance with that theory. Meanwhile HRI had neither pleaded its defenses, objected to Zenith's evidence, nor otherwise hinted that post-1959 damages caused by pre-1959 conduct were for any reason barred until long after the record had been closed. To have then sustained HRI's defenses would have been to deny Zenith the opportunity to prove its recoverable damages -- a denial that hardly comports with the letter or the spirit of Rule 15 (a). At the very minimum, if the defense of limitations or release was to be entertained and deemed to bar that part of Zenith's damages resulting from the lingering consequences of past acts, Zenith would have been entitled to perfect its proof as to damage resulting from pool operations during the four-year period, as well as to prove, if it could, what damages [\*\*\*\*20] it might have suffered in the future from those acts. To have permitted Zenith to perfect its proof would, of course, have required reopening of the record and a virtual retrial of the issue of damages.

[LEdHN\[6\]](#)<sup>↑</sup> [6][LEdHN\[7\]](#)<sup>↑</sup> [7]The trial judge here might have permitted reopening. Like a motion [\*\*803] under Rule 15 (a) to amend the pleadings, [HN5](#)<sup>↑</sup> a motion to reopen to submit additional proof is addressed to his sound discretion. See, e. g., [Swartz v. New York Central R. Co., 323 F.2d 713, 714 \(CA7 1963\)](#); [\*332] [Locklin v. Switzer Bros., 299 F.2d 160, 169-170 \(CA9 1961\)](#); [Gas Ridge, Inc. v. Suburban Agricultural Properties, Inc., 150 F.2d 363, 366](#), rehearing denied, 150 F.2d 1020 (CA5 1945); 6A J. Moore, Federal Practice para. 59.04 [13] (2d ed. 1966). But the record is clear that he refused to reopen with respect to damages in the Canadian market or otherwise to modify the [\*\*\*\*21] Canadian judgment, and that he thereby rejected HRI's proffered defenses. Although we are not privy to his unexpressed thinking and although his refusal can be read as a rejection of the defenses on the merits, it can also be read as a holding that the defenses were, in effect, waived by the

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<sup>4</sup> At the time HRI raised its defenses, the release on which it relied was not part of the record, although the record did contain a contract between the parties to the release in which they agreed to exchange releases, and frequent reference had been made during trial to the settlement of which the exchange of releases was a part. The record also belied HRI's claim that the conspiracy had been dormant during 1959-1963, for it contained a letter written in 1962 from the pool to a distributor of Motorola products in Canada threatening infringement suits if he continued to distribute American-made products of Motorola.

untimeliness of their presentation and hence that the pleadings would not be amended, except as a matter of form, and that the trial would not be reopened.

LEdHN[8] [8] On the assumption that the trial court did hold the defenses of limitations and release to have been waived, we cannot say that the judge abused his discretion or stressed too much the value of avoiding reopening a trial to litigate matters that HRI had had an opportunity, but neglected, to litigate. Nor is it irrelevant in this connection that HRI's central claims during trial were that there was no conspiracy and that Zenith had suffered no damage at all. The defenses that HRI set out in the post-trial motions were in a sense inconsistent with these trial claims, for the defenses conceded, albeit only *arguendo*, that a conspiracy did exist and that Zenith, [\*\*\*\*22] absent the conspiracy, would have controlled a sizable share of the Canadian market. HRI's post-trial argument, in effect, was one of confession and avoidance showing that [\*\*\*89] the conspiracy had been so successful in the pre-1959 period that it could be relatively or entirely quiescent from 1959 to 1963 and nonetheless cause Zenith substantial damages in those years. It is quite possible that HRI knew exactly what it was doing in not presenting this argument during trial and that it realized a [\*333] need to present it only after it learned that its original arguments had not induced the court to hold in its favor.

Whatever HRI's reasons for not offering its limitations and release defenses during trial, however, the trial court would not have erred in concluding that they were waived.

## II

Assuming, however, that the District Judge rejected the defenses of limitations and release on the merits, as the Court of Appeals held, we confront the issue of whether it is consistent with the controlling limitations statute, 15 U. S. C. § 15b, to permit Zenith to recover all of the damages it suffered during the years 1959-1963 even though some undetermined [\*\*\*\*23] portion of those damages was the proximate result of conduct occurring more than four years prior to the filing of the counterclaim. HRI contends, and the Court of Appeals held, that the statute permits the recovery only of those damages caused by overt acts committed during the four-year period. We do not agree.

### A

LEdHN[9] [9] LEdHN[10] [10] We turn first to Zenith's argument that, even if the statute of limitations were to be held applicable in this case, the statute was nonetheless tolled from November 24, 1958, to November 1, 1963,<sup>5</sup> pursuant to 15 U. S. C. § 16 (b) [\*\*804] by reason of a Government antitrust action brought against various American companies [\*334] participating along with HRI in the Canadian pool.<sup>6</sup> If Zenith is correct in this respect and the running of the statute of limitations was suspended during the pendency of the Government suit, then it was entitled at the very least to sue in 1963 for any damage to its business occurring by reason of conspiratorial conduct at any time after November 24, 1954. [\*\*\*\*24]

LEdHN[11] [11] LEdHN[12] [12] [\*\*\*\*25] LEdHN[13] [13] The Court of Appeals rejected the tolling argument. It had some doubt whether tolling was properly before it since Zenith had never entered a formal plea of tolling, and HRI now contends that Zenith's failure to so plead in its original complaint bars it forever from raising such a claim. This contention is without merit. The cases on which HRI relies themselves establish that HN6 where, as here, a plaintiff has no reason to anticipate that a claim of limitations will be raised against him, he need

<sup>5</sup> On November 1, 1962, a consent decree was entered against the last defendant named in the Government action, which had been commenced on November 24, 1958, thereby terminating that action as to all parties. See Barnett v. Warner Bros. Pictures Dist. Corp., 112 F.Supp. 5, 7 (ND Ill. 1953). For purposes of the present suit against HRI, which was not a party to the Government action, the running of the statute of limitations was thus tolled until November 1, 1963 -- one year after the entry of the consent decree. See 15 U. S. C. § 16 (b).

<sup>6</sup> The Government suit was United States v. General Electric Co., Civil Action No. 140-157, which was brought in the Southern District of New York. The complaint and the final judgment were introduced in evidence in the present proceedings as Plaintiff's Exhibits Nos. 44-47.

not set forth his claim of tolling until the limitations claim is raised. See *National & Transcontinental Trading Corp. v. International General Elec. Co.*, 15 F.R.D. 379, 382 (SDNY 1954). Cf. *Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 88 (CA2 1961). Nor should Zenith be penalized for failing to enter a formal plea of tolling in response to HRI's belated limitations plea, for Zenith can hardly be blamed for reading the remarks of the trial judge as a rejection [\*\*\*\*26] of the limitations defense on the ground of waiver. Zenith was never unambiguously called upon to submit a formal plea; to hold under such circumstances that want of a submission amounts to a waiver would be to treat pleading as "a game of skill in [\*335] which one misstep by counsel may be decisive to the outcome" -- an approach we have consistently rejected. See *Foman v. Davis, supra, at 181-182*; *United States v. Hougham*, 364 U.S. 310, 317 (1960); *Conley v. Gibson*, 355 U.S. 41, 48 (1957). The interests of justice thus clearly require that if HRI's limitations defense is to be considered on its merits, Zenith's claim of tolling must be dealt with as well.

**LEdHN[14]** [14] The Court of Appeals did, in fact, consider the tolling issue on the merits, but concluded that tolling takes place only with respect to parties to a Government suit and hence that tolling did not occur here because HRI was not such a party. This was error. **HNT** [1] The language of 15 U. S. C. § 16 [\*\*\*\*27] (b) expressly provides for tolling of the statute of limitations "in respect of every private right of action . . . based in whole or in part on any matter complained of" in the proceeding instituted by the Government. (Emphasis added.) **HN8** [1] On the face of this section, a private party who brings suit for a conspiracy against which the Government has already brought suit is undeniably basing its claim in whole or in part upon the matter complained of in the Government suit, even if the defendant named in the private suit was named neither as a defendant nor as a coconspirator by the Government. If, that is, the Government sues only certain conspirators, but also alleges and proves during trial that others were conspirators, the fact of the tolling of the statute against those so proved but not sued can hardly be denied. Nor could tolling be denied if a defendant had never been shown to be a conspirator by the evidence offered in the earlier Government suit, but then had been proved to be such in the subsequent private suit.

[\*\*805] **LEdHN[15]** [15] [\*\*\*\*28] **LEdHN[16]** [16] We find no indication in the legislative history of § 16 (b) that Congress intended it to toll the statute of limitations only against parties defendant in the Government [\*336] action. Nor is anything cited to us in this respect.<sup>7</sup> On the contrary, as we have said earlier, Congress, [\*\*\*91] believing that "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws," enacted § 16 (b) in order to "assist private litigants in utilizing any benefits they might cull from government antitrust actions." *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 317-318 (1965). We see nothing destructive of Congress' purpose in holding that § 16 (b) tolls the statute of limitations against all participants in a conspiracy which is the object of a Government suit, whether or not they are named as defendants or conspirators therein; indeed, to so hold materially furthers congressional policy by permitting private litigants to await the outcome of Government suits and use the benefits accruing therefrom.

[\*\*\*\*29] It is true that the lower federal courts have until recently confined the operation of the section and held it applicable only to defendants named in the Government suit. See, e. g., *Sun Theatre Corp. v. RKO Radio Pictures, Inc.*, 213 F.2d 284, 290-292 (CA7 1954); *Momand v. Universal Film Exchanges, Inc.*, 172 F.2d 37, [\*337] 48 (CA1 1948). But these cases and others like them, as we have indicated, fly in the face of the language

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<sup>7</sup> HRI does suggest that the 1955 amendment of § 16, see 69 Stat. 283, must be understood as an indication of Congress' approval of earlier cases in the lower federal courts confining the operation of § 16 (b) to parties defendant in Government suits. See text *infra*, this page and 337. We are unpersuaded. HRI can point to no direct evidence that Congress ever considered the issue now before us or voiced any views upon it; on the contrary, it appears that Congress left the matter for authoritative resolution in the courts. The true thrust of HRI's argument is that we must find congressional approval of the earlier cases in Congress' silence when it re-enacted the statute. We did not take such an approach, however, in *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965), and *Leh v. General Petroleum Corp.*, 382 U.S. 54 (1965), and we do not do so here.

of the statute, are antithetical to its aims, and cannot be squared with our recent decisions in *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., supra*, and *Leh v. General Petroleum Corp., 382 U.S. 54 (1965)*. *Minnesota Mining* held that § 16 (b)'s tolling provision was not confined to those situations in which a Government decree, by virtue of § 16 (a), would be *prima facie* evidence against defendants in a private suit who had also been named as defendants in a Government suit. It rejected the view that §§ 16 (a) and 16 (b) are wholly interdependent and coextensive; on the contrary, § 16 (b) was given its full sweep. *Leh*, following *Minnesota* [\*\*\*\*30] *Mining*, held that a private litigant was entitled to the benefit of tolling although the conspiracy he alleged covered a different time, named additional parties, and excluded some parties named in the prior Government suit. While *Leh* did not explicitly decide whether the statute would be tolled when the sole defendant in a private action covering the same ground as an earlier Government suit had been named neither as a conspirator nor as a party in the Government suit, we do not believe that such a case could be distinguished from *Leh*. Cases in the lower federal courts since *Leh* have also come to this conclusion. See *New Jersey v. Morton Salt Co., 387 F.2d 94 (CA3 1967)*; *Vermont v. Cayuga Rock Salt Co., 276 F.Supp. 970 (Me. 1967)*; *Michigan v. Morton Salt Co., 259 F.Supp. 35, 53-56 (Minn. 1966)*, aff'd *sub nom. Hardy Salt Co. v. Illinois, 377 F.2d 768 (CA8 1967)*.

We therefore hold that Zenith, although suing HRI, which was named neither as a party nor as a coconspirator in the Government suit, is not barred [\*\*806] from obtaining the benefits of the tolling statute, since it [\*\*\*\*31] is undisputed that the conspiracy in which HRI participated was at [\*338] least in part the same conspiracy as was the object of the Government's suit. From this it follows that the only issue still remaining upon HRI's limitations claim is whether Zenith can recover in its 1963 suit for damages suffered after June 1, 1959, as the consequence of pre-1954 conspiratorial conduct.

[\*\*\*92] B

LEdHN[17] ↑ [17] LEdHN[18] ↑ [18] LEdHN[19] ↑ [19] LEdHN[20] ↑ [20] LEdHN[21] ↑ [21] The basic rule is that HN9 ↑ damages are recoverable under the federal antitrust acts only if suit therefor is "commenced within four years after the cause of action accrued," 15 U. S. C. § 15b, plus any additional number of years during which the statute of limitations was tolled. [\*\*\*\*32] Generally, HN10 ↑ a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. See, e. g., *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd., 185 F.2d 196, 208 (CA9 1950)*; *Bluefields S. S. Co. v. United Fruit Co., 243 F. 1, 20 (CA3 1917)*, appeal dismissed, 248 U.S. 595 (1919); *2361 State Corp. v. Sealy, Inc., 263 F.Supp. 845, 850 (ND Ill. 1967)*. This much is plain from the treble-damage statute itself. 15 U. S. C. § 15. In the context of a continuing conspiracy to violate the antitrust laws, such as the conspiracy in the instant case, this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act. See, e. g., *Crummer Co. v. Du Pont, 223 F.2d 238, 247-248 (CA5 1955)*; *Delta Theaters, Inc. v. Paramount Pictures, Inc., 158 F.Supp. 644, 648 (ED La. 1958)*; [\*\*\*\*33] *Momand v. Universal Film Exchange, Inc., 43 F.Supp. 996, 1006 (Mass. 1942)*, aff'd, 172 F.2d, at 49. However, each separate cause of action that so accrues entitles a plaintiff to [\*339] recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial. See, e. g., *Farbenfabriken Bayer, A. G. v. Sterling Drug, Inc., 153 F.Supp. 589, 593 (NJ 1957)*; *Momand v. Universal Film Exchange, Inc., supra, at 1006*. Cf. *Lawlor v. Loewe, 235 U.S. 522, 536 (1915)*. Thus, HN11 ↑ if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. To recover those damages, he must sue within the requisite number of years from the [\*\*\*\*34] accrual of the action. On the other hand, it is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable. *Moe Light, Inc. v. Foreman, 238 F.2d 817, 818 (CA6 1956)*; *Chicago & N. W. R. Co. v. De Clow, 124 F. 142, 143 (CA8 1903)*; *Culley v. Pennsylvania R. Co., 244 F.Supp. 710, 715 (Del. 1965)*. Cf. *Howard v. Stillwell & Bierce Mfg. Co., 139 U.S. 199, 206 (1891)*.

[LEdHN\[22\]](#) [22] [HN12](#) In antitrust and treble-damage actions, refusal to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter [\*\*\*\*35] the plaintiff may sue to recover them at any time within four years from the date they were inflicted. Cf. [Schenley Industries v. N. J. Wine & Spirit](#) [\*\*\*93] [Wholesalers Assn.](#), 272 F.Supp. 872, 887-888 [\*807] (NJ 1967); [\*340] [Delta Theaters, Inc. v. Paramount Pictures, Inc.](#), *supra*, at 648-649. Otherwise future damages that could not be proved within four years of the conduct from which they flowed would be forever incapable of recovery, contrary to the congressional purpose that private actions serve "as a bulwark of antitrust enforcement," [Perma Life Mufflers, Inc. v. International Parts Corp.](#), 392 U.S. 134, 139 (1968), and that the antitrust laws fully "protect the victims of the forbidden practices as well as the public," [Radovich v. National Football League](#), 352 U.S. 445, 454 (1957). See also [Lawlor v. National Screen Serv. Corp.](#), 349 U.S. 322, 329 (1955).

As we have already seen, acceptance of Zenith's tolling argument requires further consideration only of that portion of Zenith's damages suffered during the 1959-1963 period as a result of pre-1954 [\*\*\*\*36] conduct of the conspiracy. We must now determine whether Zenith could have recovered those damages if it had brought suit for them in 1954, for if it could not, it would follow for the reasons stated above that it must be permitted to recover them now.

[LEdHN\[23\]](#) [23] [LEdHN\[24\]](#) [24] We do not, of course, have the thinking of the district judge on this issue, and ordinarily the matter of future damages would very much depend on his informed discretion.<sup>8</sup> But we are reluctant to return any issue in this litigation for another round of proceedings in the trial or appellate courts if we can fairly dispose of it [\*341] at this juncture. After due consideration, we have determined that in the circumstances of this case, [§ 15b](#) was no bar to any part of the damages awarded Zenith by the District Court insofar as the Canadian market was concerned.

[\*\*\*\*37] Let us assume that Zenith in a treble-damage suit brought in 1954 had presented evidence similar to that which it presented in the instant suit, indicating that it would have had the same share of a free Canadian market as it did in the United States market. Assume also that it had presented evidence to the effect that, starting in 1954, when it had no sales in the Canadian market, it would have taken 10 years to reach that share in a free market. Given such evidence, the question would be whether a district court would have permitted Zenith to recover estimated profits upon 90% of its share of the hypothetical free Canadian market for its anticipated losses in 1955, 80% for its losses in 1956, and 70% for its 1957 losses, and so on.<sup>9</sup>

[\*\*\*\*38] [LEdHN\[25\]](#) [25] We [\*\*94] find it difficult to believe that Zenith could have convinced a District Court sitting in 1954 that, although it contemplated a free market from that time forward, it would still be suffering from provable injury more than five years later. It is true that the damages awarded Zenith in this case were based on estimates of its volume of business in a free market. But those estimates were for a past period of time; the size and conditions in the market were known [\*808] and the competitive [\*342] forces were identifiable. Zenith's performance during the same period and under comparable conditions was a matter of record. It is quite another matter to predict market conditions and the performance of one competitor in that market five to 10 years hence. The proceedings before us put in stark relief the difficulties of proving the fact and the amount of damage during a

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<sup>8</sup> If the trial judge had passed upon the question, he well might have concluded that none of the damages sustained by Zenith in the Canadian market between 1959 and 1963 was a consequence of pre-1954 conspiratorial conduct. The trial judge in effect found that, as to England and Australia, the effects of conspiratorial conduct were no longer felt by Zenith more than four years after the conduct had occurred, and there is no reason to infer that his findings would have been different in regard to Canada either in the present suit or in a suit brought in 1954. But the trial judge made no such findings as to Canada, and we lack power to make them for him.

<sup>9</sup> Of course, these percentages are purely hypothetical. They rest upon an assumption that, if Zenith had sued in 1954 for future damages in the Canadian market and had claimed that it would take 10 years for it to attain its full share of that market under free competitive conditions, then it would have proved that in 1955 it would have reached 10% of that share, in 1956, 20%, and so on. In each year it would have recovered damages for that percentage of the share which it had not yet attained.

period in the immediate past. Claims of future damage would have probably gotten short shrift in the lower courts if they had been pressed in this case. In our view, this is the very treatment such claims would [\*\*\*\*39] have received had Zenith sued in 1954, and claimed damages for the decade of the sixties. The short of it is that Zenith asserted its cause of action for 1959-1963 damages well within the period during which § 15b entitled it to sue.

### III

Entirely apart from its statute of limitations defense, HRI claims that whatever part of the 1959-1963 damages was caused by conspiratorial conduct prior to 1957 is unrecoverable because of a release executed in that year by Zenith in settlement of an antitrust action against other coconspirators in the Canadian patent pool.<sup>10</sup> The [\*343] release extended not only to past but also to all future damages arising out of pre-1957 conspiratorial acts. However, while it was a coconspirator in the Canadian pool, HRI was neither a party to the 1957 suit nor a party to the [\*\*\*95] release, nor was it named in the release as one of the parties affected thereby. Nonetheless, the Court of Appeals held HRI entitled to the benefits of the release on the ground that Zenith had failed expressly to reserve any rights against HRI, and it therefore remanded the case to the District Court with directions to exclude from the judgment any damages caused by [\*\*\*\*40] pre-1957 conduct. We again conclude that the Court of Appeals erred.

[\*\*\*\*41] [LEdHN\[26\]](#) [26]Three rules have developed to deal with the question whether the release of one joint tortfeasor releases other tortfeasors who are not parties to or named in the release. The ancient common-law rule, which was grounded upon a formalistic doctrine that a release extinguished the cause of action to which it related, was that a release of one joint tortfeasor released all other parties jointly liable, regardless of the intent of the parties. See, e. g., *Western Express Co. v. Smeltzer*, 88 F.2d 94, 95 (\*3441) (CA6 1937); *American Ry. Express* [\*\*809] Co. v. *Stone*, 27 F.2d 8, 10 (CA1 1928); *Barrett v. Third Avenue R. Co.*, 45 N. Y. 628, 635 (1871); *Ellis v. Esson*, 50 Wis. 138, 146, 6 N. W. 518, 519 (1880). While this Court has referred to this rule in cases where the rights of the litigants were controlled by state or federal common law, see *Chicago & Alton R. Co. v. Wagner*, 239 U.S. 452, 456-457 (1915); *United States v. Price*, 9 How. 83, 92 (1850); *Hunt v. Rhodes*, 1 Pet. 1, 16 (1828); [\*\*\*\*42] we are cited to no case where we have applied the rule to a statutory cause of action created under federal law. Indeed, we have expressly repudiated the rule. See *Aro Mfg. Co. v. Convertible Top Co.*, 377

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<sup>10</sup> The text of the release was as follows:

"To All To Whom These Presents Shall Come Or May Concern, Greeting: Know ye, That Zenith Radio Corporation and The Rauland Corporation, each a corporation organized and existing under and by virtue of the laws of the State of Illinois, for and in consideration of the sum of One Dollar (\$ 1.00) lawful money of the United States of America and other good and valuable consideration, to them in hand paid by \* . . . . . , the receipt whereof is hereby acknowledged, have each remised, released and forever discharged, and by these presents does each for itself and its respective subsidiaries, successors and assigns remise, release and forever discharge the said \* . . . . . and its subsidiaries and their respective successors and assigns of and from all, and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckoning, bonds, bills, specialities, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law, in admiralty, or in equity, which against said \* . . . . . , its subsidiaries and their respective successors and assigns, said Zenith Radio Corporation and The Rauland Corporation and each of them ever had, now has or which each of them and their respective subsidiaries, successors and assigns, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents, not including however, claims, if any, for unpaid balances on any goods sold and delivered.

<sup>\*</sup>Insert

"Radio Corporation of America,' or

"General Electric Company,' or

"Western Electric Company.'

"This release may not be changed orally."

U.S. 476, 501 (1964). Cf. Birdsell v. Shaliol, 112 U.S. 485, 489 (1884). Moreover, in the lower federal courts, causes of action based upon federal statutes have generally been governed by one of the other two rules. The first of these rules provides that, although a release of one coconspirator normally releases all others, it will not have such an effect if a plaintiff expressly reserves his rights against the others. This rule, which has been adopted with some variation by statute in 21 States,<sup>11</sup> [\*\*\*96] by judicial decision in others, see, e. g., McKenna [\*345] v. Austin, 77 U.S. App. D. C. 228, 233-234, 134 F.2d 659, 664-665 (1943) (announcing D. C. law); Riley v. Industrial Finance Service Co., 157 Tex. 306, 311, 302 S. W. 2d 652, 655 (1957); and by the First Restatement, see Restatement, Torts § 885 (1) (1939); has been applied in a number of antitrust cases. See, e. g., [\*\*\*\*43] Miami Parts & Spring, Inc. v. Champion Spark Plug Co., 402 F.2d 83, 84 (CA5 1968); Twentieth Century-Fox Film Corp. v. Winchester Drive-In Theatre, Inc., 351 F.2d 925, 931 (CA9 1965); Dura Electric Lamp Co. v. Westinghouse Electric Corp., 249 F.2d 5, 6-7 (CA3 1957). It was this rule that the Court of Appeals followed in the opinion below. A final rule, which has gained support in several recent decisions and been adopted by the American Law Institute in a tentative draft of the Second Restatement of Torts, provides that the effect [\*\*810] of a release upon coconspirators shall be determined in accordance with the intentions of the parties. See Winchester Drive-In Theatre, Inc. v. Twentieth Century-Fox Film Co., 232 F.Supp. 556, 561-563 (ND Cal. 1964), [\*346] rev'd, Twentieth Century-Fox Film Corp. v. Winchester Drive-In Theatre, Inc., supra; Young v. State, 455 P. 2d 889 (Alaska, 1969); Breen v. Peck, 28 N. J. 351, 146 A. 2d 665 (1958); Restatement (Second), Torts § 885 (1) (Tent. Draft No. 16, 1970); 12 Vand. L. Rev. 1414, 1416-1417 (1959). [\*\*\*\*44]

[\*\*\*\*45] We recently adopted the final rule giving effect to the intentions of the parties in Aro Mfg. Co. v. Convertible Top Co., supra, a patent infringement case. The agreement in that case expressly provided for the release of "Ford, its associated companies . . . [and] its and their dealers, customers and users of its and their products" from all past and future infringement claims. 377 U.S., at 493. The document, however, did not expressly reserve the releasor's rights against anyone. The issue in the case was whether Aro, a contributory infringer which did not fit within any of the special categories enumerated in the release, was nonetheless liable for its past contribution to infringements. The District Court had found that the parties had not intended to release contributory infringers such as Aro, and, despite the absence of an express reservation of rights against such infringers, we accordingly held that Aro was not entitled to benefit from the release. We concluded that HN13[ a release, "which clearly intends to save the releasor's rights against [\*\*\*\*46] a past contributory infringer, does not automatically surrender those rights." Id., at 501.

<sup>11</sup> The Model Joint Obligations Act, 9B U. L. A. 355, which has been adopted in regard to tort claims by four States, is most similar to the rule stated in the text. It provides that a release of an obligor shall release co-obligors to the full extent of the obligor's original liability, § 5 (a), unless the amount of that liability is not known to the obligee, § 5 (b), or the obligee expressly reserves his rights against the co-obligors. § 4. The four States adopting the act are Nevada, Nev. Rev. Stat., c. 101 (1967); New York, N. Y. General Obligations Law §§ 15-101 to 15-109 (1964); Utah, Utah Code Ann. §§ 15-4-1 to 15-4-7 (1953); Wisconsin, Wis. Stat. §§ 113.01 to 113.10 (1967).

The Uniform Contribution among Tortfeasors Act, 9 U. L. A. 233, reverses the presumption arising from the absence of an express provision in the release. It enacts that "[a] release by the injured person of one joint tortfeasor . . . does not discharge the other tortfeasors unless the release so provides . . ." § 4. The eight States that have adopted the Uniform Act are Arkansas, Ark. Stat. Ann. §§ 34-1001 to 34-1009 (1947); Delaware, Del. Code Ann., Tit. 10, §§ 6301-6308 (1953); Hawaii, Hawaii Rev. Laws §§ 246-10 to 246-16 (1955); Maryland, Md. Ann. Code, Art. 50, §§ 16 to 24 (1957); New Mexico, N. M. Stat. Ann. §§ 24-1-11 to 24-1-18 (1953); Pennsylvania, Pa. Stat. Ann., Tit. 12, §§ 2082-2089 (1967); Rhode Island, R. I. Gen. Laws Ann. §§ 10-6-1 to 10-6-11 (1956); South Dakota, S. D. Comp. Laws §§ 15-8-11 to 15-8-22 (1967). Two States -- Massachusetts and North Dakota -- have adopted a slightly different 1955 revision of the Act. See Mass. Gen. Laws Ann., c. 231B, §§ 1-4 (Supp. 1971); N. D. Cent. Code §§ 32-38-01 to 32-38-04 (1960). Other States adopting statutes affecting the common law of release are Alabama, Ala. Code, Tit. 7, § 381 (1940); California, Cal. Code Civ. Proc. §§ 875-880 (Supp. 1970); Louisiana, La. Civ. Code Ann., Art. 2203 (1952); Michigan, Mich. Stat. Ann. § 27A.2925 (1962); Missouri, Mo. Rev. Stat. § 537.060 (1953); Montana, Mont. Rev. Codes Ann. § 93-8108 (1964); West Virginia, W. Va. Code Ann. § 55-7-12 (1966). The statutes last listed deal generally with the construction of instruments in suit and with the effect and form of releases in particular.

[LEdHN\[27\]](#) [27] We perceive no reason to follow a different rule in antitrust litigation. Indeed, of the three available rules, the rule adopted in *Aro* is most consistent with the aims and purposes of the treble-damage remedy under the antitrust laws. We must keep in mind the multistate and multiparty character of much private antitrust litigation; often, defendants who have conspired [\*\*\*97] together must be sued in a number of different States if all are to be reached, and, while defendants in some States may [\*347] be willing to enter into settlements, defendants in others may not. To adopt the ancient common-law rule would frustrate such partial settlements, and thereby promote litigation, while adoption of the First Restatement rule would create a trap for unwary plaintiffs' attorneys. The straightforward rule is that [HN14](#) [a party releases only those other parties whom he intends to release. Our [\*\*\*\*47] conclusion that this is the appropriate rule for giving effect to releases under the antitrust laws is further buttressed by the Restatement's abandonment in a tentative draft of the rule requiring express reservation of rights in order to save them, and its adoption of the rule to which we adhere. See *Restatement (Second), Torts § 885, Comments a-d* (Tent. Draft No. 16, 1970).

[LEdHN\[28\]](#) [28] [LEdHN\[29\]](#) [29] The intention of the parties to the 1957 release is absolutely clear from the contract made prior thereto in which they agreed to exchange releases.<sup>12</sup> [\*\*\*\*48] That contract expressly provided for releases "to bind or benefit" the party and "the parent and subsidiaries of the party giving or receiving such release ('subsidiaries' to include corporations in which the party has stock ownership of 50% or more)." <sup>13</sup> We accordingly have no hesitancy [\*\*811] in [\*348] holding that HRI, which was neither a party to the 1957 release nor a parent or subsidiary of a party, is not now entitled to the benefits of that release.

[LEdHN\[30\]](#) [30] Of course, to the extent that the \$ 10,000,000 settlement which Zenith received in return for the 1957 release was understood by the parties to provide compensation for future damages that Zenith anticipated it would suffer during 1959-1963 as a result of the pre-1957 conduct of the Canadian pool, HRI would have available to it a defense of payment, for it is being ordered by the District Court to make full payment for all the 1959-1963 damages inflicted by all the members of the pool. [\*\*\*\*49] It is settled that, [HN15](#) [entirely apart from any release, a plaintiff who has recovered any item of damage from one coconspirator may not again recover the same item from another conspirator; the law, that is, does not permit a plaintiff to recover double payment. See *Aro Mfg. Co. v. Convertible Top Co., supra, at 502-503* (plurality view); *McKenna v. Austin, supra, at 234, 134 F.2d, at 665*; *Restatement, Torts § 885 (3)* (1939); W. Prosser, *Torts § 46* (3d ed. 1964). However, the record below indicates that a defense of payment [\*\*\*98] could not here be sustained for, while the 1957 release did extend to future damages, the undisputed and unimpeached testimony of Zenith's witnesses was that the \$ 10,000,000 settlement was understood by the parties as compensation only for Zenith's damages up to the date of the release. Thus, it is not surprising that, although HRI did advance a claim of payment upon its post-trial motion in the District Court, it has made no such argument in this Court. Since the claim was untimely presented below, was not pressed here, and is not sustainable on the facts [\*\*\*\*50] contained in the record, we see no basis for its further consideration.

The judgment of the Court of Appeals is reversed, and [\*349] the case is remanded, with instructions that the Court of Appeals reinstate the judgment of the District Court with respect to the Canadian market.

<sup>12</sup> Resort may be had to the contract in construing the release since the parole evidence rule is usually understood to be operative only as to parties to a document, and HRI here was not a party to the release. See *Stern v. Commissioner, 137 F.2d 43, 46 (CA2 1943)*; *O'Shea v. New York, C. & St. L. R. Co., 105 F. 559, 562-563 (CA7 1901)*; *Restatement (Second), Torts § 885, Comment d* (Tent. Draft No. 16, 1970). See generally 9 J. Wigmore, *Evidence § 2446* (3d ed. 1940).

<sup>13</sup> The contract provided in relevant part:

"1. . . . RCA, GE and Western Electric each to grant Zenith and Rauland, respectively, a general release and Zenith and Rauland each to grant RCA, GE and Western Electric, respectively, a general release, each such release, to the extent either party may request, to bind or benefit the parent and subsidiaries of the party giving or receiving such release ('subsidiaries' to include corporations in which the party has stock ownership of 50% or more)."

**Concur by:** HARLAN

## Concur

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MR. JUSTICE HARLAN, with whom MR. JUSTICE STEWART joins, concurring in the result.

My review of the record in this case has left me with the firm conviction that the trial judge rejected Hazeltine's proffered defenses of release and the statute of limitations on the ground that they were too belatedly raised. I agree with the Court that such a course was within the trial judge's sound discretion. I therefore find it unnecessary to express any view on the remaining, difficult issues which the Court discusses.

A consideration of the posture of the case at the time of the trial judge's ruling facilitates an understanding of the record. Two years after the filing of Zenith's counterclaim, one year after the close of evidence, nine months after the filing of Hazeltine's post-trial brief, and two months after the trial judge had made preliminary findings of fact and conclusions of [\*\*\*\*51] law, Hazeltine, represented by new counsel, raised for the first time its defenses of release and the statute of limitations. It also sought to dispute the quality and the sufficiency of the proof of damages with respect to the Canadian market, and it raised the issue of governmental embargoes in the English and Australian markets.

The District Judge heard two days of argument, covering nearly 200 pages of the Appendix, on both the merits of the contentions and the equity of allowing Hazeltine to raise them so belatedly. There were three main links in the chain of Hazeltine's reasoning in support of its [\*\*812] contention that it should be allowed the benefit of the release and the statute of limitations. First, the defenses were meritorious and would bar a large portion of the enormous potential recovery. Second, Hazeltine's lateness [\*350] in raising the defenses should be excused because Zenith's counterclaim and supporting affidavit gave no notice that Zenith intended to rely on any activities occurring before the filing of the answer in 1961, which was well within the limitation period under any theory. Third, Hazeltine should be excused for failing to spot the alleged [\*\*\*\*52] shift in Zenith's theory of recovery during the course of the trial because Hazeltine's trial counsel was primarily a patent lawyer who was not completely at home in the antitrust field. App. 68-69, 72-74, 156-162.

[\*\*\*99] The District Judge on at least three occasions observed that Hazeltine had been put on notice of Zenith's theory by the allegations of the counterclaim itself and by the pretrial briefs.<sup>1</sup> [\*\*\*\*53] He repeatedly commented on trial counsel's failure to raise the defenses of release and the statute of limitations,<sup>2</sup> [\*\*\*\*54] and in the course of

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<sup>1</sup> For example: "Mr. Kayser [Hazeltine's counsel]: . . . it was not until during the trial, after we had the long Dodds affidavit and all of this testimony that suddenly, gradually this new theory starts to creep in, this new theory where we go back and try to recover again based on these allegedly wrongful acts many, many years ago."

"The Court: I must assume, to go along with that, that counsel at that time didn't read the pretrial brief which clearly set out, prior to the trial, this theory that you were taken by surprise by during the course of the trial." App. 158. See also App. 87, 144.

<sup>2</sup> For example: "The Court: . . . [Reads from Hazeltine's post-trial brief.]

"Do you differ with counsel's statement, your prior counsel's statement 90 days after proofs were closed?

"Mr. Kayser: As to what the issues were that were presented in this case, yes, your Honor, I do. I most definitely do.

"The Court: Of course, you know by now that this is a new theory on your behalf.

"Mr. Kayser: Your Honor, I don't think it is a new theory. I think that --

"The Court: I mean, at least it wasn't advanced in this brief filed June 8, 90 days after the proofs closed.

"Mr. Kayser: Your Honor, we fully recognize the fact that the trial counsel did not realize what was happening to him. We fully realize that fact. If we had realized it --

"The Court: I mean, he didn't even realize it 90 days after the proofs were over.

colloquy more [**\*351**] directly addressed to Hazeltine's other contentions he emphasized the necessity for trial counsel to [**\*\*813**] prepare his case if the client was not to suffer.<sup>3</sup> [**\*\*\*\*55**] [**\*\*\*100**] After counsel for [**\*352**] Zenith had presented his argument,<sup>4</sup> the District Judge heard Hazeltine's rebuttal, App. 223-250, with only one substantive question: "You do agree that the statute of limitations can be waived. You agree to that, don't you?" App. 237.

At the conclusion of his rebuttal argument, Hazeltine's attorney moved for leave to file "our affirmative defenses as a formal pleading of release and statute of limitations," and also moved to dismiss the counterclaim on the basis of those defenses. App. 250. The following colloquy then occurred:

"The Court: Mr. McConnell [Zenith's counsel], do you care to address yourself very briefly to those two motions he just made? You will be limited to that.

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"Mr. Kayser: Yes, your Honor. I quite agree." App. 72.

Later the following colloquy occurred:

"The Court: Do you agree with the theory that sometime litigation must end?

"Mr. Kayser: Yes, your Honor.

"The Court: And these offers of proof [with respect to embargoes by the English and Australian Governments] are now being made more than one year after the proof closed on this case?

"Mr. Kayser: Your Honor, this I think is one of the most unusual cases that will come into a Courtroom, in that we have here, as I think we can demonstrate -- without basis we have here the danger of a judgment of almost forty-nine million dollars which will spell corporate death, which is subject to the affirmative defenses of limitations and of releases. . . .

"The Court: I just got through instructing a jury that in deliberating on their verdict, they should not take into consideration either sympathy or prejudice.

. . . .

"Mr. Kayser: I submit most respectfully to this court that this court should take into account equity. This is not a matter of sympathy. This is a matter of equity and a matter of justice; that this judgment, which will spell the death of this corporation, has had absolutely no basis whatsoever. It is subject to affirmative defenses. It was accomplished by a subtle switch in theory. Maybe it should have been caught; maybe it shouldn't. But is your Honor going to penalize this corporation --

"The Court: I mean, it wasn't even caught 90 days after the proofs closed.

"Mr. Kayser: I agree, that's true. I agree. This is a very unusual case; we recognize that.

"The Court: You may proceed." App. 108-109. See also App. 71-76 *passim*, 158-161.

<sup>3</sup> For example: "The Court: . . . underlying what you are saying [with respect to the embargoes] is what is said so frequently in appeals in criminal cases, that they are where they are by virtue of incompetence of counsel.

"Now, there a person's liberty is involved, and what do the courts say in regard to this plea of incompetency of counsel?

"They say, first, was he counsel of your choice rather than appointed counsel? And if he was, the courts say, in regard to keeping men incarcerated and depriving them of their liberty, that unless the trial conducted by counsel of the prisoner's choice was such a farce, such a fraud that justice would be horrified by the result, that since you are represented by counsel of your choice, why, agreed that he might not be the greatest in the world, but he was your lawyer and you picked him out. You are going to have to remain incarcerated for the balance of your term.

"Now, how do we get around that analogy in this case?" App. 140-141.

Hazeltine's attorney responded in terms of his theory of surprise, whereupon the District Judge answered that federal procedure was based on notice pleading and in his opinion Hazeltine had been put on notice. App. 141-144.

See also, e. g., App. 116, 121-123, 146, 155.

<sup>4</sup> App. 169-223. The District Judge asked for Zenith's views on the merits of the proposed defenses, but he did not press counsel on his reply. App. 186, 189, 193.

"Mr. Kayser: Sir?

[\*353] "The Court: Mr. McConnell -- the ones that have to do with seeking to file these new pleadings on the statute of limitations.

"Mr. McConnell: Well, the statute of limitations -- this case is clearly distinguishable from the Emich case --

"The Court: All he is doing is asking leave to file, and that is the only thing I wish to have you address yourself to.

"Mr. McConnell: I think it's too late. He can make it for the record, but to actually [\*\*\*\*56] file them in this case, the record is made. The case has been closed.

"The Court: Well, the record will show that leave is given to file them at this time, after proofs are closed and after findings have been made."

[The District Judge then stated how much he had enjoyed the argument of the past two days and complimented counsel on their presentations.]

"The Court at this time is prepared to enter the final judgment and decree offered with the exception of . . . [the damages allegedly suffered in England and Australia]." App. 250-251.

The judge then indicated that he would reopen the record to receive additional evidence with regard to the embargoes in England and Australia, but that the scope of the inquiry would be narrowly limited, and in particular no relitigation of facts adduced at trial would be permitted. The judge explained, "I do feel that in order to satisfy myself, in order to do equity in this matter, that I would like, to the limited extent expressed, a reopening in regard to the matters that I have indicated that do trouble me by virtue of the offers of proof that have been made and the statements that have been made [\*101] in regard solely to Australia [\*\*\*\*57] and England." App. 252-253. Except [\*814] for giving Hazeltine's counsel five days [\*354] in which to file his affirmative defenses, the judge made no other relevant comments in ruling on the motions.

I find it impossible to believe that the judge ruled thus summarily on the merits of the complicated issues of antitrust law to which this Court devotes 15 printed pages. I also find it highly unlikely that, without a word of explanation for departing from the sentiments he expressed during argument, the judge intended to forgive Hazeltine's failure to raise the defenses earlier. To be sure, he must have considered the merits sufficiently to satisfy himself that refusal to allow Hazeltine to raise these defenses worked no gross inequity. See *Fed. Rule Civ. Proc. 15 (a)*. I remain convinced, however, that he rejected the defenses only as untimely raised.

Believing that the Court of Appeals clearly erred in reaching the opposite conclusion,<sup>5</sup> I concur in the judgment of the Court on that ground.

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## References

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<sup>5</sup> The opinion of the Court of Appeals gives no indication that its attention was drawn to the remarks of the District Judge during Hazeltine's argument in chief, which cast light on his ruling on the motion for leave to file. Its entire discussion of the basis for the District Court's action reads as follows:

"Zenith's counsel objected to the filing of the defenses on the ground that they came too late and were waived. The district court, however, permitted the defenses to be filed and thereafter denied HRI's motion for judgment based on the defenses. . . . [The Supreme Court left open the question whether this ruling was on the merits.] It is our view that the court's ruling was not on the basis of waiver, but because the defenses on their merits did not bar Zenith's recovery." [418 F.2d, at 23-24](#).

401 U.S. 321, \*354; 91 S. Ct. 795, \*\*814; 28 L. Ed. 2d 77, \*\*\*101; 1971 U.S. LEXIS 153, \*\*\*\*58

22 Am Jur 2d, Damages 26; 51 Am Jur 2d, Limitation of Actions 471; 54 Am Jur 2d, Monopolies, Restraints of Trade and Unfair Trade Practices 313, 325, 326, 361; Am Jur, Pleading (1st ed 297); Am Jur, Release (1st ed 33-39); Am Jur, Trial (1st ed 126)

US L Ed Digest, Damages 170; Joint Creditors and Debtors 8; Limitation of Actions 153.5, 157, 223; Pleading 71, 87, 88; Trial 15

ALR Digests, Damages 383; Joint Creditors and Debtors 22; Limitation of Actions 133, 222; Pleading 139, 164, 236; Trial 23

L ED Index to Anno, Damages; Joint Liability; Limitation of Actions; Pleading; Restraints of Trade and Monopolies; Trial

ALR Quick Index, Amendment of Pleading; Damages; Joint and Several Liability; Limitation of Actions; Restraints of Trade and Monopolies

Federal Quick Index, Amendment of Pleadings; Joint Liability; Limitation of Actions; Monopolies and Restraints of Trade

Annotation References:

Timeliness of amendments to pleadings made by leave of court under *Federal Rule of Civil Procedure 15(a)*. 4 ALR Fed 123.

Release of one joint tortfeasor as [\*\*\*\*59] discharging liability of others: modern trends. 73 ALR2d 403.

When does statute of limitations begin to run against civil action or criminal prosecution for conspiracy. 62 ALR2d 1369.

Amendment of pleadings to assert statute of limitations. 59 ALR2d 169.

Presumption that, in reenacting statutes, legislature adopted previous judicial construction thereof, as applied to construction by trial or intermediate appellate court. 146 ALR 923.

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## FTC v. Sperry & Hutchinson Co.

Supreme Court of the United States

November 15, 1971, Argued ; March 1, 1972, Decided

No. 70-70

### **Reporter**

405 U.S. 233 \*; 92 S. Ct. 898 \*\*; 31 L. Ed. 2d 170 \*\*\*; 1972 U.S. LEXIS 154 \*\*\*\*; 1972 Trade Cas. (CCH) P73,861

FEDERAL TRADE COMMISSION v. SPERRY & HUTCHINSON CO.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

**Disposition:** [432 F.2d 146](#), modified and remanded.

## **Core Terms**

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stamps, unfair, practices, consumers, anti trust law, exchanges, redemption, deceptive, unfair methods of competition, unfair practice, merchants, trading stamp, competitors, commerce, Federal Trade Commission Act, proscribe, redeemed, retail, restrain, violates

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

### [\*\*HN1\*\*](#) **[ Antitrust & Trade Law, Federal Trade Commission Act**

See [15 U.S.C.S. § 45\(a\)\(6\)](#).

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

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

### [\*\*HN2\*\*](#) **[ Regulated Practices, Trade Practices & Unfair Competition**

The Federal Trade Commission has broad powers to declare trade practices unfair.

Antitrust & Trade Law > Sherman Act > General Overview

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

### [\*\*HN3\*\*](#) [down] **Antitrust & Trade Law, Sherman Act**

Unfair competitive practices are not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws; nor are unfair practices in commerce confined to purely competitive behavior.

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

### [\*\*HN4\*\*](#) [down] **US Federal Trade Commission Actions, Remedial Powers**

The Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.

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

### [\*\*HN5\*\*](#) [down] **Regulated Practices, Trade Practices & Unfair Competition**

The Federal Trade Commission has described the factors it considers in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair: (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -- whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

Administrative Law > Judicial Review > General Overview

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

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

Administrative Law > Judicial Review > Standards of Review > General Overview

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

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

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

### [\*\*HN6\*\*](#) [down] **Administrative Law, Judicial Review**

The orderly functioning of the process of review requires that the grounds upon which an administrative agency acted be clearly disclosed and adequately sustained. A court cannot label a practice "unfair" under [15 U.S.C.S. § 45\(a\)\(1\)](#). It can only affirm or vacate an agency's judgment to that effect. If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For the courts to substitute their or counsel's discretion for that of the Federal Trade Commission is incompatible with the orderly functioning of the process of

judicial review. This is not to deprecate, but to vindicate the administrative process, for the purpose of the rule is to avoid propelling the court into the domain which Congress has set aside exclusively for the administrative agency.

## **Lawyers' Edition Display**

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### **Summary**

The Federal Trade Commission held that a trading stamp company violated 5 of the Federal Trade Commission Act by attempting to suppress the operation of trading stamp exchanges and other "free and open" redemption of stamps, because the company's practices restrained trade and injured competition. The United States Court of Appeals for the Fifth Circuit reversed on the ground that the FTC had not demonstrated that the company's conduct violated either the letter or the spirit of the antitrust laws ([432 F2d 146](#)).

On certiorari, the United States Supreme Court modified the Court of Appeals' judgment with respect to the Court of Appeals' construction of the Act, and remanded the case to the Court of Appeals with instructions to remand it to the FTC for such further proceedings as might be appropriate. In an opinion by White, J., expressing the unanimous views of the court, it was held that (1) the Act empowers the FTC to (a) define and proscribe an unfair competitive practice even though the practice does not infringe either the letter or the spirit of the antitrust laws and (b) proscribe practices as unfair or deceptive in their effect on consumers, regardless of their nature or quality as competitive practices or their effect on competition; (2) since the FTC's order was predicated only on the classic rationale of restraint of trade and injury to competition, it could not be upheld on the ground stated in (1); (3) since the Court of Appeals' judgment that the company's practices did not violate the letter or the spirit of the antitrust laws was not challenged in the Supreme Court, and the FTC's order could not properly be sustained on other grounds, the Court of Appeals' judgment would be affirmed; but (4) since the Court of Appeals erred in its construction of the Act, its judgment would be modified to that extent.

Powell and Rehnquist, JJ., did not participate.

### **Headnotes**

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JUDGMENT §130 > effect -- unfair trade practices -- > Headnote:

[LEdHN\[1\]](#) [1]

State and federal court decisions holding that certain business practices are lawful do not foreclose a decision by the Federal Trade Commission that such practices violate 5 of the Federal Trade Commission Act ([15 USC 45](#)), which outlaws unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce.

PRACTICES §47 > unfair trade practices -- > Headnote:

[LEdHN\[2\]](#) [2]

Section 5 of the Federal Trade Commission Act ([15 USC 45](#)), which outlaws unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, empowers the Federal Trade Commission to (1) define and proscribe an unfair competitive practice even though the practice does not infringe either the letter or the spirit of the antitrust laws, and (2) proscribe practices as unfair or deceptive in their effect on consumers, regardless of their nature or quality as competitive practices or their effect on competition.

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PRACTICES §47 > unfair trade practices -- > Headnote:

[LEdHN\[3\]](#) [3]

The 1938 Wheeler-Lea Amendment (52 Stat 111) to 5 of the Federal Trade Commission Act ([15 USC 45](#)), adding the phrase "unfair or deceptive acts or practices" to the Federal Trade Commission Act's original ban on "unfair methods of competition," makes it clear that 5 charges the Commission with protecting consumers as well as competitors.

PRACTICES §56 > FTC order -- review -- > Headnote:

[LEdHN\[4\]](#) [4]

For the underpinnings of a Federal Trade Commission order, a court must look to the FTC's opinion, not to the arguments of its counsel.

LAW §289 > review -- orders -- > Headnote:

[LEdHN\[5\]](#) [5]

Congress has delegated to the administrative official, and not to appellate counsel, the responsibility for elaborating and enforcing statutory commands.

PRACTICES §53 > FTC order -- basis -- > Headnote:

[LEdHN\[6\]](#) [6]

In a Federal Trade Commission proceeding for alleged violation of 5 of the Federal Trade Commission Act ([15 USC 45](#)), which outlaws unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, in which the FTC's order finding a violation is not premised on anything other than the classic antitrust rationale of restraint of trade and injury to competition, the FTC's observation that the respondent's conduct limited "stamp collecting consumers' ... freedom of choice in the disposition of trading stamps" will not alone support a conclusion that the FTC has found the respondent guilty of unfair practices because of damage to consumers.

PRACTICES §53 > FTC -- linking findings and conclusions -- > Headnote:

[LEdHN\[7\]](#) [7]

Even if the Federal Trade Commission's findings, in contrast to its opinion, go beyond concern with competition and address themselves to noncompetitive and consumer injury as well, and even if such findings have evidentiary support in the record, they still fail to sustain the FTC's order where the FTC does not render an opinion linking its findings and its conclusion.

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LAW §159 > orders -- conclusions -- > Headnote:

[LEdHN\[8\]](#) [8]

An administrative agency cannot support an order on considerations which it urges in court, but did not base its action on below; it must articulate a rational connection between the facts found and the choice made.

LAW §159 > necessity of disclosing grounds for action -- > Headnote:

[LEdHN\[9\]](#) [9]

The orderly function of the process of review of the action of an administrative agency requires that the grounds upon which the agency acted be clearly disclosed and adequately sustained.

PRACTICES §55 > decision on review -- > Headnote:

[LEdHN\[10\]](#) [10]

A court cannot label a practice "unfair" under [15 USC 45\(a\)\(1\)](#), which outlaws unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce; it can only affirm or vacate an agency's judgment to that effect.

LAW §249 > review -- agency order -- > Headnote:

[LEdHN\[11\]](#) [11]

If an administrative order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment.

LAW §249 > discussion -- review -- > Headnote:

[LEdHN\[12\]](#) [12]

For the courts to substitute their or counsel's discretion for that of an administrative agency is incompatible with the orderly functioning of the process of judicial review; the purpose of this rule is to avoid propelling the court into the domain which Congress set aside exclusively for the administrative agency.

ERROR §1692.2 > remand -- misconception of law -- > Headnote:

[LEdHN\[13\]](#) [13]

A Court of Appeals' judgment setting aside a Federal Trade Commission order will be affirmed where the Court of Appeals' judgment that the respondent's practices did not violate either the letter or the spirit of the antitrust laws is not attacked and remains undisturbed before the Supreme Court, and the FTC's order cannot properly be sustained on other grounds; but where the Court of Appeals erred in its construction of the statute, the Court of Appeals' judgment will be modified to that extent, and the case remanded to the Court of Appeals with instructions to remand it to the FTC for such further proceedings as may be appropriate.

## Syllabus

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The Federal Trade Commission (FTC) entered a cease-and-desist order against Sperry & Hutchinson Co. (S&H), the largest and oldest trading stamp company, on the ground that it unfairly attempted to suppress the operation of trading stamp exchanges and other "free and open" redemption of stamps. S&H argued in the Court of Appeals that its conduct was beyond the reach of § 5 of the Federal Trade Commission Act, which it claimed permitted the FTC to restrain only such practices as are either in violation of the antitrust laws, deceptive, or repugnant to public morals. The Court of Appeals reversed the FTC, holding that the FTC had not demonstrated that S&H's conduct violated § 5 because it had not shown that the conduct contravened either the letter or the spirit of the antitrust laws. *Held:*

1. The Court of Appeals erred in its construction of § 5. Congress, as previously recognized by this Court, see [FTC v. R. F. Keppel & Bro., 291 U.S. 304](#), [\*\*\*\*2] defines the powers of the FTC to protect consumers as well as competitors and authorizes it to determine whether challenged practices, though posing no threat to competition within the letter or spirit of the antitrust laws, are nevertheless either unfair methods of competition, or unfair or deceptive acts or practices. The Wheeler-Lea Act of 1938 reaffirms this broad congressional mandate. Pp. 239-244.
2. Nonetheless the FTC's order cannot be sustained. The FTC does not challenge the Court of Appeals' holding that S&H's conduct violates neither the letter nor the spirit of the antitrust laws and its opinion is barren of any attempt to rest its order on the unfairness of particular competitive practices or on considerations of consumer interests. Nor did the FTC articulate any standards by which such alternative assessments might be made. Pp. 245-249.
3. The judgment of the Court of Appeals setting aside the FTC's order is affirmed, but because that court erred in its construction of § 5, its judgment is modified to the extent that the case is remanded with instructions to return it to the FTC for further proceedings not inconsistent with this opinion. Pp. 249-250.

**Counsel:** [\*\*\*\*3] Assistant Attorney General McLaren argued the cause for petitioner. With him on the briefs were Solicitor General Griswold, Harold D. Rhynedance, Jr., Karl H. Buschmann, and Richard H. Stern.

Harold L. Russell argued the cause for respondent. With him on the brief were Samuel K. Abrams, Claus Motulsky, J. Sam Winters, Alan R. Wentzel, and Wayne T. Elliott.

**Judges:** White, J., delivered the opinion of the Court, in which all Members joined except Powell and Rehnquist, JJ., who took no part in the consideration or decision of the case.

**Opinion by:** WHITE

## Opinion

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[\*234] [\*\*173] [\*\*900] MR. JUSTICE WHITE delivered the opinion of the Court.

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In June 1968 the Federal Trade Commission held that the largest and oldest company in the trading stamp industry,<sup>1</sup> Sperry & Hutchinson (S&H), was violating § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, [15 U. S. C. § 45 \(a\)\(1\)](#), in three respects. The Commission found that S&H improperly regulated the maximum rate at which trading stamps were **[\*\*\*174]** dispensed by its retail licensees; that it combined with others to regulate the rate of stamp dispensation throughout the industry; and that it **[\*\*\*\*4]** attempted (almost **[\*\*901]** invariably successfully) to suppress the operation of trading stamp exchanges and other "free and open" redemption of stamps. The Commission entered cease-and-desist orders accordingly.

**[\*235]** S&H appealed only the third of these orders. Before the Court of Appeals for the Fifth Circuit it conceded that it acted as the Commission found, but argued that its conduct is beyond the reach of § 5 of the Act. That section provides, in pertinent part, that:

**HN1** "The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from **[\*\*\*5]** using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." [15 U. S. C. § 45 \(a\)\(6\)](#).

As S&H sees it, § 5 empowers the Commission to restrain only such practices as are either in violation of the antitrust laws, deceptive, or repugnant to public morals. In S&H's view, its practice of successfully prosecuting stamp exchanges in state and federal courts cannot be restrained under any of these theories.

The Court of Appeals for the Fifth Circuit agreed and reversed the Commission, Judge Wisdom dissenting. [432 F.2d 146 \(1970\)](#). In the lower court's view:

"To be the type of practice that the Commission has the power to declare 'unfair' the act complained of must fall within one of the following types of violations: (1) a per se violation of antitrust policy; (2) a violation of the letter of either the Sherman, Clayton, or Robinson-Patman Acts; or (3) a violation of the spirit of these Acts as recognized by the Supreme Court of the United States." [Id., at 150](#) (footnote omitted).

Holding that the FTC had not demonstrated that S&H's conduct violated either the letter or the spirit **[\*\*\*6]** of the antitrust laws, the Court of Appeals vacated the Commission's order.

The FTC petitioned for review in this Court. We granted certiorari to determine the questions presented in the petition. [401 U.S. 992 \(1971\)](#).

**[\*236]** !

#### The Challenged Conduct

S&H has been issuing trading stamps -- small pieces of gummed paper about the size of postage stamps -- since 1896. In 1964, the year from which data in this litigation are derived, the company had about 40% of the business in an industry that annually issued 400 billion stamps to more than 200,000 retail establishments for distribution in connection with retail sales of some 40 billion dollars. In 1964, more than 60% of all American consumers saved S&H Green Stamps.

In the normal course, the trading stamp business operates as follows. S&H sells its stamps to retailers, primarily to supermarkets and gas stations, at a cost of about \$ 2.65 per 1200 stamps; retailers give the stamps to consumers (typically at a rate of one for each 10 cent worth of purchases) as a bonus for their patronage; consumers paste the stamps in books of 1,200 and exchange **[\*\*\*175]** the books for "gifts" at any of 850 S&H Redemption **[\*\*\*7]** Centers maintained around the country. Each book typically buys between \$ 2.86 and \$ 3.31 worth of merchandise

<sup>1</sup> On the nature of the industry, see generally Comment, Trading Stamps, 37 N. Y. U. L. Rev. 1090 (1962). The Commission proceedings in the instant case are discussed in Comment, The Attack on Trading Stamps -- An Expanded Use of Section 5 of the Federal Trade Commission Act, 57 Geo. L. J. 1082 (1969).

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depending on the location of the redemption center and type of goods purchased. Since its development of this cycle 75 years ago, S&H has sold over one trillion stamps and redeemed approximately 86% of them.

A cluster of factors relevant to this litigation tends to disrupt this cycle and, in S&H's view, to threaten its business. An incomplete book has no redemption value. Even a complete book is of limited value because most "gifts" may be obtained only on submission of more than one book. For these reasons a collector of another type of stamps who has acquired a small number of green stamps [\*\*902] may benefit by exchanging [\*237] with a green stamp collector who has opposite holdings and preferences. Similarly, because of the seasonal usefulness or immediate utility<sup>2</sup> of an object sought, a collector may want to buy stamps outright and thus put himself in a position to secure redemption merchandise immediately though it is "priced" beyond his current stamp holdings. Or a collector may seek to sell his stamps in order to use the resulting cash to make more [\*\*\*\*8] basic purchases (food, shoes, etc.) than redemption centers normally provide.

Periodically over the past 70 years professional exchanges have arisen to service this demand. Motivated by the prospect of profit realizable as a result of serving as middlemen in swaps, the exchanges will sell books of S&H stamps previously acquired from consumers, or, for a fee, will give a consumer another company's stamps for S&H's or vice versa. Further, some regular merchants have offered discounts on their own goods in return for S&H stamps. Retailers do this as a means of competing with merchants in the area who issue stamps. By offering a price break in return for stamps, the redeeming merchant replaces the incentive to return to the issuing merchant (to secure more stamps so as to be able to obtain a gift at a redemption center) with the attraction of securing immediate benefit from the stamps by exchanging them for a discount at his store.<sup>3</sup>

[\*\*\*9] S&H fears these activities because they are believed to reduce consumer proclivity to return to green-stamp-issuing stores and thus lower a store's incentive to buy and distribute stamps. The company attempts to preempt "trafficking" in its stamps by contractual provisions [\*238] reflected in a notice on the inside cover of every S&H stamp book. The notice reads:

"Neither the stamps nor the books are sold to merchants, collectors or any other persons, at all times the title thereto being expressly reserved in the Company. . . . The stamps are issued to you as evidence of cash payment to the merchants issuing the same. The only right which you acquire in said stamps is to paste them in books like this and present them to us for redemption. You must not dispose of them or make any further use of them [\*\*\*176] without our consent in writing. We will in every case where application is made to us give you permission to turn over your stamps to any other bona-fide collector of S&H Green . . . Stamps; but if the stamps or the books are transferred without our consent, we reserve the right to restrain their use by, or take them from other parties. It is to your interest [\*\*\*10] that you fill the book, and personally derive the benefits and advantages of redeeming it." (Reproduced at 2 App. 230.)

S&H makes no effort to enforce this condition when consumers casually exchange stamps with each other, though reportedly some 20% of all the company's stamps change hands in this manner. But S&H vigorously moves against unauthorized commercial exchanges and redeemers. Between 1957 and 1965, by its own account the company filed for 43 injunctions against merchants who redeemed or exchanged its stamps without authorization, and it sent letters threatening legal action to 140 stamp exchanges and 175 businesses that redeemed S&H stamps. In almost all instances the threat or the reality of suit forced the businessmen to abandon their unauthorized practices.

[\*239] [\*\*903] II

## The Reach of Section 5

<sup>2</sup> Often merchandise obtained by redemption is used as a gift.

<sup>3</sup> The efforts of some retailers to reissue S&H stamps are not involved in this case. The FTC explicitly left S&H free to seek injunctions against reissuance. 1 App. 169.

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LEdHN[1] [1]The Commission presented two questions in its petition for certiorari, the first being "whether Section 5 of the Federal Trade Commission Act, which directs the Commission to prevent 'unfair methods of competition . . . and unfair or deceptive acts or practices,' is limited to conduct [\*\*\*\*11] which violates the letter or spirit of the antitrust laws." The other issue relates to the significance of state court holdings that the practices challenged here are lawful.<sup>4</sup> Neither question requests review of the Court of Appeals' decision that the business conduct proscribed by the Commission violates neither the letter nor spirit of the antitrust laws. Accordingly, we intimate no opinion on that issue and turn to the question of the reach of § 5.

LEdHN[2] [2]In reality, the question is a double one: First, does § 5 empower the Commission to define and [\*\*\*\*12] proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws? Second, does § 5 empower the Commission to proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition? We think the statute, its legislative history, and prior cases compel an affirmative answer to both questions.

When Congress created the Federal Trade Commission in 1914 and charted its power and responsibility [\*240] under § 5, it explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase "unfair methods of competition" by tying the concept of unfairness to a common-law or statutory standard or by enumerating the particular practices to which it was intended to apply. Senate Report No. [\*\*177] 597, 63d Cong., 2d Sess., 13 (1914), presents the reasoning that led the Senate Committee to avoid the temptations of precision when framing the Trade Commission Act:

"The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices [\*\*\*\*13] which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others."

The House Conference Report was no less explicit. "It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. If Congress were to adopt the method of definition, it would undertake an endless task." H. R. Conf. Rep. No. 1142, 63d Cong., 2d Sess., 19 (1914). See also Rublee, The Original Plan and Early History of the Federal Trade Commission, 11 Acad. Pol. Sci. Proc. 666, 667 (1926); Baker & Baum, Section 5 of the Federal Trade Commission Act: A Continuing Process of Redefinition, 7 Vill. L. Rev. 517 (1962). [\*\*\*\*14]

[\*241] Since the sweep and flexibility of this approach were thus made crystal clear, there have twice been judicial attempts to fence in the grounds upon which the FTC might rest a finding of unfairness. In *FTC v. Gratz*, 253 U.S. 421 (1920), the Court over [\*\*904] the strong dissent of Mr. Justice Brandeis (who had been involved in drafting the Trade Commission Act), wrote that while the "exact meaning" of the phrase "'unfair method of competition' . . . is in dispute," the only practices that were subject to this characterization were those that were "heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly." *Id.*, at 427. This view was reiterated in other opinions over the next decade. See, e. g., *FTC v. Curtis Publishing Co.*, 260 U.S. 568 (1923), and *FTC v. Sinclair Refining Co.*, 261 U.S. 463, 475-476 (1923). The opinion of the Court of Appeals' majority, citing *Sinclair* in support of its narrow view of the FTC's leeway, [\*\*\*\*15] is in the tradition of these authorities.

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<sup>4</sup>Though the Court of Appeals referred to state and federal court decisions that approved S&H's practice, our reading of its opinion leaves no doubt that it did not reverse the FTC order on the erroneous theory that such determinations might foreclose a contrary FTC § 5 decision. We therefore put aside the Government's second question as irrelevant and focus on its first contention.

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In [FTC v. Raladam Co., 283 U.S. 643 \(1931\)](#), a unanimous Court held that: "The paramount aim of the act is the protection of the public from the evils likely to result from the destruction of competition or the restriction of it in a substantial degree. . . . Unfair trade methods are not *per se* unfair methods of *competition*." (Italics in original.) "It is obvious," the Court continued,

"that the word 'competition' [\*\*\*178] imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors -- that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be, [\*242] lessened or otherwise injured. It is that condition of affairs which the Commission is given power to correct, and it is against that condition of affairs, and not some other, that the Commission is authorized to protect the public. . . . If broader powers be desirable they must be conferred by Congress." [Id. at 647-649.](#) [\*\*\*16]

Neither of these limiting interpretations survives to buttress the Court of Appeals' view of the instant case. Even if the first line of cases, *Gratz* and its progeny, stood unimpaired, their deference to action taken to constrain "deception, bad faith, fraud or oppression" would grant the FTC greater power to set right what it perceives as wrong than the panel of the Court of Appeals acknowledges. But frequent opportunity for reconsideration has consistently and emphatically led this Court to the view that the perspective of *Gratz* is too confined. As we recently unanimously observed: "Later cases of this Court . . . have rejected the *Gratz* view and it is now recognized in line with the dissent of Mr. Justice Brandeis in *Gratz* that [HN2](#)<sup>↑</sup> the Commission has broad powers to declare trade practices unfair." [FTC v. Brown Shoe Co., 384 U.S. 316, 320-321 \(1966\)](#).

The leading case that recognized a role for the FTC beyond that mapped out in [Gratz, FTC v. R. F. Keppel & Bro., Inc., 291 U.S. 304 \(1934\)](#), also brought *Raladam* into question; on both counts it sets the standard by which the range of FTC jurisdiction is to be measured [\*\*\*17] today. Keppel & Brothers sold penny candies in "break and take" packs, a form of merchandising that induced children to buy lesser amounts of concededly inferior candy in the hope of by luck hitting on bonus packs containing extra candy and prizes. The FTC issued a cease-and-desist order under § 5 on the theory that the popular marketing scheme contravened [\*243] public policy insofar as it tempted children to gamble and compelled those who would successfully compete with Keppel to abandon their scruples by similarly tempting children.

The Court had no difficulty in sustaining the FTC's conclusion that the [\*905] practice was "unfair," though any competitor could maintain his position simply by adopting the challenged practice. "Here," the Court said, "the competitive method is shown to exploit consumers, children, who are unable to protect themselves. . . . It is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy." [Id. at 313.](#)

En route to this result the Court met Keppel's arguments that, absent an antitrust violation or at least incipient injury to competitors, *Gratz* [\*\*\*18] and *Raladam* so straitjacketed the FTC that the Commission could not issue a cease-and-desist [\*\*\*179] order proscribing even an immoral practice. It held:

"Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories. The common law afforded a definition of unfair competition and, before the enactment of the Federal Trade Commission Act, the Sherman Act had laid its inhibition upon combinations to restrain or monopolize interstate commerce which the courts had construed to include restraints upon competition in interstate commerce. It would not have been a difficult feat of draftsmanship to have restricted the operation of the Trade Commission Act to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act, if that had been the purpose of the legislation." [Id. at 310.](#)

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[\*244] Thenceforth, [HN3](#)<sup>1</sup> unfair competitive practices were not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws; nor were unfair practices in commerce confined [\*\*\*\*19] to purely competitive behavior.

[LEdHN\[3\]](#)<sup>1</sup> [3]The perspective of *Keppel*, displacing that of *Raladam*, was legislatively confirmed when Congress adopted the 1938 Wheeler-Lea amendment, 52 Stat. 111, to § 5. The amendment added the phrase "unfair or deceptive acts or practices" to the section's original ban on "unfair methods of competition" and thus made it clear that Congress, through § 5, charged the FTC with protecting consumers as well as competitors. The House Report on the amendment summarized congressional thinking: "This amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor." H. R. Rep. No. 1613, 75th Cong., 1st Sess., 3 (1937). See also S. Rep. No. 1705, 74th Cong., 2d Sess., 2-3 (1936).

Thus, legislative and judicial authorities alike convince us that [HN4](#)<sup>1</sup> the Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, [\*\*\*\*20] considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.<sup>5</sup>

#### [\*\*\*\*21] [\*245] III

[\*\*\*180] [\*\*906] The general conclusion just enunciated requires us to hold that the Court of Appeals erred in its construction of § 5 of the Federal Trade Commission Act. Ordinarily we would simply reverse the judgment of the Court of Appeals insofar as it limited the unfair practices proscribed by § 5 to those contrary to the letter and spirit of the antitrust laws and we would remand the case for consideration of whether the challenged practices, though posing no threat to competition within the precepts of the antitrust laws, are nevertheless either (1) unfair methods of competition or (2) unfair or deceptive acts or practices.

What we deem to be proper concerns about the interaction of administrative agencies and the courts, however, counsels another course in this case. In this Court the Commission argues that, however correct the Court of Appeals may be in holding the challenged S&H practices beyond the reach of the letter or spirit of the antitrust laws, the Court of Appeals nevertheless [\*246] erred in asserting that the FTC could measure and ban conduct only according to such narrow criteria. Proceeding from this premise, with which we [\*\*\*\*22] agree, the Commission's major submission is that its order is sustainable as a proper exercise of its power to proscribe practices unfair to consumers. Its minor position is that it also properly found S&H's practices to be unfair competitive methods apart from their propriety under the antitrust laws.

[LEdHN\[4\]](#)<sup>1</sup> [4][LEdHN\[5\]](#)<sup>1</sup> [5]The difficulty with the Commission's position is that we must look to its opinion, not to the arguments of its counsel, for the underpinnings of its order. "Congress has delegated to the

<sup>5</sup> [HN5](#)<sup>1</sup> The Commission has described the factors it considers in determining whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair:

"(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -- whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking. *29 Fed. Reg. 8355* (1964).

S&H argues that a later portion of this statement commits the FTC to the view that misconduct in respect of the third of these criteria is not subject to constraint as "unfair" absent a concomitant showing of misconduct according to the first or second of these criteria. But all the FTC said in the statement referred to was that "the wide variety of decisions interpreting the elusive concept of unfairness *at least* makes clear that a method of selling violates Section 5 if it is exploitative or inequitable and if, in addition to being morally objectionable, it is seriously detrimental to consumers or others." *Ibid.* (emphasis added).

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administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Investment Co. Institute v. Camp*, 401 U.S. 617, 628 (1971). We cannot read the FTC opinion on which the challenged order rests as premised on anything other than the classic antitrust rationale of restraint of trade and injury to competition.

The Commission urges reversal of the Court of Appeals and approval of its own order because, in its words, "the Act gives the Commission comprehensive power to prevent [\*\*\*\*23] trade practices which are deceptive or unfair to consumers, regardless of whether they also are anticompetitive." Brief for the FTC 15. It says the Court of Appeals was "wrong in two ways: you can have an anticompetitive impact that is not a violation of the antitrust laws and violate Section 5. You can also have an impact upon consumers without regard to competition and you can uphold a Section 5 violation on that ground." Tr. of Oral Arg. 18. Though completely accurate, these statements cannot be squared with the Commission's holding that "it is essential in this matter, we believe, and as we have heretofore indicated, to determine whether or not there has been or may be an [\*247] impairment of competition," [\*\*\*181] Opinion of Commission, 1 App. 175; its conclusion that "respondent . . . prevents . . . competitive reaction[s] and thereby it has restrained trade. We believe this is an unfair method of competition and an unfair act and practice in violation of Section 5 of the Federal Trade Commission Act and so hold," 1 App. 178; its observation that:

"Respondent's individual acts and its acts with others taken to suppress trading stamp exchanges and other stamp [\*\*\*\*24] redemption activity are all part of a clearly defined restrictive policy pursued by the respondent. In the [\*\*907] circumstances surrounding this particular practice it is difficult to wholly separate the individual acts from the collective acts for the purpose of making an analysis of the consequences under the antitrust laws." 1 App. 179;

and like statements throughout the opinion, see, e. g., 1 App. 176-178, *passim*.

LEdHN[6] [6] There is no indication in the Commission's opinion that it found S&H's conduct to be unfair in its effect on competitors because of considerations other than those at the root of the antitrust laws.<sup>6</sup> For its part, the [\*248] theory that the FTC's decision is derived from its concern for consumers finds support in only one line of the Commission's opinion. The Commission's observation that S&H's conduct limited "stamp collecting consumers' . . . freedom of choice in the disposition of trading stamps," 1 App. 176, will not alone support a conclusion that the FTC has found S&H guilty of unfair practices because of damage to consumers.

[\*\*\*25] LEdHN[7] [7] Arguably, the Commission's findings, in contrast to its opinion, go beyond concern with competition and address themselves to noncompetitive and consumer injury as well. It may also be that such findings would have evidentiary support in the record. But even if the findings were considered to be adequate

<sup>6</sup> The Commission did explicitly decline to assess S&H's conduct in light of one leading antitrust case. In *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379 (1967), this Court held that:

"Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. *White Motor* [v. *United States*, 372 U.S. 253 (1963)]; *Dr. Miles* [Medical Co. v. *Park & Sons Co.*, 220 U.S. 373 (1911)]. Such restraints are so obviously destructive of competition that their mere existence is enough. If the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale."

Arguably, S&H's practice is proscribed by this doctrine. When the FTC declined to rely on this precedent, however, it did so not to turn to considerations other than those embedded in the antitrust laws, but instead to look for considerations less "technical" and more deeply rooted in antitrust policy:

"We do not believe it appropriate to decide the broad competitive questions presented in this record on the narrow and technical basis of a restraint on alienation. The circumstances here are much different from that where products are transferred to a dealer for resale. They are complicated by the nature of the trading stamp scheme. It is essential in this matter, we believe, and as we have heretofore indicated, to determine whether or not there has been or may be an impairment of competition. Thus, we intend to look at the substance of the allegedly illegal practice rather than to decide the case by application of a technical formula." 1 App. 175-176.

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foundation for an opinion and order resting on unfair consequences to [\*\*\*182] consumer interests, they still fail to sustain the Commission action; for the Commission has not rendered an opinion which, by the route suggested, links its findings and its conclusions. The opinion is barren of any attempt to rest the order on its assessment of particular competitive practices or considerations of consumer interests independent of possible or actual effects on competition. Nor were any standards for doing so referred to or developed.

[\*249] [LEdHN\[8\]](#) [↑] [8]Our view is that "the considerations urged here in support of the Commission's order were not those upon which its action was based." [SEC v. Chenery Corp., 318 U.S. 80, 92 \(1943\)](#). [\*\*\*\*26] At the least the Commission has failed to "articulate any rational connection between the facts found and the choice made." [Burlington Truck Lines v. United States, 371 U.S. 156, 168 \(1962\)](#).

[LEdHN\[9\]](#) [↑] [9] [LEdHN\[10\]](#) [↑] [10] [LEdHN\[11\]](#) [↑] [11] [LEdHN\[12\]](#) [↑] [12]The Commission's action being flawed in this respect, we cannot sustain its order. [HN6](#) [↑] "The orderly functioning [\*\*908] of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." [Chenery, supra, at 94.](#) [Burlington Truck Lines, supra, at 169](#). A court cannot label a practice "unfair" under [15 U. S. C. § 45 \(a\)\(1\)](#). It can only affirm or vacate an agency's judgment to that effect. "If an order is valid only as a determination of policy [\*\*\*27] or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment." [Chenery, supra, at 88](#). And as was repeated on other occasions:

"For the courts to substitute their or counsel's discretion for that of the Commission is incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate (see [Phelps Dodge Corp. v. Labor Board, 313 U.S. 177, 197](#)), the administrative process, for the purpose of the rule is to avoid 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.' 332 U.S., at 196." [Burlington Truck Lines, supra, at 169](#).

[LEdHN\[13\]](#) [↑] [13]In these circumstances, because the Court of Appeals' judgment that S&H's practices did not violate either the letter or the spirit of the antitrust laws was not attacked and remains undisturbed here, and because the Commission's [\*250] order could not properly be sustained on other grounds, [\*\*\*\*28] the judgment of the Court of Appeals setting aside the Commission's order is affirmed. The Court of Appeals erred, however, in its construction of § 5; had it entertained the proper view of the reach of the section, the preferable course would have been to remand the case to the Commission for further proceedings. [Chenery, supra, at 95;](#) [Burlington, supra, at 174;](#) [FPC v. United Gas Pipe Line Co., 393 U.S. 71 \(1968\)](#). Accordingly, the judgment of the Court of Appeals is modified to this extent and the case is remanded to the Court of Appeals with instructions to remand it to the Commission for such further [\*\*\*183] proceedings, not inconsistent with this opinion, as may be appropriate.

So ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

## References

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[55 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, 738-746](#)

US L Ed Digest, Trademarks, Tradenames, and Unfair Trade Practices 47

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Federal Quick Index, Federal Trade Commission; Trademarks, Tradenames, and Unfair Trade Practices

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## United States v. Topco Assocs.

Supreme Court of the United States

November 16, 1971, Argued ; March 29, 1972, Decided

No. 70-82

### **Reporter**

405 U.S. 596 \*; 92 S. Ct. 1126 \*\*; 31 L. Ed. 2d 515 \*\*\*; 1972 U.S. LEXIS 167 \*\*\*\*; 173 U.S.P.Q. (BNA) 193; 1972 Trade Cas. (CCH) P73,904

UNITED STATES v. TOPCO ASSOCIATES, INC.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

**Disposition:** [319 F.Supp. 1031](#), reversed and remanded.

## **Core Terms**

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territory, chains, products, Sherman Act, per se rule, horizontal, brands, licensed, label, per se violation, practices, trademarked, marketing, rule of reason, manufacturers, cooperative, restraint of trade, territorial limits, restrictions, compete, cases, anti trust law, combinations, supermarket, grocery, courts, prices, allocated, consumer, regional

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN1\*\*](#) **[ Antitrust & Trade Law, Sherman Act**

See [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

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

### [\*\*HN2\*\*](#) **[ Per Se Rule & Rule of Reason, Sherman Act**

The U.S. Supreme Court adopts a "rule of reason" analysis for determining whether most business combinations or contracts violate the prohibitions of the Sherman Act, [15 U.S.C.S. § 1](#). An analysis of the reasonableness of particular restraints includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption.

405 U.S. 596, \*596; JGÁUÉODÁFFGÍ ÁFFGÍ LÁFSEÓaÉGAÁ FÍ ÁFFÍ FÍ LÁJÍ GÁVÉSÓYÓÁÍ Í ÁFFÍLÁ 73 U.S.P.Q.  
 (BNA) 193, \*\*\*\*\*193

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

### **HN3** Price Fixing & Restraints of Trade, Horizontal Market Allocation

A per se violation of the Sherman Act, [15 U.S.C.S. § 1](#), is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. Such concerted action is usually termed a horizontal restraint, in contradistinction to combinations of persons at different levels of the market structure, e. g., manufacturers and distributors, which are termed vertical restraints. Horizontal territorial limitations are naked restraints of trade with no purpose except stifling of competition. Such limitations are per se violations of the Sherman Act.

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Antitrust & Trade Law > Sherman Act > General Overview

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

### **HN4** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

With respect to price fixing, another per se violation of the Sherman Act, [15 U.S.C.S. § 1](#), the reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. A similar observation can be made with regard to territorial limitations.

## **Lawyers' Edition Display**

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### **Summary**

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(BNA) 193, \*\*\*\*\*193

The government instituted an action in the United States District Court for the Northern District of Illinois against a co-operative association of approximately 25 small-and medium-sized regional supermarket chains, alleging that 1 of the Sherman Act was violated by the association's operations whereby association members, who controlled the operations of the association and who had a veto power of sorts as to new members, were given exclusive territories for the sale at retail of the association's private label products, and whereby the members, upon obtaining the association's permission to sell such products at wholesale, were required to agree to restrict such sales to a specific geographic area and to sell under any conditions imposed by the association. After trial on the merits, the District Court, applying the "rule of reason" pertinent in most restraint of trade cases, entered judgment for the association, concluding that the association's restrictions as to exclusive market territories and wholesaling of its private label products were procompetitive as fostering competition between the association's members and national chains or other larger supermarket chains, even though such restrictions prevented competition between association members in the sale of the association's private label goods ([319 F Supp 1031](#)).

On direct appeal, the United States Supreme Court reversed and remanded for entry of an appropriate decree. In an opinion by Marshall, J., expressing the views of five members of the court, it was held that (1) certain business relationships, such as "horizontal restraints" between competitors at the same level of the market structure to allocate market territories, were per se violations of the Sherman Act without regard to their reasonableness, (2) horizontal territorial limitations, even though unaccompanied by price fixing, were per se violations of the Act, (3) in the case at bar, the territorial restrictions as to retailing and wholesaling of the association's private label products constituted horizontal restraints and thus were per se violations of the Act, and (4) the association's other restrictions on the right of members to wholesale the association's private label goods violated the Act as improper regulations of the customers to whom association members might sell the association's private label goods.

Blackmun, J., concurring in the result, noted that although the court's conclusion had anomalous aspects since it tended to stultify competition between the association's members and larger chains, contrary to public interest, nevertheless the per se rule was firmly established and any relief therefrom must come by way of legislation.

Burger, Ch. J., dissented, expressing the views that (1) the territorial restrictions of the supermarket association had the lawful principal purpose of enhancing the members' abilities to compete with larger chains, and the District Court, after reviewing the relevant economic considerations and after examining the association's practices under the "rule of reason," had concluded that the relief sought by the government would substantially diminish competition in the supermarket field, (2) horizontal divisions of markets, without more, had not previously been held to constitute per se violations of the Sherman Act, (3) such a per se rule should not be laid down without regard to the impact which the condemned practices might have on competition, and (4) a per se rule should not be promulgated to govern cases, such as the instant case, involving division of market agreements which contain no price-fixing features and which are concerned only with trademark products that are not in a monopoly or near-monopoly position with respect to competing brands.

Powell and Rehnquist, JJ., did not participate.

## **Headnotes**

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RESTRAINTS OF TRADE AND MONOPOLIES §53 > market territories -- horizontal restraints -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C]

The operations of a co-operative association of approximately 25 small- and medium-sized regional supermarket chains whereby the members, who controlled the operations of the association and who had a veto power of sorts as to new members, were given exclusive territories for the sale at retail of the association's private label products, constitute a horizontal restraint of trade and therefore a per se violation of 1 of the Sherman Act ([15 USC 1](#)), and a Federal District Court errs in applying a "rule of reason" in concluding that such restraint is not illegal, since, even

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though the territorial limitations prevented competition between members of the association in the sale of the association's private label goods, nevertheless they fostered competition between the members of the association and national chains or other large supermarket chains; similar restrictions limiting sales at wholesale of the association's private label goods to the member's exclusive territory must also fall as violative of the Sherman Act for the same reasons.

APPEAL AND ERROR §1340 > antitrust suit -- reviewable issues -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

On appeal from a Federal District Court's judgment for an association of supermarket chains in a suit by the government alleging violation of 1 of the Sherman Act ([15 USC 1](#)) by the association's designation of exclusive territories for retail and wholesale sale by its members of the association's private label products, the United States Supreme Court is not barred from considering the issue whether a requirement that the association's permission be obtained before a member could sell at wholesale in designated territories violated the Sherman Act as a restriction on customers as well as an unlawful territorial restriction, where (1) the District Court permitted the government to pursue such point on the basis that even though the complaint did not cover customer limitations, the complaint could be amended if the limitations were proved, (2) the defendant association acquiesced in such procedure and both sides dealt with customer limitations in examining witnesses, and (3) the District Court made specific findings and conclusions with respect to the totality of the restraints on wholesaling--it being immaterial that the complaint was never formally amended.

RESTRAINTS OF TRADE AND MONOPOLIES §16 > Sherman Act -- reasonableness of restraint -- > Headnote:

[LEdHN\[3\]](#) [3]

Under the "rule of reason" analysis for determining whether most business combinations or contracts violate the prohibitions of the Sherman Act (15 USC 1-7), the analysis of the reasonableness of particular restraints includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effect, and the history of the restraint and the reasons for its adoption.

RESTRAINTS OF TRADE AND MONOPOLIES §16 > per se unreasonableness -- > Headnote:

[LEdHN\[4\]](#) [4]

The principle of per se unreasonableness, under which certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal under the Sherman Act (15 USC 1-7) without elaborate inquiry as to the precise harm they have caused or the business excuse for their use, not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but also avoids the necessity for complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable.

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RESTRAINTS OF TRADE AND MONOPOLIES §53 > market territories -- horizontal and vertical restraints -- > Headnote:  
[LEdHN\[5\]](#) [5]

An agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition is a per se violation of 1 of the Sherman Act ([15 USC 1](#)); such concerted action is a "horizontal" restraint, in contradistinction to combination of persons at different levels of the market structure, for example, manufacturers and distributors, which are "vertical restraints."

RESTRAINTS OF TRADE AND MONOPOLIES §53 > horizontal territorial limitations -- > Headnote:  
[LEdHN\[6\]](#) [6]

Horizontal territorial limitations are naked restraints of trade with no purpose except stifling of competition, and such limitations are per se violations of the Sherman Act (15 USC 1-7).

RESTRAINTS OF TRADE AND MONOPOLIES §53 > horizontal territorial limitations -- > Headnote:  
[LEdHN\[7A\]](#) [7A] [LEdHN\[7B\]](#) [7B]

Horizontal territorial limitations--even though unaccompanied by price fixing--are per se violations of the Sherman Act ([15 USC 1-7](#)).

RESTRAINTS OF TRADE AND MONOPOLIES §16 > per se unreasonableness -- > Headnote:  
[LEdHN\[8\]](#) [8]

An important reason for the formulation of rules of per se unreasonableness under the Sherman Act (15 USC 1-7) of certain agreements or practices is the inability of courts to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector.

RESTRAINTS OF TRADE AND MONOPOLIES §15 > intent or purpose of restraint -- > Headnote:  
[LEdHN\[9\]](#) [9]

Naked restraints of trade are not to be tolerated merely because they are well intended or because they are allegedly developed to increase competition.

RESTRAINTS OF TRADES AND MONOPOLIES §4 > antitrust laws -- freedom to compete -- > Headnote:  
[LEdHN\[10\]](#) [10]

The freedom guaranteed under antitrust laws in general, and the Sherman Act (15 USC 1-7) in particular, to each and every business, no matter how small, is the freedom to compete, that is, to assert with vigor, imagination,

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 (BNA) 193, \*\*\*\*\*193

devotion, and ingenuity whatever economic muscle it can muster; implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.

RESTRAINTS OF TRADE AND MONOPOLIES §36 > price fixing -- > Headnote:

[LEdHN\[11\]](#) [↓] [11]

Price fixing is a per se violation of the Sherman Act (15 USC 1-7).

COURTS §141 > RESTRAINTS OF TRADE AND MONOPOLIES §1 > controlling competition -- Congress -- > Headnote:

[LEdHN\[12\]](#) [↓] [12]

Any decision to sacrifice competition in one portion of the economy for greater competition in another portion, must be made by Congress, not by private forces or by the courts.

RESTRAINTS OF TRADE AND MONOPOLIES §51 > selection of customers -- territorial restrictions -- > Headnote:

[LEdHN\[13\]](#) [↓] [13]

The restrictions of a co-operative association of approximately 25 small- and medium-sized regional supermarket chains concerning sales at wholesale of the association's private label products--members being required to obtain the association's wholesale, and if permission is obtained, being required to agree to restrict such sales to a specific geographic area and to sell under any conditions imposed by the association--violate 1 of the Sherman Act ([15 USC 1](#)) as improper regulations of the customers to whom members of the association may sell the association's private label goods.

## Syllabus

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The United States brought this injunction action charging a violation of [§ 1](#) of the Sherman Act by appellee, Topco, a cooperative association of about 25 small and medium-sized independent regional supermarket chains operating in 33 States. As its members' purchasing agent appellee procures more than 1,000 different items, most of which have brand names owned by Topco. The members' combined retail sales in 1967 were \$ 2.3 billion, exceeded by only three national grocery chains. A member's average market share in its area is about 6% and its competitive position is frequently as strong as that of any other chain. The members own equal amounts of Topco's common stock (the voting stock), choose its directors, and completely control the association's operations. Topco's bylaws establish an "exclusive" category of territorial licenses, under which most members' licenses are issued and the two other membership categories have [\*\*\*\*2] proved to be *de facto* exclusive. Since no member under this system may sell Topco-brand products outside the territory in which it is licensed, expansion into another member's territory is in practice permitted only with the other member's consent, and since a member in effect has a veto power over admission of a new member, members can control actual or potential competition in the territorial areas in which they are concerned. Topco members are prohibited from selling any products supplied by the association at wholesale, whether trade-marked or not, without securing special permission, which is not granted without the consent of other interested licensees (usually retailers) and then the member must agree to restrict Topco product

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sales to a specific area and under certain conditions. The Government charged that Topco's scheme of dividing markets violates the Sherman Act because it operates to prohibit competition in Topco-brand products among retail grocery chains, and also challenged Topco's restrictions on wholesaling. Topco contended that it needs territorial divisions to maintain its private-label program and to enable it to compete with the larger chains; that the [\*\*\*\*3] association could not exist if the territorial divisions were not exclusive; and that the restrictions on competition in Topco-brand sales enable members to meet larger chain competition. The District Court, agreeing with Topco, upheld the restrictive practices as reasonable and pro-competitive. *Held:* The Topco scheme of allocating territories to minimize competition at the retail level is a horizontal restraint constituting a *per se* violation of [§ 1](#) of the Sherman Act, and the District Court erred in applying a rule of reason to the restrictive practices here involved. [United States v. Sealy, Inc., 388 U.S. 350](#). Topco's limitations upon reselling at wholesale are for the same reason *per se* invalid under [§ 1](#). Pp. 606-612.

**Counsel:** Howard E. Shapiro argued the cause for the United States. With him on the briefs were Solicitor General Griswold and Deputy Assistant Attorney General Comegys.

Victor E. Grimm argued the cause for appellee. With him on the brief were John T. Loughlin and William R. Carney.

**Judges:** Marshall, J., delivered the opinion of the Court, in which Douglas, Brennan, Stewart, and White, JJ., joined. Blackmun, J., filed an opinion [\*\*\*\*4] concurring in the result, post, p. 612. Burger, C. J., filed a dissenting opinion, post, p. 613. Powell and Rehnquist, JJ., took no part in the consideration or decision of the case.

**Opinion by:** MARSHALL

## Opinion

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[193] [\*597] [\*\*520] [\*\*1128] MR. JUSTICE MARSHALL delivered the opinion of the Court.

[LEdHN\[1A\]](#) [1A]The United States brought this action for injunctive relief against alleged violation by Topco Associates, Inc. (Topco), of [§ 1](#) of the Sherman Act, 26 Stat. 209, as amended, [15 U. S. C. § 1](#). Jurisdiction was grounded in [§ 4](#) of the Act, [15 U. S. C. § 4](#). Following a trial on the merits, the United States District Court for the Northern District of Illinois entered judgment for [Topco, 319 F.Supp. 1031](#), and the United States appealed directly to this Court pursuant to § 2 of the Expediting Act, 32 Stat. 823, as amended, [15 U. S. C. § 29](#). We noted probable jurisdiction, [402 U.S. 905](#) (1971), and we now reverse the judgment of the District Court.

[\*598] I

Topco is a cooperative association of approximately [\*\*\*\*5] 25 small and medium-sized regional supermarket chains that operate [\*\*1129] stores in some 33 States.<sup>1</sup> Each of the member chains operates independently; there is no pooling of earnings, profits, capital, management, or advertising resources. No grocery business is conducted under the Topco name. Its basic function is to serve as a purchasing agent for its members.<sup>2</sup> In this capacity, it procures and distributes to the members more than 1,000 different food and related nonfood items, most of which are distributed under brand names owned by Topco. The association does not itself own any manufacturing, processing, or warehousing facilities, and the items that it procures for members are usually shipped directly from the packer or manufacturer to the members. Payment is made either to Topco or directly to the manufacturer at a cost that is virtually the same for the members as for Topco itself.

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<sup>1</sup> Topco, which is referred to at times in this opinion as the "association," is actually composed of 23 chains of supermarket retailers and two retailer-owned cooperatives.

<sup>2</sup> In addition to purchasing various items for its members, Topco performs other related functions: e. g., it insures that there is adequate quality control on the products that it purchases; it assists members in developing specifications on certain types of products (e. g., equipment and supplies); and it also aids the members in purchasing goods through other sources.

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[\*\*\*\*6] All of the stock in Topco is owned by the members, with the common stock, the only stock having voting rights, being equally distributed. The board of directors, which controls the operation of the association, is drawn from the members and is normally composed [194] of high-ranking executive officers of member chains. It is the board that elects the association's officers and appoints [\*599] committee members, and it is from the board that the principal executive officers of Topco must be drawn. Restrictions on the alienation of stock and the procedure for selecting all important officials of the association from within the ranks of its members give the members complete and unfettered control over the operations of the association.

Topco was founded in the 1940's by a group of small, local grocery chains, independently owned and operated, that desired to cooperate to obtain high quality merchandise under private labels in order to compete [\*\*\*521] more effectively with larger national and regional chains.<sup>3</sup> [\*\*\*\*8] With a line of canned, dairy, and other products, the [\*600] association began. It added frozen foods in 1950, fresh produce in 1958, more general merchandise equipment [\*\*\*\*7] and supplies in 1960, and a branded bacon and carcass beef selection program in 1966. By 1964, Topco's members had combined retail sales of more than \$ 2 [\*1130] billion; by 1967, their sales totaled more than \$ 2.3 billion, a figure exceeded by only three national grocery chains.<sup>4</sup>

Members of the association vary in the degree of market share that they possess in their respective areas. The range is from 1.5% to 16%, with the average being approximately 6%. While it is difficult to compare these figures with the market shares of larger regional and national chains because of the absence in the record of accurate statistics for these chains, there is much evidence in the record that Topco members are frequently in as strong a competitive position in their respective areas as any other chain. The strength of this competitive position is due, in some measure, to the success of Topco-brand products. Although only 10% of the total goods sold by Topco members bear the association's brand names, the profit on these goods is substantial and their very existence has improved the competitive potential of Topco members with respect to other large and powerful chains.

It is apparent that from meager beginnings approximately a quarter of a century ago, Topco has developed into a purchasing association wholly owned and operated [\*\*\*\*9] by member chains, which possess much economic muscle, individually as well as cooperatively.

## II

Section 1 of the Sherman Act provides, in relevant part:

**HN1** [↑] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of [\*601] trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

<sup>3</sup>The founding members of Topco were having difficulty competing with larger chains. This difficulty was attributable in some degree to the fact that the larger chains were capable of developing their own private-label programs.

Private-label products differ from other brand-name products in that they are sold at a limited number of easily ascertainable stores. A&P, for example, was a pioneer in developing a series of products that were sold under an A&P label and that were only available in A&P stores. It is obvious that by using private-label products, a chain can achieve significant cost economies in purchasing, transportation, warehousing, promotion, and advertising. These economies may afford the chain opportunities for offering private-label products at lower prices than other brand-name products. This, in turn, provides many advantages of which some of the more important are: a store can offer national-brand products at the same price as other stores, while simultaneously offering a desirable, lower priced alternative; or, if the profit margin is sufficiently high on private-brand goods, national-brand products may be sold at reduced price. Other advantages include: enabling a chain to bargain more favorably with national-brand manufacturers by creating a broader supply base of manufacturers, thereby decreasing dependence on a few, large national-brand manufacturers; enabling a chain to create a "price-mix" whereby prices on special items can be lowered to attract customers while profits are maintained on other items; and creation of general goodwill by offering lower priced, higher quality goods.

<sup>4</sup>The three largest chains are A&P, Safeway, and Kroger.

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The United States charged that, beginning at least as early as 1960 [\*\*\*522] and continuing up to the time that the complaint was filed, Topco had combined and conspired with its members to violate S.1<sup>5</sup> in two respects. First, the Government alleged that there existed:

"a continuing agreement, understanding and concert of action among the co-conspirator member firms acting through Topco, the substantial terms of which have been and are that each co-conspirator member firm will sell Topco-controlled brands only within the marketing territory allocated to it, and will refrain from selling Topco-controlled brands outside such marketing territory."

The division of marketing territories to which the complaint refers [\*\*\*\*10] consists of a number of practices by the association.

Article IX, § 2, of the Topco bylaws establishes [195] three categories of territorial licenses that members may secure from the association:

"(a) *Exclusive* -- An exclusive territory is one in which the member is licensed to sell all products bearing specified trademarks of the Association, to the exclusion of all other persons.

"(b) *Non-exclusive* -- A non-exclusive territory is one in which a member is licensed to sell all products bearing specified trademarks of the Association, but not to the exclusion of others who may also be licensed to sell products bearing the same trademarks of the Association in the same territory.

"(c) *Coextensive* -- A coextensive territory is one [\*602] in which two (2) or more members are licensed to sell all products [\*\*\*\*11] bearing specified trademarks of the Association to the exclusion of all other persons. . ."

When applying for membership, a chain must designate the type of license that it desires. Membership must first be approved by the board of directors, and thereafter by an affirmative vote of 75% [\*\*1131] of the association's members. If, however, the member whose operations are closest to those of the applicant, or any member whose operations are located within 100 miles of the applicant, votes against approval, an affirmative vote of 85% of the members is required for approval. Bylaws, Art. I, § 5. Because, as indicated by the record, members cooperate in accommodating each other's wishes, the procedure for approval provides, in essence, that members have a veto of sorts over actual or potential competition in the territorial areas in which they are concerned.

Following approval, each new member signs an agreement with Topco designating the territory in which that member may sell Topco-brand products. No member may sell these products outside the territory in which it is licensed. Most licenses are exclusive, and even those denominated "coextensive" or "non-exclusive" prove [\*\*\*\*12] to be *de facto* exclusive. Exclusive territorial areas are often allocated to members who do no actual business in those areas on the theory that they may wish to expand at some indefinite future time and that expansion would likely be in the direction of the allocated territory. When combined with each member's veto power over new members, provisions for exclusivity work effectively to [\*\*\*523] insulate members from competition in Topco-brand goods. Should a member violate its license agreement and sell in areas other than those in which it is licensed, its membership can be terminated under Art. IV, §§ 2 (a) and 2 (b) of the [\*603] bylaws. Once a territory is classified as exclusive, either formally or *de facto*, it is extremely unlikely that the classification will ever be changed. See Bylaws, Art. IX.

LEdHN[2A] [2A]The Government maintains that this scheme of dividing markets violates the Sherman Act because it operates to prohibit competition in Topco-brand products among grocery chains engaged in retail operations. The Government also makes a subsidiary challenge to Topco's practices regarding [\*\*\*\*13] licensing members to sell at wholesale. Under the bylaws, members are not permitted to sell any products supplied by the association at wholesale, whether trademarked or not, without first applying for and receiving special permission from the association to do so.<sup>6</sup> [\*\*\*14] Before permission is granted, other licensees (usually retailers), whose

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<sup>5</sup>Topco was named in the complaint as the sole defendant, but the complaint clearly charged that its members, while not defendants, were coconspirators in Topco's violation of the Sherman Act.

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interests may potentially be affected by wholesale operations, are consulted as to their wishes in the matter. If permission is obtained, the member must agree to restrict [\*604] the sale of Topco products to a specific geographic area and to sell under any conditions imposed by the association. Permission to wholesale has often been sought by members, only to be denied by the association. The Government contends that this amounts not only to a territorial restriction violative of the Sherman Act, but also to a restriction on [\*\*1132] customers that in itself is violative of the Act.<sup>7</sup>

LEdHN[2B] [↑] [2B]

[196] From the inception of this lawsuit, Topco accepted as true most of the Government's allegations regarding territorial divisions and restrictions on wholesaling, although [\*\*\*524] it differed greatly with the Government on the conclusions, both factual and legal, to be drawn from these facts.

Topco's answer to the complaint is [\*\*\*\*15] illustrative of its posture in the District Court and before this Court:

"Private label merchandising is a way of economic life in the food retailing industry, and exclusivity is the essence of a private label program; without exclusivity, a private label would not be private. Each national and large regional chain has its own exclusive private label products in addition to the nationally advertised brands which all chains sell. Each such chain relies upon the exclusivity of its own private label line to differentiate its private [\*605] label products from those of its competitors and to attract and retain the repeat business and loyalty of consumers. Smaller retail grocery stores and chains are unable to compete effectively with the national and large regional chains without also offering their own exclusive private label products.

....

"The only feasible method by which Topco can procure private label products and assure the exclusivity thereof is through trademark licenses specifying the territory in which each member may sell such trademarked products." Answer, App. 11.

Topco essentially maintains that it needs territorial divisions to compete with larger chains; [\*\*\*16] that the association could not exist if the territorial divisions were anything but exclusive; and that by restricting competition in the sale of Topco-brand goods, the association actually increases competition by enabling its members to compete successfully with larger regional and national chains.

<sup>6</sup> Article IX, § 8, of the bylaws provides, in relevant part:

"Unless a member's membership and licensing agreement provides that such member may sell at wholesale, a member may not wholesale products supplied by the Association. If a membership and licensing agreement permits a member to sell at wholesale, such member shall control the resale of products bearing trademarks of the Association so that such sales are confined to the territories granted to the member, and the method of selling shall conform in all respects with the Association's policies."

Shortly before trial, Topco amended this bylaw with an addition that permitted any member to wholesale in the exclusive territories in which it retailed. But the restriction remained the same in all other cases.

It is apparent that this bylaw on its face applies whether or not the products sold are trademarked by Topco. Despite the fact that Topco's general manager testified at trial that, in practice, the restriction is confined to Topco-branded products, the District Court found that the bylaw is applied as written. We find nothing clearly erroneous in this finding. Assuming, *arguendo*, however, that the restriction is confined to products trademarked by Topco, the result in this case would not change.

<sup>7</sup> When the Government first raised this point in the District Court, Topco objected on the ground that it was at variance with the charge in the complaint. The District Court apparently agreed with Topco that the complaint did not cover customer limitations, but permitted the Government to pursue this line on the basis that if the limitations were proved, the complaint could later be amended. App. 141. Topco acquiesced in this procedure, and both sides dealt with customer limitations in examining witnesses. The District Court made specific findings and conclusions with respect to the totality of the restraints on wholesaling. In light of these facts, the additional fact that the complaint was never formally amended should not bar our consideration of the issue.

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The District Court, considering all these things relevant to its decision, agreed with Topco. It recognized that the panoply of restraints that Topco imposed on its members worked to prevent competition in Topco-brand products,<sup>8</sup> but concluded that

"whatever anti-competitive effect these practices may have on competition [\*\*1133] in the sale of Topco private [\*606] label brands is far outweighed by the increased ability of Topco members to compete both with the national chains and other supermarkets operating in their respective territories." [319 F.Supp. 1031, 1043 \(1970\)](#).

The court held that Topco's practices were procompetitive and, therefore, consistent with the purposes of the [\*\*\*525] antitrust laws. But we conclude that the District Court used an improper analysis in reaching its result.

[\*\*\*\*17] III

LEdHN[3] [3]On its face, § 1 of the Sherman Act appears to bar any combination of entrepreneurs so long as it is "in restraint of trade." Theoretically, all manufacturers, distributors, merchants, sellers, and buyers could be considered as potential competitors of each other. Were § 1 to be read in the narrowest possible way, any commercial contract could be deemed to violate it. [Chicago Board of Trade v. United States, 246 U.S. 231, 238 \(1918\)](#) (Brandeis, J.). The history underlying the formulation of the antitrust laws led this Court to conclude, however, that Congress did not intend to prohibit all contracts, nor even all contracts that might in some insignificant degree or attenuated sense restrain trade or competition. In lieu of the narrowest possible reading of § 1, HN2 [4] the Court adopted a "rule of reason" analysis for determining [\*607] whether most business combinations or contracts violate the [197] prohibitions of the Sherman Act. [Standard Oil Co. v. United States, 221 U.S. 1 \(1911\)](#). [\*\*\*\*18] An analysis of the reasonableness of particular restraints includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption. [Chicago Board of Trade v. United States, supra, at 238](#).

LEdHN[4] [4]While the Court has utilized the "rule of reason" in evaluating the legality of most restraints alleged to be violative of the Sherman Act, it has also developed the doctrine that certain business relationships are *per se* violations of the Act without regard to a consideration of their reasonableness. In [Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 \(1958\)](#), Mr. Justice Black explained the appropriateness of, and the need for, *per se* rules:

"There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse [\*\*\*\*19] for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken."

<sup>8</sup>The District Court recognized that "the government has introduced evidence indicating that some applications by Topco members to expand into territories assigned to other members have been denied," [319 F.Supp. 1031, 1042](#), but concluded that these decisions by Topco did not have an appreciable influence on the decision of members as to whether or not to expand. Topco expands on this conclusion in its brief by asserting that "the evidence is uncontradicted that a member has never failed to build a new store because it was unable to obtain a license." Brief for Appellee 18 n. 18. The problem with the conclusion of the District Court and the assertion by Topco is that they are wholly inconsistent with the notion that territorial divisions are crucial to the existence of Topco, as urged by the association and found by the District Court. From the filing of its answer to the argument before this Court, Topco has maintained that without a guarantee of an exclusive territory, prospective licensees would not join Topco and present licensees would leave the association. It is difficult to understand how Topco can make this argument and simultaneously urge that territorial restrictions are an unimportant factor in the decision of a member on whether to expand its business.

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LEdHN[5] [5] LEdHN[6] [6] It is only after considerable experience with certain business relationships that courts classify them as *per se* [\*608] violations of the Sherman Act. See generally Van Cise, *The Future of Per Se in Antitrust Law*, 50 Va. L. Rev. 1165 (1964). One of the classic examples of HN3 [1] a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in [\*\*\*20] order to minimize competition. [\*\*\*526] Such concerted action is usually termed a "horizontal" restraint, in contradistinction to combinations of persons at different levels of the market structure, e. g., manufacturers and distributors, which are termed "vertical" restraints. This Court has reiterated time and time again that "horizontal territorial limitations . . . are naked restraints of trade with no purpose [\*\*1134] except stifling of competition." White Motor Co. v. United States, 372 U.S. 253, 263 (1963). Such limitations are *per se* violations of the Sherman Act. See Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899), aff'd 85 F. 271 (CA6 1898) (Taft, J.); United States v. National Lead Co., 332 U.S. 319 (1947); Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Northern Pacific R. Co. v. United States, *supra*; Citizen Publishing Co. v. United States, 394 U.S. 131 (1969); United States v. Sealy, Inc., 388 U.S. 350 (1967); United States v. Arnold, Schwinn & Co., 388 U.S. 365, 390 (1967) [\*\*\*21] (STEWART, J., concurring in part and dissenting in part); Serta Associates, Inc. v. United States, 393 U.S. 534 (1969), aff'd 296 F.Supp. 1121, 1128 (ND Ill. 1968).

LEdHN[1B] [1B] We think that it is clear that the restraint in this case is a horizontal one, and, therefore, a *per se* violation of § 1. The District Court failed to make any determination as to whether there were *per se* horizontal territorial restraints in this case and simply applied a rule of reason in reaching its conclusions that the restraints were not illegal. See, e. g., Comment, *Horizontal Territorial Restraints and the Per Se Rule*, 28 Wash. & Lee L. Rev. 457, 469 (1971). In so doing, the District Court erred.

[\*609] LEdHN[7A] [7A] United States v. Sealy, Inc., supra, is, in fact, on all fours with this case. Sealy licensed manufacturers of mattresses and bedding to make and sell products using the Sealy trademark. Like Topco, Sealy was a corporation owned almost entirely by its licensees, [\*\*\*22] who elected the Board of Directors and controlled the business. Just as in this case, Sealy agreed with the licensees not to license other manufacturers or sellers to sell Sealy-brand products in a designated territory in exchange for the promise of the licensee who sold in that territory not to expand its sales beyond the area demarcated by Sealy. The Court held that this was a horizontal territorial restraint, which was *per se* violative of the Sherman Act.<sup>9</sup>

LEdHN[7B] [7B]

LEdHN[8] [8] Whether or not we would decide this case the same way under the rule of reason used by the District [\*\*\*23] Court is irrelevant to the issue before us. The fact is that courts are of limited utility in examining difficult economic problems.<sup>10</sup> Our inability to weigh, in [\*\*\*527] any meaningful [\*610] [198] sense, destruction

<sup>9</sup> It is true that in *Sealy* the Court dealt with price fixing as well as territorial restrictions. To the extent that *Sealy* casts doubt on whether horizontal territorial limitations, unaccompanied by price fixing, are *per se* violations of the Sherman Act, we remove that doubt today.

<sup>10</sup> There has been much recent commentary on the wisdom of *per se* rules. See, e. g., Comment, *Horizontal Territorial Restraints and the Per Se Rule*, 28 Wash. & Lee L. Rev. 457 (1971); Averill, *Sealy, Schwinn and Sherman One: An Analysis and Prognosis*, 15 N. Y. L. F. 39 (1969); Note, *Selected Antitrust Problems of the Franchisor: Exclusive Arrangements, Territorial Restrictions, and Franchise Termination*, 22 U. Fla. L. Rev. 260, 286 (1969); Sadd, *Antitrust Symposium: Territorial and Customer Restrictions After Sealy and Schwinn*, 38 U. Cin. L. Rev. 249, 252-253 (1969); Bork, *The Rule of Reason and the Per Se Concept*, pt. 1, *Price Fixing and Market Division*, 74 Yale L. J. 775 (1965).

Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.

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of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules.

[\*\*\*\*24] *LEDHN[9]* [9] In applying these rigid rules, the Court has consistently rejected the notion that [\*\*1135] naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition. E. g., *United States v. General Motors Corp.*, 384 U.S. 127, 146-147 (1966); *United States v. Masonite Corp.*, 316 U.S. 265 (1942); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941).

[LEdHN10](#) [10] Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the [Bill of Rights](#) is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete -- to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed [\*\*\*\*25] with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy. Cf. [United States v. Philadelphia National Bank](#), 374 U.S. 321, 371 (1963).

The District Court determined that by limiting the freedom of its individual members to compete with each other, Topco was doing a greater good by fostering competition between members and other large supermarket chains. But, the fallacy in this is that Topco has no authority under the Sherman Act to determine the [\*611] respective values of competition in various sectors of the economy. On the contrary, the Sherman Act gives to each Topco member and to each prospective member the right to ascertain for itself whether or not competition with other supermarket chains is more desirable than competition in the sale of Topco-brand products. Without territorial restrictions, Topco members may indeed "[cut] each other's throats." Cf. *White Motor Co., supra, at 278* (Clark, J., dissenting). But, we have never found this possibility sufficient to warrant condoning horizontal restraints of trade.

[\*\*\*26] [LEdHN11](#) [↑] [11] The Court has previously noted [HN4](#) [↑] with respect to price fixing, another *per se* violation of the Sherman Act, that:

"[\*\*\*528] The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed." *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927).

A similar observation can be made with regard to territorial limitations. *White Motor Co., supra*, at 265 n. 2 (BRENNAN, J., concurring).

**L****E****d****H****N****[12]** [12] There have been tremendous departures from the notion of a free-enterprise system as it was originally conceived in this country. These departures have been the product of congressional action and the will of the people. If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that must be made [\*\*\*\*27] by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decisionmaking. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to [\*612] bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.

**LEdHN[1C]** [1C] Just as the territorial restrictions on retailing Topco-brand products must fall, so must the territorial restrictions on wholesaling. The considerations are **[\*\*1136]** the same, and the Sherman Act requires identical results.

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[LEdHN\[13\]](#) [13] We also strike down Topco's other restrictions on the right of its members to wholesale goods. These restrictions amount to regulation of the customers to whom members of Topco may sell Topco-brand goods. Like territorial restrictions, limitations on customers [\*\*\*\*28] are intended to limit intra-brand competition and to promote inter-brand competition. For the reasons previously discussed, the arena in [199] which Topco members compete must be left to their unfettered choice absent a contrary congressional determination. [United States v. General Motors Corp., \*supra\*](#); cf. [United States v. Arnold, Schwinn & Co., \*supra\*](#); [United States v. Masonite Corp., \*supra\*](#); [United States v. Trenton Potteries, \*supra\*](#). See also, [White Motor Co., \*supra\*, at 281-283](#) (Clark, J., dissenting).

We reverse the judgment of the District Court and remand the case for entry of an appropriate decree.

*It is so ordered.*

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

**Concur by: BLACKMUN**

## Concur

MR. JUSTICE BLACKMUN, concurring in the result.

The conclusion the Court reaches has its anomalous aspects, for surely, as the District Court's findings make clear, today's decision in the Government's favor will tend to stultify Topco members' competition with the great and larger chains. The bigs, therefore, should [\*\*\*529] find it easier to get [\*\*\*\*29] bigger and, as a consequence, reality [\*613] seems at odds with the public interest. The *per se* rule, however, now appears to be so firmly established by the Court that, at this late date, I could not oppose it. Relief, if any is to be forthcoming, apparently must be by way of legislation.

## **Dissent by: BURGER**

Dissent

MR. CHIEF JUSTICE BURGER, dissenting.

This case does not involve restraints on interbrand competition or an allocation of markets by an association with monopoly or near-monopoly control of the sources of supply of one or more varieties of staple goods. Rather, we have here an agreement among several small grocery chains to join in a cooperative endeavor that, in my view, has an unquestionably lawful principal purpose; in pursuit of that purpose they have mutually agreed to certain minimal ancillary restraints that are fully reasonable in view of the principal purpose and that have never before today been held by this Court to be *per se* violations of the Sherman Act.

In joining in this cooperative endeavor, these small chains did not agree to the restraints here at issue in order to make it possible for them to exploit an already established line of products [\*\*\*\*30] through noncompetitive pricing. There was no such thing as a Topco line of products until this cooperative was formed. The restraints to which the cooperative's members have agreed deal only with the marketing of the products in the Topco line, and the only function of those restraints is to permit each member chain to establish, within its own geographical area and through its own local advertising and marketing efforts, a local consumer awareness of the trademarked family of products as that member's "private label" line. The goal sought was the enhancement of the individual members' abilities to compete, albeit to a modest degree, with the large national chains which had been successfully marketing private-label lines for [\*614] several years. The sole reason for a cooperative endeavor was to make economically feasible such things as quality control, large quantity purchases at bulk prices, the development of attractively printed labels, and the ability to offer a number of different lines of trademarked products. All these

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(BNA) 193, \*\*\*\*193

things, of course, are feasible for the large national chains operating individually, but [\*\*1137] they are beyond the reach of the small operators [\*\*\*\*31] proceeding alone.<sup>1</sup>

After a careful review of the economic considerations bearing upon this case, the District Court determined that "the relief which the government here seeks would not increase competition in Topco private label brands"; on the contrary, such relief "would substantially diminish competition in the supermarket field." [319 F.Supp. 1031, 1043](#). This Court has not today determined, on the basis of an examination of the underlying economic realities, that the District Court's conclusions are incorrect. Rather, the majority holds that the [\*\*\*530] District Court had no business examining Topco's [\*\*\*\*32] practices under the "rule of reason"; it should not have sought to determine whether Topco's practices did in fact restrain trade or commerce within the meaning of [§ 1](#) of the Sherman Act; it should have found no more than that those practices involve a "horizontal division of markets" and are, by that very fact, *per se* violations of the Act.

I do not believe that our prior decisions justify the result reached by the majority. Nor do I believe that a new *per se* rule should be established in disposing of this case, for the judicial convenience and ready predictability [\*615] that are made possible by *per se* rules are not such overriding considerations in [antitrust law](#) as to justify their promulgation without careful prior consideration of the relevant economic realities in the light of the basic policy and goals of the Sherman Act.

I

I deal first with the cases upon which the majority relies in stating that "this Court has reiterated time and time again that 'horizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition.' [White Motor Co. v. United States, 372 U.S. 253, 263 \(1963\)](#)." [\*\*\*33] *White Motor*, of course, laid down no *per se* rule; nor were any horizontal territorial limitations involved in that case. Indeed, it was in *White Motor* that this Court reversed the District Court's holding that vertically imposed territorial limitations were *per se* violations, explaining that "we need to know more than we do about the actual impact of these arrangements [200] on competition to decide whether they . . . should be classified as *per se* violations of the Sherman Act." [372 U.S., at 263](#). The statement from the *White Motor* opinion quoted by the majority today was made without citation of authority and was apparently intended primarily to make clear that the facts then before the Court were not to be confused with horizontally imposed territorial limitations. To treat dictum in that case as controlling here would, of course, be unjustified.

Having quoted this dictum from *White Motor*, the Court then cites eight cases for the proposition that horizontal territorial limitations are *per se* violations of the Sherman Act. One of these cases, [Northern Pacific R. Co. v. United States, 356 U.S. 1 \(1958\)](#), dealt exclusively [\*\*\*\*34] with a prohibited tying arrangement and is improperly cited as a case concerned with a division of [\*616] markets.<sup>2</sup> Of the remaining seven cases, four involved an aggregation of trade restraints that included price-fixing agreements. [Timken Roller Bearing Co. v. United States, 341 U.S. 593](#) [\*\*11381] (1951); [United States v. Sealy, Inc., 388 U.S. 350 \(1967\)](#);<sup>3</sup> [\*\*\*531] [Serta Associates, Inc. v. United](#)

<sup>1</sup> The District Court's findings of fact include the following:

"33. A competitively effective private label program to be independently undertaken by a single retailer or chain would require an annual sales volume of \$ 250 million or more and in order to achieve optimum efficiency, the volume required would probably have to be twice that amount." [319 F.Supp. 1031, 1036](#).

<sup>2</sup> There is dictum in the case to the effect that [United States v. Addyston Pipe & Steel Co., 85 F. 271 \(CA6 1898\)](#), aff'd, [175 U.S. 211 \(1899\)](#), established a "division of markets" as unlawful in and of itself. [356 U.S., at 5](#). As I will show, however, *Addyston Pipe* established no such thing; it was primarily a price-fixing case.

<sup>3</sup> I cannot agree with the Court's description of *Sealy* as being "on all fours with this case." *Ante*, at 609. *Sealy* does support the proposition that the restraints on the Topco licensees are horizontally imposed. Beyond that, however, *Sealy* is hardly controlling here. The territorial restrictions in *Sealy* were found by this Court to be so intimately a part of an unlawful price-fixing and policing scheme that the two arrangements fell together:

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States, 393 U.S. 534 (1969), aff'g 296 F.Supp. 1121 (ND Ill. 1968). Price fixing is, of course, not a factor in the instant case.

[\*\*\*\*35] Another of the cases relied upon by the Court, United States v. National Lead Co., 332 U.S. 319 (1947), involved a world-wide arrangement<sup>4</sup> [\*\*\*\*36] for dividing territories, [\*617] pooling patents, and exchanging technological information. The arrangement was found illegal by the District Court without any reliance on a *per se* rule;<sup>5</sup> this Court, in affirming, was concerned almost exclusively with the remedies ordered by the District Court and made no attempt to declare a *per se* rule to govern the merits of the case.

In still another case on which the majority relies, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), the District Court had, indeed, held that the agreements between the manufacturer and certain of its distributors, providing the latter with exclusive territories, were horizontal in nature and that they were, as such, *per se* violations of the [\*\*\*\*37] Act. 237 F.Supp. 323, 342-343. Since no appeal was taken from this part of the District Court's order,<sup>6</sup> that issue was not before this Court in its review of the case. Indeed, in dealing with the issues that were before it, this Court followed an approach markedly different from that of the District Court. First, in reviewing the case here, the Court made it clear that it was proceeding under the "rule of [\*618] reason," and not by *per se* rule;<sup>7</sup> [\*\*\*\*38] second, [\*\*\*532] the Court saw the issues [201] presented as involving 13 [\*\*1139] vertical, not horizontal, restraints.<sup>8</sup> It can hardly be contended, therefore, that this Court's decision in *Schwinn* is controlling precedent for the application in the instant case of a *per se* rule that prohibits horizontal restraints without regard to their market effects.

"This unlawful resale price-fixing activity refutes appellee's claim that the territorial restraints were mere incidents of a lawful program of trademark licensing. Cf. Timken Roller Bearing Co. v. United States, 1341 U.S. 593 (1951). The territorial restraints were a part of the unlawful price-fixing and policing." 388 U.S., at 356.

<sup>4</sup> In summarizing its findings, the District Court made the following statements:

"When the story is seen as a whole, there is no blinking the fact that there is no free commerce in titanium. Every pound of it is trammelled by privately imposed regulation. The channels of this commerce have not been formed by the winds and currents of competition. They are, in large measure, artificial canals privately constructed. . . .

....

". . . No titanium pigments enter the United States except with the consent of NL [defendant National Lead]. No foreign titanium pigments move in interstate commerce except with like approval. No titanium pigment produced by NL may leave the ports of the United States for points outside the Western Hemisphere." 63 F.Supp. 513, 521-522.

<sup>5</sup> The District Court clearly decided the case under the "rule of reason." It found that there was "a combination and conspiracy in restraint of trade; and the restraint is *unreasonable*. As such it is outlawed by Section 1 of the Sherman Act." 63 F.Supp., at 523 (emphasis added). The court rejected the argument made by the defense that the basic agreement on which the arrangement was founded was permissible under "the doctrine which validates covenants in restraint of trade when reasonably ancillary to a lawful principal purpose . . . . The world-wide territorial allocation was *unreasonable in scope when measured against the business actualities*." Id., at 524 (emphasis added).

<sup>6</sup> "The appellees did not appeal from the findings and order invalidating [territorial] restraints on resale by distributors. . . ." 388 U.S., at 368.

<sup>7</sup> "The Government does not contend that a *per se* violation of the Sherman Act is presented by the practices which are involved in this appeal . . . . Accordingly, we are remitted to an appraisal of the market impact of these practices.

". . . We must look to the specifics of the challenged practices and their impact upon the marketplace in order to make a judgment as to whether the restraint is or is not 'reasonable' in the special sense in which § 1 of the Sherman Act must be read for purposes of this type of inquiry." 388 U.S., at 373-374.

<sup>8</sup> "We are here confronted with challenged vertical restrictions as to territory and dealers. . . . These are not horizontal restraints, in which the actors are distributors with or without the manufacturer's participation." 388 U.S., at 372.

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(BNA) 193, \*\*\*\*\*193

Finally, there remains the eighth of the cases relied upon by the Court -- actually, the first in its list of "authorities" for the purported *per se* rule. Circuit Judge (later Chief Justice) Taft's opinion for the court in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (CA6 1898), aff'd, 175 U.S. 211 (1899), has generally been recognized -- and properly so -- as a fully authoritative exposition of **antitrust law**. But neither he, nor this Court in affirming, made any pretense of establishing a *per se* rule against all agreements involving horizontal territorial limitations. The defendants in that case were manufacturers and vendors of cast-iron pipe who had "entered into a combination to raise the prices for pipe" throughout a number of States "constituting considerably more than three-quarters [\*\*\*39] of the territory of the United States, and significantly called . . . 'pay territory.'" *85 F., at 291*. The associated defendants in [\*619] combination controlled two-thirds of the manufactured output of such pipe in this "pay territory"; certain cities ("reserved" cities) within the territory were assigned to particular individual defendants who sold pipe in those cities at prices fixed by the association, the other defendants submitting fictitious bids and the selling defendants paying a fixed "bonus" to the association for each sale. Outside the "reserved" cities, all sales by the defendants to customers in the "pay territory" were, again, at prices determined by the association and were allocated to the association member who offered, in a secret auction, to pay the largest "bonus" to the association itself. The effect was, of course, that the buying public lost all benefit of competitive pricing. Although the case has frequently -- and quite properly -- been cited as a horizontal allocation-of-markets case, the sole purpose of the secret customer allocations was to enable the members of the association to fix prices charged to the public at noncompetitive [\*\*\*40] levels. Judge Taft rejected the defendants' argument that the prices actually charged were "reasonable"; he held that it was sufficient for a finding of a Sherman Act violation that the combination and agreement of the defendants gave them such monopoly power that they, rather than market forces, fixed the prices of all cast-iron pipe in three-fourths of the Nation's territory. The case unquestionably laid important groundwork for the subsequent establishment [\*\*\*533] of the *per se* rule against price fixing. It did not, however, establish that a horizontal division of markets is, without more, a *per se* violation of the Sherman Act.

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The foregoing analysis of the cases relied upon by the majority indicates to me that the Court is not merely following prior holdings; on the contrary, it is establishing [**\*620**] a new *per se* rule. In the face of the District Court's well supported findings that the effects of such a rule in this case will be adverse to the public welfare,<sup>9</sup> the Court lays down that [**\*\*1140**] rule without regard to the impact that the condemned practices may have on competition. In doing so, the Court virtually invites Congress to undertake [\*\*\*\*41] to determine that impact. *Ante*, at 611-612. I question whether the Court is fulfilling the role assigned to it under the statute when it declines to make this determination; in any event, if the Court is unwilling on this record to assess the economic impact, it surely should not proceed to make a new rule to govern the economic activity. *White Motor Co. v. United States, 372 U.S., at 263.*

[\*\*\*\*42] When one of his versions of the proposed Act was before the Senate for consideration in 1890, Senator Sherman, in a lengthy, and obviously carefully prepared, address to that body, said that the bill sought

"only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer. It is the unlawful combination, [202] tested by the rules of common law and human experience, that is aimed at [\*621] by this bill, and not the lawful and useful combination.

... ■ ■ ■ ■

<sup>9</sup> Among the facts found by the District Court are the following: private-label brand merchandising, which is beyond the reach of the small chains acting independently and which by definition depends upon local exclusivity, permits the merchandiser to offer the public "lower consumer prices on products of high quality" and "to bargain more favorably with national brand manufacturers"; such merchandising fosters "the establishment of a broader supply base of manufacturers, thereby decreasing dependence upon a relatively few, large national brand manufacturers"; it also enables "smaller manufacturers, the most common source of private label products, who are generally unable to develop national brand name recognition for their products, [to] benefit . . . by the assurance of a substantial market for their products. . . ." *319 F.Supp.*, at 1035.

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"I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law . . ." 21 Cong. Rec. 2457, 2460.

In "carry[ing] out the meaning of the law" by making its "determin[ations] in each particular case," this Court early concluded that it was Congress' intent that a "rule of reason" be applied in making such case-by-case [\*\*\*\*43] determinations. Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911). And that rule of reason was to be applied in light of the Act's policy to protect the "public interests." United States v. American Tobacco Co., 221 U.S. 106, 179 (1911). [\*\*\*534] The *per se* rules that have been developed are similarly directed to the protection of the public welfare; they are complementary to, and in no way inconsistent with, the rule of reason. The principal advantages that flow from their use are, first, that enforcement and predictability are enhanced and, second, that unnecessary judicial investigation is avoided in those cases where practices falling within the scope of such rules are found. As the Court explained in Northern Pacific R. Co. v. United States, supra, at 5,

"There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

[\*622] In formulating a new *per se* rule today, [\*\*\*\*44] the Court does not tell us what "pernicious effect on competition" the practices here outlawed are perceived to have; nor does it attempt to show that those practices "lack . . . any redeeming virtue." Rather, it emphasizes only the importance of predictability, asserting that "courts are of limited utility in examining difficult economic problems" and have not yet been left free by Congress [\*\*1141] to "ramble through the wilds of economic theory in order to maintain a flexible approach." <sup>10</sup>

With all respect, I believe that there are two basic fallacies in the Court's approach here. First, while I would not characterize our role under [\*\*\*\*45] the Sherman Act as one of "rambl[ing] through the wilds," it is indeed one that requires our "examin[ation of] difficult economic problems." We can undoubtedly ease our task, but we should not abdicate that role by formulation of *per se* rules with no justification other than the enhancement of predictability and the reduction of judicial investigation. Second, from the general proposition that *per se* rules play a necessary role in antitrust law, it does not follow that the particular *per se* rule promulgated today is an appropriate one. Although it might well be desirable in a proper case for this Court to formulate a *per se* rule dealing with horizontal territorial limitations, it would not necessarily be appropriate for such a rule to amount to a blanket prohibition against all such limitations. More specifically, it is far from clear to me why such a rule should cover those division-of-market agreements that involve no price fixing and which are concerned [\*623] only with trademarked products that are not in a monopoly or near-monopoly position with respect to competing brands. The instant case presents such an agreement; I would not decide it upon the [\*\*\*\*46] basis of a *per se* rule. <sup>11</sup>

The [\*\*\*535] District Court specifically found that the horizontal [\*\*\*\*47] restraints involved here tend positively to promote competition in the supermarket field and to produce lower costs for the consumer. The Court seems implicitly to accept this determination, but says that the Sherman Act does not give Topco the authority to determine

<sup>10</sup> It seems ironical to me that in another antitrust case decided today, *Ford Motor Co. v. United States, ante*, p. 562, the Court, in contrast to its handling of the instant case, goes out of its way to commend another District Court for its treatment of a problem involving "predictions and assumptions concerning future economic and business events." Id., at 578.

<sup>11</sup> The national chains market their own private-label products, and these products are available nowhere else than in the stores of those chains. The stores of any one chain, of course, do not engage in price competition with each other with respect to their chain's private-label brands, and no serious suggestion could be made that the Sherman Act requires otherwise. I fail to see any difference whatsoever in the economic effect of the Topco arrangement for the marketing of Topco-brand products and the methods used by the national chains in marketing their private-label brands. True, the Topco arrangement involves a "combination," while each of the national chains is a single integrated corporation. The controlling consideration, however, should be that in neither case is the policy of the Sherman Act offended, for the practices in both cases work to the benefit, and not to the detriment, of the consuming public.

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(BNA) 193, \*\*\*\*\*193

for itself "whether or not competition with other supermarket chains is more desirable than competition in the sale of Topco-brand products." *Ante*, at 611. But the majority overlooks a further specific determination of [203] the District Court, namely, that the invalidation of the restraints here at issue "would not increase competition in Topco private label brands." [319 F.Supp., at 1043](#). Indeed, the District Court seemed to believe that it would, on the contrary, lead to the likely demise of those brands in time. And the evidence before the District Court would appear to justify that conclusion.

[\*624] There is no national demand for Topco brands, nor has there ever been any national advertising of those brands. It would be impracticable for Topco, with its limited financial resources, to convert itself into a national brand distributor in competition with distributors of existing national brands. [\*\*\*\*48] Furthermore, without the right to grant exclusive licenses, it could not attract and hold new members as replacements for those of its present members who, following the pattern of the past, eventually grow sufficiently in size to be able to leave the [\*1142] cooperative organization and develop their own individual private-label brands. Moreover, Topco's present members, once today's decision has had its full impact over the course of time, will have no more reason to promote Topco products through local advertising and merchandising efforts than they will have such reason to promote any other generally available brands.

The issues presented by the antitrust cases reaching this Court are rarely simple to resolve under the rule of reason; they do indeed frequently require us to make difficult economic determinations. We should not for that reason alone, however, be overly zealous in formulating new *per se* rules, for an excess of zeal in that regard is both contrary to the policy of the Sherman Act and detrimental to the welfare of consumers generally. Indeed, the economic effect of the new rule laid down by the Court today seems clear: unless Congress intervenes, grocery [\*\*\*\*49] staples marketed under private-label brands with their lower consumer prices will soon be available only to those who patronize the large national chains.

## References

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Federal Quick Index, Monopolies and Restraints of Trade

Annotation References:

Validity under federal antitrust laws of agreement conferring exclusive sales agency for designated territory. [9 L Ed 2d 1235](#).

## Flood v. Kuhn

Supreme Court of the United States

March 20, 1972, Argued ; June 19, 1972, Decided

No. 71-32

**Reporter**

407 U.S. 258 \*; 92 S. Ct. 2099 \*\*; 32 L. Ed. 2d 728 \*\*\*; 1972 U.S. LEXIS 138 \*\*\*\*; 1972 Trade Cas. (CCH) P74,041

FLOOD v. KUHN ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

**Disposition:** [443 F.2d 264](#), affirmed.

## **Core Terms**

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baseball, anti trust law, antitrust, players, exemption, cases, League, commerce, boxing, sport, overrule, Flood, decisions, team, major league, exhibitions, professional baseball, interstate commerce, stare decisis, re-examination, season, professional sports, Sherman Act, bargaining, football, inaction, Appeals, ball, major league baseball, no intention

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Regulated Industries > Sports > Baseball

Governments > Courts > Judicial Precedent

International Trade Law > General Overview

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

### [\*\*HN1\*\*](#) [down arrow] **Sports, Baseball**

Professional baseball is a business and it is engaged in interstate commerce. With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. Even though others might regard this as unrealistic, inconsistent, or illogical, the aberration is an established one. It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of stare decisis, and one that has survived the court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs. Other professional sports operating interstate are not so exempt.

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Antitrust & Trade Law > Regulated Industries > Sports > General Overview

**HN2** [down arrow] Regulated Industries, Sports

Since 1922 baseball, with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action. Remedial legislation has been introduced repeatedly in Congress but none has ever been enacted. The court, accordingly, has concluded that Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes. This, obviously, has been deemed to be something other than mere congressional silence and passivity.

Antitrust & Trade Law > Regulated Industries > Sports > Baseball

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

**HN3** [] Sports, Baseball

State antitrust regulation would conflict with federal policy, and national uniformity is required in any regulation of baseball and its reserve system.

Antitrust & Trade Law > Regulated Industries > Sports > Baseball

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

International Trade Law > General Overview

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

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

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Ge

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

4 [blue icon] Sports, Baseball

#### **As the burden on interstate**

Commerce Clause precludes the application of state antitrust law.

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major league team without being consulted about the trade, complained to the Commissioner of Baseball and sought to be made a free agent to bargain with any other major league team. After denial of his request, the player instituted an action in the United States District Court for the Southern District of New York against the Commissioner and the presidents and clubs of the two major leagues, challenging baseball's reserve system as, *inter alia*, violative of federal and state antitrust laws. The District Court found for the defendants ([316 F Supp 271](#)),

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and the Court of Appeals for the Second Circuit affirmed ([443 F2d 264](#)), both courts ruling that the question was controlled by the United States Supreme Court decisions in (1) [\*Federal Baseball Club v National League, 259 US 200, 66 L Ed 898, 42 S Ct 465, 26 ALR 357\*](#), which held that the business of professional baseball was not within the scope of federal antitrust laws, because it did not constitute interstate commerce, and (2) [\*Toolson v New York Yankees, Inc., 346 US 356, 98 L Ed 64, 74 S Ct 78\*](#), which held that the decision in the Federal Baseball Club Case would not be overruled, since Congress, in the intervening 30-year period, had not brought baseball under the antitrust laws by legislation, but had instead allowed the business to develop on the understanding that it was not subject to antitrust laws.

On certiorari, the United States Supreme Court affirmed. In an opinion by Blackmun, J., it was held, expressing the views of five members of the court, that (1) any change in the long-established judicial exemption of professional baseball, unlike other professional sports, from the federal antitrust laws, was a matter for Congress, not the Supreme Court, and (2) state antitrust laws did not apply to professional baseball.

Burger, Ch. J., concurring, expressed grave reservations as to the correctness of [\*Toolson v New York Yankees, Inc., supra\*](#), but stated that the least undesirable course was to let the matter rest with Congress.

Douglas, J., joined by Brennan, J., dissented on the grounds that (1) under the modern concept of commerce, baseball was subject to federal antitrust regulation, and (2) the Supreme Court, having created the judicial exemption for baseball, should remove it.

Marshall, J., joined by Brennan, J., dissented, expressing the views that (1) the Supreme Court should admit the error in the Federal Baseball Club Case decision, and should correct it, making baseball prospectively subject to the antitrust laws unless Congress decided otherwise, and (2) the case should be remanded to determine whether there was a violation of the antitrust laws, and to further consider the unresolved questions whether baseball's reserve system was part of a collective bargaining agreement, and because it was a mandatory subject of bargaining, federal labor statutes, rather than antitrust laws, were applicable.

Powell, J., did not participate.

## Headnotes

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COURTS §141 > judicial antitrust exemption -- professional baseball -- legislative remedy -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B]

Any change in the long-established judicial exemption of professional baseball and its reserve system, unlike other professional sports, from the federal antitrust laws--which exemption was established in [\*Federal Baseball Club v National League, 259 US 200, 66 L Ed 898, 42 S Ct 465, 26 ALR 357\*](#), and followed in [\*Toolson v New York Yankees, Inc., 346 US 356, 98 L Ed 64, 74 S Ct 78\*](#), with Congress, by positive inaction, allowing the decisions to stand and evincing a desire not to disapprove of them legislatively--is a matter for Congress, and the United States Supreme Court will not overturn such judicial exemption.

MONOPOLIES §11 > professional baseball -- judicial exemption -- > Headnote:

[LEdHN\[2\]](#) [2]

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Although professional baseball is a business engaged in interstate commerce, nevertheless with its reserve system enjoying a judicially established exemption from the federal antitrust laws, unlike other professional sports, baseball is an exception and an anomaly--such exemption being an aberration confined to baseball.

MONOPOLIES §11 > professional baseball -- judicial exemption -- > Headnote:

LEdHN[3] [  ] [3]

The long established exemption of professional baseball and its reserve system from the federal antitrust laws, which exemption was established in United States Supreme Court decisions, rests on a recognition and an acceptance of baseball's unique characteristics and needs.

## MONOPOLIES §11 > interstate commerce -- professional sports -- > Headnote:

LEdHN[4] [  ] [4]

Unlike professional baseball, other professional sports operating interstate--football, boxing, basketball, and, presumably, hockey and golf--are not exempt from federal antitrust laws.

COMMERCE §143 > MONOPOLIES §4 > professional baseball -- state antitrust laws -- > Headnote:

LEdHN[5] [  ] [5]

State antitrust laws do not apply to professional baseball because state antitrust regulation would conflict with federal policy exempting baseball from federal antitrust laws, and because national uniformity is required in any regulation of baseball and its reserve system; as the burden on interstate commerce outweighs the state's interest in regulating baseball's reserve system, the *commerce clause* precludes the application of state **antitrust law**.

# Syllabus

Petitioner, a professional baseball player "traded" to another club without his previous knowledge or consent, brought this antitrust suit after being refused the right to make his own contract with another major league team, which is not permitted under the reserve system. The District Court rendered judgment in favor of respondents, and the Court of Appeals affirmed. *Held*: The longstanding exemption of professional baseball from the antitrust laws, *Federal Baseball Club v. National League*, 259 U.S. 200 (1922); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), is an established aberration, in the light of the Court's holding that other interstate professional sports are not similarly exempt, but one in which Congress has acquiesced, and that is entitled to the benefit of *stare decisis*. Removal of the resultant inconsistency at this late date is a matter for legislative, not judicial, resolution. [\*\*\*\*2] Pp. 269-285.

**Counsel:** Arthur J. Goldberg argued the cause for petitioner. With him on the briefs was Jay H. Topkis.

Paul A. Porter argued the cause for respondent Kuhn. Louis F. Hoynes, Jr., argued the cause for respondents Feeney, President of National League of Professional Baseball Clubs, et al. With them on the brief were Mark F. Hughes, Alexander H. Hadden, James P. Garner, Warren Daane, and Jerome I. Chapman.

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**Judges:** Blackmun, J., delivered the opinion of the Court, in which Stewart and Rehnquist, JJ., joined, and in all but Part I of which Burger, C. J., and White, J., joined. Burger, C. J., filed a concurring opinion, post, p. 285. Douglas, J., post, p. 286, and Marshall, J., post, p. 288, filed dissenting opinions, in which Brennan, J., joined. Powell, J., took no part in the consideration or decision of the case.

**Opinion by: BLACKMUN**

## Opinion

[\*259] [\*\*\*731] [\*\*2100] MR. JUSTICE BLACKMUN delivered the opinion of the Court.

**LEdHN[1A]** [1A]For the third time in 50 years the Court is asked specifically to rule that professional baseball's reserve system is within the reach of the federal antitrust [\*\*\*3] laws.<sup>1</sup> [260] Collateral [\*\*732] issues of state law and of federal labor policy are also advanced.

<sup>1</sup> The reserve system, publicly introduced into baseball contracts in 1887, see *Metropolitan Exhibition Co. v. Ewing*, 42 F. 198, 202-204 (CC SDNY 1890), centers in the uniformity of player contracts; the confinement of the player to the club that has him under the contract; the assignability of the player's contract; and the ability of the club annually to renew the contract unilaterally, subject to a stated salary minimum. Thus

A. Rule 3 of the Major League Rules provides in part:

"(a) UNIFORM CONTRACT. To preserve morale and to produce the similarity of conditions necessary to keen competition, the contracts between all clubs and their players in the Major Leagues shall be in a single form which shall be prescribed by the Major League Executive Council. No club shall make a contract different from the uniform contract or a contract containing a non-reserve clause, except with the written approval of the Commissioner. . . .

"(g) TAMPERING. To preserve discipline and competition, and to prevent the enticement of players, coaches, managers and umpires, there shall be no negotiations or dealings respecting employment, either present or prospective, between any player, coach or manager and any club other than the club with which he is under contract or acceptance of terms, or by which he is reserved, or which has the player on its Negotiation List, or between any umpire and any league other than the league with which he is under contract or acceptance of terms, unless the club or league with which he is connected shall have, in writing, expressly authorized such negotiations or dealings prior to their commencement."B. Rule 9 of the Major League Rules provides in part:

"(a) NOTICE. A club may assign to another club an existing contract with a player. The player, upon receipt of written notice of such assignment, is by his contract bound to serve the assignee.

"After the date of such assignment all rights and obligations of the assignor clubs thereunder shall become the rights and obligations of the assignee club . . ."C. Rules 3 and 9 of the Professional Baseball Rules contain provisions parallel to those just quoted.

#### D. The Uniform Player's Contract provides in part:

"4. (a) . . . The Player agrees that, in addition to other remedies, the Club shall be entitled to injunctive and other equitable relief to prevent a breach of this contract by the Player, including, among others, the right to enjoin the Player from playing baseball for any other person or organization during the term of this contract."

"5. (a) The Player agrees that, while under contract, and prior to expiration of the Club's right to renew this contract, he will not play baseball otherwise than for the Club, except that the Player may participate in post-season games under the conditions prescribed in the Major League Rules. . . ."

"6. (a) The Player agrees that this contract may be assigned by the Club (and reassigned by any assignee Club) to any other Club in accordance with the Major League Rules and the Professional Baseball Rules."

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[\*\*\*4] [\*\*2101] |

## The Game

It is a century and a quarter since the New York Nine defeated the Knickerbockers 23 to 1 on Hoboken's [**\*261**] Elysian Fields June 19, 1846, with Alexander Jay Cartwright as the instigator and the umpire. The teams were amateur, but the contest marked a significant date in baseball's beginnings. That early game led ultimately to the development of professional baseball and its tightly organized structure.

The Cincinnati Red Stockings came into existence in 1869 upon an outpouring of local pride. With only one Cincinnatian on the payroll, this professional team traveled over 11,000 miles that summer, winning 56 games and tying one. Shortly thereafter, on St. Patrick's Day in 1871, the National Association of Professional Baseball Players was [**\*\*2102**] founded and the professional league was born.

The ensuing colorful days are well known. The ardent follower and the student of baseball know of General Abner Doubleday; the formation of the National League in 1876; Chicago's supremacy in the first year's competition under the leadership of Al Spalding and with Cap Anson at third base; the formation of the American Association and then of the Union [**\*\*\*\*5**] Association in the 1880's; the introduction of Sunday baseball; interleague warfare with cut-rate admission prices and player raiding; the development of the reserve "clause"; the emergence in 1885 of the Brotherhood of Professional Ball Players, and in 1890 of the Players League; the appearance of the American League, or "junior circuit," in 1901, rising from the minor Western Association; the first World [**\*262**] Series in 1903, disruption in 1904, and the Series' resumption in 1905; the short-lived Federal League on the majors' scene during World War I years; the troublesome and discouraging episode of the 1919 Series; the home run ball; the shifting of franchises; the expansion of the leagues; the installation in 1965 of the major league draft of potential new players; and the formation of the Major League Baseball Players Association in 1966.<sup>2</sup>

[**\*\*\*\*6**] Then there are the many names, celebrated for one reason or another, that have sparked the diamond and its environs and that have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season: Ty Cobb, Babe Ruth, Tris Speaker, Walter Johnson, Henry Chadwick, Eddie Collins, Lou Gehrig, Grover Cleveland Alexander, Rogers Hornsby, Harry Hooper, Goose Goslin, Jackie Robinson, Honus Wagner, Joe McCarthy, John McGraw, Deacon Phillippe, Rube Marquard, Christy [**\*\*\*\*733**] Mathewson, Tommy Leach, Big Ed Delahanty, Davy Jones, Germany Schaefer, King Kelly, Big Dan Brouthers, Wahoo Sam Crawford, Wee Willie Keeler, Big Ed Walsh, Jimmy Austin, Fred Snodgrass, Satchel Paige, Hugh Jennings, Fred Merkle, Iron Man McGinnity, Three-Finger Brown, Harry and Stan Coveleski, Connie Mack, Al Bridwell, Red Ruffing, Amos Rusie, Cy Young, Smokey Joe Wood, Chief Meyers, Chief Bender, Bill Klem, Hans Lobert, Johnny Evers, Joe Tinker, Roy Campanella, Miller Huggins, Rube Bressler, Dazzy Vance, Edd Roush, Bill Wambsganss, Clark Griffith, Branch Rickey, Frank Chance, Cap Anson, [**\*263**] Nap Lajoie, Sad Sam Jones, Bob O'Farrell, Lefty [**\*\*\*\*7**] O'Doul, Bobby Veach, Willie Kamm, Heinie Groh, Lloyd and Paul Waner, Stuffy McInnis, Charles Comiskey, Roger Bresnahan, Bill Dickey, Zack Wheat, George Sisler, Charlie Gehringer, Eppa Rixey,

"10. (a) On or before January 15 (or if a Sunday, then the next preceding business day) of the year next following the last playing season covered by this contract, the Club may tender to the Player a contract for the term of that year by mailing the same to the Player at his address following his signature hereto, or if none be given, then at his last address of record with the Club. If prior to the March 1 next succeeding said January 15, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player at said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the club shall fix in said notice; provided, however, that said amount, if fixed by a Major League Club, shall be an amount payable at a rate not less than 80% of the rate stipulated for the preceding year.

"(b) The Club's right to renew this contract, as provided in subparagraph (a) of this paragraph 10, and the promise of the Player not to play otherwise than with the Club have been taken into consideration in determining the amount payable under paragraph 2 hereof."

<sup>2</sup> See generally The Baseball Encyclopedia (1969); L. Ritter, The Glory of Their Times (1966); 1 & 2 H. Seymour, Baseball (1960, 1971); 1 & 2 D. Voigt, American Baseball (1966, 1970).

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Harry Heilmann, Fred Clarke, Dizzy Dean, Hank Greenberg, Pie Traynor, Rube Waddell, Bill Terry, Carl Hubbell, Old Hoss Radbourne, Moe Berg, Rabbit Maranville, Jimmie Foxx, Lefty Grove.<sup>3</sup> The list seems endless.

And one recalls the appropriate reference to the "World Serious," attributed to Ring Lardner, Sr.; Ernest L. Thayer's "Casey at the Bat";<sup>4</sup> [\*\*\*8] the ring of "[\*\*2103] Tinker to [\*264] Evers to Chance";<sup>5</sup> and all the other happenings, habits, and superstitions about and around baseball that made it the "national pastime" or, depending upon the point of view, "the great American tragedy."<sup>6</sup>

II

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<sup>3</sup>These are names only from earlier years. By mentioning some, one risks unintended omission of others equally celebrated.

<sup>4</sup>Millions have known and enjoyed baseball. One writer knowledgeable in the field of sports almost assumed that everyone did until, one day, he discovered otherwise:

"I knew a cove who'd never heard of Washington and Lee,  
Of Caesar and Napoleon from the ancient jamboree,  
But, bli'me, there are queerer things than anything like that,  
For here's a cove who never heard of 'Casey at the Bat'!

....

"Ten million never heard of Keats, or Shelley, Burns or Poe;  
But they know 'the air was shattered by the force of Casey's  
blow';

They never heard of Shakespeare, nor of Dickens, like as not,  
But they know the somber drama from old Mudville's haunted  
lot.

"He never heard of Casey! Am I dreaming? Is it true?  
Is fame but windblown ashes when the summer day is  
through?  
Does greatness fade so quickly and is grandeur doomed to die  
That bloomed in early morning, ere the dusk rides down the  
sky?"

"He Never Heard of Casey" Grantland Rice, The Sportlight, New York Herald Tribune, June 1, 1926, p. 23.

<sup>5</sup>"These are the saddest of possible words,

'Tinker to Evers to Chance.'

Trio of bear cubs, and fleeter than birds,

'Tinker to Evers to Chance.'

Ruthlessly pricking our gonfalon bubble,

Making a Giant hit into a double --

Words that are weighty with nothing but trouble:

'Tinker to Evers to Chance.'"

Franklin Pierce Adams, Baseball's Sad Lexicon.

<sup>6</sup>George Bernard Shaw, The Sporting News, May 27, 1943, p. 15, col. 4.

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### The Petitioner

The petitioner, Curtis Charles Flood, born in 1938, began his major league career in 1956 when he signed a contract with the Cincinnati Reds for a salary of \$ 4,000 for the season. He had no attorney or agent to advise him on that occasion. **[\*\*\*734]** He was traded to the St. Louis Cardinals before the 1958 season. Flood rose to fame as a center fielder with the Cardinals during the years 1958-1969. In those 12 seasons he compiled a batting average of .293. His best offensive season was 1967 when he achieved .335. He was .301 or better in six of the 12 St. Louis years. He participated in the 1964, 1967, and 1968 World Series. He played errorless **[\*\*\*9]** ball in the field in 1966, and once enjoyed 223 consecutive errorless games. Flood has received seven Golden Glove Awards. He was co-captain of his team from 1965-1969. He ranks among the 10 major league outfielders possessing the highest lifetime fielding averages.

**[\*265]** Flood's St. Louis compensation for the years shown was:

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1967	\$	
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	0	
1968	\$	
	72,	
	50	
	0	
1969	\$	
	90,	
	00	

These figures do not include any so-called fringe benefits or World Series shares.

But at the age of 31, in October 1969, Flood was traded to the Philadelphia Phillies of the National League in a multi-player transaction. He was not consulted about the trade. He was informed by telephone and received formal notice only after the deal had been consummated. In December he complained to the Commissioner of Baseball and asked that he be made a free agent and be placed at liberty to strike his own bargain with any other major league team. His request was denied.

Flood then instituted this antitrust suit <sup>7</sup> in January 1970 in federal court for the Southern District [\*\*\*\*10] of New York. The defendants (although not all were named in each cause of action) were the Commissioner of Baseball, the presidents of the two major leagues, and the 24 major league clubs. In general, the complaint charged violations of the federal antitrust laws and civil rights statutes, violation of state statutes and the common law, and the imposition of a form of peonage and involuntary [<sup>266</sup>] servitude contrary to the *Thirteenth Amendment* [\*\*2104] and [42 U. S. C. § 1994](#), [18 U. S. C. § 1581](#), and [29 U. S. C. §§ 102](#) and [103](#). Petitioner sought declaratory and injunctive relief and treble damages.

Flood declined to play for Philadelphia in 1970, despite a \$ 100,000 salary offer, and he sat out the year. After the season was concluded, Philadelphia sold its rights to Flood to the Washington [\*\*\*\*11] Senators. Washington and the petitioner were able to come to terms for 1971 at a salary of \$ 110,000.<sup>8</sup> Flood started the season but, apparently because he was dissatisfied with his performance, he left the Washington club on April 27, early in the campaign. He has not played baseball since then.

### III

#### The Present Litigation

Judge Cooper, in a detailed opinion, [\*\*\*735] first denied a preliminary injunction, [309 F.Supp. 793 \(SDNY 1970\)](#), observing on the way:

"Baseball has been the national pastime for over one hundred years and enjoys a unique place in our American heritage. Major league professional baseball is avidly followed by millions of fans, looked upon with fervor and pride and provides a special source of inspiration and competitive team spirit especially for the young."

"Baseball's status in the life of the nation is so pervasive that it would not strain credulity to say [\*\*\*12] the Court can take judicial notice that baseball is everybody's business. To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession, which brings surcease from daily travail and an escape from the ordinary to [<sup>267</sup>] most inhabitants of this land, were to suffer in the least because of undue concentration by any one or any group on commercial and profit considerations. The game is on higher ground; it behooves every one to keep it there." [309 F.Supp., at 797](#).

Flood's application for an early trial was granted. The court next deferred until trial its decision on the defendants' motions to dismiss the primary causes of action, but granted a defense motion for summary judgment on an additional cause of action. [312 F.Supp. 404 \(SDNY 1970\)](#).

Trial to the court took place in May and June 1970. An extensive record was developed. In an ensuing opinion, [316 F.Supp. 271 \(SDNY 1970\)](#), Judge Cooper first noted that:

<sup>7</sup> Concededly supported by the Major League Baseball Players Association, the players' collective-bargaining representative. Tr. of Oral Arg. 12.

<sup>8</sup> The parties agreed that Flood's participating in baseball in 1971 would be without prejudice to his case.

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"Plaintiff's witnesses in the main concede that some form of reserve on players is a necessary element of the organization of baseball as a league sport, but contend that the present [\*\*\*13] all-embracing system is needlessly restrictive and offer various alternatives which in their view might loosen the bonds without sacrifice to the game. . . .

"Clearly the preponderance of credible proof does not favor elimination of the reserve clause. With the sole exception of plaintiff himself, it shows that even plaintiff's witnesses do not contend that it is wholly undesirable; in fact they regard substantial portions meritorious. . . ." [316 F.Supp., at 275-276](#).

He then held that [Federal Baseball Club v. National League, 259 U.S. 200 \(1922\)](#), and [Toolson v. New York Yankees, Inc., 346 U.S. 356 \(1953\)](#), were controlling; that it was not necessary to reach the issue whether exemption from the antitrust laws would result because aspects of [\*268] baseball now are a subject of collective bargaining; that the plaintiff's state-law claims, those based on common law as well as on statute, were to be denied because baseball was not "a matter which admits of diversity of [\*\*2105] treatment," [316 F.Supp., at 280](#); that the involuntary servitude claim failed because of the absence of "the essential [\*\*\*14] element of this cause of action, a showing of compulsory service," [316 F.Supp., at 281-282](#); and that judgment was to be entered for the defendants. Judge Cooper included a statement of personal conviction to the effect that "negotiations could produce an accommodation on the reserve system which would be eminently fair and equitable to all concerned" and [\*\*\*736] that "the reserve clause can be fashioned so as to find acceptance by player and club." [316 F.Supp., at 282](#) and 284.

On appeal, the Second Circuit felt "compelled to affirm." [443 F.2d 264, 265 \(1971\)](#). It regarded the issue of state law as one of first impression, but concluded that the [Commerce Clause](#) precluded its application. Judge Moore added a concurring opinion in which he predicted, with respect to the suggested overruling of *Federal Baseball* and *Toolson*, that "there is no likelihood that such an event will occur."<sup>9</sup> [443 F.2d, at 268, 272](#).

[\*\*\*15] [\*269] We granted certiorari in order to look once again at this troublesome and unusual situation. [404 U.S. 880 \(1971\)](#).

#### IV

##### The Legal Background

A. [Federal Baseball Club v. National League, 259 U.S. 200 \(1922\)](#), was a suit for treble damages instituted by a member of the Federal League (Baltimore) against the National and American Leagues and others. The plaintiff obtained a verdict in the trial court, but the Court of Appeals reversed. The main brief filed by the plaintiff with this Court discloses that it was strenuously argued, among other things, that the business in which the defendants were engaged was interstate commerce; that the interstate relationship among the several clubs, located as they were in

<sup>9</sup> "And properly so. Baseball's welfare and future should not be for politically insulated interpreters of technical antitrust statutes but rather should be for the voters through their elected representatives. If baseball is to be damaged by statutory regulation, let the congressman face his constituents the next November and also face the consequences of his baseball voting record." [443 F.2d, at 272](#).

Cf. Judge Friendly's comments in [Salerno v. American League, 429 F.2d 1003, 1005 \(CA2 1970\)](#), cert. denied, *sub nom. Salerno v. Kuhn, 400 U.S. 1001 (1971)*:

"We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical.' . . . While we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled, we are not at all certain the Court is ready to give them a happy despatch."

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different States, was predominant; that organized baseball represented an investment of colossal wealth; that it was an engagement in moneymaking; that gate receipts were divided by agreement between the home club and the visiting club; and that the business of baseball was to be distinguished from the mere playing of the game as a sport for physical exercise and diversion. See also [259 U.S., at 201-206](#).

Mr. Justice [\*\*\*\*16] Holmes, in speaking succinctly for a unanimous Court, said:

"The business is giving exhibitions of base ball, which are purely state affairs. . . . But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and [\*270] must arrange and pay for their doing so is not enough to change the character of the business. . . . The transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not [\*\*\*737] be called trade or commerce [\*\*2106] in the commonly accepted use of those words. As it is put by the defendants, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.

"If we are right the plaintiff's business is to be described in the same [\*\*\*\*17] way and the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States." [259 U.S., at 208-209](#).<sup>10</sup>

[\*\*\*\*18] [\*271] The Court thus chose not to be persuaded by opposing examples proffered by the plaintiff, among them (a) Judge Learned Hand's decision on a demurrer to a Sherman Act complaint with respect to vaudeville entertainers traveling a theater circuit covering several States, *H. B. Marienelli, Ltd. v. United Booking Offices, 227 F. 165 (SDNY 1914)*; (b) the first Mr. Justice Harlan's opinion in *International Textbook Co. v. Pigg, 217 U.S. 91 (1910)*, to the effect that correspondence courses pursued through the mail constituted commerce among the States; and (c) Mr. Justice Holmes' own opinion, for another unanimous Court, on demurrer in a Sherman Act case, relating to cattle shipment, the interstate movement of which was interrupted for the finding of purchasers at the stockyards, *Swift & Co. v. United States, 196 U.S. 375 (1905)*. The only earlier case the parties were able to locate where the question was raised whether organized baseball was within the Sherman Act was *American League Baseball Club v. Chase, 86 Misc. 441, 149 N. Y. S. 6 (1914)*. That court had answered the question in the [\*\*\*\*19] negative.

B. *Federal Baseball* was cited a year later, and without disfavor, in another opinion by Mr. Justice Holmes for a unanimous Court. The complaint charged antitrust violations with respect to vaudeville bookings. It was held, however, that the claim was not frivolous and that the bill should not have been dismissed. *Hart v. B. F. Keith Vaudeville Exchange, 262 U.S. 271 (1923)*.<sup>11</sup>

[\*\*\*738] It has also been cited, not unfavorably, with respect to the practice of law, *United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 573 (1944)* (Stone, C. J., dissenting); with respect to [\*\*\*20] out-of-

<sup>10</sup> "What really saved baseball, legally at least, for the next half century was the protective canopy spread over it by the United States Supreme Court's decision in the Baltimore Federal League anti-trust suit against Organized Baseball in 1922. In it Justice Holmes, speaking for a unanimous court, ruled that the business of giving baseball exhibitions for profit was not 'trade or commerce in the commonly-accepted use of those words' because 'personal effort, not related to production, is not a subject of commerce'; nor was it interstate, because the movement of ball clubs across state lines was merely 'incidental' to the business. It should be noted that, contrary to what many believe, Holmes did call baseball a business; time and again those who have not troubled to read the text of the decision have claimed incorrectly that the court said baseball was a sport and not a business." 2 H. Seymour, *Baseball* 420 (1971).

<sup>11</sup> On remand of the *Hart* case the trial court dismissed the complaint at the close of the evidence. The Second Circuit affirmed on the ground that the plaintiff's evidence failed to establish that the interstate transportation was more than incidental. [12 F.2d 341 \(1926\)](#). This Court denied certiorari, [273 U.S. 703 \(1926\)](#).

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state contractors, *United States v. Employing Plasterers Assn.*, 347 U.S. 186, 196-197 [\*\*2107] (1954) (Minton, J., dissenting); and upon a general comparison reference, *North American Co. v. SEC*, 327 U.S. 686, 694 (1946).

In the years that followed, baseball continued to be subject to intermittent antitrust attack. The courts, however, rejected these challenges on the authority of *Federal Baseball*. In some cases stress was laid, although unsuccessfully, on new factors such as the development of radio and television with their substantial additional revenues to baseball.<sup>12</sup> For the most part, however, the Holmes opinion was generally and necessarily accepted as controlling authority.<sup>13</sup> And in the 1952 Report of the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, H. R. Rep. No. 2002, 82d Cong., 2d Sess., 229, it was said, in conclusion:

"On the other hand the overwhelming preponderance of the evidence established baseball's need for some sort of reserve clause. Baseball's history shows that chaotic conditions prevailed when there was no reserve clause. Experience points to no feasible [\*\*\*\*21] substitute to protect the integrity of the game or to guarantee a comparatively even competitive [\*273] struggle. The evidence adduced at the hearings would clearly not justify the enactment of legislation flatly condemning the reserve clause."

[\*\*\*\*22] C. The Court granted certiorari, 345 U.S. 963 (1953), in the *Toolson*, *Kowalski*, and *Corbett* cases, cited in nn. 12 and 13, *supra*, and, by a short *per curiam* (Warren, C. J., and Black, Frankfurter, DOUGLAS, Jackson, Clark, and Minton, JJ.), affirmed the judgments of the respective courts of appeals in those three cases. *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953). *Federal Baseball* was cited as holding "that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal [\*\*\*739] antitrust laws," *346 U.S., at 357*, and:

"Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of [\*\*\*\*23] the antitrust laws it should be by legislation. Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, supra*, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." *Ibid.*

This quotation reveals four reasons for the Court's affirmation of *Toolson* [\*\*2108] and its companion cases: (a) Congressional awareness for three decades of the Court's ruling in *Federal Baseball*, coupled with congressional [\*274] inaction. (b) The fact that baseball was left alone to develop for that period upon the understanding that the reserve system was not subject to existing federal antitrust laws. (c) A reluctance to overrule *Federal Baseball* with consequent retroactive effect. (d) A professed desire that any needed remedy be provided by legislation rather than by court decree. The emphasis in *Toolson* was on the determination, attributed even to *Federal Baseball*, that Congress had no intention to include baseball within the reach of the [\*\*\*\*24] federal antitrust laws. Two Justices (Burton and Reed, JJ.) dissented, stressing the factual aspects, revenue sources, and the absence of an express exemption of organized baseball from the Sherman Act. 346 U.S., at 357. The 1952 congressional study was mentioned. *Id., at 358, 359, 361*.

<sup>12</sup> *Toolson v. New York Yankees, Inc.*, 101 F.Supp. 93 (SD Cal. 1951), aff'd, 200 F.2d 198 (CA9 1952); *Kowalski v. Chandler*, 202 F.2d 413 (CA6 1953). See *Salerno v. American League*, 429 F.2d 1003 (CA2 1970), cert. denied, *sub nom. Salerno v. Kuhn*, 400 U.S. 1001 (1971). But cf. *Gardella v. Chandler*, 172 F.2d 402 (CA2 1949) (this case, we are advised, was subsequently settled); *Martin v. National League Baseball Club*, 174 F.2d 917 (CA2 1949).

<sup>13</sup> *Corbett v. Chandler*, 202 F.2d 428 (CA6 1953); *Portland Baseball Club, Inc. v. Baltimore Baseball Club, Inc.*, 282 F.2d 680 (CA9 1960); *Niemiec v. Seattle Rainier Baseball Club, Inc.*, 67 F.Supp. 705 (WD Wash. 1946). See *State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N. W. 2d 1, cert. denied, 385 U.S. 990 (1966).

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It is of interest to note that in *Toolson* the petitioner had argued flatly that *Federal Baseball* "is wrong and must be overruled," Brief for Petitioner, No. 18, O. T. 1953, p. 19, and that Thomas Reed Powell, a constitutional scholar of no small stature, urged, as counsel for an *amicus*, that "baseball is a unique enterprise," Brief for Boston American League Base Ball Co. as Amicus Curiae 2, and that "unbridled competition as applied to baseball would not be in the public interest." *Id.* at 14.

D. *United States v. Shubert, 348 U.S. 222 (1955)*, was a civil antitrust action against defendants engaged in the production of legitimate theatrical attractions throughout the United States and in operating theaters for the presentation of such attractions. The District Court had dismissed the complaint on the authority of *Federal Baseball* [\*\*\*\*25] and *Toolson*. *120 F.Supp. 15 (SDNY 1953)*. This Court reversed. Mr. Chief Justice Warren noted the Court's broad conception of "trade or commerce" in the antitrust statutes and the types of enterprises already held to be within the reach of that phrase. [\*275] He stated that *Federal Baseball* and *Toolson* afforded no basis for a conclusion that businesses built around the performance of local exhibitions are exempt from the antitrust laws. *348 U.S., at 227*. He then went on to elucidate the holding in *Toolson* by meticulously spelling out the factors mentioned above:

[\*\*\*740] "In *Federal Baseball*, the Court, speaking through Mr. Justice Holmes, was dealing with the business of baseball and nothing else. . . . The travel, the Court concluded, was 'a mere incident, not the essential thing.' . . .

....

"In *Toolson*, where the issue was the same as in *Federal Baseball*, the Court was confronted with a unique combination of circumstances. For over 30 years there had stood a decision of this Court specifically fixing the status of the baseball business under the antitrust laws and more particularly the validity of the so-called [\*\*\*\*26] 'reserve clause.' During this period, in reliance on the *Federal Baseball* precedent, the baseball business had grown and developed. . . . And Congress, although it had actively considered the ruling, had not seen fit to reject it by amendatory legislation. Against this background, the Court in *Toolson* was asked to overrule *Federal Baseball* on the ground that it was out of step with subsequent decisions reflecting present-day concepts of interstate commerce. The Court, in view of the circumstances of the case, declined to do so. But neither did the Court necessarily reaffirm all that was said in *Federal Baseball*. Instead, 'without re-examination of the underlying issues,' the Court adhered to *Federal Baseball* 'so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.' *346 [\*276] U.S., at 357*. In short, [\*\*2109] *Toolson* was a narrow application of the rule of *stare decisis*.

". . . If the *Toolson* holding is to be expanded -- or contracted -- the appropriate remedy lies with Congress." *348 U.S., at 228-230*.

E. *United States v. International Boxing Club, 348 U.S. 236 (1955)*, [\*\*\*\*27] was a companion to *Shubert* and was decided the same day. This was a civil antitrust action against defendants engaged in the business of promoting professional championship boxing contests. Here again the District Court had dismissed the complaint in reliance upon *Federal Baseball* and *Toolson*. The Chief Justice observed that "if it were not for *Federal Baseball* and *Toolson*, we think that it would be too clear for dispute that the Government's allegations bring the defendants within the scope of the Act." *348 U.S., at 240-241*. He pointed out that the defendants relied on the two baseball cases but also would have been content with a more restrictive interpretation of them than the *Shubert* defendants, for the boxing defendants argued that the cases immunized only businesses that involve exhibitions of an athletic nature. The Court accepted neither argument. It again noted, *348 U.S., at 242*, that "*Toolson* neither overruled *Federal Baseball* nor necessarily reaffirmed all that was said in *Federal Baseball*." It stated:

"The controlling consideration in *Federal Baseball* and *Hart* was, instead, a very practical [\*\*\*\*28] one -- the degree of interstate activity involved in the particular business under review. It follows that *stare decisis* cannot help the defendants here; for, contrary to their argument, *Federal Baseball* did not hold that all businesses based on

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professional sports were outside the scope of the antitrust laws. The issue confronting us is, therefore, not whether a previously granted exemption should continue, [\*\*277] but whether an exemption should be granted in the [\*\*\*741] first instance. And that issue is for Congress to resolve, not this Court." [348 U.S., at 243.](#)

The Court noted the presence then in Congress of various bills forbidding the application of the antitrust laws to "organized professional sports enterprises"; the holding of extensive hearings on some of these; subcommittee opposition; a postponement recommendation as to baseball; and the fact that "Congress thus left intact the then-existing coverage of the antitrust laws." [348 U.S., at 243-244.](#)

Mr. Justice Frankfurter, joined by Mr. Justice Minton, dissented. "It would baffle the subtlest ingenuity," he said, "to find a single differentiating factor between other sporting [\*\*\*\*29] exhibitions . . . and baseball insofar as the conduct of the sport is relevant to the criteria or considerations by which the Sherman Law becomes applicable to a 'trade or commerce.'" [348 U.S., at 248.](#) He went on:

"The Court decided as it did in the *Toolson* case as an application of the doctrine of *stare decisis*. That doctrine is not, to be sure, an imprisonment of reason. But neither is it a whimsy. It can hardly be that this Court gave a preferred position to baseball because it is the great American sport. . . . If *stare decisis* be one aspect of law, as it is, to disregard it in identic situations is mere caprice.

"Congress, on the other hand, may yield to sentiment and be capricious, subject only to due process. . . .

"Between them, this case and *Shubert* illustrate that nice but rational distinctions are inevitable in adjudication. I agree with the Court's opinion in *Shubert* for precisely the reason that constrains me to dissent in this case." [348 U.S., at 249-250.](#)

[\*278] Mr. Justice Minton also separately dissented on the ground that boxing is not trade or commerce. He added the comment that "Congress has [\*\*\*\*30] not attempted" [\[\\*\\*2110\]](#) to control baseball and boxing. [348 U.S., at 251, 253.](#) The two dissenting Justices, thus, did not call for the overruling of *Federal Baseball* and *Toolson*; they merely felt that boxing should be under the same umbrella of freedom as was baseball and, as Mr. Justice Frankfurter said, [348 U.S., at 250](#), they could not exempt baseball "to the exclusion of every other sport different not one legal jot or tittle from it." <sup>14</sup>

F. The parade marched on. [Radovich v. National Football League, 352 U.S. 445 \(1957\)](#), was a civil Clayton Act case testing the application of the antitrust laws to professional football. The District Court dismissed. The Ninth Circuit affirmed in part on the basis of *Federal Baseball* and *Toolson*. The court did not hesitate to "confess that the strength of the pull" of the baseball cases [\*\*\*\*31] and of *International Boxing* "is about equal," but then observed that "football is a team sport" and boxing an individual one. [231 F.2d 620, 622.](#)

This Court reversed with an opinion by Mr. Justice Clark. He said that the Court made its ruling in *Toolson* "because it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity." [352 U.S., at 450.](#) He noted [\*\*\*742] that Congress had not acted. He then said:

"All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that [\*279] it should sustain the unequivocal line of authority reaching over many years.

"Since *Toolson* and *Federal Baseball* are still cited as controlling authority in antitrust actions involving other fields of business, we now specifically limit the rule there established to the facts there involved, i. e., the business of

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<sup>14</sup> The case's final chapter is [International Boxing Club v. United States, 358 U.S. 242 \(1959\).](#)

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organized professional baseball. As long as the Congress continues to acquiesce we should adhere to -- but not [\*\*\*32] extend -- the interpretation of the Act made in those cases. . . .

"If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication. We, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action." [352 U.S., at 450-452](#) (footnote omitted).

Mr. Justice Frankfurter dissented [\*\*\*33] essentially for the reasons stated in his dissent in *International Boxing*, [\*280] 352 U.S., at 455. Mr. Justice Harlan, joined by MR. JUSTICE BRENNAN, also dissented because he, too, was "unable to distinguish football from baseball." [352 U.S., at 456](#). Here again the dissenting Justices did not call for the overruling of the baseball decisions. They merely could not [\*\*2111] distinguish the two sports and, out of respect for *stare decisis*, voted to affirm.

G. Finally, in [Haywood v. National Basketball Assn., 401 U.S. 1204 \(1971\)](#), MR. JUSTICE DOUGLAS, in his capacity as Circuit Justice, reinstated a District Court's injunction *pendente lite* in favor of a professional basketball player and said, "Basketball . . . does not enjoy exemption from the antitrust laws." [401 U.S., at 1205](#).<sup>15</sup>

[\*\*\*34] H. This series of decisions understandably spawned extensive commentary,<sup>16</sup> some of it mildly critical [\*\*\*743] and [\*281] much of it not; nearly all of it looked to Congress for any remedy that might be deemed essential.

[\*\*\*35] I. Legislative proposals have been numerous and persistent. Since *Toolson* more than 50 bills have been introduced in Congress relative to the applicability or nonapplicability of the antitrust laws to baseball.<sup>17</sup> [\*\*\*36] A

<sup>15</sup> See also *Denver Rockets v. All-Pro Management, Inc.*, 325 F.Supp. 1049, 1060 (CD Cal. 1971); *Washington Professional Basketball Corp. v. National Basketball Assn.*, 147 F.Supp. 154 (SDNY 1956).

<sup>16</sup> Neville, Baseball and the Antitrust Laws, 16 Fordham L. Rev. 208 (1947); Eckler, Baseball -- Sport or Commerce?, 17 U. Chi. L. Rev. 56 (1949); Comment, Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws, 62 Yale L. J. 576 (1953); P. Gregory, The Baseball Player, An Economic Study, c. 19 (1956); Note, The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws, 81 Harv. L. Rev. 418 (1967); The Supreme Court, 1953 Term, 68 Harv. L. Rev. 105, 136-138 (1954); The Supreme Court, 1956 Term, 71 Harv. L. Rev. 94, 170-173 (1957); Note, 32 Va. L. Rev. 1164 (1946); Note, 24 Notre Dame Law. 372 (1949); Note, 53 Col. L. Rev. 242 (1953); Note, 22 U. Kan. City L. Rev. 173 (1954); Note, 25 Miss. L. J. 270 (1954); Note, 29 N. Y. U. L. Rev. 213 (1954); Note, 105 U. Pa. L. Rev. 110 (1956); Note, 32 Texas L. Rev. 890 (1954); Note, 35 B. U. L. Rev. 447 (1955); Note, 57 Col. L. Rev. 725 (1957); Note, 23 Geo. Wash. L. Rev. 606 (1955); Note, 1 How. L. J. 281 (1955); Note, 26 Miss. L. J. 271 (1955); Note, 9 Sw. L. J. 369 (1955); Note, 29 Temple L. Q. 103 (1955); Note, 29 Tul. L. Rev. 793 (1955); Note, 62 Dick. L. Rev. 96 (1957); Note, 11 Sw. L. J. 516 (1957); Note, 36 N. C. L. Rev. 315 (1958); Note, 35 Fordham L. Rev. 350 (1966); Note, 8 B. C. Ind. & Com. L. Rev. 341 (1967); Note, 13 Wayne L. Rev. 417 (1967); Note, 2 Rutgers-Camden L. J. 302 (1970); Note, 8 San Diego L. Rev. 92 (1970); Note, 12 B. C. Ind. & Com. L. Rev. 737 (1971); Note, 12 Wm. & Mary L. Rev. 859 (1971).

<sup>17</sup> Hearings on H. R. 5307 et al. before the Antitrust Subcommittee of the House Committee on the Judiciary, 85th Cong., 1st Sess. (1957); Hearings on H. R. 10378 and S. 4070 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. (1958); Hearings on H. R. 2370 et al. before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 1st Sess. (1959) (not printed); Hearings on S. 616 and S. 886 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 86th Cong., 1st Sess. (1959); Hearings on S. 3483 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 86th Cong., 2d Sess. (1960); Hearings on S. 2391 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary,

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few of these passed one house or the other. Those that did would have expanded, not restricted, the reserve system's exemption to other professional league sports. And the Act of Sept. 30, 1961, Pub. L. 87-331, 75 Stat. 732, and the merger addition thereto effected by the Act of Nov. 8, 1966, Pub. L. 89-800, § 6 (b), [**\*282**] 80 Stat. 1515, [15 U. S. C. §§ 1291-1295](#), were also expansive rather than restrictive as to antitrust exemption.<sup>18</sup>

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In view of all this, it seems appropriate now to say that:

[LEdHN\[2\]](#) [↑] [2][HN1](#) [↑] 1. Professional baseball is a business and it is engaged in interstate commerce.

2. With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball.

[\*\*\*37]

[\*\*\*744] [LEdHN\[3\]](#) [↑] [3]3. Even though others might regard this as "unrealistic, inconsistent, or illogical," see *Radovich*, 352 U.S., at 452, the aberration is an established one, and one that has been recognized not only in *Federal Baseball* and *Toolson*, but in *Shubert*, *International Boxing*, and *Radovich*, as well, a total of five consecutive cases in this Court. It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs.

[LEdHN\[4\]](#) [↑] [4]4. Other professional sports operating interstate -- football, [**\*283**] boxing, basketball, and, presumably, hockey<sup>19</sup> [**\*\*\*38**] and golf<sup>20</sup> -- are not so exempt.

5. The advent of radio and television, with their consequent increased coverage and additional revenues, has not occasioned an overruling of *Federal Baseball* and *Toolson*.

6. The Court has emphasized that [HN2](#) [↑] since 1922 baseball, with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action. Remedial legislation has been introduced repeatedly in Congress but none has ever been enacted. The Court, accordingly, has concluded that Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes. This, obviously, has been deemed to be something other than mere congressional silence and passivity. Cf. *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 241-242 (1970).

88th Cong., 2d Sess. (1964); S. Rep. No. 1303, 88th Cong., 2d Sess. (1964); Hearings on S. 950 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965); S. Rep. No. 462, 89th Cong., 1st Sess. (1965). Bills introduced in the 92d Cong., 1st Sess., and bearing on the subject are S. 2599, S. 2616, H. R. 2305, H. R. 11033, and H. R. 10825.

<sup>18</sup> Title [15 U. S. C. § 1294](#) reads:

"Nothing contained in this chapter shall be deemed to change, determine, or otherwise affect the *applicability* or *nonapplicability* of the antitrust laws to any act, contract, agreement, rule, course of conduct, or other activity by, between, or among persons engaging in, conducting, or participating in the organized professional team sports of football, baseball, basketball, or hockey, except the agreements to which [section 1291](#) of this title shall apply." (Emphasis supplied.)

<sup>19</sup> *Peto v. Madison Square Garden Corp.*, 1958 Trade Cases, para. 69,106 (SDNY 1958).

<sup>20</sup> [Deesen v. Professional Golfers' Assn.](#), 358 F.2d 165 (CA9), cert. denied, **385 U.S. 846** (1966).

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7. The Court has expressed concern about the confusion [\*\*\*39] and the retroactivity problems that inevitably would result with a judicial overturning of *Federal Baseball*. It has voiced a preference that if any change is to be made, it come by legislative action that, by its nature, is only prospective in operation.

8. The Court noted in *Radovich*, 352 U.S., at 452, that the slate with respect to baseball is not clean. Indeed, it has not been clean for half a century.

This emphasis and this concern are still with us. We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, [\*284] has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.

LEdHN[1B] [1B] Accordingly, we adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball. We adhere also to *International Boxing* and *Radovich* and to their respective applications to professional boxing and professional football. If [\*\*\*40] there [\*\*2113] is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court. If we were to act otherwise, we would be withdrawing from the conclusion as to congressional intent made in *Toolson* and from the concerns as to retrospectivity therein expressed. Under these circumstances, [\*\*\*745] there is merit in consistency even though some might claim that beneath that consistency is a layer of inconsistency.

LEdHN[5] [5] The petitioner's argument as to the application of state antitrust laws deserves a word. Judge Cooper rejected the state law claims because HN3 state antitrust regulation would conflict with federal policy and because national "uniformity [is required] in any regulation of baseball and its reserve system." 316 F.Supp., at 280. The Court of Appeals, in affirming, stated, HN4 "As the burden on interstate [\*\*\*41] commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state antitrust law." 443 F.2d, at 268. As applied to organized baseball, and in the light of this Court's observations and holdings in *Federal Baseball*, in *Toolson*, in *Shubert*, in *International Boxing*, and in *Radovich*, and despite baseball's allegedly inconsistent position taken in the past with respect to the application of state law,<sup>21</sup> [\*285] these statements adequately dispose of the state law claims.

The conclusion we have reached makes it unnecessary for us to consider the respondents' additional argument that the reserve system is a mandatory subject of collective [\*\*\*42] bargaining and that federal labor policy therefore exempts the reserve system from the operation of federal antitrust laws.<sup>22</sup>

We repeat for this case what was said in *Toolson*:

"Without re-examination of the underlying issues, the [judgment] below [is] affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, supra*, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." 346 U.S., at 357.

And what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972: the remedy, if any is indicated, is for congressional, and not judicial, action.

<sup>21</sup> See Brief for Respondent in *Federal Baseball*, No. 204, O. T. 1921, p. 67, and in *Toolson*, No. 18, O. T. 1953, p. 30. See also *State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N. W. 2d 1, cert. denied, **385 U.S. 990 (1966)**.

<sup>22</sup> See Jacobs & Winter, Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage, 81 Yale L. J. 1 (1971), suggesting present-day irrelevancy of the antitrust issue.

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The judgment of the Court [\*\*\*\*43] of Appeals is

*Affirmed.*

MR. JUSTICE WHITE joins in the judgment of the Court, and in all but Part I of the Court's opinion.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

**Concur by:** BURGER

## Concur

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MR. CHIEF JUSTICE BURGER, concurring.

I concur in all but Part I of the Court's opinion but, like MR. JUSTICE DOUGLAS, I have grave reservations [\*286] as to the correctness of [\*Toolson v. New York Yankees, Inc., 346 U.S. 356 \(1953\)\*](#); as he notes in his dissent, he joined [\*\*\*746] that holding but has "lived to regret it." The error, if such it be, is one on which the affairs of a great many people have rested for a long time. Courts are not the forum in which this tangled web ought to be unsnarled. [\*\*2114] I agree with MR. JUSTICE DOUGLAS that congressional inaction is not a solid base, but the least undesirable course now is to let the matter rest with Congress; it is time the Congress acted to solve this problem.

**Dissent by:** DOUGLAS; MARSHALL

## Dissent

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MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

[\*\*\*44] This Court's decision in [\*Federal Baseball Club v. National League, 259 U.S. 200\*](#), made in 1922, is a derelict in the stream of the law that we, its creator, should remove. Only a romantic view <sup>1</sup> of a rather dismal business account over the last 50 years would keep that derelict in midstream.

In 1922 the Court had a narrow, parochial view of commerce. With the demise of the old landmarks of that era, particularly [\*United States v. Knight Co., 156 U.S. 1\*](#), [\*Hammer v. Dagenhart, 247 U.S. 251\*](#), and [\*Paul v. Virginia, 8 Wall. 168\*](#), the whole concept of commerce has changed.

Under the modern decisions such as [\*Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219\*](#); [\*United States v. Darby, 312 U.S. 100\*](#); [\*\*\*45] [\*Wickard v. Filburn, 317 U.S. 111\*](#); [\*United States v. South-Eastern Underwriters Assn., 322 U.S. 533\*](#), the power of Congress was recognized as broad enough to reach all phases of the vast operations of our national industrial system. [\*287] An industry so dependent on radio and television as is baseball and gleaning vast interstate revenues (see H. R. Rep. No. 2002, 82d Cong., 2d Sess., 4, 5 (1952)) would be hard put today to say with the Court in the *Federal Baseball Club* case that baseball was only a local exhibition, not trade or commerce.

Baseball is today big business that is packaged with beer, with broadcasting, and with other industries. The beneficiaries of the *Federal Baseball Club* decision are not the Babe Ruths, Ty Cobbs, and Lou Gehrigs.

The owners, whose records many say reveal a proclivity for predatory practices, do not come to us with equities. The equities are with the victims of the reserve clause. I use the word "victims" in the Sherman Act sense, since a

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<sup>1</sup> While I joined the Court's opinion in [\*Toolson v. New York Yankees, Inc., 346 U.S. 356\*](#), I have lived to regret it; and I would now correct what I believe to be its fundamental error.

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contract which forbids anyone to practice his calling is commonly called an unreasonable restraint of trade.<sup>2</sup> *Gardella v. Chandler*, 172 F.2d 402 [\*\*\*\*46] (CA2). And see *Haywood v. National Basketball Assn.*, 401 U.S. 1204 (DOUGLAS, J., in chambers).

If congressional inaction is our [\*\*\*747] guide, we should rely upon the fact that Congress has refused to enact bills broadly exempting professional sports from antitrust regulation.<sup>3</sup> H. R. Rep. No. 2002, [\*\*2115] 82d Cong., 2d Sess. [\*288] (1952). The only statutory exemption granted by Congress to professional sports concerns broadcasting [\*\*\*\*47] rights. 15 U. S. C. §§ 1291-1295. I would not ascribe a broader exemption through inaction than Congress has seen fit to grant explicitly.

[\*\*\*\*48] There can be no doubt "that were we considering the question of baseball for the first time upon a clean slate"<sup>4</sup> we would hold it to be subject to federal antitrust regulation. *Radovich v. National Football League*, 352 U.S. 445, 452. The unbroken silence of Congress should not prevent us from correcting our own mistakes.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Petitioner was a major league baseball player from 1956, when he signed a contract with the Cincinnati Reds, until 1969, when his 12-year career with the St. Louis Cardinals, which had obtained him from the Reds, ended and he was traded to the Philadelphia Phillies. He had no notice that the Cardinals were contemplating a trade, no opportunity to indicate the teams with which he would prefer playing, and no desire to go to Philadelphia. After receiving formal notification of the trade, petitioner [\*\*\*\*49] wrote to the Commissioner of Baseball protesting that he was not [\*289] "a piece of property to be bought and sold irrespective of my wishes,"<sup>1</sup> and urging that he had the right to consider offers from other teams than the Phillies. He requested that the Commissioner inform all of the major league teams that he was available for the 1970 season. His request was denied, and petitioner was informed that he had no choice but to play for Philadelphia or not to play at all.

To non-athletes it might appear that petitioner was virtually enslaved by the owners of major league baseball clubs who bartered among themselves for his services. But, athletes know that it was not servitude that bound petitioner to the club owners; it was the reserve system. The essence of that system is that a player is bound to the club with which he first signs a contract for the rest of his playing days.<sup>2</sup> He [\*\*\*748] cannot escape from the club except by retiring, [\*\*\*\*50] and he cannot prevent the club from assigning his contract to any other club.

<sup>2</sup> Had this same group boycott occurred in another industry, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207; *United States v. Shubert*, 348 U.S. 222; or even in another sport, *Haywood v. National Basketball Assn.*, 401 U.S. 1204 (DOUGLAS, J., in chambers); *Radovich v. National Football League*, 352 U.S. 445; *United States v. International Boxing Club*, 348 U.S. 236; we would have no difficulty in sustaining petitioner's claim.

<sup>3</sup> The Court's reliance upon congressional inaction disregards the wisdom of *Helvering v. Hallock*, 309 U.S. 106, 119-121, where we said:

"Nor does want of specific Congressional repudiations . . . serve as an implied instruction by Congress to us not to reconsider, in the light of new experience . . . those decisions . . . . It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines. . . . Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of . . . Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."

And see *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 556-561.

<sup>4</sup> This case gives us for the first time a full record showing the reserve clause in actual operation.

<sup>1</sup> Letter from Curt Flood to Bowie K. Kuhn, Dec. 24, 1969, App. 37.

<sup>2</sup> As MR. JUSTICE BLACKMUN points out, the reserve system is not novel. It has been employed since 1887. See *Metropolitan Exhibition Co. v. Ewing*, 42 F. 198, 202-204 (CC SDNY 1890). The club owners assert that it is necessary to preserve effective competition and to retain fan interest. The players do not agree and argue that the reserve system is overly

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Petitioner brought this action in the United States District Court for the Southern District of New York. He alleged, among other things, that the reserve system was an unreasonable [\*\*\*\*51] restraint of trade in violation of [\*290] federal antitrust laws.<sup>3</sup> The District Court [\*\*2116] thought itself bound by prior decisions of this Court and found for the respondents after a full trial. 309 F.Supp. 793 (1970). The United States Court of Appeals for the Second Circuit affirmed. 443 F.2d 264 (1971). We granted certiorari on October 19, 1971, 404 U.S. 880, in order to take a further look at the precedents relied upon by the lower courts.

This is a difficult case because we are [\*\*\*\*52] torn between the principle of *stare decisis* and the knowledge that the decisions in Federal Baseball Club v. National League, 259 U.S. 200 (1922), and Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953), are totally at odds with more recent and better reasoned cases.

In *Federal Baseball Club*, a team in the Federal League brought an antitrust action against the National and American Leagues and others. In his opinion for a unanimous Court, Mr. Justice Holmes wrote that the business being considered was "giving exhibitions of base ball, which are purely state affairs." 259 U.S., at 208. Hence, the Court held that baseball was not within the purview of the antitrust laws. Thirty-one years later, the Court reaffirmed this decision, without re-examining it, in *Toolson*, a one-paragraph *per curiam* opinion. Like this case, *Toolson* involved an attack on the reserve system. The Court said:

"The business has . . . been left for thirty years to develop, on the understanding that it was not [\*291] subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, [\*\*\*\*53] with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation." Id., at 357.

Much more time has passed since *Toolson* and Congress has not acted. We must now decide whether to adhere to the reasoning of *Toolson* -- *i. e.*, to refuse to re-examine the underlying basis of *Federal Baseball Club* -- or to proceed with a re-examination and let the chips fall where they may.

In his answer to petitioner's complaint, the Commissioner of Baseball "admits that under present concepts of interstate commerce defendants are engaged therein." App. 40. There can be no doubt that the [\*\*\*749] admission is warranted by today's reality. Since baseball is interstate commerce, if we re-examine baseball's antitrust exemption, the Court's decisions in United States v. Shubert, 348 U.S. 222 (1955), United States v. International Boxing Club, 348 U.S. 236 (1955), and Radovich v. National Football League, 352 U.S. 445 (1957), require that we bring baseball within the coverage of the antitrust [\*\*\*\*54] laws. See also, Haywood v. National Basketball Assn., 401 U.S. 1204 (DOUGLAS, J., in chambers).

We have only recently had occasion to comment that:

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. . . . Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy [\*292] because certain private citizens or groups believe that such foreclosure [\*\*2117] might promote greater competition in a more important sector of the economy." United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972).

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restrictive. Before this lawsuit was instituted, the players refused to agree that the reserve system should be a part of the collective-bargaining contract. Instead, the owners and players agreed that the reserve system would temporarily remain in effect while they jointly investigated possible changes. Their activity along these lines has halted pending the outcome of this suit.

<sup>3</sup> Petitioner also alleged a violation of state antitrust laws, state civil rights laws, and of the common law, and claimed that he was forced into peonage and involuntary servitude in violation of the Thirteenth Amendment to the United States Constitution. Because I believe that federal antitrust laws govern baseball, I find that state law has been pre-empted in this area. Like the lower courts, I do not believe that there has been a violation of the Thirteenth Amendment.

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The importance of the antitrust laws to every citizen must not be minimized. They are as important to baseball players as they are to football players, lawyers, doctors, or members of any other class of workers. Baseball players cannot be denied the benefits of competition merely because club owners view other economic interests as being more important, unless [\*\*\*\*55] Congress says so.

Has Congress acquiesced in our decisions in *Federal Baseball Club* and *Toolson*? I think not. Had the Court been consistent and treated all sports in the same way baseball was treated, Congress might have become concerned enough to take action. But, the Court was inconsistent, and baseball was isolated and distinguished from all other sports. In *Toolson* the Court refused to act because Congress had been silent. But the Court may have read too much into this legislative inaction.

Americans love baseball as they love all sports. Perhaps we become so enamored of athletics that we assume that they are foremost in the minds of legislators as well as fans. We must not forget, however, that there are only some 600 major league baseball players. Whatever muscle they might have been able to muster by combining forces with other athletes has been greatly impaired by the manner in which this Court has isolated them. It is this Court that has made them impotent, and this Court should correct its error.

We do not lightly overrule our prior constructions of federal statutes, but when our errors deny substantial federal rights, like the right to compete freely [\*\*\*\*56] and effectively to the best of one's ability as guaranteed by the [\*293] antitrust laws, we must admit our error and correct it. We have done so before and we should do so again here. See, e. g., *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 241 [\*\*750] (1970).<sup>4</sup>

[\*\*\*\*57] To the extent that there is concern over any reliance interests that club owners may assert, they can be satisfied by making our decision prospective only. Baseball should be covered by the antitrust laws beginning with this case and henceforth, unless Congress decides otherwise.<sup>5</sup>

Accordingly, I would overrule *Federal Baseball Club* and *Toolson* and reverse the decision of the Court of Appeals.  
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[\*\*\*\*58] This does not mean that petitioner would necessarily prevail, however. Lurking in the background is a hurdle of recent vintage that petitioner still must overcome. [\*294] In 1966, the Major League [\*\*2118] Players Association was formed. It is the collective-bargaining representative for all major league baseball players. Respondents argue that the reserve system is now part and parcel of the collective-bargaining agreement and that because it is a mandatory subject of bargaining, the federal labor statutes are applicable, not the federal antitrust laws.<sup>7</sup> The lower courts did not rule on this argument, having decided the case solely on the basis of the antitrust exemption.

<sup>4</sup> In the past this Court has not hesitated to change its view as to what constitutes interstate commerce. Compare *United States v. Knight Co.*, 156 U.S. 1 (1895), with *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), and *United States v. Darby*, 312 U.S. 100 (1941).

"The jurist concerned with 'public confidence in, and acceptance of the judicial system' might well consider that, however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for law itself." Szanton, *Stare Decisis; A Dissenting View*, 10 Hastings L. J. 394, 397 (1959).

<sup>5</sup> We said recently that "in rare cases, decisions construing federal statutes might be denied full retroactive effect, as for instance where this Court overrules its own construction of a statute . . ." *United States v. Estate of Donnelly*, 397 U.S. 286, 295 (1970). Cf. *Simpson v. Union Oil Co. of California*, 377 U.S. 13, 25 (1964).

<sup>6</sup> The lower courts did not reach the question of whether, assuming the antitrust laws apply, they have been violated. This should be considered on remand.

<sup>7</sup> Cf. *United States v. Hutcheson*, 312 U.S. 219 (1941).

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This Court has faced the interrelationship between the antitrust laws and the labor laws before. The decisions make several things clear. First, "benefits to organized labor cannot be utilized as a cat's-paw to pull employer's chestnuts out of the [\*\*\*\*59] antitrust fires." *United States v. Women's Sportswear Manufacturers Assn., 336 U.S. 460, 464 (1949)*. See also *Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797 (1945)*. Second, the very nature of a collective-bargaining agreement mandates that the parties be able to "restrain" trade to a greater degree than management could do unilaterally. *United States v. Hutcheson, 312 U.S. 219 (1941)*; *United Mine Workers v. Pennington, 381 U.S. 657 (1965)*; *Amalgamated Meat Cutters v. Jewel Tea, 381 U.S. 676 (1965)*; cf., *Teamsters Union v. Oliver, 358 U.S. 283 (1959)*. Finally, it is clear that some cases can be resolved only by examining the purposes and the competing interests of the labor and antitrust statutes and by striking a balance.

[\*\*\*751] It is apparent that none of the prior cases is precisely in point. They involve union-management agreements that work to the detriment of management's competitors. In this case, petitioner urges that the reserve system works to the detriment of labor.

[\*295] While there was evidence at trial concerning the [\*\*\*\*60] collective-bargaining relationship of the parties, the issues surrounding that relationship have not been fully explored. As one commentary has suggested, this case "has been litigated with the implications for the institution of collective bargaining only dimly perceived. The labor law issues have been in the corners of the case -- the courts below, for example, did not reach them -- moving in and out of the shadows like an uninvited guest at a party whom one can't decide either to embrace or expel."<sup>8</sup>

It is true that in *Radovich v. National Football League, supra*, the Court rejected a claim that federal labor statutes governed the relationship between a professional athlete and the professional sport. But, an examination of the briefs and record in that case indicates that the issue was not squarely faced. The issue is once again before [\*\*\*61] this Court without being clearly focused. It should, therefore, be the subject of further inquiry in the District Court.

There is a surface appeal to respondents' argument that petitioner's sole remedy lies in filing a claim with the National Labor Relations Board, but this argument is premised on the notion that management and labor have agreed to accept the reserve clause. This notion is contradicted, in part, by the record in this case. Petitioner suggests that the reserve system was thrust upon the players by the owners and that the recently formed players' union has not had time to modify or eradicate it. If this is true, the question arises as to whether there would then be any exemption from the antitrust laws in this case. Petitioner also suggests that there are limits [\*296] to the antitrust violations to which labor and management can agree. These limits should also be explored.

[\*\*2119] In light of these considerations, I would remand this case to the District Court for consideration of whether petitioner can state a claim under the antitrust laws despite the collective-bargaining agreement, and, if so, for a determination of whether there has been an antitrust [\*\*\*62] violation in this case.

## References

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20 Am Jur 2d, Courts 183, 186, 231-235; *54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 5*

US L Ed Digest, Courts 141, 775; Restraints of Trade and Monopolies 11, 23

ALR Digests, Courts 140, 150, 349; Restraints of Trade and Monopolies 12, 47

L Ed Index to Anno (Rev ed), Amusements; Courts; Restraints of Trade and Monopolies

ALR Quick Index, Baseball; Restraints of Trade and Monopolies; Stare Decisis

Federal Quick Index, Baseball; Courts; Monopolies and Restraints of Trade

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<sup>8</sup> Jacobs & Winter, Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage, 81 Yale L. J. 1, 22 (1971).

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Annotation References:

Professional sports as within federal antitrust laws. [98 L Ed 73, 99 L Ed 301.](#)

Amusement or educational enterprise as interstate commerce. 26 ALR 359, 47 ALR 782.

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## Tidewater Oil Co. v. United States

Supreme Court of the United States

October 11, 1972, Argued ; December 6, 1972, Decided

No. 71-366

**Reporter**

409 U.S. 151 \*; 93 S. Ct. 408 \*\*; 34 L. Ed. 2d 375 \*\*\*; 1972 U.S. LEXIS 159 \*\*\*\*; 1972 Trade Cas. (CCH) P74,258

TIDEWATER OIL CO. v. UNITED STATES ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

**Disposition:** Affirmed.

## **Core Terms**

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Expediting, court of appeals, cases, antitrust case, interlocutory order, interlocutory appeal, final judgment, district court, appeals, injunction, antitrust, appellate jurisdiction, controlling question, decree, direct appeal, civil action, interlocutory, questions, legislative history, direct review, termination, provisions, orders, screening, revision

## **LexisNexis® Headnotes**

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Governments > Legislation > Interpretation

### [HN1](#) Legislation, Interpretation

While the clear meaning of statutory language is not to be ignored, words are inexact tools at best, and hence it is essential that courts place the words of a statute in their proper context by resort to the legislative history.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Divestiture

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

### [HN2](#) Civil Actions, Injunctions

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[28 U.S.C.S. § 1292\(a\)\(1\)](#) allows interlocutory orders of the district courts granting, continuing, modifying, refusing or dissolving injunctions to be appealed to the courts of appeals except where a direct review may be had in the Supreme Court.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

#### [\*\*HN3\*\*](#) **Appellate Jurisdiction, Interlocutory Orders**

See [28 U.S.C.S. § 1292\(b\)](#).

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

#### [\*\*HN4\*\*](#) **US Department of Justice Actions, Civil Actions**

The consistent construction that had been accorded [15 U.S.C.S. § 29](#) prior to the enactment of [28 U.S.C.S. § 1292\(b\)](#) cannot simply be ignored in determining the impact of that section on government civil antitrust cases.

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

#### [\*\*HN5\*\*](#) **Appellate Jurisdiction, Final Judgment Rule**

[28 U.S.C.S. § 1292](#) is intended to apply only to interlocutory orders, not otherwise appealable under [28 U.S.C.S. § 1292\(a\)](#), in civil actions in which the courts of appeals would have jurisdiction over an appeal from the final judgment under [28 U.S.C.S. § 1291](#).

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

#### [\*\*HN6\*\*](#) **Appellate Jurisdiction, Interlocutory Orders**

[28 U.S.C.S. § 1292\(a\)](#) provides for an appeal as a matter of right from a number of specified types of interlocutory orders -- in particular, interlocutory orders granting or denying injunctions. Those interlocutory orders not within subsection (a), however, are made appealable in [28 U.S.C.S. § 1292 \(b\)](#), subject to the judgment and discretion of the district court and the court of appeals. Greater importance obviously is attached to those types of interlocutory orders specified in subsection (a) than to those covered by (b).

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

#### [\*\*HN7\*\*](#) **US Department of Justice Actions, Civil Actions**

Appeals in government civil antitrust cases can be taken only from final judgments and only to the appellate court.

## Lawyers' Edition Display

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### Summary

Pursuant to the provisions of [28 USCS 1292\(b\)](#)--which authorizes a United States Court of Appeals, in its discretion, to permit an appeal from a District Court's interlocutory order in a civil action when the District Court certifies that its order involves a controlling question of law and that immediate appeal may materially advance the ultimate termination of the litigation--a United States District Court, in a civil antitrust action brought by the United States, certified that its denial of a motion to dismiss one of the defendants involved a controlling question of law and that an immediate appeal might materially advance the ultimate termination of the litigation. However, the Court of Appeals for the Ninth Circuit denied the application for leave to appeal, on the ground that the Court of Appeals lacked jurisdiction in view of the provisions of 2 of the Expediting Act of 1903, which provides that an appeal from a final judgment of a District Court in a government civil antitrust action will lie only to the United States Supreme Court.

On certiorari, the United States Supreme Court affirmed. In an opinion by Marshall, J., expressing the view of six members of the court, it was held that [28 USCS 1292\(b\)](#) did not establish jurisdiction in the Courts of Appeals over interlocutory orders in government civil antitrust actions, since 2 of the Expediting Act created exclusive jurisdiction of appeals in such actions in the Supreme Court and precluded appeals from interlocutory orders--it being noted that the views of individual Justices critical of the wisdom of 2 of the Expediting Act, particularly because of the burden it placed on the Supreme Court, afforded no basis for disregarding the plain intent of Congress.

White, J., joined the court's opinion except for the advisory to Congress reflecting a view of the relative merits of the Expediting Act.

Douglas, J., dissenting, stated that while he agreed with Stewart, J., that [28 USCS 1292\(b\)](#) should be construed to allow interlocutory appeals to the Courts of Appeals in government civil antitrust actions, nevertheless he did not agree with the intimations in both the majority and the minority opinions that the Supreme Court was overworked.

Stewart, J., joined by Rehnquist, J., and joined in part by Douglas, J., dissented, expressing the view that since the Expediting Act of 1903 applied only to final judgments, and since [28 USCS 1292\(b\)](#), enacted in 1958, applied only to interlocutory orders, the statutes were not inconsistent and the Expediting Act should not be construed as prohibiting Court of Appeals jurisdiction under 1292(b) of interlocutory appeals in government civil antitrust actions.

### Headnotes

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APPEAL AND ERROR §21.9 > certiorari -- important question -- conflict of decisions -- > Headnote:

[LEdHN\[1\]](#) [1]

The United States Supreme Court will grant certiorari to review a Federal Court of Appeals' decision that it had no jurisdiction under [28 USCS 1292\(b\)](#) to review a District Court's interlocutory order in a civil antitrust action brought by the government, where the decision raises an important question of federal appellate jurisdiction, and where a conflict among the circuits had subsequently developed on the question.

APPEAL AND ERROR §31 > government civil antitrust actions -- interlocutory orders -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

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[28 USCS 1292\(b\)](#)--which provides that a Court of Appeals may, in its discretion, permit an appeal from a District Court's interlocutory order in a civil action when the District Court, in making an order not otherwise appealable under the provisions of 1292(a) authorizing appeals from specified types of interlocutory orders, shall certify that the order involves a controlling question of law and that immediate appeal may materially advance the ultimate termination of the litigation--does not establish jurisdiction in a Court of Appeals over interlocutory orders in antitrust actions brought by the United States, since 2 of the Expediting Act of 1903 ([15 USCS 29](#)), which provides that an appeal from a final judgment of a District Court in a government civil antitrust action will lie only to the United States Supreme Court, creates exclusive jurisdiction of appeals in such cases in the Supreme Court.

APPEAL AND ERROR §286 > Expediting Act -- purpose -- > Headnote:

[LEdHN\[3\]](#) [3]

The purpose of 2 of the Expediting Act of 1903 ([15 USCS 29](#)), which provides that in civil antitrust actions brought by the United States, an appeal from the final judgment of the District Court will lie only to the United States Supreme Court, is to expedite litigation of great and general importance, and to withdraw all intermediate appellate jurisdiction in government civil antitrust cases.

COURTS §225.4 > three-judge District Court -- Expediting Act -- purpose -- > Headnote:

[LEdHN\[4A\]](#) [4A] [LEdHN\[4B\]](#) [4B]

The purpose of 1 of the Expediting Act of 1903 ([15 USCS 28](#)), which requires that a three-judge District Court be convened to hear a government civil antitrust case which the Attorney General certifies to be of general public importance, is to provide a mechanism for full consideration of such cases by a panel of judges before presentation on appeal to the United States Supreme Court as if heard by a United States Court of Appeals.

STATUTES §145 > construction -- legislative history -- > Headnote:

[LEdHN\[5\]](#) [5]

While the clear meaning of statutory language is not to be ignored, words are inexact tools at best, and hence it is essential that the words of a statute be placed in their proper context by resort to the legislative history.

APPEAL AND ERROR §31 > government civil antitrust suit -- interlocutory order -- > Headnote:

[LEdHN\[6\]](#) [6]

An application under the All Writs Act ([28 USCS 1651\(a\)](#)) for an extraordinary writ to review an interlocutory order in a government civil antitrust case must be made to the United States Supreme Court, which has sole appellate jurisdiction in such cases under 2 of the Expediting Act of 1903 ([15 USCS 29](#)).

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## APPEAL AND ERROR §31 > government civil antitrust case -- interlocutory order -- > Headnote:

LEdHN[7A] [ ] [7A] LEdHN[7B] [ ] [7B]

Under 2 of the Expediting Act of 1903 ([15 USCS 29](#)), which provides that in civil antitrust actions brought by the United States, an appeal from the final judgment of the District Court will lie only to the United States Supreme Court, appeals of interlocutory orders in such cases cannot be taken to the Supreme Court.

**APPEAL AND ERROR §31 > government civil antitrust case -- interlocutory order -- > Headnote:**

LEdHN[8] [  ] [8]

Under 2 of the Expediting Act of 1903 ([15 USCS 29](#)), which provides that in civil antitrust actions brought by the United States, an appeal from the "final judgment" of the District Court will lie only to the United States Supreme Court, review of interlocutory orders may be had in the Supreme Court upon appeal from the final judgment, but direct review may not be had when the interlocutory order is entered, since there is then no "final judgment."

## APPEAL AND ERROR §31 > review of interlocutory injunctions -- > Headnote:

LEdHN[9] [  ] [9]

The exception clause in [28 USCS 1292\(a\)\(1\)](#)--which allows interlocutory orders of the Federal District Courts, granting, continuing, modifying, refusing, or dissolving injunctions, to be appealed to the Courts of Appeals, "except where a direct review may be had in the Supreme Court"--applies so as to bar interlocutory appeals to the Court of Appeals not only in instances where the District Court's interlocutory order itself may be appealed to the Supreme Court, but also in instances where the District Court's interlocutory order, though not itself appealable to the Supreme Court, may be reviewed in the Supreme Court on appeal from a final judgment.

**STATUTES §139 > United States Code -- interpretation -- > Headnote:**

LEdHN[10] [  ] [10]

Since the function of the Revisers of the 1948 United States Code was generally limited to that of consolidation and codification, the interpretation of provisions altered in the 1948 revision is governed by the principle that no change is to be presumed unless clearly expressed.

## APPEAL AND ERROR §31 > government civil antitrust cases -- interlocutory injunctions -- > Headnote:

[LEdHN\[11A\]](#) [  ] [11A] [LEdHN\[11B\]](#) [  ] [11B] [LEdHN\[11C\]](#) [  ] [11C]

The provisions of [28 USCS 1292\(a\)\(1\)](#)--which authorize appeals to the Courts of Appeals of interlocutory orders of the Federal District Courts granting or denying injunctions, except where direct review may be had in the United States Supreme Court--may not be invoked in civil antitrust actions brought by the United States, since 2 of the Expediting Act of 1903 ([15 USCS 29](#)), which provides that an appeal from the final judgment of a District Court in a government civil antitrust action will lie only to the Supreme Court, limits the right of appeal in such cases to a final judgment and establishes exclusive jurisdiction of such appeals in the Supreme Court.

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APPEAL AND ERROR §31 > appealability of interlocutory orders -- > Headnote:

[LEdHN\[12\]](#) [12]

28 USCS 1292(b)--which provides that a Court of Appeals may, in its discretion, permit an appeal from a District Court's interlocutory order in a civil action when the District Court, in making an order not otherwise appealable under provisions of 1292(a) authorizing appeals from specified types of interlocutory orders, shall certify that the order involves a controlling question of law and that immediate appeal may materially advance the ultimate termination of the litigation--does not create a general right of interlocutory appeal; rather, it only extends the availability of such appeals to a limited group of orders, not otherwise covered by 1292, that involve "a controlling question of law" the immediate appeal of which "may materially advance the ultimate termination of the litigation."

APPEAL AND ERROR §22 > government civil antitrust actions -- appeals to Supreme Court -- > Headnote:

[LEdHN\[13\]](#) [13]

The purposes of 2 of the Expediting Act of 1903 (15 USCS 29)--which provides that in civil antitrust actions brought by the United States, an appeal from the final judgment of the District Court will lie only to the United States Supreme Court--include the avoiding of piecemeal appeal, and the limiting of review of important questions of antitrust law to the Supreme Court.

APPEAL AND ERROR §31 > interlocutory orders -- purpose of statute -- > Headnote:

[LEdHN\[14\]](#) [14]

28 USCS 1292(b)--which provides that a Court of Appeals may, in its discretion, permit an appeal from a District Court's interlocutory order in a civil action when the District Court, in making an order not otherwise appealable under the provisions of 1292(a) authorizing appeals from specified types of interlocutory orders, shall certify that the order involves a controlling question of law and that immediate appeal may materially advance the ultimate termination of the litigation--was intended to apply only to interlocutory orders, not otherwise appealable under 1292(a), in civil actions in which the Courts of Appeals would have jurisdiction over an appeal from the final judgment under 28 USCS 1291.

APPEAL AND ERROR §31 > interlocutory orders -- purpose of statute -- > Headnote:

[LEdHN\[15A\]](#) [15A] [LEdHN\[15B\]](#) [15B]

28 USCS 1292(b)--which provides that a Court of Appeals may, in its discretion, permit an appeal from a District Court's interlocutory order in a civil action when the District Court, in making an order not otherwise appealable under the provisions of 1292(a) authorizing appeal from specified types of interlocutory orders, shall certify that the order involves a controlling question of law and that immediate appeal may materially advance the ultimate termination of the litigation--was intended to supplement 1292(a), not to provide a substitute for it.

APPEAL AND ERROR §24 > COURTS §141 > government civil antitrust actions -- appeals to Supreme Court -- wisdom of statute -- > Headnote:

[LEdHN\[16\]](#) [▼] [16]

The personal views of the Justices of the United States Supreme Court, critical of the wisdom of 2 of the Expediting Act of 1903 ([15 USCS 29](#))--which provides that in civil antitrust actions brought by the United States, an appeal from the final judgment of the District Court will lie only to the Supreme Court--are no basis for disregarding what the Supreme Court is bound to recognize as the plain and unaltered intent of Congress to require that appeals in government civil antitrust cases be taken only from final judgments and only to the Supreme Court.

## Syllabus

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The Expediting Act, providing that in a civil antitrust action brought by the United States in a federal district court an appeal from that court's final judgment will lie only to this Court, lodged exclusive appellate jurisdiction over such actions in this Court and thus bars the courts of appeals from asserting jurisdiction over interlocutory orders covered by [28 U. S. C. § 1292 \(b\)](#), as well as over other interlocutory orders specified in [§ 1292 \(a\)](#). The legislative history of those provisions contains no indication of a congressional intent to impair the original exclusivity of this Court's jurisdiction under the Expediting Act. Pp. 154-174.

**Counsel:** Moses Lasky argued the cause for petitioner. With him on the briefs was C. Lansing Hays, Jr.

A. Raymond Randolph, Jr., argued the cause for the United States pro hac vice. With him on the brief were Solicitor General Griswold and Assistant Attorney General Kauper.

**Judges:** Marshall, J., delivered the opinion [\*\*\*2] of the Court, in which Burger, C. J., and Brennan, White, Blackmun, and Powell, JJ., joined. White, J., filed a concurring statement, post, p. 174. Douglas, J., filed a dissenting opinion, post, p. 174. Stewart, J., filed a dissenting opinion, which Rehnquist, J., joined, and Douglas, J., joined in part, post, p. 178.

**Opinion by:** MARSHALL

## Opinion

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[\*151] [\*\*\*379] [\*\*410] MR. JUSTICE MARSHALL delivered the opinion of the Court.

On July 13, 1966, the United States filed a civil antitrust suit against Phillips Petroleum Co. (Phillips) and petitioner Tidewater Oil Co. (Tidewater). The complaint alleged that Phillips' acquisition of certain [\*152] assets and operations of Tidewater violated § 7 of the Clayton Act, 38 Stat. 731, as amended, [15 U. S. C. § 18](#). The District Court denied the United States' motion for a temporary restraining order to prevent consummation of the acquisition,<sup>1</sup> and its subsequent motion for a preliminary injunction to require either rescission of the acquisition or maintenance by Phillips of the going-concern value of the transferred assets and operations.

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<sup>1</sup> Tidewater then transferred title to its Western Marketing and Manufacturing Division to Phillips.

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[\*\*\*3] [LEdHN\[1\]](#) [1] [LEdHN\[2A\]](#) [2A] Petitioner continued as a party to the suit during some five years of pretrial discovery and preparation.<sup>2</sup> [\*\*\*5] [\*\*\*380] Then in April 1971, following the Government's announcement that it was ready for trial, petitioner moved to be dismissed as a party.<sup>3</sup> The District Court denied the motion, but found that it involved "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from [the] order may materially advance the ultimate termination of this litigation." It therefore certified "its order denying defendant's motion to dismiss for interlocutory appeal under [Section 1292 \(b\) of Title 28 of the United States Code](#)." As required by the statute, Tidewater then applied to the Court of Appeals for the Ninth Circuit for leave to prosecute the appeal. That court, however, denied the application relying solely on its previous [\*153] decision in [United States v. FMC Corp., 321 F.2d 534 \(1963\)](#). There an attempt was made to appeal an [\*4] interlocutory order denying a preliminary injunction in a Government civil antitrust case. Notwithstanding that [28 U. S. C. § 1292 \(a\)\(1\)](#) provides for an appeal of right to the courts of appeals from an order granting or denying preliminary injunctions, the Ninth Circuit held that it lacked jurisdiction over such an appeal in a Government civil antitrust case because of § 2 of the Expediting Act of 1903, 32 Stat. 823, as amended, [15 U. S. C. § 29](#), which provides that "in every civil action brought in any district court of the United States under any of [the Antitrust] Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court." In this case, then, the Court of Appeals extended its prior ruling to interlocutory orders within [§ 1292 \(b\)](#). Because this decision raises an important question of federal appellate jurisdiction and because a conflict [\*411] among the circuits subsequently developed on this question,<sup>4</sup> we granted certiorari.<sup>5</sup> For the reasons that follow, we affirm the decision of the Court of Appeals.

[\*\*\*6] [\*154] I

To determine the relevance of [28 U. S. C. § 1292 \(b\)](#) for Government civil antitrust cases, it is necessary first to consider the original purpose of § 2 of [\*381] the Expediting Act and the over half-century of experience with that section in the context of interlocutory appeals provisions that preceded the enactment of [§ 1292 \(b\)](#) in 1958.<sup>6</sup>

[LEdHN\[3\]](#) [3] [LEdHN\[4A\]](#) [4A] In an effort to "expedite [certain] litigation of great and general importance," 36 Cong. Rec. 1679 (remarks of Sen. Fairbanks),<sup>7</sup> [\*8] Congress enacted § 2 of the Expediting Act in 1903<sup>8</sup> to

<sup>2</sup> Tidewater merged with Getty Oil Co. on September 30, 1967. It has never been contended that that merger altered Tidewater's legal status in this case.

<sup>3</sup> In its motion to be dismissed, Tidewater contended "that Section 7 of the Clayton Act is directed only against the acquiring corporation and not against the seller, that the sale of assets by defendant Tidewater Oil Company to Phillips Petroleum Company has long ago been consummated, that no relief is obtainable against Tidewater Oil Company, and that its presence in the suit is no longer necessary or appropriate."

<sup>4</sup> Subsequent to the decision by the Ninth Circuit in this case, the Court of Appeals for the Seventh Circuit held that [§ 1292 \(b\)](#) could be used to take an interlocutory appeal in a Government civil antitrust case. See *Fisons Ltd. v. United States*, [458 F.2d 1241, 1244-1248](#), cert. denied, [405 U.S. 1041 \(1972\)](#). The only other court of appeals to consider the question, the Court of Appeals for the District of Columbia Circuit, reached the same result as the Ninth Circuit in this case. See *Farbenfabriken Bayer, A. G. v. United States*, 1968 CCH Trade Cas. para. 72,570, cert. denied, [393 U.S. 959 \(1968\)](#); *Glaxo Group, Ltd. v. United States*, Misc. No. 3261 (June 25, 1968).

<sup>5</sup> [405 U.S. 986 \(1972\)](#). We had originally denied certiorari, [404 U.S. 941 \(1971\)](#).

<sup>6</sup> Act of Sept. 2, 1958, Pub. L. 85-919, 72 Stat. 1770.

<sup>7</sup> See also *Shenandoah Valley Broadcasting v. ASCAP*, [375 U.S. 39, 40 \(1963\)](#), modified, [375 U.S. 994 \(1964\)](#). [Section 1](#) of the Expediting Act, [15 U. S. C. § 28](#), requires that a three-judge district court be convened to hear any Government civil antitrust case that the Attorney General certifies to be of "general public importance." See also 49 U. S. C. § 44. This three-judge court provision is also a reflection of the "great importance" attached to Government civil antitrust cases and was intended to provide a mechanism for full consideration of such cases by a panel of judges "before presentation to the Supreme Court as if heard by the United States circuit court of appeals." H. R. Rep. No. 3020, 57th Cong., 2d Sess., 2 (1903). But this provision has been seldom used.

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withdraw *all* intermediate appellate jurisdiction in Government civil antitrust [\*155] cases. At the time of the passage of the Expediting Act, the then recently established circuit courts of appeals<sup>9</sup> had jurisdiction [\*\*\*7] under the Evarts Act over an appeal not only from a "final decision"<sup>10</sup> but also from "an interlocutory order or decree" granting or continuing an injunction or appointing a receiver "*in a cause in which an appeal from a final decree may be taken . . . to the circuit court of appeals.*"<sup>11</sup> Hence, by [\*\*412] lodging exclusive appellate jurisdiction over the "final judgment of the district court" in this Court, the Expediting Act necessarily eliminated court of appeals jurisdiction over appeals from interlocutory, as well as final, decrees in Government civil antitrust cases.

#### LEdHN[4B] [4B]

Congress thus initially determined to speed appellate review [\*\*\*9] by channeling appeals in Expediting Act cases directly to this Court and to avoid the delay inherent in piecemeal appeal by conditioning appeal upon the presence of a "final judgment."<sup>12</sup> [\*\*\*10] But mere speed in [\*156] the disposition of Government civil antitrust cases was not Congress' only [\*\*\*382] concern; that result might have been achieved simply by establishing procedures for the expeditious handling of such cases in the courts of appeals. Congress was also intent upon facilitating review by this Court "of a class of antitrust cases deemed particularly important."<sup>13</sup> Because of the importance of uniform interpretation of the antitrust law,<sup>14</sup> which was still in its infancy in 1903, it is understandable that Congress chose to establish this special appellate procedure for Government civil antitrust cases, which were thought generally to involve issues of wide importance.<sup>15</sup>

<sup>8</sup> Act of Feb. 11, 1903, § 2, 32 Stat. 823, as amended, Act of Mar. 3, 1911, § 291, 36 Stat. 1167; Act of June 9, 1944, c. 239, 58 Stat. 272; Act of June 25, 1948, § 17, 62 Stat. 989. As originally enacted, the statute read in relevant part as follows:

"That in every suit in equity pending or hereafter brought in any circuit court of the United States under any of said Acts, wherein the United States is complainant, . . . an appeal from the final decree of the circuit court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof . . . ."

There is no contention here that the very minor changes in wording effected by the subsequent amendments and codifications of the statute in any way altered the original meaning of the Act.

<sup>9</sup> Act of Mar. 3, 1891, § 2, 26 Stat. 826.

<sup>10</sup> Act of Mar. 3, 1891, § 6, 26 Stat. 828.

<sup>11</sup> Act of June 6, 1900, c. 803, 31 Stat. 660, amending Act of Mar. 3, 1891, § 7, 26 Stat. 828, as amended, Act of Feb. 18, 1895, 28 Stat. 666 (emphasis added).

<sup>12</sup> In United States v. California Cooperative Canneries, 279 U.S. 553, 558 (1929), Mr. Justice Brandeis, speaking for the Court, detailed the causes of delay that prompted the Expediting Act:

"Congress sought by the Expediting Act to ensure speedy disposition of suits in equity brought by the United States under the Anti-Trust Act. Before the passage of the Expediting Act the opportunities for delay were many. From a final decree in the trial court under the Anti-Trust Act an appeal lay to the Circuit Court of Appeals; and six months were allowed for taking the appeal. From the judgment of the Court of Appeals an appeal lay to this Court; and one year was allowed for taking that appeal. Act of March 3, 1891, c. 517, §§ 6, 11, 26 Stat. 826, 828, 829. See United States v. E. C. Knight Co., 60 Fed. 306; 60 Fed. 934; 156 U.S. 1; United States v. Trans-Missouri Freight Association, 53 Fed. 440; 58 Fed. 58; 166 U.S. 290. Moreover, there might be an appeal to the Circuit Court of Appeals from a decree granting or denying an interlocutory injunction, Act of June 6, 1900, c. 803, 31 Stat. 660."

See also United States Alkali Export Assn. v. United States, 325 U.S. 196, 203 (1945).

<sup>13</sup> United States v. Cities Service Co., 410 F.2d 662, 664 (CA1 1969); see Brown Shoe Co. v. United States, 370 U.S. 294, 364 (1962) (Harlan, J., dissenting in part and concurring in part); 36 Cong. Rec. 1679 (remarks of Sen. Fairbanks); cf. n. 7, *supra*.

<sup>14</sup> Act of July 2, 1890, c. 647, 26 Stat. 209.

<sup>15</sup> In saying this, we are not to be understood as necessarily accepting today an important premise that underlies § 2 -- namely, that the courts of appeals, subject to review on certiorari in this Court, are incapable of providing the uniformity of interpretation

[\*\*\*\*11] [LEdHN\[5\]](#) [5] During the 25 years following the enactment of the Expediting Act, Congress amended the Evarts Act provision governing interlocutory appeals to the courts of [\*157] appeals on four separate occasions -- in 1906,<sup>16</sup> 1911,<sup>17</sup> 1925,<sup>18</sup> and 1928.<sup>19</sup> [\*\*\*\*13] It can be argued that on its face the very first of these amendments once again made interlocutory appeals [\*413] available to the courts of appeals in Government civil antitrust cases and that the language of each successive amendment, where relevant, perpetuated that state of affairs.<sup>20</sup> [\*\*\*\*14] But, [HN1](#) while the clear meaning of statutory language is not to be ignored, "words are inexact tools at best," [Harrison v. Northern Trust Co., 317 U.S. 476, 479 \(1943\)](#), [\*\*\*383] and hence it is essential that we place the words of a statute in their proper context by resort to the legislative history. Nowhere is this better illustrated than in this case. For we find it inconceivable [\*158] that Congress, having purposefully withdrawn the jurisdiction [\*\*\*\*12] of the courts of appeals in certain antitrust cases in 1903, would re-establish it in the same cases -- but only for interlocutory orders -- just three years later in 1906, without making any reference to that purpose. Yet no mention of either the Expediting Act or Government civil antitrust cases is to be found in the legislative history of the 1906 amendment to the interlocutory appeals provision<sup>21</sup> -- or, for that matter, in that of the successive amendments insofar as they are relevant;<sup>22</sup> rather, for each amendment some purpose wholly unrelated to Expediting Act cases is apparent from the relevant legislative materials.<sup>23</sup> In light of this, we find

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necessary to the administration of the antitrust laws. See *infra*, at 170. In 1903, the courts of appeals had been in existence for only 12 years and various reservations about them had not yet been dispelled. See F. Frankfurter & J. Landis, *The Business of the Supreme Court* 258 (1927). Since that time, we have had over a half-century of experience with the courts of appeals -- including experience in the field of private antitrust litigation -- which has resolved any initial doubts. See *ibid.*

<sup>16</sup> Act of Apr. 14, 1906, c. 1627, 34 Stat. 116.

<sup>17</sup> Act of Mar. 3, 1911, § 129, 36 Stat. 1134.

<sup>18</sup> Act of Feb. 13, 1925, amending § 129, 43 Stat. 937.

<sup>19</sup> Act of Apr. 11, 1928, c. 354, 45 Stat. 422.

<sup>20</sup> The 1906 amendment removed the limitation on interlocutory appeal to causes "in which an appeal from a final decree may be taken . . . to the circuit court of appeals" and provided simply that such an appeal may be taken to the court of appeals "in any cause." Act of Apr. 14, 1906, c. 1627, 34 Stat. 116. In codifying the Evarts Act interlocutory appeals provision in 1911, "in any cause" was struck, and the provision was amended to allow the courts of appeals to entertain appeals from interlocutory orders "notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court." Act of Mar. 3, 1911, § 129, 36 Stat. 1134. Finally, the famous Judges' Bill of 1925, in turn struck the "notwithstanding" language, with the result that the codified provision, § 129, simply allowed an appeal to be "taken from [an] interlocutory order or decree [granting or denying an injunction or appointing a receiver] to the circuit court of appeals . . ." Act of Feb. 13, 1925, amending § 129, 43 Stat. 937.

The 1928 amendment is completely without relevance here since it merely extended the applicability of the statute to interlocutory orders issued by the District Courts of Alaska, Hawaii, the Virgin Islands, and the Canal Zone. Act of Apr. 11, 1928, c. 354, 45 Stat. 422.

<sup>21</sup> See S. Rep. No. 2192, 59th Cong., 1st Sess. (1906); H. R. Rep. No. 542, 59th Cong., 1st Sess. (1906); 40 Cong. Rec. 1723, 1742, 4429, 4856-4857, 5056.

<sup>22</sup> As to the 1911 amendment, see S. Rep. No. 388, 61st Cong., 2d Sess., pt. 1, p. 53 (1910); H. R. Doc. No. 783, 61st Cong., 2d Sess., 57 (1910); H. R. Rep. No. 818, 61st Cong., 2d Sess. (1910); S. Doc. No. 848, 61st Cong., 3d Sess. (1911); 45 Cong. Rec. 4001. As to the 1925 amendment, see S. Rep. No. 362, 68th Cong., 1st Sess., 3 (1924); H. R. Rep. No. 1075, 68th Cong., 2d Sess., 4-5 (1925); Hearing on S. 2060 and S. 2061 before a Subcommittee of the Senate Committee on the Judiciary, 68th Cong., 1st Sess., 12 (1924).

<sup>23</sup> Thus, the 1906 amendment, see n. 20, *supra*, was intended to render ineffective certain evasive pleading tactics that had theretofore been employed to take advantage of the fact that under the Evarts Act an interlocutory appeal could be taken where only a nonconstitutional issue was at stake but not where a constitutional issue was involved. See H. R. Rep. No. 542, 59th Cong., 1st Sess., 2-3 (1906); 40 Cong. Rec. 1723 (remarks of Rep. Brantley); *id.*, at 4856 (remarks of Sen. Bacon).

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[\*159] it impossible to ascribe to Congress an [\*\*414] intent to impair the original exclusivity of this Court's [\*\*\*384] jurisdiction under § 2 through any of these amendments to the interlocutory appeals provision.

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[\*160] [LEdHN\[6\]](#) [↑] [6][LEdHN\[7A\]](#) [↑] [7A] This clearly was the view of the seven members of the unanimous Court in *United States v. California Cooperative Canneries*, 279 U.S. 553 (1929). There, in rejecting the argument that an appeal lay to the court of appeals from an order denying a motion to intervene in a Government civil antitrust case, the Court stated:<sup>24</sup>

"[The Evarts Act] provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act 'in which the United States is complainant,' the appeal should be direct to this Court from the final decree in the trial court. *Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters . . . ; and it precluded the possibility of an appeal to either [this Court or the court of appeals] from an interlocutory decree.*" [Id., at 558](#) (emphasis added).

And a decade and a half later, in *Allen Calculators v. National Cash Register Co.*, 322 U.S. 137, 142 (1944), [\*\*\*\*16] the Court reiterated "that jurisdiction to review District Court decrees was not vested in the Circuit Courts of Appeals but solely in this court, and [the Expediting Act] limited the right of appeal to final decrees." It is true that interlocutory orders in Government civil anti-trust cases were subsequently held reviewable by way of extraordinary writs under the All Writs Act, [28 U. S. C. § 1651 \(a\)](#), but application for the extraordinary writ must be made to this Court where "sole appellate jurisdiction lies" in such cases. *United States Alkali Export Assn. v. United*

The legislative history concerning the 1911 amendment, see n. 20, *supra*, indicates that the "notwithstanding" language was designed to "remove any doubt" that the limitation -- initially struck by the 1906 amendment -- on interlocutory appeals to those cases in which an appeal might be taken to the court of appeals after a final decree had been eliminated. But this merely suggests an intent finally to resolve with even more specific language the problem of evasive pleading which had motivated the 1906 amendment. See S. Rep. No. 388, 61st Cong., 2d Sess., pt. 1, p. 53 (1910). Thus, in response to inquiry whether this amendment constituted "a change in the existing law," Senator Heyburn, a sponsor of the legislation, said on the Senate floor, "This is the existing law." 45 Cong. Rec. 4001.

As to the 1925 version of the interlocutory appeals provision, see n. 20, *supra*, the analysis prepared by the committee of this Court which drafted it explained that the "notwithstanding" language was "eliminated as having no further application in view of the repeal of" the provisions that had necessitated the initial 1906 amendment. Hearing on S. 2060 and S. 2061 before a Subcommittee of the Senate Committee on the Judiciary, 68th Cong., 1st Sess., 12 (1924). And if the addition of the "notwithstanding" language in 1911 did not establish court of appeals jurisdiction over interlocutory orders in Expediting Act cases, we fail to see how dropping that language in 1925 did so. At the same time, elsewhere in the Judges' Bill, § 2 of the Expediting Act was carried forward without alteration. See Act of Feb. 13, 1925, amending § 238 (1), 43 Stat. 938. In doing so, it was stated: "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise: (1) Section 2 of the Act of February 11, 1903, 'to expedite the hearing and determination' of certain suits brought by the United States under the antitrust . . . laws . . ." *Ibid.* (emphasis added). Section 2, of course, has never contained a provision allowing appeal of interlocutory orders. Moreover, Mr. Justice Van Devanter, a member of this Court's committee that prepared the bill, testified before the Senate Committee that the character of Expediting Act cases "suggest[s] that they should go directly to the Supreme Court rather than through the circuit courts of appeals" without any indication that an exception was being introduced for interlocutory appeals to the courts of appeals. Hearing on S. 2060 and S. 2061 before a Subcommittee of the Senate Committee on the Judiciary, 68th Cong., 1st Sess., 33 (1924). See also S. Rep. No. 362, 68th Cong., 1st Sess., 3 (1924).

<sup>24</sup> Certainly the Court spoke fully cognizant of at least the amendment contained in the Judges' Bill of just four years before, see n. 20, *supra*, since all seven sitting Justices had been on the Court when its committee submitted the bill to Congress.

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States, 325 U.S. 196, 201-203 (1945); [\*161] *De Beers Consolidated Mines v. United* [\*\*415] *States, 325 U.S. 212, 217 (1945)*.<sup>25</sup>

LEdHN[7B] [↑] [7B] [\*\*\*\*17]

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[\*\*\*385] LEdHN[8] [↑] [8] LEdHN[9] [↑] [9] LEdHN[10] [↑] [10] The wording of the interlocutory appeals provision was again altered in the 1948 revision of the Judicial Code.<sup>26</sup> The result -- after certain subsequent minor changes not here relevant<sup>27</sup> -- was the present HN2 [↑] 28 U. S. C. § 1292 (a)(1), which allows "interlocutory orders of the district courts . . . granting, continuing, modifying, refusing [\*162] or dissolving injunctions . . ." <sup>28</sup> to be appealed to the courts of appeals "except where a direct review may be had in the Supreme Court." (Emphasis added.) This final clause is susceptible of two plausible constructions that yield opposite results in cases subject to the Expediting Act. A direct review of interlocutory orders in Government civil antitrust cases clearly may be had in this Court, thus barring resort to § 1292 (a)(1) -- or so it would seem. But direct [\*\*\*\*19] review may not be had when the interlocutory order is entered since there is no "final judgment," the predicate of an appeal under the Expediting Act. Therefore, were the final clause construed as directed only at the present availability of review in this Court, it would not, on its face, bar an interlocutory appeal. However, the function of the Revisers of the 1948 Code was generally limited to that of consolidation and codification.<sup>29</sup> Consequently, a well-established principle governing the interpretation of provisions altered in the 1948 revision is that "no change is to be presumed unless clearly expressed." *Fourco Glass Co. v. Transmira Products Corp., 353 U.S. 222, 228 (1957)*. We find no such clear expression here. To the contrary, the Revisers' Notes fail to reveal [\*\*\*386] any intention to expand the scope of the pre-existing jurisdiction of the courts of appeals over interlocutory appeals; the new § 1292 is described merely

<sup>25</sup> In *Alkali Export Assn.*, the Court went on to say:

"[Extraordinary] writs may not be used as a substitute for an authorized appeal; and where, as here, *the statutory scheme [the Expediting Act] permits appellate review of interlocutory orders only on appeal from the final judgment*, review by certiorari or other extraordinary writ is not permissible in the face of the plain indication of the legislative purpose to avoid piecemeal reviews." 325 U.S., at 203 (emphasis added).

Nevertheless, the Court found that exigent circumstances associated with the District Court's denial of the defendant's motion to dismiss the action justified immediate review by common-law certiorari in the particular case. Id., at 203-204.

The Court in *De Beers*, stating that "what is . . . said [in *Alkali Export Assn.*] applies in this instance," 325 U.S., at 217, granted review under the All Writs Act of a preliminary injunction, although normally review would have been to the court of appeals under what is now 28 U. S. C. § 1292 (a)(1). Of course, nothing we say today signifies a retreat from our previous statements that *appeals* of interlocutory orders in Government civil antitrust cases cannot be taken even to this Court.

<sup>26</sup> Act of June 25, 1948, 62 Stat. 929.

<sup>27</sup> In 1951 reference to the District Court of Guam was inserted in the section, Act of Oct. 31, 1951, § 49, 65 Stat. 726, and reference to the District Court for the Territory of Alaska was removed from the section effective upon the admission of Alaska into the Union in 1959, Act of July 7, 1958, S. 12 (e), 72 Stat. 348. Finally, when subsection (b) was added to the section, the former entire section was designated subsection (a). Act of Sept. 2, 1958, Pub. L. 85-919, 72 Stat. 1770.

<sup>28</sup> The portion of the provision governing appeal of interlocutory orders appointing receivers and related matters became 28 U. S. C. § 1292 (2) (1946 ed., Supp. II), now 28 U. S. C. § 1292 (a)(2).

<sup>29</sup> See S. Rep. No. 1559, 80th Cong., 2d Sess., 1-2 (1948) ("great care has been exercised to make no changes in the existing law which would not meet with substantially unanimous approval"); H. R. Rep. No. 308, 80th Cong., 1st Sess., 1-8 (1947).

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as a consolidation of a number of previously separate code provisions -- including the general [\*163] interlocutory appeals [\*\*416] provision -- "with necessary changes in phraseology to effect the consolidation. [\*\*\*20]"<sup>30</sup>

[\*\*\*21] In sum, then, our examination of the history and evolution of the present § 1292 (a)(1) -- the direct descendant of the original interlocutory appeals provision contained in the Evarts Act -- has convinced us that at least up to the passage of § 1292 (b) in 1958, Congress had not impaired the original exclusivity of this Court's jurisdiction under § 2 of the Expediting Act. As is usually true of questions of statutory construction, the issue is not totally free from doubt.<sup>31</sup> [\*\*\*22] Yet, in the last analysis, whatever ambiguity may exist in the lengthy history of the original interlocutory appeals provision relative to the Expediting Act, it results primarily from the absence of any consideration of Government civil antitrust cases in that history and thus emphasizes the extent to which appellate jurisdiction in such cases has long been viewed as a peculiarly distinct matter. Cf. *United States Alkali Export Assn. v. United States*, 325 U.S., at 202-203. Certainly, this conclusion finds substantial support in our prior decisions in which we have consistently interpreted our appellate jurisdiction under § 2 as exclusive.<sup>32</sup>

[\*164] II

LEdHN[2B] [2B]With this background, the question becomes what effect, if any, the enactment of § 1292 (b) in 1958 had upon this Court's theretofore exclusive appellate jurisdiction in Government civil antitrust cases. Section 1292 (b) provides in relevant part:

HN3 [2] "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as [\*\*\*23] to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . . ."

At the outset petitioner contends that there is simply no conflict between this provision and § 2 of the Expediting Act. It suggests that [\*\*\*387] "civil action" must be read as an all-inclusive phrase that covers, *inter alia*, Government civil antitrust cases. At the same time, it points out that § 1292 (b) is concerned only with interlocutory orders, while the Expediting Act deals only with final judgments. Thus, petitioner concludes that the enactment of § 1292 (b) is concerned only with interlocutory orders, while the Expediting Act deals only with final judgments. Thus, petitioner concludes that the enactment of § 1292 (b) made discretionary interlocutory appeals available where none had previously existed, and that the two statutes are in complete harmony with one another.

[\*\*\*24] LEdHN[11A] [11A] LEdHN[12] [12] LEdHN[13] [13]Such a facile argument could also be made to support the contention that § 1292 (a)(1) can be invoked in Expediting Act cases -- were it not for the fact that, as we have already seen, § 2 does not merely apply solely to a "final judgment" but also *limits* the right of appeal to a [\*165] "final judgment." Likewise, we can hardly accept petitioner's suggestion that when Congress enacted § 1292 (b), it wrote upon a clean slate insofar as appeals [\*\*417] from interlocutory orders in Expediting Act cases are concerned. Nor do we find in § 1292 (b) the "sharp break with the traditional policy" of limited availability of interlocutory appeal so apparent to the dissent. The new provision hardly created a general right of interlocutory

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<sup>30</sup> H. R. Rep. No. 2646 of the Committee on Revision of the Laws of the House of Representatives to accompany H. R. 7124, 79th Cong., 2d Sess., App. A107-108 (1946). See also H. R. Rep. No. 308 of the Committee on the Judiciary of the House of Representatives to accompany H. R. 3214, 80th Cong., 1st Sess., App. A110-111 (1947).

<sup>31</sup> Compare n. 20, *supra*, with n. 23, *supra*.

<sup>32</sup> See supra, at 160-161. Similarly, two of three courts of appeals which have considered the question have concluded that an interlocutory appeal does not lie under § 1292 (a)(1) in Expediting Act cases. See *United States v. Cities Service Co.*, 410 F.2d 662 (CA1 1969); *United States v. FMC Corp.*, 321 F.2d 534 (CA9 1963). But see *United States v. Ingersoll-Rand Co.*, 320 F.2d 509, 511-517 (CA3 1963).

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appeal; rather, it only extended the availability of such appeals to a limited group of orders -- not previously covered by § 1292 (a) -- that involve "a controlling question of law" the immediate [\*\*\*\*25] appeal of which "may materially advance the ultimate termination of the litigation." <sup>33</sup>HN4[<sup>↑</sup>] In short, the consistent construction that had been accorded § 2 prior to the enactment of § 1292 (b) <sup>34</sup> cannot simply be ignored in determining the impact of that section on Government civil antitrust cases, cf. *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186, 191-194 (1968). Acceptance of petitioner's contention would require us to conclude that § 1292 (b) was intended to revise the policies underlying the Expediting Act for the first time -- that it was intended as the first departure from the purposes of avoiding piecemeal appeal and of limiting review of important questions of antitrust law to this Court. We have been unable to discern any such intention.

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[\*166] LEdHN1/14[<sup>↑</sup>] [14]The legislative history associated with § 1292 (b) contains no mention of cases within the Expediting Act. <sup>35</sup> [\*\*\*\*28] Reference, to be sure, [\*\*\*388] was made to antitrust cases, but it is clear on the face of these statements <sup>36</sup> that they refer only to private treble-damages actions. <sup>37</sup> In fact, rather than indicating that § 1292 (b) was intended to apply to antitrust cases subject to final review in this Court under the Expediting Act, the legislative history strongly suggests an essentially contrary conclusion: HN5[<sup>↑</sup>] the subsection was intended to apply *only* to interlocutory orders, "not otherwise appealable under" § 1292 (a), in civil actions in which the courts of appeals would have jurisdiction over [\*\*418] an appeal from the final judgment [\*167] under 28 U. S. C. § 1291. For instance, in explaining the proposed statute, the Senate Report on § 1292 (b) states:<sup>38</sup>

"The bill results from a growing awareness of the need for expedition of cases pending [\*\*\*\*27] before the district courts. Many cases which are filed in the Federal district courts require the district judge to entertain motions at an early stage in the proceedings which, if determined, against the plaintiff, *result in a final order which would then be appealable to the circuit courts of appeals of the United States*. However, *such motions*, if determined in the plaintiff's favor, are interlocutory since they do not end the litigation and are not therefore, under existing provisions of law, appealable."

<sup>33</sup> Cf. S. Rep. No. 2434, 85th Cong., 2d Sess., 3 (1958); H. R. Rep. No. 1667, 85th Cong., 2d Sess., 2 (1958).

<sup>34</sup> It was only subsequent to the enactment of § 1292 (b) that a single Court of Appeals concluded -- despite the unqualified statements by this Court since *United States v. California Cooperative Canneries*, 279 U.S., at 558, to the contrary -- that an interlocutory appeal would lie under § 1292 (a)(1) in a Government civil antitrust case. See *United States v. Ingersoll-Rand Co.*, 320 F.2d, at 511-517. See also *Fisons Ltd. v. United States*, 458 F.2d, at 1244-1248, cert. denied, 405 U.S. 1041 (1972) (§ 1292 (b)).

<sup>35</sup> See S. Rep. No. 2434, 85th Cong., 2d Sess. (1958); H. R. Rep. No. 1667, 85th Cong., 2d Sess. (1958); Hearings on H. R. 6238 before Subcommittee No. 3 of the House Committee on the Judiciary, 85th Cong., 2d Sess. (1958); 104 Cong. Rec. 8002 (remarks of Rep. Keating). See also Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States 32-33 (1951); Report of the Proceedings of a Special Meeting of the Judicial Conference of the United States 7 (1952); Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States 27-28 (1953).

<sup>36</sup> The Senate Report suggests the denial of a motion to dismiss an antitrust action as barred by the statute of limitations as one instance in which an interlocutory appeal might be desirable. But it goes on to state:

"Disposition of antitrust cases may take considerable time, *yet upon appeal following final disposition of such cases, the court of appeals may well determine* that the statute of limitations had run and for that reason the district court did not have jurisdiction."

S. Rep. No. 2434, 85th Cong., 2d Sess., 3 (1958) (emphasis added). The reference to antitrust cases in Chief Judge John J. Parker's testimony at the hearings on § 1292 (b) was also clearly limited to private treble-damages actions. See Hearings on H. R. 6238 before Subcommittee No. 3 of the House Committee on the Judiciary, 85th Cong., 2d Sess., 9 (1958).

<sup>37</sup> 38 Stat. 731, 15 U. S. C. § 15.

<sup>38</sup> S. Rep. No. 2434, 85th Cong., 2d Sess., 2 (1958) (emphasis added).

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This is hardly supportive of petitioner's position, and yet throughout the legislative materials the focus similarly remains on interlocutory orders in civil cases that would be appealable to the courts of appeals upon final judgment.  
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[\*\*\*\*29] [LEdHN\[11B\]](#) [↑] [11B] [LEdHN\[15A\]](#) [↑] [15A] Petitioner's case is further weakened by the extraordinary result that acceptance of its position would yield. [Section 1292 \(a\)](#) [HN6](#) [↑] provides for an appeal as a matter of right from a number of specified types of interlocutory orders -- in particular, interlocutory orders granting or denying injunctions. Those interlocutory orders not within subsection (a), however, were made appealable in [§ 1292 \(b\)](#), subject to the judgment and discretion of the district court and the court of appeals. Greater importance obviously was attached to those [\*168] types of interlocutory orders specified in subsection (a) than to those covered by (b).  
40 Nevertheless, petitioner [\*\*\*389] would have us conclude that Congress intended to establish court of appeals jurisdiction for all interlocutory orders in Expediting Act cases, except those orders for which an appeal of right is provided in [§ 1292 \(a\)\(1\)](#).<sup>41</sup> [\*\*\*\*31] As the Government notes, [\*\*\*\*30] such a result would effectively turn [§ 1292](#) on its head.<sup>42</sup> Consistent with the evident thrust of the statute's legislative history, the much more sensible conclusion is that [§ 1292 \(b\)](#) was intended to establish jurisdiction in the courts of appeals to review interlocutory orders, other than those specified in [§ 1292 \(a\)](#), in civil cases in which they would have jurisdiction were the judgments final.<sup>43</sup>

[LEdHN\[11C\]](#) [↑] [11C] [LEdHN\[15B\]](#) [↑] [15B]

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[\*169] [LEdHN\[16\]](#) [↑] [16] [\*\*\*\*32] At [\*419] the foundation of the petitioner's position in this case is the contention that [§ 1292 \(b\)](#) is the panacea for the special burdens imposed on this Court by § 2 of the Expediting Act. Both the Court and various individual Members have on occasion commented that "whatever may have been the wisdom of the Expediting Act in providing direct appeals in antitrust cases at the time of its enactment in 1903, time has proven it unsatisfactory," for "direct appeals not only place a great burden on the Court but also deprive us

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<sup>39</sup> See [id., at 2-3](#); H. R. Rep. No. 1667, 85th Cong., 2d Sess., 1 (1958); Hearings on H. R. 6238 before Subcommittee No. 3 of the House Committee on the Judiciary, 85th Cong., 2d Sess., 8 (1958).

<sup>40</sup> Cf. H. R. Rep. No. 1667, 85th Cong., 2d Sess., 1-2 (1958).

<sup>41</sup> Petitioner suggests two avenues of escape from this anomalous situation: (1) that under [§ 1292 \(a\)\(1\)](#) an interlocutory appeal may in fact lie from an injunctive order in a Government civil antitrust case; (2) that if an appeal from such an order cannot be taken under [§ 1292 \(a\)](#), it may nevertheless be taken under [§ 1292 \(b\)](#) since, the argument goes, the latter applies to all orders not appealable under the former, "whatever the nature of the order and whatever the reason for its non-appealability." Reply Brief for Petitioner 7-8. Our discussion in Part I of this opinion is sufficient to dispose of petitioner's first contention. As to the second argument, while the language of [§ 1292 \(b\)](#) is unqualified on its face, the legislative history indicates that Congress was concerned only with orders of types other than those specified in [§ 1292 \(a\)](#); in other words, [§ 1292 \(b\)](#) was intended to supplement [§ 1292 \(a\)](#), not to provide a substitute for it. See n. 35, *supra*. Moreover, it would be, to say the least, extraordinary for Congress to have resorted to such a subtle method of establishing for the first time in Government civil antitrust cases interlocutory appeals for orders of the type specified in [§ 1292 \(a\)](#) without giving any hint whatsoever that this was its purpose.

<sup>42</sup> Brief for United States 18.

<sup>43</sup> Nor can it be ignored that subsequent to both the 1948 revision which resulted in [§ 1292 \(a\)](#) and the enactment of [§ 1292 \(b\)](#), we have reaffirmed that a final judgment is an essential prerequisite to an appeal of an order issued in a government civil antitrust case since "Congress . . . limited the right of review in such cases to an appeal from a decree which disposed of all matters, and it precluded the possibility of an appeal either to this Court or to a Court of Appeals from an interlocutory decree." *Brown Shoe Co. v. United States*, [370 U.S., at 305 n. 9](#). [Section 1292](#) was not, to be sure, specifically at issue in *Brown Shoe*. But in holding, as it did, that the District Court's decree was appealable only because it was "final," [id., at 306-309](#), the Court necessarily foreclosed the possibility of an interlocutory appeal to *any* court, and thus its remark concerning the preclusion of interlocutory appeals cannot be lightly dismissed.

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of the valuable assistance of the Courts of Appeals." *United States v. Singer Mfg. Co.*, 374 U.S. 174, 175 n. 1 (1963); see *Ford Motor Co. v. United States*, 405 U.S. 562, 595 n. 5 (1972) (BURGER, C. J., concurring in part and dissenting in part); *United States v. Borden Co.*, 370 U.S. 460, 477 n. (1962) (Harlan, J., dissenting); *Brown Shoe Co. v. United States*, 370 U.S. 294, 355 (1962) (Clark, J., concurring); *id. at 364-365* (Harlan, J., [\*\*\*390] dissenting in part and concurring in part). Further, in light of the present size of our docket, direct [\*\*\*\*33] review "seldom results in much expedition" since we normally must examine the entire record and resolve all questions however unsubstantial. *Id. at 355* (Clark, J., concurring); see *id. at 364* (Harlan, J., dissenting in part and concurring in part); *United States v. Borden Co., supra, at 477* n. (Harlan, J., dissenting). [\*170] Our action today should not be construed as a retreat from these previous remarks. On the contrary, we remain convinced that under present circumstances the Expediting Act fails to hasten substantially the final disposition of important antitrust actions while it unjustifiably burdens this Court with inadequately sifted records and with cases that could be disposed of by review in the courts of appeals. Uniformity in the interpretation and administration of the antitrust laws continues to be an important consideration. But such uniformity could be adequately ensured by the availability of review in this Court on certiorari of cases involving issues of general importance -- together with the "limited expediting of such cases, under the discretion of this Court," *Ford Motor Co. v. United States, supra, at 595 n. 5* [\*\*\*34] (BURGER, C. J., concurring in part and dissenting in part), where time is a factor. The simple fact is that "the legal issues in most [Government] civil antitrust cases are no longer so novel or unsettled as to make them especially appropriate for initial appellate consideration by this Court, as compared with those in a variety of other areas of federal law," *Brown Shoe Co. v. United States, supra, at 364* (Harlan, J., dissenting in part and concurring in part). Yet, despite all of these criticisms, our personal views as to the wisdom of § 2 are, of course, no basis for disregarding what we are bound to recognize as the plain and unaltered intent of Congress to require that HNT[↑] appeals in Government civil antitrust cases be taken only from final judgments and only to this Court.

In any event, petitioner has failed to convince us that permitting appeals under § 1292 (b) would provide a meaningful solution -- if any solution at all -- to the various problems created for the Court by the Expediting Act. In the [\*\*420] first place, the availability of interlocutory [\*\*\*35] appeals under § 1292 (b) would not reduce the number of Government civil antitrust cases that could be brought [\*171] to this Court on direct appeal upon the entrance of a final judgment. Nor would it reduce the number of issues subject to review by this Court; any issue determined on interlocutory appeal would normally be open to consideration on final appeal,<sup>44</sup> and doubtless some party would raise an issue appealed under § 1292 (b) since it must have involved "a controlling question of law." Also, there would be the added problem of applications for certiorari following a certified appeal in Expediting Act cases. By definition, the issue will be a substantial one and, where the appellate decision is questionable, it would be necessary to decide whether to grant certiorari, which might require the Court to consider a particular case, on two separate [\*\*\*391] occasions,<sup>45</sup> [\*\*\*37] or to deny certiorari, which might mean allowing the district court to proceed to final judgment on an erroneous basis. Given the potential waste of limited judicial resources -- those either of this Court or of the district court -- associated with each choice, neither can be considered attractive. [\*\*\*36] Finally, in emphasizing the value of the screening function that court of appeals review would provide in Expediting Act cases, we have consistently focused upon the lengthy records and complex factual issues common to such cases. Yet, as is illustrated by this very case, in which the certified question relates to a motion to dismiss a party, questions that would be presented to the courts of appeals under § 1292 (b) would often involve threshold procedural issues not [\*172] requiring extensive analysis of the record.<sup>46</sup> With respect to such issues the screening function performed by intermediate appellate review is of far less significance than it would be with

<sup>44</sup> The sole exception to this would be if the certified question had previously been considered by way of certiorari.

<sup>45</sup> Only if we were to dispose of a controlling question in such a way as to end all proceedings would the possibility of a subsequent appeal be foreclosed. A threshold issue of jurisdiction might present such a controlling question; but even that type of issue will often not end an entire Government civil antitrust case which might involve a number of parties -- as is true in this case where the certified question relates to only one of the two defendants.

<sup>46</sup> See also *Fisons Ltd. v. United States*, 458 F.2d 1241 (CA7), cert. denied, 405 U.S. 1041 (1972) (service of process); *Farbenfabriken Bayer, A. G. v. United States*, 1968 CCH Trade Cas. para. 72,570 (CADC), cert. denied, 393 U.S. 959 (1968) (quasi *in rem* jurisdiction).

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respect to questions of, say, relevant market, competition, or agreement. But these latter questions can be properly decided only after full development of the evidence, and it is therefore doubtful at best that interlocutory appeals would aid this Court in dealing with them on final review.<sup>47</sup>

[\*\*\*\*38] Nor are we even certain that the expeditious termination of litigation in the [\*\*421] district courts -- the express purpose of § 1292 (b)<sup>48</sup> -- would be materially advanced in the context of Government civil antitrust cases by acceptance of petitioner's contention. Permitting interlocutory appeals under § 1292 (b) in Expediting Act [\*173] cases would result in an anomalous situation: the court of appeals would have jurisdiction over certain interlocutory orders but not over the final judgment, which would be appealable only to this Court. An interlocutory appeal taken under § 1292 (b) must, of course, involve "a controlling question of law" the immediate appeal of which "may [\*\*\*392] materially advance the ultimate termination of the litigation." In the normal case, the decision of such a question on interlocutory appeal is final since the same court reviews the final judgment, and the likelihood of review in this Court on certiorari is very small. Here, however, the decision of the court of appeals on the interlocutory order would essentially be only an advisory opinion to the district court since the issue would usually be open to relitigation on appeal of the [\*\*\*\*39] final judgment to this Court.<sup>49</sup> The net result would be added work for the courts of appeals,<sup>50</sup> with no assurance that there would ultimately be a saving of district court time.

#### [\*\*\*\*40] III

Hence, we conclude that § 1292 (b) did not establish jurisdiction in the Court of Appeals over interlocutory orders in Expediting Act cases. The exclusive nature of [\*174] the jurisdiction created in § 2 of the Expediting Act has consistently been recognized by this Court, and we hold today that that exclusivity remains unimpaired. Despite our interest in a restructuring of our jurisdiction under the Expediting Act, we are neither willing nor able to adopt the ungainly half measure offered by the petitioner in this case.

*Affirmed.*

MR. JUSTICE WHITE joins the Court's opinion except for the advisory to Congress reflecting one view of the relative merits of the Expediting Act.

**Dissent by:** DOUGLAS; STEWART

<sup>47</sup> Other than threshold procedural issues, the question consistently sought to be raised on interlocutory appeal has been the propriety of orders granting or denying preliminary injunctions with respect to proposed acquisitions. See United States v. Cities Service Co., 410 F.2d 662 (CA1 1969); United States v. FMC Corp., 321 F.2d 534 (CA9 1963); United States v. Ingersoll-Rand Co., 320 F.2d 509 (CA3 1963). Although appeals of such orders would involve the merits of the antitrust actions, the fact is that permitting interlocutory appeal under § 1292 (b) would not bring these orders and the related evidence before the courts of appeals since they come within § 1292 (a)(1). Cf. n. 41, *supra*. Moreover, because of the need for speed if an acquisition is to be enjoined before accomplished, requests for such interlocutory orders must be determined after, at most, only an initial hearing and without full development of the record. Consequently, appeals from such orders would not necessarily bring before the courts of appeals the lengthy records and numerous documents with which we have often been forced to deal after final judgment.

<sup>48</sup> See S. Rep. No. 2434, 85th Cong., 2d Sess., 1-2 (1958).

<sup>49</sup> Of course, this problem would not exist if the interlocutory decision were reviewed immediately on certiorari in this Court; but, as we have already seen, this alternative entails serious problems of its own.

<sup>50</sup> In this respect, it must be recalled that interlocutory appeal under § 1292 (b) is subject to the decision of the court of appeals in the exercise of its discretion, to allow appeal of the question certified by the district court. Thus, the effectiveness of § 1292 (b) in Government civil antitrust cases would be dependent upon the willingness of the courts of appeals to assume this new burden aware of the limited import of their decisions and of the fact that interlocutory appeals in such cases would represent only added work for them, since they would not otherwise consider any appeal.

## Dissent

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MR. JUSTICE DOUGLAS, dissenting.

I agree with MR. JUSTICE STEWART that the appeal of the interlocutory order in this case to the Court of Appeals under [28 U. S. C. § 1292 \(b\)](#) was not barred by the Expediting Act. But I disagree with the intimations in both the majority opinion and the other dissenting opinion that because of our overwork the antitrust cases should first be routed to the courts of appeals and only then brought here.<sup>1</sup> [\*\*\*41]

The case for our "overwork" is a myth. The total number of cases filed has increased from 1063 cases in the 1939 Term to 3643 in the 1971 Term. That increase has largely been in the *in* [\*\*422] *forma pauperis* [\*\*\*393] cases, 117 being filed in the 1939 Term and 1930 in the 1971 Term. But we grant certiorari or note probable jurisdiction in very few cases. The signed opinions of the Court (which are only in argued cases) totaled 137 in the 1939 Term with [\*175] six *per curiams*<sup>2</sup> or a total of 143 Court [\*\*\*\*42] opinions, while in the 1971 Term we had 129 signed opinions of the Court and 20 *per curiams*<sup>3</sup> or a total of 149 Court opinions. So in terms of petitions for certiorari granted and appeals noted and set for argument our load today is substantially what it was 33 years ago.

The load of work so far as processing cases is concerned has increased. That work is important; and in many ways it is the most important work we do. For the selection of cases across the broad spectrum of issues presented is the very heart of the judicial process. Once our jurisdiction was largely mandatory and the backlog of cases piled high. The 1925 Act<sup>4</sup> changed all that, leaving to the Court the selection of those certiorari cases which seem important to the public interest. The control of the docket was left to the minority, only four votes out of nine being necessary to grant a petition. The review or sifting of these [\*\*\*43] petitions is in many respects the most important and, I think, the most interesting of all our functions. Across the screen each Term come the worries and concerns of the American people -- high and low -- presented in concrete, tangible form. Most of these cases have been before two or more courts already; and it is seldom important that a third or fourth review be granted. But we have national standards for many of our federal-state problems and it is important, where they control, that the national standards be uniform; and it is equally important where state law is supreme, that the States be allowed to experiment with various approaches and solutions.

Neither taking that jurisdiction from us nor the device of reducing our jurisdiction is necessary for the performance [\*176] of our duties. We are, if anything, underworked, not overworked. Our time is largely spent in the fascinating task of reading petitions for certiorari and jurisdictional statements. [\*\*\*\*44] The number of cases taken or put down for oral argument has not materially increased in the last 30 years.

The Expediting Act, [15 U. S. C. §§ 28, 29](#), involved in the present case, does not contribute materially to our caseload. In the 1967 Term we had 12 such cases but only three of them were argued, the others being disposed of summarily. In the 1968 Term we had eight, but only three were argued. On the 1969 Term we had four; only two being argued. In the 1970 Term only two such cases reached us and each was argued. In the 1971 Term four such cases reached us, two of them being argued.<sup>5</sup>

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<sup>1</sup> It is true that several Justices over the years have expressed the desire that the antitrust cases come to us only by certiorari to the courts of appeals. So far as I am aware the only opinion speaking for the Court containing that suggestion is [United States v. Singer Mfg. Co., 374 U.S. 174](#). But there the idea was contained only in a footnote ([\*id.\* at 175 n. 1](#)); and as Mr. Chief Justice Hughes was wont to say, "Footnotes do not really count."

<sup>2</sup> Not including orders of dismissal or affirmance.

<sup>3</sup> Including orders of dismissal or affirmance.

<sup>4</sup> Judiciary Act of Feb. 13, 1925, 43 Stat. 936.

<sup>5</sup> *Ford Motor Co. v. United States, 405 U.S. 562*; *United States v. Topco Associates, 405 U.S. 596*.

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[\*\*\*45] [\*\*\*394] If [\*\*423] there are any courts that are surfeited, they are the courts of appeals. In my Circuit -- the Ninth -- it is not uncommon for a judge to write over 50 opinions for the court in one term. That Circuit has at the present time a 15-month backlog of civil cases, while we are current. The average number of signed opinions for the Court in [\*177] this Court is close to 12 per Justice; only occasionally does anyone write even as many as 18; and we have no backlog.

Separate opinions -- including dissents and concurring opinions -- multiply. If they are added to the total of 149 for the 1971 Term, the overall number would be 328. But the writing of concurrences, dissents, or separate opinions is wholly in the discretion of the Justice. It is not mandatory work; it is writing done in the vast leisure time we presently have.

The antitrust cases are only small fractions of our caseload. Yet they represent large issues of importance to the economy, to consumers, and to the maintenance of the free-enterprise system. Congress has expressed in the Sherman Act,<sup>6</sup> the Clayton Act,<sup>7</sup> the Robinson-Patman Act,<sup>8</sup> and the Celler-Kefauver Act<sup>9</sup> a clear policy [\*\*\*46] to keep the avenues of business open, to bar monopolies, and to save the country from the cartel system which is the product of gargantuan growth.

It is of course for Congress and Congress alone to determine whether the Expediting Act<sup>10</sup> should bring the [\*178] antitrust cases directly here. While I join the statutory construction in MR. JUSTICE STEWART's dissent, I do not join that part which expresses to me an inaccurate account of the "overwork" of the Court. We are vastly underworked. One interested in history will discover that once upon a time Hugo Black wrote [\*\*\*47] over 30 opinions for the Court in a Term where only 135 opinions were written for the Court, a few more than we all wrote last Term.

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST concurs, and [\*\*\*395] MR. JUSTICE DOUGLAS concurs in part, dissenting.

The Expediting Act, enacted in 1903, provides that in civil antitrust actions brought by the United States "an appeal from the *final judgment* of the district court will lie only to the Supreme Court. [\*\*\*48] " (Emphasis added.) Section 1292 (b), enacted in 1958, provides that when a district court, "in making in a civil action an order not otherwise appealable under this section," shall appropriately certify the question involved, the court of appeals has

The antitrust cases not argued in the 1967-1971 Terms were either reversed out of hand or affirmed out of hand (some of these being companion cases to those that were argued), or dismissed as moot, or dismissed for want of jurisdiction. There were three dismissed for want of jurisdiction.

*Farbenfabriken Bayer A. G. v. United States*, 393 U.S. 216, involved an interlocutory order in which we ruled that we had no jurisdiction. *Standard Fruit & S. S. Co. v. United Fruit Co.*, 393 U.S. 406, involved an effort of a corporation, not a party, to inspect the divestiture plans being submitted to the District Court pursuant to a consent judgment. *Garrett Freightlines v. United States*, 405 U.S. 1035, involved an appeal from a defendant dismissed from the antitrust case because of the primary jurisdiction of the Interstate Commerce Commission over the acquisition in question.

<sup>6</sup> Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, [15 U. S. C. §§ 1-7](#).

<sup>7</sup> Clayton Act of Oct. 15, 1914, 38 Stat. 730, [15 U. S. C. § 12 et seq., § 44](#).

<sup>8</sup> Robinson-Patman Act of June 19, 1936, 49 Stat. 1526, [15 U. S. C. §§ 13, 13a, 13b, 21a, 1013](#).

<sup>9</sup> Celler-Kefauver Act of Dec. 29, 1950, 64 Stat. 1125, [15 U. S. C. §§ 18, 21](#).

<sup>10</sup> For the legislative history of the Act see H. R. Rep. No. 3020, 57th Cong., 2d Sess.

Senator Fairbanks, leading exponent of the Act, said in reporting it to the Senate: "The far-reaching importance of the cases arising under antitrust laws now upon the statute books or hereafter to be enacted, and the general public interest therein, are such that every reasonable means should be provided for speeding the litigation. It is the purpose of the bill to expedite litigation of great and general importance. It has no other object." 36 Cong. Rec. 1679.

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discretionary jurisdiction to hear an interlocutory appeal from that order. Thus, the Expediting Act, by its terms, relates only to appeals from *final* judgments in a limited category of cases, while § 1292 (b) applies to appeals from certain *interlocutory* orders in *all* civil actions. The Expediting Act does not prohibit court of appeals jurisdiction under § 1292 (b), for the former applies only to final judgments, while the latter applies only to interlocutory orders. To find any inconsistency whatever between the two statutes thus requires rejection of the [\*\*424] plain meaning of each of them -- rejection, in short, of a most basic principle of statutory construction. As the Court of Appeals for the Seventh Circuit recognized in *Fisons Ltd. v. United States*, 458 F.2d 1241, 1245 (1972), "the language of each [can] be given full effect without limiting the scope of the other."

[\*179] [\*49] Moreover, the purpose of § 1292 (b) is wholly consistent with that of the Expediting Act. The 1903 statute was motivated by the view that Government antitrust actions are so important that they should be expedited. *Shenandoah Valley Broadcasting v. ASCAP*, 375 U.S. 39, 40 (1963).<sup>1</sup> [\*50] So, too, the motivation behind § 1292 (b), enacted 55 years later, was the contemporary view that interlocutory appeals involving important and controlling questions of law are a useful means of expediting litigation. Although § 1292 (b) authorizes a departure from the general rule against interlocutory appeals, it does so only for the purpose of materially advancing the ultimate termination of the litigation.<sup>2</sup> Thus, the Expediting [\*180] Act [\*396] and § 1292 (b) are animated by precisely the same objectives and warranted by precisely the same circumstances, and they should be read together as supplementing one another, not as antagonistic.

[\*51] The legislative history of § 1292 (b) indicates that its primary benefit was expected to occur in the protracted or "big" cases, including civil antitrust litigation.<sup>3</sup> [\*52] Yet, if no appeal can be taken to a court of appeals under § 1292 (b) in a civil antitrust suit where the Government is plaintiff, then the purpose behind the statute cannot be served at all in these cases, for no statute provides for such an interlocutory appeal directly to this

<sup>1</sup> In reporting the bill that became the Expediting Act, Senator Fairbanks stated that:

"Every reasonable means should be provided for speeding the litigation. It is the purpose of the bill to expedite litigation of great and general importance. It has no other object." 36 Cong. Rec. 1679.

<sup>2</sup> The Senate Report on the bill that became § 1292 (b) stated:

"This legislation results from a considerable study by committees of the Judicial Conference. The legislation itself was introduced at the request of the Administrative Office of the United States Courts pursuant to the direction of the Judicial Conference of the United States. . . . The bill results from a growing awareness of the need for expedition of cases pending before the district courts. Many cases which are filed in the Federal district courts require the district judge to entertain motions at an early stage in the proceedings which, if determined, against the plaintiff, result in a final order which would then be appealable to the circuit courts of appeals of the United States. However, such motions, if determined in the plaintiff's favor, are interlocutory since they do not end the litigation and are not therefore, under existing provisions of law, appealable. . . .

....

"The committee believes that this legislation constitutes a desirable addition to the existing authority to appeal from interlocutory orders of the district courts of the United States. . . . Any legislation, therefore, appropriately safeguarded, which might aid in the disposition of cases before the district courts of the United States by saving useless expenditure of court time is such as to require the approbation of all those directly concerned with the administration of justice in the United States." S. Rep. No. 2434, 85th Cong., 2d Sess., 2, 4 (1958).

<sup>3</sup> The Senate Report stated:

"There are many civil actions from which similar illustrations could be furnished. For example, in an antitrust action a plea may be entered that the claim is barred by the statute of limitations. If this motion is denied, under existing law the matter is not appealable and the case then goes forward to trial. Disposition of antitrust cases may take considerable time, yet upon appeal following final disposition of such cases, the court of appeals may well determine that the statute of limitations had run and for that reason the district court did not have jurisdiction." Id., at 3.

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Court. It seems to me that if Congress had wanted to exclude cases like this one from the beneficent provisions [\*\*425] of § 1292 (b), it would have said so.<sup>4</sup>

[\*181] The Expediting Act originally provided that Government antitrust cases would be heard by a panel of judges upon the certification of the Attorney General. That provision is now 15 U. S. C. § 28, which provides for a panel of three. The purpose of the provision was to ensure that cases would receive full consideration by a panel of judges before presentation to this Court.<sup>5</sup> The Expediting Act, of course, has been criticized because it routes complex cases directly here without benefit of screening by the courts of appeals. As we stated in United States v. Singer Mfg. Co., 374 U.S. 174, 175 n. 1 (1963): [\*\*\*53]

"Whatever may have been the wisdom of the Expediting Act in providing direct appeals in antitrust cases at the time of its enactment in 1903, time has proven it unsatisfactory. . . . Direct appeals not only place a great burden on the Court but also deprive us of the valuable assistance of the Courts of Appeals."

See also Brown Shoe Co. v. United States, 370 U.S. 294, 355 (1962) (Clark, J., concurring); id., at 364-365 (Harlan, J., dissenting in [\*\*\*397] part and concurring in part); United States v. Borden Co., 370 U.S. 460, 477 n. (1962) (Harlan, [\*182] J., dissenting); Ford Motor Co. v. United States, 405 U.S. 562, 595 n. 5 (1972) (BURGER, C. J., concurring in part and dissenting in part). Interlocutory appeals under § 1292 (b) in Government antitrust cases would provide screening of at least some issues in at least some cases by courts of appeals before those issues reach this Court; and this, as shown above, would be consistent with the original policy of the Expediting Act. The Court's decision today precludes, in cases like this, both the useful expediting effect of § 1292 [\*\*\*54] (b) and the equally desirable potential of intermediate review by the courts of appeals of important legal issues.

It is said that a ban on court of appeals jurisdiction under § 1292 (b) in Government antitrust cases is to be derived from the provisions of § 1292 (a)(1). The latter section provides that the courts of appeals shall [\*\*\*55] have jurisdiction of appeals from interlocutory orders of district courts granting or denying injunctions "except where a direct review may be had in the Supreme Court." The argument is that that language expressly excludes court of appeals jurisdiction in Expediting Act cases; and since there is nothing in the language of § 1292 (b) that contradicts this express exclusion, interlocutory orders in Expediting Act cases are likewise not appealable under § 1292 (b). If § 1292 (b) did allow court of appeals jurisdiction in this case, it is said, the result would be that an interlocutory order in a Government antitrust case could be appealed to a court of appeals only if it did not involve an injunction; and that result [\*\*426] would effectively turn § 1292 on its head, because in non-Expediting Act cases, § 1292 gives priority to injunctive orders, which may be appealed as of right.

There are several answers to this argument. At the outset, it is not clear that the major premise -- that § 1292 (a)(1) expressly excludes court of appeals jurisdiction in Expediting Act cases -- is valid. On that question, the [\*183]

<sup>4</sup> Although the antitrust cases referred to in the Senate Committee Report on § 1292 (b) were apparently private cases, rather than Government litigation, the proposed legislation was introduced, after considerable study, at the direction of the Judicial Conference of the United States (n. 2, *supra*), whose members -- all eminent federal judges -- were surely familiar with the appellate procedure in civil antitrust cases brought by the Government.

<sup>5</sup> The House Report on the bill explains this provision by quoting a letter of the Attorney General as follows:

"There are a number of cases now provided by statute where appeals may be made directly to the Supreme Court from the district and circuit courts . . . .

"The class of cases that I suggest should be brought within this rule, it seems to me, is of as great importance as any of those referred to. The suggested provision requiring a full bench of the circuit judges would insure the cases receiving as full consideration before presentation to the Supreme Court as if heard by the United States circuit court of appeals." H. R. Rep. No. 3020, 57th Cong., 2d Sess., 2 (1903).

Circuits are divided, the First and the Ninth denying [\*\*\*\*56] their jurisdiction,<sup>6</sup> and the Third upholding appealability.<sup>7</sup> We have never before faced the question nor resolved the conflict.

[\*\*\*\*57] But even if the Expediting Act does bar court of appeals jurisdiction to review interlocutory injunctive orders under § 1292 (a)(1) in Government antitrust cases, it does [\*\*\*398] not follow that there must be a similar bar to § 1292 (b) jurisdiction. The very fact that § 1292 (a)(1) contains express language which at least arguably creates an exception to court of appeals jurisdiction, while § 1292 (b) contains no such language, is reason enough to treat the two differently. Beyond that, § 1292 (a)(1) has a history dramatically different from § 1292 (b). That history was thoroughly reviewed in United States v. Cities Service Co., 410 F.2d 662 (CA1 1969), in United States v. Ingersoll-Rand Co., 320 F.2d 509 (CA3 1963), and in the Court's opinion today, *ante*, at 155-163, and need not be discussed in detail here. Suffice it to say that the original version of § 1292 (a)(1) was [\*184] enacted in 1891, and that the provision went through several changes in language in succeeding years, during which its relationship to the 1903 Expediting Act was often unclear. See United States v. Cities Service Co., 410 F.2d, at 666-669. [\*\*\*\*58] The provision was finally codified in its present form in 1948, although, as the above-mentioned conflict among the circuits demonstrates, that codification did not make its relationship to the Expediting Act any clearer. Section 1292 (b), on the other hand, was an entirely new statute, written on a clean slate in 1958, and representing a sharp break with the traditional policy against appeals from noninjunctive interlocutory orders. At that time, there was already growing doubt about the wisdom of the Expediting Act; and the fact that Congress conferred § 1292 (b) jurisdiction without making any express exception for cases where direct review may be had in this Court -- such as had been in § 1292 (a)(1) for some years -- is surely some indication that Congress in 1958 was expressing the contemporary view that interlocutory appeals to the courts of appeals on controlling questions of law provide a desirable tool that should not be denied even in Expediting Act cases.

As to the point that this interpretation would "turn § 1292 on its head," it is certainly arguable that if an appeal from an injunctive order in an Expediting Act case cannot be had under § 1292 (a)(1), it may [\*\*\*\*59] still be taken under § 1292 (b). Section 1292 (b) relates to orders "not otherwise appealable under this section," whatever the nature of the order and whatever the reason for [\*\*427] its nonappealability. Hence, if, in Government antitrust cases, courts of appeals have no jurisdiction under § 1292 (a)(1), then an interlocutory injunctive order would be an order "not otherwise appealable," and § 1292 (b)'s discretionary jurisdiction might well be held to apply.

[\*185] In short, there is no validity to the argument that the terms of § 1292 (a)(1), whatever they may mean, have any bearing upon the proper interpretation of § 1292 (b).

It is also argued that the basic policy of the Expediting Act was to remove *all* court of appeals jurisdiction in Government antitrust cases. According to this argument, although the Act speaks only of final judgments, it must be understood to include interlocutory appeals, since, at the time the Act was passed, the courts of appeals could review interlocutory orders only in cases where they could review final judgments. From United States v. California Cooperative Canneries, 279 U.S. 553, 558 (1929), to Brown [\*\*\*60] Shoe Co. v. United States, 370 U.S., at 305 n. 9, [\*\*\*399] the argument goes, this Court has consistently indicated that courts of appeals may not exercise jurisdiction in Expediting Act cases, regardless of whether the appeal is from a final or interlocutory order; and it

<sup>6</sup> United States v. Cities Service Co., 410 F.2d 662 (CA1 1969); United States v. FMC Corp., 321 F.2d 534 (CA9 1963).

<sup>7</sup> United States v. Ingersoll-Rand Co., 320 F.2d 509 (CA3 1963). The reasoning of the Third Circuit in this case was as follows: Section 1292 (a)(1) permits an appeal to a court of appeals of interlocutory injunctive orders "except where a direct review may be had in the Supreme Court." Since the Supreme Court has direct review in Expediting Act cases *only* from final judgments, it has none from interlocutory orders. Hence, the exception in § 1292 (a)(1) does not bar court of appeals jurisdiction over interlocutory injunctive orders in Government antitrust cases. The court then concluded:

"In fact, it is extremely difficult and requires doing violence to the language of the statute to escape the conclusion that interlocutory orders, such as the one at bar, are reviewable by a court of appeals excepting and only excepting those types of cases in which an interlocutory order is directly reviewable by the Supreme Court." 320 F.2d, at 517.

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should not be assumed that Congress in 1958 repealed this longstanding interpretation by legislation that is not addressed specifically to appeals in these cases.

I fail to see how we effect anything like a repealer of the Expediting Act by construing [§ 1292 \(b\)](#) to permit court of appeals jurisdiction thereunder in Expediting Act cases. As demonstrated above, there is no inconsistency whatever between this construction of [§ 1292 \(b\)](#) and the plain language of the Expediting Act. It is equally clear that the reason why in 1903, and indeed for 55 years thereafter, courts of appeals could not review noninjunctive interlocutory orders in cases where they could not review the final judgment is not that the Expediting Act forbade such review, but that there was no statutory authority for such review in any cases whatsoever. In 1958, however, Congress broke with the old policy against interlocutory [\[\\*\\*\\*\\*61\]](#) appeals from noninjunctive orders and specifically provided that such appeals [\[\\*186\]](#) may be taken to the courts of appeals in their discretion in *all* civil actions, where the question is properly certified. I see no reason, in the absence of some statutory prohibition, to refrain from applying that clear language, whether or not the court of appeals can review the final judgment.

The cases cited by the Government do not persuade me otherwise. *California Canneries*, of course, was decided 29 years before the enactment of [§ 1292 \(b\)](#); and whatever was said there was a judgment on what Congress had done, not on what it could do or on the meaning of what it was to do 29 years later. *Brown Shoe* does postdate the enactment of [§ 1292 \(b\)](#); but that case involved a direct appeal to this Court, and the only question about appealability was whether the appealed order was final. The issue of court of appeals jurisdiction under [§ 1292 \(b\)](#) was not involved there, nor was the 1958 Act even mentioned in the short footnote dictum so heavily relied on by the Government. That dictum did little more than quote the language of *California Canneries*, and it surely cannot be understood [\[\\*\\*\\*\\*62\]](#) to decide the issue now before us.

Finally, it is said that it would be anomalous for a court of appeals that is without jurisdiction to entertain an appeal from a final judgment to decide an interlocutory issue that could control the outcome of the case. But there is *no* case in which the judgment of a court of appeals is necessarily final. Whenever a court of appeals decides a controlling question of law in any litigation, its views are subject to review here. Far from being anomalous, interlocutory review of potentially dispositive questions by the courts of appeals in Government antitrust cases would be helpful [\[\\*\\*428\]](#) to this Court, giving us the benefit of intermediate appellate consideration in these cases. We could then exercise our certiorari power informed by the reasoning of an appellate [\[\\*187\]](#) court, and there might be no later direct appeal at all from the final judgment. And surely interlocutory appeals under [§ 1292 \(b\)](#) in [\[\\*\\*\\*400\]](#) Government antitrust cases would serve to lighten the burden on trial courts and litigants alike.

We cannot, of course, create an appellate jurisdiction not created by Congress, however desirable. But what Congress has [\[\\*\\*\\*\\*63\]](#) conferred, we should not reject.

I would reverse the order of the Court of Appeals denying Tidewater's petition to appeal under [§ 1292 \(b\)](#) for lack of jurisdiction, and I would remand this case to that court with directions to consider the merits of the petition to appeal.

## References

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[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 402- 405](#)

US L Ed Digest, Appeal and Error 31, 325

ALR Digests, Appeal and Error 7, 45

L Ed Index to Anno, Appeal and Error; Restraints of Trade and Monopolies

ALR Quick Index, Appeal and Error; Restraints of Trade and Monopolies

Federal Quick Index, Appeal and Error; Monopolies and Restraints of Trade

Annotation References:

I EUÁNEÜÉAFÍ FÆFI Í LÁHÁUEÓðA Æ GÌ LÁH ÁSEÓðAÉGÁHÍ Í EELÁJÍ GÁWÜÉSÓYÓðAÍ JÆH H

Direct review by Federal Supreme Court of District Court judgments or decrees. [46 L Ed 741, 56 L Ed 894, 63 L Ed 877, 71 L Ed 273.](#)

Appealability of orders in government civil antitrust actions. 10 ALR Fed 607.

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## **United States v. Glaxo Group, Ltd.**

Supreme Court of the United States

November 9, 1972, Argued ; January 22, 1973, Decided

No. 71-666

### **Reporter**

410 U.S. 52 \*; 93 S. Ct. 861 \*\*; 35 L. Ed. 2d 104 \*\*\*; 1973 U.S. LEXIS 26 \*\*\*\*; 176 U.S.P.Q. (BNA) 289; 1973 Trade Cas. (CCH) P74,323; 1973-1 Trade Cas. (CCH) P74,323

UNITED STATES v. GLAXO GROUP LTD. ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

**Disposition:** [328 F.Supp. 709](#), reversed; see also [302 F.Supp. 1](#).

## **Core Terms**

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patent, griseofulvin, bulk, district court, licensees, antitrust, bulk-form, licensing, sales, manufacture, invalid, antitrust violation, dosage-form, dosage, restrictions, bulk-sales, cancellation, sublicense, patentee, cases, violations, microsize, public interest, invention, mandatory, wholesale, leverage, courts, deceit

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

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

Patent Law > Remedies > Equitable Relief > Injunctions

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

Civil Procedure > ... > Justiciability > Standing > General Overview

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

Patent Law > ... > Defenses > Patent Invalidity > General Overview

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

**[HN1](#)** Remedies, Injunctions

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While the United States is without standing to bring a suit in equity to cancel a patent on the ground of invalidity, the United States is entitled to attack the validity of patents relied upon to justify anticompetitive conduct otherwise violative of the law to vindicate the public interest in enjoining violations of the Sherman Act.

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Governments > Courts > Authority to Adjudicate

Civil Procedure > Appeals > Appellate Jurisdiction > Lower Court Jurisdiction

## **HN2** [down arrow] **Appellate Jurisdiction, Interlocutory Orders**

The framing of decrees should take place in the District rather than in Appellate Courts. District courts are invested with large discretion to model their judgments to fit the exigencies of the particular case. The appellate court does not, however, treat that power as one of discretion, subject only to reversal for gross abuse, but has recognized an obligation to intervene in this most significant phase of the case when necessary to assure that the relief will be effective.

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

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

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

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

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

## **HN3** [down arrow] **Ownership & Transfer of Rights, Licenses**

Mandatory selling on specified terms and compulsory patent licensing at reasonable charges are recognized antitrust remedies.

## **Lawyers' Edition Display**

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### **Summary**

A British drug manufacturer held an American patent on the dosage form of griseofulvin, a fungicide, and another British drug manufacturer held an American patent on a microsize dosage form of griseofulvin. The two manufacturers made a patent pooling agreement containing certain restrictions on the sale of bulk-form griseofulvin. Similar bulk-sale restrictions were contained in sublicensing agreements made by the two manufacturers with three American drug companies. In a civil antitrust action in the United States District Court for the District of Columbia, the United States Government sought to enjoin enforcement of the bulk-sale restrictions on the ground that they involved unreasonable restraints of trade, in violation of 1 of the Sherman Act. Also, the government challenged the validity of the American patents which had been obtained by the British manufacturers. The District Court held that the bulk-sales restrictions constituted per se violations of 1 of the Sherman Act, but that since the manufacturers were not relying on the patents in defense of the government's antitrust claims, the government could not challenge the validity of the patents ([302 F Supp 1](#)). Although the District Court granted the government's request for injunctive relief against future violations, the District Court denied the government's request that the manufacturers

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be ordered (1) to make bulk sales on reasonable and nondiscriminatory terms and prices to all bona fide applicants, and (2) to grant reasonable-royalty licenses for the manufacture of griseofulvin ([328 F Supp 709](#)).

On direct appeal by the government pursuant to the Expediting Act, the United States Supreme Court reversed. In an opinion by White, J., expressing the views of six members of the court, it was held (1) that the government could challenge the validity of the defendants' patents even if the defendants did not rely upon the patents in defense of their conduct, and (2) that the District Court should have granted the government's request for orders requiring mandatory bulk sales and compulsory reasonable-royalty licensing.

Rehnquist, J., joined by Stewart and Blackmun, JJ., dissenting, would affirm the judgment below on the grounds (1) that the patents challenged by the government bore no relationship whatever to the defendants' unreasonable restraint of trade, and (2) that the Supreme Court's factual assumptions in determining the appropriate remedy were completely contrary to the District Court's findings.

## **Headnotes**

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PATENTS §362 > right to challenge -- antitrust action by United States -- > Headnote:

[LEdHN\[1\]](#) [1]

In a civil antitrust action by the United States Government, the government may challenge the validity of the defendants' patents even if the defendants do not rely upon the patents in defense of their conduct, where (1) according to the allegations of the complaint, the defendants had issued licenses under their patents which unreasonably restrained trade by prohibiting the licensees from making bulk sales, and had included in a patent pooling agreement a covenant to impose such restrictions on licensees, and (2) in response to the government's assertion of substantial claims for relief consisting of orders requiring mandatory bulk sales and compulsory reasonable-royalty licensing, the defendants have asserted that such relief would deny the defendants an essential ingredient of their rights under the patent system, and that there is no warrant for such a drastic forfeiture of their rights.

COURTS §282 > jurisdiction -- antitrust actions -- > Headnote:

[LEdHN\[2\]](#) [2]

The Federal District Courts have jurisdiction to entertain and decide antitrust suits brought by the government and to fashion effective relief where a violation is found.

RESTRAINTS OF TRADE AND MONOPOLIES §77 > remedy for patent pooling agreement restrictions -- mandatory bulk sales -- compulsory reasonable-royalty licensing -- > Headnote:

[LEdHN\[3\]](#) [3]

In a civil antitrust action by the United States Government, the government is entitled to relief consisting of orders requiring that the defendants, British drug manufacturers, make bulk sales of griseofulvin, a fungicide, on reasonable and nondiscriminatory terms and prices to all bona fide applicants, and that the defendants grant reasonable- royalty licenses for the manufacture of griseofulvin, where (1) the defendants' patents involving griseofulvin have given them economic leverage with which to insist upon and enforce bulk sales restrictions

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imposed upon their three American licensees pursuant to the defendants' patent pooling agreement; (2) the patents have been intimately associated with and have contributed to effectuating conduct which has been held to be a per se restraint of trade in griseofulvin; (3) the effect of the defendants' refusal to sell in bulk and of prohibition of bulk sales by the licensees has been that bulk griseofulvin has not been available to any but the defendants' three licensees, and that these three are the only sources of dosage-form griseofulvin in the United States; (4) only by requiring the defendants to sell bulk-form griseofulvin on nondiscriminatory terms to all bona fide applicants will the dosage-form, wholesale market become competitive; and (5) unless American firms other than the three licensees are licensed to manufacture griseofulvin, competition in the United States market will depend entirely upon the defendants' willingness to continue to supply their present licensees with the bulk form of the drug.

RERAINTS OF TRADES AND MONOPOLIES §75 > relief -- > Headnote:

[LEdHN\[4\]](#) [4]

In civil antitrust actions, the framing of decrees should take place in the Federal District Courts rather than in appellate courts, and District Courts are invested with large discretion to model their judgments to fit the exigencies of the particular case.

APPEAL AND ERROR §1382 > discretion of District Court -- > Headnote:

[LEdHN\[5\]](#) [5]

The power of a Federal District Court to model its judgment to fit the exigencies of a particular antitrust case is not one of discretion, subject only to reversal for gross abuse; rather, the United States Supreme Court has an obligation to intervene in this most significant phase of the case when necessary to assure that the relief will be effective.

RERAINTS OF TRADE AND MONOPOLIES §75 > relief -- > Headnote:

[LEdHN\[6\]](#) [6]

The purpose of relief in an antitrust case is, so far as practicable, to cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.

## Syllabus

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Appellees, Imperial Chemical Industries Ltd. and Glaxo Group Ltd., British drug companies engaged in the manufacture and sale of the fungicide griseofulvin, pooled their bulk- and dosage-form patents and sublicensed certain firms in the United States to practice the patents. The pooling agreement contained a covenant to restrict bulk sales and resales, and sublicensing agreements prohibited bulk resales to third parties without the licensors' prior consent. The United States filed a civil antitrust suit against appellees to restrain alleged violations of [§ 1](#) of the Sherman Act, and the Government also attacked the validity of the dosage-form patents, and sought the relief of mandatory, nondiscriminatory bulk-form sales and reasonable-royalty licensing of the patents. The District Court held that bulk-sales restrictions were *per se* violations of [§ 1](#) and enjoined their future use, [\[\\*\\*\\*\]2](#) but refused the Government's request to order mandatory, nondiscriminatory sales of the bulk form of the drug and reasonable-

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royalty licensing of appellees' patents as part of the relief. The court also refused to entertain the Government's claim of patent invalidity, since appellees did not rely on their patents in defense of the antitrust claims. *Held:*

1. Where patents are directly involved in antitrust violations and the Government presents a substantial case for relief in the form of restrictions on the patents, the Government may challenge the validity of the patents regardless of whether the owner relies on the patents in defending the antitrust action. Pp. 57-60.
2. In order to "pry open to competition" the market closed by the antitrust violations, an order for mandatory, nondiscriminatory sales to all bona fide applicants is appropriate relief, and where, as in this case, the manufacturer may choose not to make bulk-form sales, and the licensees are not bound by the court's order for mandatory sales, further relief in the form of reasonable-royalty licensing of the patents is also proper. Pp. 60-64.

**Counsel:** Deputy Solicitor General Friedman argued the cause for the [\*\*\*\*3] United States. With him on the briefs were Solicitor General Griswold, Assistant Attorney General Kauper, Acting Assistant Attorney General Comegys, Wm. Terry Bray, Howard E. Shapiro, and Richard H. Stern.

Henry P. Sailer argued the cause for appellee Glaxo Group Ltd. With him on the brief was Francis D. Thomas, Jr. Sigmund Timberg argued the cause for appellee Imperial Chemical Industries, Ltd. With him on the brief were Paul N. Kokulis and Lawrence A. Hymo.

**Judges:** White, J., delivered the opinion of the Court, in which Burger, C. J., and Douglas, Brennan, Marshall, and Powell, JJ., joined. Rehnquist, J., filed a dissenting opinion in which Stewart and Blackmun, JJ., joined, post, p. 64.

**Opinion by:** WHITE

## Opinion

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[289] [\*53] [\*\*107] [\*\*863] MR. JUSTICE WHITE delivered the opinion of the Court.

The United States appeals pursuant to § 2 of the Expediting Act, as amended, 62 Stat. 989, [15 U. S. C. § 29](#), from portions of a decision by the United States District Court for the District of Columbia in a civil antitrust suit. We are asked to decide whether the Government may challenge the validity of patents involved in illegal restraints of trade, when [\*\*\*\*4] the defendants do not rely upon the patents in defense of their conduct, and whether the District Court erred in refusing certain relief requested by the Government.

I

Appellees, Imperial Chemical Industries Ltd. (ICI) and Glaxo Group Ltd. (Glaxo), are British drug companies engaged in the manufacture and sale of griseofulvin. Griseofulvin is an antibiotic compound that may be cut with inert ingredients and administered [\*54] orally in the form of capsules or tablets to humans or animals for the treatment of external fungus infections. There is no substitute for dosage-form griseofulvin in combating certain infections. Griseofulvin itself is unpatented and unpatentable. ICI owns various patents on the dosage form of the drug.<sup>1</sup> [\*\*\*\*5] Glaxo owns various patents on a method for manufacturing the drug in bulk form, as well as a patent on the finely ground, "microsize" dosage form of the drug.<sup>2</sup>

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<sup>1</sup> Specifically at issue in the present litigation is U.S. Patent No. 2,900,304, issued August 18, 1959. The patent embodies two types of claims -- (1) a method of curing humans or animals of external fungus diseases by administering "an effective amount of griseofulvin" to them internally and (2) a capsule, tablet, or pill containing an effective amount of griseofulvin.

<sup>2</sup> Specifically at issue in the present litigation is U.S. Patent No. 3,330,727, issued July 11, 1967. This patent covers the improved (finely ground or "microsize") dosage form of griseofulvin. This form has proved more effective and more marketable than other dosage forms of the drug.

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[\*\*\*108] [290] On April 26, 1960, ICI and Glaxo entered into a formal agreement pooling their griseofulvin patents. At the time of the execution of the agreement, ICI held patents on the dosage form of the drug, and Glaxo held bulk-form manufacturing patents. Pursuant to the agreement, ICI acquired the right to manufacture bulk-form griseofulvin under Glaxo's patents, to sell bulk-form griseofulvin, and to sublicense under Glaxo's patents. Glaxo was authorized to manufacture dosage-form griseofulvin and to sublicense under ICI's patents. As part of the agreement, ICI undertook "not to sell and to use its best endeavors" [\*\*864] to prevent its subsidiaries and associates from selling any griseofulvin in bulk to any independent third party without Glaxo's express consent in writing."

Subsequent to the pooling [\*\*\*6] of the griseofulvin patents, ICI granted a sublicense to American Home Products [\*55] Corp. (AMHO), ICI's exclusive distributor in the United States. ICI agreed to sell bulk-form griseofulvin to AMHO. AMHO was authorized to process the bulk form into dosage form and to sell the drug in that form. With respect to bulk sales the agreement stated: "You [AMHO] will not, without first obtaining our [ICI's] consent, resell, or redeliver in bulk supplies of griseofulvin." Glaxo had previously entered into similar sublicensing agreements with two United States companies -- Schering Corp. (Schering) and Johnson & Johnson (J & J). The agreements contained a covenant on the part of the licensees "not to sell or to permit its Affiliates to sell any griseofulvin in bulk to any independent third party without Glaxo's express consent in writing."<sup>3</sup>

[\*\*\*7] On March 4, 1968, the United States filed a civil antitrust suit against ICI and Glaxo, pursuant to [§ 4](#) of the Sherman Act, [15 U. S. C. § 4](#), to restrain alleged violations of [§ 1](#) of the Act, 26 Stat. 209, as amended, [15 U. S. C. § 1](#). The Government charged that the restrictions on the sale and resale of bulk-form griseofulvin, contained in the 1960 ICI-Glaxo agreement and the various sublicensing agreements, were unreasonable restraints of trade. The Government also challenged the validity of ICI's dosage-form patent.<sup>4</sup>

[\*\*\*8] [\*56] The District Court, citing this Court's decision in [United States v. Arnold, Schwinn & Co., 388 U.S. 365 \(1967\)](#), held that the bulk-sales restrictions contained in the ICI-AMHO agreement were *per se* violations of [§ 1](#) of the Sherman Act.<sup>5</sup> [\*\*\*109] [302 F.Supp. 1 \(DC 1969\)](#). Because ICI had filed an affidavit disclaiming any desire to rely on its patent in defense of the antitrust claims, the District Court struck the claims of patent invalidity from the Government's complaint, ruling that the Government could not challenge ICI's patent when it was not relied upon as a defense to the antitrust claims. The District Court also denied the Government's motion to amend its complaint to allege the invalidity of Glaxo's patent on "microsize" griseofulvin.<sup>6</sup>

[\*\*\*9] Subsequently, in separate, unreported orders, the bulk-sales restrictions in the Glaxo-J & J, the Glaxo-Schering, and the Glaxo-ICI agreements were found to be *per se* violations of [§ 1](#). The court enjoined future use of the bulk-sales restrictions, but refused the Government's request to order mandatory, nondiscriminatory sales of the bulk form of the drug and reasonable-royalty licensing of the ICI and Glaxo patents as part of the relief. [328](#)

<sup>3</sup> Although AMHO, Schering, and J & J could have manufactured bulk-form griseofulvin under Glaxo's patents, in practice they purchased the bulk form of the drug from ICI and Glaxo and themselves performed the processes to convert the drug to dosage form.

<sup>4</sup> See, *supra*, n. 1. The Government contended that the "method" portion of the patent did not disclose how to practice the invention in that it failed to specify what is an "effective amount" of the drug. See [35 U. S. C. § 112](#). The Government also argued that ICI's product claims were invalid because the dosage form that they covered did not specify an "effective amount" of the drug, did not specify the diseases that could be cured, and claimed a patent monopoly over a substance long in the public domain. See [35 U. S. C. §§ 100 and 101](#).

<sup>5</sup> The case was decided on the basis of various motions concerning the merits and the relief. Testimony was not received; the facts were developed in affidavits, exhibits, and interrogatories accompanying the motions.

<sup>6</sup> See n. 2. The Government had sought to challenge the patent on the basis that the patent purported to monopolize a product long in the public domain, on the basis of prior disclosure, and on the basis of prior public use. See [35 U. S. C. §§ 100, 101, 102 \(a\), 102 \(b\)](#).

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F.Supp. 709 (DC 1971). The United States took a direct **[\*\*865]** appeal under the Expediting Act and we noted probable jurisdiction. *405 U.S. 914.* **[\*57]** //

LEdHN[1] [1]The major issue before us is whether the District Court erred in ruling that the United States could challenge the validity of a patent in the course of prosecuting an antitrust action only when the patent is relied on as a defense, which was not the case here. We agree with the United States that this was an unduly narrow view of the controlling cases.

United States v. Bell Telephone Co., 167 U.S. 224 (1897), acknowledged prior decisions permitting **[\*\*\*\*10]** the United States to sue to set aside **[291]** a patent for fraud or deceit associated with its issuance, but held that the federal courts should not entertain suits by the Government "to set aside a patent for an invention on the mere ground of error of judgment on the part of the patent officials," at least where the United States "has no proprietary or pecuniary [interest] in the setting aside of the patent [and] is not seeking to discharge its obligations to the public . . ." *167 U.S., at 269, 265*. Subsequently, United States v. United States Gypsum Co., 333 U.S. 364 (1948), referred to *Bell Telephone* as holding that HN1 [1] the United States was "without standing to bring a suit in equity to cancel a patent on the ground of invalidity," *id., at 387*, but went on to declare that, to vindicate the public interest in enjoining violations of the Sherman Act, the United States is entitled to attack the validity of patents relied upon to justify anticompetitive conduct otherwise violative of the law. The Court noted that, because of the public interest in free competition, it had repeatedly held that the private licensee-plaintiff in an **[\*\*\*\*11]** antitrust suit may attack the validity of the patent under which he is licensed even though he has agreed not to do so in his license. The authorities **[\*\*\*110]** for this proposition were *Sola Electric Co. v. Jefferson Electric* **[\*581]** *Co., 317 U.S. 173 (1942)*; *Edward Katzinger Co. v. Chicago Metallic Mfg. Co., 329 U.S. 394 (1947)*; and *MacGregor v. Westinghouse Electric & Mfg. Co., 329 U.S. 402 (1947)*. The essence of those cases is best revealed in *Katzinger* where the Court held that, although a patent licensee (under the then-controlling law) was normally foreclosed from questioning the validity of a patent he is privileged to use, the bar is removed when he alleges conduct by the patentee that would be illegal under the antitrust laws, absent the patent. The licensee was free to challenge the patent in these circumstances because the "federal courts must, in the public interest, keep the way open for the challenge of patents which are utilized for price-fixing . . ." *Id., at 399*. *Katzinger* and *Gypsum* were much in the tradition of *Pope Mfg. Co. v. Gormully, 144 U.S. 224, 234 (1892)*: **[\*\*\*12]** "It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly . . .," a view most recently echoed in *Lear, Inc. v. Adkins, 395 U.S. 653, 670 (1969)*.

We think that the principle of these cases is sufficient authority for permitting the Government to raise and litigate the validity of the ICI-Glaxo patents in this antitrust case. According to the record, appellees had issued licenses under their patents that unreasonably restrained trade by prohibiting the licensees from selling or reselling bulk-form griseofulvin and had included in the pooling agreement a covenant to impose such restrictions on licensees. These charges were sustained, the court concluding that the covenant and the patent license provisions were *per se* restraints of trade in the griseofulvin product market.

**[\*\*866]** The District Court was then faced with the Government's attack on the pertinent patents as well as its **[\*59]** demand for mandatory sales and reasonable-royalty licensing, the latter being well-established forms of relief when necessary to an effective **[\*\*\*13]** remedy, particularly where patents have provided the leverage for or have contributed to the antitrust violation adjudicated. See for example, *Besser Mfg. Co. v. United States, 343 U.S. 444 (1952)*; United States v. United States Gypsum Co., 340 U.S. 76 (1950); *International Salt Co. v. United States, 332 U.S. 392 (1947)*; *Hartford-Empire Co. v. United States, 323 U.S. 386 (1945)*. Appellees opposed mandatory sales and compulsory licensing, asserting that the Government would "deny defendants an essential ingredient of their rights under the patent system," and that there was no warrant for "such a drastic forfeiture of their rights." In this context, where the court would necessarily be dealing with the future enforceability of the patents, we think it would have been appropriate, if it appeared that the Government's claims for further relief were substantial, for the court to have also entertained the Government's challenge to the validity of those patents.

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LEdHN[2] [2]In arriving at this conclusion, we do not recognize unlimited [\*\*\*14] authority [\*\*\*111] in the Government to attack a patent by basing an antitrust claim on the simple assertion that the patent is invalid. Cf. *Walker Process Equipment v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965).Nor do we invest the Attorney General with a roving commission to question the validity of any patent lurking in the background of an antitrust case. But the district courts have jurisdiction to entertain and decide antitrust suits brought by the Government and, where a violation is found, to fashion effective relief. This often involves a substantial question as to whether it is necessary to limit the rights normally vested in the owners of patents, which in itself can be a complex [\*60] and difficult issue. The litigation would usually proceed on the assumption that valid patents are involved, but if this basic assumption is itself challenged, we perceive no good reason, either in terms of the patent system or of judicial administration, for refusing to hear and decide it.

[292] The District Court, therefore, erred in striking the allegations of the Government's complaint dealing with the patent validity issue and in refusing to permit [\*\*\*15] the Government to amend its complaint with respect to this issue. On remand, the District Court should consider the validity of the ICI dosage-form patent and the Glaxo microsize patent.

### III

LEdHN[3] [3]The question remains whether the Government's case for additional relief was sufficient to provide the appropriate predicate for a consideration of its challenge to the validity of these patents. For this purpose, as we have said, its case need not be conclusive, but only substantial enough to warrant the court's undertaking what could be a large inquiry, one which could easily obviate other questions of remedy if the patent is found invalid and which, if the patent is not invalidated, would lend substance to a defendant's claim that a valid patent should not be limited, absent the necessity to provide effective relief for an antitrust violation to which the patent has contributed. Here, we think not only that the United States presented a substantial case for additional relief, but that it was sufficiently convincing that the District Court, wholly aside from the question of patent validity, should have ruled favorably [\*\*\*16] on the demand for mandatory sales and compulsory licensing.

In the first place, it is clear from the evidence that the ICI dosage-form patent, along with other ICI and Glaxo patents, gave the appellees the economic leverage with which to insist upon and enforce the bulk-sales [\*61] restrictions imposed on the [\*867] licensees.<sup>7</sup> Glaxo apparently [\*\*\*112] considered the bulk-sales restriction to be a prerequisite to the granting of a sublicense, for it rejected a draft of the ICI-AMHO agreement because, among other things, it would have permitted AMHO to sell griseofulvin in bulk form. There are indications, also, that Glaxo refused a sublicense to others than Schering and J & J because of fears that the companies would sell in bulk form or pressure Glaxo to allow such sales. The [\*62] source of the patent-pooling agreement pursuant to which such

<sup>7</sup> The Government argued in the District Court:

"We submit that [ *United States v. Gypsum* [333 U.S. 364 (1948)] should be understood more broadly to support challenge to any patent used by antitrust defendants in furtherance of their illegal program. The importance of the Imperial patent to the defendants' scheme to violate the antitrust laws is plain. It was, according to ICI's contentions, the reason for the patent pool agreement in the first place; Glaxo's grant of rights to ICI was paid for with the Imperial patent. Without the Imperial patent the defendants could not maintain their monopoly in the United States over the drug, for then anyone who could secure bulk form griseofulvin could make it up into pills and sell them without a patent to stop him; bulk form griseofulvin is, as ICI points out, unpatented. The Imperial patent thus bolsters the effectiveness of the illegal restraint on alienation ICI imposes on the resale of bulk form griseofulvin: if a small drug company somehow manages to get the unpatented bulk form drug despite ICI's restraint on alienation designed to prevent it or anyone else from doing so, the defendants may still suppress the manufacture of the drug by threat of patent infringement suit. In this context, vindication of the public interest in competition in unpatentable goods is doubly important -- for there is a double impediment to commerce -- the patent and the conspiracy."

The Government, throughout its brief in this Court, emphasizes the importance of the patents to the antitrust violation.

"In cases like this, the patents involved generally are of major importance in furthering the allegedly unlawful patent licensing practices; they give the defendants the power which enables them to impose the restraints of trade. That is the situation here. The patents were essential to the appellees' scheme to violate the antitrust laws."

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licenses were permitted and which contained the bulk-sales restriction was simple: Glaxo needed the ICI dosage-form patent to assure its licensees the right to use the patent and sell in dosage form. Pooling permitted ICI to engage in bulk manufacture, and, in exchange, ICI imposed the bulk-sales restrictions upon its [\*\*\*\*17] licensees. There can be little question that the patents involved here were intimately associated with and contributed to effectuating the conduct that the District Court held to be a *per se* restraint of trade in griseofulvin.

[\*\*\*\*18] Secondly, we think that ICI and Glaxo should have been required to sell bulk-form griseofulvin on reasonable and nondiscriminatory terms and to grant patent licenses at reasonable-royalty rates to all bona fide applicants in order to "pry open to competition" the griseofulvin market that "has been closed by defendants' illegal restraints." *International Salt Co.*, 332 U.S., at 401.

The United States griseofulvin market consists of three wholesalers, all licensees of appellees, that account for nearly 100% of United States sales totaling approximately eight million dollars. Glaxo and ICI have never sold in bulk to others than the licensees and have prohibited bulk sales and resales by the licensees. In practice, the licensees have not manufactured griseofulvin under the bulk-form patents, preferring instead to purchase in bulk form from ICI and Glaxo. The licensees sell the drug in dosage and microsize form to retail outlets at virtually identical prices. The effect of appellees' refusal to sell in bulk and prohibition [293] of such sales by the licensees has been that bulk griseofulvin has not been available to any but appellees' three licensees and that these three [\*\*\*\*19] are the only sources of dosage-form griseofulvin in the United States.

There is little reason to think that the appellees or their licensees, now that the bulk-sales restrictions have been declared illegal, will begin selling in bulk. It is in [\*63] their economic self-interest to [\*\*868] maintain control of [\*\*\*113] the bulk form of the drug in order to keep the dosage-form, wholesale market competition-free. Bulk sales would create new competition among wholesalers, by enabling other companies to convert the bulk drug into dosage and microsize forms and sell to retail outlets, and would presumably lead to price reductions as the result of normal competitive forces. There is, in fact, substantial evidence in the record to the effect that other drug companies would not only have entered the market, had they been able to make bulk purchases, but also would have charged substantially lower wholesale prices for the dosage and microsize forms of the drug. Only by requiring the appellees to sell bulk-form griseofulvin on nondiscriminatory terms to all bona fide applicants will the dosage-form, wholesale market become competitive.

Relief in the form of compulsory sales may [\*\*\*\*20] not, however, alone insure a competitive market. Glaxo and ICI could choose to discontinue bulk-form manufacturing or the sale of griseofulvin in bulk form. The patent licensees might then begin to practice the bulk-form manufacturing patents pursuant to the patent licenses to fill their needs for the bulk drug. The licensees, of course, are not parties to this action, and a mandatory-sales order would not affect them. They would not be required to make the economically less advantageous bulk sales. The bulk form of the drug would be controlled by the licensees, and the appellees, because they would be required under the Government's proposed relief to sell to all applicants only so long as they sell to any United States purchasers, could easily avoid the mandatory-sales requirement. Unless other American firms are licensed to manufacture griseofulvin, competition in the United States market will depend entirely upon appellees' willingness to continue to supply their present licensees with the bulk form of the drug.

[\*64] [LEdHN\[4\]](#) [↑] [4][LEdHN\[5\]](#) [↑] [5] [\*\*\*\*21] [LEdHN\[6\]](#) [↑] [6]This Court has repeatedly recognized that "[HN2](#)" the framing of decrees should take place in the District rather than in Appellate Courts" and has generally followed the principle that district courts "are invested with large discretion to model their judgments to fit the exigencies of the particular case." *International Salt Co.*, *supra*, at 400-401; accord, *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972). The Court has not, however, treated that power as one of discretion, subject only to reversal for gross abuse, but has recognized "an obligation to intervene in this most significant phase of the case" when necessary to assure that the relief will be effective. [United States v. United States Gypsum Co.](#), 340 U.S., at 89. Accordingly, we have ordered the affirmative relief that the District Court refused to implement. See, e.g., *United States v. United States Gypsum Co.* The purpose of relief in an antitrust case is "so far as practicable,

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[to] [\*\*\*22] cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *Id., at 88.* **HN3**<sup>↑</sup> Mandatory selling on specified terms and compulsory patent licensing at reasonable charges are recognized antitrust remedies. See, e. g., *Besser Mfg. Co. v. United States*, 343 U.S. 444 (1952); *International Salt* [\*\*\*114] *Co. v. United States*, 332 U.S. 392 (1947); *Hartford- Empire Co. v. United States*, 323 U.S. 386 (1945). The District Court should have ordered those remedies in this case.

To the extent indicated in this opinion, the judgment of the District Court is reversed.

So ordered.

Dissent by: REHNQUIST

## Dissent

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[\*\*114contd] [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART and MR. JUSTICE BLACKMUN concur, dissenting.

The Court has undertaken to substitute its judgment for that of Congress [\*\*\*23] in the initiation of novel procedures for the [\*\*869] determination of patent validity, and in so doing [\*65] has blandly disregarded the procedural history of this case.

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There is neither statutory nor case authority for the existence of a general right of either private individuals or the Government to collaterally challenge the validity of issued patents. In the Patent Act of 1790, Congress provided that private citizens could, upon motion alleging fraudulent procurement, prompt a district court to issue to a patentee an order to show cause why his letters patent should not be repealed.<sup>1</sup> [\*\*\*24] A substantially identical provision was carried over in the Patent Act of 1793.<sup>2</sup> But the Patent Act of 1836 contained no provision for such individual actions although it increased the number of statutory [294] defenses in infringement actions.<sup>3</sup> The effect of this omission was determined by *Mowry v. Whitney*, 14 Wall. 434 (1872), to be the preclusion of private actions to cancel patents, even when fraudulently procured.

As part of the rationale in *Mowry*, the Court reasoned that the equitable suit for cancellation of a patent because it was fraudulently procured was a substitute for the writ of *scire facias* and, accordingly, it should have the same limitations. In dictum, the Court stated: "The fraud, if one exists, has been practiced on the government, and as the party injured, it is the appropriate party to assert the remedy or seek relief." *Id., at 441*. When the United States later sued to set aside two patents issued to Alexander Graham Bell subsequent to several purported [\*66] acts of fraud by him on the Patent Office, this Court relied heavily on the dictum in *Mowry, supra*, in recognizing the right of the Federal Government to sue for the cancellation of letters patent obtained by fraud:

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<sup>1</sup> Stat. 109. For an excellent review of the history briefly summarized here, see Cullen & Vickers, Fraud in the Procurement of a Patent, 29 Geo. Wash. L. Rev. 110 (1960).

<sup>2</sup> Stat. 318.

<sup>3</sup> Stat. 117.

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"That the government, authorized both by the Constitution and the statutes to bring suits at law and in equity, should find it to be its duty to correct this evil, to recall these patents, to get a remedy for this fraud, is so clear that it [\*\*\*\*25] needs no argument . . . ." [United States v. Bell Telephone Co., 128 U.S. 315, 370 \(1888\)](#) (*Bell I*). [\*\*\*115] The Government asserts that the breadth of this holding was established in the dictum in [United States v. Bell Telephone Co., 159 U.S. 548 \(1895\)](#) (*Bell II*), wherein the Court upheld its appellate jurisdiction in such patent cancellation cases. There, it was stated:

"In [United States v. Telephone Company, \[128 U.S. 315\]](#), it was decided that where a patent for a grant of any kind issued by the United States has been obtained by fraud, by mistake or by accident, a suit by the United States against the patentee is the proper remedy for relief, and that in this country, where there is no kingly prerogative but where patents for land and inventions are issued by the authority of the government, and by officers appointed for that purpose who may have been imposed upon by fraud or deceit, or may have erred as to their power, or made mistakes in the instrument itself, the appropriate remedy is by proceedings by the United States against the patentee." [Id., at 555.](#)

But in [United States v. Bell Telephone Co., 167 U.S. 224 \(1897\)](#) [\*\*\*\*26] (*Bell III*), the Court characterized the above-quoted language as a "general statement" of the [\*\*870] power [\*67] of the Government to maintain a suit and, again in dictum, limited its effect, saying:

"But while there was thus rightfully affirmed the power of the Government to proceed by suit in equity against one who had wrongfully obtained a patent for land or for an invention, there was no attempt to define the character of the fraud, or deceit or mistake, or the extent of the error as to power which must be established before a decree could be entered cancelling the patent. It was not affirmed that proof of any fraud, or deceit, or the existence of any error on the part of the officers as to the extent of their power, or that any mistake in the instrument was sufficient to justify a decree of cancellation. Least of all was it intended to be affirmed that the courts of the United States, sitting as courts of equity, could entertain jurisdiction of a suit by the United States to set aside a patent for an invention on the mere ground of error of judgment on the part of the patent officials. That would be an attempt on the part of the courts in collateral attack to [\*\*\*\*27] exercise an appellate jurisdiction over the decisions of the Patent Office, although no appellate jurisdiction has been by the statutes conferred. . . ." [Id., at 269.](#)

The plain import of the *Bell* cases is that the authority of the Government to bring an independent action to cancel a patent is confined to the traditional equitable grounds of fraud, mistake, and deceit. The Government makes two arguments to support its position that it should not be as limited here. It contends that since this is an antitrust action, its right to attack the validity of the patent is established by the rationale of [United States v. United States Gypsum Co., 333 U.S. 364 \(1948\)](#), and is therefore not subject to the limitations of *Bell III*. Alternatively, it argues that *Bell III* has been so undercut [\*68] by subsequent decisions, including *Gypsum*, that it should no longer be followed.

In [Gypsum Co., supra](#), the Court stated in "deliberate *dicta*" that the [\*\*\*116] Government may challenge the validity of a patent which has been asserted by an antitrust defendant to be a defense to the Government's claim of antitrust [\*\*\*\*28] violations. It reasoned that in a suit to vindicate the public interest by enjoining violations of the Sherman Act, the United States should have the opportunity, similar to that afforded licensees in an action for royalties, to show that an asserted shield of patentability does not exist. [Id., at 386-388.](#)

The *Bell* cases enunciate the range of the Government's authority, quite independent of any other litigation it may have with a patentee, to attack a governmental grant from the Patent Office obtained by the sort of fraud or mistake there described. The *Gypsum* doctrine, [295] on the other hand, sprang from the right of the Government as a civil plaintiff under the antitrust laws to assert the invalidity of a patent grant set up as a defense to its civil complaint. Since a private licensee may attack the validity of a patent that is made the basis of an action against him for royalties, the Government should, equally, have the right to attack a patent that is set up as a defense by the patentee in the Government's action.

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The Government's claim here essentially falls between these two limited grants of authority. A claim of lack of patentability, without [\*\*\*\*29] more, is not within the Government's authority *qua* government to set aside a patent for fraud or mistake. And since the decision of the merits of the Government's claim of antitrust violation against these appellees in no way required the court to determine the validity of their patents, the reasoning of *Gypsum* is not applicable. The Government may, therefore, prevail only if we are to blur the distinction between [\*69] these separate grants of authority, and extend such authority to circumstances that are within the rationale of neither. [\*\*871] Certainly, it is true, as the Court states, that there is a public interest favoring the judicial testing of patent validity and the invalidation of specious patents. See, e. g., *Blonder-Tongue v. University Foundation*, 402 U.S. 313, 343-344 (1971); *Lear, Inc. v. Adkins*, 395 U.S. 653, 657, 664 (1969). For when a patent is invalid, "the public parts with the monopoly grant for no return, the public has been imposed upon and the patent clause subverted." *United States v. Singer Mfg. Co.*, 374 U.S. 174, 197, 199-200 (1963) (WHITE, J., concurring).

Significant [\*\*\*\*30] recognition is given to this interest by both the *Bell* and *Gypsum* doctrines. Additional authority resides in the Government to obtain judicially decreed restrictions on patent monopoly in appropriate cases where the defendant's antitrust violations have consisted, at least in part, of patent misuse. *International Salt Co. v. United States*, 332 U.S. 392 (1947); *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945); *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488 (1942). But the sort of roving commission that the majority now authorizes whereby the Government may request a court to invalidate any patent owned by an antitrust defendant that in any way related to the factual background of the claimed antitrust violation cannot be regarded as a reasonably necessary extension of any of these principles. [\*\*\*117] It is, therefore, more properly the creature of statute than of judicial innovation.

## II

Although the Court purports to limit its holding to avoid giving the Government such a roving commission, the range of the new authority is pointed up by the facts in this case. [\*70] The Government [\*\*\*\*31] submitted its case to the District Court in three motions for partial summary judgment on the very narrow issue that the vertical restrictions on the resale of bulk-form griseofulvin constituted *per se* violations of the antitrust laws under the *Schwinn* doctrine.<sup>4</sup> *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). Although common bulk-form griseofulvin is the subject of a British manufacturing patent owned by Glaxo, it is neither patented nor patentable in the United States.

The two patents that this Court is now authorizing the Government to challenge bear no relationship whatsoever to the illegal [\*\*\*\*32] restraint found. The ICI patent relates only to the dosage form of the drug. The majority states that "it is clear from the evidence that the ICI dosage-form patent . . . gave the appellees the economic leverage with which to insist upon and enforce the bulk-sales restrictions imposed on the licensees." *Ante*, at 60-61. But no such evidence was submitted in the Government's statement of undisputed facts that accompanied its motions for partial summary judgment on the restraint-of-alienation issue. And no such fact was included in the District Court's findings of undisputed or ultimate facts. The District Court found precisely the opposite:

"Plaintiff has not shown on this record that defendants' current licensing practices are related to the adjudged antitrust violation nor are they methods to circumvent the prohibition of restraints on resale. . . ." *328 F.Supp. 709, 713*. [\*71]

Since the Court's factual assumption as to economic leverage is completely contrary to the finding of the District [\*\*872] Court, presumably the Court without saying so is holding that finding to be clearly erroneous. Yet the only

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<sup>4</sup> The majority inaccurately states that the lower court sustained the allegations in the complaint that appellees had unreasonably restrained trade by prohibiting the licensee from selling or reselling bulk-form griseofulvin. In fact, the District Court only found that the restraint on reselling bulk-form griseofulvin constituted the *per se* antitrust violations found.

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support for such a holding, to which [\*\*\*33] the Court refers, is an unverified statement contained in the Government's argument to the District Court on this issue. While the Government has an impressive batting average in this Court as an antitrust litigant, it has not heretofore [296] had the benefit of having unverified assertions of its counsel treated as being of sufficient evidentiary weight to upset a considered factual finding of the District Court in which that argument was made. Nothing in the antitrust laws or in the Federal Rules of Civil Procedure exempts the Government from having to make its case in the trial court in the same manner as any other litigant. The Court's conclusion that there "can be little question that the patents involved here were intimately associated with and contributed to effectuating the conduct that the District Court held to [\*\*118] be a *per se* restraint of trade in griseofulvin," *ante*, at 62, is thus reached only by a substantial departure from the settled usages of appellate review.

Similarly, the other patent which the Government may now have declared invalid was not even granted until 1967, and it, too, relates to the dosage form of the drug. Since the restraints on alienation [\*\*\*34] were imposed in the early 1960's, there cannot be a plausible contention that it in any way provided "economic leverage" for the antitrust violations. And there was no other proof of its relationship to the bulk-form market and the antitrust violations.<sup>5</sup> Thus, the scope of the new authority extends [\*72] to any patent that happens to be present in a patent-licensing agreement that contains a restraint on alienation in a different market, regardless of its relationship to such restraint.

Since there is no congressional authorization [\*\*\*35] for the challenge by the Government to the validity *vel non* of patents without regard to the relationship to antitrust violations, and since there was no proved relationship between these violations and the patents in question, I would affirm the judgment and orders of the District Court. I therefore dissent.

## References

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- [54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 97, 98, 383;](#) [60 Am Jur 2d, Patents 328](#)
- US L Ed Digest, Patents 362; Restraints of Trade and Monopolies 75, 77
- ALR Digests, Restraints of Trade and Monopolies 15, 18
- L Ed Index to Anno, Patents; Restraints of Trade and Monopolies
- ALR Quick Index, Patents; Restraints of Trade and Monopolies
- Federal Quick Index, Monopolies and Restraints of Trade; Patents

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<sup>5</sup> This total lack of proof of any relationship also defeats for me the granting of compulsory licensing of the United States patents. Compulsory licensing is a recognized remedy in patent misuse cases, see, e. g., *International Salt Co. v. United States*, 332 U.S. 392 (1947), *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945), but here the District Court specifically found there was no patent misuse or other abuse of patent rights.



## **United States v. Falstaff Brewing Corp.**

Supreme Court of the United States

October 17, 1972, Argued ; February 28, 1973, Decided

No. 71-873

### **Reporter**

410 U.S. 526 \*; 93 S. Ct. 1096 \*\*; 35 L. Ed. 2d 475 \*\*\*; 1973 U.S. LEXIS 130 \*\*\*\*; 1973 Trade Cas. (CCH) P74,377; 1973-1 Trade Cas. (CCH) P74,377

UNITED STATES v. FALSTAFF BREWING CORP. ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND.

**Disposition:** [332 F.Supp. 970](#), reversed and remanded.

## **Core Terms**

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acquisition, de novo, entrant, merger, beer, competitor, brewers, district court, anticompetitive, breweries, largest, cases, concentration, acquiring, regional, objective evidence, sales, eliminated, effects, exerted, seller, firms, probabilities, capability, geographic, antitrust, trier of fact, no intention, procompetitive, credible

## **LexisNexis® Headnotes**

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Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

[\*\*HN1\*\*](#) [] **Antitrust Statutes, Clayton Act**

See [15 U.S.C.S. § 18](#).

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Mergers & Acquisitions Law > Antitrust > Market Definition

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## [HN2](#) [down] Antitrust Statutes, Clayton Act

Section 7 of the Clayton Act, [15 U.S.C.S. § 18](#), forbids mergers in any line of commerce where the effect may be substantially to lessen competition or tend to create a monopoly. The section proscribes many mergers between competitors in a market, it also bars certain acquisitions of a market competitor by a noncompetitor, such as a merger by an entrant who threatens to dominate the market or otherwise upset market conditions to the detriment of competition. Suspect also is the acquisition by a company not competing in the market but so situated as to be a potential competitor and likely to exercise substantial influence on market behavior. Entry through merger by such a company, although its competitive conduct in the market may be the mirror image of that of the acquired company, may nevertheless violate § 7 because the entry eliminates a potential competitor exercising present influence on the market.

## Lawyers' Edition Display

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### Summary

In a government civil antitrust suit to enjoin the nation's fourth largest brewer from acquiring a brewer which was the largest seller of beer in New England, the United States District Court for the District of Rhode Island entered judgment for the defendant and dismissed the complaint on the ground that the acquiring company had no intent to enter the New England market except through acquisition and that it therefore could not be considered a potential competitor in that market ([332 F Supp 970](#)).

On direct appeal, the United States Supreme Court reversed and remanded for a proper assessment of the acquiring company as a potential competitor in the New England market. In an opinion by White, J., expressing the views of four members of the court, it was held that an acquisition by a company not competing in the same market as the acquired company is not legal merely because the acquiring company would never have entered the market *de novo*, but only by acquisition, and that the court must give separate consideration to whether the acquiring company was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in the market.

Douglas, J., while joining in the court's opinion in this respect, filed a concurring opinion declaring that it was not a prerequisite to the government's case to prove that the acquisition had present anticompetitive effects.

Marshall, J., concurred in the result on the ground that where strong objective evidence indicates that a firm is a potential entrant into a market, it is error for the trial judge to rely solely on the firm's subjective prediction of its own future conduct.

Rehnquist, J., joined by Stewart, J., dissented on the ground that the theory on which the court reversed was never advanced by the government.

Brennan and Powell, JJ., did not participate.

## Headnotes

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APPEAL AND ERROR §338 > antitrust suit -- > Headnote:

[LEdHN\[1\]](#) [down] [1]

Under 2 of the Expediting Act ([15 USCS 29](#)), providing that in every civil antitrust action brought in any Federal District Court wherein the United States is complainant, an appeal from the court's final judgment will lie only to the

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Supreme Court, the Supreme Court has jurisdiction of a direct appeal to it from a Federal District Court's judgment for the defendant dismissing the complaint in a government civil action alleging a violation of 7 of the Clayton Act ([15 USCS 18](#)).

RERAINTS OF TRADE AND MONOPOLIES §34.5 > mergers -- > Headnote:

[LEdHN\[2\]](#) [2]

Section 7 of the Clayton Act ([15 USCS 18](#)), which forbids mergers in any line of commerce where the effect may be substantially to lessen competition or tend to create a monopoly, proscribes many mergers between competitors in a market and also bars certain acquisitions of a market competitor by a noncompetitor, such as a merger by an entrant who threatens to dominate the market or otherwise upset market conditions to the detriment of competition.

RERAINTS OF TRADE AND MONOPOLIES §34.5 > mergers -- > Headnote:

[LEdHN\[3\]](#) [3]

Market entry through merger by a company not competing in the market, but so situated as to be a potential competitor and likely to exercise substantial influence on market behavior, may violate 7 of the Clayton Act ([15 USCS 18](#)), which forbids mergers in any line of commerce where the effect may be substantially to lessen competition or tend to create a monopoly, although the entrant's competitive conduct in the market may be the mirror image of that of the acquired company, because the entry eliminates a potential competitor exercising present influence on the market.

RERAINTS OF TRADE AND MONOPOLIES §34.5 > mergers -- > Headnote:

[LEdHN\[4\]](#) [4]

Under 7 of the Clayton Act ([15 USCS 18](#)), which forbids mergers in any line of commerce where the effect may be substantially to lessen competition or tend to create a monopoly, an acquisition by a company not competing in the same market as the acquired company is not legal merely because the acquiring company would never have entered the market de novo; the court must give separate consideration to whether the acquiring company was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in the market.

RERAINTS OF TRADE AND MONOPOLIES §34.5 > mergers -- > Headnote:

[LEdHN\[5\]](#) [5]

In determining the anticompetitive effect of a merger under 7 of the Clayton Act ([15 USCS 18](#)), which forbids mergers in any line of commerce where the effect may be substantially to lessen competition or tend to create a monopoly, in a case involving an acquisition by a company not competing in the relevant market, the critical question is not the acquiring company's internal company decisions with respect to entering the market but whether, given its financial capabilities and the market conditions, it could reasonably be considered a potential entrant into that market.

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PLEADING §176 > antitrust complaint -- > Headnote:

[LEdHN\[6\]](#) [6]

In a government civil antitrust suit under 7 of the Clayton Act ([15 USCS 18](#)), which forbids mergers in any line of commerce where the effect may be substantially to lessen competition or tend to create a monopoly, an allegation in the complaint that the acquisition violated 7 because it eliminated potential competition encompasses the acquiring company's influence on existing competition as an on-the-fringe potential competitor, and the government need not be more specific in its allegation.

EVIDENCE §979 > sufficiency -- antitrust -- > Headnote:

[LEdHN\[7\]](#) [7]

Circumstantial evidence is the life blood of antitrust law, especially for 7 of the Clayton Act ([15 USCS 18](#)), which forbids mergers in any line of commerce where the effect may be substantially to lessen competition or tend to create a monopoly, and which is concerned with probabilities, not certainties.

## Syllabus

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Respondent Falstaff, the Nation's fourth largest beer producer, which was desirous of achieving national status, agreed to acquire the largest seller of beer in the New England market rather than enter *de novo*. The District Court dismissed the Government's resultant suit charging violation of § 7 of the Clayton Act, finding that entry by acquisition, which the court found was the only way that respondent intended to penetrate the New England market, would not result in a substantial lessening of competition. *Held*: The District Court erred in assuming that, because respondent would not have entered the market *de novo*, it could not be considered a potential competitor. The court should have considered whether respondent was a potential competitor in the sense that its position on the edge of the market exerted a beneficial influence on the market's competitive conditions. Pp. 531-538.

**Counsel:** Assistant Attorney General [\*\*\*\*2] Kauper argued the cause for the United States. With him on the briefs were Solicitor General Griswold, Acting Assistant Attorney General Comegys, William Bradford Reynolds, and Howard E. Shapiro.

Matthew W. Goring argued the cause for appellees. With him on the brief were James S. McClellan, Jerome M. McLaughlin, and Stephen J. Carlotti.

**Judges:** White, J., delivered the opinion of the Court, in which Burger, C. J., and Blackmun, J., joined, and in Part I of which Douglas, J., joined. Douglas, J., filed an opinion concurring in part, post, p. 538. Marshall, J., filed an opinion concurring in the result, post, p. 545. Rehnquist, J., filed a dissenting opinion, in which Stewart, J., joined, post, p. 572. Brennan, J., took no part in the decision of the case. Powell, J., took no part in the consideration or decision of the case.

**Opinion by:** WHITE

## Opinion

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[\*527] [\*\*\*478] [\*\*1097] MR. JUSTICE WHITE delivered the opinion of the Court.

[\*\*1098] [LEdHN/1](#)<sup>1</sup> [1]Alleging that Falstaff Brewing Corp.'s acquisition of the Narragansett Brewing Co. in 1965 violated § 7 of the Clayton Act, 38 Stat. 731, as amended, [\*\*\*\*3] [15 U. S. C. § 18](#),<sup>1</sup> [\*\*\*\*4] the United States brought this antitrust suit under the theory that potential competition in the New England beer market may be substantially lessened by the acquisition. The District Court held to the contrary, [332 F.Supp. 970 \(1971\)](#), and we noted probable jurisdiction<sup>2</sup> to determine whether the trial court applied an erroneous legal standard in so deciding, [405 U.S. 952 \(1972\)](#). We remand to the District Court for a proper assessment of Falstaff as a potential competitor.

As stipulated by the parties, the relevant product market is the production and sale of beer, and the six New England States<sup>3</sup> compose the geographic market. While beer sales in New England increased approximately 9.5% in the four years preceding the acquisition, the eight largest sellers increased their share of these sales from approximately 74% to 81.2%. In 1960, approximately 50% of the sales were made by the four largest sellers; by 1964, their share of the market was 54%; and [\*528] by 1965, the year of acquisition, their share was 61.3%. The number of brewers operating plants in the geographic market decreased from 32 in 1935, to 11 in 1957, to six in 1964.<sup>4</sup>

[\*\*\*\*5] Of the Nation's 10 largest brewers in 1964, only Falstaff and two others did not sell beer in New England; Falstaff was the largest of the three and had the closest brewery.<sup>5</sup> [\*\*\*479] In relation to the New England market, Falstaff sold its product in western Ohio, to the west and in Washington, D. C., to the south.

The acquired firm, Narragansett, was the largest seller of beer in New England at the time of its acquisition, with approximately 20% of the market; had been the largest seller for the five preceding years; had constantly expanded its brewery capacity between 1960 and 1965; and had acquired either the assets or the trademarks of several smaller brewers [\*\*\*\*6] in and around the geographic market.

The fourth largest producer of beer in the United States at the time of acquisition, Falstaff was a regional brewer<sup>6</sup> with 5.9% of the Nation's production in 1964, having grown steadily since its beginning as a brewer in 1933 through acquisition and expansion of other breweries. As of January 1965, Falstaff sold beer in 32 States, but did not sell in the Northeast, an area composed of New England and States such as New York and New Jersey; the area [\*\*1099] being the highest beer consumption region in the [\*529] United States. Between 1955 and 1966, the company's net sales and net income almost doubled, and in 1964 it was planning a 10-year, \$ 35 million program to expand its existing plants.

<sup>1</sup> [HN1](#)<sup>1</sup> Section 7 provides in relevant part:

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." [15 U. S. C. § 18](#).

For the legislative history of the amendment in 1950 that greatly expanded the section's scope, 64 Stat. 1125, see *Brown Shoe Co. v. United States*, [370 U.S. 294, 311-323 \(1962\)](#).

<sup>2</sup> Jurisdiction lies under § 2 of the Expediting Act, 32 Stat. 823, as amended, [15 U. S. C. § 29](#).

<sup>3</sup> Maine, New Hampshire, Vermont, Massachusetts, Connecticut, and Rhode Island.

<sup>4</sup> Nationally, the number of brewers decreased from 663 in 1935 to 140 in 1965.

<sup>5</sup> Of the three "top ten" brewers that were not selling in New England, Falstaff ranked fourth nationally, the other two ranking eighth and ninth. From Boston, Massachusetts, the distance to Falstaff's closest brewery was 844 miles, while the distance to the eighth and ninth largest sellers' breweries was 1,385 and 2,000 miles respectively.

<sup>6</sup> A "regional," as contrasted with a "national" brewer, is one that is not selling in all the significant national markets.

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Falstaff met increasingly strong competition in the 1960's from four brewers who sold in all of the significant markets. National brewers possess [\*\*\*7] competitive advantages since they are able to advertise on a nationwide basis, their beers have greater prestige than regional or local beers, and they are less affected by the weather or labor problems in a particular region. Thus Falstaff concluded that it must convert from "regional" to "national" status, if it was to compete effectively with the national producers.<sup>7</sup> For several years Falstaff publicly expressed its desire for national distribution<sup>8</sup> and after making several efforts in the early 1960's to enter the Northeast by acquisition, agreed to acquire Narragansett in 1965.

[\*\*\*8] Before the acquisition was accomplished, the United States brought suit<sup>9</sup> alleging that the acquisition would violate § 7 because its effect may be to substantially lessen competition in the production and sale of beer in the New England market. This contention was based on two grounds: because Falstaff was a potential entrant [\*530] and because the acquisition eliminated competition that would have existed had Falstaff entered the market *de novo* or by acquisition and expansion of a smaller firm, a so-called "toe-hold" acquisition.<sup>10</sup> The acquisition was [\*\*\*480] completed after the Government's motions for injunctive relief were denied, and Falstaff agreed to operate Narragansett as a separate subsidiary until otherwise ordered by the court.

After a trial on the merits, [\*\*\*9] the District Court found that the geographic market was highly competitive; that Falstaff was desirous of becoming a national brewer by entering the Northeast; that its management was committed against *de novo* entry; and that competition had not diminished since the acquisition.<sup>11</sup> The District Court then held:

"The Government's contentions that Falstaff at the time of said acquisition was a potential entrant into said New England market, and that said acquisition deprived the New England market of additional competition are not supported by the evidence. On the contrary, the credible evidence establishes beyond a reasonable doubt that the executive management of Falstaff had consistently decided not to attempt to enter said market unless it could acquire a brewery with a strong and viable distribution system such as that possessed by Narragansett. Said executives had carefully considered such possible alternatives as (1) acquisition of a small brewery on the east coast, (2) the shipping of beer from its [\*531] existing breweries, the nearest of which was located in Ft. Wayne, [\*\*1100] Indiana, (3) the building of a new brewery on the east coast and other possible [\*\*\*10] alternatives, but concluded that none of said alternatives would have effected a reasonable probability of a profitable entry for it in said New England market. In my considered opinion the plaintiff has failed to establish by a fair preponderance of the evidence that Falstaff was a potential competitor in said New England market at the time it acquired Narragansett. The credible evidence establishes that it was not a potential entrant into said market by any means or way other than by said acquisition. Consequently it cannot be said that its acquisition of Narragansett eliminated it as a potential competitor therein." 332 F.Supp., at 972.

Also finding that the Government had failed to establish that the acquisition [\*\*\*11] would result in a substantial lessening of competition, the District Court entered judgment for Falstaff and dismissed the complaint.

<sup>7</sup> In 1958, Falstaff commissioned a study of actions it should take to maximize profits. The study recommended, *inter alia*, that Falstaff become a national brewer by entering those areas where it was not then marketing its product, especially the Northeast, and that Falstaff should build a brewery on the East Coast rather than buy.

<sup>8</sup> For example, Falstaff in several press releases and in the company publication expressed its desire for national distribution, and at a panel discussion in October 1964 the president of Falstaff, in response to a question as to Falstaff's reaction to industry trends in beer sales, stated: "For long range planning we are aiming for national distribution. Naturally this involves coming East." App. 82.

<sup>9</sup> Suit was filed against both Falstaff and Narragansett, but as to the latter, the complaint was dismissed shortly after it was filed.

<sup>10</sup> Hereinafter, reference to *de novo* entry includes "toe-hold" acquisition as well.

<sup>11</sup> Over the objections of the Government, the District Court allowed post-acquisition evidence and noted in the opinion that the market share of Narragansett dropped from 21.5% in 1964 to 15.5% in 1969, while the shares of the two leading national brewers increased from 16.5% to 35.8%.

[LEdHN\[2\]](#) [2] [LEdHN\[3\]](#) [3] [HN2](#) Section 7 of the Clayton Act forbids mergers in any line of commerce where the effect may be substantially to lessen competition or tend to create a monopoly. The section proscribes many mergers between competitors in a market, *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); it also bars certain acquisitions of a market competitor by a noncompetitor, such as a merger by an entrant who threatens to dominate the market or otherwise upset market conditions [\[\\*\\*\\*481\]](#) to the detriment of competition, *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 578-580 (1967). Suspect also is the acquisition by a company not competing in the market but so situated [\[\\*532\]](#) as to be a potential [\[\\*\\*\\*\\*12\]](#) competitor and likely to exercise substantial influence on market behavior. Entry through merger by such a company, although its competitive conduct in the market may be the mirror image of that of the acquired company, may nevertheless violate § 7 because the entry eliminates a potential competitor exercising present influence on the market. *Id.*, at 580-581; *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 173-174 (1964). As the Court stated in *United States v. Penn-Olin Chemical Co.*, *supra*, at 174, "The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated."

In the case before us, Falstaff was not a competitor in the New England market, nor is it contended that its merger with Narragansett represented an entry by a dominant market force. It was urged, however, that Falstaff was a potential competitor so situated that its entry by merger rather than *de novo* violated § 7. The District Court, however, relying heavily [\[\\*\\*\\*\\*13\]](#) on testimony of Falstaff officers, concluded that the company had no intent to enter the New England market except through acquisition and that it therefore could not be considered a potential competitor in that market. Having put aside Falstaff as a potential *de novo* competitor, it followed for the District Court that entry by a merger would not adversely affect competition in New England.

[LEdHN\[4\]](#) [4] The District Court erred as a matter of law. The error lay in the assumption that because Falstaff, as a matter of fact, would never have entered the market *de novo*, it could in no sense be considered a potential competitor. More specifically, the District Court failed to give separate consideration to whether Falstaff was a potential competitor in the sense that it was so positioned [\[\\*533\]](#) on the edge of the market that it exerted [\[\\*\\*1101\]](#) beneficial influence on competitive conditions in that market.

A similar error was committed by the Court of Appeals in *FTC v. Procter & Gamble Co., supra*, where one of the reasons for the Commission's finding the acquisition in violation [\[\\*\\*\\*\\*14\]](#) of § 7 was that the merger eliminated Procter as a potential entrant, not because Procter would have entered independently, but because the acquisition eliminated the procompetitive effect Procter exerted from the fringe of the market. *Id.*, at 575. The Court of Appeals struck down this finding because there was no evidence that Procter ever intended *de novo* entry, but we held the Commission's finding was "amply supported by the evidence," *id.*, at 581, because the evidence "clearly show[ed] that Procter was the most likely entrant," *id.*, at 580, and it was "clear that the existence of Procter at the edge of the industry exerted considerable influence on the market," *id.*, at 581. Thus, the fact that [\[\\*\\*\\*482\]](#) Falstaff and its management had no intent to enter *de novo*, and would not have done so, does not *ipso facto* dispose of the potential-competition issue.

[LEdHN\[5\]](#) [5] [LEdHN\[6\]](#) [6] [LEdHN\[7\]](#) [7] The specific [\[\\*\\*\\*\\*15\]](#) question with respect to this phase of the case is not what Falstaff's internal company decisions were but whether, given its financial capabilities and conditions in the New England market, it would be reasonable to consider it a potential entrant into that market. Surely, it could not be said on this record that Falstaff's general interest in the New England market was unknown; <sup>12</sup> and if it would appear to rational beer merchants in New England that Falstaff might well build a new brewery to supply the northeastern market then its entry by merger becomes suspect under § 7. The District Court should therefore have appraised the economic facts about Falstaff and the New England market [\[\\*534\]](#) in order to determine whether in any realistic sense Falstaff could be said to be a potential competitor on the fringe of the market with likely influence on existing competition.<sup>13</sup> This does [\[\\*\\*\\*483\]](#) not mean that the [\[\\*\\*1102\]](#) testimony

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<sup>12</sup> See n. 8, *supra*, and accompanying text.

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[\*535] of company officials about actual intentions of the company is irrelevant or is to be looked upon with

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<sup>13</sup> In *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 581 (1967), we found the acquiring company at the edge of the market exerted "considerable influence" on the market because "market behavior . . . was influenced by each firm's predictions of the market behavior of its competitors, actual and potential"; because "barriers to entry . . . were not significant" as to the acquiring company; because "the number of potential entrants was not so large that the elimination of one would be insignificant"; and because the acquiring firm was the most likely entrant.

It is suggested that the District Court failed to consider whether Falstaff was an on-the-fringe potential competitor with influence on existing competition because the Government never alleged in its complaint that Falstaff was exerting a present procompetitive influence, never proceeded under this theory, and further failed to introduce any evidence to support this view. But this position merely ascribes an arbitrary meaning to the language of the complaint. The Government in its complaint alleged that the acquisition violated § 7 because it eliminated potential competition; since potential competition may stimulate a present procompetitive influence, the allegation certainly encompassed the "on-the-fringe influence" that the District Court failed to consider, and the Government was not required to be more specific in its allegation.

The Government did not produce direct evidence of how members of the New England market reacted to potential competition from Falstaff, but circumstantial evidence is the lifeblood of antitrust law, see *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 221 (1939); *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U.S. 208, 210 (1921), especially for § 7 which is concerned "with probabilities, not certainties," *Brown Shoe Co. v. United States*, 370 U.S., at 323. As was stated in *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 174 (1964), "potential competition cannot be put to a subjective test. It is not 'susceptible of a ready and precise answer.'"

Nor was there any lack of circumstantial evidence of Falstaff's on-the-fringe competitive impact. As the record shows, Falstaff was in the relevant line of commerce, was admittedly interested in entering the Northeast, and had, among other ways, see n. 8, *supra*, made its interest known by prior-acquisition discussions. Moreover, there were, as my Brother MARSHALL would put it, objective economic facts as to Falstaff's capability to enter the New England market; and the same facts which he would have the District Court look to in determining whether the particular theory of potential competition we do not reach has been violated, would be probative of violation of § 7 through loss of a procompetitive on-the-fringe influence. See *FTC v. Procter & Gamble Co.*, *supra*, at 580-581; *United States v. Penn-Olin Chemical Co.*, *supra*, at 173-177; *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 660 (1964).

And as for the contention that the Government did not proceed under this on-the-fringe influence view, the record is to the contrary. At one point in the trial, the Government informed the trial judge that a deposition was being introduced into evidence "to establish that Falstaff was a company that was on the wings or at the edge of the New England market. . . . What I mean by that is that Falstaff was capable and interested in entering the New England market and would be waiting for the opportunity to develop, but that Falstaff, over the long term, would eventually or could eventually or was a likely entrant into the New England market, to use the terminology in *FTC v. Procter & Gamble Company*." App. 124. Further into its presentation of proof, the Government was introducing evidence of the trend toward concentration in the market, and stated: "It is this concentration, your Honor, which, as we attempted to point out in our pretrial brief, makes potential competition. . . . The concentration of sales within a small number of firms in New England. This is what makes the potential competition . . . so very, very important to this market. . . . In such a situation the potential entry of a fresh competitive factor is of extreme importance." App. 170.

That the on-the-fringe influence theory was one of the theories the Government was proceeding under was apparent to Falstaff. In its opening statement, Falstaff stated:

"Now, the Government has a theory which is, so far as the judicial determinations on the point are concerned, comparatively new. You were handed the other day a portion of the record in FTC against Bendix-Fram Corporation, and you were handed at the same time a typed or otherwise reproduced copy of the opinion of Commissioner Elman of the FTC in that case."

"That opinion is not yet officially reported. The case is on its way to an appeal. . . . The Commissioner announced a theory upon which the Government relies and which they say lies within the ambit of this vague, undefined creature, potential competition. What that decision, on appeal as I say, what that decision announces is the doctrine which is called the toe-hold doctrine, and it goes like this:

"If a producer of Product A is standing in the wings, as the Commissioner says, outside the market, merely standing there, but in a position to move into the market if he chooses. He must remain there in the wings and forbear acquiring the producer of a like product within the market area.

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suspicion; but it does mean that theirs is not necessarily the last [\*536] word in arriving at a [\*\*\*484] conclusion about [\*\*\*\*16] how Falstaff should be considered in terms of its status as a potential entrant into the market in issue.

[\*\*\*\*17] [\*537] [\*\*1103] Since it appears that the District Court entertained too narrow a view of Falstaff as a potential competitor and since it appears that the District Court's conclusion that the merger posed no probable threat to competition followed automatically from the finding that Falstaff had no intent to enter *de novo*, we remand this case for the District Court to make the proper assessment of Falstaff as a potential competitor.

II

Because we remand for proper assessment of Falstaff as an on-the-fringe potential competitor, it is not necessary to reach the question of whether § 7 bars a market-extension merger by a company whose entry into the market would have no influence whatsoever on the present state of competition in the market -- that is, the entrant will not be a dominant force in the market and has no current influence in the marketplace. We leave for another day the question of the applicability of § 7 to a merger that will leave competition in the marketplace exactly as it was, neither hurt nor helped, and that is challengeable under § 7 only on grounds that the company could, but did not, enter *de novo* or through "toe-hold" acquisition and that [\*\*\*\*18] there is less competition than there would have been had entry been in such a manner. There are traces of this view in our cases, see *Ford Motor Co. v. United States*, 405 U.S. 562, 567 (1972); *id. at 587* (BURGER, C. J., concurring in part and dissenting in part); *FTC v. Procter & Gamble Co.*, 386 U.S., at 580; *id. at 586* (Harlan, J., concurring); *United States v. Penn-Olin Chemical Co.*, 378 U.S., at 173, but the Court has not squarely faced the question,<sup>14</sup> if for no other reason than because there has [\*538] been no necessity to consider it. See *Ford Motor Co. v. United States, supra*; *FTC v. Procter & Gamble Co., supra*; *United States v. Penn-Olin Chemical Co., supra*; *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

[\*\*\*\*19] The judgment of the District Court dismissing the complaint against Falstaff is reversed, and the case is remanded for further proceedings consistent with this opinion.

*So ordered.*

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"The Commissioner fancies that the mere presence of such a manufacturer or seller close to the market area had some effect which could fall within his ill-defined concept of potential competition. And he found in Bendix-Fram that Bendix was in such a position. He found that Bendix could have acquired a small company rather than Fram, a relatively larger one, beefed it up by expenditures of money which Bendix could afford, and develop it into a full-blown competitor within the market area. I do not know whether that notion will gain substantial acceptance in the theory of antitrust law. I do not know that it will have the approval of the Supreme Court if and when it ever reaches it. I do know, however, that that is an entirely different situation [than] we have here.

.....

"*If there is any sense to this total theory at all it must be that the acquiring company was in fact so closely located to the market served by the acquired company that its entrance into the market unilaterally, under its own steam, without motivation was a distinct threat to those who were competing in the market.*" App. 182-183. (Emphasis added.)

Falstaff then proceeded to state why it felt that the on-the-fringe influence theory did not apply in this case.

During its proof, Falstaff had both its expert witness on economics, App. 257, and an officer of Narragansett, App. 376, testify as to whether Falstaff's presence had a procompetitive effect, both stating that it did not.

<sup>14</sup> It is suggested that certain language in the Court's opinion in *United States v. Continental Can Co.*, 378 U.S. 441, 464 (1964), is to the contrary. But there the merger was held proved *prima facie* anticompetitive because the acquiring and acquired companies were engaged in the same overall line of commerce in the same geographic market. This notwithstanding, it is again only arbitrary to assume that the quoted language was not referring to the acquired company's on-the-fringe influence as a potential competitor for certain end uses for containers.

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MR. JUSTICE BRENNAN took no part in the decision of this case. MR. JUSTICE POWELL took no part in the consideration or decision of this case.

**Concur by:** DOUGLAS (In Part); MARSHALL

## Concur

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[\*\*\*485] MR. JUSTICE DOUGLAS, concurring in part.

Although I join Part I of the Court's opinion and its judgment remanding the [\*\*1104] case to the District Court for further proceedings consistent with the opinion, I offer the following observations with respect to the question which the Court does not reach.

There can be no question that it would be sufficient for the Government to prove its case to show that Falstaff would have made a *de novo* entry but for the acquisition of Narragansett or that Falstaff was a potential competitor exercising present influence on the market. See *Ford Motor Co. v. United States*, 405 U.S. 562; *FTC v. Procter & Gamble Co.*, 386 U.S. 568; *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158; *United States v. El Paso Natural Gas Co.*, 376 U.S. 651. [\*\*\*20] But, I do not believe that it was a prerequisite to the Government's [\*539] case to prove that the acquisition had marked immediate, *i. e.*, present, anticompetitive effects.

Section 7 evidences a definite concern for protecting competitive markets. It does not require "merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future . . ." *United States v. Philadelphia National Bank*, 374 U.S. 321, 362. In *United States v. Penn-Olin Chemical Co., supra, at 170-171*, the Court said:

"The grand design of the original § 7, as to stock acquisitions, as well as the Celler-Kefauver Amendment, as to the acquisition of assets, was to arrest incipient threats to competition which the Sherman Act did not ordinarily reach. It follows that actual restraints need not be proved. The requirements of the amendment are satisfied when a 'tendency' toward monopoly or the 'reasonable likelihood' of a substantial lessening of competition in the relevant market is shown."

Moreover, we are concerned with probabilities, not certainties. See *Brown Shoe* [\*\*\*21] Co. v. *United States*, 370 U.S. 294, 323.

Falstaff acquired Narragansett in 1965. Prior to that time, Falstaff was the largest brewer in the country that did not sell in the New England market. It had stated publicly that it wanted to become a national brewer to allow it to compete more effectively with the existing national brewers. Falstaff has conceded in its brief that "given an acceptable level of profit it had the financial capability and the interest to enter the New England beer market."

During the four years preceding 1965, beer sales in New England had increased approximately 9.5%. Nevertheless, the market had become more concentrated. In 1960, the eight largest sellers accounted for approximately [\*540] 74% of the beer sales; by 1964, they accounted for 81.2%. From 1957 to 1964, the number of breweries decreased from 11 to 6. In addition, there is evidence that two of the remaining [\*\*\*486] breweries were interested in being acquired. And, by Falstaff's own admission, "at the time of the acquisition, the substantial growth in the market shares of the national brewers was just beginning to occur."

One of the principal purposes of § 7 [\*\*\*22] was to stem the "rising tide" of concentration in American business." *United States v. Pabst Brewing Co.*, 384 U.S. 546, 552. When an industry or a market evidences signs of decreasing competition, we cannot allow an acquisition which may "tend to accelerate concentration." *Ibid.*; *Brown Shoe Co. v. United States, supra, at 346*.

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The implications of the Clayton Act, as amended by the Celler-Kefauver Act, 15 U. S. C. § 18, are much, much broader than the customary restraints of competition and the power of monopoly. Louis D. Brandeis testified in favor of the bill that became the Clayton Act in 1914. "You cannot have true American citizenship, you cannot preserve political liberty, you cannot secure American standards of living unless some degree **[\*\*1105]** of industrial liberty accompanies it."<sup>1</sup> He went on to say<sup>2</sup> in answer to George W. Perkins, who testified against the bill:

"Mr. Perkins' argument in favor of the efficiency of monopoly proceeds upon the assumption, in the first place, and mainly upon the assumption, that with increase of size comes increase of efficiency. If any general proposition could **[\*\*\*\*23]** be laid down on that subject, it would, in my opinion, be the opposite. It is, of course, true that a business unit may be too small to be efficient, but it is equally **[\*541]** true that a unit may be too large to be efficient. And the circumstances attending business to-day are such that the temptation is toward the creation of too large units of efficiency rather than too small. The tendency to create large units is great, not because larger units tend to greater efficiency, but because the owner of a business may make a great deal more money if he increases the volume of his business tenfold, even if the unit profit is in the process reduced one-half. It may, therefore, be for the interest of an owner of a business who has capital, or who can obtain capital at a reasonable cost, to forfeit efficiency to a certain degree, because the result to him, in profits, may be greater by reason of the volume of the business. Now, not only may that be so, but in very many cases it is so.

"And the reason why . . . increasing the size of a business may tend to inefficiency is perfectly obvious when one stops to consider. Anyone who critically analyzes a business learns this: That success **[\*\*\*\*24]** or failure of an enterprise depends usually upon one man; upon the quality of one man's judgment, and, above all things, his capacity to see what is needed and his capacity to direct others."

That is why the Celler Committee reporting in 1971 on conglomerates and other types of mergers<sup>3</sup> said that "Preservation of a competitive **[\*\*\*487]** system was seen as essential to avoid the concentration of economic power that was thought to be a threat to the Nation's political and social system."<sup>4</sup> Control of American business is being transferred from local communities to distant cities **[\*542]** where men on the 54th floor with only balance sheets and profit and loss statements before them decide the fate of communities with which they have little or no relationship. As a result of mergers and other acquisitions, some States are losing major corporate headquarters and their local **[\*\*\*\*25]** communities are becoming satellites of a distant corporate control.<sup>5</sup> The antitrust laws favored a wide diffusion of corporate control; and that aim has been largely defeated with serious consequences. Thus, a recent Wisconsin study shows that "the growth of aggregate Wisconsin employment of companies acquired by out-of-state corporations declined substantially more than that of those acquired by in-state corporations."<sup>6</sup> In this connection, the Celler Report states:<sup>7</sup>

"The Wisconsin study found, also, that 53 percent of acquired companies after the merger had a slower rate of payroll growth. Payroll growth, notably in large firms acquired by out-of-State corporations, was depressed by mergers. Inflation in recent years has markedly raised wages and salaries. It would be reasonable to expect that payrolls in acquired companies, **[\*\*1106]** because of the inflation, would have advanced more than employment. In this connection, the report states: 'The fact that this frequently did not happen in companies acquired by out-of-

<sup>1</sup> Hearings on S. Res. 98 before the Senate Committee on Interstate Commerce, 62d Cong., Vol. 1, p. 1155.

<sup>2</sup> *Id.*, at 1147.

<sup>3</sup> Investigation of Conglomerate Corporations, Report by the Staff of Antitrust Subcommittee of the House Committee on the Judiciary on H. Res. 161, 92d Cong., 1st Sess. (Comm. Print).

<sup>4</sup> *Id.*, at 18.

<sup>5</sup> *Id.*, at 52-53.

<sup>6</sup> *Id.*, at 53.

<sup>7</sup> *Id.*, at 54.

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state firms would lead one to believe that their acquirers have transferred a portion of the higher salaried employees to a location outside Wisconsin. [\*\*\*\*26] Such transfers mean a loss of talent, retail expenditures, and personal income taxes in the economies of Wisconsin's communities and the state."

[\*543] The adverse influence on local affairs of out-of-state acquisitions has not gone unnoticed in our opinions. Thus "the desirability of retaining 'local control' over industry and the protection of small businesses" was our comment in *Brown Shoe Co. v. United States*, 370 U.S., at 315-316, on one of the purposes of strengthening § 7 of the Clayton Act through passage of the Celler-Kefauver Act.

By reason of the antitrust laws, efficiency in terms of the accounting of dollar costs and profits is not the measure of the public interest nor is growth in size [\*\*\*\*27] where no substantial competition is curtailed. The antitrust laws look with suspicion on the acquisition of local business units by out-of-state companies. For then local employment is apt to suffer, local payrolls are likely to drop off, and responsible entrepreneurs in counties and States are replaced by clerks.

A case in point is Goldendale in my State of Washington. It was a thriving community -- an ideal place to raise a family -- until the company that owned the sawmill was bought by an out-of-state giant. In a year or so, auditors in faraway New York City, who never knew the glories of Goldendale, decided to close the local mill and truck all the logs to Yakima. Goldendale became greatly crippled. It is Exhibit A to the Brandeis concern, [\*\*488] which became part of the Clayton Act concern, with the effects that the impact of monopoly often has on a community, as contrasted with the beneficent effect of competition.

A nation of clerks is anathema to the American antitrust dream. So is the spawning of federal regulatory agencies to police the mounting economic power. For the path of those who want the concentration of power to develop unhindered leads predictably [\*\*\*\*28] to socialism that is antagonistic to our system. See Blake & Jones, *The Goals of Antitrust: A Dialogue on Policy -- In Defense of Antitrust*, 65 Col. L. Rev. 377 (1965).

[\*544] It is against this background that we must assess the acquisition by Falstaff, the largest producer of beer in the United States that did not sell in the New England market, of the leading seller in that market.

In *United States v. El Paso Natural Gas Co.*, 376 U.S., at 660, we indicated that "the effect on competition in a particular market through acquisition of another company is determined by the nature or extent of that market and by the nearness of the absorbed company to it, that company's eagerness to enter that market, its resourcefulness, and so on." Falstaff's president testified below that Falstaff for some time had wanted to enter the New England market as part of its interest in becoming a national brewer. And Falstaff has conceded in its brief before this Court that "given an acceptable level of profit it had the financial capability and the interest to enter the New England beer market." With both the interest and the capability to enter the market, Falstaff [\*\*\*\*29] was "the most likely entrant." *FTC v. Procter & Gamble Co.*, 386 U.S., at 581. Thus, although Falstaff might not have made a *de novo* entry if it had not been allowed to acquire Narragansett,<sup>8</sup> we cannot say that it would be unwilling [\*\*1107] to make such an entry *in the future* when the New England market might be ripe for an infusion of new competition. At this point in time, it is the most likely new competitor. Moreover, there can be no question that replacing the leading seller in the market, a regional brewer, with a seller [\*545] with national capabilities increased the trend toward concentration.

[\*\*\*\*30] I conclude that there is "reasonable likelihood" that the acquisition in question "may be substantially to lessen competition." Accordingly, I would be inclined to reverse and direct the District Judge to enter judgment for the Government and afford appropriate relief. Nevertheless, since the Court will not reach this question and I agree with the legal principles set forth in Part I of its opinion, I join the judgment remanding the case for further proceedings.

MR. JUSTICE MARSHALL, concurring in the result.

<sup>8</sup> Falstaff contended below that a *de novo* entry would not be profitable. Management stated that an established distribution system was a prerequisite to entry. The District Judge concluded that "the credible evidence establishes that [Falstaff] was not a potential entrant into said market by any means or way other than by said acquisition." *332 F.Supp. 970, 972*.

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I share the majority's view that the District Judge erred as a matter of law and that the case must be remanded for further proceedings. I cannot agree, however, with the theory upon which the majority bases the remand.

[\*\*\*489] The majority accuses the District Judge of neglecting to assess the present procompetitive effect which Falstaff exerted by remaining on the fringe of the market. The explanation for this failing is rather simple. The Government never alleged in its complaint that Falstaff was exerting a present procompetitive influence,<sup>1</sup> it introduced not a scrap of evidence to support this view,<sup>2</sup> [\*\*\*32] and [\*546] even at this stage of the proceedings, [\*\*\*31] it seemingly disclaims reliance on this theory.<sup>3</sup>

Thus, [\*\*1108] our remand leaves the hapless District Judge with the unenviable task of reassessing nonexistent evidence under a theory advanced by neither of the parties. I submit that civil antitrust litigation is complicated enough when the trial judge confines his attention to the legal arguments and evidence offered by the parties and avoids investigation of hypothetical lawsuits which might have been brought.

[\*547] The majority's departure from this self-evident proposition is all the more startling when one realizes that the Court eschews reliance on a well-established, plainly applicable body of law in order to reach questions not properly before it. As MR. JUSTICE DOUGLAS ably demonstrates, see *ante*, at 539-540, many decisions by this Court hold that § 7 is violated when a merger is reasonably likely [\*\*\*33] to eliminate future or potential competition. See also *infra*, at 560-562. I know of no case suggesting that this principle [\*\*\*490] is only applicable when the plaintiff can show that the merger will have present anticompetitive consequences, and the majority cites no authority for this proposition.

In the course of a nine-day trial, the Government introduced voluminous evidence to support its potential competition theory. But at the conclusion of the trial, the District Judge dismissed the Government's action in an opinion covering a scant two and one-half pages in the Federal Supplement<sup>4</sup> [\*\*\*34] and without making any findings of fact or conclusions of law.<sup>5</sup> See [United States v. Falstaff Brewing Corp., 332 F.Supp. 970 \(RI 1971\)](#).

<sup>1</sup> The Government's complaint alleged that the merger violated § 7 because "potential competition in the production and sale of beer between Falstaff and Narragansett will be eliminated." (Emphasis added.) While it is true, as the majority asserts, that "potential competition may stimulate a present procompetitive influence," see *ante*, at 534 n. 13, the complaint nowhere alleges that such a procompetitive influence occurred in this case.

<sup>2</sup> Significantly, the majority cites no evidence at all from the record indicating that firms within the New England market were deterred from anticompetitive practices by Falstaff's presence at the market fringe. Indeed, my Brethren concede that "the Government did not produce direct evidence of how members of the New England market reacted to potential competition from Falstaff," *ibid.* While the majority contends that there was "circumstantial evidence" relevant to determining whether there was a loss of procompetitive influence, the evidence it points to suggests only that Falstaff might have been perceived as a potential entrant -- not that this perception produced a present procompetitive effect. In fact, the little evidence on the question which does appear in the record strongly suggests that Falstaff was exerting no procompetitive influence. Thus, an economist testifying for the defense stated that, in his expert judgment, Falstaff's presence on the fringe of the market "had no effect" on the practices of firms within the market (App. 257). Similarly, the director of marketing for Narragansett testified that those within the market did not view Falstaff as a threat and that it never occurred to them that Falstaff would attempt a *de novo* entry (App. 376).

To be sure, this testimony may well have been biased and might properly have been discounted by the trier of fact. But it is harder to dismiss the documentary evidence showing continued vigorous competition after Falstaff's entry by acquisition. If Falstaff was exerting a substantial procompetitive influence by threatening entry, it would seem to follow that anticompetitive practices should have emerged when this threat was removed. The majority nowhere accounts for the continuing absence of such practices.

<sup>3</sup> In its brief before this Court, the Government characterizes its cause of action as follows:

"The theory of the suit was that *potential competition* in the New England beer market may be substantially lessened by the acquisition." Brief for United States 2-3.

<sup>4</sup> Cf. [United States v. El Paso Natural Gas Co., 376 U.S. 651, 663 \(1964\)](#) (opinion of Harlan, J.):

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The court held that Falstaff "was not a potential entrant into said market by any means or way other than by said acquisition. Consequently, it cannot be [**\*548**] said that its acquisition of Narragansett eliminated it as a potential competitor therein." *Id., at 972*. The District Judge based this conclusion on testimony by Falstaff executive personnel that "Falstaff had consistently decided not to attempt to enter said market unless it could acquire a brewery with a strong and viable distribution system such as that possessed by Narragansett." *Ibid.*

Inasmuch as the District Court grounded its dismissal on these conclusions, I think we have a responsibility to assess the validity of the legal standard from which they are derived. I would hold that where, as here, strong objective evidence indicates that a firm is a potential entrant into a market, it is error for the trial judge to rely solely on the firm's subjective prediction of its own future conduct. [**\*\*\*\*35**] While such subjective evidence is probative on the issue of potential entry, it is inherently unreliable and must be used with great care. Ordinarily, the district court should presume that objectively measurable market forces will govern a firm's future conduct. Only when there is a compelling demonstration that a firm will not follow its economic self-interest may the district court consider subjective evidence in predicting that conduct. Even then, subjective evidence should be preferred only when the objective evidence is weak or contradictory. Because the District Court failed to apply these standards, I [**\*\*1109**] would remand the case for further consideration.

I

Although this case ultimately turns on a point of law, it cannot be satisfactorily understood without some appreciation of the factual context in which it arises. A somewhat more detailed description of the relevant line of commerce, the relevant geographic market, and the market structure than that provided by the majority is therefore in order.

#### **[\*549] [\*\*\*491] A. The Product Market**

The relevant product market is the production and sale of beer. The firms competing for this market can be divided [**\*\*\*\*36**] into three categories: national, regional, and local. The national firms, Anheuser-Busch, Schlitz, Pabst, and Miller, sell their product throughout the country and advertise on a national basis. In contrast, the regional firms, the largest of which are Hamm's, Carling, Coors, Falstaff, and National Bohemian, market their beer in narrower geographical areas of varying size. Local brewers sell their product in a small area, sometimes no larger than a single State.

Originally, most of the market was held by a large number of small local and regional brewers. The high cost of transporting beer favored the local distributor in early years. But more recently, the national brewers have been able to overcome this difficulty to some extent by decentralizing their production facilities. Moreover, any remaining extra transportation costs associated with national distribution are now outweighed by the advantages of centralized management and, especially, national advertising. Thus, in recent years, while the beer market as a whole has expanded, the number of breweries has declined dramatically. See *United States v. Pabst Brewing Co., 384 U.S. 546, 550 (1966)*. Whereas [**\*\*\*\*37**] in 1935 there were 684 brewing plants operating in the United States, by 1965 the number had been reduced to 178. Economies of scale, a relatively low profit margin, and significant barriers to market entry have all led to a concentration of beer production among the few national and large regional brewers.

#### **B. The Geographic Market**

"Both as a practitioner and as a judge I have more than once felt that a closely contested government antitrust case, decided below in favor of the defendant, has founderered in this Court for lack of an illuminating opinion by the District Court. District Courts should not forget that such cases, the trials of which usually result in long and complex factual records, come here without the benefit of any sifting by the Courts of Appeals. The absence of an opinion by the District Court has been a handicap in this instance."

<sup>5</sup> See *Fed. Rule Civ. Proc. 52 (a)*. Cf. *United States v. El Paso Natural Gas Co., supra, at 656-657*.

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These national trends are reflected in the six New England States, which constitute the relevant geographic market. In the four years preceding Falstaff's acquisition [**\*550**] of Narragansett, New England beer sales increased 9.5% -- a substantial gain, although somewhat below the increase in national sales for the same period. At the same time, however, the number of brewers operating plants in the region declined precipitately. Thus, in 1957, there were 11 breweries in the New England States, but by 1964 the number had declined to six, and of those six, two of the three smallest had publicly expressed an interest in merging with a larger competitor.

Not surprisingly, this decline in the number of breweries in New England was accompanied by an increase in the market shares of those selling in the region. In 1960, the eight largest participants [\*\*\*\*38] in the New England market claimed 74% of all beer sales, and by 1964 this figure had risen to 81.2%. Examination of the four largest brewers shows that their share of the market rose from about 50% in 1960 to 54% in 1964, to 61.3% in 1965. In large part, these figures are probably explicable in terms of the nationwide trend in favor of the large national and regional brewers. Seven of the Nation's 10 largest breweries, including, of course, all the national breweries, sell beer in New England, and their share of the market has increased as the small, local breweries disappeared.

At the same time, however, the concentration of the market does not yet seem to have produced blatantly anticompetitive effects. In recent years, prices have remained fairly stable despite rising costs, and competition [\*\*\*492] seems relatively intense among the few large firms which dominate the market. Still, [\*\*1110] there is no doubt that the seeds of anticompetitive conduct are present, since "as [an oligopolistic] condition develops, the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge." *United States v. Aluminum Co. of America*, 377 U.S. 271, 280 (1964). [\*\*\*\*39] One commentator's description of the national beer market aptly characterizes the situation in New England: "The [\*551] increasing concentration . . . and the unlikely entrance of new rivals poses a threat to the future level of competition in this industry. Thus far, there is no evidence of collusion in the beer industry. But as the industry becomes populated by fewer and fewer companies, the possibility and likelihood will be enhanced of their engaging in tacit or direct collusion -- given the inelastic nature of demand -- to establish a joint profit maximizing price and output. Similarly, the chances will become slimmer that individual firms in the industry will follow a truly independent price and production strategy, vigorously striving to take sales away from rival brewers. With only a few sellers will come the increasing awareness that parallel business behavior might be feasible." Elzinga, The Beer Industry, in W. Adams, *The Structure of American Industry* 189, 213 (4th ed. 1971).

### *C. Narragansett -- The Acquired Firm*

Narragansett is a regional brewery with only minuscule sales outside of New England. Within the New England market, however, the firm has been highly [\*\*\*\*40] successful. Although only twenty-first in national sales and accounting for only 1.4% of the beer sales in the United States, Narragansett was the largest seller of beer in New England for the five years preceding its acquisition. In recent years, the firm has expanded steadily until, in 1964, the year before acquisition, it sold 1.275 million barrels, which was about 20% of the New England market. Net profits had increased from \$ 417,284 in 1960 to a record level of \$ 713,083 in 1964.

Notwithstanding this growth, Narragansett felt itself under some pressure from the national brewers.<sup>6</sup> The [\*552] corporation was closely held by the Haffenreffer family, and the stockholders apparently concluded that it was in their interest to diversify their personal holdings by selling Narragansett.

## [\*\*\*\*41] *D. Falstaff -- The Acquiring Firm*

<sup>6</sup>This pressure continued during the post-acquisition period. From 1964 to 1969, Narragansett's share of the market slipped from 21.5% to 15.5%, while Anheuser-Busch and Schlitz, two large national firms, increased their combined share from 16.5% to 35.8%.

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Like Narragansett, Falstaff has been highly successful in recent years. Beginning with a 100,000-barrel plant in St. Louis shortly after the repeal of Prohibition, the firm has steadily grown. By 1964, it was the Nation's fourth largest producer, marketing 5.8 million barrels, or 5.9% of the total national production.

Throughout its history, Falstaff has followed a pattern of acquiring weak breweries and expanding them so as to extend its influence to new markets. Although still a regional brewer, by 1965 the company had [\*\*\*493] expanded its network of plants and distributorships over an area far larger than that in which Narragansett competed. In that year, Falstaff operated eight plants and sold its product in 32 States in the West, Midwest, and South. Sixteen of these States were added in the period after 1950. However, as of 1965, Falstaff sold virtually no beer in any of the Northeastern States, including the six composing the New England area. Falstaff marketed its product both through company-owned branches and through some 600 independent distributorships.<sup>7</sup>

[\*\*\*\*42] [\*553] In [\*\*1111] the years immediately prior to its acquisition of Narragansett, Falstaff's steady pattern of growth had continued. Between 1955 and 1964, its sales increased from \$ 77 million to \$ 139.5 million and its net profits grew from \$ 4.3 million to \$ 7 million. In the year before acquisition, the company announced a 10-year expansion program in which it was prepared to invest \$ 35 million.

Yet, despite this encouraging trend, Falstaff, like Narragansett, was to some extent handicapped by the competitive advantages -- in particular, national advertising -- enjoyed by national distributors. For years, the company had publicly expressed the desire to become a national brewer, and the logical region for market extension was the Northeast. New England seemed a particularly appropriate area to initiate expansion. As indicated above, seven of the 10 largest manufacturers already sold beer in New England, and Falstaff was the largest of the three remaining outside the market. The New England market was expanding at a healthy rate, and it appeared to be a fertile area for growth.

In 1958, Falstaff commissioned a study from Arthur D. Little, Inc., to determine the [\*\*\*\*43] feasibility of future expansion. The Little Report, two years in the making, concluded that Falstaff should enter the northeastern market sometime within the next five years. But although it was clear that Falstaff should move into the northeast market, the method of entry was less obvious. After a careful review of cost estimates and the ratio of earnings to net worth, the Little Report recommended *de novo* entry through the construction of a new plant to serve the Northeast. The report concluded that "there appears to be ample reason . . . for building rather than buying . . . [and] that major new market entrances need [\*554] not be predicated on the availability of a brewery Falstaff could purchase."

Despite this analysis, Falstaff's own management personnel apparently concluded that the profit return on a *de novo* entry would be inordinately low.<sup>8</sup> Falstaff argued [\*\*\*494] at trial that it needed a strong, pre-existing distribution system to make a profitable entry. But cf. n. 7, *supra*. An independent economist, Dr. Ira Horowitz, testified on behalf of Falstaff that *de novo* entry would result in a 6.7% return which he characterized as "a very, very [\*\*\*44] poor investment indeed." However, it should be noted that the 6.7% figure failed to account for the increment in Falstaff's profit margin which would result from its newly gained status as a national brewer with modern plants to serve the eastern part of the Nation -- the very increment which provided the primary motivation for expansion in the first place. While Dr. Horowitz apparently recognized that such an increment might materialize,

<sup>7</sup> At trial, Falstaff argued that it was unlikely to make a *de novo* entry into the New England market since it had learned through experience that a strong, pre-existing organization of distributors was essential to success. It is true that Falstaff sold most of its beer through independent distributors. However, it should be noted that between 20% and 25% of its sales were made through company branches which Falstaff had established itself. As might be expected, Falstaff's profit margin was significantly higher in areas where it used its own distribution facilities. Moreover, Falstaff's assertion is belied by its own prior history. As noted above, for years Falstaff had successfully expanded by purchasing failing breweries with weak distribution facilities and turning them into effective competitors.

<sup>8</sup> At trial, Falstaff also argued that the other Little recommendations which Falstaff did follow led to disastrous consequences, that Little's estimate of construction costs were unrealistic, and that the Little Report was premised on Falstaff's penetration of the mid-Atlantic as well as the New England market.

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he stated that he was unable to estimate its size.<sup>9</sup> [\*\*1112] Moreover, even the 6.7% return rate compares favorably with Falstaff's actual rate of return on its Narragansett purchase, which was a mere 3.7%.

[\*\*\*\*45] In any event, whatever the abstract merits of this dispute, it is clear that Falstaff's management personnel determined that entry by acquisition offered the preferable avenue for expansion. Beginning in 1962, the company held discussions with Liebmann, P. Ballantine [\*555] & Sons,<sup>10</sup> Piel Brothers, and Dawsons, all of which did a significant percentage of their business in the New England market. All of these possibilities were eventually rejected, and in 1965, Falstaff finally settled on Narragansett as the most promising available brewery.

II

With this factual background, it becomes possible to articulate the legal standards which should govern the resolution of this case.

#### A. The Purposes of § 7

As is clear from its face, § 7 was designed to deal with the anticompetitive effects of excessive industrial concentration caused by the corporate marriage of two competitors. "It is the basic [\*\*\*\*46] premise of [§ 7] that competition will be most vital 'when there are many sellers, none of which has any significant market share.'" [United States v. Aluminum Co. of America, 377 U.S., at 280](#).

But § 7 does more than prohibit mergers with immediate anticompetitive effects. The Act by its terms prohibits acquisitions which "may . . . substantially . . . lessen competition, or . . . tend to create a monopoly." The use of the subjunctive indicates that Congress was concerned with the *potential* effects of mergers even though, at the time they occur, they may cause no present anticompetitive consequences. See, e. g., [FTC v. Procter & Gamble Co., 386 U.S. 568, 577 \(1967\)](#). To be sure, remote possibilities are not sufficient to satisfy the test set forth in § 7. Despite substantial concern with halting a trend toward concentration in its incipiency, Congress did not intend to prohibit all expansion and growth [\*\*\*495] through acquisition [\*556] and merger. The predictive judgment often required under § 7 involves a decision based upon a careful scrutiny and a reasonable assessment of the future consequences of a merger without [\*\*\*\*47] unjustifiable, speculative interference with traditional market freedoms. As we stated in *Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962)*: "Congress used the words 'may be substantially to lessen competition' (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act." See also [United States v. Pabst Brewing Co., 384 U.S., at 552](#); [United States v. Penn-Olin Chemical Co., 378 U.S. 158, 171 \(1964\)](#).

The legislative history of § 7 makes plain that this was the intent of Congress. Before 1950, § 7 prohibited only those mergers which lessened competition "between the corporation whose stock is so acquired and the corporation making the acquisition."<sup>11</sup> [\*\*\*\*49] The Celler-Kefauver [\*\*1113] Amendment, added in 1950, deleted these words and provided instead that all mergers which substantially lessened competition "in any line of commerce in any section of the country" [\*\*\*\*48] were to be outlawed. See 64 Stat. 1126. Thus, whereas before

<sup>9</sup> Dr. Horowitz' estimates were based on the assumption that Falstaff's profit margin would be \$ 1.16 per barrel, which was the margin currently enjoyed by the company. However, Anheuser-Busch and Pabst, two of the larger national breweries, both earned more than \$ 2.50 per barrel in their modern plants.

<sup>10</sup> Ultimately, on March 6, 1972, Falstaff announced plans to acquire Ballantine's trademarks and tradename.

<sup>11</sup> The original § 7 provided in relevant part: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." 38 Stat. 731.

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1950, § 7 proscribed only [**\*557**] those mergers which eliminated present, actual competition between the merging firms, the Celler-Kefauver Amendment reached cases where future or potential competition in the entire relevant market might be adversely affected by the merger.<sup>12</sup> "Section 7 of the Clayton Act was intended to arrest the anticompetitive effects of market power in their incipency. The core [**\*\*\*496**] question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future. . . . The section can deal only with probabilities, not with certainties. . . . And there is certainly no requirement that the anticompetitive power manifest itself in anticompetitive [**\*558**] action before § 7 can be called into play. If the enforcement of § 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipency would be frustrated." [FTC v. Procter & Gamble Co., 386 U.S., at 577.](#)

#### [\*\*\*\*50] B. Modes of Potential Competition

Since 1950, we have repeatedly applied § 7 to cases where the merging firms competed in the same line of commerce, and we have been willing to define the line of commerce liberally so as to reach anticompetitive practices in their "incipency." See, e. g., [United States v. Phillipsburg National Bank, 399 U.S. 350 \(1970\)](#); [United States v. Pabst Brewing Co., 384 U.S. 546 \(1966\)](#); [United States v. Aluminum Co. of America, 377 U.S. 271 \(1964\)](#); [United States v. Philadelphia National Bank, 374 U.S. 321 \(1963\)](#); [Brown Shoe Co. v. United States, 370 U.S. 294 \(1962\)](#). But in keeping with the spirit of the Celler-Kefauver Amendment, we have also applied § 7 to cases where the acquiring firm is outside the market in which the acquired firm competes. These cases fall into three broad categories which, while frequently overlapping, can be dealt with separately for analytical purposes.

1. *The Dominant Entrant.* -- In some situations, a firm outside the market [**\*\*1114**] may have overpowering resources which, if brought to bear within the market, [**\*\*\*\*51**] could ultimately have a substantial anticompetitive effect. If such a firm were to acquire a company within the relevant market, it might drive other marginal companies out of business, thus creating an oligopoly, or it might raise entry barriers to such an extent that potential new entrants would be discouraged from entering the market. Cf. *Ford Motor Co. v. United States, 405 U.S. 562, 567-568 (1972)*; [FTC v. Procter & Gamble Co., 386 U.S., at 575.](#)<sup>13</sup> [**\*559**] Such a danger is especially intense when the market is already highly concentrated or entry barriers are already unusually high before the dominant firm enters the market.

<sup>12</sup> The legislative history of the 1950 amendment was traced in detail in our opinion in *Brown Shoe Co. v. United States, 370 U.S. 294 (1962)*. "The deletion of the 'acquiring-acquired' test was the direct result of an amendment offered by the Federal Trade Commission. In presenting the proposed change, Commission Counsel Kelley made the following points: this Court's decisions had implied that the effect on competition between the parties to the merger was not the only test of the illegality of a stock merger; the Court had applied Sherman Act tests to Clayton Act cases and thus judged the effect of a merger on the industry as a whole; this incorporation of Sherman Act tests, with the accompanying 'rule of reason,' was inadequate for reaching some mergers which the Commission felt were not in the public interest; and the new amendment proposed a middle ground between what appeared to be an overly restrictive test insofar as mergers between competitors were concerned, and what appeared to the Commission to be an overly lenient test insofar as all other mergers were concerned. Congressman Kefauver supported this amendment and the Commission's proposal was then incorporated into the bill which was eventually adopted by the Congress. See Hearings [before Subcommittee No. 2 of the House Committee on the Judiciary] on H. R. 515, [80th Cong., 1st Sess.] at 23, 117-119, 238-240, 259; Hearings before a Subcommittee of the Senate Judiciary Committee on H. R. 2734, 81st Cong., 1st Sess. . . . 147." [370 U.S., at 317 n. 30.](#)

<sup>13</sup> To be sure, in terms of anticompetitive effects, the dominant firm's acquisition of another firm within the market might be functionally indistinguishable from a *de novo* entry, which § 7 does not forbid. But "surely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition." [United States v. Philadelphia National Bank, 374 U.S. 321, 370 \(1963\)](#). Moreover, entry by acquisition has the added evil of eliminating one firm in the market and thus increasing the burden on the remaining firms which must compete with the dominant entering firm.

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[\*\*\*\*52] 2. *The Perceived Potential Entrant.* -- Even if the entry of a firm does not upset the competitive balance within the market, it may be that the removal of the firm from the fringe of the market has a [\*\*\*497] present anticompetitive effect. In a concentrated oligopolistic market, the presence of a large potential competitor on the edge of the market, apparently ready to enter if entry barriers are lowered, may deter anticompetitive conduct within the market. As we pointed out in [United States v. Penn-Olin Chemical Co., 378 U.S., at 174](#): "The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market [is] a substantial incentive to competition which cannot be underestimated." From the perspective of the firms already in the market, the possibility of entry by such a lingering firm may be an important consideration in their pricing and marketing decisions. When the lingering firm enters the market by acquisition, the competitive influence exerted by the firm is lost with no offsetting gain through an increase in the number of companies seeking [\*\*\*\*53] a share of the relevant market. The result is a net decrease [\*560] in competitive pressure.<sup>14</sup> Cf. [United States v. El Paso Natural Gas Co., 376 U.S. 651, 659-660 \(1964\)](#).

3. *The Actual Potential Entrant.* -- Since the effect of a perceived potential entrant depends upon the perception of those already in the market, it [\*\*\*\*54] may in some cases be difficult to prove. Moreover, in a market which is already competitive, the existence of a perceived potential entrant will have no present effect at all.<sup>15</sup> The entry by acquisition of [\*1115] such a firm may nonetheless have an anticompetitive effect by eliminating an actual potential competitor. When a firm enters the market by acquiring a strong company within the market, it merely assumes the position of that company without necessarily increasing competitive pressures. Had such a firm not entered by acquisition, it might at some point have entered *de [\*561] novo*. An entry *de novo* would increase competitive pressures within the market, and an entry by acquisition eliminates the possibility that such an increase will take place in the future. Thus, even if a firm [\*\*\*498] at the fringe of the market exerts no present procompetitive effect, its entry by acquisition may end for all time the promise of more effective competition at some future date.

[\*\*\*\*55] Obviously, the anticompetitive effect of such an acquisition depends on the possibility that the firm would have entered *de novo* had it not entered by acquisition. If the company would have remained outside the market but for the possibility of entry by acquisition, and if it is exerting no influence as a perceived potential entrant, then there will normally be no competitive loss when it enters by acquisition. Indeed, there may even be a competitive gain to the extent that it strengthens the market position of the acquired firm.<sup>16</sup> Thus, mere entry by acquisition would not *prima facie* establish a firm's status as an actual potential entrant. For example, a firm, although able to enter the market by acquisition, might, because of inability to shoulder the *de novo* start-up costs, be unable to enter *de novo*. But where a powerful firm is engaging in a related line of commerce at the fringe of the relevant market, where it has a strong incentive to enter the market *de novo*, and where it has the financial capabilities to do so, we have not hesitated to ascribe to it the role of an actual potential entrant. In such cases, we have held that § 7 prohibits an

<sup>14</sup> Thus, whereas the practical difference between entry by acquisition and entry *de novo* may be marginal in the case of a dominant entrant, see n. 13, *supra*, it is crucial in the case of a perceived potential entrant. If the perceived potential entrant enters *de novo*, its deterrent effect on anticompetitive practices remains and the total number of firms competing for market shares increases. But when such a firm enters by acquisition, it merely steps into the shoes of the acquired firm. The result is no net increase in the actual competition for market shares and the removal of a threat exerting procompetitive influence from outside the market.

<sup>15</sup> Still, even if the market is presently competitive, it is possible that it might grow less competitive in the future. For example, a market might be so concentrated that even though it is presently competitive, there is a serious risk that parallel pricing policies might emerge sometime in the near future. In such a situation, an effective competitor lingering on the fringe of the market -- what might be called a *potential* perceived potential entrant -- could exert a deterrent force when anticompetitive conduct is about to emerge. As its very name suggests, however, such a firm would be still a further step removed from the exertion of actual, present competitive influence, and the problems of proof are compounded accordingly -- particularly in light of the showing of reasonable probability required under § 7.

<sup>16</sup> However, if the acquired firm is strengthened to such an extent that it upsets the market balance and drives its competitors out of the market, the acquiring firm takes on the characteristics of a dominant entrant, and the merger may therefore violate § 7 under that theory. See [supra, at 558-560](#) and n. 14.

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entry by [\*\*\*\*56] acquisition since such an entry eliminates the possibility of future actual competition which would occur if there were an entry *de novo*.

[\*562] In light of the many decisions to this effect, the majority's assertion that "the Court has not squarely faced [this] question" is inexplicable. In [United States v. Continental Can Co., 378 U.S. 441 \(1964\)](#), for example, the defendant argued that "the types of containers produced by Continental and Hazel-Atlas [the acquired firm] at the time of the merger were for the most part not in competition with each other and hence the merger could have no effect on competition." [\*Id.\* at 462](#). But MR. JUSTICE WHITE, [\*57] writing for the Court, rejected that argument, holding that "it is not at all self-evident that the lack of current competition between Continental and Hazel-Atlas for some important end uses of metal and glass containers significantly diminished the adverse effect of the merger on competition. Continental might have concluded that it could effectively insulate itself from competition by acquiring a major firm *not presently directing its market acquisition efforts toward the same end uses as Continental, but possessing the potential to do so.*" [\*Id.\* at 464](#) (emphasis added). The majority says it is "only arbitrary" to read this language as not referring to Hazel-Atlas' present procompetitive influence on the market. But the *Continental Can* Court said not a word about present procompetitive effects, and, indeed, made clear that it was relying on [\*\*1116] the future anticompetitive impact of the merger. The Court held, for example, that "the fact that Continental and Hazel-Atlas were not substantial competitors [\*\*\*499] of each other for certain end uses at the time of the merger may actually enhance the *long-run tendency* of the merger to lessen competition. [\*58]" [\*Id.\* at 465](#) (emphasis added). See also *Ford Motor Co. v. United States*, 405 U.S. 562 (1972); *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

### [\*563] C. Problems of Proof -- The Role of Subjective Evidence

Although § 7 deals with probabilities, not ephemeral possibilities, all forms of potential competition involve future events and all of them are, therefore, to some extent speculative and uncertain. Whether future competition will be reduced by a present merger is clearly "not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their 'incipiency.'" [United States v. Philadelphia National Bank](#), 374 U.S., at 362. [\*\*\*59]

The unavoidable problems of proof are compounded in some cases by the relevance of subjective statements of future intent by the managers of the acquiring firm. Although not susceptible of precise analysis, the objective conditions of the market may at least be measured and quantified. But there exists no very good way of evaluating a subjective statement by the manager of a firm that the firm does or does not intend to enter a given market at some future date.

Fortunately, in two of the three forms of potential competition, such subjective evidence has no role to play. Clearly, in the case of a dominant entrant, the only issue is whether the firm's entry by acquisition will so upset objective market forces as to substantially reduce future competition. Since the firm will have already taken steps to enter the market by the time a § 7 action is filed, its statements of subjective intent are irrelevant.

[\*564] Similarly, when the Government proceeds on the theory that the acquiring firm is a perceived potential entrant, testimony as to the subjective intent of the acquiring firm is not probative. The perceived potential entrant exerts a procompetitive effect because [\*\*\*60] companies in the market *perceive* it as a potential entrant. The companies in the market may entertain this perception whether the perceived potential entrant is *in fact* a potential entrant or not. Thus, a firm on the fringe of the market may exert a procompetitive effect even if it has no intention of entering the market, so long as it seems to those within the market that it may have such an intention.<sup>17</sup> [\*\*\*61]

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<sup>17</sup> Thus, in [United States v. Penn-Olin Chemical Co., 378 U.S. 158 \(1964\)](#), for example, management testified that the company had no intention of making a *de novo*, nonacquisitive entry, [\*id.\* at 166](#), and in part on the basis of this testimony, the District

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It follows that subjective [\*\*\*500] testimony by the [\*\*1117] managers of the perceived potential entrant is irrelevant.<sup>18</sup>

However, subjective statements of management are probative in cases where the acquiring firm is alleged to be an actual potential entrant. First, management's statements that it does not intend to make a *de novo* market entry, together with its associated reasons, provide an expert judgment on the conclusions to be drawn [\*565] by the trier of fact from the objective market forces. Just as the Government may introduce expert testimony to inform and guide the trial court with respect to the appropriate business judgments to be derived from the objective data, so too the defendant is entitled to present the evaluation of its [\*\*\*\*62] own "experts" who may include its management personnel. Although such evidence from management is obviously biased and self-serving, it is nonetheless admissible to prove that the objective market pressures do not favor a *de novo* entry.

More significantly, management's statement of subjective intent, if believed, affects the firm's status as an actual potential entrant. As indicated above, the actual potential entrant's entry by acquisition is anticompetitive only if it eliminates some future possibility that it might have entered *de novo*. An unequivocal statement by management that it has absolutely no intention of entering the market *de novo* at any time in the future is relevant to the issue of whether the possibility of such an entry exists. After all, the character of management is itself essentially an objective factor in determining whether the acquiring firm is an actual potential entrant.

But although subjective evidence is probative and admissible in actual potential-entry cases, its utility is sharply limited. We have certainly never suggested that subjective evidence of likely future entry is *required* to make out a § 7 case. On the contrary, in [\*\*\*\*63] *United States v. Penn-Olin Chemical Co.*, 378 U.S., at 175, where the objective evidence of potential entry was strong, we said, "*Unless we are going to require subjective evidence, this array of probability certainly reaches the prima facie stage. As we have indicated, to require more would be to read the statutory requirement of reasonable probability into a requirement of certainty. This we will not do.*" (Emphasis added.)

[\*566] Nor do our prior cases hold that the district courts are bound by subjective statements of company officials that they have no intention of making a *de novo* entry. We have emphasized that the decision whether the acquiring firm is an actual potential entrant is, in the last analysis, an independent one to be made by the trial court on the basis of all relevant evidence properly weighted [\*\*\*501] according to its credibility. Thus, in *FTC v. Procter & Gamble Co.*, for example, managers of Procter & Gamble testified that they had no intention of making a *de novo* entry, and the Court of Appeals thought itself bound by that testimony. See [386 U.S., at 580](#), and [id., at 585](#) (Harlan, [\*\*\*\*64] J., concurring). We reversed, holding that "the evidence . . . clearly shows that Procter was the most likely entrant." [Id., at 580](#).

As these cases indicate, subjective evidence has, at best, only a marginal role to play in actual potential-entry cases. In order to make out a *prima facie* case, the Government need only show that objectively measurable market data favor a *de novo* entry and that the alleged potential entrant has the economic capability to make such an entry. To be sure, the [\*\*1118] defendant may then introduce subjective testimony in rebuttal, and in the rare case where the objective evidence is evenly divided, it is conceivable that extremely credible subjective evidence might tip the balance. But where objectively measurable market forces make clear that it is in a firm's economic self-interest to make a *de novo* entry and that the firm has the economic capability to do so, I would hold that it is

Court found that such an entry was unlikely, *id. at 173*. But we rejected this finding as irrelevant to the company's status as a perceived potential entrant since "the corporation . . . might have remained at the edge of the market, continually threatening to enter," *ibid.*, and so affected competition within the market.

<sup>18</sup> Public statements by management that the firm does not intend to enter the market may be relevant. To the extent that such statements are believed by the firms within the market, they affect their perception of the firm outside the market as a potential entrant. But in that event, the statements of intent are admissible, not to show subjective state of mind, but, rather, as one of the objective factors controlling the perception of the firms within the market.

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error for the District Court to conclude that the firm is not an actual potential entrant on the basis of testimony by company officials as to the firm's future intent.<sup>19</sup>

[\*\*\*\*65] [\*567] The reasons for so limiting the role of subjective evidence are not difficult to discern. Such evidence should obviously be given no weight if it is not credible. But it is in the very nature of such evidence [\*\*\*502] that in the [\*568] usual case it is not worthy of credit.<sup>20</sup> First, any statement of future intent will be inherently self-serving. A defendant in a § 7 case such as this wishes to enter the market by acquisition and its managers know that its ability to do so depends upon whether it can convince a court that it would not have entered *de novo* if entry by acquisition were prevented. It is thus strongly in management's interest to represent that it has no intention of entering *de novo* -- a representation which is not subject to external verification and which is so speculative in nature that it could virtually never serve as the predicate for a perjury charge.

[\*\*\*\*66] Moreover, in a case where the objective evidence strongly favors entry *de novo*, a firm which asks us to believe that it does not intend to enter *de novo* by implication asks us to believe that it does not intend to act in its own economic self-interest. But corporations are, after all, profit-making institutions, and, absent special circumstances, they can be expected to follow courses of action most likely to maximize profits.<sup>21</sup> The [\*569] trier of fact should, therefore, look with great suspicion upon a suggestion that a company with an opportunity to expand

<sup>19</sup> It might be argued that economic decisions are "inherently subjective" and that any attempt to derive objective conclusions from economic data is futile. If this observation means that different people reach different conclusions from the same objective data, then the point must, of course, be conceded. Similarly, if the point is that economic predictions are difficult and fraught with uncertainty, it is well taken. As we recognized in *United States v. Philadelphia National Bank*, such questions are "not . . . susceptible of a ready and precise answer in most cases." [374 U.S., at 362](#). But although the factual controversies in § 7 cases may prove difficult to resolve, the statutory scheme clearly demands their resolution. As this Court held years ago, in response to a similar argument: "So far as the arguments proceed upon the conception that in view of the generality of the statute it is not susceptible of being enforced by the courts because it cannot be carried out without a judicial exertion of legislative power, they are clearly unsound. The statute certainly generically enumerates the character of acts which it prohibits and the wrong which it was intended to prevent. The propositions therefore but insist that . . . it never can be left to the judiciary to decide whether in a given case particular acts come within a generic statutory provision. But to reduce the propositions, however, to this their final meaning makes it clear that in substance they deny the existence of essential legislative authority and challenge the right of the judiciary to perform duties which that department of the government has exerted from the beginning." *Standard Oil Co. v. United States*, [221 U.S. 1, 69-70 \(1911\)](#). Section 7 by its terms requires the trial judge to make a prediction, and it is entirely possible that others may reasonably disagree with the conclusion he reaches. But a holding that the fact of such disagreement requires the judge to delegate his decisionmaking authority to one of the parties would strike at the heart of the very notion of judicial conflict resolution. While it may be true that different people see economic facts in different light, § 7 gives federal judges and juries the responsibility to reach *their* conclusions as to the economic facts. And "if justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try." O. Holmes, *The Common Law* 48.

<sup>20</sup> The Government directs our attention to a case which dramatically illustrates the unreliable character of such evidence. When the Government challenged Bethlehem Steel's acquisition of Youngstown Steel in a § 7 proceeding, Bethlehem vigorously argued that it would never enter the Midwestern steel market *de novo*. But when the merger was disallowed, see *United States v. Bethlehem Steel Corp.*, [168 F.Supp. 576 \(SDNY 1958\)](#), Bethlehem nonetheless elected to make a *de novo* entry. See Moody's Industrial Manual 2861 (1966).

<sup>21</sup> It is possible to imagine a small, closely held corporation which is not solely concerned with profit maximization and which through excessive conservatism or inertia would not seize upon an opportunity to expand its profits. But such a corporation is exceedingly unlikely to become the defendant in a § 7 lawsuit. Section 7 suits of this type are triggered when a firm tries to expand its market by entering hitherto foreign territory by acquisition. A firm caught in the act of expanding by acquisition can hardly be heard to say that it is uninterested in expansion.

It is also possible that a firm might make a good-faith error as to the nature of objective market forces. Thus, even though the objective factors favor entry *de novo*, the firm's managers might *think* that the same factors are unfavorable. But as the objective evidence favoring entry becomes stronger, the possibility of good-faith error correspondingly decreases, so that if the objective forces favoring entry are clear, the chance of good-faith error becomes *de minimis*. Moreover, the mere fact that a firm is presently making a good-faith error does not demonstrate that it will continue to do so in the future. See *supra*, this page.

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its market and the means to seize upon that opportunity will follow a deliberate policy of self-abnegation if the route of expansion first selected is legally foreclosed to it.

[\*\*\*67] Thus, in most cases, subjective statements contrary to the objective evidence simply should not be believed. But even if the threshold credibility gap is breached, it still does not follow that subjective statements of future intent should outweigh strong objective evidence to the contrary. Even if it is true that management has no present intent of entering the market *de novo*, the possibility remains that it may change its mind as the objective factors favoring such entry are more clearly perceived. Of course, it is possible that management will adamantly continue to close its eyes to the company's own self-interest. But in that event, the chance remains that the stockholders will install [\*\*\*503] new, more competent officers who will better serve their interests. All of these possibilities are abruptly and irrevocably aborted when the firm is allowed to enter the market by acquisition. And while it is conceivable that none of the possibilities will materialize if entry by acquisition [\*570] is prevented, it is absolutely certain that they will not materialize if such entry is permitted. All that is necessary to trigger a § 7 violation is a finding by the trial [\*\*\*68] court of a reasonable chance of future competition. In most cases, strong objective evidence will be sufficient to create such a chance despite even credible subjective statements to the contrary.<sup>22</sup>

[\*\*\*69] To summarize, then, I would not hold that subjective evidence may never be considered in the context of an actual potential-entry case. Such evidence should always be admissible as expert, although biased, commentary on the nature of the objective evidence. And in a rare case, the subjective evidence may serve as a counterweight to weak or inconclusive objective data. But when the district court can point to no compelling reason why the subjective testimony should be believed or when the objective evidence strongly points to the feasibility of entry *de novo*, I would hold that it is error for the court to rely in any way upon management's subjective statements as to its own future intent.

### III

As indicated above, the Government failed to press the argument that Falstaff was a dominant or perceived potential entrant. Since there is virtually no evidence in the record to support either of these theories, I cannot [\*571] say that the District Judge erred in rejecting them. It does appear, however, that he applied an erroneous standard in evaluating the subjective evidence relevant to Falstaff's position as an actual potential entrant and that this error infected the court's [\*\*\*70] factual determinations. I would therefore remand the cause so that a proper fact-finding can be made.

The record shows that the New England market is highly concentrated with a few large firms gaining a greater and greater share of the market. Although this market structure has yet to produce overtly anticompetitive behavior, there is a real danger that parallel pricing and marketing policies will soon emerge if new competitors do not enter the field.

The objective evidence in the record strongly suggests that Falstaff had both the capability and the incentive to enter the New England market *de novo*. It is undisputed that it was in Falstaff's interest to gain the status of a national brewer in the near future and that New England was a logical area to begin [\*\*\*504] its expansion. Indeed, Falstaff's own actions in entering the New England market support this conclusion. Nor can it be doubted that Falstaff had the economic capability to enter New England. Falstaff is the Nation's fourth largest brewer and the largest still outside of New England. It has been consistently profitable in recent years, has an excellent credit rating, and had, in 1964, enough excess capital [\*\*\*71] to finance a 10-year, \$ 35 million expansion project. The

<sup>22</sup> The distinction between subjective statements of intent and objectively verifiable facts is not unknown in other areas of the law. See, e. g., *Wright v. Council of City of Emporia*, 407 U.S. 451, 460-462 (1972); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227-228 (1963). Indeed, perhaps the oldest rule of evidence -- that a man is presumed to intend the natural and probable consequences of his acts -- is based on the common law's preference for objectively measurable data over subjective statements of opinion and intent. Nor have we hesitated to apply this principle to *antitrust law*. See, e. g., *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 702-703 (1967); *United States v. Gypsum Co.*, 333 U.S. 364, 394 (1948).

Little Report concluded that *de novo* entry into the Northeast was feasible and, although Falstaff attacks these findings, the trier of fact might well have accepted them had he relied upon the objective evidence.

To be sure, Falstaff introduced a great deal of evidence tending to show that entry *de novo* would have been less profitable for it than entry by acquisition. [**\*572**] I have no doubt that this is true. Indeed, if it can be assumed that Falstaff is a rational, profit-maximizing corporation, its own decision offers strong proof that entry by acquisition was the preferable alternative. But the test in § 7 cases is not whether anticompetitive conduct is profit maximizing. The very purpose of § 7 is to direct the profit incentive into channels which are procompetitive. Thus, the proper test is whether Falstaff would have entered the market *de novo* if the preferable alternative of entry by acquisition had been denied it. The objective evidence strongly suggests that such an entry would have occurred.

The District Court, however, chose to ignore this objective evidence almost totally. Instead, the [\*\*\*\*72] trial judge seems to have considered himself bound by Falstaff's subjective representations that it had no intention of entering the market *de novo*. As noted above, even if these subjective statements are credible, they appear to be insufficient to outweigh the strong objective evidence to the contrary.

Findings of fact are, of course, for the trial judge in the first instance, and even in antitrust cases where the evidence is largely documentary, appellate courts should be reluctant to set them aside. But when the facts are found under a standard which is legally deficient, the situation is fundamentally different. It is the duty of appellate courts to establish the legal standards by which the facts are to be judged. The facts in this case were judged by a wrong standard, and the cause should therefore be remanded for a new, error-free determination.

**Dissent by: [\*\*1120] REHNQUIST**

Dissent

[\*\*\*504contd] [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE STEWART concurs, dissenting.

[\*\*\*73] Civil litigation in our common-law system is conducted within the framework of the time-honored principle that the plaintiff must introduce sufficient evidence to convince [\*573] the trier of fact that his claim for relief is factually meritorious. However large [\*\*1121] the societal interest in the area of antitrust law, so long as Congress assigns the vindication of those interests to civil litigation in the federal courts, antitrust litigation is no exception to that rule. The plaintiff, whether public or private, must prove to the satisfaction of the judge or jury that the defendant violated the antitrust laws. United States v. Yellow Cab Co., 338 U.S. 338 (1949). It is the exclusive responsibility of the trier of fact to weigh, as he sees fit, all admissible evidence in resolving disputed issues of fact, [\*\*\*505] *ibid.*, and his findings of fact cannot be overturned on appeal unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. Gypsum Co., 333 U.S. 364, 395 (1948). Cf. FTC v. Procter & Gamble Co., 386 U.S. 568 (1967). [\*\*\*74] The Court today simply disregards these principles.

The Court remands this case to the District Court to consider "whether Falstaff was a potential competitor in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market." *Ante*, at 532-533. The antitrust theory underlying the remand is that the competitors in the relative geographic market, aware of Falstaff's presence on the periphery, would not exercise their ostensible market power to raise prices because of the possibility that Falstaff, sufficiently tempted by the high prices in that market, would enter. A Government suit challenging a merger or acquisition can, of course, be premised on this theory, and, if sufficient evidence to convince the trier of fact is introduced, the determination that the merger or acquisition violated § 7 would not be reversed on appeal.

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As my Brother MARSHALL convincingly demonstrates, however, in this case the Government neither proceeded on the theory advanced by the Court nor introduced *any* [\*574] evidence that would support that theory. The theory that the Government did advance, and upon which it [\*\*\*75] offered its evidence, is concisely summarized in the Government's statement in opposition to Falstaff's motion to dismiss.

"In our opening statement we attempted to show that the Government would prove -- and I believe we have -- that Falstaff, the fourth largest brewing corporation in the nation, had a continuous intensive interest in entering New England; that it carried on negotiations for five years with companies serving New England; that alternative methods of entry other than the acquisition of the largest New England brewer were available to Falstaff; and that it was in fact one of a few and the most likely entrant into this market; that its entrance into this market was especially important because the market is concentrated; that is, the sales of beer in New England are highly concentrated in the hands of the relatively few number of brewers.

"The entry by Falstaff by building a brewery, by shipping into this market, and opening it up, by the acquisition of a company less than number 1, thereby eliminating its most significant potential competitor, were all available to it. Because of the concentration [\*\*1122] in the market and because of Falstaff's being the [\*\*\*76] most potential entrant, the acquisition by Falstaff of the leading firm in this market eliminated what we consider to be one of a few potential competitive effects that this market could expect for years." Transcript, Vol. 3, p. 7.

For this Court to reverse and to remand for consideration of a possible factual basis for a theory never advanced by the plaintiff is a drastic and unwarranted departure from the most basic principles of civil litigation [\*575] and appellate review. In [\*\*\*506] this case, the Government originally advanced one theory, but failed to introduce sufficient evidence to convince the trier of fact. That failure is "a not uncommon form of litigation casualty, from which the Government is no more immune than others." *United States v. Yellow Cab Co., 338 U.S., at 341*. The Court now resuscitates this "casualty" by use of a theory transplant, allowing the Government a second opportunity to vindicate its position by arguing a different theory not originally propounded before the District Court or on appeal. I cannot join in the Court's rescue operation for this "litigation casualty," an operation which succeeds only by flagrantly disregarding [\*\*\*77] some of the axioms upon which our judicial system is founded.

Although agreeing with my Brother MARSHALL's criticism of the Court's reason for remanding this case, I cannot agree with his grounds for remanding to the District Court for reconsideration. That theory is based, erroneously I believe, on the notion that there is an identifiable difference between "objective" and "subjective" evidence in an antitrust case such as this. My Brother MARSHALL would have the District Court weigh "objective" evidence more heavily than "subjective" evidence. In the field of economic forecasting in general, and in the area of potential competition in particular, however, the distinction between "objective" and "subjective" evidence is largely illusory. It is, I believe, incorrect to state that a trier of fact can determine "objectively" what "is in a firm's economic self-interest." Such a determination is guesswork. The term "economic self-interest" is a convenient shorthand for describing the economic decision reached by an individual or firm, but does not connote some simple, mechanical formula which determines the input values, or their assigned weight, in the process of economic decisionmaking. [\*\*\*78] The simple fact is that any economic decision is largely subjective. [\*576] In the instant case, Falstaff sought to prove why it was not in the "economic self-interest" of that firm to enter a new geographic market without an established distribution system. Its explanation is as "objective" as any of the evidence offered by the Government to show why a hypothetical Falstaff should enter the market. The question of who is an "actual potential competitor" is entirely factual. In deciding questions of fact, it is the province of the trier to weigh all of the evidence; but it is peculiarly his province to determine questions of credibility.

"Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. . . .

". . . There is no exception [to the 'clearly erroneous' rule of appellate review] which permits [the Government], even in an antitrust case, to come to this Court for what virtually amounts to a trial *de novo* on the record of such findings as intent, motive and design." *United States v. Yellow Cab Co., 338 U.S., at 341-342*.

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I would not ignore our prior [\*\*\*\*79] decisions or rewrite the rules of evidence simply to afford the Government a second chance, which is uniformly denied to other litigants, to convince the trier of fact.

## References

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54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 134

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ALR Digests, Restraints of Trade and Monopolies 13

L Ed Index to Anno, Restraints of Trade and Monopolies

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Annotation References:

Construction, by Supreme Court of the United States, of 7 of the Clayton Act ([15 USC 18](#)), dealing with acquisition by one corporation of stock of another. [14 L Ed 2d 784](#).

Appealability of orders in government civil antitrust actions. 10 ALR Fed 607.

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## Missouri Portland Cement Co. v. Cargill, Inc.

Supreme Court of the United States

July 25, 1974, Dismissed

No. A-1265 (73-2014)

### **Reporter**

418 U.S. 919 \*; 94 S. Ct. 3210 \*\*; 41 L. Ed. 2d 1161 \*\*\*; 1974 U.S. LEXIS 2185 \*\*\*\*; 1974-2 Trade Cas. (CCH) P75,171

MISSOURI PORTLAND CEMENT CO. v. CARGILL, INC.

**Prior History:** [\*\*\*\*1] C. A. 2d Cir.

Reported below: [498 F.2d 851](#).

## **Core Terms**

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conglomerate, acquisition, anti trust law, injunction, cement

## **Opinion**

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[\*919] [\*\*3210] Motion of respondent to vacate stay heretofore entered by MR. JUSTICE DOUGLAS on July 12, 1974, granted. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion.

**Dissent by:** DOUGLAS

## **Dissent**

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MR. JUSTICE DOUGLAS, dissenting.

Cargill, desirous of acquiring control of petitioner, made a cash offer for all of petitioner's common stock. Petitioner thereupon filed this suit in the United States District Court for the Southern District of New York to enjoin that tender offer, alleging that acquisition of control of petitioner would violate § 7 of the Clayton Act, 38 Stat. 731, as amended, [15 U. S. C. § 18](#). That court issued the injunction stating in a detailed opinion its view that the acquisition of stock control by Cargill raises serious antitrust issues.

The sole question here is whether Cargill's attempts to take over Missouri Portland will be enjoined, pending the outcome of a trial on the merits of Missouri Portland's claim that a merger of these two companies would violate the antitrust laws. The District Court granted such an injunction, [375 F.Supp. 249](#), but the Court of Appeals [\*\*\*\*2] reversed. [498 F.2d 851](#). Missouri Portland sought and received a stay of the Court of Appeals' mandate, thus reinstating the injunction issued by the District Court. Today the Court vacates that stay.

The Court treats the case as if we were in the sensitive [First Amendment](#) field where relatively minor restraints may have a "chilling" effect on an important constitutional [\*920] right. But as I read the Constitution and [Bill of Rights](#), a corporation has no constitutional right to merge, consolidate, or acquire the assets of another company. The old Court in the days of "substantive due process" built an expansive corporate [Bill of Rights](#) by reading "liberty" in the [Due Process Clause of the Fifth Amendment](#) as including the "liberty" to exploit people, our resources, and our

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environment. The Court trifles with the antitrust laws when it vacates a stay that only requires Cargill to wait until there is a ruling on the merits before it swallows up Missouri Portland. What the Court does today is a shocking example of the disregard of law to please the management of huge conglomerates. Denial of a stay means a decision on the merits. For once the companies [\*\*\*3] and their personnel are mixed, the momentum to complete the acquisition is almost irresistible. By careless neglect we actually decide that what appears to be a monstrous violation of the law may go on unremedied.

### [\*\*3211] I

The Court of Appeals did not hold that the findings of the District Court were "clearly erroneous." The Court of Appeals considered the issue on the merits to be frivolous and only required Cargill to agree to hold the assets of Missouri Portland in a separate corporation or division so that it can be divested under any subsequent decree of the Court. But that misses the whole point, as I will make clear.

### II

Missouri Portland is the Nation's 20th largest producer of Portland cement with 2% of the national capacity and 8% in the 11-state region it serves. The District [\*\*\*1162] Court defined the relevant markets here as four [\*921] metropolitan areas in which Missouri Portland ranks either first or second in market share. In all of these markets the top four firms have at least 88% of the market.<sup>1</sup>

[\*\*\*4] Cargill is a huge, privately held conglomerate with headquarters in Minneapolis. In fiscal 1973 it had sales of \$ 5.3 billion. Cargill specializes in commodities and thus has special skills in the transportation of heavy, bulk products and in the sale of fungible products. Cement is a heavy, bulky, fungible product, but Cargill is not involved in the cement industry.

Substantial antitrust issues are raised by the proposed takeover of Missouri Portland by Cargill. The District Court found that Cargill is the most likely potential entrant into the cement industry and concluded that a significant anticompetitive effect would result from Cargill's entry via a takeover of an already dominant firm rather than by *de novo* entry or by "toehold" acquisition. Furthermore, the District Court found that the addition of Cargill's huge financial resources to Missouri Portland's already substantial assets will raise significant barriers to entry of others in the relevant markets and will tend to increase the dominance of Missouri Portland in markets which are already heavily concentrated. Finally, the District Court noted that the challenged acquisition would eliminate a potential competitor [\*\*\*5] from the fringe of the market, thereby possibly resulting in an additional anticompetitive effect.

The Court of Appeals disputed all of these conclusions by the District Court. Yet the very fact that disagreement exists between the two lower courts on these points indicates the likely existence of a substantial question. If the District Court's version of the facts is the correct [\*922] one, it seems that the takeover would violate the Clayton Act. See *United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973)*; *Ford Motor Co. v. United States, 405 U.S. 562 (1972)*; *FTC v. Procter & Gamble Co., 386 U.S. 568 (1967)*; *United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964)*; *United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964)*.

### [\*\*3212] III

The issues raised by the petition for certiorari present a substantial question that involves a conflict between the decisions below and another Court of Appeals. In *Kennecott Copper Corp. v. FTC, 467 F.2d 67 (CA10 1972)*, the court held that anticompetitive effect could occur even though [\*\*\*6] the acquiring and acquired corporations did not produce related products but did have related skills.<sup>2</sup> The court below was confronted with facts strikingly

<sup>1</sup> The four metropolitan markets are St. Louis, Kansas City, Memphis, and Omaha.

<sup>2</sup> In addition, the opinion of the court below conflicts with decisions of other Courts of Appeals on the significance of the acquiring corporation's "deep pocket." According to the court below, the facts that the acquiring corporation has great financial resources and that it intends to use these resources are not enough to show potential anticompetitive effect. But see *General Foods Corp.*

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similar to those of *Kennecott* as regards the lack of related products but the presence of related skills. That court, however, candidly admitted that it was declining to follow the *Kennecott* decision. [498 F.2d, at 860 n. 14](#). In our decision in [United States v. Falstaff Brewing Corp., supra, at 537](#), we left open the extent to which potential anticompetitive effect will be considered determinative in "conglomerate mergers" such as this one where entry could have been *de novo* or via "toehold" acquisition. **[\*923]** Given the conflict between the Circuits on this matter, the present case presents a good vehicle in which we should consider this problem.

**[\*\*\*\*7] IV**

Cargill had acquired 18% of the common stock of Missouri Portland before the injunction issued. Now that the injunction has been lifted by the Court of Appeals and this Court, Cargill is free to acquire the controlling interest in Missouri Portland. That means that it can dictate what its subsidiary will do. We are foolhardy to assume that the litigation will then go on. Cargill in control of its subsidiary **[\*\*\*1163]** will make the subsidiary toe the line and be obedient to Cargill's wishes. The substantial antitrust issue apparent in the conflict between the Courts of Appeals will now not likely be resolved. The internal segregation of assets of the two companies is only an idle gesture.

If we fail to live under a rule of law and instead leave the field open to the uncontrolled machinations of conglomerates, Cargill will follow the infamous pattern of IT&T, uncontrolled and uncontrollable. Behind this motion to vacate the stay are very large questions of law and public policy. What is the place of antitrust law in the conglomerate field? Are conglomerates immune as some suggest? If not, what controls over them exist under present antitrust laws? These are questions **[\*\*\*\*8]** that are substantial and pressing. The Circuits are in conflict; and the Court goes pell-mell for an escape for this conglomerate from a real test under existing antitrust law.

I repeat, there is no constitutional right to take over other companies. Cargill should be required to accept delay as one of the risks it incurred by **[\*\*3213]** seeking to gain control of so dominant a firm in the cement industry **[\*924]** rather than being content with a "toehold" acquisition or *de novo* entry.

I would continue the stay in force until the merits of the case have been adjudicated.

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v. [FTC, 386 F.2d 936 \(CA3 1967\)](#); [United States Steel Corp. v. FTC, 426 F.2d 592 \(CA6 1970\)](#); [Ecko Products Co. v. FTC, 347 F.2d 745 \(CA7 1965\)](#); [Kennecott Copper Co. v. FTC, 467 F.2d 67 \(CA10 1972\)](#).

## **GULF OIL CORP. v. COPP**

Supreme Court of the United States

October 21-22, 1974, Argued ; December 17, 1974, Decided

No. 73-1012

**Reporter**

419 U.S. 186 \*; 95 S. Ct. 392 \*\*; 42 L. Ed. 2d 378 \*\*\*; 1974 U.S. LEXIS 47 \*\*\*\*; 1974-2 Trade Cas. (CCH) P75,402

GULF OIL CORP. ET AL. v. COPP PAVING CO., INC., ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

**Disposition:** [487 F.2d 202](#), reversed.

### **Core Terms**

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commerce, asphaltic, concrete, interstate commerce, Clayton Act, Sherman Act, interstate, sales, Oil, liquid, interstate highway, anti trust law, effects, Robinson-Patman Act, provisions, markets, engaged in commerce, practices, acquisitions, monopoly, purposes, instrumentalities, employees, prices, cases, legislative history, Fair Labor Standards Act, regulation, highways, lessen

### **LexisNexis® Headnotes**

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

**[HN1](#)[] Antitrust & Trade Law, Robinson-Patman Act**

See [15 U.S.C.S. § 13\(a\)](#).

Antitrust & Trade Law > Clayton Act > General Overview

**[HN2](#)[] Antitrust & Trade Law, Clayton Act**

See [15 U.S.C.S. § 14](#).

Antitrust & Trade Law > Clayton Act > General Overview

**[HN3](#)[] Antitrust & Trade Law, Clayton Act**

See [15 U.S.C.S. § 18](#).

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

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

Antitrust & Trade Law > Robinson-Patman Act > Jurisdiction

#### **HN4** **Robinson-Patman Act, Claims**

The distinct "in commerce" language of the Clayton and Robinson-Patman Act provisions appears to denote only persons or activities within the flow of interstate commerce -- the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer.

### **Lawyers' Edition Display**

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#### **Summary**

The plaintiff, a producer of asphaltic concrete, brought suit in a United States District Court in California, alleging that the defendant oil companies had committed various violations of the federal antitrust laws. The alleged violations relating to the sale of asphaltic concrete included price discrimination in violation of 2(a) of the Robinson-Patman Act ([15 USCS 13\(a\)](#)), exclusive dealing and tying arrangements in violation of 3 of the Clayton Act ([15 USCS 14](#)), and corporate acquisitions in violation of 7 of the Clayton Act ([15 USCS 18](#)). The District Court held that although the asphaltic concrete was used in the construction of interstate highways, the sales of such concrete were entirely intrastate and were not "in commerce" within the meaning of the Robinson-Patman Act or the Clayton Act, and that jurisdiction over the plaintiff's claims under such Acts was therefore lacking. However, the United States Court of Appeals for the Ninth Circuit reversed, holding that the sales of asphaltic concrete for use in the construction of interstate highways were "in commerce," and that the jurisdictional requirements of the Robinson-Patman Act and Clayton Act were therefore satisfied ([487 F2d 202](#)).

On certiorari, the United States Supreme Court reversed. In an opinion by Powell, J., expressing the views of six members of the court, it was held that although sales of asphaltic concrete were made for use in construction of interstate highways, such sales, by a firm engaged in entirely intrastate sales of asphaltic concrete which could be marketed only locally, were not "in commerce" within the jurisdictional ambit of either 2(a) of the Robinson-Patman Act or 3 or 7 of the Clayton Act.

Marshall, J., concurring, joined in the court's judgment and opinion, but disagreed with a characterization used in one of the court's dicta.

Douglas, J., joined by Brennan, J., dissented on the grounds that jurisdiction was sustainable on an "in commerce" theory, and that jurisdiction was also sustainable on the alternative ground that even if the sales of asphaltic concrete were not in the flow of commerce, the plaintiff's pleadings sufficiently alleged that interstate commerce was affected.

#### **Headnotes**

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MONOPOLIES §21 > relation to interstate commerce -- Robinson-Patman Act -- Clayton Act -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B]

Although entirely intrastate sales of asphaltic concrete, which can be marketed only locally, are made for use in construction of interstate highways, such sales are not "in commerce" as a matter of law within the jurisdictional ambit of either 2(a) of the Robinson-Patman Act ([15 USCS 13\(a\)](#)) or 3 or 7 of the Clayton Act ([15 USCS 14, 18](#)).

MONOPOLIES §21 > relation to interstate commerce -- Sherman Act -- > Headnote:

[LEdHN\[2\]](#) [2]

However local its immediate object, a contract, combination, or conspiracy nonetheless may constitute a restraint within the meaning of 1 of the Sherman Act ([15 USCS 1](#)) if it substantially and adversely affects interstate commerce; if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

MONOPOLIES §21 > relation to interstate commerce -- > Headnote:

[LEdHN\[3\]](#) [3]

In contrast with 1 of the Sherman Act ([15 USCS 1](#)), which prohibits certain conduct "in restraint of trade or commerce among the several States," the distinct language "in commerce," as used in 2(a) of the Robinson-Patman Act ([15 USCS 13\(a\)](#)) and in 3 and 7 of the Clayton Act ([15 USCS 14, 18](#)), appears to denote only persons or activities within the flow of interstate commerce--the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer; thus, the jurisdictional requirements of the latter provisions cannot be satisfied merely by showing that allegedly anticompetitive acquisitions and activities affect commerce.

MONOPOLIES §21 > relation to interstate commerce -- Robinson-Patman Act -- Clayton Act -- > Headnote:

[LEdHN\[4\]](#) [4]

For a corporate acquisition to violate 7 of the Clayton Act ([15 USCS 18](#)), the acquired corporation must be one which engages in interstate commercial activities; for a corporation's alleged exclusive dealing arrangements to violate 3 of the Clayton Act ([15 USCS 14](#)) or for its allegedly discriminatory sales to violate 2(a) of the Robinson-Patman Act ([15 USCS 13\(a\)](#)), such arrangements or sales must occur in the course of its interstate activities; and for a corporation's allegedly discriminatory sales to violate 2(a) of the Robinson-Patman Act ([15 USCS 13\(a\)](#)), at least one such sale must have been made in interstate commerce.

MONOPOLIES §21 > relation to interstate commerce -- > Headnote:

[LEdHN\[5\]](#) [5]

Although Congress has deemed interstate highways critical to the national economy and has authorized extensive federal participation in their financing and regulation, nothing in the Federal Aid Highway Act ([23 USCS 101 et seq.](#))

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or other legislation evinces an intention to apply the full range of antitrust laws to persons who, as part of their local business, supply materials used in construction of local segments of interstate roads, nor does the fact that interstate highways are instrumentalities of commerce somehow render the suppliers of materials instrumentalities of commerce as well.

ERROR §1537 > MONOPOLIES §21 > relation to interstate commerce -- "nexus" theory -- > Headnote:

LEdHN[6A] [▼] [6A] LEdHN[6B] [▼] [6B] LEdHN[6C] [▼] [6C]

Even if interstate highways are instrumentalities of interstate commerce, conduct with respect to an ingredient of an interstate highway does not have such a "nexus" to commerce as to be per se "in commerce," within the meaning of either 2(a) of the Robinson-Patman Act ([15 USCS 13\(a\)](#)) or 3 or 7 of the Clayton Act ([15 USCS 14, 18](#)); assuming arguendo that the facially narrow language of the Clayton and Robinson-Patman Acts was intended to denote something more than the relatively restrictive "flow of commerce" concept, the "nexus" approach would be an irrational way to proceed, and a United States Court of Appeals judgment based on this "nexus to commerce" theory will be reversed by the United States Supreme Court.

MONOPOLIES §21 > STATUTES §147 > interstate commerce -- > Headnote:

LEdHN[7] [  ] [7]

Since the Conference Committee deleted the phrase "whether in commerce or not" from 2(a) of the Robinson-Patman Act ([15 USCS 13\(a\)](#)) and left the language "in commerce" in 2(a), and since the United States Courts of Appeals have read the "in commerce" language of 2(a) to mean that 2(a) applies only where at least one of the transactions which, when compared, generate a discrimination, cross a state line, the legislative history does not warrant, in the face of this long-standing interpretation and the continued Congressional silence, that the United States Supreme Court extend 2(a) beyond its clear language to reach a multitude of local activities which hitherto have been left to state and local regulation.

## MONOPOLIES §6 > purpose of legislation -- > Headnote:

LEdHN[8] [  ] [8]

Sections 3 and 7 of the Clayton Act ([15 USCS 14, 18](#)) were intended to complement the Sherman Act ([15 USCS 1 et seq.](#)) and to facilitate achievement of its purposes by reaching, in their incipiency, acts and practices which promise, in their full growth, to impair competition in interstate commerce.

EVIDENCE §403 > MONOPOLIES §21 > interstate commerce -- burden of proof -- > Headnote:

LEdHN [9]  [9]

Even if 3 and 7 of the Clayton Act ([15 USCS 14](#), [18](#)) extend to acquisitions and sales having substantial effects on interstate commerce, a court cannot presume that such effects exist; the plaintiff must allege and prove that apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods in order to invoke federal antitrust prohibitions.

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EVIDENCE §963 > MONOPOLIES §21 > effects on interstate commerce -- insufficiency of proof -- > Headnote:  
[LEdHN\[10\]](#) [10]

In an antitrust case involving an issue whether "in commerce" requirements of 3 and 7 of the Clayton Act ([15 USCS 14, 18](#)) are satisfied, the plaintiff's "effects on commerce" theory, even if legally correct, must fail for want of proof, where (1) the plaintiff has presented no evidence of effects on interstate commerce, but has argued merely that such effects could be presumed from the use of asphaltic concrete in the construction of interstate highways, although such concrete could be marketed only locally and was sold in entirely intrastate sales, (2) a United States District Court, in summary judgment proceedings, concluded, on the basis of the record before it, that the defendants' alleged antitrust violations had no substantial impact on interstate commerce, and (3) the District Court's conclusion cannot be considered erroneous.

COURTS §246 > PLEADINGS §48.5 > jurisdictional issues -- summary judgment -- > Headnote:

[LEdHN\[11A\]](#) [11A] [LEdHN\[11B\]](#) [11B]

Assuming that the interstate commerce requirements of 3 and 7 of the Clayton Act ([15 USCS 14, 18](#)) are properly deemed issues of subject matter jurisdiction, rather than simply necessary elements of federal antitrust claims, there is an identity between the "jurisdictional" issues and certain issues on the merits, and hence no objection to reserving the jurisdictional issues until a hearing on the merits, but by the same token, there is no objection to the use, in appropriate cases, of summary judgment procedure to determine whether there is a genuine issue of material fact as to the interstate commerce elements.

## Syllabus

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Respondent operators of a California "hot plant," at which asphaltic concrete for surfacing highways is manufactured and sold entirely intrastate, alleging violations of, *inter alia*, [§ 2 \(a\)](#) of the Clayton Act, as amended by the Robinson-Patman Act (hereafter [§ 2 \(a\)](#)), and [§§ 3](#) and [7](#) of the Clayton Act, brought suit against petitioner liquid asphalt producers and two of their subsidiaries, to which such asphalt is sold and which use it to manufacture and sell asphaltic concrete in competition with respondents. [Section 2 \(a\)](#) forbids "any person engaged in commerce, in the course of such commerce" to discriminate in price "where either or any of the purchases involved in such discrimination are in commerce" and the discrimination has substantial anticompetitive effects "in any line of commerce." [Section 3](#) makes it unlawful "for any person engaged in commerce, in the course of such commerce" to make tie-in sales or enter exclusive-dealing arrangements [\[\\*\\*\\*\\*2\]](#) where the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." And [§ 7](#) forbids certain acquisitions by a corporation "engaged in commerce" of the assets or stock "of another corporation engaged also in commerce" where the effect may be substantially to lessen competition "in any line of commerce in any section of the country." The District Court held that it had no jurisdiction of the claims because the market for asphaltic concrete is exclusively and necessarily local, but the Court of Appeals reversed, holding that the jurisdictional requirements of [§§ 2 \(a\), 3](#), and [7](#) were satisfied by the fact that sales of asphaltic concrete are made for use in interstate highways. *Held:*

1. The fact that interstate highways are instrumentalities of commerce does not render petitioners' conduct with respect to a material sold for use in constructing these highways "in commerce" as a matter of law for purposes of [§§ 2 \(a\), 3](#), and [7](#) of the Clayton Act. [Overstreet v. North Shore Corp., 318 U.S. 125](#), and [Alstate Construction Co. v. Durkin, 345 U.S. 13](#), distinguished. Pp. 193-199.

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2. The "in commerce" [\*\*\*3] language of the Robinson-Patman and Clayton Act provisions in question does not extend on an "effects on commerce" theory to petitioners' sales and acquisitions. Pp. 199-203.

(a) In face of the longstanding judicial interpretation of the language of [§ 2 \(a\)](#) requiring that "either or any of the purchases involved in such discrimination [be] in commerce," as meaning that [§ 2 \(a\)](#) applies only where "at least one of the two transactions which, when compared, generate a discrimination . . . [crosses] a state line," [Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4, 9; Belliston v. Texaco, Inc., 455 F.2d 175, 178](#), and the continued congressional silence on the subject, this Court is not warranted in extending [§ 2 \(a\)](#) beyond its clear language to reach a multitude of local activities hitherto left to state and local regulation. Pp. 199-201.

(b) The "effects on commerce" theory, whereby [§§ 3](#) and [7](#) of the Clayton Act would be held to extend to acquisitions and sales having substantial effects on commerce, even if legally correct, fails here for want of proof, since respondents presented no evidence of effect on interstate commerce [\*\*\*4] from the use of asphaltic concrete in interstate highways. Pp. 201-203.

**Counsel:** Moses Lasky argued the cause for petitioners. With him on the briefs were Richard Haas and George A. Cumming, Jr.

Martin M. Shapero argued the cause for respondents. With him on the brief was Jack Corinblit. \*

**Judges:** POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. MARSHALL, J., filed a concurring opinion, post, p. 203. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN, J., joined, post, p. 204.

**Opinion by:** POWELL

## Opinion

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[\*188] [\*\*395] [\*\*\*382] MR. JUSTICE POWELL delivered the opinion of the Court.

[LEdHN\[1A\]](#) [1A] This case concerns the jurisdictional requirements of [§ 2 \(a\)](#) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, <sup>1</sup> [15 U. S. C. § 13 \(a\)](#), and of [§§ 3](#) and [7](#) of the Clayton Act, 38 Stat. 731, as amended, [15 U. S. C. §§ 14](#) [\*\*\*5] and [18](#). It presents the questions whether a firm engaged in entirely intrastate sales of asphaltic concrete, a product that can be marketed only locally, is a corporation "in commerce" within the meaning of each of these sections, and whether such sales are "in commerce" and "in the course of such commerce" within the meaning of [§ 2 \(a\)](#) and [3](#) respectively. The Court of Appeals for the Ninth Circuit held these jurisdictional requirements satisfied, without more, by the fact that sales of asphaltic concrete are made for use in construction of interstate highways. [487 F.2d 202 \(1973\)](#). We reverse.

|

[\*\*\*383] Asphaltic concrete is a product used to surface roads and highways. It is manufactured at "hot plants" by combining, at temperatures of approximately 375 degrees F, about 5% liquid petroleum asphalt with about 95% aggregates and fillers. The substance is delivered by truck to construction sites, where it is placed [\*\*\*6] at temperatures of about 275 degrees F. Because it must be hot when placed and because of its great weight and relatively low value, asphaltic concrete can be sold and delivered profitably only within a radius of 35 miles or so from the hot plant.

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\* Solicitor General Bork, Assistant Attorney General Kauper, William L. Patton, and Carl D. Lawson filed a brief for the United States as amicus curiae.

<sup>1</sup> Hereafter, for simplicity, cited as [§ 2 \(a\)](#) of the Robinson-Patman Act.

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Petitioners Union Oil Co., Gulf Oil Corp., and Edgington Oil Co., defendants below, produce liquid petroleum [\*\*189] asphalt from crude oil at their California refineries. The companies sell liquid asphalt to their subsidiaries and other firms throughout the Western States. The market in liquid asphalt is interstate, and each oil company concedes that it engages in interstate commerce.

Petitioner Union Oil sells some of its liquid asphalt to its wholly owned subsidiary, Sully-Miller Contracting Co., which uses it to manufacture asphaltic concrete at 11 hot plants in Los Angeles and Orange Counties, Cal. Gulf Oil sells all of its liquid asphalt to its wholly owned subsidiary, petitioner Industrial Asphalt, Inc. Industrial distributes the liquid asphalt to third parties and also uses it to produce asphaltic concrete at 55 hot plants in California, Arizona, and Nevada. Edginton Oil sells its liquid asphalt to, *inter alia*, Sully-Miller, [\*\*\*7] Industrial, and respondents.

Respondents, Copp Paving Co., Inc., Copp Equipment Co., Inc., and Ernest A. Copp,<sup>1a</sup> operate a hot plant in Artesia, Cal., where they produce asphaltic concrete both for Copp's own use as a paving contractor and for sale to other contractors. Copp's operations and asphaltic concrete sales are limited to the southern half of Los Angeles County, where it competes with Sully-Miller and [\*\*396] Industrial in the asphaltic concrete market. All three firms sell a more than *de minimis* share of their asphaltic concrete for use in the construction of local segments of the interstate highway system. Neither Copp, Industrial, nor Sully-Miller makes any interstate sales of the product.<sup>2</sup>

[\*190] [\*\*\*8] Copp filed this complaint in the District Court for the Central District of California against the oil companies, Sully-Miller, and Industrial, seeking injunctive relief and treble damages.<sup>3</sup> The complaint, as amended, alleged that the various defendants had committed a catalog of antitrust violations with respect to both the asphalt oil and asphaltic concrete markets. Claiming harm to itself as a consumer of liquid asphalt, Copp alleged: that the defendants had fixed prices and allocated the asphalt oil market geographically, in violation of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1; [\*\*\*384] that they had sold liquid asphalt at discriminatory prices to Copp and other purchasers, in violation of § 2(a) of the Robinson-Patman Act; and that Gulf Oil had violated § 7 of the Clayton Act by acquiring Industrial. Also claiming harm to itself as a competitor in the asphaltic concrete market, Copp further alleged: that the defendants had fixed prices, divided the market geographically, and employed various methods of monopolizing and attempting to gain a monopoly in the Los Angeles area market, in violation of §§ 1 and 2 of the Sherman [\*\*\*9] Act; that, in violation of § 3 of the Clayton Act, Industrial and Sully-Miller had conditioned sales of asphaltic concrete in areas where Copp did not compete on customers' agreeing to buy only from the defendants in areas where Copp did compete, and had "tied" sales of asphaltic concrete to sales of other commodities and to favorable extensions of credit; that, in violation of § 7 of the Clayton Act, Gulf Oil had acquired Industrial and Union Oil had acquired Sully-Miller, these acquisitions apparently having the effect of lessening competition in the Los Angeles asphaltic concrete market; and, finally, that Industrial and Sully-Miller had discriminated in the prices at which they sold asphaltic concrete, charging [\*191] higher prices in areas where Copp did not compete, this in violation of § 2(a).

Because of the liquid asphalt claims, the case was one of the *Western Liquid Asphalt* cases transferred, pursuant to 28 U. S. C. § 1407, [\*\*\*10] to the District Court for the Northern District of California for coordinated pretrial proceedings.<sup>4</sup> The defendants thereafter moved for summary judgment in favor of Sully-Miller, against which Copp had alleged only violations arising from conduct in the asphaltic concrete market. The motion also sought to limit the issues as to the other defendants to those involving liquid asphalt.

<sup>1a</sup> Respondents are collectively referred to hereinafter as Copp.

<sup>2</sup> Although Industrial's Nevada hot plant is sufficiently close to the California and Arizona borders to allow sales and deliveries to those States, Industrial has disavowed such sales, without contradiction. App. 117.

<sup>3</sup> 15 U. S. C. § 15.

<sup>4</sup> In re Western Liquid Asphalt, 303 F.Supp. 1053 (JPML 1969); In re Western Liquid Asphalt, 309 F.Supp. 157 (JPML 1970). As explained *infra*, the case here concerns only asphaltic concrete, not liquid asphalt.

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The District Court ordered full discovery as to jurisdiction over Copp's asphaltic concrete claims. At the conclusion of discovery, Copp's jurisdictional showing rested solely on the fact that some of the streets and roads in the Los Angeles area are segments of the federal interstate highway system, and on a stipulation that a greater than *de minimis* amount of asphaltic concrete [\*\*\*\*11] is used in their construction and repair. The District Court thereupon entered an order dismissing all claims against Sully-Miller and those claims against the other defendants involving the marketing of asphaltic concrete.

In its opinion accompanying this order the court explicitly discussed only the jurisdictional requirements of the [\*\*397] Sherman Act.<sup>5</sup> On the facts presented to it, the court found that asphaltic concrete is made wholly from components produced and purchased intrastate and that [\*192] the product's market is exclusively and necessarily local. Because of these factors, the court concluded that the [\*\*\*385] alleged restraints of trade in asphaltic concrete could not be deemed within the flow of interstate commerce, despite use of the product in interstate highways. Moreover, Copp had failed to show, either by deduction from the evidence or by the evidence itself, that the alleged restraints as to asphaltic concrete would affect any interstate market. It had neither shown a necessary or probable adverse consequence to the construction of interstate highways and hence to the flow of commerce, nor had it suggested or supported a theory by which restraints [\*\*\*12] on local trade in asphaltic concrete affect the interstate liquid asphalt market. The court held that it lacked jurisdiction of Copp's asphaltic concrete claims under the Sherman Act and therefore that Copp also had failed to support jurisdiction under the Robinson-Patman and Clayton Acts.

On Copp's interlocutory appeal, [28 U. S. C. § 1292 \(b\)](#), the Ninth Circuit reversed, holding as to the Sherman Act claims "that the production of asphalt for use in interstate highways rendered the producers 'instrumentalities' of interstate commerce and placed them 'in' that commerce as a matter of law." [487 F.2d, at 204](#). Having so concluded, the court held that jurisdiction properly attached to Copp's Clayton and Robinson-Patman Act claims as well, [\*\*\*13] since those Acts were intended to supplement the purpose and effect of the Sherman Act. [\*Id. at 205-206.\*](#)<sup>6</sup>

We granted certiorari, despite the interlocutory character of the Ninth Circuit's judgment, because of the importance of the issues both to this litigation and to [\*193] proper interpretation of the jurisdictional reach of the antitrust laws, and because of ostensible conflicts with decisions of other circuits.<sup>7</sup> We limited the grant, however, to the questions arising under the Clayton and Robinson-Patman Acts.<sup>8</sup> [415 U.S. 988 \(1974\).](#)

[\*\*\*14] II

The text of each of the statutory provisions involved here is set forth in the margin.<sup>9</sup> In brief, § 2 (a) of the [\*194] [\*\*\*386] Robinson-Patman [\*\*398] Act forbids "any person engaged in commerce, in the course of such

<sup>5</sup> 1972 CCH Trade Cases para. 74,013.

The court held the asphalt oil claims against the oil companies and Industrial within its jurisdiction because of the interstate character of that market. That ruling is not before us.

<sup>6</sup> The court reserved the question of summary judgment in favor of defendant Sully-Miller, holding that question not properly before it under [Fed. Rule Civ. Proc. 54 \(b\)](#).

<sup>7</sup> [28 U. S. C. § 1254 \(1\)](#). See [Hawaii v. Standard Oil Co. of California, 405 U.S. 251 \(1972\)](#).

<sup>8</sup> Because of our limited grant and because of the Ninth Circuit's reservation of judgment as to Sully-Miller, see n. 6, *supra*, Union Oil and Industrial are the only defendants who have participated in argument here.

<sup>9</sup> Robinson-Patman Act, § 2 (a), Act of June 19, 1936, c. 592, 49 Stat. 1526, [15 U. S. C. § 13 \(a\)](#):

**HN1** [↑] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the

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commerce" to discriminate in price "where either or any of the purchases involved in such discrimination are in commerce" and where the discrimination has substantial anticompetitive effects "in any line of commerce." [Section 3](#) of the Clayton Act makes it unlawful "for any person engaged in commerce, in the course of such commerce" to make tie-in sales or enter exclusive-dealing arrangements, where the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." [Section 7](#) of the Clayton Act forbids certain acquisitions by a corporation "engaged in commerce" of the assets or stock "of another corporation engaged also in commerce," where the effect may be substantially to lessen competition "in any line of commerce in any section of the country."

[\*\*\*\*15] [LEdHN\[2\]](#) [2]The explicit reach of these provisions extends only to persons and activities that are themselves "in commerce," the term "commerce" being defined in [§ 1](#) of the Clayton Act, insofar as relevant here, as "trade or commerce among the several States and with foreign nations . . ." [15 U. S. C. § 12](#). This "in commerce" language differs distinctly from that of [§ 1](#) of the Sherman Act, which includes within its scope all prohibited conduct "in restraint of trade or commerce among the several States, or with foreign nations . . ." The jurisdictional reach of [§ 1](#) thus is keyed directly to effects on interstate markets and the interstate flow of goods. Moreover, our cases have recognized that in enacting [§ 1](#) Congress "wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . ." [\*195] [United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 558 \(1944\)](#). Consistently with this purpose and with the plain thrust of the statutory language, the Court has held that, however local its immediate object, [\*\*\*\*16] a "contract, combination . . . or conspiracy" nonetheless may constitute a restraint within the meaning of [§ 1](#) if it substantially and adversely affects interstate commerce. E. g., [Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 234 \(1948\)](#). "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." [United States v. Women's Sportswear Mfrs. Assn., 336 U.S. 460, 464 \(1949\)](#).

[LEdHN\[3\]](#) [3] [LEdHN\[4\]](#) [4]In contrast to [§ 1](#), [HN4](#) the distinct "in commerce" language of the Clayton and Robinson-Patman Act provisions with which we are concerned here appears to denote only persons or activities within the flow of interstate commerce -- the practical, economic continuity in the generation of goods and services for [\*\*\*387] interstate markets and their transport and distribution to the consumer. If this is so, the jurisdictional requirements of these provisions cannot be satisfied merely by showing that allegedly anticompetitive acquisitions [\*\*\*\*17] and activities affect commerce. Unless it appears (i) that Sully-Miller engages in interstate commercial activities ([§ 7](#)), (ii) that Industrial's alleged exclusive-dealing arrangements and discriminatory sales occur in the course of its interstate activities ([§§ 2 \(a\)](#) and [3](#)), and (iii) that at least one of Industrial's allegedly discriminatory sales was made in interstate commerce ([§ 2 \(a\)](#)), Copp's claims must fail.

purchases involved in such discrimination are in commerce . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . ."

Clayton Act, Act of Oct. 15, 1914, c. 323, 38 Stat. 730, as amended:

[Section 3 \(15 U. S. C. § 14\)](#):

[HN2](#) "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

[Section 7 \(15 U. S. C. § 18\)](#):

[HN3](#) "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly . . ."

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Copp argues, and the Court of Appeals for the Ninth Circuit agreed, that [\*\*399] it had made exactly this sort of "in commerce" showing. Copp does not contend that Industrial and Sully-Miller in fact make interstate asphaltic concrete sales or are otherwise directly involved in national [\*196] markets. Cf. [United States v. Philadelphia National Bank, 374 U.S. 321, 336 n. 12 \(1963\)](#). Nor does it contend that the local market in asphaltic concrete is an integral part of the interstate market in other component commodities or products. Instead, Copp's "in commerce" argument turns entirely on the use of asphaltic concrete in the construction of interstate highways.

In support of this argument, Copp relies primarily on cases decided [\*\*\*18] under the Fair Labor Standards Act.<sup>10</sup> In the first of these, [Overstreet v. North Shore Corp., 318 U.S. 125 \(1943\)](#), the Court held that because interstate roads and railroads are indispensable instrumentalities of interstate commerce, employees engaged in the construction or repair of such roads are employees "in commerce" to whom, by its terms, the Fair Labor Standards Act extends. Subsequently in [Alstate Construction Co. v. Durkin, 345 U.S. 13 \(1953\)](#), the Court held that since interstate highways are instrumentalities of commerce, employees engaged in the manufacture of materials used in their construction are properly deemed to be engaged "in the production of goods for commerce," within the meaning of that phrase in the Fair Labor Standards Act. Copp reasons that since the connection between manufacture of road materials and interstate commerce was enough for application of the Fair Labor Standards Act, it also should be sufficient to warrant invocation of the Clayton and Robinson-Patman Act provisions against sellers and sales of such materials.

[\*\*\*19] But we are concerned in this case with significantly different statutes. As in *Overstreet* and *Alstate*, there is no question of Congress' power under the [Commerce Clause](#) to include otherwise ostensibly local activities within the reach of federal economic regulation, when [\*197] such activities sufficiently implicate interstate commerce.<sup>11</sup> The question, rather, is how far Congress intended to extend its mandate under the Clayton and Robinson-Patman [\*\*\*388] Acts.<sup>12</sup> The answer depends on the statutory language, read in light of its purposes and legislative history. See [FTC v. Bunte Bros., 312 U.S. 349 \(1941\)](#).

[\*\*\*20] [LEdHN/5](#) [5]Congress has deemed interstate highways critical to the national economy and has authorized extensive federal participation in their financing and regulation. Nothing, however, in the Federal-Aid Highway Act<sup>13</sup> or other legislation evinces an intention to apply the full range of antitrust laws to persons who, as part of their local business, supply materials used in construction of local segments of interstate roads. Nor does the fact that interstate highways are instrumentalities of commerce somehow [\*\*400] render the suppliers of materials instrumentalities of commerce as well, in the sense used in *Overstreet*. No different conclusion can be drawn from *Alstate*. The statute involved there explicitly reached persons employed "in the production of goods for commerce." Congress could and, according to the Court in *Alstate*, did find that the federal concerns embodied in the Fair Labor Standards Act required its application to employees producing [\*198] materials for use in interstate highways. But neither this nor the Court's holding in *Alstate* places such employees, or the sellers [\*\*\*21] and sales of such materials, "in commerce" as a matter of law for purposes of the Clayton and Robinson-Patman Acts.

[LEdHN/6A](#) [6A] [6A]Copp's "in commerce" argument rests essentially on a purely formal "nexus" to commerce: the highways are instrumentalities of interstate commerce; therefore any conduct of petitioners with respect to an ingredient of a highway is *per se* "in commerce." Copp thus would have us expand the concept of the flow of

<sup>10</sup> 52 Stat. 1060, as amended, [29 U. S. C. § 201 et seq.](#)

<sup>11</sup> E. g., [Heart of Atlanta Motel v. United States, 379 U.S. 241, 249-258 \(1964\)](#).

<sup>12</sup> The jurisdictional inquiry under general prohibitions like these Acts and [§ 1](#) of the Sherman Act, turning as it does on the circumstances presented in each case and requiring a particularized judicial determination, differs significantly from that required when Congress itself has defined the specific persons and activities that affect commerce and therefore require federal regulation. Compare [United States v. Yellow Cab Co., 332 U.S. 218, 232-233 \(1947\)](#), with, e. g., [Perez v. United States, 402 U.S. 146 \(1971\)](#); [Maryland v. Wirtz, 392 U.S. 183 \(1968\)](#); and [Katzenbach v. McClung, 379 U.S. 294 \(1964\)](#).

<sup>13</sup> [23 U. S. C. § 101 et seq.](#)

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commerce by incorporating categories of activities that are perceptibly connected to its instrumentalities. But whatever merit this categorical inclusion-and-exclusion approach may have when dealing with the language and purposes of other regulatory enactments, it does not carry over to the context of the Robinson-Patman and Clayton Acts. The chain of connection has no logical endpoint. The universe of arguably included activities would be broad [\*\*\*\*22] and its limits nebulous in the extreme. See *Alstate Construction Co. v. Durkin, supra, at 17-18* (DOUGLAS, J., dissenting). More importantly, to the extent that those limits could be defined at all, the definition would in no way be anchored in the economic realities of interstate markets, the intensely practical concerns that underlie the purposes of the antitrust laws. See *United States v. Yellow Cab Co., 332 U.S. 218, 231 (1947)*.

LEdHN[1B] [↑] [1B] LEdHN[6B] [↑] [6B] In short, assuming, *arguendo*, [\*\*\*389] that the facially narrow language of the Clayton and Robinson-Patman Acts was intended to denote something more than the relatively restrictive flow-of-commerce concept, we think the nexus approach would be an irrational way to proceed. The justification for an expansive interpretation of the "in commerce" language, if such an interpretation is viable at all, must rest on a congressional intent that the Acts [\*199] reach all practices, even those of local character, harmful to the national marketplace. [\*\*\*23] This justification, however, would require courts to look to practical consequences, not to apparent and perhaps nominal connections between commerce and activities that may have no significant economic effect on interstate markets. We hold, therefore, that Sully-Miller's and Industrial's sales to interstate highway contractors are not sales "in commerce" as a matter of law within the jurisdictional ambit of Robinson-Patman Act § 2 (a) and Clayton Act §§ 3 and 7.

### III

LEdHN[6C] [↑] [6C] Our rejection of the "nexus to commerce" theory requires that the Ninth Circuit's judgment be reversed. Copp also advances, somewhat obliquely, a second theory to support that judgment. It contends that, despite the facially narrow "in commerce" language of the Robinson-Patman and Clayton Act provisions, Congress intended those provisions to manifest the full degree of its commerce power. Therefore, it is argued, the language should not be limited to the flow-of-commerce concept defined by this Court and other courts, but rather should be held to extend, as does § 1 of the Sherman Act, to all persons and activities that have a substantial [\*\*\*24] effect on interstate commerce. We find this theory equally unavailing on the record here.

#### A

LEdHN[7] [↑] [7] As to § 2 (a) of the Robinson-Patman Act at least, the extraordinarily [\*\*401] complex legislative history fails to support Copp's argument. When the Patman bill was passed by the House, it contained, in addition to the present narrow language of § 2 (a), the following provision:

"[It] shall also be unlawful for any person, *whether in commerce or not*, either directly or indirectly, to [\*200] discriminate in price between different purchasers . . . where . . . such discrimination may substantially lessen competition . . ." <sup>14</sup>

The Conference Committee, however, deleted this "effects on commerce" provision, leaving only the "in commerce" language of § 2 (a). <sup>15</sup> Whether Congress took this action because it wanted to reach only price discrimination in interstate markets or because of its then understanding of the reach of the commerce power, <sup>16</sup> [\*\*\*26] its action strongly militates against a judgment that Congress intended a result that it expressly declined to enact. Moreover, even if [\*\*\*\*25] the legislative history were ambiguous, the courts in nearly four decades of litigation [\*\*\*390] have interpreted the statute in a manner directly contrary to an "effects on commerce" approach. With almost perfect consistency, the Courts of Appeals have read the language requiring that "either or any of the purchases involved in

<sup>14</sup> H. R. 8442, 74th Cong., 2d Sess. (1936) (emphasis added).

<sup>15</sup> H. R. Conf. Rep. No. 2951, 74th Cong., 2d Sess. (1936).

<sup>16</sup> Compare F. Rowe, Price Discrimination under the Robinson-Patman Act 77-83 (1962) with Note, Restraint of Trade -- Robinson-Patman Act, 86 Harv. L. Rev. 765, 770-772 (1973).

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such discrimination [be] in commerce" to mean that § 2 (a) applies only where "at least one of the two transactions which, when compared, generate a discrimination . . . [crosses] a state line."<sup>17</sup> In the face of this longstanding [\*201] interpretation and the continued congressional silence, the legislative history does not warrant our extending § 2 (a) beyond its clear language to reach a multitude of local activities that hitherto have been left to state and local regulation. See *FTC v. Bunte Bros.*, 312 U.S. 349 (1941).

[\*\*\*27] B

LEdHN[8] [8]With respect to §§ 3 and 7 of the Clayton Act, the situation is not so clear. Both provisions were intended to complement the Sherman Act and to facilitate achievement of its purposes by reaching, in their incipiency, acts and practices that promise, in their full growth, to impair competition in interstate commerce. *E. g.*, *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922). The United States argues in its *amicus* brief that, given this purpose, the "in commerce" [\*202] language of §§ 3 and 7 should be seen as no more than a historical anomaly. When these sections were originally enacted, it was thought that Congress' Commerce Clause power reached only those subjects within the flow of commerce, then defined rather narrowly by the Court. Thus, it is argued, the "in commerce" language was thought to be coextensive with the reach of the Commerce Clause and to bring within the ambit of the Act all activities over which Congress could exercise its constitutional [\*\*\*28] authority. Since passage of the Act, this Court's decisions [\*202] have read Congress' power under the Commerce Clause more expansively, extending it beyond the flow of commerce to all activities having a substantial effect on interstate commerce. See *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S., at 229-233. The United States concludes that the scope of the Clayton Act, like that of the Sherman Act, should be held to have expanded correspondingly, both because of Congress' clear intention to reach as far as it could and because [\*\*\*391] Congress' purpose to foster competition in interstate commerce could not otherwise wholly be achieved.

LEdHN[9] [9]This argument from the history and practical purposes of the Clayton Act is neither without force nor without at least a measure of support.<sup>18</sup> But whether it would justify radical expansion of the Clayton Act's scope beyond that which the statutory language defines -- expansion, moreover, by judicial decision rather than amendatory legislation -- is doubtful. In any event, this case does not present an occasion to decide [\*\*\*29] the question. Even if the Clayton Act were held to extend to acquisitions and sales having substantial effects on commerce, a court cannot presume that such effects exist. The plaintiff must allege and prove that apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods in order to invoke federal antitrust prohibitions. See *United States v. Yellow Cab Co.*, 332 U.S., at 230-234.

LEdHN[10] [10] LEdHN[11A] [11A]Copp was allowed full discovery as to all interstate commerce issues. It relied primarily on the nexus theory rejected above, and presented no evidence of effect on interstate commerce. Instead it argued merely that such effects could be presumed from the use of asphaltic concrete in interstate highways. [\*30] The District Court concluded, [\*203] on the basis of the record before it, that petitioners' alleged antitrust violations had no "substantial impact on interstate commerce."<sup>19</sup> There may be circumstances

<sup>17</sup> Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4, 9 (CA5), cert. denied, 396 U.S. 901 (1969); Belliston v. Texaco, Inc., 455 F.2d 175, 178 (CA10), cert. denied, 408 U.S. 928 (1972).

No decision of this Court implies any contrary approach. In *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954), the plaintiff sold bread locally, in competition with Mead's, a firm with bakeries in several States. Moore alleged that Mead's sold bread in his town at a price lower than that which it charged for bread delivered from its in-state plant to customers in an adjoining State. The Tenth Circuit held that Mead's activities were essentially local, and that if § 2 (a) applied to them it would exceed Congress' commerce power. The Court (DOUGLAS, J.) unanimously reversed, stating that Congress clearly has power to reach the local activities of a firm that finances its predatory practices through multistate operations. This language, however, spoke to the commerce power rather than to jurisdiction under § 2 (a). In fact, Mead's did have interstate sales and its price discrimination thus fell within the literal language of the statute.

<sup>18</sup> See *Standard Oil Co. v. United States*, 337 U.S. 293, 314-315 (1949).

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[\*\*403] in which activities, like those of Sully-Miller and Industrial, would have such effects on commerce. On the record in this case, however, the conclusion of the District Court that no such circumstances existed here cannot be considered erroneous. This being so, the "effects on commerce" theory, even if legally correct, must fail for want of proof.

[\*\*\*31] The judgment of the Court of Appeals is

*Reversed.*

**Concur by:** MARSHALL

## Concur

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MR. JUSTICE MARSHALL, concurring.

I join in the judgment and opinion of the Court, with one qualification. Part III-B of the opinion correctly notes that we have no occasion today [\*\*\*392] to pass upon the [\*204] applicability of the Clayton Act to activities having a substantial effect on commerce although not "in commerce," since no such effects are present in this case. For the same reason, we ought not to characterize the construction offered by the United States as a "radical expansion of the Clayton Act's scope." As the Court itself says, "the situation is not so clear." Until the issue is properly presented by a case requiring its resolution, I would express no opinion on it.

**Dissent by:** DOUGLAS

## Dissent

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MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN joins, dissenting.

I suppose it would be conceded that if one person or company acquired all the asphaltic concrete plants in the United States, there might well be a violation of § 2 of the Sherman Act, which makes unlawful a monopoly of "any part of the trade or commerce among the several States." 26 Stat. 209, as amended, 15 U. S. C. § 2. [\*\*\*32] Moreover, even though their sales were all intrastate, they would come within the ban of § 1 of the Sherman Act, if they substantially affected interstate commerce. For in the Sherman Act, we held, "Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . ." United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 558 (1944).

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<sup>19</sup> LEdHN[11B] [11B]

1972 CCH Trade Cases para. 74-013, p. 92,208. Copp makes no specific objection here to the District Court's use of summary judgment procedure, see Brief for Respondents 11-12, nor to the form of the judgment. Moreover, there is no indication that Copp was foreclosed from presenting all available evidence concerning the interstate commerce issues, at least as to §§ 3 and 7. Cf. McBeath v. Inter-American Citizens for Decency Comm., 374 F.2d 359, 363 (CA5 1967). In any event, assuming that the interstate commerce requirements of §§ 3 and 7 are properly deemed issues of subject-matter jurisdiction, rather than simply necessary elements of the federal claims, cf., e. g., United States v. Employing Plasterers Assn., 347 U.S. 186 (1954); Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948); 5 J. Moore, Federal Practice para. 38.36 [2.-2], p. 299 (2d ed. 1974), there is, as the dissenting opinion by MR. JUSTICE DOUGLAS notes, an identity between the "jurisdictional" issues and certain issues on the merits, and hence, under Land v. Dollar, 330 U.S. 731 (1947), no objection to reserving the jurisdictional issues until a hearing on the merits. By the same token, however, there is no objection to use, in appropriate cases, of summary judgment procedure to determine whether there is a genuine issue of material fact as to the interstate commerce elements.

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While the Clayton Act modified the Sherman Act by restricting possible application of the antitrust laws to labor unions,<sup>1</sup> and by expanding the scope of those laws to cover the aggregation of economic power through stock acquisitions,<sup>2</sup> there is not a word to suggest that [\*205] when Congress defined the term "commerce" it desired to contract the scope of that term.<sup>3</sup> [\*\*\*\*35] The legislative history does not furnish even a bare suggestion or inference that "commerce" under the Clayton Act meant something [\*\*404] less than it meant under the Sherman Act. The Clayton Act became the law in 1914; and prior to that time the Court had held over and over again that acts or conduct wholly intrastate might be "in restraint of trade or commerce" as that phrase was used [\*\*\*\*33] in the Sherman Act. *Swift & Co. v. United States*, 196 U.S. 375, 397 (1905); *United States v. Patten*, 226 U.S. 525, 541-543 [\*\*\*393] (1913). These holdings were reflected in the "affecting commerce" standard of the *Shreveport Rate Cases*, *Houston & Texas R. Co. v. United States*, 234 U.S. 342, 353-355 (1914). The primary definition of commerce, for Clayton Act purposes, is "trade or commerce among the several States."<sup>4</sup> In the years just preceding passage of [\*206] that Act, this Court had held on several occasions that the phrase "among the several States" embraces all commerce save that "which is confined to a single State and does not affect other States." *Second Employers' Liability Cases*, 223 U.S. 1, 46-47 (1912) (emphasis added); *The Minnesota Rate Cases*, 230 U.S. 352, 398-399 (1913). In applying the Clayton Act prohibitions to persons and corporations "engaged in commerce [among the several States]," Congress thus may reasonably be said to have intended to reach persons or corporations whose activities, while wholly intrastate in nature, affect other States through [\*\*\*\*34] their effects on interstate commerce.

The holding in *Transamerica Corp. v. Board of Governors*, 206 F.2d 163, 166 (CA3 1953), that Congress, when it enacted the Clayton Act, desired "to exercise its power under the *commerce clause of the Constitution* to the fullest extent," has nothing to rebut it. Congress apparently was not as timorous as the present Court in moving against centers of economic power and practices [\*\*\*\*36] that aggrandize it. Heretofore that is the way we have read the Clayton Act: that Act was intended to complement the Sherman Act by regulating in their incipency actions which might irreparably damage competition before reaching the level of actual restraint proscribed by the Sherman Act, and, in the absence of some indication of legislative intent to the contrary, we should not lightly assume that Congress intended to undercut that complementary function by circumscribing the jurisdictional reach of the Clayton Act more narrowly than that of the [\*207] Sherman Act.<sup>5</sup> See *United States v. \*\*\*3941 [\*\*405] Penn-Olin*

<sup>1</sup> 38 Stat. 731, *15 U. S. C. § 17*. See H. R. Rep. No. 627, 63d Cong., 2d Sess., 14-16 (1914); *United States v. Hutcheson*, 312 U.S. 219 (1941).

<sup>2</sup> *15 U. S. C. § 18*; H. R. Rep. No. 627, *supra*, at 17. See also *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 170-171 (1964); *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957).

<sup>3</sup> The definition of "antitrust laws" as used in the Clayton Act includes the Sherman Act. *15 U. S. C. § 12*. The definition of "commerce" was actually "broadened so as to include trade and commerce between any insular possessions or other places under the jurisdiction of the United States, which at present do not come within the scope of the Sherman antitrust law or other laws relating to trusts." H. R. Rep. No. 627, *supra*, at 7.

The Sherman Act declares illegal every contract, combination, or conspiracy "in restraint of trade or commerce among the several States . . ." *15 U. S. C. § 1*. It also makes a misdemeanor a monopoly of "any part of the trade or commerce among the several States . . ." *15 U. S. C. § 2*.

<sup>4</sup> "Commerce" as used in the Clayton Act is defined in *§ 1* as follows:

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States." *15 U. S. C. § 12*.

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Chemical Co., 378 U.S. 158, 170-171 (1964); United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 589, 597 (1957); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 355-356 (1922); S. Rep. No. 698, 63d Cong., 2d Sess., 1 (1914). And that is the way in which we assumed that the Celler-Kefauver Act in 1950, 64 Stat. 1125, 15 U. S. C. § 18, addressed itself to the problem. For we said in Brown Shoe Co. v. United States, 370 U.S. 294, 315-323 (1962), [\*\*\*\*37] that the legislative history showed congressional concern over the "desirability of retaining 'local control' over industry and the protection of small businesses." Id., at 315-316. One dramatic way of leveling local business is pulling it into a vast interstate business regime of the nature alleged in this complaint.

[\*\*\*\*38] [\*208] !

I agree with the court below that jurisdiction may be sustained on an "in commerce" theory.<sup>6</sup> Clayton Act §§ 3 and 7 apply to persons or corporations "engaged in commerce"; we have held, in a line of cases arising under the Fair Labor Standards Act (FLSA), 52 Stat. 1060, as amended, 29 U. S. C. § 201 et seq., that persons or enterprises engaged in building or repairing toll roads, bridges, and canal locks are "engaged in commerce" and therefore within the reach of the commerce power, by virtue of their relationship to indispensable instrumentalities of our system of interstate commerce. Mitchell v. Vollmer & Co., 349 U.S. 427 (1955); Fitzgerald Co. v. Pedersen, 324 U.S. 720 (1945); Overstreet v. North Shore Corp., 318 U.S. 125 (1943). It is true, as the majority notes, that the FLSA and the antitrust laws are different statutes, but the critical difference between the statutes arises in an area which in no way weakens the applicability of the FLSA cases to the present inquiry.

[\*\*\*\*39] In the FLSA and in many other regulatory enactments, Congress itself has determined that certain classes of activities have a sufficient impact upon interstate commerce to warrant regulation of the entire class, regardless of whether an individual instance of the activity in question can be shown to be in or to affect commerce. See generally Perez v. United States, 402 U.S. 146, 152-154 (1971); United States v. Darby, 312 U.S. 100, 119-121, I\*2091 (1941). The FLSA represents such a congressional determination with respect to the payment of wages below a specified level and with respect to employment exceeding a specified number of hours [\*\*\*395] per week (under specified conditions). 29 U. S. C. §§ 206, 207. Once either of these practices is found to exist with respect to an employer or employee covered by the FLSA, the regulatory provisions of that Act are called into play without further inquiry into the possible effect of the individual employer's practices on interstate commerce.

[\*\*406] In the antitrust laws, Congress has provided a different sort of treatment. The Sherman Act broadly prohibits [\*\*\*\*40] practices in restraint of trade or commerce, and the Clayton and Robinson-Patman Acts bar price discrimination, tie-ins, and corporate stock or assets acquisitions where "the effect of" such practices "may be substantially to lessen competition or tend to create a monopoly in any line of commerce." The finding that a person or corporation is covered by these Acts does not trigger automatic application of the regulatory prohibition; instead,

<sup>5</sup> Indeed, we would have to sit as a Committee of Revision over Congress, shaping the law to fit our prejudices against antitrust regulations, to hold that "in commerce" as used in the Clayton Act was intended to provide less comprehensive coverage than the language of the Sherman Act. Prior to passage of the Clayton Act, labor union practices had been held by this Court to affect commerce and thus to fall within the reach of the Sherman Act, despite the fact that the union activities could not be regarded as being in the flow of commerce. Loewe v. Lawlor, 208 U.S. 274, 300-301 (1908). See also Teamsters Local 167 v. United States, 291 U.S. 293, 297 (1934); Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); United States v. Employing Plasterers Assn., 347 U.S. 186, 189 (1954). If the Court is right today in saying that "in commerce" as used in the Clayton Act is to be read more restrictively than the Sherman Act, then those who drafted the Clayton Act (including Louis D. Brandeis) to protect labor were needlessly concerned -- no express exemption of labor would have been necessary, since the "in commerce" language of the Clayton Act (if narrowly read) would not have supported judicial attempts to reach labor activities on an "affecting commerce" theory. The drafters obviously thought otherwise.

<sup>6</sup> The decision of the Court of Appeals on the Sherman Act issue, which remains intact by virtue of our limited grant of certiorari, held that petitioners and their alleged activities were sufficiently "in commerce" to support Sherman Act jurisdiction. 487 F.2d 202, 205 (1973). The majority now holds, however, that petitioners and their alleged activities were *not* sufficiently "in commerce" to support Clayton and Robinson-Patman Act coverage. In light of the latter holding, it is difficult to imagine the reception that Copp's Sherman Act claims will receive on remand.

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a court must go on to make an individualized determination of the actual or potential impact of that particular person's or corporation's activities on competition or on interstate commerce.<sup>7</sup>

[\*\*\*\*41] It is in this respect that the antitrust laws differ from the FLSA and other regulatory enactments. The present case, however, does not turn on that difference, because it does not raise the issue of whether the actions of the [\*210] named defendants had a sufficiently adverse effect on interstate commerce to make out a violation of the antitrust laws; that issue goes to the merits of Copp's claims, and cannot properly be reached at this stage. Instead, the case as now presented raises the threshold issue of whether the named defendants are within the jurisdictional reach of the antitrust laws, and our inquiry on that point does not differ significantly from our inquiry under the FLSA or any other regulatory statute. The FLSA covers employers of employees "engaged in commerce or in the production of goods for commerce"; the Clayton Act and Robinson-Patman Act provisions at issue here cover persons or corporations "engaged in commerce." We have held, in FLSA and Federal Employers' Liability Act (FELA) cases, that Congress' use of the phrase "engaged in commerce" is sufficiently broad to reach employees engaged in repairing highways or in carrying bolts to be used for bridge [\*\*\*\*42] repairs, [Overstreet v. North Shore Corp., supra](#); in light of the purposes of the Clayton Act, I see no reason why the phrase "engaged in commerce" as used in that Act should not be read equally broadly, and should not thereby be deemed sufficient to reach corporations engaged in building highways or in producing and supplying the very materials used in such construction. As the Court of Appeals aptly noted: "Regulation of business practices through the antitrust laws . . . may justifiably reach further than some other types of regulation because the antitrust laws are concerned directly with aiding the flow of commerce." [487 F.2d 202, 204 \(1973\)](#).

[\*\*396] II

An alternative ground for affirming the judgment below, likewise rejected by the majority, is that the Clayton Act's "engaged in commerce" jurisdictional language is sufficiently broad to encompass corporations which are [\*211] not in the flow of commerce itself but which, through their activities, affect commerce. For the reasons stated in the introductory portion of this opinion, I, for one, am persuaded that Clayton Act §§ 3 and 7 are as broad as the Sherman Act in this respect. [\*\*\*\*43] The majority expressly disclaims any intent to resolve that issue on the ground that Copp has failed to produce any "proof" of such effects, and [\*\*407] is therefore not entitled to continue this suit even under a broad reading of the jurisdictional phrase; in my view, the burden of proof which the Court thereby imposes upon Copp is one which may not properly be imposed at this stage of the litigation.

The complaint alleges the acquisition by Gulf of named companies with the purpose and effect of creating a monopoly under the Sherman Act and likewise substantially lessening competition and creating a monopoly in violation of § 7 of the Clayton Act. Like allegations are made respecting certain acquisitions of Union Oil. Allegations are made that the petitioners divide the geographic areas of competition for the purpose of eliminating competition. The petitioners are alleged to indulge in tie-in practices, whereby base rock material would be sold substantially more cheaply to contractors who buy their asphaltic concrete from the named petitioners. The complaint alleges that the petitioners have maintained high prices in areas where there is no competition and that where competition [\*\*\*\*44] exists, they sell their products at artificially low prices -- below cost -- and that that is the practice of petitioners where they compete with Copp. Thus, violations of the Sherman Act, Clayton Act, and Robinson-Patman Act are alleged.

There has been no trial. The case was disposed of on pleadings and affidavits. The District Judge ordered discovery so that all the parties could "develop the facts bearing upon the question of whether the alleged conspiracy [\*212] was one affecting interstate commerce." At the end of the time allotted for discovery, the District Court ruled that "the local activities of the defendants with regard to asphaltic concrete did not have a substantial

<sup>7</sup> Of course, in a limited range of Sherman Act cases, this Court has held that certain practices are *per se* violations of the antitrust laws; that is to say, these practices are conclusively presumed to be illegal without the need for any particularized inquiry into their effects. See generally *White Motor Co. v. United States*, [372 U.S. 253, 259-262 \(1963\)](#), and cases collected therein. These cases may be viewed as limited exceptions to the individualized approach described in the text above.

I FJÁMEÐA Í ÆRGGLÁÍ ÁUÐAÐUGA Æ LÁGSEÐA ÆGA Á ÞEÐU LÁFJÍ I ÁMÆÐASÓYÓÐA Í ÞEÐI

impact on interstate commerce," and as respects one of the defendants (who is not a party in the case now before us) granted its motion for summary judgment.<sup>8</sup>

[\*\*\*\*45] The Court of Appeals speaking [\*\*\*397] through Judge Alfred T. Goodwin said -- properly, I think:

"Nor can we accept defendants' argument that the plaintiffs must show not only that the parties and sales are 'in' commerce but must show that competition was injured before the court has jurisdiction. This is the result of confusing the substantive with the jurisdictional requirements of the antitrust laws. It is not necessary for a plaintiff to prove his whole case in order to give the courts jurisdiction to hear it." [487 F.2d, at 206](#).

The allegations and the complaint plainly gave the District Court jurisdiction.<sup>9</sup> [\*\*\*\*46] What a trial on the merits might [\*213] [\*213] [\*213] produce no one knows. The District Judge said: "I conclude that the local activities of the defendants with regard to asphaltic concrete did not have a substantial impact on interstate commerce." That could not possibly be said until at least the plaintiffs had offered their proof; yet, as the Court of Appeals said, the plaintiffs need not prove, on a motion that goes to the jurisdiction of the court, the merits of their case in order to obtain an opportunity to try it.<sup>10</sup>

<sup>8</sup> [Federal Rule Civ. Proc. 56](#) "deals with the merits" of a claim and if in favor of the defendant is "in bar and not in abatement," 6 J. Moore, Federal Practice para. 56.03, p. 2051 (2d ed. 1974). Lack of jurisdiction of the court is a matter in abatement and thus is not usually appropriate for a summary judgment, which is not a substitute for a motion to dismiss for want of jurisdiction. *Id.*, at 2052-2053.

On the general propriety of discovery orders of this sort, see 4 *id.*, para. 26.56 [6]; but "[there] are cases . . . in which the jurisdictional questions are so intertwined with the merits that the court might prefer to reserve judgment on the jurisdiction until after discovery has been completed." *Id. at 26-191*. See also the discussion in n. 10, *infra*.

<sup>9</sup> The issue of whether there is subject-matter jurisdiction raises the question whether the complaint, on its face, asserts a nonfrivolous claim "arising under" federal law. [Baker v. Carr, 369 U.S. 186, 199-200 \(1962\)](#); [Bell v. Hood, 327 U.S. 678, 682-683 \(1946\)](#). If such a claim is stated, the District Court is then empowered to assume jurisdiction and to determine whether the claim is good or bad, on the basis of a motion to dismiss for failure to state a claim or cause of action. [Romero v. International Terminal Operating Co., 358 U.S. 354, 359 \(1959\)](#); [Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 249 \(1951\)](#). Such a dismissal is on the merits, not for want of jurisdiction. [Bell v. Hood, supra](#).

<sup>10</sup> It is sometimes said that where the district court's jurisdiction is challenged, that court has the power, either on its own motion or on motion of a party, to inquire into the facts as they exist for purposes of resolving the jurisdictional issue. [Land v. Dollar, 330 U.S. 731, 735 n. 4 \(1947\)](#), and cases cited; [Local 336, American Federation of Musicians v. Bonatz, 475 F.2d 433, 437 \(CA3 1973\)](#). On the other hand, if the jurisdictional issue is closely intertwined with or dependent on the merits of the case, the preferred procedure is to proceed to a determination of the case on the merits. [McBeath v. Inter-American Citizens for Decency Comm., 374 F.2d 359, 362-363 \(CA5\)](#), cert. denied, [389 U.S. 896 \(1967\)](#); [Jaconski v. Avisun Corp., 359 F.2d 931, 935-936 \(CA3 1966\)](#).

The cases cited for the proposition that a district court may inquire into jurisdictional facts on a motion to dismiss for want of jurisdiction are cases in which the jurisdictional issue was whether the plaintiff met the amount-in-controversy requirement. That jurisdictional issue is sufficiently independent of the merits of the claim to warrant independent examination, if challenged. Where the jurisdictional issue is more closely linked to the merits, disposition of the jurisdictional issue on motion becomes inappropriate. Thus in *Land v. Dollar*, where the complaint alleged that members of the United States Maritime Commission were unlawfully holding shares of Dollar stock under a claim that the stock belonged to the United States, the District Court dismissed on the ground that the suit was against the United States. In affirming a reversal of that dismissal, the Court said: "[Although] as a general rule the District Court would have authority to consider questions of jurisdiction on the basis of affidavits as well as the pleadings, this is the type of case where the question of jurisdiction is dependent on decision of the merits." [330 U.S., at 735](#). This was true because if the plaintiffs prevailed on either of their theories on the merits (that the Commission was without authority to acquire the shares, or that the contract was simply a pledge of the shares rather than an outright transfer),

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## References

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[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 5-7, 111, 119, 142, 143](#)

[15 USCS 13\(a\), 14, 18](#)

US L Ed Digest, Restraints of Trade and Monopolies 21

ALR Digests, Restraints of Trade and Monopolies 11-15

L Ed Index to Annos, Restraints of Trade and Monopolies

ALR Quick Index, Restraints of Trade and Monopolies

Federal Quick Index, Monopolies and Restraints of Trade; Robinson-Patman Act

Annotation References:

Robinson-Patman Act as construed by Supreme Court. [2 L Ed 2d 1737](#).

Construction, by Supreme Court of the United States, of 7 of the Clayton Act ([15 USCS 18](#)), dealing with acquisition by one corporation of stock of another. [14 L Ed 2d 784](#).

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then they would also prevail on the jurisdictional issue. And in the *McBeath* case, *supra*, the Court of Appeals for the Fifth Circuit reversed a pretrial dismissal of a Sherman Act claim on grounds of lack of jurisdiction (for failure to show an effect on interstate commerce). Relying on *Land v. Dollar*, it held that the issue of effects on interstate commerce was so intertwined with the merits of the claim that it was error for the District Court to dismiss without giving the plaintiff a full chance to prove his case on the merits.

In cases such as *United States v. Employing Plasterers Assn.*, 347 U.S. 186 (1954); *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948); and *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), this Court has reviewed "interstate commerce" issues in the context of dismissals of antitrust suits prior to trial on the merits. Those dismissals, however, were based, not upon motions for summary judgment or for dismissal for want of jurisdiction, but rather upon motions to dismiss for failure to state a claim. In such cases, of course, the allegations of the complaint must be taken as true. *Id.*, at 224. In the case now before us, the District Court clearly went beyond the face of the complaint and required respondents to produce *proof* of interstate effects.



## **Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100**

Supreme Court of the United States

Argued November 19, 1974 ; June 2, 1975

No. 73-1256

### **Reporter**

421 U.S. 616 \*; 95 S. Ct. 1830 \*\*; 44 L. Ed. 2d 418 \*\*\*; 1975 U.S. LEXIS 17 \*\*\*\*; 77 Lab. Cas. (CCH) P10,873; 1975-1 Trade Cas. (CCH) P60,341; 89 L.R.R.M. 2401

CONNELL CONSTRUCTION CO., INC. v. PLUMBERS & STEAMFITTERS LOCAL UNION NO. 100, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

Prior History: [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

### **Core Terms**

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subcontracting, secondary, antitrust, anti trust law, subcontractors, contractor, proviso, nonunion, exemption, picketing, organizing, general contractor, employees, sanctions, remedies, mechanical, provisions, construction industry, labor policy, firms, federal labor, boycotts, jobsite, labor union, hot cargo, organizational, campaign, damages, parties, wages

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Business & Corporate Compliance > ... > Unfair Labor Practices > Employer Violations > Interference With Protected Activities

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

### **HN1[] Labor, Statutory Exemptions**

The Clayton Act, [15 U.S.C.S. § 17](#) and the Norris-La Guardia Act, [29 U.S.C.S. §§ 104, 105](#), and [113](#) declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities,

including secondary picketing and boycotts, from the operation of the antitrust laws. They do not exempt concerted action or agreements between unions and nonlabor parties.

[Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions](#)

[Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption](#)

[Antitrust & Trade Law > Exemptions & Immunities > General Overview](#)

[Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview](#)

## **HN2** **Labor, Nonstatutory Exemptions**

A proper accommodation between the congressional policy favoring collective bargaining under the National Labor Relations Act, [29 U.S.C.S. § 158](#), and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions. The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions.

[Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions](#)

[Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview](#)

[Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions](#)

## **HN3** **Labor, Nonstatutory Exemptions**

Labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions. Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market.

[Antitrust & Trade Law > Procedural Matters > Jurisdiction > Exclusive Jurisdiction](#)

[Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction](#)

[Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption](#)

[Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview](#)

## **HN4** **Jurisdiction, Exclusive Jurisdiction**

The federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws.

[Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview](#)

**HN5** Collective Bargaining & Labor Relations, Unfair Labor Practices

See [29 U.S.C.S. § 158](#).

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

**HN6** Collective Bargaining & Labor Relations, Federal Preemption

Federal law pre-empts state remedies that interfere with federal labor policy or with specific provisions of the National Labor Relations Act, [29 U.S.C.S. § 158](#).

## **Lawyers' Edition Display**

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### **Summary**

The defendant building trades union supported its efforts to organize mechanical subcontractors by picketing, among others, the plaintiff general building contractor. The union's sole objective was to compel the general contractors to agree that in letting subcontracts for mechanical work they would deal only with firms that were parties to the union's current collective-bargaining agreement. The union disclaimed any interest in representing the general contractors' employees. The plaintiff contractor filed suit in a Texas state court to enjoin the picketing as a violation of the state antitrust laws and the union removed the case to the United States District Court for the Northern District of Texas. The contractor then signed the subcontracting agreement under protest and amended its complaint to claim that the agreement violated 1 and 2 of the Sherman Antitrust Act ([15 USCS 1, 2](#)) and was therefore invalid. The contractor sought a declaration to this effect and an injunction against any further efforts to force it to sign such an agreement. The District Court held that the subcontracting agreement was exempt from federal antitrust laws and that federal labor legislation pre-empted the state's antitrust laws ([78 LRRM 3012](#)). The Court of Appeals for the Fifth Circuit affirmed (*483 F2d 1154*).

On certiorari the United States Supreme Court affirmed the ruling on state law pre-emption and reversed on the question of federal antitrust immunity. In an opinion by Powell, J., expressing the view of five members of the court it was held that (1) the agreement was not exempt from the federal antitrust laws and may be the basis of a federal antitrust suit, and (2) the case should be remanded for consideration of the question, not decided by the courts below and not briefed nor fully argued in the Supreme Court, whether the agreement violated the Sherman Act.

Stewart, J., also joined by Brennan and Marshall, JJ., dissented on the ground that Congress did not intend to impose antitrust sanctions for the union's secondary boycott activities.

While joining the dissenting opinion of Stewart, J., Douglas, J., emphasized that the union's conduct was regulated exclusively by federal labor laws, since the plaintiff contractor based its complaint on the ground that the union coerced it into signing the subcontracting agreement.

## **Headnotes**

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MONOPOLIES §46 > union agreement with building contractor -- ceasing doing business with nonunion subcontractors -- applicability of federal antitrust laws -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D]

An agreement, obtained by a building trades union from a general building contractor by picketing the contractor, under which the contractor would subcontract mechanical work at the construction site only to firms that have a current collective bargaining contract with the union is not exempt from the federal antitrust laws and may be the basis of a federal antitrust suit by the contractor where (1) the union used direct restraints on the business market to support its campaign for organizing mechanical subcontractors and the agreements with the contractor and other general contractors indiscriminately excluded nonunion subcontractors from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods; (2) the "most favored nation" clause in a multiemployer bargaining agreement between the union and a mechanical contractor association promised to eliminate competition between association members and any other subcontractor that the union might organize, and in that portion of the market, the restriction on subcontracting would eliminate competition on all subjects covered by the multiemployer agreement, even on subjects unrelated to wages, hours, and working conditions; (3) success in exacting agreements from general contractors would also give the union power to control access to the market for mechanical subcontracting work, enabling the union to create a geographical enclave for local contractors; (4) the union had no interest in representing the contractor and hence the federal policy favoring collective bargaining can offer no shelter for the union's coercive action against the contractor or its campaign to exclude nonunion firms from the subcontracting market; and (5) the agreement between the union and the contractor was outside the context of a collective-bargaining relationship and not restricted to a particular jobsite, but nonetheless obligated the contractor to subcontract work only to firms that have a contract with the union, the agreement between the union and the contractor having a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions.

MONOPOLIES §46 > labor unions -- combinations with nonlabor parties -- > Headnote:

[LEdHN\[2\]](#) [2]

Sections 6 and 20 of the Clayton Act ([15 USCS 17, 29 USCS 52](#)) and the Norris-LaGuardia Act ([29 USCS 104, 105, 113](#)), which statutes declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws, do not exempt concerted action or agreements between unions and nonlabor parties.

MONOPOLIES §46 > labor unions -- nonstatutory exemption -- > Headnote:

[LEdHN\[3\]](#) [3]

A proper accommodation between the congressional policy favoring collective bargaining under the National Labor Relations Act ([29 USCS 151 et seq.](#)) and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions.

MONOPOLIES §46 > labor unions -- scope of exemptions -- > Headnote:

[LEdHN\[4\]](#) [4]

While labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions, the policy does not require that a union have freedom to impose direct restraints on competition among those who employ its members.

MONOPOLIES §46 > labor unions -- scope of statutory and nonstatutory exemptions -- > Headnote:  
[LEdHN\[5\]](#) [5]

While organized labor's statutory exemption from the antitrust laws ([15 USCS 17](#), [29 USCS 52](#)) allows unions to accomplish some restraints by acting unilaterally, the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market.

MONOPOLIES §46 > federal labor policy -- curtailment of competition -- > Headnote:  
[LEdHN\[6\]](#) [6]

Curtailment of competition based on efficiency is neither a goal of federal labor policy nor a necessary effect of the elimination of competition among workers.

MONOPOLIES §5 > federal legislation -- aim -- > Headnote:  
[LEdHN\[7\]](#) [7]

Competition based on efficiency is a positive value that the antitrust laws strive to protect.

MONOPOLIES §46 > building trades union -- organizing subcontractors -- illegality of means -- > Headnote:  
[LEdHN\[8\]](#) [8]

The fact that a building trade union's goal to organize as many subcontractors as possible is legal even though a successful organizing campaign ultimately would reduce the competition that unionized employers face from nonunion firms, does not render the methods of the union chosen to accomplish this goal immune from antitrust actions where the union, by agreement with several contractors, made nonunion subcontractors ineligible to compete for a portion of the available work, and this kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions; the union's method contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust law.

COURTS §278.5 > federal -- power -- labor law questions -- > Headnote:  
[LEdHN\[9\]](#) [9]

Federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws.

421 U.S. 616, \*616; 95 S. Ct. 1830, \*\*1830; 44 L. Ed. 2d 418, \*\*\*418; 1975 U.S. LEXIS 17, \*\*\*\*1

LABOR §116 > MONOPOLIES §46 > NLRA -- construction industry proviso -- scope -- > Headnote:

[LEdHN\[10A\]](#) [10A] [LEdHN\[10B\]](#) [10B] [LEdHN\[10C\]](#) [10C]

The construction industry proviso to 8(e) of the National Labor Relations Act ([29 USCS 158\(e\)](#)) that nothing in subsection (e), dealing with unfair labor practices of labor organizations, shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, does not allow an agreement, not exempt from the federal antitrust laws, between a building trades union and a building contractor that the contractor would subcontract mechanical work at the construction site only to firms that have a current collective bargaining contract with the union; the construction industry proviso does not authorize subcontracting agreements with "stranger" contractors, not limited to any particular jobsite, and its authorization extends only to agreements in the context of collective-bargaining relationship and possibly to common-situs relationships on particular jobsites as well.

LABOR §47 > NLRA -- construction industry proviso -- interpretation -- > Headnote:

[LEdHN\[11\]](#) [11]

The construction industry proviso to 8(e) of the National Labor Relations Act ([29 USCS 158\(e\)](#)) that nothing in subsection (e), dealing with unfair labor practices of labor organizations, shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of works to be done at the site of the construction, must be interpreted in the light of the statutory setting and the circumstances surrounding its enactment.

STATUTES §167.5 > interpretation -- literal meaning -- > Headnote:

[LEdHN\[12\]](#) [12]

A thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.

STATES §38 > union agreement subject to federal antitrust laws -- inapplicability of state antitrust laws -- > Headnote:

[LEdHN\[13\]](#) [13]

Although subject to federal antitrust laws, an agreement between a building trades union and a general building contractor under which the contractor would subcontract mechanical work at the construction site only to firms that have a current collective bargaining contract with the union is not subject to state antitrust laws.

COMMERCE §129 > labor -- federal law -- pre-empting state law -- > Headnote:

[LEdHN\[14\]](#) [14]

Federal law pre-empts state remedies that interfere with federal labor policy or with specific provisions of the National Labor Relations Act ([29 USCS 151 et seq.](#)); the use of state **antitrust law** to regulate union activities in aid

of organization must also be pre-empted because it creates a substantial risk of conflict with policies central to federal labor law.

LABOR §48 > pre-emption of state laws -- remedies -- > Headnote:

[LEdHN\[15A\]](#) [15A] [LEdHN\[15B\]](#) [15B]

While in most cases a decision that state law is pre-empted by federal labor law leaves the parties with recourse only to the federal labor law as enforced by the National Labor Relations Board, in cases where there is an independent federal remedy that is consistent with the National Labor Relations Act ([29 USCS 151 et seq.](#)), such as an antitrust suit, the parties may have a choice of federal remedies.

STATES §38 > union organizational activities -- federal or state law -- > Headnote:

[LEdHN\[16\]](#) [16]

Because employee organization is central to federal labor policy and regulations of organizational procedures is comprehensive, federal law does not admit the use of state antitrust laws to regulate union activity that is closely related to organizational goals; while other agreements between unions and nonlabor parties may yet be subject to state antitrust laws, the governing factor is the risk of conflict with the National Labor Relations Act ([50 USCS 151 et seq.](#)) or with federal labor policy.

ERROR §1088 > remand -- question not decided below nor briefed and argued in Supreme Court -- > Headnote:

[LEdHN\[17\]](#) [17]

The United States Supreme Court will remand a case for consideration of the question whether the Sherman Antitrust Act ([15 USCS 1, 2](#)) is violated by an agreement between a building trades union and a general building contractor under which the contractor would subcontract mechanical work at the construction site only to firms that have a current collective bargaining contract with the union, where this question was decided neither by the United States District Court nor by the Court of Appeals and where the issue was not briefed and argued fully in the Supreme Court.

## Syllabus

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Respondent union, representing the plumbing and mechanical trades in Dallas, was a party to a multiemployer collective-bargaining agreement with a mechanical contractors association. The agreement contained a "most favored nation" clause, by which the union agreed that if it granted a more favorable contract to any other employer it would extend the same terms to all association members. Respondent picketed petitioner, a general building contractor which subcontracted all plumbing and mechanical work and had no employees respondent wished to represent, to secure a contract whereby petitioner agreed to subcontract such work only to firms that had a current contract with respondent. Petitioner signed under protest and, claiming that the agreement violated [§§ 1 and 2](#) of the Sherman Act and state antitrust laws, brought suit against respondent seeking declaratory and injunctive relief. By the time this case went to trial, respondent had secured identical agreements from other general contractors and was selectively picketing those [\*\*\*\*2] who resisted. The District Court held (1) that the subcontracting agreement

was exempt from federal antitrust laws because it was authorized by the first proviso in § 8 (e) of the National Labor Relations Act (NLRA), which exempts jobsite contracting agreements in the construction industry from the statutory ban on secondary agreements requiring employers to cease doing business with other persons, and (1) that federal labor legislation pre-empted the State's antitrust laws. The Court of Appeals affirmed. Held:

1. Respondent union's agreement with petitioner is not entitled to the nonstatutory exemption from the federal antitrust laws recognized in *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, because it imposed direct restraints on competition among subcontractors that would not have resulted from the elimination of competition based on differences in wages and working conditions. Pp. 621-626.

(a) The agreement indiscriminately excluded nonunion subcontractors from a portion of the market, even if their competitive advantages were derived from efficient operating methods rather than substandard wages and working conditions P. 623.

(b) The "most-favored nation" [\*\*\*\*3] clause in the multiemployer bargaining agreement, by insuring that no union subcontractor would have a competitive advantage on any matters covered by the agreement, gave respondent's agreements with petitioner and other general contractors the effect of creating a sheltered market for union subcontractors in that portion of the subcontracting market controlled by signatory general contractors. Pp. 623-624.

(c) Since the agreement did not simply prohibit subcontracting to any nonunion firm but to any firm that did not have a contract with respondent, it gave the union complete control over subcontract work offered by general contractors that had signed the agreement and empowered the union to exclude certain subcontractors from that portion of the market by refusing to deal with them. Pp. 624-625.

2. The first proviso to § 8 (e) of the NLRA does not shelter the challenged agreement from the federal antitrust laws, since that proviso was not intended to authorize subcontracting agreements that are neither within the context of a collective-bargaining relationship nor limited to any particular jobsite. Here respondent, which has never sought to represent petitioner's employees or [\*\*\*\*4] bargain with petitioner on their behalf, makes no claim to be protecting those employees from working with nonunion men; the agreement was not limited to any particular jobsite; and respondent concededly sought the agreement solely as a means of pressuring Dallas mechanical subcontractors to recognize it as their employees' representative. Pp. 626-633.

3. There is no indication that Congress in the Taft-Hartley amendments or later meant to make NLRA remedies for "hotcargo" agreements exclusive, thus precluding liability for such agreements under the antitrust acts. Pp. 633-634.

4. The agreement is not subject to the state antitrust laws, the use of which to regulate union activities in aid of union organization would risk substantial conflict with policies central to federal labor law. Pp. 635-637.

. Whether the subcontracting agreement violated the Sherman Act, an issue not fully briefed or argued in this Court, must be decided on remand. P. 637.

*483 F.2d 1154*, reversed in part, affirmed in part, and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting [\*\*\*\*5] opinion, post, p. 638. STEWART, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined, post, p. 638.

**Counsel:** Joseph F. Canterbury, Jr., argued the cause and filed briefs for petitioner.

David R. Richards argued the cause and filed a brief for respondent.\*

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\*Briefs of amici curiae urging reversal were filed by Gerard C. Smetana, Lawrence D. Ehrlich, Jerry Kronenberg, and Milton Smith for the Chamber of Commerce of the United States; by Vincent J. Apruzzese, Francis A. Mastro, and William L. Keller for

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**Judges:** Burger, Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist

**Opinion by:** POWELL

## Opinion

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[\*618] [\*\*\*423] [\*\*1833] MR. JUSTICE POWELL delivered the opinion of the Court.

LEdHN[1A] [↑] [1A]The building trades union in this case supported its efforts to organize [\*\*\*424] mechanical subcontractors by picketing certain general contractors, including petitioner. The union's sole objective was to compel the general contractors to agree that in letting subcontracts for mechanical work they would deal only with firms that were [\*619] parties to the union's current collective-bargaining agreement. The union disclaimed any interest in representing the general contractors' employees. In this case the picketing succeeded, and petitioner seeks to annul the resulting agreement as an illegal restraint on competition under federal and state law. The union claims immunity from federal antitrust statutes and argues that federal labor regulation pre-empts state law.

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Local 100 is the bargaining representative for workers in the plumbing and mechanical trades in Dallas. When this litigation began, [\*\*\*7] it was party to a multiemployer bargaining agreement with the Mechanical Contractors Association of Dallas, a group of about 75 mechanical contractors. That contract contained a "most favored nation" clause, by which the union agreed that if it granted a more favorable contract to any other employer it would extend the same terms to all members of the Association.

Connell Construction Co. is a general building contractor in Dallas. It obtains jobs by competitive bidding and subcontracts all plumbing and mechanical work. Connell has followed a policy of awarding these subcontracts on the basis of competitive bids, and it has done business with both union and nonunion subcontractors. Connell's employees are represented by various building [\*\*1834] trade unions. Local 100 has never sought to represent them or to bargain with Connell on their behalf.

In November 1970, Local 100 asked Connell to agree that it would subcontract mechanical work only to firms that had a current contract with the union. It demanded that Connell sign the following agreement: S

"WHEREAS, the contractor and the union are engaged in the construction industry, and

[\*620] "WHEREAS, the contractor [\*\*\*8] and the union desire to make an agreement applying in the event of subcontracting in accordance with Section 8 (e) of the Labor-Management Relations Act;

"WHEREAS, it is understood that by this agreement the contractor does not grant, nor does the union seek, recognition as the collective bargaining representative of any employees of the signatory contractor; and

"WHEREAS, it is further understood that the subcontracting limitation provided herein applies only to mechanical work which the contractor does not perform with his own employees but uniformly subcontracts to other firms;

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the Associated General Contractors of America et al.; and by Kenneth C. McGuiness and Robert E. Williams for the Air-Conditioning and Refrigeration Institute et al.

Briefs of amici curiae urging affirmance were filed by Solicitor General Bork, Peter G. Nash, John S. Irving, Patrick Hardin, Norton J. Come, and Linda Sher for the National Labor Relations Board, and by J. Albert Woll, Laurence Gold, and Thomas E. Harris for the American Federation of Labor and Congress of Industrial Organizations.

"THEREFORE, the contractor and the union mutually agree with respect to work falling within the scope of this agreement that is to be done at the site of construction, alteration, painting or repair of any building, structure, or other works, that [if] the contractor should contract or subcontract [\*\*\*425] any of the aforesaid work falling within the normal trade jurisdiction of the union, said contractor shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with Local Union 100 of the United Association of Journeymen and [\*\*\*\*9] Apprentices of the Plumbing and Pipefitting Industry."<sup>1</sup>

When Connell refused to sign this agreement, Local 100 stationed a single picket at one of Connell's major construction sites. About 150 workers walked off the job, and construction halted. Connell filed suit in state court to enjoin the picketing as a violation of Texas antitrust laws. Local 100 removed the case to federal court. Connell then signed the subcontracting agreement under protest. It amended its complaint to claim that the [\*621] agreement violated §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1 and 2, and was therefore invalid. Connell sought a declaration to this effect and an injunction against any further efforts to force it to sign such an agreement.

By the time the case went to trial, Local 100 had submitted identical agreements to a number of other general contractors in Dallas. Five others had signed, and the union was waging a selective picketing campaign against those who resisted.

The District Court held that the subcontracting agreement was exempt from federal antitrust laws because it was authorized by the construction industry proviso to § 8 (e) [\*\*\*\*10] of the National Labor Relations Act, 49 Stat. 452, as added, 73 Stat. 543, 29 U.S.C. § 158 (e). The court also held that federal labor legislation pre-empted the State's antitrust laws. 78 L.R.R.M. 3012 (ND Tex. 1971). The Court of Appeals for the Fifth Circuit affirmed, 483 F. 2d 1154 (1973), with one judge dissenting. It held that Local 100's goal of organizing nonunion subcontractors was a legitimate union interest and that its efforts toward that goal were therefore exempt from federal antitrust laws. On the second issue, it held that state law was pre-empted under San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). We granted certiorari on Connell's petition. 416 U.S. 981 (1974). We reverse on the question of federal antitrust immunity and affirm the ruling on state law pre-emption.

## II

LEdHN[2] [↑] [2]LEdHN[3] [↑] [3]The basic sources of organized labor's exemption from federal antitrust [\*\*1835] laws are §§ 6 and 20 of the Clayton Act, 38 Stat. 731 and [\*\*\*\*11] 738, 15 U.S.C. § 17 and 29 U.S.C. § 52, and the Norris-La Guardia Act, 47 Stat. 70, 71, and 73, 29 U.S.C. §§ 104, 105, and 113. HN1 [↑] These statutes declare [\*622] that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws. See United States v. Hutcheson, 312 U.S. 219 (1941). They do not exempt concerted action or agreements between unions and nonlabor parties. Mine Workers v. Pennington, 381 U.S. 657, 662 (1965). The Court has recognized, however, that HN2 [↑] a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional [\*\*\*426] policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions. Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965).

[\*\*\*\*12] LEdHN[4] [↑] [4]LEdHN[5] [↑] [5]The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that HN3 [↑] labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions. See Mine Workers v. Pennington, supra, at 666; Jewel Tea, supra, at 692-693 (opinion of WHITE, J.). Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus,

while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, e.g., [Federation of Musicians v. Carroll, 391 U.S. 99 \(1968\)](#), [\*\*\*13] the nonstatutory exemption offers no similar protection when a union and a nonlabor [\*623] party agree to restrain competition in a business market. See [Allen Bradley Co. v. Electrical Workers, 325 U.S. 797, 806-811 \(1945\)](#); Cox, Labor and the Antitrust Laws - A Preliminary Analysis, 104 U. Pa. L. Rev. 252 (1955); Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659 (1965).

[LEdHN\[1B\]](#) [↑] [1B][LEdHN\[6\]](#) [↑] [6][LEdHN\[7\]](#) [↑] [7]In this case Local 100 used direct restraints on the business market to support its organizing campaign. The agreements with Connell and other general contractors indiscriminately excluded nonunion subcontractors from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods. Curtailment of competition based on efficiency is neither a goal of federal labor policy nor a necessary effect [\*\*\*14] of the elimination of competition among workers. Moreover, competition based on efficiency is a positive value that the antitrust laws strive to protect.

The multiemployer bargaining agreement between Local 100 and the Association, though not challenged in this suit, is relevant in determining the effect that the agreement between Local 100 and Connell would have on the business market. The "most favored nation" clause in the multiemployer agreement promised to eliminate competition between members of the Association and any other subcontractors that Local 100 might organize. By giving members of the Association a contractual right to insist on terms as favorable as those given any competitor, it guaranteed that the union would make no agreement that would give an unaffiliated contractor a competitive advantage over members [\*\*\*427] of [\*\*1836] the Association.<sup>1</sup> Subcontractors in the Association thus [\*624] stood to benefit from any extension of Local 100's organization, but the method Local 100 chose also had the effect of sheltering them from outside competition in that portion of the market covered by subcontracting agreements between general contractors and Local [\*\*\*15] 100. In that portion of the market, the restriction on subcontracting would eliminate competition on all subjects covered by the mutiemployer agreement, even on subjects unrelated to wages, hours, and working conditions.

Success in exacting [\*\*\*16] agreements from general contractors would also give Local 100 power to control access to the market for mechanical subcontracting work. The agreements with general contractors did not simply prohibit subcontracting to any nonunion firm; they prohibited subcontracting to any firm that did not have a contract with Local 100. The union thus had complete control over subcontract work offered by general contractors that had signed these agreements. Such control could result in significant adverse effects on the market and on consumers - effects unrelated to the union's legitimate goals of organizing workers and standardizing working conditions. For example, if the union thought the interests of its members would be served by having fewer subcontractors competing for the available work, [\*625] it could refuse to sign collective-bargaining agreements with marginal firms. Cf. [Mine Workers v. Pennington, supra](#). Or, since Local 100 has a well-defined geographical jurisdiction, it could exclude "traveling" subcontractors by refusing to deal with them. Local 100 thus might be able to create a geographical enclave for local contractors, similar to the closed market in [Allen Bradley, supra](#).

<sup>1</sup> The primary effect of the agreement seems to have been to inhibit the union from offering any other employer a more favorable contract. When asked at trial whether another subcontractor could get an agreement on any different terms, Local 100's business agent answered:

"No. The agreement says that no one will be given a more favorable agreement. I couldn't, if I desired, as an agent, sign an agreement other than the ones in existence between the local contractors and the Local 100.

.....

"Q. I see. So that's - in other words, once you sign that contract with the Mechanical Contractors' Association, that sets the only type of agreement which your Union can enter into with any other mechanical contractors; is that correct, sir?

"A. That is true." Tr. 45-46.

[\*\*\*\*17] [LEdHN\[8\]](#) [8] This record contains no evidence that the union's goal was anything other than organizing as many subcontractors as possible.<sup>2</sup> This goal was legal, even though a successful organizing campaign ultimately would reduce the competition that unionized employers face from nonunion firms. But the methods the union chose are not immune from antitrust sanctions simply because the goal is legal. Here Local 100, by agreement with several contractors, made nonunion subcontractors ineligible [\*\*\*428] to compete for a portion of the available work. This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.

[\*\*\*\*18] [LEdHN\[1C\]](#) [1C] There can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude [\*626] might be entitled to an antitrust exemption [\*\*1837] if it were included in a lawful collective-bargaining agreement. Cf. *Mine Workers v. Pennington*, 381 U.S., at 664-665; *Jewel Tea*, 381 U.S., at 689-690 (opinion of WHITE, J.); *id.*, at 709-713, 732-733 (opinion of Goldberg, J.). In this case, Local 100 had no interest in representing Connell's employees. The federal policy favoring collective bargaining therefore can offer no shelter for the union's coercive action against Connell or its campaign to exclude nonunion firms from the subcontracting market.

### III

[LEdHN\[9\]](#) [9] [LEdHN\[10A\]](#) [10A] Local 100 nonetheless contends that the kind of agreement it obtained from Connell is explicitly allowed by the construction-industry proviso to § 8(e) and that antitrust policy therefore must defer to the NLRA. The [\*\*\*\*19] majority in the Court of Appeals declined to decide this issue, holding that it was subject to the "exclusive jurisdiction" of the NLRB. 483 F. 2d, at 1174. This Court has held, however, that [HN4](#) [↑] the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws.<sup>3</sup> We conclude that § 8 (e) does not allow this type of agreement.

[LEdHN\[11\]](#) [11] [LEdHN\[12\]](#) [12] Local 100's argument is straightforward: [\*\*\*\*20] the first proviso to § 8 (e) allows "an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other [\*627] work."<sup>4</sup> Local [\*\*\*429] 100 is a labor organization, Connell is an employer in

<sup>2</sup> There was no evidence that Local 100's organizing campaign was connected with any agreement with members of the multiemployer bargaining unit, and the only evidence of agreement among those subcontractors was the "most favored nation" clause in the collective-bargaining agreement. In fact, Connell has not argued the case on a theory of conspiracy between the union and unionized subcontractors. It has simply relied on the multiemployer agreement as a factor enhancing the restraint of trade implicit in the subcontracting agreement it signed.

<sup>3</sup> *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 684-688 (1965) (opinion of WHITE, J.); *id.*, at 710 n. 18 (opinion of Goldberg, J.); cf. *Vaca v. Sipes*, 386 U.S. 171, 176-188 (1967); *Smith v. Evening News Assn.*, 371 U.S. 195 (1962).

<sup>4</sup> Section 8 (e) provides:

[HN5](#) [↑] "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the

the construction industry, and the agreement covers only work "to be done at the site of construction, alteration, painting or repair of any building, structure, or other works." Therefore, Local 100 says, the agreement comes within the proviso. Connell responds by arguing that despite the unqualified language of the proviso, Congress intended only to allow subcontracting agreements within the context of a collective-bargaining relationship; that is, Congress did not intend to permit a union to approach a "stranger" contractor and obtain a binding agreement not to deal with nonunion [\*628] subcontractors. On its face, the proviso suggests no such limitation. This Court has held, however, that § 8 (e) must [\*\*\*\*21] be interpreted in [\*\*1838] light of the statutory setting and the circumstances surrounding its enactment: S

"It is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. [Holy Trinity Church v. United States, 143 U.S. 457, 459.](#)" [National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612, 619 \(1967\).](#)l

[\*\*\*\*22] Section 8 (e) was part of a legislative program designed to plug technical loopholes in § 8 (b)(4)'s general prohibition of secondary activities. In § 8 (e) Congress broadly proscribed using contractual agreements to achieve the economic coercion prohibited by § 8 (b)(4). See [National Woodwork Mfrs. Assn., supra, at 634](#). The provisos exempting the construction and garment industries were added by the Conference Committee in an apparent compromise between the House bill, which prohibited all "hot cargo" agreements, and the Senate bill, which prohibited them only in the trucking industry.<sup>5</sup> [\*\*\*\*24] Although the garment-industry proviso was supported by detailed explanations in both Houses,<sup>6</sup> the construction-industry proviso was explained only by bare references to "the pattern of collective [\*629] bargaining" in the industry.<sup>7</sup> It seems, however, to have been adopted as a partial substitute for an attempt to overrule this Court's decision in [NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675 \(1951\)](#) [\*\*\*430]<sup>8</sup> [\*\*\*\*25] Discussion of "special problems" in the construction industry,

construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and subsection (b)[(4)(B)] of this section the terms 'any employer,' 'any person engaged in commerce or an industry affecting commerce,' and 'any person' when used in relation to the terms 'any other producer, processor, or manufacturer,' 'any other employer,' or 'any other person' shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception." [29 U.S.C. § 158 \(e\).](#)

<sup>5</sup> See H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess., 39-40 (1959).

<sup>6</sup> 105 Cong. Rec. 17327 (1959) (remarks by Sen. Kennedy); id., at 17381 (remarks by Sens. Javits and Goldwater); id., at 15539 (memorandum by Reps. Thompson and Udall); id., at 16590 (memorandum by Sen. Kennedy and Rep. Thompson). These debates are reproduced in 2 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, pp. 1377, 1385, 1576, 1708 (1959) (hereinafter Leg. Hist. of LMRDA).

<sup>7</sup> 105 Cong. Rec. 17899 (1959) (remarks by Sen. Kennedy); id., at 18134 (remarks by Rep. Thompson); 2 Leg. Hist. of LMRDA 1432, 1721.

<sup>8</sup> President Eisenhower's message to Congress recommending labor reform legislation urged amendment of the secondary-boycott provisions to permit secondary activity "under certain circumstances, against secondary employers engaged in work at a common construction site with the primary employer." S. Doc. No. 10, 86th Cong., 1st Sess., 3 (1959) (emphasis added). Various bills introduced in both Houses included such provisions, see 2 Leg. Hist. of LMRDA 1912-1915, but neither the bill that passed the Senate nor the one that passed the House contained a Denver Building Trades provision. The Conference Committee proposed to include such an amendment to § 8 (b)(4)(B) in the Conference agreement, along with a closely linked construction-industry exemption from § 8 (e). 105 Cong. Rec. 17333 (1959) (proposed Senate resolution), 2 Leg. Hist. of LMRDA 1383. But a parliamentary obstacle killed the § 8 (b)(4)(B) amendment, and only the § 8 (e) proviso survived. See 150 Cong. Rec. 17728-17729, 17901-17903, 2 Leg. Hist. of LMRDA 1397-1398, 1434-1436. References to the proviso suggest that the Committee may have intended the § 8 (e) proviso simply to preserve the status quo under [Carpenters' v. NLRB \(Sand Door\), 357 U.S. 93 \(1958\)](#), pending action on the Denver Building Trades problem in the following session. See H.R. Rep. No. 1147, *supra, n. 5, at 39-40*; 105 Cong. Rec. 17900 (1959) (report of Sen. Kennedy on Conference agreement), 2 Leg. Hist. of LMRDA 1433. Although Senator Kennedy introduced a bill to amend § 8 (b)(4), S. 2643, 86th Cong., 1st Sess. (1959), it was never reported out of committee.

applicable to both the § 8 (e) proviso and the attempt to [\*\*\*\*23] overrule Denver Building Trades, focused on the problems of picketing a single nonunion subcontractor on a multiemployer building project, and the close relationship between contractors and subcontractors [\*630] at the jobsite.<sup>9</sup> Congress [\*\*1839] limited the construction-industry proviso to that single situation, allowing subcontracting agreements only in relation to work done on a jobsite. In contrast to the latitude it provided in the garment-industry proviso, Congress did not afford construction unions an exemption from § 8 (b)(4)(B) or otherwise indicate that they were free to use subcontracting agreements as a broad organizational weapon. In keeping with these limitations, the Court has interpreted the construction-industry proviso as S

"a measure designed to allow agreements pertaining to certain secondary activities on the construction site because of the close community of interests there, but to ban secondary-objective agreements concerning nonjobsite work, in which respect the construction industry is no different from any other." [National Woodwork Mfrs. Assn., 386 U.S., at 638-639](#) (footnote omitted).I

Other courts have suggested that it serves an even narrower function:

"[T]he purpose of the section 8 (e) proviso was to alleviate the frictions that may arise when union men work continuously alongside nonunion men on the same construction site." [Drivers Local 695 v. NLRB, 124 U.S. App. D.C. 93, 99, 361 F. 2d 547, 553 \(1966\)](#).

See also [Denver Building Trades, 341 U.S., at 692-693](#) (DOUGLAS, J., dissenting); [Essex County & Vicinity \[\\*631\] District Council of Carpenters v. NLRB, 332 F. 2d 636, 640 \(CA3 1964\)](#).

[\*\*\*431] Local 100 does not suggest that its subcontracting agreement is related to any of these policies. It does not claim to be protecting Connell's employees from having to work alongside nonunion men. [\*\*\*26] The agreement apparently was not designed to protect Local 100's members in that regard, since it was not limited to jobsites on which they were working. Moreover, the subcontracting restriction applied only to the work Local 100's members would perform themselves and allowed free subcontracting of all other work, thus leaving open a possibility that they would be employed alongside nonunion subcontractors. Nor was Local 100 trying to organize a nonunion subcontractor on the building project it picketed. The union admits that it sought the agreement solely as a way of pressuring mechanical subcontractors in the Dallas area to recognize it as the representative of their employees.

[LEdHN\[10B\]](#) [↑] [10B]If we agreed with Local 100 that the construction-industry proviso authorizes subcontracting agreements with "stranger" contractors, not limited to any particular jobsite, our ruling would give construction unions an almost unlimited organizational weapon.<sup>10</sup> The unions [\*632] would be free to enlist any general contractor to bring economic pressure on nonunion subcontractors, as long as the [\*\*1840] agreement [\*\*\*27] recited that it only covered work to be performed on some jobsite somewhere. The proviso's jobsite restriction then would serve only to prohibit agreements relating to subcontractors that deliver their work complete to the jobsite.

<sup>9</sup> See 105 Cong. Rec. 17881 (1959) (remarks by Sen. Morse); id., at 15541 (memorandum by Reps. Thompson and Udall); id., at 15551-15552 (memorandum by Sen. Elliott); id., at 15852 (remarks by Rep. Goodell); See also id., at 20004-20005 (post-legislative remarks by Rep. Kearns); 2 Leg. Hist. of LMRDA 1425, 1577, 1588, 1684, and 1861.

<sup>10</sup> Local 100 contends, unsoundly we think, that the NLRB has decided this issue in its favor. It cites [Los Angeles Building & Construction Trades Council \(B & J Investment Co.\), 214 N.L.R.B. No. 86, 87 L.R.R.M. 1424 \(1974\)](#), and a memorandum from the General Counsel explaining his decision not to file unfair labor practice charges in a similar case, Plumbers Local 100 (Hagler Construction Co.), No. 16-CC-447 (May 1, 1974). In B & J Investment the Board approved, without comment, an administrative law judge's conclusion that the § 8 (e) proviso authorized a subcontracting agreement between the Council and a general contractor who used none of his own employees in the particular construction project. The agreement in question may have been a prehire contract under § 8 (f), and it is not clear that the contractor argued that it was invalid for lack of a collective-bargaining relationship. The General Counsel's memorandum in Hagler Construction is plainly addressed to a different argument - that a subcontracting clause should be allowed only if there is a pre-existing collective-bargaining relationship with the general contractor or if the general contractor has employees who perform the kind of work covered by the agreement.

[\*\*\*\*28] It is highly improbable that Congress intended such a result. One of the major aims of the 1959 Act was to limit "top-down" organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees.<sup>11</sup> [\*\*\*\*29] Congress accomplished this goal by enacting § 8(b)(7), which restricts primary recognitional picketing, and by further tightening § 8(b)(4)(B), which prohibits the use of most secondary tactics in organizational campaigns. Construction unions are fully covered by these sections. The only special consideration given them in organizational campaigns is § 8(f), which allows "prehire" agreements in the construction industry, but only under [\*\*\*432] careful safeguards preserving workers' rights to decline union representation. The legislative history accompanying § 8(f) also suggests that Congress may not [\*633] have intended that strikes or picketing could be used to extract prehire agreements from unwilling employers.<sup>12</sup>

[LEdHN\[10C\]](#) [↑] [10C] These careful limits on the economic pressure unions may use in aid of their organizational campaigns would be undermined seriously if the proviso to § 8(e) were construed to allow unions to seek subcontracting agreements, at large, from any general contractor vulnerable to picketing. Absent a clear indication that Congress intended to leave such a glaring loophole in its restrictions on "top-down" organizing, we are unwilling to read the construction industry proviso as broadly as Local 100 suggests.<sup>13</sup> Instead, we think its authorization extends only to agreements in the context of collective-bargaining relationships and, in light of congressional [\*\*\*30] references to the Denver Building Trades problem, possibly to common-situs relationships on particular jobsites as well.<sup>14</sup>

[\*\*\*31] Finally, Local 100 contends that even if the subcontracting agreement is not sanctioned by the construction- [\*634] industry proviso and therefore is illegal under § 8(e), it cannot be the basis for antitrust liability because the remedies in the NLRA are exclusive. This argument is grounded in the legislative history of the 1947 Taft-Hartley amendments. Congress rejected attempts to regulate secondary activities by repealing the antitrust exemptions in the Clayton and Norris-LaGuardia Acts, and created special remedies under the labor law instead.<sup>15</sup> It made secondary activities [\*\*1841] unfair labor practices under § 8(b)(4), and drafted special provisions for preliminary injunctions at the suit of the NLRB and for recovery of actual damages in the district courts. § 10(l) of the NLRA, 49 Stat. 453, as added, 61 Stat. 149, as amended, 29 U.S.C. § 160 (l), and § 303 of the Labor Management Relations Act, 61 Stat. 158, as amended, 29 U.S.C. § 187. But whatever significance this legislative choice has for antitrust suits based on those secondary activities prohibited by § 8(b)(4), it has no relevance to the question [\*\*\*32] whether Congress meant to preclude antitrust suits based on the "hot cargo" agreements that it outlawed in 1959. There is no legislative [\*\*\*433] history in the 1959 Congress suggesting that labor-law remedies

<sup>11</sup> 105 Cong. Rec. 6428-6429 (1959) (remarks of Sen. Goldwater); id., at 6648-6649 (remarks of Sen. McClellan); id., at 6664-6665 (remarks of Sen. Goldwater); id., at 14348 (memorandum of Rep. Griffin); 2 Leg. Hist. of LMRDA 1079, 1175-1176, 1191-1192, 1523.

<sup>12</sup> H.R. Rep. No. 1147, supra, n. 5, at 42; 105 Cong. Rec. 10104 (1959) (memorandum of Sen. Goldwater); id., at 18128 (remarks by Rep. Barden); 2 Leg. Hist. of LMRDA 1289, 1715. The NLRB has taken this view. Operating Engineers Local 542, 142 N.L.R.B. 1132 (1963), enforced, 331 F. 2d 99 (CA3), cert. denied, 379 U.S. 889 (1964).

<sup>13</sup> As noted above, supra, at 628-630, the garment-industry proviso reflects different considerations. The text of the proviso and the treatment in congressional debates and reports suggest that Congress intended to authorize garment workers' unions to continue using subcontracting agreements as an organizational weapon. See Danielson v. Joint Board, 494 F. 2d 1230 (CA2 1974) (Friendly, J.).

<sup>14</sup> Connell also has argued that the subcontracting agreement was subject to antitrust sanctions because the construction-industry proviso authorizes only voluntary agreements. The foundation of this argument is a contention that § 8(b)(4)(B) forbids picketing to secure an otherwise lawful "hot cargo" agreement in the construction industry. Because we hold that the agreement in this case is outside the § 8(e) proviso, it is unnecessary to consider this alternative contention.

<sup>15</sup> See H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., (House Managers' statement), 65-67 (1947); 93 Cong. Rec. 4757, 4770, 4834-4874 (1947) (debates over Sen. Ball's proposal for antitrust sanctions and Sen. Taft's compromise proposal for actual damages, which became § 303 of the NLRA).

for § 8(e) violations were intended to be exclusive, or that Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRA.<sup>16</sup>

[\*\*\*\*33] [\*635] [LEdHN\[1D\]](#) [1D] We therefore hold that this agreement, which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates Connell to subcontract work only to firms that have a contract with Local 100, may be the basis of a federal antitrust suit because it has a potential for restraining competition in the business market in ways that would not follow naturally from elimination of competition over wages and working conditions.

#### IV

[LEdHN\[13\]](#) [13] [LEdHN\[14\]](#) [14] [LEdHN\[15A\]](#) [15A] Although we hold that the union's agreement with Connell is subject to the federal antitrust laws, it does not follow that state [antitrust law](#) may apply as well. The Court has held repeatedly that [HN6](#) federal law pre-empts state remedies that interfere with federal labor [\*\*\*\*34] policy or with specific provisions of the NLRA. E.g., [Motor Coach Employees v. Lockridge, 403 U.S. 274 \(1971\)](#); [Teamsters v. Morton, 377 U.S. 252 \(1964\)](#); [Teamsters v. Oliver, 358 U.S. 283 \(1959\)](#).<sup>17</sup> The use of state [antitrust law](#) to [\*636] regulate union activities in aid of organization must also be pre-empted because it creates a substantial risk of conflict with policies central to federal labor law.

#### [LEdHN\[15B\]](#) [15B] [15B]

[\*\*\*\*35] In [\*\*1842] this area, the accommodation between federal labor and antitrust policy is delicate. Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy favoring lawful [\*\*\*434] employee organization, not only by delineating exemptions from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves. See [Apex Hosiery Co. v. Leader, 310 U.S. 469 \(1940\)](#). State antitrust laws generally have not been subjected to this process of accommodation. If they take account of labor goals at all, they may represent a totally different balance between labor and antitrust policies.<sup>18</sup> Permitting state

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<sup>16</sup> The dissenting opinion of MR. JUSTICE STEWART argues that § 303 provides the exclusive remedy for violations of § 8(e), thereby precluding recourse to antitrust remedies. For that proposition the dissenting opinion relies upon "considerable evidence in the legislative materials." Post, at 650. In our view, these materials are unpersuasive. In the first place, Congress did not amend § 303 expressly to provide a remedy for violations of § 8(e). See Labor-Management Reporting and Disclosure Act of 1959, §§ 704(d), (e), 73 Stat. 544-545. The House in 1959 did reject proposals by Representatives Hiestand, Alger, and Hoffman to repeal labor's antitrust immunity. Post, at 650-654. Those proposals, however, were much broader than the issue in this case. The Hiestand-Alger proposal would have repealed antitrust immunity for any action in concert by two or more labor organizations. The Hoffman proposal apparently intended to repeal labor's antitrust immunity entirely. That the Congress rejected these extravagant proposals hardly furnishes proof that it intended to extend labor's antitrust immunity to include agreements with nonlabor parties, or that it thought antitrust liability under the existing statutes would be inconsistent with the NLRA. The bill introduced by Senator McClellan two years later provides even less support for that proposition. Like most bills introduced in Congress, it never reached a vote.

<sup>17</sup> In most cases a decision that state law is pre-empted leaves the parties with recourse only to the federal labor law, as enforced by the NLRB. See [Motor Coach Employees v. Lockridge, 403 U.S. 274 \(1971\)](#); [San Diego Building Trades Council v. Garmon, 359 U.S. 236 \(1959\)](#). But in cases like this one, where there is an independent federal remedy that is consistent with the NLRA, the parties may have a choice of federal remedies. Cf. [Vaca v. Sipes, 386 U.S. 171, 176-188 \(1967\)](#); [Smith v. Evening News Assn., 371 U.S. 195 \(1962\)](#).

<sup>18</sup> Texas law is a good example. [Texas Rev. Civ. Stat. Ann., Arts. 5152](#) and 5153 (1971), declare that it is lawful for workers to associate in unions and to induce other persons to accept or reject employment. Article 5154, however, referring to the preceding articles, provides: "Nothing herein shall be construed to repeal, affect or diminish the force and effect of any statute now existing on the subject of trusts, conspiracies against trade, pools and monopolies." The Texas antitrust statutes prohibit, among other specified agreements, trusts, and monopolies, any combination of two or more persons to restrict "the free pursuit of a lawful business." [Tex. Bus. & Comm. Code §§ 15.02-15.04](#) (1968).

**antitrust law** to operate in this field could frustrate the basic federal policies favoring employee organization and allowing elimination of competition among wage earners, and interfere with the detailed system Congress has created for regulating organizational techniques.

[\*\*\*\*36] [\*637] [LEdHN\[16\]](#) [↑] [16]Because employee organization is central to federal labor policy and regulation of organizational procedures is comprehensive, federal law does not admit the use of state **antitrust law** to regulate union activity that is closely related to organizational goals. Of course, other agreements between unions and nonlabor parties may yet be subject to state antitrust laws. See [Teamsters v. Oliver, supra, at 295-297](#). The governing factor is the risk of conflict with the NLRA or with federal labor policy.

V

[LEdHN\[17\]](#) [↑] [17]Neither the District Court nor the Court of Appeals decided whether the agreement between Local 100 and Connell, if subject to the antitrust laws, would constitute an agreement that restrains trade within the meaning of the Sherman Act. The issue was not briefed and argued fully in this Court. Accordingly, we remand for consideration whether the agreement violated the Sherman Act.<sup>19</sup>

[\*\*\*\*37] Reversed in part, affirmed in part, and remanded.

**Dissent by:** DOUGLAS

## Dissent

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[\*638] [\*\*\*435] MR. JUSTICE DOUGLAS, dissenting.

While I join the opinion of MR. JUSTICE STEWART, I write to emphasize what is, for me, the determinative feature of the case. Throughout this litigation, Connell has maintained only that Local 100 coerced it into signing the subcontracting agreement. With the complaint so drawn, I have no difficulty [\*\*1843] in concluding that the union's conduct is regulated solely by the labor laws. The question of antitrust immunity would be far different, however, if it were alleged that Local 100 had conspired with mechanical subcontractors to force nonunion subcontractors from the market by entering into exclusionary agreements with general contractors like Connell. An arrangement of that character was condemned in [Allen Bradley Co. v. Electrical Workers, 325 U.S. 797 \(1945\)](#), which held that Congress did not intend "to immunize labor unions who aid and abet manufacturers and traders in violating the Sherman Act," [id., at 810](#). Were such a conspiracy alleged, the multiemployer bargaining agreement between Local 100 and the mechanical [\*\*\*\*38] subcontractors would unquestionably be relevant. See [Mine Workers v. Pennington, 381 U.S. 657, 673 \(1965\)](#) (concurring opinion); [Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 737 \(1965\)](#) (dissenting opinion). But since Connell has never alleged or attempted to show any conspiracy between

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<sup>19</sup> In addition to seeking a declaratory judgment that the agreement with Local 100 violated the antitrust laws, Connell sought a permanent injunction against further picketing to coerce execution of the contract in litigation. Connell obtained a temporary restraining order against the picketing on January 21, 1971, and thereafter executed the contract - under protest - with Local 100 on March 28, 1971. So far as the record in this case reveals, there has been no further picketing at Connell's construction sites. Accordingly, there is no occasion for us to consider whether the Norris-LaGuardia Act forbids such an injunction where the specific agreement sought by the union is illegal, or to determine whether, within the meaning of the Norris-LaGuardia Act, there was a "labor dispute" between these parties. If the Norris-LaGuardia Act were applicable to this picketing, injunctive relief would not be available under the antitrust laws. See [United States v. Huteson, 312 U.S. 219 \(1941\)](#). If the agreement in question is held on remand to be invalid under federal antitrust laws, we cannot anticipate that Local 100 will resume picketing to obtain or enforce an illegal agreement.

Local 100 and the subcontractors, I agree that Connell's remedies, if any, are provided exclusively by the labor laws.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

As part of its effort to organize mechanical contractors in the Dallas area, the respondent Local Union No. 100 [\*639] engaged in peaceful picketing to induce the petitioner Connell Construction Co., a general contractor in the building and construction industry, to agree to subcontract plumbing and mechanical work at the construction site only to firms that had signed a collective-bargaining agreement with Local 100. None of Connell's own employees were members of Local 100, and the subcontracting agreement contained the union's express disavowal of any intent to organize or represent them. The picketing at Connell's construction [\*\*\*\*39] site was therefore secondary activity, subject to detailed and comprehensive regulation pursuant to § 8(b)(4) of the National Labor Relations Act, as added, 61 Stat. 141, [29 U.S.C. § 158\(b\)\(4\)](#), and § 303 of the Labor Management Relations Act, 61 Stat. 158, as amended, [29 U.S.C. § 187](#). Similarly, the subcontracting agreement under which Connell agreed to cease doing business with nonunion mechanical contractors is governed by the provisions of § 8(e) of the National Labor Relations Act, [29 U.S.C. § 158\(e\)](#). The relevant legislative history unmistakably demonstrates that in regulating secondary activity and "hot cargo" agreements in 1947 and 1959, Congress selected with great care the sanctions to be imposed if proscribed union activity should occur. In so doing, Congress rejected efforts to give private parties injured by union \*\*\*436 activity such as that engaged in by Local 100 the right to seek relief under federal antitrust laws. Accordingly, I would affirm the judgment before us.

I

For a period of 15 years, from passage of the Norris-LaGuardia Act, 47 Stat. 70, in 1932 <sup>1</sup> until enactment of [\*40] [\*640] the Labor Management Relations Act (the Taft-Hartley Act), 61 Stat. 136, in 1947, union economic pressure directed against a neutral, secondary employer was not subject to sanctions under either federal labor law or antitrust law, at least in the absence of proof that the union was coercing the secondary employer \*\*\*1844 in furtherance of a conspiracy with a nonlabor group. See [United States v. Hutcheson, 312 U.S. 219](#); [Allen Bradley Co. v. Electrical Workers, 325 U.S. 797](#). "Congress abolished, for purposes of labor immunity, the distinction between primary activity between the 'immediate disputants' and secondary activity in which the employer disputants and the members of the union do not stand 'in the proximate relation of employer and employee....'" [National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612, 623](#).

[\*\*\*\*41] In [Hunt v. Crumboch, 325 U.S. 821](#), for example, the Court found that union conduct in forcing a freight carrier out of business was protected activity beyond the reach of the federal antitrust laws even though it involved secondary pressure that culminated in the union's compelling the carrier's principal patron to break its contract with the carrier and to discharge the carrier from further service. "That which Congress has recognized as lawful," the Court noted, "this Court has no constitutional power to declare unlawful, by arguing that Congress has accorded too much power to labor organizations." [Id., at 825 n. 1](#).

Congressional concern over labor abuses of the broad immunity granted by the Norris-LaGuardia Act was one of the considerations that resulted in passage of the Taft- [\*641] Hartley Act in 1947, which, among other things, prohibited specified union secondary activity. See [National Woodwork Mfrs. Assn. v. NLRB, supra, at 623](#). The central thrust of that statutory provision was to forbid "a union to induce employees to strike against or to refuse to handle goods for their employer when an object is to force him or another \*\*\*42 person to cease doing business with some third party." [Carpenters' Union v. NLRB, 357 U.S. 93, 98](#). <sup>2</sup> In condemning \*\*\*437 "specific union

<sup>1</sup> Before 1932 this Court had held that secondary strikes and boycotts were not exempt from the coverage of the antitrust laws. E.g., [Duplex Printing Press Co. v. Deering, 254 U.S. 443](#); [Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn., 274 U.S. 37](#). Duplex and its progeny were overruled by Congress with passage of the Norris-LaGuardia Act, 47 Stat. 70. See [Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc., 311 U.S. 91, 100-103](#); [United States v. Hutcheson, 312 U.S. 219, 229-231, 235-237](#).

conduct directed to specific objectives," ibid., however, Congress deliberately chose not to subject unions engaging in prohibited secondary activity to the sanctions of the antitrust laws.

**[\*\*\*\*43]** Section 12(a)(3) of the Hartley bill, H.R. 3020, 80th Cong., 1st Sess., as initially passed by the House, defined "unlawful concerted activities" to include an "illegal boycott." 1 NLRB Legislative History of the Labor Management Relations Act, 1947, p. 205 (hereinafter Leg. Hist. of LMRA). Section 12(c) provided that the Norris-LaGuardia Act should have no "application in any action or proceeding in a court of the United States involving any activity defined in this section as unlawful." **[\*642]** 1 Leg. Hist. of LMRA 206-207. The Committee on Education and Labor explained in its report on the Hartley bill: S

"Illegal boycotts take many forms.... Sometimes they are direct restraints of trade, designed to compel people against whom they are engaged in to place their business with some other than those they are dealing with at the time.... [§ 12], these practices are called by their correct name, 'unlawful concerted activities.' It is provided that any person injured in his person, property, or business by an unlawful concerted activity affecting commerce may sue the **[\*\*1845]** person or persons responsible for the injury in any district court having jurisdiction of the parties **[\*\*\*\*44]** and recover damages. The bill makes inapplicable in such suits the Norris-LaGuardia Act, which heretofore has protected parties to industrial strife from the consequences of their lawlessness, no matter how violent their disputes became. Persons who engage in unlawful concerted activities are subject to losing their rights and privileges under the act." H.R. Rep. No. 245, 80th Cong., 1st Sess., 24, 44, 1 Leg. Hist. of LMRA 315, 335.I

The Senate, however, refused to adopt the House's removal of antitrust immunity for prohibited secondary activity, choosing instead to make the remedies available under federal labor law exclusive. The Senate Committee on Labor and Public Welfare approved S. 1126, 80th Cong., 1st Sess., which provided that proscribed secondary conduct would be an unfair labor practice and could be enjoined on application of the National Labor Relations Board. No private remedy for an injured employer was authorized in the bill approved by the Committee. See S. Rep. No. 105, 80th Cong., 1st Sess., 7-8, 22, 1 Leg. Hist. of LMRA 413-414, 428.

Four members of the Senate Committee, although **[\*643]** supporting the provisions of S. 1126 as reported by the Committee, **[\*\*\*\*45]** felt that a number of the provisions of the bill could be stronger. S. Rep. No. 105, *supra, at 50, 1* Leg. Hist. of LMRA 456. In particular, the minority Senators proposed: S

**[\*\*\*438]** "An amendment reinserting in the bill a section making secondary boycotts and jurisdictional strikes unlawful and providing for direct suits in the courts by any injured party.

.....  
"The amendment proposes that [the injured party] be entitled to file a suit for damages and obtain a temporary injunction while that suit is being heard.

.....  
"The amendment, furthermore, removes the protection of the Clayton Act from monopoly agreements to fix prices, allocate customers, restrict production, distribution, or competition, or impose restrictions or conditions on the purchase, sale, or use of material, machines, or equipment. While the existence of the union should not be a combination in restraint of trade, we see no reason why unions should not be subject in this field to the same restriction as are competing employers." S. Rep. No. 105, *supra, at 54-55, 1* Leg. Hist. of LMRA 460-461.I

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<sup>2</sup> The Act added § 8(b)(4) to the National Labor Relations Act, making it an unfair labor practice for a labor organization or its agents "to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person...." 61 Stat. 141.

Senator Ball, one of the four minority Senators on the Labor and Public Welfare Committee, [\*\*\*\*46] did in fact offer an amendment on the Senate floor that was "designed to correct the interpretation of the Norris-LaGuardia and Clayton acts made by the Supreme Court in the Hutchinson [sic] case, and a number of other cases brought by former Assistant Attorney General Thurman Arnold, when he attempted to break up monopolistic practices on [\*644] the part of labor unions, sometimes acting on their own, sometimes in conspiracy with employers." 93 Cong. Rec. 4838, 2 Leg. Hist. of LMRA 1354.<sup>3</sup>

[\*\*\*\*47] Although stating that he personally agreed with the changes proposed by Senator Ball, Senator Taft argued for defeat of the Ball amendment, explaining that resistance to providing a private injunctive remedy in cases of secondary boycotts was so strong that an [\*\*1846] attempt to eliminate the labor exemption from the antitrust laws would lead to the defeat of any effort to provide for a private damages remedy for injured parties. Senator Taft proposed as a substitute that private parties be given only the right to sue for actual damages. 93 Cong. Rec. at 4843-4844, 2 Leg. Hist. of LMRA 1365. The Ball amendment was thereafter defeated, 93 Cong. Rec. at 4847, 2 Leg. Hist. of LMRA 1369-1370, and Senator Taft introduced his proposal "to restore to people who lose something because of boycotts and jurisdictional strikes the money which they have lost." 93 Cong. Rec. at 4858, 2 Leg. Hist. of LMRA 1370-1371.

In response to Senator Morse's claim that the proposal would impose virtually unlimited liability on unions, Senator Taft made plain that he was not advocating the use of antitrust sanctions against prohibited secondary activity. "Under the Sherman Act the same question of boycott [\*\*\*\*48] damage is subject to a suit [\*\*\*439] for [treble] damages [\*645] and attorneys' fees. In this case we simply provide for the amount of the actual damages." 93 Cong. Rec. 4872-4873, 2 Leg. Hist. of LMRA 1398; see *Teamsters v. Morton*, 377 U.S. 252, 260 n. 16. Senator Taft's proposal for a private damages remedy under federal labor law was adopted by the Senate. 93 Cong. Rec. 4874-4875, 2 Leg. Hist. of LMRA 1399-1400.

In Conference, the House members agreed to eliminate the provisions of the Hartley bill which, like the Ball amendment, provided that the Norris-LaGuardia Act should have no application to private suits for unlawful secondary activity. See H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. (House Manager's statement), 58-59, 1 Leg. Hist. of LMRA 562-563. With only "clarifying changes," H.R. Conf. Rep. No. 510, *supra*, at 67, 1 Leg. Hist. of LMRA 571, the House-Senate Conferencees and then both Houses of Congress agreed to regulate union secondary activity by making specified activity an unfair labor practice under § 8(b)(4) of the National Labor Relations Act, authorizing the Board to seek injunctions against such activity, *29 U.S.C. § 160* [\*\*\*\*49] (I), and providing for recovery of actual damages in a suit by a private party under Senator Taft's compromise proposal, which became § 303 of the Labor Management Relations Act, *29 U.S.C. § 187*.<sup>4</sup> Congress in 1947 did not prohibit all [\*646]

<sup>3</sup>The amendment introduced by Senator Ball provided in part that the Clayton Act and the Norris-LaGuardia Act "shall not be applicable in respect of violations of subsection (a) [defining prohibited secondary conduct], or in respect of any contract, combination, or conspiracy, in restraint of commerce, to which a labor organization is a party, if one of the purposes of such contract, combination, or conspiracy is to fix prices, allocate customers, restrict production, distribution, or competition, or impose restrictions or conditions upon the purchase, sale or use of any material, machines, or equipment." 93 Cong. Rec. 4757 (1947).

<sup>4</sup> Section 303 of the Labor Management Relations Act of 1947, 61 Stat. 158-159, provided:

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is -

"(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

.....

secondary activity by labor unions, see *Carpenters v. NLRB*, 357 U.S. 93; and those practices which it did outlaw were to be remedied only by seeking relief from the Board or by pursuing the newly created, exclusive federal damages remedy provided by § 303. *Teamsters v. Morton, supra*.

[\*\*\*\*50] II

Contrary to the assertion in the Court's opinion, ante, at 634, the deliberate congressional decision to [\*\*1847] make § 303 the exclusive private remedy for unlawful secondary activity is clearly relevant to the question of Local 100's antitrust liability in the case before us. The Court is correct, of course, in noting that § 8(e)'s prohibition of "hot cargo" agreements was not added to the Act until 1959, and that § 303 was not then amended to cover § 8(e) violations [\*\*\*440] standing alone. But as part of the 1959 amendments designed to close "technical loopholes" perceived in the Taft-Hartley Act, Congress amended § 8(b)(4) to make it an unfair labor practice for a labor organization to threaten or coerce a neutral employer, either directly or through his employees, where an object of the secondary pressure is to force the employer to enter into an agreement prohibited by § 8(e).<sup>5</sup> [\*\*\*\*52] At the same [\*647] time, Congress expanded the scope of the § 303 damages remedy to allow recovery of the actual damages sustained as a result of a union's engaging in secondary activity to force an employer to sign an agreement in violation of § 8(e).<sup>6</sup> In short, Congress [\*\*\*\*51] has provided an employer like Connell with a fully effective private damages remedy for the allegedly unlawful union conduct involved in this case.

The essence of Connell's complaint is that it was coerced by Local 100's picketing into "conspiring" with the union by signing an agreement that limited its ability [\*648] to subcontract mechanical work on a competitive basis.<sup>7</sup> If, as the Court today holds, [\*\*\*\*53] the subcontracting agreement is not within the construction-industry proviso to § 8(e), then Local 100's picketing to induce Connell to sign the agreement constituted a § 8(b)(4) unfair labor practice, and was therefore also unlawful under § 303(a), *29 U.S.C. § 187(a)*.<sup>8</sup> [\*\*\*\*55] Accordingly, [\*\*\*441] Connell has

"(b) Whoever shall be injured in his business or property by reason [o]f any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

<sup>5</sup> Section 8(b)(4) of the National Labor Relations Act, as amended by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 542-543, now provides in part that it shall be an unfair labor practice for a labor organization or its agents:

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is -

"(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section...." *29 U.S.C. § 158 (b)(4)*.

<sup>6</sup> Section 303, as amended by the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 545, now provides:

"(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in *section 158(b)(4)* of this title.

"(b) Whoever shall be injured in his business or property by reason [o]f any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit." *29 U.S.C. § 187*.

<sup>7</sup> Indeed, Connell's original state-court complaint was filed before Connell had signed any agreement with Local 100. See ante, at 620. At that point it was apparent that the primary reason for the lawsuit was Connell's request for an injunction to stop the union's picketing.

[\*\*1848] the right to sue Local 100 for damages sustained as a result [**\*649**] of Local 100's unlawful secondary activity pursuant to § 303(b), [29 U.S.C. § 187\(b\)](#). Although "limited to actual, compensatory damages," [Teamsters v. Morton, 377 U.S., at 260](#), Connell would be entitled under § 303 to recover all damages to its business that resulted from the union's coercive conduct, including any provable damage caused by Connell's inability to subcontract mechanical work to nonunion firms. Similarly, any nonunion mechanical contractor who believes his business has been harmed by Local 100's having coerced Connell into signing the subcontracting agreement is entitled to sue the union for compensatory damages; for § 303 broadly grants its damages action to "[w]hoever shall be injured in his business or property" [\*\*\*\*54] by reason of a labor organization's engaging in a § 8(b)(4) unfair labor practice.<sup>9</sup>

[\*\*\*\*56] [**\*650**] Moreover, there is considerable evidence in the legislative materials indicating that in expanding the scope of § 303 to include a remedy for secondary pressure designed to force an employer to sign an illegal "hot cargo" clause and in restricting the remedies for violation of § 8(e) itself to those available from the Board, Congress in 1959 made the [\*\*\*442] same deliberate choice to exclude antitrust remedies as was made by the 1947 Congress.

While the House was considering labor reform legislation in the summer of 1959, specific proposals were made to apply the antitrust laws to labor unions. Representative Hiestand of California introduced a bill which "would solve many of the problems attending unbridled union power as it exists and operates in this country. My proposal is in the nature of antitrust legislation, applied to labor unions." 105 Cong. Rec. 12135, 2 NLRB Legislative History of [\*\*1849] the Labor-Management Reporting and Disclosure Act of 1959, p. 1507 (hereinafter Leg. Hist. of LMRDA).

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<sup>8</sup> If, contrary to the Court's conclusion, see ante, at 626-633, Congress intended what it said in the proviso to § 8(e), then the subcontracting agreement is valid and, under the view of the Board and those Courts of Appeals that have considered the question, Local 100's picketing to obtain the agreement would also be lawful. See, e.g., [Orange Belt District Council of Painters v. NLRB, 117 U.S. App. D.C. 233, 236, 328 F. 2d 534, 537](#); [Construction Laborers v. NLRB, 323 F. 2d 422](#) (CA9); [Northeastern Indiana Bldg. Trades Council, 148 N.L.R.B. 854](#), enforcement denied on other grounds, [122 U.S. App. D.C. 220, 352 F. 2d 696](#). Connell would therefore have neither a remedy under § 303 nor one with the Board.

It would seem necessarily to follow that conduct specifically authorized by Congress in the National Labor Relations Act could not by itself be the basis for federal antitrust liability, unless the Court intends to return to the era when the judiciary frustrated congressional design by determining for itself "what public policy in regard to the industrial struggle demands." [Duplex Printing Press Co. v. Deering, 254 U.S. 443, 485](#) (Brandeis, J., dissenting). See [United States v. Hutcheson, 312 U.S. 219](#). In my view, however, even if Local 100's conduct was unlawful, Connell may not seek to invoke the sanctions of the antitrust laws. Accordingly, I find it unnecessary to decide in this case whether the subcontracting agreement entered into by Connell and Local 100 is within the ambit of the construction-industry proviso to § 8(e), and if it is, whether it was permissible for Local 100 to utilize peaceful picketing to induce Connell to sign the agreement.

<sup>9</sup> If Connell and Local 100 had entered into a purely voluntary "hot cargo" agreement in violation of § 8(e), an injured nonunion mechanical subcontractor would have no § 303 remedy because the union would not have engaged in any § 8(b)(4) unfair labor practice. The subcontractor, however, would still be able to seek the full range of Board remedies available for a § 8(e) unfair labor practice. Moreover, if Connell had truly agreed to limit its subcontracting without any coercion whatsoever on the part of Local 100, the affected subcontractor might well have a valid antitrust claim on the ground that Local 100 and Connell were engaged in the type of conspiracy aimed at third parties with which this Court dealt in [Allen Bradley Co. v. Electrical Workers, 325 U.S. 797](#). At the very least, an antitrust suit by an injured subcontractor under circumstances in which Congress had failed to provide any form of private remedy for damage resulting from an illegal "hot cargo" agreement would present a very different question from the one before us - a question which it is not now necessary to answer. Cf. [Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 708 n. 9](#) (opinion of Goldberg, J.).

On the other hand, the signatory of a purely voluntary agreement that violates § 8(e) is fully protected from any damage that might result from the illegal "hot cargo" agreement by his ability simply to ignore the contract provision that violates § 8(e). If the union should attempt to enforce the illicit "hot cargo" clause through any form of coercion, the employer may then bring a § 303 damages suit or may file an unfair labor practice charge with the Board. See [29 U.S.C. § 158\(b\)\(4\)\(B\)](#). Since § 8(e) provides that any prohibited agreement is "unenforceable and void," any union effort to invoke legal processes to compel the neutral employer to comply with his purely voluntary agreement would obviously be unavailing.

Representative Alger of Texas joined in cosponsoring the legislation, stating that "[u]nion monopoly power" manifests itself in "restrictive trade practices [\*\*\*\*57] such as price fixing, restrictions on use of new processes and technological improvements, exclusion of products for the market, and so forth.... This bill deals directly with [this aspect] of union monopoly power." 105 Cong. Rec. 12136, 2 Leg. Hist. of LMRDA 1507. Representative Alger added the following explanation of the bill: S

"Under the language of H.R. 8003 any attempt [\*651] by a union to induce an employer or a group of employers to comply with a union demand which would result in restrictive trade practices would be unlawful, and an employer faced with such a demand could seek legal remedies to restrain the union from enforcing its demand. The consequent denial to unions of the right to fix prices or impose other artificial market limitations would not in any way interfere with normal and legitimate union functions or with their proper collective bargaining powers. They would merely be placed on an equal footing with all other groups in society as was the case during the fifty years prior to the Hutcheson decision." 105 Cong. Rec. 12137, 2 Leg. Hist. of LMRDA 1508.I

The Landrum-Griffin bill, H.R. 8400, 86th Cong., 1st Sess., which, as amended, was enacted as the [\*\*\*\*58] Labor-Management Reporting and Disclosure Act of 1959,<sup>10</sup> by contrast, clearly provided that the new secondary-boycott [\*652] and "hot cargo" provisions were to be enforced solely through the Board and by use of the § 303 damages remedy. See 105 Cong. Rec. 14347-14348, 2 Leg. Hist. of [\*\*\*443] LMRDA 1522-1523. Recognizing this important difference, Representative Alger proposed to amend the Landrum-Griffin bill by adding, as an additional title, the antitrust provisions of H.R. 8003. 105 Cong. Rec. 15532-15533, 2 Leg. Hist. of LMRDA 1569. Representative Alger once again stated that his proposed amendment would make it unlawful for an individual local union to "[e]nter into any arrangement - voluntary or coerced - with any employer, groups of employers, or other unions which cause product boycotts, price fixing, or other types of restrictive trade practices." 105 Cong. Rec. 15533, 2 Leg. Hist. of LMRDA 1569.

[\*\*\*\*59] Representative Griffin responded to Representative Alger's proposed amendment by observing: S

"[I]t serves to point out that the substitute [the Landrum-Griffin bill] is a minimum bill. It might be well at this point to mention some provisions that are not in it.

"There is no antitrust law provision in this bill.

... . . .

"This is truly a minimum bill that a responsible Congress should pass. I believe I speak for the gentleman from Georgia [MR. LANDRUM], as well as myself when I say that if amendments are offered on the floor to add [\*\*1850] antitrust provisions or others that have been mentioned, I, for one, will oppose them. The gentleman from Georgia and I have tried to balance delicately the provisions which we believe should be in a bill at this time and which a majority of this body could support." 105 Cong. Rec. 15535, 2 Leg. Hist. of LMRDA 1571-1572.I

The Alger amendment was rejected, as were additional [\*653] efforts to subject proscribed union activities to the antitrust laws and their sanctions. See, e.g., 105 Cong. Rec. 15853, 2 Leg. Hist. of LMRDA 1685 (amendment offered by Rep. Hoffman). The House then adopted the Landrum-Griffin bill over [\*\*\*\*60] protests that it "does not go far enough, that it needs more teeth, and that more teeth are going to come in the form of legislation to bring

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<sup>10</sup> The legislative proceedings leading to the passage of the Labor-Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act), 73 Stat. 519, began in January 1959 when Senator John Kennedy introduced S. 505, 86th Cong., 1st Sess. In March 1959 Senator Kennedy introduced S. 1555, incorporating 46 amendments to S. 505 made by the Committee on Labor and Public Welfare. S. 1555, with various additional amendments, was approved by the Senate on April 25, 1959, and sent to the House, where it was referred to the Committee on Education and Labor. On July 30, 1959, the House Committee favorably reported H.R. 8342, 86th Cong., 1st Sess. One week earlier H.R. 8400 and H.R. 8401, identical bills, were introduced in the House by Representatives Landrum and Griffin, respectively. The House voted on August 13, 1959, to substitute the text of H.R. 8400 for the text of the House Committee bill, and the Landrum-Griffin bill was then inserted by the House in S. 1555 in lieu of its provisions. The Conference made several substantive changes in the Landrum-Griffin bill, which was then passed by both the House and Senate and approved by the President. See generally 1 Leg. Hist. of LMRDA vii-xi.

labor union activities under the antitrust laws." 105 Cong. Rec. 15858, 2 Leg. Hist. of LMRDA 1690 (remarks of Rep. Alger); see 105 Cong. Rec. 15859-15860, 2 Leg. Hist. of LMRDA 1691-1692 (adoption of the Landrum amendment to H.R. 8342, substituting in lieu of the text thereof the text of H.R. 8400 as amended).

The House-Senate Conference made some substantive changes in the language of the amendments to § 8 (b)(4), and also added the construction- and garment-industry provisos to § 8 (e). See generally Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257. But no change was made in the nature of the sanctions authorized for violations of either section by the House-passed Landrum-Griffin bill: An injured party could either seek relief from the Board or bring suit for damages under § 303 against unions that violate the revised secondary-boycott prohibitions. No provisions were made for exposing proscribed union secondary activity or "hot cargo" agreements to antitrust liability. See H. [\*\*\*\*61] R. Conf. Rep. No. 1147, 86th Cong., 1st Sess., [\*\*\*444] 1 Leg. Hist. of LMRDA 934.<sup>11</sup>

[\*654] Indeed, two years after enactment of the Landrum-Griffin Act, Senator McClellan, whose committee hearings into abuses caused by concentrated [\*\*\*\*62] labor power had played a major role in generating support for the 1959 labor reform legislation, together with five other Senators, introduced a bill to provide antitrust sanctions for illegal "hot cargo" agreements in the transportation industry, despite the fact that such agreements were already expressly prohibited by § 8 (e).<sup>12</sup> As it had in 1947 and 1959, however, Congress in 1961 rejected this effort to subject illegal union secondary conduct to the sanctions of the antitrust laws.

[\*\*\*\*63] In [\*\*1851] sum, the legislative history of the 1947 and 1959 amendments and additions to national labor law clearly demonstrates that Congress did not intend to restore antitrust sanctions for secondary boycott activity such as that engaged in by Local 100 in this case, but rather [\*655] intended to subject such activity only to regulation under the National Labor Relations Act and § 303 of the Labor Management Relations Act. The judicial imposition of "independent federal remedies" not intended by Congress, no less than the application of state law to union conduct that is either protected or prohibited by federal labor law,<sup>13</sup> threatens "to upset the balance of power between labor and management expressed in our national labor policy." [Teamsters v. Morton, 377 U.S., at 260](#). See [Carpenters v. NLRB, 357 U.S., at 98-100](#); [National Woodwork Mfrs. Assn. v. NLRB, 386 U.S., at 619-620](#). Accordingly, the judgment before us should be affirmed.

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## References

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<sup>11</sup> Representative Hiestand, during House debate on the report of the Conference Committee, recommended adoption of the bill as amended by the Conference and complimented Representatives Landrum and Griffin for their efforts in guiding the bill through Congress. But in expressing concern over the fact that the legislation did not restore antitrust sanctions for union secondary activity and other anticompetitive restraints of trade, he warned: "[W]e should act today with full knowledge that passage of the Landrum-Griffin bill will not solve every problem. The heart of the problem, the very heart, is the sheer power in the hands of labor union leaders due to their above-the-law status with respect to our antimonopoly laws." 105 Cong. Rec. 18132; 2 Leg. Hist. of LMRDA 1719.

<sup>12</sup> [Section 2 \(b\)\(2\)](#) of Senator McClellan's bill, S. 2573, 87th Cong., 1st Sess., provided that the Sherman Act be amended to read in part:

"Notwithstanding any other provision of law, every contract, agreement, or understanding, express or implied, between any labor organization and any employer engaged in the transportation of persons or property, whereby such employer undertakes to cease, or to refrain from, purchasing, using, selling, handling, transporting, or otherwise dealing in any of the products or services of any producer, processor, distributor, supplier, handler, or manufacturer which are distributed in trade or commerce in any territory of the United States or the District of Columbia, or between any such territory and another, or between any such territory or territories and any State or States or the District of Columbia or with foreign nations, or between the District of Columbia and any State or States or foreign nations, or to cease doing business with any other person shall be unlawful."

<sup>13</sup> I fully agree with the Court's conclusion, ante, at 635-637, that federal labor law pre-empts the state law that Connell sought to apply to Local 100's secondary activity in this case.

48 Am Jur 2d, Labor and Labor Relations 306, 309, 1458

16 Am Jur PI & Pr Forms (Rev ed), Labor and Labor Relations Form 101.1

15 USCS 17; 29 USCS 52, 104, 105, 113, 158(e)

US L Ed Digest, Commerce 129; Restraints of Trade and Monopolies 46; States 38

ALR Digests, Commerce 32; Restraints of Trade and Monopolies 22

L Ed Index to Annos, Labor and Employment; Restraints of Trade and Monopolies

ALR Quick Index, Commerce; Labor and Labor Unions; Restraints of Trade and Monopolies

Federal Quick Index, Commerce; Monopolies and Restraints of Trade

Annotation References:

Union activities violating the federal antitrust laws. 9 L Ed 2d 998, 20 L Ed 2d 1528.

National Labor Relations Act and Labor Management Relations Act as excluding state action. 93 L Ed 470, 94 L Ed 984, 95 L Ed 384, 98 L Ed 245, 99 L Ed 559, 100 L Ed 1174; 174 ALR 1051. [\*\*\*\*65]

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## **United States v. Citizens & Southern Nat'l Bank**

Supreme Court of the United States

Argued March 19, 1975 ; June 17, 1975

No. 73-1933

### **Reporter**

422 U.S. 86 \*; 95 S. Ct. 2099 \*\*; 45 L. Ed. 2d 41 \*\*\*; 1975 U.S. LEXIS 113 \*\*\*\*; 1975-1 Trade Cas. (CCH) P60,360

UNITED STATES v. CITIZENS & SOUTHERN NATIONAL BANK ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

### **Core Terms**

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banks, correspondent, Sherman Act, mergers, Deposits, de facto, Top, acquisition, bank holding company, district court, shares, demand deposit, branching, antitrust, stock, acquire, largest, de jure, transactions, grandfather, suburban, Loans, immunity, programs, total loan, Clayton Act, affiliation, proposed acquisition, total deposit, markets

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > ... > Bank Expansions > Branch Banking > Federal Preemption

Banking Law > Commercial Banks > Bank Expansions > General Overview

Banking Law > ... > Bank Expansions > Branch Banking > General Overview

#### **HN1[] Regulated Industries, Financial Institutions**

In applying the antitrust laws to banking, careful account must be taken of the pervasive federal and state regulation characteristic of the industry, particularly the legal restraints on entry unique to this line of commerce.

Antitrust & Trade Law > Sherman Act > General Overview

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

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Clayton Act > General Overview

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

See [15 U.S.C.S. § 18.](#)

Antitrust & Trade Law > Regulated Industries > Financial Institutions > Bank Mergers

Banking Law > ... > Banking & Finance > Commercial Banks > Mergers & Consolidations

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Banking Law > Commercial Banks > Bank Expansions > General Overview

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

### **HN4** [down] Financial Institutions, Bank Mergers

Pursuant to [12 U.S.C.S. § 1828\(c\)\(7\)\(B\)](#), referring to [12 U.S.C.S. § 1828 \(c\)\(5\)\(B\)](#), bank mergers are made subject to Clayton Act standards unless the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served. Hence, in bank merger cases brought under the Clayton Act, there is a convenience and needs defense that comes into play only after a district court has made a de novo determination of the status of a bank merger under the Clayton Act.

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

Banking Law > ... > National Banks > Interest & Usury > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

### **HN5** [down] Per Se Rule & Rule of Reason, Per Se Violations

The dissemination of price information is not itself a per se violation of the Sherman Act, [15 U.S.C.S. § 1.](#)

Banking Law > Commercial Banks > Bank Expansions > Banking Interests

Governments > Local Governments > Finance

Banking Law > Bank Activities > Electronic Banking > General Overview

## **HN6** **Bank Expansions, Banking Interests**

Correspondent banking is an interbank practice whereby city correspondent banks provide a cluster of services to smaller country banks in exchange for interbank deposits. Among the services typically provided within a conventional correspondent arrangement are check clearing, help with bill collections, participation in large loans, legal advice, help in building securities portfolios, counseling as to personnel policies, staff training, help in site selection, auditing, and the provision of electronic data processing.

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

## **HN7** **Antitrust & Trade Law, Sherman Act**

Even commonly owned firms must compete against each other if they hold themselves out as distinct entities. The corporate interrelationships of the conspirators are not determinative of the applicability of the Sherman Act, [15 U.S.C.S. §§ 1, 2](#). A fortiori, independently owned firms cannot escape competing merely by pretending to common ownership or control. Moreover, a business entity generally cannot justify restraining trade between itself and an independently owned entity merely on the ground that it helped launch that entity, by providing expert advice or seed capital.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

## **HN8** **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

Accomplished through private agreement, market division is a per se offense under the Sherman Act, [15 U.S.C.S. §§ 1, 2](#). Horizontal territorial limitations are naked restraints of trade with no purpose except stifling of competition.

## **Lawyers' Edition Display**

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### **Summary**

To circumvent Georgia law which, as then in force, restricted city banks from opening branches in suburban areas, a Georgia national bank (C&S National) formed a holding company (C&S Holding), and the latter company embarked upon a program of forming de facto branch banks in the suburbs of Atlanta. This program involved, among other features, ownership by C&S Holding of 5 percent of the stock of each of the suburban banks (the maximum allowed by state law), and ownership of much of the remaining stock by parties friendly to the C&S system of banking entities (C&S), this system including C&S National and its majority owned affiliates and C&S Holding, but excluding the 5-percent banks. After Georgia amended its banking statutes to allow de jure branching on a countywide basis, C&S applied to the Federal Deposit Insurance Corporation (FDIC) under the Bank Merger Act of 1966 ([12 USCS 1828\(c\)](#)) for permission to acquire all of the stock of six of the 5-percent banks operated by

C&S as de facto branches. The FDIC authorized all but one of the proposed acquisitions. The government immediately commenced the instant litigation in the United States District Court for the Northern District of Georgia for injunctive relief, alleging that the five acquisitions authorized by the FDIC would lessen competition in relevant banking markets, thus violating 7 of the Clayton Act ([15 USCS 18](#)), and that the historic "de facto branch" relations between C&S and the six 5-percent banks constituted unreasonable restraints of trade in violation of 1 of the Sherman Act ([15 USCS 1](#)). The District Court rendered judgment for C&S on all the issues ([372 F Supp 616](#)).

On direct appeal, the United States Supreme Court affirmed. In an opinion by Stewart, J., expressing the views of six members of the court, it was held that (1) the "grandfather" provision to the Bank Holding Company Act ([12 USCS 1849\(d\)](#)) immunized the C&S transactions consummated prior to July 1966; (2) in the face of the stringent state restrictions on branching, C&S program of founding new de facto branches, and maintaining them as such, did not infringe 1 of the Sherman Act; and (3) the acquisitions, proposed by C&S, of stock in the de facto branch corporations did not violate 7 of the Clayton Act.

Brennan, J., joined by Douglas and White, JJ., dissented on the grounds that (1) the government proved violations of 1 of the Sherman Act and 7 of the Clayton Act; and (2) the grandfather provision of the Bank Holding Company Act did not foreclose antitrust scrutiny as to some of the de facto branch corporations.

## Headnotes

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MONOPOLIES §5 > federal antitrust laws -- application to banking -- relevant considerations -- > Headnote:  
[LEdHN\[1\]](#) [1]

In applying the antitrust laws to banking, careful account must be taken of the pervasive federal and state regulation characteristic of the industry, and particularly of the legal restraints on entry unique to this line of commerce; this admonition has special force where de facto branch arrangements and proposed acquisitions of stock in de facto branches are a direct response to a state's historic restrictions on branch banking.

MONOPOLIES §34.5 > bank mergers -- "convenience and needs defense" -- > Headnote:  
[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

In cases in which a bank merger is challenged under 7 of the Clayton Act ([15 USCS 18](#)), prohibiting the acquisition by one corporation of the stock of another where the effect of such acquisition may be substantially to lessen competition, there is a "convenience and needs defense" that comes into play only after a United States District Court has made a de novo determination of the status of a bank merger under the Act, since pursuant to a provision in the Bank Merger Act ([12 USCS 1828\(c\)\(7\)\(B\)](#)), referring to [12 USCS 1828\(c\)\(5\)\(B\)](#), bank mergers are made subject to Clayton Act standards unless "the anticipated effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."

MONOPOLIES §20 > banks -- correspondent associate programs -- immunity from antitrust laws -- > Headnote:  
[LEdHN\[3\]](#) [3]

In determining whether correspondent associate programs of a system of banking entities are immune from scrutiny under the Sherman Antitrust Act ([15 USCS 1 et seq.](#)), recourse must be had directly to the provisions of the Bank Holding Company Act ([12 USCS 1841 et seq.](#)); such immunity cannot be rested on the doctrine of exclusive primary jurisdiction of the Federal Reserve Board under a provision of the Bank Holding Company Act ([12 USCS 1842\(a\)](#)) which requires the prior approval of the Federal Reserve Board for certain transactions by bank holding companies, including transactions tending to create or enlarge holding company control of independent banks.

MONOPOLIES §20 > acquisitions of bank stock -- antitrust immunity -- Federal Reserve Board -- staff's "understanding" --

> Headnote:

[LEdHN\[4\]](#) [down] [4]

An "understanding" between the staff of the Federal Reserve Board and a bank holding company that its correspondent associate programs then in effect did not offend a provision of the Bank Holding Company Act ([12 USCS 1842\(a\)](#)) concerning the legality or illegality of the acquisition of bank shares or assets, does not give rise to any antitrust immunity, since(1) a consummated transaction acquires immunity under [12 USCS 1849\(b\)](#) only when no antitrust action has been commenced within 30 days after the transaction has received the approval of the Board, in an order which is subject to judicial review and which reflects application by the Board of the special antitrust standards of [12 USCS 1842\(c\)](#), and (2) under [12 USCS 1849\(b\)](#), the immunity applies only to an acquisition, merger, or consolidation transaction approved under [12 USCS 1842](#) in compliance with the Bank Holding Company Act.

MONOPOLIES §20 > Bank Holding Company Act -- purpose -- > Headnote:

[LEdHN\[5\]](#) [down] [5]

The purpose of the complex machinery set forth in the provision of the Bank Holding Company Act ([12 USCS 1849\(b\)](#)--which, insofar as relevant, states that a consummated transaction acquires immunity only when no antitrust action has been commenced within 30 days after the transaction has received the approval of the Federal Reserve Board, in an order which is subject to judicial review and which reflects application by the Board of the special antitrust standards of [12 USCS 1842\(c\)](#)--is to accord finality to formal actions of the Board not subjected to timely challenge under the antitrust laws; there is no indication that Congress wished to accord a similar finality to the informal views of the Board's staff.

MONOPOLIES §20 > acquisition of stock in banking corporations -- "grandfather" provision of Bank Holding Company Act --

> Headnote:

[LEdHN\[6A\]](#) [down] [6A] [LEdHN\[6B\]](#) [down] [6B] [LEdHN\[6C\]](#) [down] [6C] [LEdHN\[6D\]](#) [down] [6D]

Transactions by which a system of banking entities created a correspondent associate relationship with some of its de facto branch banks and which were consummated prior to July 1966, without the Attorney General having taken any action against those transactions, fall within the terms of the "grandfather" provision of the Bank Holding Company Act ([12 USCS 1849\(d\)](#)), and the correspondent associate programs in force as to those de facto branch banks are immune from attack under 1 of the Sherman Antitrust Act ([15 USCS 1](#)), since the grandfather provision (1) does not state or imply that the covered transactions must have received the formal approval of the Federal Reserve Board; (2) is a simple conferral of legislative amnesty for theretofore unchallenged transactions completed before Congress had clarified the nature of the accommodation between the federal laws; (3) creates immunity

under 1 of the Sherman Antitrust Act ([15 USCS 1](#)), not simply under the stock acquisition prohibition of 7 of the Clayton Act ([15 USCS 18](#)), which is an indication that its protection extends not merely to literal acquisitions, mergers, and consolidations, but also to "restraints of trade" simultaneous with and functionally integral to such transactions; (4) though by its terms applying to transactions of the kind described in [12 USCS 1842\(a\)](#), is not limited to benefit only transactions that plainly transgressed [12 USCS 1842\(a\)](#); and (5) while creating a conclusive presumption of compliance with the **antitrust law**, does not necessarily create such a presumption of compliance with the provisions of the Bank Holding Company Act.

BANKS §3.5 > formation of de facto branch -- merger -- > Headnote:

[LEdHN/7](#) [down] [7]

While the formation, by a system of banking entities, of de facto branch banks is a unique type of transaction, it may fairly be characterized as an acquisition, merger or consolidation of the kind described in the provision of the Bank Holding Company Act concerning the legality or illegality of acquisition of bank shares or assets ([12 USCS 1842\(a\)](#)), where, though multifaceted, the formation of the de facto branches was a unitary and cohesive undertaking in the sense that all the facets were closely coordinated, simultaneously instituted, and designed to serve the single purpose of fitting the new bank into the system of the banking entities.

MONOPOLIES §33 > price information -- > Headnote:

[LEdHN/8](#) [down] [8]

The dissemination of price information is not itself a per se violation of the Sherman Antitrust Act ([15 USCS 1 et seq.](#)).

ERROR §1477 > antitrust actions -- review of District Court's findings -- > Headnote:

[LEdHN/9](#) [down] [9]

In the light of the United States Supreme Court's holding that the correspondent associate program of a system of bank entities concerning its de facto branches is permissible under 1 of the Sherman Antitrust Act ([15 USCS 1](#)), the Supreme Court cannot hold "clearly erroneous," within the meaning of Federal Civil Procedure [Rule 52\(a\)](#), the United States District Court's finding--in the government's civil antitrust action against banks, in which the government alleged that the relationship between that system and its de facto branch banks was illegal per se because encompassing a tacit agreement to fix interest rates and services--that the lack of significant price competition did not flow from that agreement but instead was an indirect, unintentional, and formally discouraged result of the sharing of expertise and information which was at the heart of the correspondent associate program.

MONOPOLIES §32 > violation of Sherman Act -- correspondent banking arrangement -- > Headnote:

[LEdHN/10](#) [down] [10]

Standing alone, the facts that (1) the associate program of a system of bank entities for its associated branch corporations has gone several steps beyond conventional correspondent arrangements in that the system banks

closely advised the boards of directors of the de facto branch banks, supplied their chief executive officers, allowed full "branchlike" use of the system's logogram, provided all the system banks' services available at a de jure branch, dealt with the de facto branch banks through the system banks' administration department, provided constant and detailed information on prices and on all banking procedures, and (2) conceivably these relationships, separately or taken together, restrained competition among all these banks more thoroughly or effectively than would have a conventional correspondent program, do not make out a violation of the Sherman Antitrust Act ([15 USCS 1 et seq.](#)) where the system banks' operation of the associated corporations as de facto operations was a direct response to the state's historic restrictions on de jure branching.

MONOPOLIES §5 > Sherman Act -- central message -- > Headnote:

[LEdHN\[11\]](#) [11]

The central message of the Sherman Antitrust Act ([15 USCS 1 et seq.](#)) is that a business entity must find new customers and higher profits through internal expansion, that is, by competing successfully rather than by arranging treaties with its competitors.

MONOPOLIES §10 > conspiracy -- corporate interrelationship -- common ownership and control -- > Headnote:

[LEdHN\[12\]](#) [12]

The corporate interrelationships of conspirators are not determinative of the applicability of the Sherman Antitrust Act ([15 USCS 1 et seq.](#)); a fortiori, independently owned firms cannot escape competing merely by pretending to common ownership, since the pretence would simply perfect the cartel.

MONOPOLIES §53 > market division -- horizontal territorial limitations -- > Headnote:

[LEdHN\[13\]](#) [13]

Accomplished through private agreement, market division is a per se offense under the Sherman Antitrust Act ([15 USCS 1 et seq.](#)); horizontal territorial limitations are naked restraints of trade with no purpose except stifling of competition.

MONOPOLIES §34 > Sherman Act -- de facto branch banks -- state restrictions on branching -- > Headnote:

[LEdHN\[14\]](#) [14]

A program, adopted by a system of bank entities, of founding new de facto branches, and maintaining them as such, does not infringe 1 of the Sherman Antitrust Act ([15 USCS 1](#)) where stringent state restrictions on banking preclude the formation of de jure branches.

MONOPOLIES §34.5 > banks -- acquisition of stock in de facto branch corporation -- > Headnote:

[LEdHN\[15A\]](#) [15A] [LEdHN\[15B\]](#) [15B]

The acquisitions, proposed by a system of banking entities and approved by the Federal Deposit Insurance Corporation, of stock in de facto branch corporations, founded ab initio with the system's sponsorship, do not violate 7 of the Clayton Act ([15 USCS 18](#)), prohibiting stock acquisitions the effect of which may be substantially to lessen competition in any line of commerce in any section of the country, where (1) the bank system's program of founding and maintaining new de facto branch corporations does not, in the face of the state's antibranching law, violate the Sherman Antitrust Act ([15 USCS 1 et seq.](#)), and hence the proposed acquisitions will extinguish no present competitive conduct or relationships; and (2) as to future competition, there is no evidence of any realistic prospect that denial of these acquisitions would lead the banks to compete against each other, the record showing that none of the shareholders, directors, or officers of the de facto branch corporations expressed any inclination to break their ties with the bank system and its correspondent associate program.

EVIDENCE §343.5 > acquisition of stock in banking corporations -- prima facie case -- burden of rebuttal -- > Headnote:

[LEdHN\[16\]](#) [16]

In a civil antitrust action brought by the government to challenge the acquisitions, by a system of banking entities, of the stock of de facto branch corporations as violating 7 of the Clayton Act ([15 USCS 18](#)), the government makes out a prima facie case of such violation by establishing that the bank system is the predominate banking institution in the appropriate markets, that in these markets the commercial banking industry is quite highly concentrated in terms of market share statistics, and that the proposed acquisitions would increase the system's nominal market shares; it is then incumbent upon the bank system to show that the market share statistics give an inaccurate account of the acquisitions' probable effects on competition.

MONOPOLIES §34.5 > stock acquisitions -- effect on competition -- > Headnote:

[LEdHN\[17\]](#) [17]

The prohibition in 7 of the Clayton Act ([15 USCS 18](#)) of the acquisition by one corporation of the stock of another where the effect of such acquisition may be to substantially lessen competition in any line of commerce in any section of the country, is concerned with "probable" effects on competition, and not with "ephemeral possibilities."

## Syllabus

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To circumvent Georgia's long standing stringent restrictions on city banks' opening branches in suburban areas, appellee Citizens & Southern National bank (C&S National) formed a holding company, which then embarked on a program of forming *de facto* branch banks in Atlanta's suburbs. This program included the holding company's ownership of 5 percent of the stock of each of the suburban banks', ownership of much of the remaining stock by parties friendly to the C&S system of banking entities (hereafter C&S), the suburban banks' use of the C&S logogram and of all C&S's banking services, and close C&S oversight of the suburban banks' operation and governance. In 1970, Georgia amended its banking statutes so as to allow *de jure* branching upon a countywide basis. This meant that C&S could now absorb the 5-percent banks as true branches, because Atlanta is contained within the two counties encompassing the suburbs in which the 5-percent banks operated. Consequently C&S applied to the Federal Deposit Insurance Corporation [\*\*\*\*2] (FDIC) under the Bank Merger Act of 1966 for permission to acquire all the stock of six of the 5-percent banks historically operated as *de facto* branches or

"correspondent associate" banks within the C&S system. The FDIC authorized five of the proposed acquisitions. The Government then brought suit in District Court for injunctive relief, alleging that the five acquisitions would lessen competition in relevant banking markets in violation of § 7 of the Clayton Act, and that the historic, *de facto* branch relations between C&S and the six 5-percent banks constituted unreasonable restraints of trade in violation of § 1 of the Sherman Act. The court rendered judgment for C&S. Three of the 5-percent banks were formed prior to, and three after, July 1, 1966. The "grandfather" provision of the Bank Holding Company Act, 12 U.S.C. § 1849(d), as added by the 1966 amendments, provides that [a]ny acquisition, merger, or consolidation of the kind described in [12 U.S.C. § 1842 (a)]. . . which was consummated at any time prior or subsequent to May 9, 1956, and as to which no litigation was initiated by the Attorney General prior to July 1, 1966, shall [\*\*\*\*3] be conclusively presumed not to have been in violation of any antitrust laws other than § 2 of the Sherman Act. Title 12 U.S.C. § 1842 (a) makes it unlawful, absent the Federal Reserve Board's prior approval, for bank holding companies to engage in certain transactions, including those tending to create or enlarge holding company control of independent banks. *Held:*

1. Since the Attorney General took no action by July 1966 against the three 5-percent banks that were formed prior to that date, the transactions by which these banks became 5-percent banks fall within the terms of the grandfather provision of the Bank Holding Company Act, and therefore the correspondent associate programs in force at these banks are immune from attack under § 1 of the Sherman Act. While C&S's formation of a *de facto* branch was a unique type of transaction, it may fairly be characterized as an "acquisition, merger, or consolidation of the kind described in [12 U.S.C. § 1842 (a)]," and clearly falls within the class of dealings by bank holding companies that Congress intended, in the grandfather provision, to shield from retroactive challenge under the antitrust [\*\*\*\*4] laws. Pp. 102-111.

2. In the face of the stringent state restrictions on branching, C&S's program of founding new *de facto* branches, and maintaining them as such, did not infringe § 1 of the Sherman Act. Pp. 111-120.

(a) Though the government contends that the correspondent associate programs encompassed at least a tacit agreement to fix interest rates and service charges so as to make the interrelationships--to that extent at least--illegal *per se*, it cannot be held, in view of the mixed evidenced in the record, and of the fact that such programs, as such, were permissible under the Sherman Act, that the District Court clearly erred in finding that the lack of significant price competition flowed, not from a tacit agreement, but as an indirect, unintentional, and formally discouraged result of the sharing of expertise and information that was at the heart of the correspondent associate program. Pp. 112-114.

(b) The Government's alternative contention that the correspondent associate programs transcending conventional "correspondent" relationships "unreasonably" restrained competition among the 5-percent banks and between these banks and C&S National, is not persuasive, [\*\*\*\*5] since even if the Government had proved that such programs restrained competition among the defendant banks more thoroughly or effectively than would have a conventional correspondent program (which the District Court found not to be the case), that alone would not make out a Sherman Act violation. Pp. 114-116.

(c) Where C&S has operated the 5-percent banks as *de facto* branches in direct response to Georgia's historic restrictions on *de jure* branching, restraints of trade integral to this particular, unusual function are not unreasonable. To characterize the relationships at issue as an unreasonable restraint of trade is to forget that their whole purpose and effect were to defeat a restraint of trade, and by providing new banking options to suburban Atlanta customers, while eliminating no existing options, C&S's *de facto* branching program has plainly been procompetitive. Pp. 116-120.

3. The proposed acquisitions will not violate § 7 of the Clayton Act. Pp. 120-122.

(a) Since C&S's program of founding and maintaining new *de facto* branches in the face of Georgia's antibranching law did not violate the Sherman Act, and since the *de facto* branches [\*\*\*\*6] that C&S proposes to acquire were all founded *ab initio* with C&S sponsorship, it follows that the proposed acquisitions will extinguish no present competitive conduct or relationships. P. 121.

(b) As for future competition, there is no evidence of any realistic prospect that denial of the acquisitions would lead the defendant banks to compete against each other, the Clayton Act being concerned with "probable" effects on competition, not with "ephemeral possibilities." Pp. 121-122.

372 F.Supp. 616, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and WHITE, JJ., joined, *post*, p. 130.

**Counsel:** *Deputy Solicitor General Friedman* argued the cause for the United States. On the briefs were *Solicitor General Bork*, *Assistant Attorney General Kauper*, *Gerald P. Norton*, *Howard E. Shapiro*, and *George Edelstein*.

*Daniel B. Hodgson* argued the cause for appellees. With him on the briefs were *Michael A. Doyle*, *Walter M. Grant*, *Richard A. Posner*, and *Philip L. Roache, Jr.*\*

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**Judges:** Burger, Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist

**Opinion by:** STEWART

## Opinion

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[\*89] [\*\*48] [\*\*2103] MR. JUSTICE STEWART delivered the opinion of the Court.

For many years the State of Georgia restricted banks located in cities from opening branches in suburban areas. To circumvent these restrictions in the Atlanta area, the Citizens & Southern National Bank (C&S National) formed the Citizens & Southern Holding Company (C&S Holding), and the latter company embarked on a program of forming *de facto* branch banks in the suburbs of Atlanta. This program involved, among other features, ownership by C&S Holding of 5 percent of the stock of each of the suburban banks (the maximum allowed by state law), ownership of much of the remaining stock by parties friendly to C&S,<sup>1</sup> use by the suburban banks of the C&S logogram and of all of C&S's banking services, and close C&S oversight of the operation and governance of the suburban banks. The expectation on all sides -- by C&S, by the suburban banks, and by state and federal bank regulators -- was that C&S would acquire these "5-percent banks" outright, and convert them into *de jure* [\*\*\*\*8] branches, as soon as state law, or the Atlanta city limits, [\*90] were altered so as to permit the accomplishment of this end.

In 1970, Georgia amended its banking statutes to allow *de jure* branching on a countywide basis. Because the city of Atlanta is contained within two counties, DeKalb and Fulton, which encompass [\*\*2104] the Atlanta suburbs in which the 5-percent banks operated, this change in the law meant that C&S National could now absorb the 5-percent banks as true branches. C&S consequently applied [\*\*\*\*9] to the Federal Deposit Insurance Corporation (FDIC), under the Bank Merger Act of 1966, [\*\*\*49] 80 Stat. 7, 12 U.S.C. § 1828, for permission to acquire all of

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\* *Cubbedge Snow* and *Charles M. Stapleton* filed a brief for the Independent Bankers Association of Georgia, Inc., as *amicus curiae*.

<sup>1</sup> Unless otherwise indicated, the term "C&S" refers generically to the C&S system of banking entities, including C&S National and its majority owned affiliates and C&S Holding, but excluding the 5-percent banks. The defendants in this suit -- appellees here -- are C&S National, C&S Holding, six of the 5-percent banks, and two banks in the Atlanta area, C&S Emory and C&S East Point, which are subsidiaries of C&S Holding. Taken together, these will sometimes be called the "defendant banks."

the stock of six of the 5-percent banks historically operated by C&S as *de facto* branches. The FDIC authorized all but one of the proposed acquisitions.

The Justice Department immediately commenced this litigation in a Federal District Court for injunctive relief, alleging that the five acquisitions authorized by the FDIC would lessen competition in relevant banking markets, and thus violate [§ 7](#) of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, [15 U.S.C. § 18](#), and that the historic "de facto branch" relations between C&S and the six 5-percent banks constituted unreasonable restraints of trade in violation of [§ 1](#) of the Sherman Act, 26 Stat. 209, as amended, [15 U.S.C. § 1](#). After a trial, the court rendered judgment for C&S on all the issues. [372 F. Supp. 616](#). The Government appealed under [§ 2](#) of the Expediting Act, 32 Stat. 823, as amended, [15 U.S.C. § 29](#), and we noted probable jurisdiction. [\*\*\*\*10]<sup>2</sup>

#### [\*91] I. The Background of This Litigation

[LEdHN\[1\]](#) [1] [HN1](#) In applying the antitrust laws to banking, careful account must be taken of the pervasive federal and state regulation characteristic of the industry, "particularly the legal restraints on entry unique to this line of commerce." [United States v. Marine Bancorporation](#), [418 U.S. 602, 606](#). This admonition has special force in the present case, for the *de facto* branch arrangements [\*\*\*\*11] and the proposed acquisitions involved here were a direct response to Georgia's historic restrictions on branch banking.

Before 1927 Georgia permitted statewide branching, and C&S National, then as now headquartered in Savannah, established three branches in the city of Atlanta. In 1927, state law was changed to prohibit all branching.<sup>3</sup> C&S therefore decided to expand through the formation of a bank holding company. C&S Holding was founded in 1928, and between 1946 and 1954 this company purchased two banks, and founded a third, in the Atlanta area. But in 1956 Georgia again altered its statutes to prohibit a bank holding company from acquiring more than 15 percent of a bank's stock. Georgia Bank Holding Company Act, 1 Ga. Laws 1956, pp. 309-312. A 1960 amendment, still in force, reduced the maximum ownership level to 5 percent. [Ga. Code Ann. 13-207\(a\)\(2\)](#) (1967 ed. and Supp. 1974).

[\*\*\*\*12] By the 1950's, C&S National was interested primarily in suburban expansion. The Atlanta city limits had been frozen since 1952, and the area's economic and population growth consequently occurred primarily outside the city's boundaries. Between 1959 and 1969, C&S Holding accordingly established in the Atlanta suburbs (in DeKalb and Fulton Counties) the six 5-percent [\*92] banks at issue in this case. Five of these banks were founded under the sponsorship [\*\*\*50] of C&S; the sixth, the Tucker Bank, had long been an independent suburban bank when, in 1965, C&S converted it into a 5-percent bank.<sup>4</sup>

<sup>2</sup> [419 U.S. 893](#). Notice of appeal was filed prior to the effective date of the Antitrust Procedures and Penalties Act, Pub. L. 93-528, [§ 7](#), 88 Stat. 1710. The proposed acquisitions were stayed automatically by the filing of the suit, [12 U.S.C. § 1828\(c\)\(7\)\(A\)](#). The District Court continued the stay, and it has remained in force pending this decision.

<sup>3</sup> A 1929 amendment allowed branching within the home-office city of a bank, but this was of no aid to the ambitions of C&S National outside Savannah.

<sup>4</sup> Founded with C&S sponsorship were: (1) The Sandy Springs Bank, Fulton County (two offices). Founded in 1959 and operational in 1960 as the Citizens National Bank of Sandy Springs, it was converted in 1969 from a national to a state-chartered bank and adopted the name Citizens and Southern Bank of Sandy Springs. (2) The Chamblee Bank, DeKalb County. Founded in 1960 as the Chamblee National Bank, it was converted to a state-chartered bank in 1969 and adopted the name Citizens and Southern Bank of Chamblee. (3) The North Fulton Bank, Fulton County and North Fulton County. It was founded in 1967 as the Citizens and Southern Bank of North Fulton, a state-chartered institution. (4) The Park National Bank, DeKalb County. It was founded in 1967 as the Citizens and Southern Park National Bank. (5) The South DeKalb Bank, DeKalb County (two offices). It was founded as the Citizens and Southern South DeKalb Bank, a state-chartered institution, in 1969.

The Citizens and Southern Bank of Tucker (two offices), in DeKalb County, was independently founded in 1919, as the Bank of Tucker. C&S Holding acquired 5-percent ownership in 1965, and the bank then adopted its present name. This bank is involved in only the Sherman Act phase of this case. Its proposed acquisition by C&S was forbidden by the FDIC.

[\*\*\*\*13] Each [\*\*2105] of these six banks was made a "correspondent associate" bank within the C&S system. This status involved many different relationships between the 5-percent bank and C&S: In addition to the 5-percent stock held by C&S Holding, substantial shares were also held by officers, shareholders, and friendly customers of other C&S banks, and by their family members. It was understood from the outset that the 5-percent banks would be acquired outright by C&S as soon as the law permitted. From at least 1965 on, the 5-percent banks used the C&S logogram on their buildings, papers, and correspondence. C&S filed the charter applications of the 5-percent banks [\*93] and openly assured the banks of full financial support, assurances which were often instrumental in securing regulatory approval of their creation. C&S chose the principal executive officer for each 5-percent bank. The employees of these banks were accorded the same pension and promotion rights in the C&S system as possessed by their colleagues at C&S National and its *de jure* affiliates. C&S selected the location of, and oversaw the selection of directors for, the suburban banks. A C&S executive served as an [\*\*\*\*14] "advisory director" to each suburban bank. C&S conducted surprise audits and credit checks at the suburban banks. Each of the suburban banks provided the full panoply of C&S banking services, and customers of any 5-percent bank could avail themselves of these services at any of the other 5-percent banks, or at C&S National and its *de jure* branches. C&S supplied to each 5-percent bank, through manuals and memoranda, a large quantity of information concerning every conceivable banking procedure and problem. Included were data -- stamped "for information only" -- concerning interest rates and service charges employed by C&S National and its *de jure* branches, but each 5-percent bank was cautioned to use its own judgment in setting interest rates and service charges. In sum, it is fair to say -- and the parties agree - that in almost every respect save corporate form, each of the 5-percent banks was a *de facto* branch of C&S National.

Between 1966 and 1968, the Federal Reserve Board investigated C&S's [\*\*\*51] network of correspondent associate banks. The purpose of the investigation was to determine whether C&S was exerting such control over the 5-percent banks as to require [\*\*\*\*15] special "approval" of the Federal Reserve Board pursuant to § 3 of the Bank Holding Company Act of 1956, as amended. [12 U.S.C. § 1842](#). The investigation ended in an "understanding" between the Board's staff and C&S that the "correspondent [\*94] associate" program, as the staff understood it, did not require formal approval.<sup>5</sup> The Justice Department participated in this investigation, and took no action of any kind inconsistent with this "understanding."

In 1970 Georgia amended its banking statutes to permit *de jure* branching within any county in which a bank already [\*\*2106] had an office. [Ga. Code Ann. 13-203.1 \(a\)](#) (Supp. 1974). This allowed C&S National to branch [\*\*\*\*16] into those Atlanta suburbs which -- like the city of Atlanta - are within the confines of DeKalb and Fulton Counties. C&S decided to convert the six 5-percent banks at issue here into *de jure* branches. C&S applied to the FDIC for permission to acquire all of the assets, and to assume all of the liabilities, of the 5-percent banks.<sup>6</sup> On October 4, 1971, after reviewing reports on the proposed acquisitions from the Federal Reserve Board, the Comptroller of the Currency, and the Justice Department, the FDIC approved C&S's acquisition of the five suburban banks which C&S had helped to found, but disapproved acquisition of the Tucker Bank. Because the Tucker Bank had enjoyed an independent existence before being converted into a 5-percent bank, the FDIC concluded that the correspondent associate affiliation there had been "anticompetitive in its origins" and should not be "ratified" by

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<sup>5</sup> See n. 17, *infra*. The investigation was concerned with § 3 of the Bank Holding Company Act of 1956, 70 Stat. 134, as amended on July 1, 1966, by Pub. L. 89-485, [§ 7](#), 80 Stat. 237, and on Dec. 31, 1970, by Pub. L. 91-607, Tit. I, § 102, 84 Stat. 1763. [12 U.S.C. § 1842](#).

<sup>6</sup> The acquisitions were to be made by bank subsidiaries of C&S Holding: C&S East Point, which proposed to acquire the Sandy Springs and North Fulton Banks, and C&S Emory, which proposed to acquire the Chamblee, Park National, South DeKalb, and Tucker Banks. The FDIC was the responsible federal agency because each of the acquiring banks is a "nonmember [of the Federal Reserve System] insured bank." [12 U.S.C. § 1828 \(c\)\(2\)\(C\)](#).

approval of outright [\*95] acquisition.<sup>7</sup> As for the five banks which C&S had helped to found, however, the FDIC stated: S

"[T]he opening of these... *de novo* banks served the convenience and needs of their respective communities and enhanced competition...."I

[\*\*\*17] The FDIC noted that the C&S system was the largest commercial banking institution in Fulton County and in DeKalb County.<sup>8</sup> For this reason, it observed, "new acquisitions of nonaffiliated banks in the [\*\*\*52] same market [by C&S] would raise the most serious competitive problems under the Bank Merger Act as amended and under Section 7 of the Clayton Act." But the FDIC reasoned that the acquisitions proposed by C&S did not raise such problems because the banks involved in the proposed mergers "do not compete today and never have competed"; further, there existed "no reasonable probability" that any of the 5-percent banks would break their ties with the C&S system even if the proposed acquisitions were disapproved. Thus, "[s]uch mergers would not alter the existing competitive structure... in any way or add to the concentration of banking resources now held by the C&S system."

#### [\*\*\*18] II. *The Suit in the District Court*

On November 2, 1971, within the 30-day period prescribed for such suits, 12 U.S.C. §§ 1828 (c)(6) and (7), [\*96] the United States filed a complaint in the District Court for the Northern District of Georgia, alleging that the five acquisitions approved by the FDIC would violate § 7 of the Clayton Act and that the ongoing correspondent associate relationships between C&S and the six 5-percent banks which it had originally sought to acquire constituted unreasonable restraints of trade, in violation of § 1 of the Sherman Act. The Government sought injunctive relief prohibiting the proposed acquisitions and terminating the alleged violations of the Sherman Act. On January 24, 1974, after an extensive trial, the District Court entered a judgment for the defendants. 372 F. Supp. 616, 643.

[\*\*2107] As to the Sherman Act allegations, the District Court based its judgment upon two separate and independent grounds. First, it held that the 1968 "understanding" between the staff of the Federal Reserve Board and C&S insulated the correspondent associate relationship between C&S and the 5-percent banks [\*\*\*19] from attack under the antitrust laws. *Id.*, at 627. The court based this conclusion on the following statement in Whitney Bank v. New Orleans Bank, 379 U.S. 411, 419: S

"We believe Congress intended the statutory proceedings before the [Federal Reserve] Board to be the sole means by which questions as to the organization or operation of a new bank by a bank holding company may be tested."I

Alternatively, assuming the Sherman Act applied, the District Court found that the United States had failed to prove that the correspondent associate relationships involved "collusive price fixing" or "any agreements not to compete or for market division."<sup>9</sup> The court held [\*97] [\*\*\*53] "that the matters complained of are subject to the 'rule of

<sup>7</sup> The FDIC noted that the independent Tucker Bank had not been in unsound financial condition when C&S assumed *de facto* control in 1965, and that it would have been better for competition if C&S had instead sponsored a new bank in the community "just as it did in other growing sections of DeKalb County prior to the recent change in Georgia's branching laws."

<sup>8</sup> See the Appendix to this opinion for the District Court's statistical summary of the Atlanta area's banking markets, C&S's place in these markets, and the effect of the proposed acquisitions on the market-share statistics.

<sup>9</sup> The court stated:

"The Government contends that the following aspects of the relationships between the defendants have restrained interstate trade and commerce:

"1. The routine and systematic practice of furnishing to one another comprehensive information as to past, present and future competitive practices and policies with a purpose of achieving uniformity among the defendants;

"2. The provision by C&S National to the five percent defendants of various manuals and memoranda;

reason,' [and]... the Government has not sustained its burden of proof as to the unreasonableness of the practices involved or with respect to any adverse impact upon competition." [372 F. Supp., at 627-628](#).

**[\*\*\*\*20]** The Government had conceded that it was no violation of the Sherman Act for a large city bank to arrange a traditional "correspondent" relationship with a smaller, [\*98] outlying bank -- a "mutually beneficial arrangement whereby the smaller bank receives needed services and the larger bank obtains both the benefit of the correspondent bank balance kept with it and the income from the sale of its services to the smaller bank's customers." [Id., at 628](#). Noting this concession, the District Court observed: S

"[S]uch assistance to, or sponsorship of, a smaller bank, is desirable and necessary and not anticompetitive. The difference between a pure correspondent relationship and a correspondent associate relationship as set forth in the evidence is merely one of degree, a fine line of demarcation almost impossible for the Court to perceive....

**[\*\*2108]** "... [T]he Court finds as a fact that the relationship between C&S National, C&S Holding, and the five percent defendant banks, and the interchange of information between them, have been reasonable under the circumstances and not in violation of [Section 1](#) of the Sherman Act." *Ibid.*

Turning to the [\*\*\*\*21] claim under [§ 7](#) of the Clayton Act, the court found that the various defendant banks were each "engaged in commerce" and that the relevant "line of commerce" was "commercial banking." The court declined, however, to define the appropriate geographic markets, stating that its "disposition of the case is based upon factors which make a precise delineation of the market area unnecessary." [372 F. Supp., at 629](#). Simply assuming the correctness of the Government's position that the appropriate markets were DeKalb County, Fulton County, North Fulton County, or the Atlanta area generally, the court made detailed findings as to the effect of the proposed acquisitions on C&S's nominal market shares. [Id., at 629-633](#).<sup>10</sup> But, just as had the FDIC [\*99] before it, the court saw these increases in nominal shares as of no competitive [\*\*\*54] significance because the 5-percent banks had always been *de facto* branches within the C&S system. [Id., at 633-638](#).<sup>11</sup>

"3. The provision by C&S National to the five percent defendants of suggestions and advice on such matters as rates, hours of operation, types of loan to discourage and minimum loan rates....

"The Government also asserts, and the record shows, that the advice and suggestions offered by C&S National are generally followed.

"These activities, however, do not amount to collusive price fixing. For example, there is no suggestion that any advice as to rates amounts to more than an expert appraisal of a market situation from the point of view of a lending institution -- a type of opinion to which a lending institution would naturally be expected to pay great attention....

"The practices involved here do not conform to the accepted definition or description of per se antitrust violations where no resort to context or circumstances is required (or permitted).

.....

"There is no evidence of record to conclude that the utilization by the five percent defendant banks of the services or information received by them from C&S National or C&S Holding was a result of any tacit or explicit combinations rather than the natural deference of the recipient to information from one with greater expertise or better sources. In either case there is the flow of information as to rates, practices, etc., which the Government apparently applauds or at least condones in a correspondent banking relationship." [372 F. Supp., at 626, 627](#), and 628.

<sup>10</sup> See Appendix to this opinion.

<sup>11</sup> The court noted that "no witness (for either the Government or the defendants) testified that the proposed mergers would have any adverse economic or competitive implications whatever...." [372 F. Supp., at 638](#). Competitors of the suburban 5-percent banks "expressed the view that the proposed mergers would have no effect whatsoever on competition as it relates to third parties." *Ibid.* The court found "as a fact that there is no presently existing substantial competition between the five percent defendant banks and C&S National, or *inter sese*, or with third parties, which would be affected by the proposed merger." [Id., at 642](#).

[\*\*\*\*22] [\*100] III. *The Issues Under the Sherman and Clayton Acts*

It is common ground in this case that the 5-percent banks have been operated from the outset substantially as *de facto* branches of C&S, even though they are and have always been separate corporate entities. From these agreed-upon facts, the parties draw sharply divergent conclusions under the Sherman and Clayton Acts.

Section 1 of the Sherman Act, [15 U.S.C. § 1](#), provides: S

**HN2** [↑] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce [\[\\*\\*2109\]](#) among the several States... is declared to be illegal...."I

The Government contends that the relationships between C&S and the six 5-percent banks constituted unreasonable restraints of trade on two alternative theories: (1) The relationships encompassed an agreement to fix interest rates and service charges among the 5-percent banks, and between these banks and C&S-owned banks, resulting in a "*per se*" violation of the Sherman Act (2) The programs unreasonably restrained interbank competition, [\[\\*\\*\\*23\]](#) as to prices and services, by extending interbank cooperation far beyond the conventional "correspondent" arrangements which large city banks traditionally make with small banks in [\[\\*\\*\\*55\]](#) outlying markets. C&S denies that its relationships with the 5-percent banks encompassed any agreements to fix prices and contends that the process of *de facto* branching was a procompetitive response to Georgia's anticompetitive ban on *de jure* branching, and thus legal under the Sherman [\[\\*101\]](#) Act's "rule of reason." In the alternative, C&S contends that its relationships with the 5-percent banks were subject to the "exclusive primary jurisdiction" of the Federal Reserve Board and thus immune from attack under [§ 1](#) of the Sherman Act.

**LEdHN[2A]** [↑] [2A] Section 7 of the Clayton Act, [15 U.S.C. § 18](#), provides: S

**HN3** [↑] "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal [\[\\*\\*\\*24\]](#) Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." <sup>12</sup>I

In the interval between the trial and the announcement of the District Court's opinion, the Supreme Court of Georgia had ruled in a separate suit brought by a group of independent suburban banks that C&S was in technical violation of the state bank holding company law with respect to the 5-percent banks in the Atlanta suburbs. Its judgment was grounded on the fact that, in addition to the 5-percent stock interest directly owned by C&S Holding, substantial numbers of shares were owned by C&S officers and directors. The state court accordingly directed the Georgia Banking Commissioner to file suit to force divestiture of excess stock holdings by these shareholders. [Independent Bankers Assn. v. Dunn](#), 230 Ga. 345, 197 S.E. 2d 129, modified *sub nom.* [Citizens & Southern National Bank v. Independent Bankers Assn.](#), 231 Ga. 421, 202 S.E. 2d 78. The District Court's opinion took notice of this state-court judgment and concluded that it would not lead to genuine competition among the 5-percent banks or between them and C&S. [372 F. Supp., at 643](#). After the District Court's opinion was announced, the state Banking Commissioner, acting pursuant to the state-court judgment, ordered C&S Holding to limit its direct and indirect interest in the stock of correspondent associate banks to 5 percent and ordered C&S to "terminate any direct or indirect supervision of the... five percent banks beyond that which is available from The Citizens and Southern National Bank or the Citizens and Southern Holding Company to any bank that wishes to enter into a correspondent relationship with such bank or holding company." On June 3, 1974, the District Court amended its opinion *nunc pro tunc* to find that the Banking Commissione's "order does not change the underlying basis of the Court's decision that the proposed mergers will not substantially lessen competition." [Id., at 643 n. 8.](#)

<sup>12</sup> **HN4** [↑] Pursuant to [12 U.S.C. § 1828 \(c\)\(7\)\(B\)](#), referring to [12 U.S.C. § 1828 \(c\)\(5\)\(B\)](#), bank mergers are made subject to Clayton Act standards unless "the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." Hence, in bank merger cases brought under the Clayton Act, there is a "convenience and needs' defense" that "comes into play only after a district court has made a de novo determination of the status of a bank merger under the Clayton Act." [United States v. Marine Bancorporation](#), 418 U.S. 602, 626. See also [United States v. Third National Bank in Nashville](#), 390 U.S. 171; [United](#)

## LEdHN[2B] [↑] [2B]

[\*\*\*\*25] The Government argues that the acquisitions of the five suburban banks approved by the FDIC would "lessen" competition when compared to what the situation would be if the defendant banks ceased their alleged [\*102] violations of the Sherman Act. The Government further contends that, even if the present relationships between C&S and the 5-percent banks do not offend the Sherman Act, since the relationships might nevertheless change and the whole situation become more competitive for business or state-law reasons, the proposed acquisitions violate [§ 7](#) by foreclosing this possibility. C&S argues that the acquisitions would merely convert de facto into de jure branches, with no perceptible effect on competition compared with the present situation, which is asserted by C&S to be lawful under the Sherman Act. C&S urges that there is no realistic possibility of future competition among the defendant banks. In the alternative, C&S contends that each of the 5-percent banks operates in a distinct and segregatable market, so that the proposed acquisitions would not lessen competition in any relevant "section of the country"; and that any anticompetitive effects of the acquisitions are [\*\*\*\*26] "outweighed in the public interest" because the acquisitions meet "the convenience and needs" of banking customers in the [\*\*\*56] [\*\*2110] Atlanta area.<sup>13</sup> The District Court did not reach these alternative contentions.

### A. The Sherman Act Issues

#### 1. The Question of Immunity

LEdHN[3] [↑] [3]The District Court thought the correspondent associate programs immune from Sherman Act scrutiny because they were subject to the "exclusive primary jurisdiction" of the Federal Reserve Board under the Bank Holding Company Act of 1956, as amended. We do not so understand the law. The court relied on Whitney Bank v. New Orleans Bank, 379 U.S. 411, but the question in that case was the wholly different one of whether it is the Comptroller of the Currency or the [\*103] Federal Reserve Board that has jurisdiction to determine whether transactions by a bank holding company conform with applicable [\*\*\*\*27] state banking law. For guidance as to antitrust immunities, recourse must be had directly to the provisions of the Bank Holding Company Act, 12 U.S.C. § 1841 et seq.

The statutory scheme requires the "prior approval" of the Federal Reserve Board for certain transactions by bank holding companies - including transactions tending to create or enlarge holding company control of independent banks. 12 U.S.C. § 1842 (a).<sup>14</sup> The types of transactions requiring Board approval were expanded by amendments to the Act in 1966 and 1970.<sup>15</sup> Prior to [\*104] 1966, it appeared that Board approval of a transaction

States v. First City National Bank of Houston, 386 U.S. 361. Because of its disposition of the case, the District Court did not reach this additional defense which had been asserted by C&S.

<sup>13</sup> See n. 12, *supra*.

<sup>14</sup> "It shall be unlawful, except with the prior approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company...." 12 U.S.C. § 1842 (a).

<sup>15</sup> Prior to the amendments of July 1, 1966, Pub. L. 89-485, [§ 7](#), 80 Stat. 237, prior approval of the Board was not required for causing a bank to become a subsidiary of a bank holding company. In addition to adding this requirement, the 1966 amendments broadened the definition of a subsidiary from a company in which a bank holding company "own[s]" 25 percent of the voting shares to a company in which a bank holding company "directly or indirectly own[s] or control[s]" this percentage share. Compare § 4 of the 1966 amendments, 80 Stat. 236, with [§ 2 \(d\)](#) of the Bank Holding Company Act of 1956, 70 Stat. 133. The provision is now codified at 12 U.S.C. § 1841 (d)(1). The definition of subsidiary has also included, from the outset of the Act, "any company the election of a majority of whose directors is controlled in any manner" by a bank holding company. 12

provided no immunity from antitrust action, for a note then set out under [12 U.S.C. § 1841](#) stated that nothing in the Act was to be construed as a "defense" to an antitrust suit. The 1966 amendments to the Act formalized [\*\*\*57] this provision, but also blunted its force by establishing an intricate procedure for accommodating the jurisdictions of the Board and the Justice Department.<sup>16</sup> Under [\*105] [\*\*\*28] the Act as amended, the Board "shall not approve" an [\*\*2111] otherwise forbidden transaction unless it meets certain antitrust standards derived from, but not everywhere identical to, the standards of the Sherman Act and of [§ 7](#) of the Clayton Act. [12 U.S.C. § 1842 \(c\)](#). The Board's [\*106] order granting or denying an application for prior approval is subject to review in the courts of appeals. [12 U.S.C. § 1848](#). Furthermore, an approved transaction is stayed automatically for 30 days, during which time an antitrust suit challenging the transaction may be brought in the district court. [12 U.S.C. § 1849 \(b\)](#). Such a suit is governed [\*\*\*58] by the modified antitrust standards set out in [§ 1842 \(c\)](#). If the antitrust suit is not brought within 30 days, and the transaction is consummated, S

[U.S.C. § 1841 \(d\)\(2\)](#). The amendments of December 31, 1970, Pub. L. 91-607, § 101 (d), 84 Stat. 1763, further enlarged the definition of subsidiary to include "any company with respect to the management or policies of which such bank holding company has the power, directly or indirectly, to exercise a controlling influence, as determined by the Board, after notice and opportunity for hearing." [12 U.S.C. § 1841 \(d\)\(3\)](#).

<sup>16</sup> § 11 of the 1966 amendments, Pub. L. 89-485, 80 Stat. 240. As presently in force, [12 U.S.C. § 1849](#), the provision (with subsection headings omitted) reads:

"(a) Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of existing law, nor shall anything herein contained constitute a defense to any action, suit, or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action, or conduct, except as specifically provided in this section.

"(b) The Board shall immediately notify the Attorney General of any approval by it pursuant to [section 1842](#) of this title of a proposed acquisition, merger, or consolidation transaction, and such transaction may not be consummated before the thirtieth calendar day after the date of approval by the Board. Any action brought under the antitrust laws arising out of an acquisition, merger, or consolidation transaction approved under [section 1842](#) of this title shall be commenced within such thirty-day period. The commencement of such an action shall stay the effectiveness of the Board's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented. In any judicial proceeding attacking any acquisition, merger, or consolidation transaction approved pursuant to [section 1842](#) of this title on the ground that such transaction alone and of itself constituted a violation of any antitrust laws other than [section 2](#) of Title 15, the standards applied by the court shall be identical with those that the Board is directed to apply under [section 1842](#) of this title. Upon the consummation of an acquisition, merger, or consolidation transaction approved under [section 1842](#) of this title in compliance with this chapter and after the termination of any antitrust litigation commenced within the period prescribed in this section, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than [section 2](#) of Title 15, but nothing in this chapter shall exempt any bank holding company involved in such a transaction from complying with the antitrust laws after the consummation of such transaction.

"(c) In any action brought under the antitrust laws arising out of any acquisition, merger, or consolidation transaction approved by the Board under [section 1842](#) of this title, the Board and any State banking supervisory agency having jurisdiction within the State involved, may appear as a party of its own motion and as of right, and be represented by its counsel.

"(d) Any acquisition, merger, or consolidation of the kind described in [section 1842 \(a\)](#) of this title which was consummated at any time prior or subsequent to May 9, 1956, and as to which no litigation was initiated by the Attorney General prior to July 1, 1966, shall be conclusively presumed not to have been in violation of any antitrust laws other than [section 2](#) of Title 15.

"(e) Any court having pending before it on or after July 1, 1966, any litigation initiated under the antitrust laws by the Attorney General with respect to any acquisition, merger, or consolidation of the kind described in [section 1842 \(a\)](#) of this title shall apply the substantive rule of law set forth in [section 1842](#) of this title.

"(f) For the purposes of this section, the term 'antitrust laws' means the Act of July 2, 1890 (the Sherman Antitrust Act), the Act of October 15, 1914 (the Clayton Act), and any other Acts in pari materia."

"the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of Title 15 § 2 of the Sherman Act], but nothing in this chapter shall exempt any bank holding company involved in such a [\*\*\*\*29] transaction from complying with the antitrust laws after the consummation of such transaction." 12 U.S.C. § 1849 (b).I

[\*\*\*\*30] LEdHN[4]<sup>↑</sup> [4] LEdHN[5]<sup>↑</sup> [5]C&S can draw no consolation from these provisions. It is true that the staff of the Federal Reserve Board, in 1968, came to an "understanding" with C&S that the correspondent associate programs then in effect did not offend § 3 of the Bank Holding Company Act, \*\*2112 12 U.S.C. § 1842 (a), and thus did not require formal Board "approval."<sup>17</sup> But this did not give rise to any \*107 antitrust immunity. A consummated transaction acquires immunity under § 1849 (b) only when no antitrust \*\*\*59 action has been commenced within 30 days after \*108 the transaction has received the "approval" of the *Board*, in an order which is subject to judicial review and which reflects application by the Board of the special antitrust standards of § 1842 (c). The immunity applies only to "an acquisition, merger, or consolidation transaction approved under section 1842 of this title in compliance with this chapter." § 1849 (b). The obvious purpose of the complex machinery in § 1849 (b) is \*\*\*\*31 to accord finality to formal actions of the Board not subjected to timely challenge under the antitrust laws. There is no indication that Congress wished to accord a similar finality to the informal views of the Board's staff.

[\*\*\*\*32] LEdHN[6A]<sup>↑</sup> [6A]We note, however, that the 1966 amendments also added a "grandfather" provision to the Bank Holding Company Act, 12 U.S.C. § 1849 (d): S

<sup>17</sup> The Secretary to the Federal Reserve Board described the investigation and the 1968 "understanding" in a 1972 letter to the Justice Department:

"The fact finding inquiry undertaken by Board staff into the relationship between Citizens & Southern and the other banking institutions referred to was begun in 1966 and continued into 1968. The principal focus of the inquiry concerned essentially two questions: (1) whether Citizens & Southern had unlawfully acquired a direct or indirect stock ownership in these banking institutions in excess of 5 per cent without first having secured the requisite prior Board approval; and (2) whether the banking institutions had unlawfully become subsidiaries of Citizens & Southern by virtue of the election of directors without first having received the requisite prior Board approval. The inquiry arose in 1966 out of information contained in Citizens & Southern's registration statement filed with the Board and in 1968 as a result of information supplied by the Comptroller of the Currency in connection with the merger of the Citizens and Southern National Bank and the Citizens and Southern Bank of Augusta. The inquiry referred to was not initiated as a result of any application filed with the Board for approval of an acquisition, merger, or consolidation transaction under section 3 of the Bank Holding Company Act.

....  
"The Board of Governors did not issue any order approving the relationships between Citizens & Southern and the other banking institutions under section 3 of the Bank Holding Company Act.

....  
"There was no determination made that approval of the Board under section 3 of the Bank Holding Company Act was required for Citizens & Southern to retain an ownership interest of 5 per cent or less in the banking institutions referred to or to maintain the relationships with those banks in circumstances where Citizens & Southern did not elect a majority of the directors of any such bank. There was an understanding reached between members of the Board's staff and representatives of Citizens & Southern that in those cases where Citizens & Southern purchased 5 per cent or less of the stock of a bank, in some instances furnishing a principal operating officer for such bank, as well as other employee benefits, Citizens & Southern would not be deemed to have control of a majority of the directors of such bank on these facts alone. Further, where the foregoing circumstances existed and where control of additional shares was purchased by the bank's executive officer, control of such shares purchased would not be attributed to Citizens & Southern so long as Citizens & Southern did not finance the purchase of such shares, directly or indirectly. Finally, it was understood that even though Citizens & Southern was responsible, directly or indirectly, in placing one or two directors on the boards of such banks, if that number did not constitute a majority of directors of such bank, the Board's staff would not consider that Citizens & Southern could reasonably be held to have control of a majority of the directors of such bank."

"Any acquisition, merger, or consolidation of the kind described in section 1842 (a) of this title which was consummated at any time prior or subsequent to May 9, 1956, and as to which no litigation was initiated by the Attorney General prior to July 1, 1966, shall be conclusively presumed not to have been in violation of any antitrust laws other than section 2 of Title 15 [§ 2 of the Sherman Act]."I

[\*\*2113] Unlike § 1849 (b), this provision does not state or imply that the covered transactions must have received the formal approval of the Federal Reserve Board. This grandfather provision is not, like § 1849 (b), an attempt to accommodate the competing jurisdictions of the Federal Reserve Board under § 1842 and the Justice Department under the antitrust laws. Rather, the grandfather provision is a simple conferral of legislative amnesty for [\*109] theretofore unchallenged transactions completed before Congress had clarified [\*\*\*\*33] the nature of that accommodation.

The transactions by which C&S created a correspondent associate relationship with three of the 5-percent banks - the Sandy Springs, Chamblee, and Tucker banks -- were consummated prior to July 1966, and the Attorney General had taken no action against those transactions by that date. Those transactions thus fall within the terms of the grandfather provision, and the correspondent associate programs in force at those three banks are, therefore, immune from attack under § 1 of the Sherman Act.

LEdHN[6B] [↑] [6B] LEdHN[7] [↑] [7]While the formation by C&S of a *de facto* branch was a unique type of transaction, it may fairly be characterized as an "acquisition, merger, or consolidation of the kind described in § 1842 (a)." Forming a *de facto* branch was a multifaceted operation -- involving a multiplicity of purchases of stock by a number of parties, the adoption of the C&S logogram by the *de facto* branch, the connection of the *de facto* branch with C&S personnel and information programs, the structuring of the bank [\*\*\*\*34] to receive and administer all C&S banking services, and the establishment of formal C&S influence over the board of directors at the *de facto* branch. But even before its scope was expanded in 1970, § 1842 (a) was concerned with more than the literal "acquisition" of stock: It took broad account of the "indirect" control of stock, and the control of boards of directors "in any manner," by bank [\*\*\*60] holding companies.<sup>18</sup> The grandfather provision creates immunity under § 1 of the Sherman Act, not simply under § 7 of the Clayton Act, an indication that its protection extends not merely to literal acquisitions, mergers, and consolidations, but also to "restraints of trade" simultaneous with and functionally [\*110] integral to such transactions. Though multifaceted, the formation by C&S of a *de facto* branch was a unitary and cohesive undertaking in the sense that all the facets were closely coordinated, simultaneously instituted, and designed to serve the single purpose of fitting the new bank into the "C&S system." There is virtually nothing about the present correspondent associate programs that was not fully evident and in place from the moment the programs were [\*\*\*\*35] launched. There has been no increase in C&S control, nor any change in the way it has been exercised.

LEdHN[6C] [↑] [6C]Whether these programs violated § 1842 (a) -- as it applies today or as it applied when the programs began -- is not relevant to our inquiry.<sup>19</sup> By its terms, the grandfather provision applies to transactions of the kind described in § 1842 (a). We cannot believe that Congress wished to grant the benefits of the provision only to transactions that plainly transgressed § 1842 (a). Such a construction would make application of the grandfather provision not only cumbersome and time consuming,<sup>20</sup> but also flagrantly [\*\*2114] inequitable. The formation of a

<sup>18</sup> See n. 15, *supra*.

<sup>19</sup> LEdHN[6D] [↑] [6D]The grandfather provision creates a conclusive presumption of compliance with the antitrust laws, but not necessarily of compliance with the provisions of the Bank Holding Company Act. See 12 U.S.C. § 1849 (f).

<sup>20</sup> If the correspondent associate program had received formal Board approval, any antitrust immunity created by the machinery in § 1849 (b) could, of course, have extended only to those features of the program clearly and expressly encompassed by the approval order. But § 1849 (d) applies even where, as here, there has been no approval order. If the provision were construed to cover only transactions actually violative of § 1842 (a), a court applying the provision would face the daunting -- and quite senseless -- task of dissecting a complicated, integrated transaction, such as the formation of a *de facto* branch, into those components which did and those which did not require prior approval of the Board.

*de facto* C&S branch involved the direct and [\*111] indirect acquisition of bank stock, and the direct and indirect assertion of control over the governance and operations of a bank, by a bank holding company. Though unusual in [\*\*\*\*36] form, such a transaction quite clearly falls within the class of dealings by bank holding companies which Congress intended, in § 1849 (d), to shield from retroactive challenge under the antitrust laws.

[\*\*\*\*37] 2. *De Facto Branching Under the Sherman Act*

Three of the 5-percent banks -- the Park National, South DeKalb, and North Fulton banks - were formed after July 1, 1966, and their correspondent associate relationships with C&S are therefore beyond the reach of the grandfather provision of the Bank Holding Company Act and subject to scrutiny under the Sherman Act.

Each of these banks was founded *ab initio* through the sponsorship of C&S. Except for that sponsorship, they would very probably not exist. The record shows that other banking organizations had been unsuccessful [\*\*\*61] in attempting to launch new banks in the area, and C&S affiliation and financial backing were instrumental in convincing state and federal banking authorities to charter these new banks. In short, these banks represented a policy by C&S of *de facto* branching through the formation of new banking units, rather than through the acquisition, and consequent elimination, of pre-existing, independent banks.<sup>21</sup>

[\*\*\*\*38] Of necessity, the Government's attack on this process [\*112] is highly technical. Had the new banks been *de jure* branches of C&S, the whole process would have been beyond reproach. Branching allows established banks to extend their services to new markets, thereby broadening the choices available to consumers in those markets.<sup>22</sup> Having access to parent-bank financial support, expert advice, and proved banking services, branches of several city banks can often enter a market not yet large or developed enough to support a variety of independent, unit banks. Branching thus offers competitive choice to markets where monopoly or oligopoly might otherwise prevail. Furthermore, the branching process gives to outlying customers the benefit of sophisticated services which local unit banks might have little ability or incentive to deliver. The Government denies none of this, nor that C&S's program of *de facto* branching was, until 1970, the closest substitute to *de jure* branching allowed under Georgia law. Yet the Government insists that this *de facto* branching violated the Sherman Act because the parent bank and its *de facto* branches were legally distinct corporate [\*\*\*\*39] entities and were obligated, therefore, to compete vigorously against each other.

It is, of course, conceded that C&S's *de facto* branches have not behaved as active competitors with respect either to each other or to C&S National and its majority-owned affiliates. But the Government goes further and contends that the correspondent associate programs have actually encompassed at least a tacit agreement to fix interest rates and service charges, see *Interstate Circuit*, [\*2115] Inc. v. United States, 306 U.S. 208, 227; United States v. Masonite Corp., 316 U.S. 265, 275-276; United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 723; United States v. General Motors Corp., 384 U.S. 127, [\*113] 142-143, so as to make the interrelationships -- to that extent at least - illegal "per se." See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-226, n. 59; [\*\*\*\*40] United States v. Parke, Davis & Co., 362 U.S. 29, 47. C&S vigorously denies the existence of any agreement to fix prices. The evidence in the record is mixed.

LEdHN[8] [8]C&S did regularly notify the 5-percent banks -- as it did its *de jure* branches -- of the interest rates and [\*\*\*62] service charges in force at C&S National and its affiliates. But HN5 [5] the dissemination of price information is not itself a *per se* violation of the Sherman Act. See Maple Flooring Assn. v. United States, 268 U.S. 563; Cement Mfrs. Protective Assn. v. United States, 268 U.S. 588; United States v. Container Corp., 393 U.S. 333, 338 (concurring opinion). A few of the memoranda distributed by C&S could be construed as advocating price

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<sup>21</sup> The Tucker Bank, which was not founded as a new bank by C&S, comes within the coverage of the grandfather provision, as explained in the previous section. *De facto* branching through the *de facto* "acquisition" of pre-existing banks might raise questions under the Sherman Act considerably different from those presented by the C&S practice of *de facto* branching through founding *new* banks.

<sup>22</sup> See generally M. Mayer, *The Bankers* 83-91 (1974).

uniformity; on the other hand, the memoranda were almost without exception stamped "for information only," and the 5-percent banks were admonished by C&S, several times and very clearly, to use their own judgment in setting [\*\*\*\*41] prices; indeed, the banks were warned that the antitrust laws required no less. The District Court observed that in fact prices did not often vary significantly among the 5-percent banks or between these banks and C&S National, but the court attributed this to the "natural deference of the recipient to information from one with greater expertise or better services." [372 F. Supp., at 628](#). And the court found as a fact that there was no "collusive price fixing." [Id., at 626](#).

**LEdHN[9]** [9] Were we dealing with independent competitors having no permissible reason for intimate and continuous cooperation and consultation as to almost every facet of doing business, the evidence adduced here might well preclude a finding that the parties were not engaged in a [\*114] conspiracy to affect prices. But, as we indicate below, the correspondent associate programs, as such, were permissible under the Sherman Act. In this unusual light, we cannot hold clearly erroneous the District Court's finding that the lack of significant price competition did not flow from a tacit agreement but instead was [\*\*\*\*42] an indirect, unintentional, and formally discouraged result of the sharing of expertise and information which was at the heart of the correspondent associate programs. [Fed. Rule Civ. Proc. 52 \(a\); United States v. General Dynamics Corp., 415 U.S. 486, 508](#).

The Government argues, alternatively, that the correspondent associate programs have gone far beyond conventional "correspondent" relationships, and that consequently these programs have "unreasonably" restrained competition among the 5-percent banks and between these banks and C&S National. The District Court was not persuaded by this theory: S

"The difference between a pure correspondent relationship and a correspondent associate relationship as set forth in the evidence is merely one of degree, a fine line of demarcation almost impossible for the Court to perceive.... In either case there is the flow of information as to rates, practices, etc., which the Government apparently applauds or at least condones in a correspondent banking relationship." [372 F. Supp., at 628](#).I

The court's dilemma is understandable, for in neither law nor banking custom has there developed a clear, fixed [\*\*2116] [\*\*\*\*43] definition of the correspondent relationship: <sup>23</sup> S

**HN6** "Correspondent banking is an [\*\*\*63] interbank practice whereby 'city' correspondent banks provide a cluster [\*115] of services to smaller 'country' banks in exchange for interbank deposits. Dating back to colonial times, correspondent banking originally provided an extended network of independent unit banks with a link to financial centers, and at the same time furnished substitute central banking functions. Today, as a vital component of the era of electronic banking, it enables city correspondents to provide customers with a range of services that is varied, extensive and constantly expanding; one survey lists as many as fifty different categories."I

Among the services typically provided within a conventional correspondent arrangement are check clearing, help with bill collections, participation in large loans, legal advice, help in building securities portfolios, counseling as to personnel policies, staff training, help in site selection, auditing, and the provision of electronic data processing. Furthermore, like C&S's program, [\*\*\*\*44] the correspondent respondent arrangement is often established as a prelude to a formal merger between the two banks. <sup>24</sup>

<sup>23</sup> Austin & Solomon, A New Antitrust Problem: Vertical Integration in Correspondent Banking, 122 U. Pa. L. Rev. 366, 367-368 (1973).

<sup>24</sup> *Id.*, at 367-371. On the varieties of "service packages" to be found in correspondent banking, see also Knight, Correspondent Banking, Part I: Balances and Services, Fed. Reserve Bank of Kansas City Monthly Review (Nov. 1970); Knight, Correspondent Banking, Part II: Loan Participation and Fund Flows, Fed. Reserve Bank of Kansas City Monthly Review (Dec. 1970); Subcommittee on Domestic Finance of the House Committee on Banking and Currency, 88th Cong., 2d Sess., A Report on the Correspondent Banking System (Comm. Print Dec. 1964), and Correspondent Relations: A Survey of Banker Opinion (Comm. Print Oct. 1964); Nadler, Three Score Years of Correspondent Banking, Banking 54-55 (July 1968); 1970 Correspondent Banking Survey in Am. Banker 8-71 (Dec. 18, 1970).

[\*\*\*\*45] [LEdHN\[10\]](#) [10] Nevertheless, C&S's program does appear to have gone several steps beyond conventional correspondent arrangements. [\*116] C&S has closely advised the boards of directors of the 5-percent banks, supplied their chief executive officers, allowed full "branchlike" use of the C&S logogram, provided all the C&S services available at a *de jure* branch, dealt with the 5-percent banks through the C&S branch administration department, and provided constant and detailed information on prices and on all banking procedures.<sup>25</sup> It is conceivable that these relationships, separately or taken together, have restrained competition among the defendant banks more thoroughly or effectively than would have a conventional correspondence program. But even if the Government had proved this, which the District Court found not to be the case, that alone would not make out a Sherman Act violation. C&S has operated the 5-percent banks as *de facto* branches as a direct response to Georgia's historic restrictions on *de jure* branching, and the question therefore remains whether restraints of trade integral to this [\*\*\*\*46] particular, unusual function are unreasonable. See [Chicago Board of Trade v. United States, 246 U.S. 231, 238](#). We turn directly to that question.

[LEdHN\[11\]](#) [11] [LEdHN\[12\]](#) [12] The central message of the Sherman Act is that a business entity [\*\*\*64] must find new customers and higher profits through internal expansion - that is, by competing successfully rather than by arranging treaties with its competitors. This Court has held that [HN7](#) even commonly owned firms must compete against each other, if they hold themselves [\*\*\*\*47] out as distinct entities. "The corporate interrelationships of the conspirators... [\*\*2117] are not determinative of the applicability of the Sherman Act." [United States v. Yellow Cab Co., 332 U.S. 218, 227](#). See also [Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., \[\\*117\] 340 U.S. 211, 215](#); [Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598](#); [Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-142](#). *A fortiori*, independently owned firms cannot escape competing merely by pretending to common ownership or control, for the pretense would simply perfect the cartel. We may also assume, though the question is a new one, that a business entity generally cannot justify restraining trade between itself and an independently owned entity merely on the ground that it helped launch that entity, by providing expert advice or seed capital. Otherwise the technique of sponsorship followed by restraint might displace internal growth as the normal and legitimate technique of business expansion, with unknowable consequences.

But these general principles do not dispose [\*\*\*\*48] of the present case. C&S was absolutely restrained by state law from reaching the suburban market through the preferred process of internal expansion. *De facto* branching was the closest available substitute.<sup>26</sup> Just last Term, in a brief presented to this Court, the Justice Department told us that it was desirable and procompetitive for a bank to "[enter] *de novo* into areas foreclosed to branching by sponsoring the organization of an affiliate bank, and later acquiring the bank. This method of expansion is legal and a well-recognized practice used by large statewide banking organizations, and recognized by the federal banking authorities."<sup>27</sup> The [\*118] Government acknowledged that such a sponsored bank could "be affiliated with its sponsor for purposes of correspondent relationships and other inter-bank services, including financial support," and that it could be "formed" by the parent bank's "officers, directors, or their associates" and could be "assisted" by the

<sup>25</sup> Also, of course, C&S owns 5 percent of the stock in these banks -- not a common facet of correspondent banking. But the Government neither challenges C&S's 5-percent ownership, as such, nor suggests that it aggravates the alleged antitrust problems.

<sup>26</sup> This case does not require us to explore the conceivable antitrust problems raised by correspondent banking in all circumstances and in all its many forms. We deal here solely with the founding and maintenance of new *de facto* branch banks in the context of a state ban on *de jure* branching.

<sup>27</sup> Brief for United States 15-16, filed in No. 73-38, O.T. 1973, *United States v. Marine Bancorporation* (citations to record omitted).

parent firm "until acquired and converted into a branch." <sup>28</sup> This is as good a curbstone description as any of precisely the relationships at issue in the present case. <sup>29</sup>

[\*\*\*\*49] [LEdHN\[13\]](#)<sup>↑</sup> [13]To characterize these relationships [\*\*\*65] as an unreasonable restraint of trade is to forget that their whole purpose and effect were to *defeat* a restraint of trade. Georgia's antibranching law amounted to a compulsory market division. [HN8](#)<sup>↑</sup> Accomplished through private agreement, market division is a *per se* offense under the Sherman Act: S

"This Court has reiterated time and again that '[h]orizontal territorial limitations... are naked restraints of trade with no purpose except stifling of competition.'" [United States v. Topco Associates, Inc., 405 U.S. 596, 608](#), quoting [White Motor Co. v. United States, 372 U.S. 253, 263](#).I

The obvious purpose and effect of a rigid antibranching law are to make the potential bank customers of suburban, small town, and rural areas a captive market for small unit banks.<sup>30</sup> C&S devised [\*\*2118] a strategy to circumvent [\*119] this statutory barrier. By providing new banking options to suburban Atlanta customers, [\*\*\*\*50] while eliminating no existing options, the *de facto* branching program of C&S has plainly been procompetitive.

[\*\*\*\*51] [LEdHN\[14\]](#)<sup>↑</sup> [14]The Government suggests that a "conventional" correspondent relationship between C&S and the 5-percent banks would have been equally procompetitive and would have had the added virtue of facilitating competition among the 5-percent banks and between them and C&S National. This is mere speculation on the present record. Moreover, it is far from clear that a conventional correspondent relationship would have allowed C&S to put its full range of services into the suburban market which, in light of the antibranching law, was the very point of its policy and program. Putting to one side the total lack of realism in suggesting that C&S might have founded new banks that would have competed vigorously with it and with each other, cf. [United States v. Penn-Olin Chemical Co., 378 U.S. 158, 169](#), the Government's argument wholly disregards C&S's ultimate goal of acquiring the new banks outright as soon as legally possible, a goal which the Government last year thought wholly proper. We hold that, in the face of the stringent state restrictions on [\*120] branching, C&S's program of founding [\*\*\*\*52] new *de facto* branches, and maintaining them as such, did not infringe [§ 1](#) of the Sherman Act.

#### [\*\*\*66] B. *The Clayton Act Claim*

[LEdHN\[15A\]](#)<sup>↑</sup> [15A]In the light of the previous discussion, disposition of the Clayton Act claim becomes relatively straight-forward. The issue under [§ 7](#) of the Clayton Act is whether the effect of the proposed acquisitions, approved by the FDIC, "may be substantially to lessen competition... in any line of commerce in any section of the country."

<sup>28</sup> *Id.*, at 16 and 17.

<sup>29</sup> The brief noted with approval an example where the sponsored bank had, according to state banking authorities, become a "satellite" of the parent bank. *Id.*, at 16 n. 16.

<sup>30</sup> The banking business is, of course, riddled with state and federal regulatory barriers to entry. See [United States v. Marine Bancorporation, 418 U.S., at 628-629](#). But most of these barriers - e.g., chartering requirements - at least arguably serve the overriding public interest in maintaining customer confidence in the industry as a whole by assuring adequate financial stability and responsible management for all banks. Antibranching laws, on the other hand, are now widely recognized as a simple device to protect outlying unit banks from the rigors of regional competition. See Report, President's Commission on Financial Structure and Regulation 59-63, 113 (1971); Note, Bank Charter, Branching, Holding Company and Merger Laws: Competition Frustrated, 71 Yale L.J. 502, 515-516 (1962); Smith & Greenspun, Structural Limitations on Bank Competition, 32 Law & Contemp. Prob. 40, 45-46 (1967); Comment, Bank Branching in Washington: A Need for Reappraisal, 48 Wash. L. Rev. 611 (1973); Baker, State Branch Bank Barriers and Future Shock -- Will the Walls Come Tumbling Down?, 91 Banking L.J. 119 (1974). See also [United States v. Marine Bancorporation, supra, at 612 n. 8](#).

[LEdHN\[16\]](#) [16] The Government established that C&S is the predominant banking institution in DeKalb County, Fulton County, North Fulton County, and the Atlanta area generally; that in these markets the commercial banking industry is quite highly concentrated in terms of market share statistics; and, of course, that the proposed acquisitions would increase C&S's nominal market shares.<sup>31</sup> The District Court did not decide whether the geographic markets proposed by the Government were the appropriate ones. But assuming, *arguendo*, that they were, the Government [\*\*\*\*53] plainly made out a *prima facie* case of a violation of § 7 under several decisions of this Court. See [United States v. Philadelphia National Bank, 374 U.S. 321, 362-366](#); [United States v. Phillipsburg National Bank & Trust Co., 399 U.S. 350, 365-367](#); [United States v. General Dynamics Corp., 415 U.S., at 497](#). It was thus incumbent upon C&S to show that the market-share statistics gave an inaccurate account of the acquisitions' probable effects on competition. [\*\*2119] [United States v. General Dynamics Corp., supra, at 497-498](#); [United States v. Marine Bancorporation, 418 U.S., at 631](#). The District Court, like [\*121] the FDIC before it, concluded that C&S had made the necessary showing that these proposed acquisitions would not "lessen" competition for the simple reason that under the correspondent associate program that had been continuously in effect, no real competition had developed or was likely to develop among the 5-percent banks, or between these and C&S National.

[\*\*\*\*54] [LEdHN\[15B\]](#) [15B] As to present and past competition, the Government agrees there is and has been none. If this state of affairs were the result of violations of the Sherman Act, we agree with the Government that making the evil permanent through acquisition or merger would offend the Clayton Act. See [Citizen Publishing Co. v. United States, 394 U.S. 131, 135](#). But we have already concluded that C&S's program of founding and maintaining new *de facto* branches in the face of Georgia's antibranching law did not violate the Sherman Act, and the *de facto* branches which C&S proposes to acquire were all founded *ab initio* with C&S sponsorship. It thus indisputably follows that the proposed acquisitions will extinguish no present competitive conduct or relationships. See [United States v. Trans Texas Bancorporation, 412 U.S. 946, aff'd per curiam 1972 Trade Cas. p 74,257](#) (WD Tex.).

[LEdHN\[17\]](#) [17] As for future competition, neither the District Court nor the FDIC could find any realistic [\*\*\*\*55] prospect that [\*\*\*67] denial of these acquisitions would lead the defendant banks to compete against each other. The 5-percent banks theoretically *could* break their ties with C&S and its correspondent associate program, for these banks are each independently owned, but the record shows that none of the shareholders, directors, or officers of the 5-percent banks expressed any inclination to do so, and there was no evidence that the program has been other than beneficial and profitable for both C&S and the 5-percent [\*122] banks.<sup>32</sup> The Clayton Act is concerned with "probable" effects on competition, not with "ephemeral possibilities." [Brown Shoe Co. v. United States, 370 U.S. 294, 323](#).

[\*\*\*\*56] For the reasons set out in this opinion, the judgment of the District Court is affirmed.

<sup>31</sup> See Appendix to this opinion.

<sup>32</sup> In the entire history of C&S's 5-percent program, only the Stone Mountain Bank terminated its relationship with C&S. The record shows that that bank was not sponsored by C&S, that a large amount of the stock remained in the hands of a family hostile to C&S, that the bank's shareholders never intended to merge with C&S, and that the bank's board of directors resisted introduction of C&S banking methods. None of these factors exists with respect to the banks at issue in the present case.

It is true that C&S has recently been ordered by the State Banking Commissioner to trim back its percentage ownership of the suburban banks and to modify, in ways not yet fully clear, its "supervision" of those banks. See n. 11, *supra*. But the District Court considered this development and concluded that it would not lead to true competition among the defendant banks. The court explicitly found that the changes ordered would not affect the bonds of inter-bank consultation and cooperation which are at the heart of the correspondent associate program. [372 F. Supp., at 638, 643](#), and n. 8.

*It is so ordered.*

## APPENDIX TO OPINION OF THE COURT

The District Court summarized the structure of various banking markets in the Atlanta area, and the statistical effects of the proposed acquisitions, in the following way, [372 F.Supp., at 629-632](#):

### *DeKalb County*

Treating C&S National, C&S Emory and C&S DeKalb as one banking organization, there are 19 commercial banking organizations operating offices in DeKalb [**\*123**] [**\*\*2120**] County. In terms of total deposits and total individual, partnership and corporation ("IPC") demand deposits held by all banking offices located in DeKalb County, the top 4 banks, respectively, are C&S (offices of C&S National in DeKalb County, C&S Emory and C&S DeKalb), First National Bank of Atlanta, Trust Company of Georgia, and Fulton National Bank. In terms of outstanding loans, the top 4 banks are C&S (offices of C&S National in DeKalb County, C&S Emory and C&S DeKalb), Trust Company of Georgia, Tucker and Fulton National Bank. The shares of total deposits, total loans and total IPC demand deposits accounted for by the four [\*\*\*\*57] largest banks are as follows:

IPC			
	Total	Total	Demand
	Deposits	Loans	Deposits
<b>Banks</b>	<b>(12/31/71)</b>	<b>(12/31/71)</b>	<b>(6/30/72)</b>
Top 2	38.3%	42.7%	34.8%
Top 3	51.8%	52.4%	47.3%
Top 4	62.9%	61.8%	58.2%

C&S (offices of C&S National in DeKalb County, C&S Emory and C&S DeKalb) accounts for the following [\*\*\*68] shares of total deposits, total loans and total IPC demand deposits held by all banking offices located in DeKalb County.

IPC			
	Total	Total	Demand
	Deposits	Loans	Deposits
<b>Bank</b>	<b>(12/31/71)</b>	<b>(12/31/71)</b>	<b>(6/30/72)</b>
C&S	24.1%	28.5%	20.1%

Chamblee, Park National and South DeKalb, all of whose banking offices are located in DeKalb County, account for the following shares of total deposits, total loans and total IPC demand deposits held by all banking offices located in DeKalb County: [**\*124**]

IPC			
	Total	Total	Demand
	Deposits	Loans	Deposits
<b>Banks</b>	<b>(12/31/71)</b>	<b>(12/31/71)</b>	<b>(6/30/72)</b>
Chamblee	5.7%	5.7%	5.9%
Park National	2.9%	1.5%	3.0%
South DeKalb	1.8%	2.5%	1.9%

IPC			
	Total	Total	Demand
Banks	Deposits	Loans	Deposits
	(12/31/71)	(12/31/71)	(6/30/72)
	10.4%	9.7%	10.8%

Depending on the unit of measurement, Chamblee is the third [\*\*\*\*58] or fourth largest bank headquartered in DeKalb County.

If the proposed mergers were approved, the C&S system (which would include offices of C&S National and South DeKalb) would account for 34.5% of the total deposits of all the banking offices located in DeKalb County, 38.2% of the total loans and 30.9% of the total IPC demand deposits. C&S would also be acquiring the third (or fourth) largest bank headquartered in DeKalb County.

If the proposed mergers were approved, the four largest banks would account for the following shares of the DeKalb County market:

IPC			
	Total	Demand	
Banks	Deposits	Loans	Deposits
Top 2 after mergers	48.7%	52.4%	45.6%
Top 3 after mergers	62.2%	62.1%	58.1%
Top 4 after mergers	73.3%	71.5%	69.0%

Thus, if the proposed mergers were approved, the C&S system's share of total deposits, for example, would increase from about 24% to 34%, or an increase of about 40%. The share of total deposits accounted for by the top 4 banks would increase from about 63% to 73%, while that of the top 2 and top 3 banks would increase from 38% to 49% and from 52% to 62%, respectively.

#### [\*125] North Fulton County

There [\*\*\*\*59] are nine commercial banks operating offices in North Fulton County. In terms of total deposits and total IPC demand deposits held by all banking offices located in North Fulton County, the top 4 banks, respectively, are Sandy Springs, Roswell Bank, Fulton Exchange Bank and North Fulton. On June 30, 1970, however, there were only five banks operating offices in North Fulton County: the four banks just mentioned and Trust Company of Georgia Bank of Sandy Springs, which is now a branch of Trust Company of Georgia. The shares of total deposits and IPC demand [\*\*2121] deposits accounted for by the four largest banks are as follows:

Banks	IPC		
	Demand	Demand	Total
	Deposits	Deposits	Deposits
	(6/30/72)	(6/30/70)	(6/30/70)
Top 2	57.8%	66.4%	64.0%
Top 3	70.1%	78.9%	80.2%
Top 4	80.3%	90.7%	91.9%

As of June 30, 1972, the North [\*\*\*69] Springs Office of C&S East Point accounted for 1.7% of total IPC demand deposits held by all banking offices located in North Fulton County.

As of June 30, 1972, Sandy Springs and North Fulton accounted for 36.4% and 10.2%, respectively, of total IPC demand deposits held by all banking offices located [\*\*\*\*60] in North Fulton County. As of June 30, 1970, they accounted for 34.4% and 11.7%, respectively, of total deposits held by all commercial banking offices located in North Fulton County.

If the proposed mergers were approved, the C&S system (which would include C&S East Point's North Springs Office, North Fulton and Sandy Springs) would [\*126] account for 48.3% of the total IPC demand deposits held by all commercial banking offices located in North Fulton County and the four largest banks would account for the following shares of IPC demand deposits in North Fulton County:

IPC	
Demand	
Banks	Deposits
Top 2 after mergers	69.7%
Top 3 after mergers	82.0%
Top 4 after mergers	92.0%

Thus, if the proposed mergers were approved, the C&S system's <sup>1</sup> share of total IPC demand deposits held by all banking offices located in North Fulton County would increase from 1.7% to 48.3%, and the C&S system's share in this area would be twice that of the second largest banking organization, the Roswell Bank. Two of the four largest banks in the area would become part of the Atlanta area's largest banking organization. In addition, the share of total IPC demand deposits [\*\*\*\*61] accounted for by the top 4 banks would increase from 80.3% to 92.0%, while the shares of the top 2 and top 3 banks would increase from 57.8% to 69.7% and from 70.1% to 82.0%, respectively.

#### *Fulton County*

Treating C&S National and C&S East Point as one banking organization, there are 18 commercial banking organizations operating offices in Fulton County. In terms of total loans, deposits and IPC demand deposits held [\*127] by all banking offices located in Fulton County, the top 4 banks, respectively, are C&S (offices of C&S National in Fulton County and C&S East Point), First National Bank of Atlanta, Trust Company of Georgia and Fulton National Bank. The shares of total loans, deposits [\*\*\*\*62] and IPC demand deposits accounted for by the four largest banks are as follows:<sup>2</sup>

IPC			
	Total	Total	Demand
	Loans	Deposits	Deposits
Banks	(12/31/71)	(12/31/71)	(6/30/72)
Top 2	63.0%	55.2%	61.3%
Top 3	78.8%	73.9%	78.1%
Top 4	89.4%	87.0%	88.8%

C&S (offices of C&S National in Fulton County and C&S East Point) [\*\*\*70] accounts for the following shares of total loans, deposits and IPC demand deposits held by all banking offices located in Fulton County:

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<sup>1</sup> These computations consider the 5-percent defendant banks as completely separate entities (rather than as constituting a part of the C&S system as actually is the case), and of course, do not relate to competition as such but rather to the assignment of statistical proportions to the various entities involved.

<sup>2</sup> See n. 1, *supra*.

IPC			
	Total	Total	Demand
	Loans	Deposits	Deposits
Bank	(12/31/71)	(12/31/71)	(6/30/72)
C&S	37.2%	30.8%	32.1%

[\*\*2122] Sandy Springs and North Fulton, both of whose banking offices are located in Fulton County, account for the following shares of total loans, deposits and IPC demand deposits held by all banking offices located in Fulton County:

IPC			
	Total	Total	Demand
	Loans	Deposits	Deposits
Banks	(12/31/71)	(12/31/71)	(6/30/72)
Sandy Springs	.7%	.8%	.9%
North Fulton	.3%	.3%	.3%
	1.0%	1.1%	1.2%

[\*\*\*\*63] [\*128] Depending on the unit of measurement, Sandy Springs is the eighth or ninth largest banking organization in Fulton County.

If the proposed mergers were approved, the C&S system (which would include offices of C&S National in Fulton County, C&S East Point, Sandy Springs and North Fulton) would account for 38.2% of the total loans held by all banking offices in Fulton County, 31.9% of the total deposits and 33.3% of the total IPC demand deposits.

If the proposed mergers were approved, the four largest banks would account for the following shares in Fulton County:

IPC			
	Total	Total	Demand
	Loans	Deposits	Deposits
Banks			
Top 2 after mergers	64.0%	56.3%	62.5%
Top 3 after mergers	79.8%	75.0%	79.3%
Top 4 after mergers	90.4%	88.1%	90.0%

#### Atlanta Area

Treating C&S National, C&S Emory, C&S DeKalb and C&S East Point as one banking organization, there are 31 commercial banking organizations operating offices in the Atlanta area, six of which operate offices in both Fulton and DeKalb Counties. In terms of total loans, deposits, and IPC demand deposits held by all banking offices located in the Atlanta area, the top 4 banks, [\*\*\*\*64] respectively, are C&S (offices of C&S National, C&S East Point, C&S Emory and C&S DeKalb), First National Bank of Atlanta, Trust Company of Georgia and Fulton National Bank. The shares of total loans, deposits and IPC demand deposits accounted for by the four largest banks are as follows: [\*129]

IPC		
Total	Total	Demand

	<b>Loans</b>	<b>Deposits</b>	<b>Deposits</b>
<b>Banks</b>	<b>(12/31/71)</b>	<b>(12/31/71)</b>	<b>(6/30/72)</b>
Top 2	60.5%	53.2%	58.0%
Top 3	76.2%	71.3%	74.3%
Top 4	86.7%	84.2%	85.0%

C&S (offices of C&S National, C&S Emory, C&S East Point and C&S DeKalb) accounts for the following shares of total loans, deposits and IPC demand deposits held by all banking offices located in the Atlanta area:

	<b>IPC</b>		
	<b>Total</b>	<b>Total</b>	<b>Demand</b>
	<b>Loans</b>	<b>Deposits</b>	<b>Deposits</b>
<b>Bank</b>	<b>(12/31/71)</b>	<b>(12/31/71)</b>	<b>(6/30/72)</b>
C&S	36.4%	30.0%	30.6%

[\*\*\*71] Chamblee, Park National, South DeKalb, Sandy Springs and North Fulton account for the following shares of total loans deposits and IPC demand deposits held by all banking offices located in the Atlanta area:

	<b>IPC</b>		
	<b>Total</b>	<b>Total</b>	<b>Demand</b>
	<b>Loans</b>	<b>Deposits</b>	<b>Deposits</b>
<b>Banks</b>	<b>(12/31/71)</b>	<b>(12/31/71)</b>	<b>(6/30/72)</b>
Chamblee	.5%	.6%	.8%
Park National	.1%	.3%	.4%
South DeKalb	.2%	.2%	.3%
Sandy Springs	.6%	.7%	.8%
North Fulton	.3%	.2%	.2%
	1.7%	2.0%	2.5%

[\*\*\*\*65] If their deposits (as of 12/31/71) were combined (\$ 71,142,252), these five banks would be the equivalent of the sixth largest banking organization in the Atlanta area. Sandy Springs and Chamblee are, alone, the tenth and eleventh largest banking organizations in the Atlanta area, respectively.

[\*130] If the proposed mergers were approved, the C&S system (which would include the offices of C&S National in [\*\*2123] the Atlanta area, C&S Emory, C&S DeKalb, C&S East Point, Chamblee, Park National, South DeKalb, Sandy Springs and North Fulton) would account for 38.2% of the total loans held by all banking offices located in the Atlanta area, 32.0% of the total deposits and 33.0% of the total IPC demand deposits. C&S would also be acquiring the tenth and eleventh largest banks in the Atlanta area.

If the proposed mergers were approved, the four largest banks would account for the following shares in the Atlanta area:

	<b>IPC</b>		
	<b>Total</b>	<b>Total</b>	<b>Demand</b>
	<b>Loans</b>	<b>Deposits</b>	<b>Deposits</b>
<b>Banks</b>	<b>(12/31/71)</b>	<b>(12/31/71)</b>	<b>(6/30/72)</b>
Top 2 after mergers	62.2%	55.2%	60.5%
Top 3 after mergers	77.9%	73.3%	76.8%

	IPC		
	Total	Total	Demand
Banks	Loans	Deposits	Deposits
Top 4 after mergers	88.4%	86.2%	87.5%

**Dissent by:** BRENNAN

## Dissent

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MR. JUSTICE **BRENNAN**, [\*\*\*\*66] with whom MR. JUSTICE **DOUGLAS** and MR. JUSTICE WHITE join, dissenting.

I agree that the District Court erred in holding that the correspondent associate programs are immune from Sherman Act scrutiny because they are subject to the "exclusive primary jurisdiction" of the Federal Reserve Board under the Bank Holding Company Act of 1956, as amended. The District Court also erred, however, in holding that the United States did not prove the violations of § 1 of the Sherman Act, and § 7 of the Clayton Act, alleged, and I therefore dissent from the affirmance of its judgment.

The issues under the Clayton and Sherman Acts, while logically independent, are related; both present the question whether a large commercial bank, already possessing [\*131] a substantial share of the Atlanta market, may lawfully acquire other banks, rather than expand internally. Three banks now control more than 75% of the commercial banking business in Atlanta. Today's decision assures that their dominions will soon be extended as arrangements they have made with independent banks to operate as "*de facto* branches" are solidified through merger. I cannot agree with today's decision that the Government [\*\*\*\*67] is powerless to prevent this result.

### [\*\*72] I. *The Sherman Act*

The "5-percent" banks in this litigation entered into a relationship with C&S far exceeding that of "correspondent banking," the provision of check clearance, investment advice, personnel training, or other specialized services in arm's-length transactions.<sup>1</sup> From the very inception of these relationships, it was contemplated that [\*132] the 5-percent banks would seek, and C&S would provide, advice and guidance with respect to virtually every business decision of significance. C&S provided advisory directors -- treated by all parties as actual directors -- made available operating manuals covering banking practices in minute detail,<sup>2</sup> and maintained a constant [\*\*2124] flow

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<sup>1</sup> Relationships labeled "correspondent banking" may call for careful scrutiny as the sale of specialized services by the corresponding bank shades into "consultation" by the correspondent on every business decision of significance. Correspondent banking, like other intra-industry interaction among firms or their top management, provides an opportunity both for the kind of education and sharing of expertise that ultimately enhances consumer welfare and for "understandings" that inhibit, if not foreclose, the rivalry that antitrust laws seek to promote. As one commentator on commercial banking practices has observed:

"[C]ommunication, especially when it comes from those at the top of a power hierarchy, tends to facilitate conflict resolution. Perhaps a great deal should not be made of this, but competition is a form of conflict and, in the present context, conflict resolution is a form of restraint on competition." Phillips, Competition, Confusion, and Commercial Banking, 19 J. of Finance 32, 42 (1964).

Since the relationship of C&S to the 5-percent banks goes well beyond ordinary "correspondent banking," this case does not present an occasion for further examination of the lawfulness of these more limited interconnections among firms.

<sup>2</sup> The Consumer Credit Operating Bulletin, 7 App. E-1024 (DX-311), is illustrative. It explains what bank records should be established, the methods for arranging a repayment plan, and the procedures to be followed in perfecting a security interest. In addition, the manual sets forth C&S practice with respect to charges for late payments, extensions of repayment deadlines, and the notification of a borrower's employer about repayment delinquency.

of bulletins whose contents ranged from admonitions about the antitrust laws to exhortations to "get the rates [on loans] up." C&S, through its Branch Supervision Department, monitored the performance of the management of the 5-percent banks and was instrumental in having replaced those who did not measure up. These arrangements had the desired effect. The elaborate fabric of "consultations," of seeking "advice and guidance, [\*\*\*\*68]" eliminated the opportunity for rivalry among the defendant banks. The District Court found "no presently existing substantial competition between the five-percent banks and C&S National, or *inter sese*." [372 F. Supp. 616, 642 \(1974\)](#).

[\*\*\*\*69] A

The Court concludes that antitrust scrutiny of the affiliation of three 5-percent banks is foreclosed by the grandfather provision of § 11 (d) of the Bank Holding Company Act, [12 U.S.C. § 1849\(d\)](#). That holding is plainly a distorted expansion of § 11 (d) beyond its language and purpose.

The concept of an amnesty for unchallenged structural arrangements in commercial banking first appeared [**\*133**] in the 1966 amendments to the Bank Merger Act, 80 Stat. 7. In those amendments, Congress, responding in part to this Court's decisions in [United States v. Philadelphia National Bank, 374 U.S. 321 \(1963\)](#), [\*\*\*\*73] and [United States v. First National Bank & Trust Co. of Lexington, 376 U.S. 665 \(1964\)](#), attempted to mesh antitrust considerations with review of proposed bank mergers by the appropriate regulatory agency. The resulting provisions, which mandate Justice Department participation in the regulatory approval process as well as consideration by the regulatory agencies of "competitive factors," and permit an antitrust suit within 30 days of regulatory approval, appear today in the Federal Deposit Insurance [\*\*\*\*70] Act, [12 U.S.C. § 1828](#). See [United States v. First City National Bank of Houston, 386 U.S. 361 \(1967\)](#); [United States v. Third National Bank in Nashville, 390 U.S. 171 \(1968\)](#). The 1966 amendments also included a grandfather provision, 80 Stat. 10, that conferred immunity from antitrust challenge (except under [§ 2](#) of the Sherman Act) upon any "merger, consolidation, acquisition of assets, or assumption of liabilities" consummated before June 17, 1963, the date of the decision in *Philadelphia National Bank*.

A few months after enactment of the Bank Merger Act amendments, the "antitrust" provisions were written almost verbatim into the Bank Holding Company Act. Unlike their Merger Act counterparts, the 1966 amendments to the Bank Holding Company Act were not principally addressed to integrating antitrust standards with the regulatory process, but rather to expanding the Federal Reserve Board's jurisdiction and regulatory powers. The antitrust provisions of the Holding Company Act amendments received little legislative attention; the brief reference to them in the legislative history indicates that their purpose [\*\*\*\*71] [**\*134**] was to "apply to bank holding company cases the same procedures as are now provided in bank merger cases...."<sup>3</sup> Among the provisions so borrowed from the earlier Bank Merger Act amendments was the grandfather provision, § 11 (d).

Because [\*\*2125] of congressional preoccupation with the regulatory features of the 1966 amendments to the Bank Holding Company Act, interpretation of the antitrust provisions may involve as much an attribution of congressional intent as a discernment of it. This is particularly the case with respect to § 11 (d), which was transplanted from one regulatory statute to another with seemingly scant attention to the differences in the regulatory environment. [\*\*\*\*72] Objections that grandfathering holding company acquisitions posed policy questions different from the retroactive immunization of mergers were quickly brushed aside,<sup>4</sup> and § 11 (d) was swept into law along with the other antitrust provisions. Thus, despite whatever dissimilarity of underlying policy considerations may have been exposed, Congress indicated that it considered the grandfather provisions in both statutes [\*\*\*74] to advance substantially similar purposes. Accordingly, however difficult may be the discernment of the congressional intent expressed in § 11 (d), we must look for assistance to its counterpart in the Bank Merger Act, the only guidepost Congress has left us.

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<sup>3</sup> As initially enacted by the House, the amendments contained no antitrust provisions. See generally H.R. Rep. No. 534, 89th Cong., 1st Sess. (1965). These were added later by the Senate Banking and Currency Committee and subsequently adopted by both Houses. See S. Rep. No. 1179, 89th Cong., 2d Sess., 10 (1966).

<sup>4</sup> See letter from Deputy Attorney General Clark to Sen. Robertson, reprinted at 112 Cong. Rec. 12385 (1966), and accompanying remarks by Sen. Robertson, *ibid.*

The grandfather provision of the Bank Merger Act amendments most assuredly did not provide sanctuary [**\*135**] for then-unchallenged price-fixing, market-division, [**\*\*\*\*73**] or other cartel activity by banks. Congressional concern was much more narrowly directed. *Philadelphia National Bank* rejected a *literal* interpretation of [§ 7](#) of the Clayton Act that would have limited its application to stock acquisitions by banks, an interpretation that nevertheless enjoyed some acceptance prior to the decision. Congress was concerned about the difficulty of unscrambling pre-*Philadelphia National Bank* mergers undertaken in reliance upon the literal interpretation of [§ 7](#), which the Court ultimately rejected, and accordingly immunized them from suit under that section.<sup>5</sup> But a provision barring suit under [§ 1](#) of the Sherman Act was also necessary to safeguard the same mergers because of our decision in *Lexington Bank, supra*. Thus, although the resulting grandfather provision covered both the Clayton and Sherman Acts (except Sherman Act [§ 2](#)), its purpose was to shield structural arrangements of the sort the Government challenged in *Philadelphia National Bank* and was continuing to challenge in the District Courts thereafter.<sup>6</sup>

[**\*\*\*\*74**] Against the foregoing background, we confront the language of the counterpart in the Bank Holding Company Act. As enacted in 1966, § 11 (d) shielded an "acquisition, merger, or consolidation of the kind described in § 3 (a) of this Act." Section 3 (a) provided then, as today, that: S

"(a) It shall be unlawful, except with the prior [**\*136**] approval of the Board, (1) for any action to be taken that causes any company to become a bank holding company; (2) for any action to be taken that causes a bank to become a subsidiary of a bank holding company; (3) for any bank holding company to acquire direct or indirect ownership or control of any voting shares of any bank if, after such acquisition, such company will directly or indirectly own or control more than 5 per centum of the voting shares of such bank; (4) for any bank holding [**\*\*2126**] company or subsidiary thereof, other than a bank, to acquire all or substantially all of the assets of a bank; or (5) for any bank holding company to merge or consolidate with any other bank holding company."<sup>7</sup><sup>1</sup>

Section 3 (a) is thus the operative provision of the statute permitting [**\*\*\*75**] the Federal Reserve Board to regulate [**\*\*\*\*75**] the events therein described.

By "grandfathering" an "acquisition, merger, or consolidation of the kind described in § 3 (a)," Congress obviously exempted from antitrust challenge only the events for which Board approval would have been required. None of the transactions defined by § 3 (a), however, includes those features of the "correspondent associate" relationship that the Government is challenging under Sherman Act [§ 1](#) in this case. Clauses (4) and (5) of § 3 (a) refer, respectively, to an acquisition of assets and a merger of two holding companies. Clause (3) refers to ownership of voting stock by a holding company; the stock ownership by C&S is not, however, the salient feature of the affiliative relationship and indeed is not challenged in this case. Clauses (1) and (2) address the creation of a holding company-subsidiary relationship. [**\*137**] The [**\*\*\*\*76**] definitional provisions of [§ 2 \(d\)](#) have undergone recent expansion, but in 1966 they designated a bank as a "subsidiary" if a holding company either (1) directly or indirectly owned or controlled 25% or more of its voting stock, or (2) controlled in any manner the election of a majority of its directors. These two conditions would often be satisfied simultaneously, and indeed shortly after enactment of the forerunner of this provision in 1956 it was suggested that the second condition was redundant. See Note, *The Bank Holding Company Act of 1956*, 9 Stan. L. Rev. 333, 337, and n. 59 (1957). Congress, however, was apparently concerned that stock interests could be so structured that a holding company could elect a majority of directors without

<sup>5</sup> See S. Rep. No. 299, 89th Cong., 1st Sess., 1-7 (1965); H.R. Rep. No. 1221, 89th Cong., 2d Sess., 4 (1966); 111 Cong. Rec. 13304-13305 (1965) (remarks of Sen. Robertson); 112 Cong. Rec. 2454 (1966) (remarks of Rep. Cellar).

<sup>6</sup> See *United States v. Crocker-Anglo National Bank*, 223 F. Supp. 849 (ND Cal. 1963); *United States v. Manufacturers Hanover Trust Co.*, 240 F. Supp. 867 (SDNY 1965), cited in Hearings on S. 1698 before a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 1st Sess., 446, 463 (1965).

<sup>7</sup> Section 3 (a) had been in force since enactment of the Bank Holding Company Act in 1956. The 1966 amendment added clause (2) to its provisions.

satisfying the 25% ownership requirement.<sup>8</sup> Whether or not this fear was well-founded, it is clear that satisfaction of either condition required an arrangement whereby the holding company had the power to vote stock.

**[\*\*\*\*77]** In establishing its "correspondent associates" C&S did not engage in the transactions described by § 3 (a) in 1966 and therefore sheltered by § 11 (d). Indeed, because of state-law restrictions C&S could not resort to the methods described by § 3 (a) of the Holding Company Act and turned instead to more informal arrangements, including "understandings." While the functional equivalent of a holding company-subsidiary relationship could perhaps be created through informal affiliation, § 3 (a), at least until quite recently, has been **[\*138]** triggered by the formality of control of voting stock. To be sure, § 2 (d) has always referred to a subsidiary as one whose stock is "directly or indirectly" owned or controlled or whose election of directors is controlled "*in any manner*" by the holding company.<sup>9</sup> But there has been no suggestion by Congress, nor by the Board, that this language would embrace the less formal arrangements **[\*\*\*76]** by which the C&S banks operated in complete harmony with C&S. Indeed, the **[\*\*2127]** statutory clues suggest the contrary, that Congress was concerned with powers attached to stock, and that "indirect" ownership or control merely referred **[\*\*\*\*78]** to their exercise derivatively, through an intermediary.<sup>10</sup>

**[\*\*\*\*79] [\*139]** In the 1970 amendments to the Holding Company Act, 84 Stat. 1760, Congress expanded the reach of § 3. The Act now defines "control" to include a relationship whereby a company "directly or indirectly exercises a controlling influence over the management and policies of the bank...." § 2(a)(2)(C), 12 U.S.C. § 1841(a)(2)(C). Congressional preoccupation with stock is still evident since there is a statutory presumption that "any company which directly or indirectly owns, controls, or has power to vote less than 5 per centum of any class of voting securities of a given bank or company does not have control over that bank or company." § 2 (a) (3). Nevertheless the Board has by regulation established a rebuttable presumption of control where a company S

"enters into any agreement or understanding with a bank... such as a management contract, pursuant to which the company or any of its subsidiaries exercises significant influence with respect to the general management or overall operations of the bank...." 12 CFR § 225.2 (b) (3) (1975).I

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<sup>8</sup> See H.R. Rep. No. 609, 84th Cong., 1st Sess., 12-13 (1955); 101 Cong. Rec. 8028 (1955) (remarks of Rep. Patman). In the form initially adopted by the House, the Act would have defined as a subsidiary a bank over which another company was found by the Federal Reserve Board to "exercise a controlling influence." The Senate amendment substituted the provision ultimately enacted, the requirement of control of the election of directors. See S. Rep. No. 1095, 84th Cong., 1st Sess., 5 (1955).

<sup>9</sup> The reference to indirect ownership, though contained in § 2 (a) of the 1956 Act (defining holding company), was inadvertently omitted from § 2 (d). See 70 Stat. 134. The 1966 amendments corrected the omission. See S. Rep. No. 1179, 89th Cong., 2d Sess., 8 (1966).

<sup>10</sup> Section 2 (g) of the Act defined indirect control or ownership:

"For the purposes of this Act -

"(1) shares owned or controlled by any subsidiary of a bank holding company shall be deemed to be indirectly owned or controlled by such bank holding company;

"(2) shares held or controlled directly or indirectly by trustees for the benefit of (A) a company, (B) the shareholders or members of a company, or (C) the employees (whether exclusively or not) of a company, shall be deemed to be controlled by such company; and

"(3) shares transferred after January 1, 1966, by any bank holding company (or by any company which, but for such transfer, would be a bank holding company) directly or indirectly to any transferee that is indebted to the transferor, or has one or more officers, directors, trustees, or beneficiaries in common with or subject to control by the transferor, shall be deemed to be indirectly owned or controlled by the transferor unless the Board, after opportunity for hearing, determines that the transferor is not in fact capable of controlling the transferee."

This provision was added by the 1966 amendments to adopt interpretations previously made by the Board. S. Rep. No. 1179, supra, at 8.

Arguably, the Board's interpretation would now bring within § 3 the affiliation [\*\*\*\*80] of the 5-percent banks with C&S. But the Board's interpretation is based upon recent legislation expanding the reach of the Board's regulatory authority.<sup>11</sup> Since I do not suppose Congress intended in 1966 to immunize transactions of the kind it had not yet brought within § 3, the 1970 amendment is relevant only because it demonstrates the limited character [\*140] of the transactions previously embraced by § 3 and "grandfathered" under § 11 (d).

The conclusion that Congress had traditionally not brought informal arrangements within § 3 (a) was reinforced by the provisions of § 4 (a) (2) of the original Act, 70 Stat. 135, which forbade a bank holding company to S

[\*\*\*77] "engage in any business other than that of banking or of managing or controlling banks [\*\*\*81] or of furnishing services to or performing services for any bank of which it owns or controls 25 per centum or more of the voting shares."<sup>12</sup>

This provision was enacted in 1956, and as early as 1960 the Board by regulation interpreted "services" to include many of the functions C&S has performed for the 5-percent banks. Included in the Board's interpretation are: "(1) [establishment] and supervision of loaning policies; (2) direction of the purchase [\*\*2128] and sale of investment securities; (3) selection and training of officer personnel; (4) establishment and enforcement of operating policies; and (5) general supervision over all policies and practices." [12 CFR § 225.113 \(1975\)](#). The differentiation of these activities from "control or management" and their inclusion in § 4 of the Act rather than in § 3 vividly exposes the fallacy of today's holding invoking § 11 (d) to foreclose scrutiny of the "correspondent associate" relationship of three of the 5-percent banks. Since § 11 (d) shielded only the events then described in § 3 (a), the conclusion is compelled that all the 5-percent banks are properly before us on the Sherman Act counts. [\*\*\*82]<sup>12</sup> Accordingly, I turn to the merits.

#### [\*141] B

The District Court found that there were no express agreements among the defendant banks to fix prices or divide markets that would call for application of the per [\*\*\*83] se rule, [United States v. Socony-Vacuum Oil Co., 310 U.S. 150 \(1940\)](#); [United States v. Sealy, Inc., 388 U.S. 350 \(1967\)](#), but it also found that the effect of the association was to eliminate all competition among the banks involved.

The Court finds the restraints embodied in the "correspondent associate" relationship reasonable because of state-law restrictions that blocked, for a time, the avenue of internal expansion by C&S. If the question before us were the lawfulness of these arrangements at their inception, this solution might be satisfactory. The question would be a close one, however, calling for a delicate balancing of the immediate benefits of expanded banking services against the more distant, but nevertheless real, danger of permitting the restraints necessary to circumvent *de jure* barriers to expansion to continue longer than the conditions that justified them. The inquiry would, of course, have to take into account the possibility that expansion would occur under less restrictive conditions. New entry by an [\*\*\*78] unaffiliated bank<sup>13</sup> or entry [\*142] with a more limited form of sponsorship -- a period of initial [\*\*\*84] assistance,

<sup>11</sup> Congress specifically noted the expansion. See S. Rep. No. 91-1084, p. 6 (1970); H.R. Rep. No. 91-1747, p. 12 (1970). See also Note, The Bank Holding Company Act Amendments of 1970, 39 Geo. Wash. L. Rev. 1200, 1213-1214 (1971).

<sup>12</sup> My conclusion that the affiliative relationships are not within the terms of § 3 (a), at least prior to the 1970 amendment, is further supported by the scope and outcome of the 1968 investigation of C&S undertaken by the Federal Reserve Board staff. The investigation was convened specifically to inquire into a possible violation of § 3. The staff was principally concerned with the pattern of ownership of the stock of the 5-percent banks, especially by C&S officers and employees. Ultimately the staff found this acceptable, so long as C&S did not finance the purchases. There is no indication, however, that the staff concerned itself with communications between C&S and the 5-percent banks with respect to such matters as interest rates, loan repayment policies, or other terms of business.

<sup>13</sup> There is little doubt that pent-up consumer demand for additional banks would sooner or later induce efforts to organize new ones. More questionable, however, is whether regulatory authorities would respond promptly to permit new entry. In general, regulatory policy has been thought to retard formation of new banking institutions. See Peltzman, Entry in Commercial Banking, 8 J. Law & Econ. 11 (1965).

followed by a withdrawal of the sponsor's influence, at least to a conventional correspondent relationship<sup>14</sup> -- might have sufficed to provide the expansion cited here as a justification for [\*\*2129] incidental restraints. The judicial resources consumed by such an inquiry in any particular case would not be insubstantial, and the very difficulty of making such judgments has in many cases led us to prefer *per se* rules. [United States v. Socony-Vacuum Co., supra, at 220-221](#); [Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 \(1958\)](#); [United States v. Sealy, Inc., supra](#); [United States v. Topco Associates, Inc., 405 U.S. 596 \(1972\)](#). See also [United States v. Philadelphia National Bank, 374 U.S., at 362](#).

[\*\*\*\*85] The issue in this case, however, is not whether the affiliation of the 5-percent banks was lawful at its inception, but whether it could lawfully continue, for the Government sought only an injunction. By the time the Government brought suit, Georgia law permitted [\*143] C&S to branch freely in the Atlanta suburbs. Because the rule of reason requires us to assess the lawfulness of a restraint in light of all the circumstances, [Chicago Board of Trade v. United States, 246 U.S. 231, 238 \(1918\)](#), the lawfulness of the practices at their inception, even if assumed, could not be controlling, for changes in market conditions can deprive once-reasonable arrangements of their justification. [United States v. Jerrold Electronics, 187 F. Supp. 545, 560-561 \(ED Pa. 1960\)](#), aff'd, 365 U.S. 567 (1961). See also [United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 596-598 \(1957\)](#). The claimed desirability of the challenged arrangements as a response to now-repealed restrictions of Georgia law is therefore relevant only insofar as it may also be claimed that continuation of such arrangements undisturbed by [\*\*\*\*86] the Sherman Act would be vital to their creation were Georgia to reinstate its restrictions in the future. Put another way, we need concern ourselves with the lawfulness of "*de facto* branches" as a response to state-law restrictions only if appellees make a convincing showing that [\*\*\*79] no bank would engage in "*de facto* branching" without a guarantee of perpetual noninterference from the antitrust laws.

Certainly it is open to C&S to argue that no rational banker would sponsor a *de facto* branch unless assured that the resulting relationships could continue in perpetuity. But this sort of argument has seldom carried the day in this Court, see [United States v. Sealy, supra](#); [United States v. Topco Associates, supra](#), and I do not find it persuasive in this case. A bank hemmed in by state antibranching restrictions will presumably find it profitable to take a small stock interest in an independent bank, to offer assistance and thereby attempt to win consumer loyalty through an expanded use of its own name. C&S presumably found these arrangements [\*144] profitable at their inception. The record does not show whether C&S actually charged [\*\*\*\*87] the 5-percent banks for such assistance as site selection, economic surveys, equipment procurement, and other promotional services; there is no suggestion, however, that C&S provided these services at an ultimate loss, and presumably gains ultimately accrued to the provider. True, C&S hoped to cement the relationships through merger, but it is not clear that these expectations were essential to the initial undertaking. Indeed, C&S continued to provide assistance to certain banks as to which there was little prospect of ultimate acquisition by C&S. 2 App. 378-379. Our concern, in any event, lies not with protecting the expectations of C&S but with avoiding disincentives to the provision of desirable services. Sponsorship will be profitable to a sponsor bank assuming that there is a demand for the services of the sponsored bank and that the sponsor can recoup in some fashion a return for its assistance. These conditions should be [\*\*2130] sufficient to induce a profit-seeking bank, chafing under antibranching restrictions, to sponsor a new entrant even if permanent arrangements are forbidden.

This case, therefore, does not present an occasion for consideration whether the restraints [\*\*\*\*88] incident to "*de facto* branching" are lawful when undertaken in response to a prohibition of *de jure* branching, a position the Court says the Government took last Term in [United States v. Marine Bancorporation, 418 U.S. 602 \(1974\)](#). The restraints

<sup>14</sup> The record demonstrates that such a chain of events is possible. Citizens & Southern Bank of Stone Mountain, organized in 1957 with C&S assistance, functioned as a correspondent associate from 1959 until 1970. At that time it declined an offer of acquisition by C&S and became independent of the C&S system. Appellees have argued that Stone Mountain represents a unique case because a majority of voting stock remained in the hands of a single family not intimately tied to the C&S system. This contention is not wholly supported by the record, since in his trial testimony Mr. Mills Lane, President of C&S from 1946 to 1970, referred to three other banks having a similar structure of ownership. (2 App. 378-379, referring to Pelham, Fayetteville, Hogansville). The example of Stone Mountain does, in any event, demonstrate that sponsorship can occur under conditions ultimately leading to independence of the sponsored institution.

incident to the affiliation of the 5-percent banks with C&S must be examined in light of conditions prevailing at the time of suit, which include the ability of C&S to branch freely in the Atlanta suburbs.

The arrangements between C&S and the 5-percent banks resemble a "common brand" marketing agreement or a franchising arrangement in which the franchisor [\*145] itself deals directly with consumers as well as providing entrepreneurial skill and other assistance to franchisees. Such combinations may, under certain circumstances, enhance competition. Common-brand marketing may permit a group of small firms to exploit promotional economies and thereby compete with larger enterprises whose business spans several geographic submarkets. Franchising may facilitate entry by allowing an entering firm to save on promotional expenses and to purchase needed entrepreneurial assistance. Restraints invariably accompany [\*\*\*\*89] these combinations for the purpose of promoting [\*\*\*80] product uniformity, for some standardization of product is indispensable to the success of the scheme. Because notwithstanding accompanying restraints such combinations may on balance enhance competition, it would be a mistake to regard them as *per se* or even presumptively unlawful, and lower courts have not done so. See, e.g., *United States v. Topco Associates, Inc.*, 319 F. Supp. 1031, 1038 (ND Ill. 1970), rev'd on other grounds, 405 U.S. 596 (1972); *Siegel v. Chicken Delight, Inc.*, 448 F. 2d 43 (CA9 1971); *Susser v. Carvel Corp.*, 332 F. 2d 505 (CA2 1964). But the Sherman Act limits the scope of cooperation incident to such arrangements. The participants may not fix prices or divide markets. *United States v. Topco Associates, Inc., supra*; *United States v. Sealy, Inc., supra*; *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). Such combinations, moreover, warrant careful scrutiny when their participants collectively possess a dominant share of a common market, as to which there are [\*\*\*\*90] substantial barriers to entry, for these conditions enhance the profitability of price collusion among participants and thus may tempt them to standardize price as well as other product attributes.

Despite the acceptability generally of common-brand [\*146] or franchising arrangements, they pose particular difficulty in the commercial banking context. Many features of a commercial bank's services are set by regulation, thus inhibiting competition by restricting the number of product features that individual firms are free to vary. With interest rates on loans fixed by law, for example, competition is confined to such "non-price" features as collateral requirements or repayment policies. With competition thus already delimited, few additional restraints incident to a cooperative scheme can be tolerated before competition is extinguished entirely. Moreover, the entry barriers posed by regulation enhance the danger that incidental cooperation will be extended to abolish all rivalry. These considerations suggest that cooperative arrangements in commercial banking should be permitted only where their competitive benefits are clear, and where the combined market shares of the participants [\*\*\*\*91] dispel the fear that price collusion will accompany them.

The situation here fails to satisfy the test. The combined shares of C&S and the 5-percent banks are substantial under any of the alternative definitions of [\*\*2131] the geographic market cited by the Court. *Ante*, at 122-130.<sup>15</sup> Furthermore, the cooperative arrangements [\*\*\*81] involve [\*147] not a group of small firms allied to challenge a larger rival, *United States v. Topco Associates, supra*, but instead the dominant firm which thereby extends its hegemony. In a market so concentrated as is commercial banking in Atlanta, the most must be made of opportunity for rivalry among existing firms. Cf. *United States v. Philadelphia National Bank*, 374 U.S., at 372. The 5-percent banks are now substantial, thriving enterprises,<sup>16</sup> inhibited from competing with C&S only by the "correspondent

<sup>15</sup> The District Court made no finding as to the relevant geographic market, accepting the Government's contentions *arguendo* in deciding the case. The Court apparently does the same. A report prepared by the Government's expert witness concluded that while the Atlanta Standard Metropolitan Statistical Area was too large to be considered an integral geographic market, the constituent counties of DeKalb and Fulton were "reasonable geographic areas within which it is appropriate to analyze the competitive effects of the proposed mergers." 4 App. E-83. This is an approximation, of course, since the same report revealed that a number of DeKalb residents use Fulton County banks, thus suggesting that in certain respects DeKalb and Fulton County banks compete for the same business. Accordingly, it appears that defining the geographic market to include both DeKalb and Fulton Counties would be justified under our cases. See *United States v. Phillipsburg National Bank & Trust Co.*, 399 U.S. 350 (1970); *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

<sup>16</sup> Three of the 5-percent banks - Sandy Springs, Chamblee, and Tucker -- had deposits exceeding \$15 million as of January 1, 1970. North Fulton, Park National, and South DeKalb were smaller and more recently organized, but all have experienced

"associate" relationship. I would hold that the Government is entitled to an injunction, specifically against the continued use by the 5-percent banks of the C&S name, the continued use of advisory directors furnished by C&S, and continued "consultations" between the management of the 5-percent banks [\*\*\*\*92] and C&S, including the flow of memoranda for "advice and guidance."

[\*\*\*\*93] II. *The Clayton Act*

The Court concedes that under our prior decisions the Government has established a *prima facie* case under [§ 7](#). *Ante*, at 120. But the Court affirms the District Court's determination that the acquisitions add nothing [\*148] of anticompetitive significance to the pre-existing "correspondent associate" relationship. Since I have concluded that the relationship itself violates the Sherman Act, I also disagree with the Court's affirmance of the District Court on the Clayton Act issue. Since, in my view, appellees can no longer rely upon the affiliation to rebut the Government's *prima facie* case, I would remand to the District Court for consideration of the "convenience and needs" defense of [12 U.S.C. § 1828\(c\)\(5\)\(B\)](#). But I also disagree with the Court's conclusion that the acquisitions add nothing of significance to the existing arrangements, and I would therefore reverse even if I accepted the Court's disposition of the Sherman Act counts. I state briefly my reasons for so concluding.

If not acquired, the 5-percent banks have the power to break their ties with C&S, and the likelihood that any would do so may be expected [\*\*\*\*94] to increase as the demand for their services grows and as their managements acquire additional business experience. However risky these ventures may have been at their inception, the recent performance of the 5-percent banks attests to their present viability.<sup>17</sup> Because of the continuing [\*2132] population growth of the Atlanta area, the banks may anticipate an expanding demand for their services. These circumstances might well induce the management of a 5-percent bank to assume a more independent posture, at least to shop around among other large [\*\*\*82] Atlanta banks for more conventional "correspondent" services.<sup>18</sup>

[\*\*\*\*95] [\*149] Quite apart from what the managements of the 5-percent banks might do, it is most improbable that C&S would long be happy with existing arrangements if acquisition were enjoined. The record demonstrates the aggressive, expansionist performance of C&S, having increased its Atlanta offices from three in 1946 to more than 100 by the time of trial. It is quite inconceivable that such a firm would long be content to continue operations through *de facto* branches in which its interest was limited to 5%. The formation of *de jure* branches, ultimately in competition with former "correspondent associates," would be a plausible result.

The foregoing are not "ephemeral possibilities," [Brown Shoe Co. v. United States, 370 U.S. 294, 323 \(1962\)](#), that antitrust analysis should ignore. [Section 7](#) was intended, as we have repeatedly said, to "arrest anticompetitive tendencies in their 'incipiency.'" [United States v. Philadelphia National Bank, 374 U.S., at 362](#). In applying the [§ 7](#) standards, we are obliged to hold acquisitions unlawful if a reasonable likelihood of a substantial lessening of competition under future conditions is discernible. [\*\*\*\*96] E.g., [United States v. Continental Can Co., 378 U.S.](#)

vigorous growth. The average annual rate of deposit growth for the two years preceding January 1, 1970, was 102% for North Fulton and 50% for Park National, in contrast to a national average rate for all commercial bank deposits during the same period of slightly more than 10%. South DeKalb, organized in late 1969, had more than doubled its deposits from \$ 1.5 to \$ 3 million during the first half of 1970. 5 App. E-422, E-546.

<sup>17</sup> See n. 16, *supra*.

<sup>18</sup> Officers of both C&S and the 5-percent banks testified that they had not contemplated a severance of relations, but this testimony does not establish what would happen if the acquisitions were enjoined. Had the managements testified that they would not consider severance under any circumstances, such declarations of an intention to eschew a course dictated by economic self-interest would have to be viewed with skepticism. See [United States v. Falstaff Brewing Corp., 410 U.S. 526, 568-570 \(1973\)](#) (MARSHALL, J., concurring in result).

Whether the 5-percent banks would have been formed at all had their principals expected the Clayton Act to bar ultimate acquisition by C&S is a different question. I am not troubled by it for essentially the same reasons that have led me to conclude above that enjoining continuation of correspondent associate relationships would not deter sponsorship of *de facto* branches under state-law restrictions on *de jure* branching. See [supra, at 143-144](#).

[441, 458 \(1964\); FTC v. Procter & Gamble Co., 386 U.S. 568, 577 \(1967\); United States v. Falstaff Brewing Corp., 410 U.S. 526, 539 \(1973\)](#) (DOUGLAS, J., concurring in part). While inquiry as to future market conditions and performance inevitably involves speculation, fidelity to the **[\*150]** congressional purpose requires us to resolve reasonable doubts in favor of the preservation of independent entities. This is perforce true where, as here, the market is highly concentrated and the acquiring firm is the dominant one.

My Brother WHITE reminded us in his dissent last Term in [United States v. Marine Bancorporation, 418 U.S., at 653: S](#)

"In the last analysis, one's view of this case, and the rules one devises for assessing whether this merger should be barred, turns on the policy of [§ 7](#) of the Clayton Act to bar mergers which may contribute to further concentration in the structure of American business.... The dangers of concentration are particularly acute in the banking business, since 'if the costs of banking services and credit are allowed **[\*\*\*97]** to become excessive by the **[\*\*\*83]** absence of competitive pressures, virtually all costs, in our credit economy, will be affected....'" (Citations omitted.)

**[\*\*2133]** Today's decision permits C&S, the dominant commercial bank in Atlanta, further to entrench its position. Two other rivals, which together with C&S control more than 75% of the banking business in Atlanta, may now be expected to follow suit, acquiring their own "*de facto* branches."<sup>19</sup> I believe these developments exemplify the "further concentration in the structure of American business" that [§ 7](#) was designed to prevent. Accordingly, I would reverse the judgment of the District Court.

## References

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Applicability **[\*\*\*98]** of federal antitrust laws as affected by other Federal Statutes or by Federal Constitution--Supreme Court cases

[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 198- 201, 420](#)

12 Am Jur Legal Forms2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 178:91-178:93

[12 USCS 1841 et seq., 1849\(d\); 15 USCS 1, 18](#)

US L Ed Digest, Restraints of Trade and Monopolies 34, 34.5

ALR Digests, Restraints of Trade and Monopolies 17.5

L Ed Index to Annos, Grandfather Clause; Restraints of Trade and Monopolies

ALR Quick Index, Branch Banks, Grandfather Clause; National Banks; Restraints of Trade and Monopolies

Federal Quick Index, Banks; Branch Banks; Grandfather Clause ;Monopolies and Restraints of Trade; National Banks

Annotation References:

Applicability of federal antitrust laws as affected by other federal statutes or by Federal Constitution--Supreme Court cases. [45 L Ed 2d 841](#).

The doctrine of primary administrative jurisdiction, as defined and applied by the Supreme Court. [38 L Ed 2d 796](#).

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<sup>19</sup> The record indicates that at the time C&S applied for regulatory approval of the acquisitions, its two largest competitors, First National Bank of Atlanta and Trust Company of Georgia, had sought and in some cases had obtained, approval for similar acquisitions of affiliated banks. 1 App. E-39.

422 U.S. 86, \*150; 95 S. Ct. 2099, \*\*2133; 45 L. Ed. 2d 41, \*\*\*83; 1975 U.S. LEXIS 113, \*\*\*\*98

Construction, [\*\*\*\*99] by Supreme Court of the United States, of 7 of the Clayton Act ([15 USCS 18](#)), dealing with acquisition by one corporation of stock of another. [14 L Ed 2d 784](#).

What is a "branch bank" within statutes regulating the establishment of branch banks. 23 ALR3d 683.

Construction of "grandfather clause" of statute or ordinance regulating or licensing business or occupation. 4 ALR2d 667 .

Application to banks and banking institutions of antimonopoly or antitrust laws. 83 ALR2d 374.

Branch banks. 30 ALR 927, 50 ALR 1340, 136 ALR 471.

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## Cantor v. Detroit Edison Co.

Supreme Court of the United States

Argued January 14, 1976 ; July 6, 1976

No. 75-122

### **Reporter**

428 U.S. 579 \*; 96 S. Ct. 3110 \*\*; 49 L. Ed. 2d 1141 \*\*\*; 1976 U.S. LEXIS 4 \*\*\*\*; 1976-1 Trade Cas. (CCH) P60,947; 15 P.U.R.4th 401

CANTOR, DBA SELDEN DRUGS CO. v. DETROIT EDISON CO.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## **Core Terms**

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Sherman Act, regulation, exemption, anti trust law, state law, tariff, immunity, monopoly, electricity, antitrust, state action, light bulb, anticompetitive, commerce, light-bulb, customers, state regulation, bulbs, private conduct, state statute, pre-empted, private action, state official, resale price, state-action, compliance, sovereign, cases, interstate commerce, legislative history

## **LexisNexis® Headnotes**

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Energy & Utilities Law > Regulators > Public Utility Commissions > Authorities & Powers

Communications Law > Regulators > US Federal Communications Commission > Jurisdiction

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

Energy & Utilities Law > Utility Companies > General Overview

Energy & Utilities Law > Utility Companies > Rates > General Overview

### **HN1[] Public Utility Commissions, Authorities & Powers**

[Mich. Comp. Laws § 460.6](#) (1970) vests the Michigan Public Service Commission (commission) with complete power and jurisdiction to regulate all public utilities in the state. The statute confers express power on the commission to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities.

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

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

428 U.S. 579, \*579; 96 S. Ct. 3110, \*\*3110; 49 L. Ed. 2d 1141, \*\*\*1141; 1976 U.S. LEXIS 4, \*\*\*\*1

State authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity.

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

#### **HN3** Exemptions & Immunities, Parker State Action Doctrine

A state does not give immunity to those who violate the Sherman Act, [15 U.S.C.S. § 2](#), by declaring that their action is lawful.

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

Energy & Utilities Law > Utility Companies > Rates > General Overview

Governments > Public Improvements > General Overview

#### **HN4** Exemptions & Immunities, Parker State Action Doctrine

The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, where the regulatory commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the regulatory commission into "state action." A private utilities' exercise of the choice allowed by state law where the initiative comes from it and not from the state, does not make its action in doing so "state action" for purposes of the [U.S. Const. amend. XIV](#).

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

#### **HN5** Energy & Utilities, Utility Companies

The federal antitrust laws are applicable to electrical utilities.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > General Overview

Governments > Legislation > Expiration, Repeal & Suspension

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

#### **HN6** Procedural Matters, Jurisdiction

An implied repeal of the antitrust laws may be found only if there exists a plain repugnancy between the antitrust and regulatory provisions.

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

## **HN7** Exemptions & Immunities, Parker State Action Doctrine

The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act, [15 U.S.C.S. § 2](#), was not meant to proscribe is whether the activity is required by the state acting as sovereign.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

## **HN8** Antitrust & Trade Law, Sherman Act

The only way the legality of any program may be tested under the Sherman Act is by determining whether the persons who administer it have acted lawfully. The Act proscribes the conduct of persons, not programs.

## **Lawyers' Edition Display**

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### **Summary**

A Michigan druggist who sold electric light bulbs sued a Michigan electric utility for federal antitrust violations by virtue of the utility's lamp exchange program under which it supplied its residential customers with free light bulbs when their bulbs burned out. The United States District Court for the Eastern District of Michigan entered summary judgment for the utility on the ground that although its lamp exchange program predated state regulation of electric utilities, the Michigan Public Service Commission had approved the utility's tariff including the omission of any separate charge for bulbs, and the tariff could not be changed without the Commission's approval, so that the lamp exchange program was exempt from antitrust liability ([392 F Supp 1110](#)). The United States Court of Appeals for the Sixth Circuit affirmed without opinion ([513 F2d 630](#)).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Stevens, J., expressing the views of five members of the court, it was held (in Parts I and III of the opinion) that neither the approval of the tariff nor the fact that it could not be terminated without Commission approval implied an antitrust exemption. Stevens, J., joined by Brennan, White and Marshall, JJ., also expressed the view (in Parts II and IV of the opinion) that the case was not controlled by [Parker v Brown, 317 US 341, 87 L Ed 315, 63 S Ct 307](#), and that the extent of any state action exemption from the antitrust laws should be decided by case-by-case adjudication of specific controversies.

Burger, Ch. J., concurred in the judgment and in all except Parts II and IV of the opinion, as to which he declared that [Parker v Brown, supra](#), cannot be limited to suits against state officials.

Blackmun, J., concurred in the judgment on the grounds that inconsistent state laws are pre-empted by the Sherman Act, and that state-sanctioned anti-competitive activity must fall if its potential harms outweigh its benefits.

Stewart, J., joined by Powell and Rehnquist, JJ., dissented on the ground that the utility's compliance with the tariff is immune from antitrust liability.

## **Headnotes**

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428 U.S. 579, \*579; 96 S. Ct. 3110, \*\*3110; 49 L. Ed. 2d 1141, \*\*\*1141; 1976 U.S. LEXIS 4, \*\*\*\*1

ERROR §1408 > summary judgment -- > Headnote:

[LEdHN\[1\]](#) [1]

On certiorari to review the affirmance of summary judgment for the defendant, the United States Supreme Court will resolve doubts in favor of the plaintiff to the extent that the facts are disputed.

MONOPOLIES §9 > state action -- > Headnote:

[LEdHN\[2\]](#) [2]

State authorization, approval, encouragement or participation in restrictive private conduct confers no antitrust immunity.

MONOPOLIES §11 > utilities -- > Headnote:

[LEdHN\[3A\]](#) [3A] [LEdHN\[3B\]](#) [3B]

The federal antitrust laws are applicable to electrical utilities.

MONOPOLIES §9 > state regulation -- effect -- > Headnote:

[LEdHN\[4\]](#) [4]

The mere possibility of conflict between state regulatory policy and federal antitrust policy is an insufficient basis for implying an exemption from the federal antitrust laws.

MONOPOLIES §9 > state regulation -- effect -- > Headnote:

[LEdHN\[5\]](#) [5]

Assuming that there are situations in which the existence of state regulation should give rise to an implied exemption from the federal antitrust laws, the standards for ascertaining the existence and scope of such an exemption must be at least as severe as those applied to federal regulatory legislation.

MONOPOLIES §20 > regulated industries -- > Headnote:

[LEdHN\[6A\]](#) [6A] [LEdHN\[6B\]](#) [6B]

The relevant aspect of the agency's jurisdiction must be sufficiently central to the purposes of the enabling statute so that implied repeal of the antitrust laws is necessary to make the regulatory scheme work before the antitrust laws will be deemed impliedly repealed.

MONOPOLIES §7 > immunity -- > Headnote:

[LEdHN\[7A\]](#) [7A] [LEdHN\[7B\]](#) [7B]

Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.

STATUTES §229 > implied repeals -- > Headnote:

[LEdHN\[8A\]](#) [8A] [LEdHN\[8B\]](#) [8B]

The cardinal rule, applicable to legislation generally, is that repeals by implication are not favored.

MONOPOLIES §44 > electric utility -- > Headnote:

[LEdHN\[9\]](#) [9]

Neither a state's approval of an electric utility's tariff embodying no separate charge for light bulbs nor the fact that the program may not be terminated until a new tariff is filed is a sufficient basis for implying an exemption from the federal antitrust laws for that program.

MONOPOLIES §9 > exemptions -- > Headnote:

[LEdHN\[10A\]](#) [10A] [LEdHN\[10B\]](#) [10B]

The absence of an exemption from the antitrust laws does not mean that those laws have been violated.

## **Syllabus**

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Respondent, a private utility that is the sole supplier of electricity in southeastern Michigan, also furnishes its residential customers, without additional charge, with almost 50% of the most frequently used standard-size light bulbs under a longstanding practice antedating state regulation of electric utilities. This marketing practice for light bulbs is approved, as part of respondent's rate structure, by the Michigan Public Service Commission, and may not be changed unless and until respondent files, and the Commission approves, a new tariff. Petitioner, a retail druggist selling light bulbs, brought an action against respondent, claiming that it was using its monopoly power in the distribution of electricity to restrain competition in the sale of light bulbs in violation of the Sherman Act. The District Court entered a summary judgment against petitioner, holding on the authority of [\*Parker v. Brown, 317 U.S. 341\*](#), that the Commission's approval of respondent's light-bulb marketing practices exempted the practices [\*\*\*\*2] from the federal antitrust laws, and the Court of Appeals affirmed. Held: Neither Michigan's approval of respondent's present tariff nor the fact that the light-bulb-exchange program may not be terminated until a new tariff is filed, is sufficient basis for implying an exemption from the federal antitrust laws for that program. Pp. 592-598.

(a) The State's participation in the decision to have a light-bulb exchange program is not so dominant that it is unfair to hold a private party responsible for its conduct in implementing the decision, but rather the respondent's

participation in the decision is sufficiently significant to require that its conduct, like comparable conduct by unregulated businesses, conform to applicable federal law. Pp. 592-595.

(b) Michigan's regulation of respondent's distribution of electricity poses no necessary conflict with a federal requirement that respondent's activities in competitive markets satisfy antitrust standards. Merely because certain conduct may be subject to state regulation and to the federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards, but, even assuming inconsistency, this would not mean [\*\*\*\*3] that the federal interest must inevitably be subordinated to the State's; moreover, even assuming that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, the enforcement of the antitrust laws would not be foreclosed in an essentially unregulated area such as the electric light-bulb market. Pp. 595-598.

513 F. 2d 630, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, and MARSHALL, JJ., joined, and in which (except as to Parts II and IV) BURGER, C.J., joined. BURGER, C.J., filed an opinion concurring in the judgment, and concurring in part, post, p. 603. BLACKMUN, J., filed an opinion concurring in the judgment, post, p. 605. STEWART, J., filed a dissenting opinion, in which POWELL and REHNQUIST, JJ., joined, post, p. 614.

**Counsel:** Burton I. Weinstein argued the cause for petitioner. With him on the briefs were Robert A. Holstein, Michael L. Sklar, and David L. Nelson.

George D. Reycraft argued the cause for respondent. With him on the brief were Donald I. Baker, Leon S. Cohan, and Dean J. Landau.

Solicitor General Bork argued the cause for the United [\*\*\*\*4] States as amicus curiae urging reversal. With him on the brief were Assistant Attorney General Kauper, Barry Grossman, and Carl D. Lawson.

Howard J. Trienens argued the cause for Michigan Bell Telephone Co. et al. as amici curiae urging affirmance. With him on the brief were Theodore N. Miller and C. John Buresh.\*

**Judges:** Burger, Brennan, Stewart, White, Marshall, Blackmun, Powell, Rehnquist, Stevens.

**Opinion by:** STEVENS

## Opinion

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[\*581] [\*\*\*1144] [\*\*3113] MR. JUSTICE STEVENS delivered the opinion of the Court. +

In Parker v. Brown, 317 U.S. 341, the Court [\*\*\*\*5] held that the Sherman Act was not violated by state action displacing competition in the marketing of raisins. In this case we must decide whether the Parker rationale immunizes private action which has been approved by a State and which must be continued while the state approval remains effective.

The Michigan Public Service Commission pervasively regulates the distribution of electricity within the State and also has given its approval to a marketing practice which has a substantial impact on the otherwise unregulated business of distributing electric light bulbs. Assuming, arguendo, that the approved practice has unreasonably restrained trade in the light-bulb market, the District Court<sup>1</sup> and the Court of Appeals<sup>2</sup> held, on the authority of

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\* Sumner J. Katz filed a brief for the National Association of Regulatory Utility Commissioners as amicus curiae urging affirmance.

+ Parts II and IV of this opinion are joined only by MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL.

Parker, that the Commission's approval exempted the practice from the federal antitrust laws. Because we questioned the applicability of Parker to this situation, we granted certiorari, *423 U.S. 821*. We now reverse.

[\*\*\*\*6] [LEdHN\[1\]](#) [↑] [1]Petitioner, a retail druggist selling light bulbs, claims that respondent is using its monopoly power in the distribution of electricity to restrain competition in the sale of bulbs in violation of the Sherman Act.<sup>3</sup> Discovery [\*582] and argument in connection with defendant's motion [\*\*\*1145] for summary judgment were limited by stipulation to the issue raised by the Commission's approval of respondent's light-bulb-exchange program. We state only the facts pertinent to that issue and assume, without opining, that without such approval an antitrust violation would exist. To the extent that the facts are disputed, we must resolve doubts in favor of the petitioner since summary judgment was entered against him. We first describe respondent's "lamp exchange program," we next discuss the holding in *Parker v. Brown*, and then we consider whether that holding should be extended to cover this case. Finally, we comment briefly on additional authorities on which respondent relies.

[\*\*\*\*7] I

Respondent, the Detroit Edison Co., distributes electricity and electric light bulbs to about five million people in southeastern Michigan. In this marketing area, respondent is the sole supplier of electricity, and supplies consumers with almost 50% of the [\*\*3114] standard-size light bulbs they use most frequently.<sup>4</sup> Customers are billed for the electricity they consume, but pay no separate charge for light bulbs. Respondent's rates, including the omission of any separate charge for bulbs, have been approved by the Michigan Public Service Commission, and may not be changed without the Commission's approval. Respondent must, therefore, continue [\*583] its lamp-exchange program until it files a new tariff and that new tariff is approved by the Commission.

Respondent, or a predecessor, has been following the [\*\*\*\*8] practice of providing limited amounts of light bulbs to its customers without additional charge since 1886.<sup>5</sup> [\*\*\*\*9] In 1909 the State of Michigan began regulation of electric utilities.<sup>6</sup> In 1916 the Michigan Public Service Commission first approved a tariff filed by respondent setting forth the lamp-supply program. Thereafter, the Commission's approval of respondent's tariffs has included implicit approval of the lamp-exchange program. In 1964 the Commission also approved respondent's decision to eliminate the program for large commercial customers.<sup>7</sup> The elimination of the service for such customers became effective as part of a general rate reduction for those customers.

<sup>1</sup> [392 F. Supp. 1110 \(ED Mich. 1974\)](#).

<sup>2</sup> [513 F. 2d 630 \(CA6 1975\)](#).

<sup>3</sup> Petitioner's complaint asserts that respondent's light-bulb-exchange program violates § 2 of the Sherman Act, [15 U.S.C. § 2](#), and § 3 of the Clayton Act, [15 U.S.C. § 14](#). In his brief in this Court, petitioner has also argued that the program constitutes unlawful tying violative of § 1 of the Sherman Act. The complaint seeks treble damages and an injunction permanently enjoining respondent from requiring the purchase of bulbs in connection with the sale of electrical energy. The complaint purports to be filed on behalf of all persons similarly situated, but the record contains no indication that the plaintiff moved for a class determination pursuant to [Fed. Rule Civ. Proc. 23 \(c\)](#).

<sup>4</sup> Respondent does not distribute fluorescent lights or high-intensity discharge lamps; if bulbs of those types were included, respondent's share of the market would only be about 23%.

<sup>5</sup> Under respondent's practice, new residential customers are provided with bulbs in "such quantities as may be needed" for all of their permanent fixtures; thereafter, respondent replaces residential customers' burned out light bulbs in proportion to their estimated use of electricity for lighting. The customer incurs no direct charge for such bulbs at the time they are furnished to him, but normally turns in any burned-out bulbs to obtain a new supply.

<sup>6</sup> See [Mich. Comp. Laws §§ 460.551, 460.559](#) (1970).

<sup>7</sup> Apparently many commercial customers use relatively large quantities of fluorescent lighting and therefore have less interest in the bulb-exchange program.

In 1972 respondent provided its [\*\*\*1146] residential customers with 18,564,381 bulbs at a cost of \$2,835,000.<sup>8</sup> [\*\*\*\*10] In its accounting to the Michigan Public Service Commission, respondent included this amount as a portion of its cost of providing service to its customers. Respondent's accounting records reflect no direct profit as a result of the [\*584] distribution of bulbs. The purpose of the program, according to respondent's executives, is to increase the consumption of electricity. The effect of the program, according to petitioner, is to foreclose competition in a substantial segment of the light-bulb market.<sup>9</sup>

The distribution of electricity in Michigan is pervasively regulated by the Michigan Public Service Commission. **HN1**[] A Michigan statute<sup>10</sup> vests the Commission with "complete power and jurisdiction to regulate all public utilities in the state...." The statute confers express power on the Commission "to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities." Respondent advises us that the heart of the Commission's function is to regulate the "furnishing... [of] electricity for the production of light, heat or power...."<sup>11</sup>

[\*\*\*\*11] The distribution of electric light bulbs in Michigan is unregulated. The statute creating the Commission contains no direct reference to light bulbs. Nor, as far as we have been advised, does any other Michigan [\*\*3115] statute authorize the regulation of that business. Neither the Michigan Legislature, nor the Commission, has ever made any specific investigation of the desirability of a lamp-exchange program or of its possible effect on competition in the light-bulb market. Other utilities regulated by the Michigan Public Service Commission do not follow the practice of providing bulbs to their customers at no [\*585] additional charge. The Commission's approval of respondent's decision to maintain such a program does not, therefore, implement any statewide policy relating to light bulbs. We infer that the State's policy is neutral on the question whether a utility should, or should not, have such a program.

Although there is no statute, Commission rule, or policy which would prevent respondent from abandoning the program merely by filing a new tariff providing for a proper adjustment in its rates, it is nevertheless apparent that while the existing tariff remains [\*\*\*12] in effect, respondent may not abandon the program without violating a Commission order, and therefore without violating state law. It has, therefore, been permitted by the Commission to carry out the program, and also is required to continue to do so until an appropriate filing has been made and has received the approval of the Commission.

Petitioner has not named any public [\*\*\*1147] official as a party to this litigation and has made no claim that any representative of the State of Michigan has acted unlawfully.

## II

In *Parker v. Brown* the Court considered whether the Sherman Act applied to state action. The way the Sherman Act question was presented and argued in that case sheds significant light on the character of the state-action concept embraced by the *Parker* holding.

The plaintiff, Brown, was a producer and packer of raisins; the defendants were the California Director of Agriculture and other public officials charged by California statute with responsibility for administering a program for the marketing of the 1940 crop of raisins. The express purpose of the program was to restrict competition among the growers and maintain prices in the distribution [\*586] [\*\*\*\*13] of raisins to packers.<sup>12</sup> [\*\*\*\*14] Nevertheless, in

<sup>8</sup> Of this amount, \$ 2,363,328 was paid to the three principal manufacturers of bulbs from whom respondent made its purchases; the other \$ 471,672 represented costs incurred in the use of respondent's personnel and facilities in carrying out the program.

<sup>9</sup> According to respondent the effect of the program is to save consumers about \$3 million a year, since the bulbs they now receive at a cost of \$ 2,835,000 would cost them about \$ 6 million in the retail market.

<sup>10</sup> [Mich. Comp. Laws § 460.6](#) (1970).

<sup>11</sup> See Brief for Respondent 11; [Mich. Comp. Laws § 460.501](#) (1970).

the District Court, Brown did not argue that the defendants had violated the Sherman Act. He sought an injunction against the enforcement of the program on the theory that it interfered with his constitutional right to engage in interstate commerce. Because he was attacking the constitutionality of a California statute and regulations having statewide applicability, a three-judge District Court was convened.<sup>13</sup> With one judge dissenting, the District Court held that the program violated the [Commerce Clause](#) and granted injunctive relief.<sup>14</sup>

The defendant state officials took a direct appeal to this Court. Probable jurisdiction [\*\*3116] was noted on April 6, 1942, and the Court heard oral argument on the [Commerce Clause](#) issue on May 5, 1942. In the meantime, on April 27, 1942, the Court held that the State of Georgia is a "person" within the meaning of § 7 of the Sherman Act and therefore entitled to maintain an action for treble damages. [Georgia v. Evans, 316 U.S. 159](#).

Presumably because the Court was then concerned with the relationship between the sovereign States and the antitrust laws, it immediately [\*\*\*\*15] [\*\*\*1148] set Parker v. Brown for reargument<sup>15</sup> and, on its own motion, requested the Solicitor General of the United States to file a brief as amicus curiae and directed the parties to discuss the question whether the California statute was rendered invalid by the Sherman Act.<sup>16</sup>

[\*\*\*\*16] In his supplemental brief the Attorney General of [\*588] California<sup>17</sup> advanced three arguments against using the Sherman Act as a basis for upholding the injunction entered by the District Court. He contended (1) that even though a State is a "person" entitled to maintain a treble-damage action as a plaintiff, Congress never intended to subject a sovereign State to the provisions of the Sherman Act; (2) that the California program did not, in any event, violate the federal statute; and (3) that since no evidence or argument pertaining to the Sherman Act

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<sup>12</sup> "The California Agricultural Prorate Act authorizes the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers. The declared purpose of the Act is to 'conserve the agricultural wealth of the State' and to 'prevent economic waste in the marketing of agricultural products' of the state." [317 U.S., at 346](#).

"The declared objective of the California Act is to prevent excessive supplies of agricultural commodities from 'adversely affecting' the market, and although the statute speaks in terms of 'economic stability' and 'agricultural waste' rather than of price, the evident purpose and effect of the regulation is to 'conserve agricultural wealth of the state' by raising and maintaining prices, but 'without permitting unreasonable profits to producers.' § 10." [Id., at 355](#).

<sup>13</sup> Title 28 U.S.C. § 2281 has been consistently read by this Court as authorizing a three-judge court only when the state statute which is sought to be enjoined is of a general and statewide application. [Moody v. Flowers, 387 U.S. 97, 101](#).

<sup>14</sup> [Article I, § 8, cl. 3, of the United States Constitution](#) provides:

"Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...."

<sup>15</sup> The Court also asked the parties to consider whether the Agricultural Adjustment Act, as amended, or any other Act of Congress, invalidated the California program. The supplemental briefs noted that the California program had been adopted with the collaboration of officials of the United States Department of Agriculture, and had been aided by loans from the Commodity Credit Corporation recommended by the Secretary of Agriculture. These facts were emphasized in portions of Mr. Chief Justice Stone's opinion discussing the Agricultural Adjustment Act and the [Commerce Clause](#), see [317 U.S., at 357, 358-359, 368](#), but were not mentioned in connection with the Court's discussion of the Sherman Act.

<sup>16</sup> The first order entered in the Supreme Court Journal on Monday, May 11, 1942, provided:

"No. 1040. W.B. Parker, Director of Agriculture, et al., appellants, v. Porter L. Brown. This cause is restored to the docket for reargument on October 12 next. In their briefs and on the oral argument counsel for the parties are requested to discuss the questions whether the state statute involved is rendered invalid by the action of Congress in passing the Sherman Act, the Agricultural Adjustment Act as amended, or any other Act of Congress. The Solicitor General is requested to file a brief as amicus curiae and, if he so desires, to participate in the oral argument." Journal, O. T. 1941, p. 252.

<sup>17</sup> The Honorable Earl Warren, later Chief Justice of the United States.

had been offered or considered in the District Court, the injunction should not be sustained on an antitrust theory.  
<sup>18</sup>

[\*\*\*\*17] In his brief for the United States as amicus curiae, the Solicitor General did not take issue with the appellants' first argument. He contended that the California program was inconsistent with the policy of the Sherman Act, but expressly disclaimed any argument that the State of California or its officials had violated federal law.<sup>19</sup> [\*\*\*\*18] [\*\*3117] Later in his [\*\*\*1149] brief the Solicitor General drew an [\*589] important distinction between economic action taken by the State itself and private action taken pursuant to a state statute permitting or requiring individuals to engage in conduct prohibited by the Sherman Act. The Solicitor General contended that the private conduct would clearly be illegal but recognized that a different problem existed with respect to the State itself.<sup>20</sup> It was the latter problem that was presented in the Parker case.

This Court set aside the injunction entered by the District Court. In the portion of his opinion for the Court discussing the Sherman Act issue, Mr. Chief Justice Stone addressed only the first of the three arguments advanced by the California Attorney General. The Court held that even though comparable programs organized by private persons would be illegal, the action taken by state officials pursuant to express legislative command did not violate the Sherman Act.<sup>21</sup>

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<sup>18</sup> In the index to his supplemental brief, the California Attorney General outlined his discussion of the Sherman Act in these words:

"The Sherman Anti-Trust law and the California raisin program.....	35
"1. Is a state subject to the Sherman Act?.....	35
"2. Does the state seasonal program for raisins violate the provisions of the Sherman Act?.....	48
"(a) The Sherman Act is circumscribed by the rule of reason .....	53
"(b) Federal legislation as exempting state program from anti-trust laws.....	60
"3. May the California raisin program be enjoined in the present action?.....	64"

<sup>19</sup> At p. 59 of its brief, the Government stated:

"The Sherman Act does not in terms define its scope in so far as it applies to the activities of state governments. But nothing in the Act precludes its application to programs sponsored by the states. Sections 1 and 2 prohibit unlawful conduct by 'persons,' and the word 'person,' as defined in Section 7, in some connections at least, may include a state. Georgia v. Evans, 316 U.S. 159.

"But the question we face here is not whether California or its officials have violated the Sherman Act, but whether the state program interferes with the accomplishment of the objectives of the federal statute."

<sup>20</sup> At p. 63 of its brief, the Government stated:

"A state statute permitting, or requiring, dealers in a commodity to combine so as to limit the supply or raise the price of a subject of interstate commerce would clearly be void. The question here is whether a state may itself undertake to control the supply and price of a commodity shipped in interstate commerce or otherwise restrain interstate competition through a mandatory regulation."

<sup>21</sup> "But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

"The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

[\*\*\*\*19] [\*590] This narrow holding made it unnecessary for the Court to agree or to disagree with the Solicitor General's view that a state statute permitting or requiring private conduct prohibited by federal law "would clearly be void."<sup>22</sup> The Court's narrow holding also avoided any question about the applicability of the antitrust laws to private action taken under color of state law.

Unquestionably the term "state action" may be used broadly to encompass [\*\*\*1150] individual action supported to some extent by state law or custom. Such a broad use of the term, which is familiar in civil rights litigation,<sup>23</sup> [\*\*\*\*20] is not, [\*591] however, what Mr. Chief Justice Stone described in his Parker opinion. He carefully selected language which plainly [\*\*3118] limited the Court's holding to official action taken by state officials.<sup>24</sup>

[\*\*\*\*21] In this case, unlike Parker, the only defendant is a private utility. No public officials or agencies are named as parties and there is no claim that any state action violated the antitrust laws. Conversely, in Parker there was no claim that any private citizen or company had violated the law. The only Sherman Act issue decided was whether the sovereign State itself, which had been held to be a person within the meaning of § 7 of the statute, was also subject to its prohibitions. Since the case now before us does not call into question the legality of any [\*592] act of the State of Michigan or any of its officials or agents, it is not controlled by the Parker decision.

### III

In this case we are asked to hold that private conduct required by state law is exempt from the Sherman Act. Two quite different reasons might support such a rule. First, if a private citizen has done nothing more than obey the command of his state sovereign, it would be unjust to conclude that he has thereby offended federal law. Second, if the State is already regulating an area of the economy, it is arguable that Congress did not intend to superimpose

"There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations.' 21 Cong. Rec. 2562, 2457; see also [id.] at 2459, 2461. That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history.

"The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. [Olsen v. Smith, 195 U.S. 332, 344](#)[3]45; cf. [Lowenstein v. Evans, 69 F. 908, 910.](#)" [317 U.S., at 350-352.](#)

<sup>22</sup> See n. 15, *supra*.

<sup>23</sup> See [Monroe v. Pape, 365 U.S. 167, 172-187](#); [Adickes v. Kress & Co., 398 U.S. 144, 188-234](#) (BRENNAN, J., concurring in part and dissenting in part).

<sup>24</sup> In his three-page discussion of the Sherman Act issue in *Parker v. Brown*, Mr. Chief Justice Stone made 13 references to the fact that state action was involved. Each time his language was carefully chosen to apply only to official action, as opposed to private action approved, supported, or even directed by the State. Thus, his references were to (1) "the legislative command of the state," and (2) "a state or its officers or agents from activities directed by its legislature," [317 U.S., at 350](#); and to (3) "a state's control over its officers and agents," (4) "the state as such," (5) "state action or official action directed by a state," and (6) "state action," [id., at 351](#); and to (7) "the state command to the Commission and to the program committee," (8) "state action," (9) "the state which has created the machinery for establishing the prorate program," (10) "it is the state, acting through the Commission, which adopts the program...," (11) "[t]he state itself exercises its legislative authority," (12) "[t]he state in adopting and enforcing the prorate program...," and finally (13) "as sovereign, imposed the restraint as an act of government...," [id., at 352](#).

The cumulative effect of these carefully drafted references unequivocally differentiates between official action, on the one hand, and individual action (even when commanded by the State), on the other hand.

the antitrust laws as an additional, and [\*\*\*\*22] perhaps conflicting, regulatory mechanism. We consider these two reasons separately.

LEdHN[2][<sup>↑</sup>] [2]We may assume, arguendo, that it would be unacceptable ever to impose statutory liability on a party who had done nothing more than obey a state command. Such an assumption would not decide this case, if, indeed, it would decide any actual case. For typically cases of this kind involve a blend of private and public decisionmaking.<sup>25</sup> [\*\*\*\*23] The Court has already decided that HN2[<sup>↑</sup>] state [\*\*\*1151] authorization,<sup>26</sup> approval,<sup>27</sup> encouragement,<sup>28</sup> or [\*593] participation<sup>29</sup> [\*\*\*\*24] in restrictive private [\*3119] conduct confers no antitrust immunity. And in *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, the Court invalidated the plaintiff's entire resale price maintenance program even though it was effective throughout the State only because the Louisiana statute imposed a direct restraint on retailers who had not signed fair trade agreements.<sup>30</sup>

In each of these cases the initiation and enforcement of the program under attack involved a mixture of private and public decisionmaking. In each case, notwithstanding the state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held [\*\*\*\*25] responsible for the consequences of his decision.

The case before us also discloses a program which is the product of a decision in which both the respondent and the [\*594] Commission participated. Respondent could not maintain the lamp-exchange program without the approval of the Commission, and now may not abandon it without such approval. Nevertheless, there can be no doubt that the option to have, or not to have, such a program is primarily respondent's, not the Commission's.<sup>31</sup> [\*\*\*\*26] Indeed, respondent [\*\*\*1152] initiated the program years before the regulatory agency was even

<sup>25</sup>Indeed, in *Parker v. Brown* itself, there was significant private participation in the formulation and effectuation of the proration program. As the Court pointed out, approval of the program upon referendum by a prescribed number of producers was one of the conditions for effectuating the program. See *ibid*.

<sup>26</sup>"It cannot be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress." *Northern Securities Co. v. United States*, 193 U.S. 197, 346.

<sup>27</sup>In the *Parker* opinion itself, the Court pointed out that HN3[<sup>↑</sup>] a State does not give immunity to those who violate the Sherman Act "by declaring that their action is lawful." *317 U.S., at 351*.

<sup>28</sup>"Respondents' arguments, at most, constitute the contention that their activities complemented the objective of the ethical codes. In our view that is not state action for Sherman Act purposes. It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign," *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791.

<sup>29</sup>See *Continental Co. v. Union Carbide*, 370 U.S. 690; cf. also *Union Pacific R. Co. v. United States*, 313 U.S. 450, cited in *Parker v. Brown*, *supra*, at 352.

<sup>30</sup>Thus, although the private decision to enforce a statewide fair trade program was not only approved by the State, but actually would have been ineffective without the statutory command to nonsigners to adhere to the prices set by the plaintiff, the rationale of *Parker v. Brown* did not immunize the restraint. Quite the contrary, in his opinion for the Court Mr. Justice Douglas cited *Parker* for the proposition that private conduct was forbidden by the Sherman Act even though the State had compelled retailers to follow a parallel price policy. He said: "Therefore, when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. See *Parker v. Brown*, 317 U.S. 341, 350." 341 U.S., at 389.

<sup>31</sup>We recently described an analogous exercise of a public utility's power to make business decisions subject to Commission approval in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345:

HN4[<sup>↑</sup>] "The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any

created. There is nothing unjust in a conclusion that respondent's participation in the decision is sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law.<sup>32</sup> Accordingly, even though there may be cases in which the State's participation in a decision is so dominant [\*595] that it would be unfair to hold a private party responsible for his conduct in implementing it, this record discloses no such unfairness.

Apart from the question of fairness to the individual who must conform not only to state regulation but to the federal antitrust laws as well, we must consider whether Congress intended to superimpose antitrust standards on conduct already being regulated under a different standard. Amici curiae forcefully contend that the competitive standard imposed by antitrust legislation [\*\*3120] is fundamentally inconsistent with the "public interest" standard widely enforced by regulatory agencies, and that the essential teaching of *Parker v. Brown* is that the federal antitrust laws should not be applied in areas of the economy pervasively regulated by state agencies.

There are at least three reasons why this argument is unacceptable. First, merely because certain conduct may be subject both to state [\*\*\*27] regulation and to the federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards; second, even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's; and finally, even if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, that assumption would not foreclose the enforcement of the antitrust laws in an essentially unregulated area such as the market for electric light bulbs.

LEdHN[3A][][3A]Unquestionably there are examples of economic regulation in which the very purpose of the government control is to avoid the consequences of unrestrained competition. Agricultural marketing programs, such as that involved in *Parker*, were of that character. But all economic regulation does not necessarily suppress competition. On the contrary, public utility regulation typically [\*596] assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation.<sup>33</sup> [\*\*\*1153] There [\*\*\*28] is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy.<sup>34</sup> Thus, Michigan's regulation of respondent's distribution of electricity poses no necessary conflict with a federal requirement that respondent's activities in competitive markets satisfy antitrust standards.<sup>35</sup>

approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action.' At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the *Fourteenth Amendment*."*Id.*, at 357. (Footnote omitted.)

<sup>32</sup> Nor is such a conclusion even arguably inconsistent with the underlying rationale of *Parker v. Brown*. For in that case California required every raisin producer in the State to comply with the proration program, whereas Michigan has never required any utility to adopt a lamp-exchange program.

<sup>33</sup> As MR. JUSTICE STEWART pointed out in his dissenting opinion in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 389, the "very reason for the regulation of private utility rates -- by state bodies and by the Commission -- is the inevitability of a monopoly that requires price control to take the place of price competition."

<sup>34</sup> Commenting on a possible conflict between federal regulatory policy and federal antitrust policy we have repeatedly said "[r]epeal [of the antitrust laws] is to be regarded as implied only if necessary to make the... [Act] work, and even then only to the minimum extent necessary."*Id.*, at 391, quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357.

<sup>35</sup> Indeed, since our decision in *Otter Tail Power Co. v. United States, supra*, there can be no doubt about the proposition that HN5[] the federal antitrust laws are applicable to electrical utilities. Although there was dissent from the particular application of the statute in that case, there was no dissent from the basic proposition that such utilities must obey the federal antitrust laws.

[\*\*\*\*29] [LEdHN\[3B\]](#) [3B]

[LEdHN\[4\]](#) [4] [LEdHN\[5\]](#) [5] The mere possibility of conflict between state regulatory policy and federal antitrust policy is an insufficient basis for implying an exemption from the federal antitrust laws. Congress could hardly have intended state regulatory agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws.<sup>36</sup> Therefore, assuming that there are [\*\*\*\*30] [\\*\\*3121](#) situations in [\*597] which the existence of state regulation should give rise to an implied exemption, the standards for ascertaining the existence and scope of such an exemption surely must be at least as severe as those applied to federal regulatory legislation.

[\*\*\*\*31] [LEdHN\[6A\]](#) [6A] [LEdHN\[7A\]](#) [7A] [LEdHN\[8A\]](#) [8A] The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory Act work, "and [\\*\\*\\*1154](#) even then only to the minimum extent necessary."<sup>37</sup>

[LEdHN\[6B\]](#) [6B] [LEdHN\[7B\]](#) [7B] [LEdHN\[8B\]](#) [8B]

[\*\*\*\*32] [\*598] The application of that standard to this case inexorably requires rejection of respondent's claim. For Michigan's regulatory scheme does not conflict with federal antitrust policy and, conversely, if the federal antitrust laws should be construed to outlaw respondent's lightbulb-exchange program, there is no reason to believe that Michigan's regulation of its electric utilities will no longer be able to function effectively. Regardless of the outcome of this case, Michigan's interest in regulating its utilities' distribution of electricity will be almost entirely unimpaired.

<sup>36</sup> Respondent does not argue that state regulation provides a stronger justification for an implied exemption than federal regulation. On the contrary, respondent relies heavily on [Gordon v. New York Stock Exchange, 422 U.S. 659](#), in which the Court upheld the fixed commissions of the stock exchange as an integral part of the effective operation of the Securities Exchange Act of 1934. The inapplicability of that case is manifest from MR. JUSTICE STEWART'S brief concurring opinion in which he stated:

"The Court has never held, and does not hold today, that the antitrust laws are inapplicable to anticompetitive conduct simply because a federal agency has jurisdiction over the activities of one or more of the defendants. [HN6](#) An implied repeal of the antitrust laws may be found only if there exists a 'plain repugnancy between the antitrust and regulatory provisions.' [United States v. Philadelphia Nat. Bank, 374 U.S. 321, 351](#).

"The mere existence of the Commission's reserve power of oversight with respect to rules initially adopted by the exchanges, therefore, does not necessarily immunize those rules from antitrust attack.... The question presented by the present case, therefore, is whether exchange rules fixing minimum commission rates are 'necessary to make the Securities Exchange Act work.'" [Id., at 692-693](#).

The lamp-supply program is by no means comparably imperative in the continued effective functioning of Michigan's regulation of the utilities industry.

<sup>37</sup> See n. 34, supra. Recent cases make it clear that the relevant "aspect of the agency's jurisdiction must be sufficiently central to the purposes of the enabling statute so that implied repeal of the antitrust laws is 'necessary to make the [regulatory scheme] work.'" Robinson, Recent Antitrust Developments: 1975, 31 Record of N.Y.C.B.A. 38, 57-58 (1976).

In [United States v. National Assn. of Securities Dealers, 422 U.S. 694, 719-720](#), the Court pointed out:

"Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. See, e.g., [United States v. Philadelphia Nat. Bank, 374 U.S., at 348](#); [United States v. Borden Co., 308 U.S. 188, 197-206 \(1939\)](#)."

These cases are, of course, consistent with the "cardinal rule," applicable to legislation generally, that repeals by implication are not favored. [Posadas v. National City Bank, 296 U.S. 497, 503](#).

LEdHN[9] [↑] [9] LEdHN[10A] [↑] [10A] We conclude that neither Michigan's approval of the tariff filed by respondent, nor the fact that the lamp-exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exemption from the federal antitrust laws for that program.<sup>38</sup>

LEdHN[10B] [↑] [10B]

[\*\*\*\*33] IV

The dissenting opinion voices the legitimate concern that violation of the antitrust laws by regulated companies may give rise to "massive treble damage liabilities." This is an oft-repeated criticism of the inevitably [\*599] imprecise language of the Sherman Act and of the consequent difficulty in predicting with certainty its application to various specific fact situations.<sup>39</sup> The far-reaching value of this basic part of our law, however, has enabled it to withstand such criticism in the past.<sup>40</sup>

[\*\*\*\*34] The [\*\*\*\*1155] [\*\*3122] concern about treble-damage liability has arguable relevance to this case in two ways. If the hazard of violating the antitrust laws were enhanced by the fact of regulation, or if a regulated company had engaged in anticompetitive conduct in reliance on a justified understanding that such conduct was immune from the antitrust laws, a concern with the punitive aspects of the treble-damage remedy would be appropriate. But neither of those circumstances is present in this case.

When regulation merely takes the form of approval of a tariff proposed by the company, it surely has not increased the company's risk of violating the law. The [\*600] respondent utility maintained its lamp-exchange program both before and after it was regulated. The approval of the program by the Michigan Commission provided the company with an arguable defense to the antitrust charge, but did not increase its exposure to liability.

Nor can the utility fairly claim that it was led to believe that its conduct was exempt from the federal antitrust laws. A claim of immunity or exemption is in the nature of an affirmative defense to conduct which is otherwise assumed to [\*\*\*\*35] be unlawful. This Court has never sustained a claim that otherwise unlawful private conduct is exempt from the antitrust laws because it was permitted or required by state law.

In the Court's most recent consideration of this subject, it described the defendant's claim with pointed precision as "this so-called state-action exemption." *Goldfarb v. Virginia State Bar*, 421 U.S., 773, 788. The Court then explained that the question whether the anticompetitive activity had been required by the State acting as sovereign was the "threshold inquiry" in determining whether it was state action of the type the Sherman Act was not meant to

<sup>38</sup> Of course, the absence of an exemption from the antitrust laws does not mean that those laws have been violated.

<sup>39</sup> It is this concern which has repeatedly prompted the introduction of bills which, if adopted, would make the award of treble damages in antitrust litigation discretionary rather than mandatory. See Report of the Attorney General's National Committee to Study the Antitrust Laws 378-380 (1955). See also, e.g., H.R. 978, 85th Cong., 1st Sess. (1957); H.R. 190, 87th Cong., 1st Sess. (1961).

<sup>40</sup> "As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-360.

proscribe.<sup>41</sup> Certainly that careful use of language could not have been read as a guarantee that compliance with any state requirement would automatically confer federal antitrust immunity.

[\*\*\*\*36] The dissenting opinion in this case makes much of the obvious fact that *Parker v. Brown* implicitly held that California's raisin-marketing program was not a violation of the Sherman Act. That is, of course, perfectly [\*\*601] true. But [HN8](#)<sup>↑</sup> the only way the legality of any program may be tested under the Sherman Act is by determining whether the persons who administer it have acted lawfully. The federal statute proscribes the conduct of persons, not programs, and the narrow holding in *Parker* concerned only the legality of the conduct of the state officials charged by law with the responsibility for administering California's program. What sort of charge might have been made against the various private persons who engaged in a variety of different activities implementing that program is unknown and unknowable because no such [\*\*1156] charges were made.<sup>42</sup> Even if the state program had been held unlawful, such a holding would not necessarily have supported a claim that private individuals who had merely conformed their conduct to an [\*\*3123] invalid program had thereby violated the Sherman Act. Unless and until a court answered that question, there would be no occasion to [\*\*\*\*37] consider an affirmative defense of immunity or exemption.

Nor could respondent justifiably rely on either the holding in [\*Eastern R. Conf. v. Noerr Motors, 365 U.S. 127\*](#), or the reference in that opinion to *Parker*.<sup>43</sup> The holding in *Noerr* was that the concerted activities of the railroad defendants in opposing legislation favorable to the plaintiff motor carriers was not prohibited by the Sherman Act. The case did not involve any question of either liability or exemption for private action taken in compliance with state law.

[\*\*\*\*38] Moreover, nothing in the *Noerr* opinion implies that [\*602] the mere fact that a state regulatory agency may approve a proposal included in a tariff, and thereby require that the proposal be implemented until a revised tariff is filed and approved, is a sufficient reason for conferring antitrust immunity on the proposed conduct. The passage quoted in the dissent, post, at 622, sets up an assumed dichotomy between a restraint imposed by governmental action, as contrasted with one imposed by private action, and then cites [\*United States v. Rock Royal Co-op., 307 U.S. 533\*](#), and *Parker* for the conclusion that the former does not violate the Sherman Act.<sup>44</sup> That passing reference to *Parker* sheds no light on the significance of state action which amounts to little more than approval of a private proposal. It surely does not qualify the categorical statement in *Parker* that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." [\*317 U.S., at 351\*](#). Yet the dissent would allow every state agency to grant precisely that immunity by merely including a direction to engage [\*\*\*\*39] in the proposed conduct in an approval order.<sup>45</sup>

<sup>41</sup> [HN7](#)<sup>↑</sup> "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. [\*Parker v. Brown, 317 U.S., at 350-352; Continental Co. v. Union Carbide, 370 U.S. 690, 706-707 \(1962\).\*](#)" [\*421 U.S., at 790\*](#).

<sup>42</sup> Indeed, it did not even occur to the plaintiff that the state officials might have violated the Sherman Act; that question was first raised by this Court.

<sup>43</sup> Actually the reference was primarily to [\*United States v. Rock Royal Co-op., 307 U.S. 533\*](#), and only secondarily to *Parker*. See [\*365 U.S., at 136 n. 15\*](#).

<sup>44</sup> "We accept, as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below -- that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws. It has been recognized, at least since the landmark decision of this Court in [\*Standard Oil Co. v. United States, 122 U.S. 1\*](#) that the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of 'individuals or combinations of individuals or corporations.' Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." (*Rock Royal* and *Parker* are then cited in the footnote which is omitted.) [\*365 U.S., at 135-136\*](#).

<sup>45</sup> MR. JUSTICE STEWART's analysis rests largely on the dubious assumption that if each of several steps in the implementation of an anticompetitive program is lawful, the entire program must be equally lawful.

[\*\*\*\*40] [\*603] MR. [\*\*\*1157] JUSTICE STEWART's separate opinion possesses a virtue which ours does not. It announces a simple rule that can easily be applied in any case in which a state regulatory agency approves a proposal and orders a regulated company to comply with it. No matter what the impact of the proposal on interstate commerce, and no matter how peripheral or casual the State's interests may be in permitting it to go into effect, the state act would confer immunity from treble-damages liability. Such a rule is supported by the wholesome interest in simplicity in the regulation of a complex economy. In our judgment, however, that interest is heavily outweighed by the fact that such a rule may give a host of state regulatory agencies broad power to grant exemptions from an important federal law for reasons wholly unrelated either to federal policy or even to any necessary significant state interest. Although it is tempting to try to fashion a rule which would govern the decision of the liability issue and the damages issue in all future cases presenting [\*\*3124] state-action issues, we believe the Court should adhere to its settled policy of giving concrete meaning [\*\*\*\*41] to the general language of the Sherman Act by a process of case-by-case adjudication of specific controversies.

Since the District Court has not yet addressed the question whether the complaint alleged a violation of the antitrust laws, the case is remanded for a determination of that question and for such other proceedings as may be appropriate.

Reversed and remanded.

**Concur by:** BLACKMUN; BURGER (In Part)

## Concur

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MR. JUSTICE BLACKMUN, concurring in the judgment.

MR. CHIEF JUSTICE BURGER, concurring in the judgment and in all except Parts II and IV of the Court's opinion.

I concur in the judgment and in all except Parts II and IV of the Court's opinion. I do not agree, however, that *Parker v. Brown*, 317 U. S. 341 (1943), can logically be limited to suits against state officials. In interpreting *Parker*, the Court has heretofore focused on the challenged *activity*, not upon the identity of the *parties* to the suit.<sup>S</sup>

"The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the *activity* is required by the State acting as sovereign." *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 790 (1975) [\*\*\*\*42] (emphasis added).<sup>I</sup>

If *Parker*'s holding were limited simply to the nonliability of state officials, then the Court's inquiry in *Goldfarb* as to the County Bar Association's claimed exemption could have ended upon our recognition that the organization was "a voluntary association and not a state agency. . . ." *421 U. S., at 790*. Yet, before determining that there was no exemption from the antitrust laws, the Court proceeded to treat the Association's contention that its action, having been "prompted" by the State Bar, was "state action for Sherman Act purposes." *Ibid.*

The reading of *Parker* in Part II is unnecessary to the result in this [\*\*\*1158] case; that decision simply does not address the precise issue raised by the present case. There was no need in *Parker* to focus upon the situation where the State, in addition to requiring a public utility "to meet regulatory criteria insofar as it is exercising its natural monopoly powers," *ante*, at 596, also purports, without any independent regulatory purpose, to control the utility's activities in separate, competitive markets. Today the Court correctly concludes:<sup>S</sup>

"The Commission's approval [\*\*\*\*43] of respondent's decision to maintain such a program does not . . . implement any statewide policy relating to light bulbs. We infer that the State's policy is *neutral* on the question [\*605] whether a utility should, or should not, have such a program." *Ante*, at 585 (emphasis added).<sup>I</sup>

To find a "state action" exemption on the basis of Michigan's undifferentiated sanction of this ancillary practice could serve no federal or state policy.

Mr. Justice Blackmun, concurring in the judgment.

I agree with the Court insofar as it holds that the fact that anticompetitive conduct is sanctioned, or even required, by state law does not of itself put that conduct beyond the reach of the Sherman Act. Since the opposite proposition is the ground on which the Court of Appeals affirmed the dismissal of this suit, I also agree that its judgment must be reversed. My approach, however, is somewhat different from that of the Court.

I

As to the principal question in the case, that of the Sherman Act's pre-emptive effect upon inconsistent state laws, it is, as the dissent points out, one of congressional intent. No one denies that Congress could, if it wished, override those state [\*\*\*\*44] laws whose operation would subvert the federal policy of free competition in interstate commerce. In discerning that intent, however, I find somewhat less assistance in the legislative history than does the dissent. It is true that the framers of the Sherman Act expressed [\*\*3125] the view that certain areas of economic activity were left entirely to state regulation. The dissent quotes several of these expressions. Post, at 632-634. A careful reading of those statements reveals, however, that they little more than reflect the then-prevailing view that Congress lacked the power, under the Commerce Clause, to regulate economic activity that was within the domain of the States. The Court since then has recognized a greatly expanded Commerce Clause [\*606] power. Arguably, the Sherman Act should have remained confined within the outlines of that power as it was thought to exist in 1890, on the theory that if Congress believed it could not regulate any more broadly, it must not have attempted to do so. But that bridge already has been crossed, for it has been held that Congress intended the reach of the Sherman Act to expand along with that of the commerce power. Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. 738, 743 n. 2 (1976), [\*\*\*\*45] and cases cited.

Our question in this case is one that the Sherman Act's framers did not directly confront or explicitly address: What was to be the result if the expanding ambit of the Sherman [\*\*\*1159] Act should bring it into conflict with inconsistent state law? But it seems to me that this bridge also has been crossed. In Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), the issue was whether the Sherman Act permitted enforcement of a Louisiana statute requiring compliance by liquor retailers with resale price agreements to which they were not parties, but which had been entered into by other retailers with their wholesale suppliers. The Court held the Louisiana statute unenforceable; there is no plausible reading of that decision other than that the statute was pre-empted by the Sherman Act.<sup>1</sup> Northern Securities Co. v. United States, 193 U.S. 197 (1904), is to the same effect. The defenders of the railroad holding company attacked in that case argued that it was beyond the Sherman Act's reach because it was lawful under the corporation [\*607] laws of New Jersey. The holding company was nonetheless held unlawful, and, [\*\*\*\*46] to that extent, the law of New Jersey was forced to give way.<sup>2</sup> [\*\*\*\*47] Indeed, I suppose that some degree of state-law pre-emption is implicit in the most fundamental operation of the Sherman Act. If a State had no antitrust policy of its own, anticompetitive combinations of all kinds would be sanctioned and enforced under that State's general contract and corporation law. Yet, there has never been any doubt that if such combinations offend the Sherman Act, they are illegal, and state laws to that extent are overridden.<sup>3</sup>

<sup>1</sup> The Court expressly stated in Schwegmann: "The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress." And again: "[W]hen a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." 341 U.S., at 386, 389.

<sup>2</sup> The argument that New Jersey law exempted Northern Securities Company from the Sherman Act was thoroughly canvassed in the plurality opinion. 193 U.S., at 344-351. It was rejected for the reason "that no State can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress." Id., at 350.

<sup>3</sup> In passing, we may cast at least a sidelong glance at a related area of federal trade regulation -- that of the patent laws. Although the federal statute is no more explicit on the point than is the Sherman Act, see 35 U.S.C. § 100 et seq., it clearly pre-empts state laws that purport either to expand on or to infringe the federal patent monopoly. See, e.g., Lear, Inc. v. Adkins, 395

Congress itself has given support to the view that inconsistent state laws are pre-empted by the Sherman Act. Were it the case that state statutes held complete sway, Congress would not have found it necessary [\*\*3126] in 1937 to pass the Miller-Tydings Fair Trade Act, 50 Stat. 693, amending the Sherman Act, specifically exempting from the latter's operation certain price maintenance agreements sanctioned by state law. [15 U.S.C. § 1](#). There are other instances of Congress' acting to protect [\*\*\*48] state-sanctioned anticompetitive schemes from the Sherman [\*608] Act. In response to Schwegmann, see H.R. Rep. No. [\*\*\*1160] 1437, 82d Cong., 2d Sess., 1-2, Congress in 1952 passed the McGuire bill, 66 Stat. 632, extending the Miller-Tydings exemption to state statutes that enforced resale price agreements against nonsigners. [15 U.S.C. §§ 45 \(a\)\(2\) to \(5\)](#). A similar enactment is the McCarran-Ferguson Act of 1945, 59 Stat. 34, exempting from federal statutes "any law enacted by any State for the purpose of regulating the business of insurance," with provision that the Sherman Act, and other named federal statutes, should apply to that business after a specified date "to the extent that such business is not regulated by State law." [15 U.S.C. § 1012 \(b\)](#).<sup>4</sup> These express grants of Sherman Act immunity seem significant to me. As the Court stated in [United States v. Borden Co.](#), 308 U.S. 188, 201 (1939), construing the immunity granted to certain agreements by the Agricultural Marketing [\*609] Agreement Act of 1937, "[i]f Congress had desired to grant any further immunity, Congress doubtless would have said so. [\*\*\*49]"

[\*\*\*50] II

I also agree with MR. JUSTICE STEVENS that the particular anticompetitive scheme attacked in this case must fall despite the imprimatur it claims to have received from the State of Michigan. To say, as I have, that the Sherman Act generally pre-empts inconsistent state laws is not to answer the much more difficult question as to which such laws are pre-empted and to what extent. I fear there are no easy solutions, though several suggest themselves.

It cannot be decisive, for example, simply that a state law goes so far as to require, rather than simply to authorize, the anticompetitive conduct in question. The Court accepted this as a prerequisite to antitrust immunity in [Goldfarb v. Virginia State Bar](#), 421 U.S. 773, 790 (1975), but it cannot alone be sufficient. The whole issue in Schwegmann was whether the State could require obedience to a fixed resale price arrangement. Similarly, compliance with an anticompetitive contract, or adherence to an illegal corporate combination, might well be "required" by a State's general contract and corporation law.

Neither can it be decisive that a particular statesanctioned scheme was initiated by the private actors [\*\*\*51] [\*\*\*1161] rather than by the State. I see no difference in the degree of private initiation as between the marketing arrangement approved in [Parker v. Brown](#), 317 U.S. 341 (1943) (and properly approved, I think, for reasons set forth below), and the resale price maintenance scheme disapproved in Schwegmann. In each case the particular [\*\*3127] scheme was initiated by the private actors at the invitation of a general statute, with which they may or may [\*610] not have had anything to do. The same was true in Northern Securities, and the same is true here. To be sure, there is a certain rough justice, as well as an appearance of simplicity, in a rule based upon who actually is responsible for the scheme in question, but I fear that both the justice and the simplicity would prove illusory in the rule's actual application. Every state enactment is initiated, in its way, by its beneficiaries. It would scarcely make

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[U.S. 653 \(1969\); Sears, Roebuck & Co. v. Stiffel Co.](#), 376 U.S. 225 (1964); [Compcorp Corp. v. Day-Brite Lighting](#), 376 U.S. 234 (1964).

<sup>4</sup>The McCarran-Ferguson Act was passed in reaction to the holding in [United States v. Underwriters Assn.](#), 322 U.S. 533 (1944), that the business of insurance is "commerce" within the meaning of the Sherman Act. Congress' expressed concern was that the application of that Act would "greatly impair or nullify the regulation of insurance by the States," bringing to a halt their "experimentation and investigation" in the area. The Act was vigorously endorsed by Governors and insurance commissioners of "almost all of the States." The Justice Department, in opposing the McCarran-Ferguson Act, specifically argued that [Parker v. Brown](#), 317 U.S. 341 (1943), made the legislation unnecessary because it immunized the insurance business insofar as it was regulated by the States. Congress was not so sure:

"Parker v. Brown dealt with a State commission authorized by State statute to enforce a program in conformity with, if not supplementary to, a Federal statute. Obviously, all State regulation concerning insurance does not and would not fall in such a category." S. Rep. No. 1112, 78th Cong., 2d Sess., 5 (1944). See also S. Rep. No. 20, 79th Cong., 1st Sess., 1-3 (1945); H.R. Rep. No. 873, 78th Cong., 1st Sess., 7 (1943); H.R. Rep. No. 143, 79th Cong., 1st Sess., 4 (1945).

sense to immunize only those powerful enough to speak entirely through their governmental representatives, or, for that matter, to stifle such speech with the threat that it will destroy antitrust immunity. Moreover, the process of enactment is likely [\*\*\*\*52] to involve such a complex interplay between those regulating and those regulated that it will be impossible to identify the true "initiator."

A final, ostensibly simple, solution that I find wanting would be to insist only on some degree of affirmative articulation by the State of its conscientious intent to sanction the challenged scheme, and its reasons therefor. This also is a tempting solution, particularly in this case, where there is little to suggest (at least in recent years) that the Michigan Public Service Commission has even actively considered the light-bulb tie-in, much less articulated a justification for it. Yet such a solution would also lead to perverse results. A regulation whose justification was too plain to require explication would be vulnerable; a questionable one could be immunized if its proponents had the skill or influence to generate the proper legislative history. And, of course, deciding how much "affirmative articulation" of state policy is enough is not a simple matter.

I would apply at least for now, a rule of reason, taking it as a general proposition that state-sanctioned anticompetitive activity must fall like any other if its potential harms [\*\*\*\*53] outweigh its benefits. This does not mean [\*611] that state-sanctioned and private activity are to be treated alike. The former is different because the fact of state sanction figures powerfully in the calculus of harm and benefit. If, for example, the justification for the scheme lies in the protection of health or safety, the strength of that justification is forcefully attested to by the existence of a state enactment. I would assess the justifications of such enactments in the same way as is done in equal protection review, and where such justifications are at all substantial (as one would expect them to be in the case of most professional licensing or fee-setting schemes, for example, cf. [Olsen v. Smith, 195 U.S. 332 \(1904\)](#)), I would be reluctant to find the restraint unreasonable. A particularly strong justification exists for a state-sanctioned scheme if the State in effect has substituted itself for the forces of competition, and regulates private activity to the same ends [\*\*\*1162] sought to be achieved by the Sherman Act. Thus, an anticompetitive scheme which the State institutes on the plausible ground that it will improve the performance of the [\*\*\*\*54] market in fostering efficient resource allocation and low prices can scarcely be assailed. One could not doubt the legality of Detroit Edison's electric power monopoly; the fear of such a monopoly is primarily its tendency to charge excessive prices, but its prices in this instance are controlled by the State.

No doubt such a rule of reason will crystallize, as it is applied, into various per se rules relating to certain kinds of state enactments, such as the regulation of the classic natural monopoly, the public utility. We should not shrink in our general approach, however, from what seems to me our constitutionally mandated task, one often set for us by conflicting federal and state laws, and that is the balancing of implicated federal and state interests with a view to assuring that when these are truly in conflict, the former prevail.

[\*612] The dissent's fears on this score appear to me to be exaggerated. The balancing of harm and benefit is, in general, a process with which federal courts are well acquainted [\*\*3128] in the antitrust field. The special problem of assessing state interests to determine whether they are strong enough to prevail against supreme [\*\*\*\*55] federal dictates is also a familiar one to the federal courts. Indeed, a state action that interferes with competition not only among its own citizens but also among the States is already subject under the [Commerce Clause](#) to much the same searching review of state justifications as is proposed here. See, e.g., [Dean Milk Co. v. Madison, 340 U.S. 349, 354 \(1951\)](#) (state restriction on sale of milk not locally processed held invalid because "reasonable and adequate alternatives [were] available" to protect health interests); [Southern Pacific Co. v. Arizona, 325 U.S. 761, 770-784 \(1945\)](#) (state restriction of train lengths held invalid under the [Commerce Clause](#) because "the state [safety] interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service").

### III

By these standards the present case does not seem a difficult one. The light-bulb tie-in presents the usual dangers of such a scheme, principally that respondent will extend its monopoly from the sale of electric power into that of light bulbs, not because it sells better light bulbs, but because its light bulbs are the ones customers [\*\*\*\*56] must pay for if they are to have light at all. See P. Areeda, Antitrust Analysis 569-570 (2d ed. 1974). On the record

before us the scheme appears to be unjustified. No doubt it originated as a means to promote electric power use, but it is difficult to see why a tie-in (rather than an optional, promotional light-bulb sale) was necessary [\*613] to that end even in the 19th century, laying aside the question whether the promotion of greater electric power use remains today a plausible public goal. Respondent would justify the scheme on the ground of consumer savings, its light bulbs assertedly being cheaper and better than those commercially [\*\*\*1163] available. Brief for Respondent 7-9, 41-42. But again, a tie-in is not necessary to pass along these savings. A tie-in is only necessary in order to force consumers to pay for light bulbs from Detroit Edison rather than someone else. But there is no indication that one light bulb does not fit the socket as well as another, or that the sale of light bulbs is in any way crucial to respondent's successful operation. Conceivably, Michigan's aim is the very extension of the monopoly, born of a preference for having light bulbs [\*\*\*57] supplied by one whose prices are already regulated. But ending competition in the light-bulb market cannot be accepted as an adequate state objective without some evidence -- of which there is not the least hint in this record -- that such competition is in some way ineffective. For all that appears, light-bulb marketing, unlike electric power production, is not a natural monopoly, nor does it implicate health or safety, nor is it beset with problems of instability or other flaws in the competitive market.<sup>5</sup> [\*\*\*58] [\*614] This is [\*\*3129] what I take it the Court means when it says the electric light-bulb market is "essentially unregulated," and on that understanding I agree with its conclusion. It is conceivable that respondent may show, upon further evidence, a sufficient justification for the scheme, but it certainly has not done so as yet.<sup>6</sup>

<sup>5</sup>The approach described in the text is entirely consistent with the result reached in *Parker v. Brown*. Wildly fluctuating agricultural prices are a prime candidate for some collective scheme that interrupts free competition in order to bring badly needed stability; under the State's close supervision, as was the case in *Parker*, the scheme seems entirely reasonable. I see no reason to disapprove the holding of *Parker*, therefore, and to the extent that the plurality, by stressing the identity of the state defendants in that case, intimates that a different result might have been reached had the raisin growers themselves been sued, I cannot agree.

Neither can I agree with the dissent, however, that *Parker* must be taken to stand for the broad proposition that a State can immunize any conduct from the application of the Sherman Act. It is true, as the dissent points out, that there are statements arguably to that effect in *Parker*, but the opinion is hardly unambiguous on the point. The Court also observed in that case that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." [317 U.S., at 351](#). Moreover, if we must choose between *Parker*'s more categorical statements and the seemingly contrary statements in *Schwegmann* and *Northern Securities*, see nn. 1 and 2, *supra*, I prefer the latter, as more in keeping with the actual holdings of those cases.

<sup>6</sup>MR. JUSTICE STEVENS states that there may be cases in which "the State's participation in a decision [to adopt the challenged restraint] is so dominant that it is unfair to hold a private party responsible for his conduct in implementing it." *Ante*, at 594-595. I agree that a defense based on fairness may be available. I would not, however, rule it out in this case, as the Court's opinion does. The parties, like the court below, so far have addressed themselves only to the question whether petitioner's suit is completely barred by *Parker v. Brown* and the Michigan Public Service Commission's approval of the challenged tie-in. I would confine our present decision to that question alone, leaving consideration of a fairness defense to the lower courts on remand, and making only these two further observations:

First, I take it that a defense based on fairness would be a defense to a damages recovery but not injunctive relief. The latter, of course, presents no danger of unfairness. Moreover, as MR. JUSTICE STEVENS implies by his emphasis on not unfairly holding a private party "responsible," the defense rests on the theory, not that the challenged restraint is legal, but that since the defendant has committed no voluntary act in implementing it, he cannot be said to have violated any law. The same would not be true of acts following a judgment that the restraint is in fact illegal, and the state law to that extent invalid.

Second, I would hope that consideration will be given on remand to allowing a defense against damages wherever the conduct on which such damages would be based was required by state law. Such a rule would comport with the theory that a defendant should not be held "responsible" in damages for conduct as to which he had no choice, by which I do not mean to rule out other possible grounds for such a rule. See Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U.L. Rev. 693, 728-732 (1974). It would also eliminate what seems to me the extremely unfair possibility that during a particular period -- and it could be a regulatory lag during which the regulatee was attempting to change the state mandate -- the regulatee could be required by state law to conform to a course of conduct for which he was all the while accumulating treble-damages liability under federal law.

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Dissent by: STEWART

## Dissent

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[\*\*\*1164] MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST join, dissenting.

The Court today holds that a public utility company, pervasively regulated by a state utility commission, [\*615] may be held liable for treble damages under the Sherman Act for engaging in conduct which, under the requirements of its tariff, it is obligated to perform. I respectfully dissent from this unprecedented application of the federal antitrust laws, which will surely result in disruption of the operation of every state-regulated public utility company in the Nation and in the creation of "the prospect of massive treble damage liabilities" <sup>1</sup> payable ultimately by the companies' customers.

The starting point in analyzing this case is *Parker v. Brown*, 317 U.S. 341. While Parker did not create the "so-called state-action [\*\*\*\*60] exemption" <sup>2</sup> from the federal antitrust laws, <sup>3</sup> [\*\*\*61] it is [\*\*3130] the case that is most frequently [\*616] cited for the proposition that the "[Sherman] Act was intended to regulate private practices and not to prohibit a State from imposing a restraint as an act of government." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788. The plurality [\*\*\*1165] opinion would hold that that case decided only that "the sovereign State itself," ante, at 591, could not be sued under the Sherman Act. This view of Parker, which would trivialize that case to the point of overruling it, <sup>4</sup> flies in the face of the decisions of [\*617] this Court that have interpreted or applied Parker's "state action" doctrine, and is unsupported by the sources on which the plurality relies.

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<sup>1</sup> Posner, The Proper Relationship Between State Regulation and the Federal Antitrust Laws, 49 N.Y.U.L. Rev. 693, 728 (1974).

<sup>2</sup> *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788.

<sup>3</sup> The progenitor of that doctrine in this Court was *Olsen v. Smith*, 195 U.S. 332, a decision relied on by Parker to support the proposition that when a State, acting as sovereign, imposes a restraint on commerce, that restraint does not violate the *Sherman Act*. *Parker v. Brown*, 317 U.S., at 352. Olsen involved a challenge to the validity of a Texas law fixing the charges of pilots operating in the port of Galveston and prohibiting all but duly commissioned pilots from engaging in the pilotage business. The Court rejected the argument that the Texas pilotage statutes were "repugnant... to the laws of Congress forbidding combinations in restraint of trade or commerce," *195 U.S.*, at 339:

"The contention that because the commissioned pilots have a monopoly of the business, and by combination among themselves exclude all others from rendering pilotage services, is also but a denial of the authority of the State to regulate, since if the State has the power to regulate, and in so doing to appoint and commission, those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law. When the propositions just referred to are considered in their ultimate aspect they amount simply to the contention, not that the Texas laws are void for want of power, but that they are unwise. If an analysis of those laws justified such conclusion -- which we do not at all imply is the case -- the remedy is in Congress, in whom the ultimate authority on the subject is vested, and cannot be judicially afforded by denying the power of the State to exercise its authority over a subject concerning which it has plenary power until Congress has seen fit to act in the premises." *Id.*, at 344-345.

<sup>4</sup> If *Parker v. Brown*, *supra*, could be circumvented by the simple expedient of suing the private party against whom the State's "anticompetitive" command runs, then that holding would become an empty formalism, standing for little more than the proposition that Porter Brown sued the wrong parties.

MR. JUSTICE BLACKMUN in a separate opinion today states that he sees "no reason to disapprove the holding of Parker" ante, at 613 n. 5, but then proceeds to do precisely that. The holding in Parker was that "[t]he state in adopting and enforcing the

[\*\*\*\*62] As to those sources, I would have thought that except in rare instances an analysis of the positions taken by the parties in briefs submitted to this Court should play no role in interpreting its written opinions.<sup>5</sup> A [\*618] contrary rule would permit the "plain meaning" of our decisions to be qualified or even overridden by their "legislative history" - i.e., briefs submitted by the contending parties. The legislative history of congressional enactments is useful in discerning legislative intent, because that history emanates from the same source as the legislation itself and is thus directly probative of the intent of the draftsmen. The conflicting views presented in the adversary briefs and arguments submitted to this Court do not bear an analogous relationship to the Court's final product.

[\*\*\*\*63] But assuming, arguendo, that it is appropriate to look behind the language of *Parker v. Brown, supra*, I think it is apparent that the plurality has distorted the positions [\*\*3131] taken by the State of California and the United States as amici curiae. The question presented on reargument in Parker was "whether the state statute involved is rendered invalid by the action of Congress in passing the Sherman Act...." Ante, at 587 n. [\*\*\*1166] 16. This phrasing indicates that the precise issue on which the Court sought reargument was whether the California statute was pre-empted by the Sherman Act, not whether sovereign States were immune from suit under the Sherman Act.

The State of California and the Solicitor General certainly understood this to be the principal issue. As the plurality opinion correctly notes, the supplemental brief filed by the State of California in response to the question posed by this Court advanced three basic arguments. And as it further notes, this Court's decision in Parker rested on the first of those arguments. But what the plurality fails to acknowledge is that California's first argument was in principal part a straightforward [\*\*\*\*64] contention [\*619] that the Sherman Act was not intended to pre-empt state regulation of intrastate commerce.<sup>6</sup>

prorate program... imposed [a] restraint as an act of government which the Sherman Act did not undertake to prohibit." [317 U.S. at 352](#). MR. JUSTICE BLACKMUN's position is that the Sherman Act does prohibit all state-imposed restraints which do not satisfy the Sherman Act's "rule of reason" -- a view quite different from the holding in Parker. The fact that the result in Parker could have been reached by a different route -- by a holding, for instance, that the prorate restraint was "reasonable" within the meaning of the Sherman Act or was impliedly exempted by the Agricultural Marketing Agreement Act of 1937 -- is simply irrelevant.

I am puzzled by MR. JUSTICE BLACKMUN's willingness to emasculate Parker, which the Court indicated to have continued vitality just this Term. See *Virginia Pharmacy Bd. v. Virginia Consumer Council*, [425 U.S. 748, 770](#). It seems to me that such a step is inconsistent not only with the legislative history of the Sherman Act but also with well-settled principles of stare decisis applicable to this Court's construction of federal statutes. See *Edelman v. Jordan*, [415 U.S. 651, 671 n. 14](#). If those principles preclude the reconsideration of an antitrust exemption which is in every sense an "aberration" and an "anomaly," *Flood v. Kuhn*, [407 U.S. 258, 282](#), then a fortiori they preclude the re-examination of an exemption that coincides with a clear expression of congressional intent.

<sup>5</sup> A different approach is, of course, called for in interpreting this Court's summary dispositions of appeals. See generally *Hicks v. Miranda*, [422 U.S. 332, 345 n. 14](#); *Port Authority Bondholders Protective Comm. v. Port of New York Authority*, [387 F.2d 259, 262](#) (CA2).

<sup>6</sup> California's argument began with a statement of the principle that the Federal Government and the States -- "sister sovereignties," Supplemental Brief for Appellants 35 in *Parker v. Brown*, O.T. 1942, No. 46 -- are each "supreme" when legislating "within their respective spheres." "The subject of Federal power is still 'commerce,' -- not all commerce, but commerce with foreign nations and among the several states." *Id. at 35-37*. Incorporating by explicit reference its preceding argument with respect to whether the Federal Agricultural Adjustment Act of 1938 pre-empted the California statute, *id. at 38*, and proceeding from the premise that the subject matter of the California law was intrastate commerce within the jurisdiction of the State, California contended that "it should never be held that Congress intends to supersede or suspend the exercise of the police powers of the States unless its purpose to effect that result is clearly manifested." *Ibid.* California added that "[s]uch an intent should be even more clear and express when it serves not only to suspend the police powers, but to subject the sovereignty of the State to the inhibition and penalties of Congressional action." *Id. at 38-39*.

The plurality's position today seems to be that because the State of California placed particular emphasis on the fact that the proscriptions of the Sherman Act, if applicable, would run directly against the State, California's argument in the first part of its

[\*\*\*\*65] With respect to the amicus brief of the United States, [\*620] the plurality opinion states that the "Solicitor General did not take issue with the appellants' first argument." Ante, at 588. Indeed, the plurality says, the Solicitor General "expressly disclaimed any argument that the State of California or its officials had violated federal law." Ibid. In support of this assertion, the plurality opinion quotes the following language from p. 59 of the Solicitor General's brief in Parker: S

"[T]he question we face here is not whether California or its officials have violated the Sherman Act, but whether the state program [\*\*\*1167] interferes with the accomplishment of the objectives of the federal statute." Ante, at 589 n. 19.I

This statement by the Solicitor General was indeed correct, because the question on which the Court had requested supplemental briefing was "whether the state statute involved is rendered invalid by the action of Congress in passing the Sherman Act," not "whether California or its officials have violated [\*\*3132] the Sherman Act...." As the Solicitor General noted in the very next sentence, "[a] state law may be superseded as conflicting [\*\*\*\*66] with a federal statute irrespective of whether its administrators are subject to prosecution for violation of the paramount federal enactment."<sup>7</sup> The Solicitor General then proceeded [\*621] to take strenuous issue with the principal contention advanced in the first part of the relevant section of California's brief -- that the framers of the federal legislation had not intended to pre-empt state legislation like the California Agricultural Prorate Act.<sup>8</sup>

[\*\*\*\*67] Thus, it is clear that the plurality has misread the positions taken by the State of California and the Solicitor General in Parker v. Brown. The question presented to the Court in Parker was whether the restraint on

brief was simply and solely that "Congress never intended to subject a sovereign State to the provisions of the Sherman Act...." Ante, at 588. Yet, as the preceding quotations show, California's argument in the first part of its brief dovetailed two interrelated themes: First, that state regulation of intrastate commerce was not pre-empted by the Sherman Act and, second, that the framers of the Sherman Act did not intend its proscriptions to run directly against the sovereign States. It was the first of these themes that California deemed primary. Near the close of the first part of California's brief appeared the following passage:

"To hold the State within the prohibition of the Sherman Act in the present instance would result in prohibiting it from exercising its otherwise valid police powers. This Court has repeatedly and emphatically stated that 'it should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the State, even when it may do so, unless its purpose to effect that result is clearly manifested.'" Supplemental Brief for Appellants 47-48 in Parker v. Brown, O.T. 1942, No. 46 (footnote omitted).

<sup>7</sup> This distinction was properly drawn, as is apparent from decisions in the labor law context. A State or political subdivision thereof is not normally subject to the prohibitions of the National Labor Relations Act, 49 Stat. 449, as amended, [29 U.S.C. § 151 et seq.](#) See, e.g., [NLRB v. Natural Gas Utility Dist.](#), [402 U.S. 600](#). But it certainly does not follow that sovereign enactments of the State may not be deemed pre-empted by the federal legislation. [San Diego Unions v. Garmon](#), [359 U.S. 236](#); [Garner v. Teamsters](#), [346 U.S. 485](#).

<sup>8</sup> The Solicitor General began his analysis with the following statement:

"A state statute permitting, or requiring, dealers in a commodity to combine so as to limit the supply or raise the price of a subject of interstate commerce would clearly be void. The question here is whether a state may itself undertake to control the supply and price of a commodity shipped in interstate commerce or otherwise restrain interstate competition through a mandatory regulation." Brief for United States as Amicus Curiae 63 in Parker v. Brown, O.T. 1942, No. 46.

He then acknowledged that "[i]t seems clear that Congress, when it enacted the statute, did not intend to deprive the states of their normal 'police' powers over business and industry.... For example, in the field of public utilities, a state can undoubtedly regulate rates without running afoul of the Sherman Act notwithstanding the fact that the rate regulation may embrace interstate commerce." [Id. at 63-64](#) (footnotes and citations omitted). But, the Solicitor General continued, "[a]lthough Congress plainly did not regard local laws in these fields as incompatible with the Sherman Act, we believe that the same cannot be said when the state statute is designed directly to control the competitive aspects of an industry in a manner which will have more than local effect." [Id. at 64-65](#). This was the critical portion of the Solicitor General's argument, which sought to draw a delicate distinction between acceptable police power legislation, such as public utility regulation, and pre-empted police power legislation, such as that designed explicitly to suppress competition affecting interstate commerce.

trade effected by the California statute was exempt [\*622] from the operation of the Sherman Act. That was the question addressed by the Solicitor General and, in principal part, by the State of California. And it was the question resolved by this Court in its holding that "[t]he state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, [\*\*\*1168] imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." [317 U.S., at 352](#).

The notion that Parker decided only that "action taken by state officials pursuant to express legislative command did not violate the Sherman Act," ante, at 589, and that that "narrow holding... avoided any question about the applicability of the antitrust laws to private action" taken under command of state law, ante, at 590, is thus refuted by the very sources [\*\*\*\*68] on which the plurality opinion relies. That narrow view of the Parker decision is also refuted by the subsequent cases in this Court that have interpreted and applied the Parker doctrine.

In [Eastern R. Conf. v. Noerr Motors, 365 U.S. 127](#), for instance, the Court held that no violation of the Sherman Act could be predicated on the attempt by private persons to influence the passage or enforcement of state laws regulating [\*\*3133] competition in the trucking industry.<sup>9</sup> The Court took as its starting point the ruling in Parker v. Brown that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." [365 U.S., at 136](#). The Court [\*623] viewed it as "equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly." Ibid. A contrary ruling, the Court held, "would substantially impair the power of government to take actions through its legislature and executive [\*\*\*\*69] that operate to restrain trade." [Id., at 137](#). Surely, if a rule permitting Sherman Act liability to arise from lobbying by private parties for state rules restricting competition would impair the power of state governments to impose restraints, then a fortiori a rule permitting Sherman Act liability to arise from private parties' compliance with such rules would impair the exercise of the States' power. But as the Court in Noerr correctly noted, the latter result was foreclosed by Parker's holding that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." [365 U.S., at 136](#).

[\*\*\*\*70] Litigation testing the limits of the state-action exemption has focused on whether alleged anticompetitive conduct by private parties is indeed "the result of" state action. Thus, in [Goldfarb v. Virginia State Bar, 421 U.S. 773](#), the question was whether price fixing practiced by the respondents was "required by the State acting as sovereign. [Parker v. Brown, 317 U.S., at 350-352....](#)" [Id., at 790](#). The Court held that the "so-called state-action [\*\*\*1169] exemption," [id., at 788](#), did not protect the respondents because it "cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent.... Respondents' arguments, at most, constitute the contention that their activities complemented the objective [\*624] of the ethical codes. In our view that is not state action for Sherman Act purposes. It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." [Id., at 790-791](#). The plurality's view that Parker does not cover state-compelled [\*\*\*\*71] private conduct flies in the face of this carefully drafted language in the Goldfarb opinion.

Parker, Noerr, and Goldfarb point unerringly to the proper disposition of this case. The regulatory process at issue has three principal stages. First, the utility company proposes a tariff. Second, the Michigan Public Service Commission investigates the proposed tariff and either approves it or rejects it. Third, if the tariff is approved, the utility company must, under command of state law, provide service in accord with its requirements until or unless the Commission approves a modification. The utility company thus engages in two distinct activities: It proposes a tariff and, if the tariff is approved, it obeys its terms. The first action cannot give rise to antitrust liability under Noerr

<sup>9</sup>The only exception is where the attempt to influence state regulation is a "sham" aimed at "harass[ing] and deterr[ing]... competitors from having 'free and unlimited access' to the agencies and courts...." [California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 515](#).

and the second -- compliance with the terms of the tariff under the command of state law -- is immune from antitrust liability under Parker and Goldfarb.<sup>10</sup>

[\*\*\*\*72] [\*625] The [\*\*3134] plurality's contrary view would effectively overrule not only Parker but the entire body of post-Parker case law in this area, including Noerr. With the Parker holding [\*\*\*1170] reduced to the trivial proposition that the Sherman Act was not intended to run directly against state officials or governmental entities, the Court would fashion a new two-part test for determining whether state utility regulation creates immunity from the federal antitrust law. The first part of the test would focus on whether subjecting state-regulated utilities to antitrust liability would be "unjust." The second part of the test would look to whether the draftsmen of the Sherman Act intended to "superimpose" antitrust standards, and thus exposure to treble damages, on conduct compelled by state regulatory laws. THE CHIEF JUSTICE accedes to the new two-part test, at least where the State "purports, without any independent regulatory purpose, to control [a] utility's activities in separate, competitive [\*626] markets." Ante, at 604. The new immunity test thus has the approval of a majority of the Court in instances where state-compelled anticompetitive practices [\*\*\*\*73] are deemed "ancillary" to the State's regulatory goals.<sup>11</sup>

With scarcely a backward glance at the Noerr case, the Court concludes that because the utility company's "participation" in the decision to incorporate the lamp-exchange program into the tariff was "sufficiently significant," there is nothing "unjust" in concluding that the company is required to conform its conduct to federal antitrust law "like comparable conduct by unregulated businesses...." Ante, at 594. This attempt to distinguish between the exemptive force of mandatory state rules adopted at the behest of private parties [\*\*\*\*74] and those adopted pursuant to the State's unilateral decision is flatly inconsistent with the rationale of Noerr. There the Court pointedly rejected "[a] construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested" because such a construction "would... deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that [\*\*3135] right may be of the most importance to them." [365 U.S., at 139.](#)<sup>12</sup>

[\*627] Today's holding will not only penalize the right to petition but may very well [\*\*\*\*75] strike a crippling blow at state utility regulation. As the Court seems to acknowledge, such regulation is heavily dependent on the active

<sup>10</sup> The Court's reliance on [Jackson v. Metropolitan Edison Co., 419 U.S. 345](#), is misplaced. There the Court held that a utility's discontinuance of service to a customer for nonpayment of bills was not "state action" sufficient to trigger the protections of the Due Process Clause of the Fourteenth Amendment. The petitioner had argued that because the State Public Utility Commission had approved that practice as a part of the respondent's general tariff, the termination was "state action" for Fourteenth Amendment purposes. [Id., at 354](#). The Court disagreed, holding as follows: "The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action.' At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment." [Id., at 357](#) (footnote omitted).

This constitutional holding has no bearing on whether a utility's action in compliance with a tariff which it proposed is exempt from Sherman Act liability. The latter is a question of legislative intent, not constitutional law, and must be answered on the basis of a separate line of authority -- namely, decisions such as Parker and Noerr which have construed the Sherman Act.

<sup>11</sup> I disagree with THE CHIEF JUSTICE's conclusion that Michigan's policy is "neutral" with respect to whether a utility should have a lamp-exchange program. See n. 26, infra. Moreover, I think it is apparent that insistence on statutory articulation of a state "purpose" to regulate activities performed incident to the provision of a "natural monopoly" service will lead to serious interference with state regulation. See *ibid.*

<sup>12</sup> As the Court noted in Noerr, the scheme at issue in Parker required popular initiative. [365 U.S., at 137-138, n. 17](#). And as it further noted, Parker itself expressly rejected the argument that the necessity for private initiative affected the "program's validity under the Sherman Act...." [Id., at 137.](#)

participation of the regulated parties, who typically propose tariffs which are either adopted, rejected, or modified by utility commissions. But if a utility can escape the unpredictable consequences of the second arm of the Court's new test, see *infra*, this page only by playing possum -- by [\*\*\*1171] exercising no "option" in the Court's terminology, *ante*, at 594 -- then it will surely be tempted to do just that, posing a serious threat to efficient and effective regulation.

The second arm of the Court's new immunity test, which apparently comes into play only if the utility's own activity does not exceed a vaguely defined threshold of "sufficient freedom of choice," purports to be aimed at answering the basic question of whether "Congress intended to superimpose antitrust standards on conduct already being regulated" by state utility regulation laws. *Ante*, at 595. Yet analysis of the Court's opinion reveals that the three factors to which the Court pays heed have little or nothing to do with discerning congressional intent. Rather, [\*\*\*\*76] the second arm of the new test simply creates a vehicle for ad hoc judicial determinations of the substantive validity of state regulatory goals, which closely resembles the discarded doctrine of substantive due process. See *Ferguson v. Skrupa*, 372 U.S. 726.

The Court's delineation of the second arm of the new test proceeds as follows. Apart from the "fairness" question, the Court states, there are "at least three reasons" why the light-bulb program should not enjoy Sherman Act immunity. *Ante*, at 595. "First," the Court observes, "merely because certain conduct may be subject both to state regulation and to the federal antitrust laws does not necessarily mean that it must satisfy [\*628] inconsistent standards...." *Ibid.* That is true enough as an abstract proposition, but the very question is whether the utility's alleged "tie" of light-bulb sales to the provision of electric service is immune from antitrust liability, assuming it would constitute an antitrust violation in the absence of regulation.<sup>13</sup> Second, the Court states, "even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the State's. [\*\*\*\*77] ..." *Ibid.* The Court goes on to amplify this rationale as follows: "The mere possibility of conflict between state regulatory policy and federal antitrust policy is an insufficient basis for implying an exemption from the federal antitrust laws. Congress could hardly [\*\*3136] have intended state regulatory [\*\*\*1172] agencies to have broader power than federal agencies to exempt private conduct from the antitrust laws. Therefore, [\*629] assuming that there are situations in which the existence of state regulation should give rise to an implied exemption, the standards for ascertaining the existence and scope of such an exemption surely must be at least as severe as those applied to federal regulatory legislation." The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory act work, 'and even then only to the minimum extent necessary.'

"The application of that standard to this case inexorably requires rejection of respondent's claim." *Ante*, at 596-598 (footnotes omitted).I

[\*\*\*\*78] The Court's analysis rests on a mistaken premise. The "implied immunity" doctrine employed by this Court to reconcile the federal antitrust laws and federal regulatory statutes cannot, rationally, be put to the use for which the Court would employ it. That doctrine, a species of the basic rule that repeals by implication are disfavored, comes into play only when two arguably inconsistent federal statutes are involved. "'Implied repeal'" of

<sup>13</sup> The Court seems to indicate at one point that it would be improper to "superimpose" antitrust liability on state regulatory schemes aimed at suppressing competition and raising prices. See *ante*, at 595 ("Unquestionably there are examples of economic regulation in which the very purpose of the government control is to avoid the consequences of unrestrained competition. Agricultural marketing programs, such as that involved in *Parker*, were of that character"). But some state regulation, the Court continues, aims not at suppressing competition, but rather at duplicating the effects of competition -- i.e., keeping prices down. With respect to state regulation of the latter type, the state scheme will not afford an exemption to the extent the regulated party is engaged in "business activity in competitive areas of the economy." *Ante*, at 596 (footnote omitted).

This rationale will not bear its own weight. If compliance with a state program aimed at suppressing competition in nonmonopoly industries -- i.e., raisin production -- cannot give rise to Sherman Act liability, then surely compliance with a state program aimed at controlling the terms and conditions of service performed incident to the provision of a "natural monopoly" product cannot give rise to treble damages.

federal antitrust laws by inconsistent state regulatory statutes is not only "not favored," ante, at 597-598, n. 37, it is impossible. See *U.S. Const., Art. VI, cl. 2.*

A closer scrutiny of the Court's holding reveals that its reference to the inapposite "implied repeal" doctrine is simply window dressing for a type of judicial review radically different from that engaged in by this Court in *Gordon v. New York Stock Exchange, 422 U.S. 659*, and *United States v. Philadelphia National Bank, 374 U.S. 321*. Those cases turned exclusively on issues of statutory construction and involved no judicial scrutiny of the abstract "necessity" or "centrality" of particular [\*630] regulatory provisions. Instead, the federal [\*\*\*\*79] regulatory statute was accepted as a given, as was the federal *antitrust law*. The Court's interpretative effort was aimed at accommodating these arguably inconsistent bodies of law, not at second-guessing legislative judgments concerning the "necessity" for including particular provisions in the regulatory statute.

The Court's approach here is qualitatively different. The State of Michigan, through its Public Service Commission, has decided that requiring Detroit Edison to provide "free" light bulbs as a term and condition of service is in the public interest. Yet the Court is prepared to set aside that policy determination: "The lamp-supply program is by no means... imperative in the continued effective functioning of Michigan's regulation of the utilities industry." Ante, at 597 n. 36 (emphasis added). Even "if the federal antitrust laws should be construed to outlaw respondent's light-bulb-exchange program, there is no reason to believe that Michigan's regulation of its electric utilities will no longer be able to function effectively. Regardless of the outcome of this case, Michigan's interest in regulating [\*\*\*1173] its utilities' distribution of electricity will be [\*\*\*\*80] almost entirely unimpaired." Ante, at 598 (emphasis added).

The emphasized language in these passages shows that the Court is adopting an interpretation of the Sherman Act which will allow the federal judiciary to substitute its judgment for that of state legislatures and administrative agencies with respect to whether particular anticompetitive regulatory provisions are "sufficiently central," ante, at 597 n. 37, to a judicial conception of the proper scope of state utility regulation. The content of those "purposes," ibid., which the Court will suffer the States to promote derives presumably from the mandate of the Sherman Act. On this assumption -- and no other is plausible -- it becomes apparent [\*631] that the Court's second reason for extending the Sherman Act to cover the light-bulb program, when divested of inapposite references to the federal implied [\*\*3137] repeal doctrine, is merely a restatement of the third rationale, which the Court phrases as follows: "[F]inally, even if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, that assumption would not foreclose the enforcement [\*\*\*\*81] of the antitrust laws in an essentially unregulated area such as the market for electric light bulbs." Ante, at 595. This statement raises at last the only legitimate question, which is whether Parker erred in holding that Congress, in enacting the Sherman Act, did not intend to vitiate state regulation of the sort at issue here by creating treble-damages exposure for activities performed in compliance therewith.

The Court's rationale appears to be that the draftsmen of the Sherman Act intended to exempt state-regulated utilities from treble damages only to the extent those utilities are complying with state rules which narrowly reflect the "typical[] assumption" that the [utility] is a natural monopoly" and which regulate the utility's "natural monopoly powers" as opposed to its "business activity in competitive areas of the economy." Ante, at 595-596 (footnotes omitted). Furthermore, such regulation must be "sufficiently central" to the regulation of natural monopoly powers if it is to shield the regulated party from antitrust liability. Ante, at 597 n. 37. This Delphic reading of the Sherman Act, which is unaided by any reference to the language or legislative history [\*\*\*\*82] of that Act, is, of course, inconsistent with Parker v. Brown. Parker involved a state scheme aimed at artificially raising the market price of raisins. Raisin production is not a "natural monopoly." If the limits of [\*632] the state-action exemption from the Sherman Act are congruent with the boundaries of "natural monopoly" power, then Parker was wrongly decided.

But the legislative history of the Sherman Act shows conclusively that Parker was correctly decided. The floor debates and the House Report on the proposed legislation clearly reveal, as at least one commentator has noted, that "Congress fully understood the narrow scope given to the *commerce clause*" in [\*\*\*1174] 1890. <sup>14</sup> [\*\*\*\*83]

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<sup>14</sup> Slater, Antitrust and Government Action: A Formula for Narrowing Parker v. Brown, 69 Nw. U.L. Rev. 71, 84 (1974). See, e.g., 20 Cong. Rec. 1169 (1889) (remarks of Sen. Reagan); id., at 1458 (remarks of Sen. George); 21 Cong. Rec. 2467 (1890)

This understanding is, in many ways, of historic interest only, because subsequent decisions of this Court have "permitted the reach of the Sherman Act to expand along with expanding notions of congressional power."<sup>15</sup> But the narrow view taken by the Members of Congress in 1890 remains relevant for the limited purpose of assessing their intention regarding the interaction of the Sherman Act and state economic regulation.

The legislative history reveals very clearly that Congress' perception of the limitations of its power under the Commerce Clause was coupled with an intent not to intrude upon the authority of the several States to regulate "domestic" commerce. As the House Report stated: S

"It will be observed that the provisions of the bill are carefully confined to such subjects of legislation as are clearly within the legislative authority of Congress.

"No attempt is made to invade the legislative authority [\*633] of the several States or even to occupy doubtful grounds. No system of laws can be devised by Congress alone which would effectually protect the people of the United States against the evils and oppression of trusts and monopolies. Congress has no authority to deal, generally, with the subject within the States, and the States have no authority to legislate in respect of commerce between the several States or with foreign nations.

[\*\*3138] "It follows, therefore, that the legislative authority [\*\*\*\*84] of Congress and that of the several States must be exerted to secure the suppression of restraints upon trade and monopolies. Whatever legislation Congress may enact on this subject, within the limits of its authority, will prove of little value unless the States shall supplement it by such auxiliary and proper legislation as may be within their legislative authority."<sup>16</sup>

Similarly, the floor debates on the proposed legislation reveal an intent to "[g]o as far as the Constitution permits Congress to go,"<sup>17</sup> in the words of Senator Sherman, conjoined with an intent not to "interfere with" state-law efforts to "prevent and control combinations within the limit of the State."<sup>18</sup> Far from demonstrating an intent to preempt state laws aimed at preventing or controlling combinations or monopolies, the legislative debates show that Congress' goal was to supplement such state efforts, themselves [\*\*\*1175] restricted to the geographic [\*\*\*\*85] boundaries of the several States. As Senator Sherman stated: "Each State can deal with a combination within the State, but only the General Government can deal [\*634] with combinations reaching not only the several States, but the commercial world. This bill does not include combinations within a State...."<sup>19</sup> Indeed a preexisting body of state law forbidding combinations in restraint of trade provided the model for the federal Act. As Senator Sherman stated with respect to the proposed legislation: "It declares that certain contracts are against public policy, null and void. It does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government. Similar contracts in any State in the Union are now, by common or statute law, null and void."<sup>20</sup>

It is noteworthy [\*\*\*\*86] that the body of state jurisprudence which formed the model for the Sherman Act coexisted with state laws permitting regulated industries to operate under governmental control in the public interest. Indeed, state regulatory laws long antedated the passage of the Sherman Act and had, prior to its passage, been upheld by this Court against constitutional attacks.<sup>21</sup> Such laws were an integral part of state efforts to regulate [\*635]

(remarks of Sen. Hiscock); id., at 2469-2470 (remarks of Sen. Reagan); id., at 2566 (remarks of Sen. Stewart); id., at 2567 (remarks of Sen. Hoar); id., at 2600 (remarks of Sen. George).

<sup>15</sup> *Hospital Building Co. v. Rex Hospital Trustees*, 425 U.S. 738, 743 n. 2.

<sup>16</sup> H.R. Rep. No. 1707, 51st Cong., 1st Sess., 1 (1890) (emphasis added).

<sup>17</sup> 20 Cong. Rec. 1167 (1889).

<sup>18</sup> 21 Cong. Rec. 2456 (1890) (emphasis added).

<sup>19</sup> Id., at 2460.

<sup>20</sup> Id., at 2456.

competition to which Congress turned for guidance in barring restraints of interstate commerce, and it is clear that those laws were left undisturbed by the passage of the Sherman Act in 1890. For, as congressional spokesmen expressly stated, there was no intent to "interfere with" state laws regulating domestic commerce or "invade the legislative authority of the several States...."

[\*\*\*\*87] As previously noted, the intent of the draftsmen of the Sherman Act not to intrude on the sovereignty of the States was coupled with a full and precise understanding of the narrow scope of congressional power under the Commerce Clause, as it was then interpreted by decisions of this Court. Subsequent decisions of the Court, however, have permitted the "jurisdictional" reach of the Sherman Act to expand [\*\*3139] along with an expanding view of the commerce power of Congress. See Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. 738, 743 n.2, and cases cited therein. These decisions, based on a determination that Congress intended to exercise all the power it possessed when it enacted the Sherman [\*\*\*1176] Act,<sup>22</sup> [\*\*\*\*88] have in effect allowed the Congress of 1890 the retroactive benefit of an enlarged judicial conception of the commerce power.<sup>23</sup>

It was this retroactive expansion of the jurisdictional reach of the Sherman Act that was in large part responsible for the advent of the Parker doctrine. Parker involved a program regulating the production of raisins [\*636] within the State of California. Under the original understanding of the draftsmen of the Sherman Act, such in-state production, like in-state manufacturing, would not have been subject to the regulatory power of Congress under the Commerce Clause and thus not within the "jurisdictional" reach of the Sherman Act. See United States v. E. C. Knight Co., 156 U.S. 1. If the state of the law had remained static, the Parker problem would rarely, if ever, have arisen. As stated in Northern Securities Co. v. United States, 193 U.S. 197, the operative premise would have been that the "Anti-Trust [\*\*\*89] Act... prescribe[d]... a rule for interstate and international commerce, (not for domestic commerce,)" *id., at 337*. The relevant question would have been whether the anticompetitive conduct required or permitted by the state statute was in restraint of domestic or interstate commerce. If the former, the conduct would have been beyond the reach of the Sherman Act; if the latter, the conduct would probably have violated the Sherman Act, regardless of contrary state law, on the theory that "[n]o State can, by... any... mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or... to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce." *Id., at 345-346*.

But the law did not remain static. As one commentator has put it: "By 1942, when *Parker v. Brown* was decided, the interpretation and scope of the commerce clause had changed substantially. With the development of the 'affection doctrine' purely intrastate events" -- like state-mandated anticompetitive arrangements [\*\*\*90] with respect to in-state agricultural production or in-state provision of utility services -- "could be regulated [\*637] under the commerce clause if these events had the requisite impact on interstate commerce."<sup>24</sup> This development created a potential for serious conflict between state statutes regulating commerce which, in 1890, would have been considered "domestic" but which, in 1942, were viewed [\*\*\*1177] as falling within the jurisdictional reach of

<sup>21</sup> See Munn v. Illinois, 94 U.S. 113, 125 ("Under [the police] powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property").

<sup>22</sup> E.g., United States v. Frankfort Distilleries, 324 U.S. 293, 298; United States v. Underwriters Assn., 322 U.S. 533, 558; Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 435. See also United States v. American Bldg. Maint. Industries, 422 U.S. 271, 278; Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 194-195.

<sup>23</sup> See Hospital Building Co. v. Rex Hospital Trustees, 425 U.S., at 743 n. 2; Gulf Oil Corp. v. Copp Paving Co., *supra*, at 201-202; Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 229-235.

<sup>24</sup> Slater, *supra*, n. 14, at 85.

the Sherman Act. To have held that state statutes requiring anticompetitive arrangements with respect to such commerce were pre-empted by the Sherman Act would, in effect, have transformed a generous principle of judicial construction -- namely the "retroactive" expansion of the jurisdictional reach of the Sherman Act to **[\*\*3140]** the limits of an expanded judicial conception of the commerce power -- into a transgression of the clearly expressed congressional intent not to intrude on the regulatory authority of the States.

**[\*\*\*\*91]** The "state action" doctrine of *Parker v. Brown*, as clarified by Goldfarb, represents the best possible accommodation of this limiting intent and the post-1890 judicial expansion of the jurisdictional reach of the Sherman Act. Parker's basic holding -- that the Sherman Act did not intend to displace restraints imposed by the State acting as sovereign -- coincides with the expressed legislative goal not to "invade the legislative authority of the several States...." Goldfarb clarified Parker by holding that private conduct, if it is to come within the state-action exemption, must be not merely "prompted" but "compelled" by state action. Thus refined, the doctrine performs the salutary function of isolating those areas of state regulation where the State's sovereign interest is, by the State's own judgment, at its strongest, and limits the exemption to those areas.<sup>25</sup>

**[\*\*\*\*92]** **[\*638]** Beyond this the Court cannot go without disregarding the purpose of the Sherman Act not to disrupt state regulatory laws.<sup>26</sup> **[\*\*\*\*94]** Congress, of **[\*\*\*1178]** course, can alter its **[\*639]** original intent and expand or contract the categories of state law which may permissibly impose restraints on competition. For example, in 1937 Congress passed the Miller-Tydings Act which attached a proviso to § 1 of the Sherman Act permitting resale price maintenance contracts where such contracts were permitted by applicable state law. This proviso was interpreted in **[\*\*3141]** *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, not to permit a State to enforce a law providing that all retailers within a State were bound by a resale price maintenance contract executed by any one retailer in the State. As the Court today notes, Parker -- and the legislative judgment embodied in the 1890 version of the Sherman Act -- would, standing alone, have seemed to immunize the state

<sup>25</sup> MR. JUSTICE BLACKMUN expresses the view that the Court answered the question of "what was to be the result if the expanding ambit of the Sherman Act should bring it into conflict with inconsistent state law" in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, and that the answer it gave was that any state regulatory statute "inconsistent" with the judicially expanded Sherman Act was pre-empted. *Ante*, at 606. But the opinion in Schwegmann -- which did not purport to modify or overrule Parker -- is most plausibly read as resting on a post-1890 expression of congressional intent, the Miller-Tydings Act. See *infra*, at 639. Even assuming, however, that Schwegmann conflicted with Parker, then surely the most significant aspect of that conflict is that Congress did not allow it to persist, as Schwegmann was soon legislatively overruled by the enactment of the McGuire bill, 66 Stat. 632, 15 U.S.C. §§ 45(a)(2)(5).

<sup>26</sup> The Court states at one point that the omission of a "direct reference to light bulbs" in the statute creating the Michigan Public Service Commission indicates that the State's policy is "neutral on the question whether a utility should, or should not, have such a program." *Ante*, at 584, 585. This statement seems to suggest that the Court considers the specificity with which a state legislature deals with particular regulatory matters to be relevant in determining whether agency action respecting such matters represents a sovereign choice, entitled to deference under the Sherman Act.

This suggestion overlooks the fact that Michigan's policy, far from being "neutral," is, as announced in Mich. Comp. Laws § 460.6 (1970), to vest an expert agency "with complete power and jurisdiction to regulate all public utilities in the state...." That agency is "vested with power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service and all other matters pertaining to the formation, operation or direction of such public utilities. It is further granted the power and jurisdiction to hear and pass upon all matters pertaining to or necessary or incident to such regulation of all public utilities, including electric light and power companies...." *Ibid.* (emphasis added).

If a state legislature can ensure antitrust exemption only by eschewing such broad delegation of regulatory authority and incorporating regulatory details into statutory law, then there is a very great risk that the State will be prevented from regulating effectively. For as this Court has repeatedly observed in another context, "[d]elegation... has long been recognized as necessary in order that the exertion of legislative power does not become a futility.... [T]he effectiveness of both the legislative and administrative processes would become endangered if [the legislature] were under the... compulsion of filling in the details beyond the liberal prescription [of requiring the making of 'just and reasonable' rates and regulating in the 'public interest'] here. Then the burdens of minutiae would be apt to clog the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues." Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398.

scheme. Ante, at 593. But Congress was thought to have struck a new balance in 1937 with respect to a specific category of state-imposed restraints. Accordingly, the Court in Schwegmann [\*\*\*\*93] determined congressional intent concerning the permissible limits of state restraints with respect to resale price maintenance by reference to the later, and more specific, expression of congressional purpose.<sup>27</sup>

[\*640] There has been no analogous alteration of the original intent regarding the area of state regulation at issue here. Indeed, to the extent subsequent congressional action is probative at all, it shows a continuing intent to defer to the regulatory authority of the States over the terms and conditions of in-state electric utility service. Thus, § 201(a) of the Federal Power Act, [16 U.S.C. § 824\(a\)](#), provides in relevant part that "Federal regulation... [is] to extend only to those matters which are not subject to regulation by the States."

The Court's opinion simply ignores the clear evidence of congressional intent and substitutes its own policy judgment about the desirability of disregarding any facet of state economic regulation that it thinks unwise or of no great importance. In adopting this freewheeling approach to the language of the Sherman Act the Court creates a statutory simulacrum [\*\*\*\*95] of the substantive due process doctrine I thought had been put to rest long ago. See [Ferguson v. Skrupa, 372 U.S. 726](#).<sup>28</sup> For [\*\*\*1179] the Court's approach contemplates the selective interdiction of those anticompetitive state regulatory measures that are deemed not "central" to the limited range of regulatory goals considered "imperative" by the federal judiciary.

Henceforth, a state-regulated public utility company must at its peril successfully divine which of its countless and interrelated tariff provisions a federal court will ultimately consider "central" or "imperative." If it guesses wrong, it may be subjected to treble damages as a penalty for its compliance with state law.

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Annotation References:

Valid governmental action as conferring immunity or exemption from private liability under the federal antitrust laws.  
12 ALR Fed 329.

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<sup>27</sup> The decision in Schwegmann rested primarily on a detailed analysis of the legislative history of the Miller-Tydings Act. [341 U.S., at 390-395](#).

<sup>28</sup> See Verkuil, State Action, Due Process and Antitrust: Reflections on Parker v. Brown, 75 Col. L. Rev. 328 (1975).



## **United States Steel Corp. v. Fortner Enterprises, Inc.**

Supreme Court of the United States

Argued November 1, 1976 ; February 22, 1977

No. 75-853

### **Reporter**

429 U.S. 610 \*; 97 S. Ct. 861 \*\*; 51 L. Ed. 2d 80 \*\*\*; 1977 U.S. LEXIS 43 \*\*\*\*; 1977-1 Trade Cas. (CCH) P61,294

UNITED STATES STEEL CORP. ET AL. v. FORTNER ENTERPRISES, INC.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## **Core Terms**

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financing, economic power, houses, tying product, customers, sales, tying arrangement, credit market, prefabricated, competitors, seller, tied product, terms, lenders, lending, loans

## **LexisNexis® Headnotes**

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

### **HN1** **Price Fixing & Restraints of Trade, Tying Arrangements**

The decisions regarding tying focus attention on the question whether the seller has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market. In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product.

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

### **HN2** **Price Fixing & Restraints of Trade, Tying Arrangements**

If the evidence merely shows that credit terms are unique because the seller is willing to accept a lesser profit -- or to incur greater risks -- than its competitors, that kind of uniqueness will not give rise to any inference of economic power in the credit market.

## **Lawyers' Edition Display**

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### **Summary**

This civil antitrust case presented the question whether 1 of the Sherman Act ([15 USCS 1](#)) was violated by a tying arrangement whereby in exchange for the promise of the plaintiff, a real estate developer, to purchase from one of the defendant companies prefabricated houses to be erected on certain property, the other defendant company, a wholly owned subsidiary of the house manufacturer, agreed to finance the cost of acquiring and developing the land as well as the cost of the houses. In earlier proceedings, the United States District Court for the Western District of Kentucky entered a summary judgment for the defendants and the United States Court of Appeals for the Sixth Circuit affirmed, but the United States Supreme Court reversed and remanded, holding that the agreement affected a "not insubstantial" amount of commerce in the tied product (prefabricated houses) and that the plaintiff was entitled to an opportunity to prove that the defendants possessed "appreciable economic power" in the market for the tying product (credit) ([394 US 495, 22 L Ed 2d 495, 89 S Ct 1252](#)). On remand, the District Court ultimately held that the evidence established that the defendants had sufficient economic power in the credit market to make the tying arrangement unlawful, and the Court of Appeals affirmed ([523 F2d 961](#)).

On certiorari, the United States Supreme Court reversed. In an opinion by Stevens, J., expressing the unanimous view of the court, it was held that "appreciable economic power" in the market for the tying product was not established, where the record merely showed that (1) the corporation that manufactured the houses and owned the credit company was one of the nation's largest corporations, there being no showing that the affiliation between the companies gave the credit company any cost advantage over its competitors, (2) the defendants had entered into similar tying arrangements with a significant number of other customers, such fact indicating nothing as to the defendants' economic power in the credit market, (3) the plaintiff was charged a noncompetitive price for the prefabricated houses, exceeding prices of comparable products, such proof also being consistent with the possibility that the financing was unusually expensive and that the price for the entire package was equal to, or below, a competitive price, and (4) the financing was "unique," primarily because it covered 100% of the plaintiff's acquisition and development costs and the lender accepted a high risk at a low interest rate, no inference of economic power in the credit market being warranted merely because the seller was willing to accept a lesser profit, or to incur greater risks, than its competitors, absent any evidence that the credit company had some cost advantage over its competitors, or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected.

Burger, Ch. J., joined by Rehnquist, J., concurred, emphasizing that the peculiar arrangement in the case at bar involved two separate products sold by two separate corporations, and thus the court's decision did not implicate ordinary credit sales of only a single product, which could not constitute a tying arrangement subject to per se scrutiny under the Sherman Act.

## Headnotes

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Restraints of Trade and Monopolies §30 > tying arrangement -- conspiracy to monopolize -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B]

In a civil antitrust action based on 2 of the Sherman Act ([15 USCS 2](#))--the plaintiff alleging that the defendants, a prefabricated housing manufacturer and a wholly owned subsidiary credit company, had conspired to acquire a monopoly in the market for prefabricated houses by making loans only when purchasers agreed to purchase prefabricated houses from the defendant manufacturer--a finding that 2 was violated is not proper where the record merely shows that the defendants combined or conspired to increase sales of prefabricated house packages, and that the sole purpose of the loan program was to increase the manufacturer's share of the market in prefabricated house packages; "increasing sales" and "increasing market share" are normal business goals, not forbidden by 2 without other evidence of an intent to monopolize, particularly where the defendants did not have a large market share or dominant market position.

Evidence §172 > inference -- intent to monopolize -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

No inference of intent to monopolize, in violation of 2 of the Sherman Act ([15 USCS 2](#)), can be drawn from the fact that a firm with a small market share has engaged in nonpredatory competitive conduct in the hope of increasing sales.

EVIDENCE §343.5 > Evidence §343.5 > tying arrangement -- credit terms -- economic power -- > Headnote:

[LEdHN\[3A\]](#) [3A] [LEdHN\[3B\]](#) [3B] [LEdHN\[3C\]](#) [3C] [LEdHN\[3D\]](#) [3D]

In a treble damage action alleging that 1 of the Sherman Act ([15 USCS 1](#)) was violated by a tying arrangement whereby in exchange for the plaintiff's promise to purchase the tied product (prefabricated houses to be erected on certain property) from the defendant house manufacturer, the other defendant company, a wholly owned subsidiary of the house manufacturer, agreed to finance the cost of acquiring and developing the land as well as the cost of the houses, "appreciable economic power" in the market for the tying product (credit), which would be necessary to make the tying arrangement illegal, is not established where the record merely shows that (1) the corporation that manufactured the houses and owned the credit company was one of the nation's largest corporations, there being no showing that the affiliation between the companies gave the credit company any cost advantage over its competitors in the credit market, (2) the defendants entered into tying arrangements with a significant number of other customers, such fact indicating nothing as to the defendants' economic power in the credit market, (3) the plaintiff was charged a noncompetitive price for the prefabricated houses, exceeding prices of comparable products, such proof also being consistent with the possibility that the financing was unusually expensive and that the price for the entire package was equal to or below a competitive price, and (4) the financing was "unique," primarily because it covered 100% of the plaintiff's acquisition and development costs and the lender accepted a high risk at a low interest rate, no inference of economic power in the credit market being warranted by evidence which merely showed that credit terms were unique because the seller was willing to accept a lesser profit or to incur greater risks than its competitors; the unusual credit bargain offered to the plaintiff proves nothing more than a willingness to provide cheap financing in order to sell expensive houses, and without any evidence that the credit company had some cost advantage over its competitors--or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected--the unique character of its financing does not support the conclusion that the defendants had the kind of economic power which the plaintiff had the burden of proving in order to prevail.

Evidence §979 > effect -- tying arrangement -- economic power -- > Headnote:

[LEdHN\[4\]](#) [4]

In some tying situations a disproportionately large volume of sales of the tied product resulting from only a few strategic sales of the tying product may reflect a form of economic "leverage" that is probative of power in the market for the tying product, and if the purpose of the tie-in is to facilitate price discrimination, such evidence implies the existence of power that a free market will not tolerate under the Sherman Act ([15 USCS 1 et seq.](#)).

Restraints of Trade and Monopolies §30 > tying arrangements -- economic power -- > Headnote:

[LEdHN\[5\]](#) [5]

In order to show the requisite economic power in the tying product to establish an unlawful tying arrangement under 1 of the Sherman Act ([15 USCS 1](#)), it is not necessary that the defendant have a monopoly or even a dominant position throughout the market for the tying product; the proper question is whether the seller has some advantage not shared by his competitors in the market for the tying product.

Restraints of Trade and Monopolies §30 > tying arrangements -- economic power -- > Headnote:

[LEdHN\[6A\]](#) [6A] [LEdHN\[6B\]](#) [6B]

In determining whether there is sufficient economic power in the tying product to establish an unlawful tying arrangement under 1 of the Sherman Act ([15 USCS 1](#)), the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as the tie-in, with respect to any appreciable number of buyers within the market; the mere inclusion of tie-in clauses in contracts with an appreciable number of buyers does not establish the requisite market power, since market power in the sense of power over price must still exist; if the price could have been raised but the tie-in was demanded in lieu of the higher price, then the requisite economic power exists.

## Syllabus

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In exchange for respondent real estate development corporation's promise to purchase prefabricated houses to be erected on certain land, petitioner United States Steel Corp.'s Home Division (the manufacturer of the houses) and petitioner Credit Corp., a wholly owned subsidiary that provides financing to the Home Division's customers, agreed to finance respondent's cost of acquiring and developing the land. After difficulties arose while the development was in progress, respondent brought a treble-damages action against petitioners, alleging that the transaction was a tying arrangement forbidden by the Sherman Act, because the competition for prefabricated houses (the tied product) was restrained by petitioners' abuse of power over credit (the tying product). After this Court, in a prior review of the case upon reversing a summary judgment in petitioners' favor, held that the agreement affected a "not insubstantial" amount of commerce in the tied product and that respondent was entitled to an opportunity to prove that petitioners [\*\*\*\*2] possessed "appreciable economic power" in the market for the tying product, the District Court ultimately held that the evidence justified the conclusion that petitioners did have sufficient economic power in the credit market to make the tying arrangement unlawful, and the Court of Appeals affirmed. That evidence related to four propositions: (1) petitioner Credit Corp. and the Home Division were owned by one of the Nation's largest corporations; (2) petitioners entered into tying arrangements with a significant number of customers in addition to respondent; (3) the Home Division charged respondent a noncompetitive price for its prefabricated houses; and (4) the financing provided to respondent was "unique," primarily because it covered 100% of respondent's acquisition and development costs. *Held:* The record does not support the conclusion that petitioners had appreciable economic power in the market for credit, the tying product. Where the record merely shows that the credit terms are unique because the seller was willing to accept a lesser profit -- or to incur greater risks - than its competitors, such uniqueness does not give rise to any inference of economic power in [\*\*\*\*3] the credit market. The unusual credit bargain offered to respondent proves nothing more than a willingness to provide cheap financing in order to sell expensive houses, and without any evidence that the Credit Corp. had some cost advantage over its competitors -- or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected -- the unique character of its financing does not support the lower courts' conclusion that petitioners had the kind of economic power that respondent had the burden of proving in order to prevail. Pp. 614-622.

523 F. 2d 961, reversed.

STEVENS, J., delivered the opinion for a unanimous Court. BURGER, C.J., filed a concurring opinion, in which REHNQUIST, J., joined, *post*, p. 622.

**Counsel:** Macdonald Flinn argued the cause for petitioners. With him on the briefs were *Albert F. Reutlinger*, *William H. Buchanan*, and *Norman Yoerg, Jr.*

*Kenneth L. Anderson* argued the cause for respondent. With him on the briefs was *A. Scott Hamilton, Jr.*

**Judges:** Burger, Brennan, Stewart, White, Marshall, Blasckmun, Powell, Rehnquist, Stevens

**Opinion by:** STEVENS

## Opinion

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[\*611] [\*\*\*\*4] [\*\*\*84] [\*\*863] Mr. JUSTICE STEVENS delivered the opinion of the Court.

LEdHN[1A] [↑] [1A]LEdHN[2A] [↑] [2A]In exchange for respondent's promise to purchase prefabricated houses to be erected on land near Louisville, Ky., petitioners agreed to finance the cost of acquiring and developing the land. Difficulties arose while the development was in progress, and respondent (Fortner) commenced this treble-damages action, claiming that the transaction was a tying arrangement forbidden by the Sherman Act. Fortner alleged that competition for prefabricated houses (the tied product) was restrained by petitioners' abuse of power over credit (the tying product). A summary judgment in favor of petitioners was reversed by this Court. Fortner Enterprises v. United States Steel Corp., 394 U.S. 495 (*Fortner I*). We held that the agreement affected a "not insubstantial" amount of commerce in the tied product and that Fortner was entitled to an opportunity to prove that petitioners possessed "appreciable" [\*612] economic power" in the [\*\*\*\*5] market for the tying product. The question now presented is whether the record supports the conclusion that petitioners had such power in the credit market.<sup>1</sup>

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<sup>1</sup> As explained at the outset of the opinion, *Fortner I* involved "a variety of questions concerning the proper standards to be applied by a United States district court in passing on a motion for summary judgment in a civil antitrust action." 394 U.S., at 496. Petitioners do not ask us to re-examine *Fortner I*, which left only the economic power question open on the issue of whether a *per se* violation could be proved. On the other hand, Fortner has not pursued the suggestion in *Fortner I* that it might be able to prove a § 1 violation under the rule-of-reason standard. 394 U.S., at 500. Thus, with respect to § 1, only the economic-power issue is before us.

LEdHN[1B] [↑] [1B]LEdHN[2B] [↑] [2B]In *Fortner I*, the Court noted that Fortner also alleged a § 2 violation, namely, that petitioners "conspired together for the purpose of: acquiring a monopoly in the market for prefabricated houses." 394 U.S., at 500. The District Court held that a § 2 violation had been proved. Although the Court of Appeals did not reach this issue, a remand is unnecessary. It is clear that neither the District Court's findings of fact nor the record supports the conclusion that § 2 was violated. The District Court found only that "the defendants did combine or conspire to increase sales of prefabricated house packages by United States Steel Corporation by the making of loans to numerous builders containing the tie-in provision" and that "the sole purpose of the loan programs of the Credit Corporation was specifically and deliberately to increase the share of the market of United States Steel Corporation in prefabricated house packages...." App. 1603 (emphasis added). But "increasing sales" and "increasing market share" are normal business goals, not forbidden by § 2 without other evidence of an intent to monopolize. The evidence in this case does not bridge the gap between the District Court's findings of intent to increase sales and its legal conclusion of conspiracy to monopolize. Moreover, petitioners did not have a large market share or dominant market position. See n. 3, *infra*. No inference of intent to monopolize can be drawn from the fact that a firm with a small market share has engaged in nonpredatory competitive conduct in the hope of increasing sales. Yet as we conclude, *infra*, at 621-622, that is all the record in this case shows.

[\*\*\*\*6] The [\*\*\*85] [\*\*864] conclusion that a violation of § 1 of the Sherman Act<sup>2</sup> [\*613] had been proved was only reached after two trials. At the first trial following our remand, the District Court directed a verdict in favor of Fortner on the issue of liability, and submitted only the issue of damages to the jury. The jury assessed damages, before trebling, of \$ 93,200. The Court of Appeals reversed the directed verdict and remanded for a new trial on liability. 452 F. 2d 1095 (CA6 1971), cert. denied, 406 U.S. 919. The parties then waived the jury; the trial judge heard additional evidence, and entered extensive findings of fact which were affirmed on appeal. 523 F.2d 961 (1975). Both courts held that the findings justified the conclusion that petitioners had sufficient economic power in the credit market to make the tying arrangement unlawful.

LEdHN[3A] [3A] [\*\*\*\*7] Before explaining why we disagree with the ultimate conclusion of the courts below, we first describe the tying arrangement and then summarize the findings on the economic-power issue.

I

Only the essential features of the arrangement between the parties need be described. Fortner is a corporation which was activated by an experienced real estate developer for the purpose of buying and improving residential lots. One petitioner, United States Steel Corp., operates a "Home Division" which manufactures and assembles components of prefabricated houses; the second petitioner, the "Credit Corp.," is a wholly owned subsidiary, which provides financing to customers of the Home Division in order to promote sales. Although their common ownership and control make it appropriate to regard the two as a single seller, they sell two separate products -- prefabricated houses and credit. The credit extended to Fortner was not merely for the price of the homes. Petitioners agreed to lend Fortner over \$ 2,000,000 in exchange for Fortner's promise to purchase the components of 210 homes for about \$ 689,000. The additional borrowed funds were intended to cover Fortner's cost of acquiring and [\*\*\*\*8] [\*614] developing the vacant [\*\*\*86] real estate, and the cost of erecting the houses.

The impact of the agreement on the market for the tied product (prefabricated houses) is not in dispute. On the one hand, there is no claim -- nor could there be -- that the Home Division had any dominance in the prefabricated housing business. The record indicates that it was only moderately successful, and that its sales represented a small fraction of the industry total.<sup>3</sup> On [\*\*865] the other hand, we have already held that the dollar value of the sales to respondent was sufficient to meet the "not insubstantial" test described in earlier cases. See 394 U.S., at 501-502. We therefore confine our attention to the source of the tying arrangement -- petitioners' "economic power" in the credit market.

[\*\*\*\*9] II

LEdHN[3B] [3B] The evidence supporting the conclusion that the Credit Corp. had appreciable economic power in the credit market relates to four propositions: (1) petitioner Credit Corp. and the Home Division were owned by one of the Nation's largest corporations; (2) petitioners entered into tying arrangements with a significant number of customers in addition to Fortner; (3) the Home Division charged respondent a noncompetitive price for its prefabricated homes; and (4) the financing provided to Fortner was "unique," primarily because it covered 100% of Fortner's acquisition and development costs.

The Credit Corp. was established in 1954 to provide financing for customers of the Home Division. The United States Steel Corp. not only provided the equity capital, but also allowed the Credit Corp. to use its credit in order [\*615] to borrow money from banks at the prime rate. Thus, although the Credit Corp. itself was not a particularly large company, it was supported by a corporate parent with great financial strength.

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<sup>2</sup> 26 Stat. 209, as amended, 15 U.S.C. § 1.

<sup>3</sup> In 1960, for example, the Home Division sold a total of 1,793 houses for \$ 6,747,353. There were at least four larger prefabricated home manufacturers, the largest of which sold 16,804 homes in that year. In the following year the Home Division's sales declined while the sales of each of its four principal competitors remained steady or increased.

The Credit Corp.'s loan policies were primarily intended to help the Home Division [\*\*\*\*10] sell its products.<sup>4</sup> It extended credit only to customers of the Home Division, and over two-thirds of the Home Division customers obtained such financing. With few exceptions, all the loan agreements contained a tying clause comparable to the one challenged in this case. Petitioner's home sales in 1960 amounted to \$ 6,747,353. Since over \$ 4,600,000 of these sales were tied to financing provided by the Credit Corp.,<sup>5</sup> it is apparent that the tying arrangement was used with a number of customers in addition to Fortner.

[\*\*\*\*11] The [\*\*\*87] least expensive house package that Fortner purchased from the Home Division cost about \$ 3,150. One witness testified that the Home Division's price was \$ 455 higher than the price of comparable components in a conventional home; another witness, to whom the District Court made no reference in its findings, testified that the Home Division's price was \$ 443 higher than a comparable prefabricated product. Whether the price differential was as great as 15% is not entirely clear, but the record does support the conclusion that the contract required Fortner to pay a noncompetitive price for the Home Division's houses.

The finding that the credit extended to Fortner was unique [\*616] was based on factors emphasized in the testimony of Fortner's expert witness, Dr. Masten, a professor with special knowledge of lending practices in the Kentucky area. Dr. Masten testified that mortgage loans equal to 100% of the acquisition and development cost of real estate were not otherwise available in the Kentucky area; that even though Fortner had a deficit of \$ 16,000, its loan was not guaranteed by a shareholder, officer, or other person interested in its business; and that [\*\*\*\*12] the interest rate of 6% represented a low rate under prevailing economic conditions.<sup>6</sup> Moreover, he explained that the stable [\*\*866] price levels at the time made the risk to the lender somewhat higher than would have been the case in a period of rising prices. Dr. Masten concluded that the terms granted to respondent by the Credit Corp. were so unusual that it was almost inconceivable that the funds could have been acquired from any other source. It is a fair summary of his testimony, and of the District Court's findings, to say that the loan was unique because the lender accepted such a high risk and the borrower assumed such a low cost.

The District Court also found that banks and federally insured savings and loan associations generally were prohibited by law from making 100% land acquisition and development loans, and "that other conventional lenders would not have made such loans at the time in question since they were not prudent loans due to [\*\*\*\*13] the risk involved." App. 1596.

Accordingly, the District Court concluded "that all of the required elements of an illegal tie-in agreement did exist since the tie-in itself was present, a not insubstantial amount of interstate commerce in the tied product was restrained and the Credit Corporation did possess sufficient economic power or leverage to effect such restraint." *Id.*, at 1602.

### [\*617] III

LEdHN[3C] [3C]Without the finding that the financing provided to Fortner was "unique," it is clear that the District Court's findings would be insufficient to support the conclusion that the Credit Corp. possessed any significant economic power in the credit market.

Although the Credit Corp. is owned by one of the Nation's largest manufacturing corporations, there is nothing in the record to indicate that this enabled it to borrow [\*\*\*88] funds on terms more favorable than those available to competing lenders, or that it was able to operate more efficiently than other lending institutions. In short, the affiliation between the petitioners does not appear to have given the Credit Corp. any cost advantage [\*\*\*\*14] over

<sup>4</sup> After reviewing extensive evidence taken from the files of the Credit Corp., including a memorandum stating that "our only purpose in making the loan... is shipping houses," the District Court expressly found "that the Credit Corporation was not so much concerned with the risks involved in loans but whether they would help sell houses." App. 1588-1589.

<sup>5</sup> This figure is not stated in the District Court's findings; it is derived from the finding of total sales and the finding that 68% of the sales in 1960 were made to dealers receiving financial assistance from the Credit Corp. See *id.*, at 1589-1590.

<sup>6</sup> The prime rate at the time was 5% or 5 1/2%.

its competitors in the credit market. Instead, the affiliation was significant only because the Credit Corp. provided a source of funds to customers of the Home Division. That fact tells us nothing about the extent of petitioners' economic power in the credit market.

LEdHN[4] [↑] [4]The same may be said about the fact that loans from the Credit Corp. were used to obtain house sales from Fortner and others. In some tying situations a disproportionately large volume of sales of the tied product resulting from only a few strategic sales of the tying product may reflect a form of economic "leverage" that is probative of power in the market for the tying product. If, as some economists have suggested, the purpose of a tie-in is often to facilitate price discrimination, such evidence would imply the existence of power that a free market would not tolerate.<sup>7</sup> But in this case Fortner was only required to purchase houses for the number of lots for which it received financing. The tying product produced no commitment from Fortner to purchase varying quantities of the tied product over an extended period of time. This [\*\*\*\*15] record, therefore, does not describe [\*618] the kind of "leverage" found in some of the Court's prior decisions condemning tying arrangements.<sup>8</sup>

The fact that Fortner -- and presumably other Home Division customers as well -- paid a noncompetitive price for houses also lends insufficient support to the judgment of the lower court. Proof that [\*\*867] Fortner paid a higher price for the tied product is consistent with the possibility that the [\*\*\*\*16] financing was unusually inexpensive<sup>9</sup> and that the price for the entire package was equal to, or below, a competitive price. And this possibility is equally strong even though a number of Home Division customers made a package purchase of homes and financing.<sup>10</sup>

[\*\*\*\*17] [\*619] The [\*\*\*89] most significant finding made by the District Court related to the unique character of the credit extended to Fortner. This finding is particularly important because the unique character of the tying product has provided critical support for the finding of illegality in prior cases. Thus, the statutory grant of a patent monopoly in International Salt Co. v. United States, 332 U.S. 392; the copyright monopolies in United States v. Paramount Pictures, Inc., 334 U.S. 131, and United States v. Loew's Inc., 371 U.S. 38; and the extensive land

<sup>7</sup> See Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L.J. 19 (1957).

<sup>8</sup> See e.g., United Shoe Machinery v. United States, 258 U.S. 451; International Business Machines v. United States, 298 U.S. 131; International Salt Co. v. United States, 332 U.S. 392. In his article in the 1969 Supreme Court Review, 16, Professor Dam suggests that this kind of leverage may also have been present in Northern Pacific R. Co. v. United States, 356 U.S. 1.

<sup>9</sup> Fortner's expert witness agreed with the statement:

"The amount of the loan as a percentage of the collateral or security is only one element in determining its advantage to a borrower. The other relevant factors include the rate of interest charged, whether the lender discounts the amount loaned or charges service for [sic] other fees and maturity in terms of repayment." App. 1686.

<sup>10</sup> Relying on Advance Business Systems & Supply Co. v. SCM Corp., 415 F. 2d 55 (CA4 1969), cert. denied, 397 U.S. 920, Fortner contends that acceptance of the package by a significant number of customers is itself sufficient to prove the seller's economic power. But this approach depends on the absence of other explanations for the willingness of buyers to purchase the package. See 415 F. 2d, at 68. In the *Northern Pacific* case, for instance, the Court explained:

"The very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power, at least where, as here, no other explanation has been offered for the existence of these restraints. The 'preferential routing' clauses conferred no benefit on the purchasers or lessees. While they got the land they wanted by yielding their freedom to deal with competing carriers, the defendant makes no claim that it came any cheaper than if the restrictive clauses had been omitted. In fact any such price reduction in return for rail shipments would have quite plainly constituted an unlawful rebate to the shipper. So far as the Railroad was concerned its purpose obviously was to fence out competitors, to stifle competition." 356 U.S., at 7-8 (footnote omitted).

As this passage demonstrates, this case differs from *Northern Pacific* because use of the tie-in in this case can be explained as a form of price competition in the tied product, whereas that explanation was unavailable to the Northern Pacific Railway.

holdings in *Northern Pacific R. Co. v. United States*, 356 U.S. 1,<sup>11</sup> represented tying products that the Court regarded as sufficiently unique to give rise to a presumption of economic power.<sup>12</sup>

[\*\*\*\*18]

[\*620] [LEdHN\[5\]](#) [5][LEdHN\[6A\]](#) [6A]As the Court plainly stated in its prior opinion in this case, these decisions do not require that the defendant have a monopoly or even a dominant position throughout the market for a tying product. See [394 U.S., at 502-503.HN1](#) They do, however, focus attention on the question whether the seller has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market.<sup>13</sup> [\*\*868] In [\*\*\*90] short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product.

[LEdHN\[6B\]](#) [6B]

[\*\*\*\*19] Without any such advantage differentiating his product from that of his competitors, the seller's product does not [\*621] have the kind of uniqueness considered relevant in prior tying-clause cases. n14 The Court made this point explicitly when it remanded this case for trial: S

"We do not mean to accept petitioner's apparent argument that market power can be inferred simply because the kind of financing terms offered by a lending company are 'unique and unusual.' We do mean, however, that uniquely and unusually advantageous terms can reflect a creditor's unique economic advantages over his competitors." [394 U.S., at 505I](#)

<sup>11</sup> The Court in *Northern Pacific* concluded that the railroad "possessed substantial economic power by virtue of its extensive landholdings" and then described those holdings as follows:

"As pointed out before, the defendant was initially granted large acreages by Congress in the several North-western States through which its lines now run. This land was strategically located in checkerboard fashion amid private holdings and within economic distance of transportation facilities. Not only the testimony of various witnesses but common sense makes it evident that this particular land was often prized by those who purchased or leased it and was frequently essential to their business activities." [Id., at 7.](#)

<sup>12</sup> "Since one of the objectives of the patent laws is to reward uniqueness, the principle of these cases was carried over into antitrust law on the theory that the existence of a valid patent on the tying product, without more, establishes a distinctiveness sufficient to conclude that any tying arrangement involving the patented product would have anticompetitive consequences." [United States v. Loew's Inc., 371 U.S. 38, 46.](#)

<sup>13</sup> "Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." [394 U.S., at 504.](#)

Professor Dam correctly analyzed the burden of proof imposed on Fortner by this language. In his article in the 1969 Supreme Court Review, 25-26, he reasoned:

"One important question in interpreting the *Fortner* decision is the meaning of this language. Taken out of context, it might be thought to mean that, just as the 'host of tying arrangements' was 'compelling evidence' of 'great power' in *Northern Pacific*, so the inclusion of tie-in clauses in contracts with 'any appreciable numbers of buyers' establishes market power. But the passage read in context does not warrant this interpretation. For the immediately preceding sentence makes clear that market power in the sense of power over price must still exist. If the price could have been raised but the tie-in was demanded in lieu of the higher price, then -- and presumably only then -- would the requisite economic power exist. Thus, despite the broad language available for quotation in later cases, the treatment of the law on market power is on close reading not only consonant with the precedents but in some ways less far-reaching than *Northern Pacific* and *Loew's*, which could be read to make actual market power irrelevant." (Footnotes omitted.)

An accompanying footnote explained: S

"Uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves. Such barriers may be legal, as in the case of patented and copyrighted products, e.g., *International Salt*; Loew's, or physical, as when the product is land, e.g., *Northern Pacific*. It is true that the barriers may also be economic, as when competitors are simply unable to produce the distinctive product profitably, but the uniqueness test in such [\*\*\*\*20] situations is somewhat confusing since the real source of economic power is not the product itself but rather the seller's cost advantage in producing it." [\*Id.\*, at 505 n. 2.](#)<sup>1</sup> F

n14 One commentator on *Fortner* I noted:

"The Court's uniqueness test is adequate to identify a number of situations in which this type of foreclosure is likely to occur. Whenever there are some buyers who find a seller's product uniquely attractive, and are therefore willing to pay a premium above the price of its nearest substitute, the seller has the opportunity to impose a tie to some other good." Note, The Logic of Foreclosure: Tie-In Doctrine after *Fortner v. U.S. Steel*, 79 Yale L.J. 86, 93-94 (1969).

Quite clearly, [HN2](#)<sup>↑</sup> if the evidence merely shows that credit terms are unique because the seller is willing to accept a lesser profit -- or to incur greater risks -- than its competitors, [\*622] that kind of uniqueness will not give rise to any inference of economic power in the credit [\*\*\*\*21] market. Yet this is, in substance, all that the record in this case indicates.

[LEdHN\[3D\]](#)<sup>↑</sup> [3D]The unusual credit bargain offered to Fortner proves nothing more than a willingness to provide cheap financing in order to sell expensive houses.<sup>15</sup> Without any evidence [\*\*\*91] that the Credit Corp. had some [\*\*869] cost advantage over its competitors -- or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected -- the unique character of its financing does not support the conclusion that petitioners had the kind of economic power which Fortner had the burden of proving in order to prevail in this litigation.

[\*\*\*\*22] The judgment of the Court of Appeals is reversed.

So ordered.

**Concur by:** BURGER

## Concur

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MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, concurring.

I concur in the Court's opinion and write only to emphasize what the case before us does *not* involve; I join on the basis of my understanding of the scope of our holding. Today's decision does not implicate ordinary credit sales of only a single product and which therefore cannot constitute a tying arrangement subject to *per se* scrutiny under [§ 1](#) of the Sherman Act. In contrast to such transactions, we are dealing here with a peculiar arrangement expressly found by the Court in *Fortner* I to involve two separate products sold by [\*623] two separate corporations. [\*Fortner Enterprises v. United States Steel Corp.\*, 394 U.S. 495, 507 \(1969\)](#). Consequently, I read the Court's assumption

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<sup>15</sup> The opinion of the Court in *Fortner* I notes that smaller companies might not have the "financial strength to offer credit comparable to that provided by larger competitors under tying arrangements." [\*394 U.S.\*, at 509](#). *Fortner*'s expert witness was unaware of the financing practices of competing sellers of prefabricated homes, App. 1691-1692, but there is nothing to suggest that they were unable to offer comparable financing if they chose to do so.

that a tie-in existed in this case, required as it is by the law of the case, to cast no doubt on the legality of credit financing by manufacturers or distributors.

## References

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What [\*\*\*\*23] constitutes "sufficient economic power" to make tying arrangement unlawful restraint of trade violative of 1 of Sherman Act ([15 USCS 1](#))

[\*54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 59-64, 72\*](#)

12 Am Jur Legal Forms 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 178:70

5 USCS 1

US L Ed Digest, Restraints of Trade and Monopolies 30

ALR Digests, Restraints of Trade and Monopolies 16.5

L Ed Index to Annos, Restraints of Trade and Monopolies

ALR Quick Index, Restraints of Trade and Monopolies

Federal Quick Index, Monopolies and Restraints of Trade; Tying Arrangements

Annotation References:

What constitutes "sufficient economic power" to make tying arrangement unlawful restraint of trade violative of 1 of Sherman Act ([15 USCS 1](#)). [\*51 L Ed 2d 826\*](#).

What constitutes "attempt to monopolize," within meaning of 2 of Sherman Act ([15 USCS 2](#)). 27 ALR Fed 762.

Business units or persons within single, commonly owned enterprise as conspiring with each other [\*\*\*\*24] in violation of 1 or 3 of Sherman Act ([15 USCS 1, 3](#)). 20 ALR Fed 682.

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## **Cont'l T.V. v. GTE Sylvania**

Supreme Court of the United States

Argued February 28, 1977 ; June 23, 1977; as amended

No. 76-15

**Reporter**

433 U.S. 36 \*; 97 S. Ct. 2549 \*\*; 53 L. Ed. 2d 568 \*\*\*; 1977 U.S. LEXIS 134 \*\*\*\*; 1977-1 Trade Cas. (CCH) P61,488

CONTINENTAL T.V., INC., ET AL. v. GTE SYLVANIA INC.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**Disposition:** The Court affirmed the judgment.

## **Core Terms**

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retailers, restrictions, franchised, vertical, manufacturer, distributors, per se rule, bicycles, products, intrabrand, dealers, territories, Sherman Act, rule of reason, interbrand, sales, wholesale, television, customer, antitrust, transactions, prices, cases, nonsale, selling, discount, outlets, market share, nonfranchised, overruling

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

### **HN1 [down arrow] Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act, 15 U.S.C.S. § 1, prohibits every contract, combination, or conspiracy, in restraint of trade or commerce. The rule of reason is the prevailing standard of analysis. Under this rule, the fact-finding weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

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

## [HN2](#) Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive. There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

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

## [HN3](#) Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Per se rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, per se rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials, but those advantages are not sufficient in themselves to justify the creation of per se rules. If it were otherwise, all of antitrust law would be reduced to per se rules, thus introducing an unintended and undesirable rigidity in the law.

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

## [HN4](#) Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The distinction drawn between sale and nonsale transactions is not sufficient to justify the application of a per se rule in one situation and a rule of reason in the other.

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

## [HN5](#) Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The per se rule stated in *United States v. Arnold, Schwinn & Co., 388 U. S. 365 (1967)*, is overruled. A departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than - as in Schwinn - upon formalistic line drawing.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

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

## [HN6](#) Per Se Rule & Rule of Reason, Sherman Act

When anticompetitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive practices challenged under [§ 1](#) of the Sherman Act.

## **Lawyers' Edition Display**

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### **Summary**

The franchise agreement between a television manufacturer and its franchised retailers provided that each franchisee could sell the manufacturer's products only from the location at which the retailer was franchised. Following the cancellation of the franchise of one of the retailers, the finance company that handled the credit arrangements between the manufacturer and its retailers brought a diversity action in the United States District Court for the Northern District of California seeking recovery of money owed and of secured merchandise held by the retailer. In cross-claims the retailer alleged that the manufacturer violated 1 of the Sherman Act ([15 USCS 1](#)) by entering into franchise agreements that prohibited the sale of the manufacturer's products other than from specified locations. Relying on [United States v Arnold, Schwinn & Co. \(1976\) 388 US 365, 18 L Ed 2d 1249, 87 S Ct 1856 \(Schwinn\)](#), the District Court rejected the manufacturer's requested jury instruction that the location restriction was illegal only if it unreasonably restrained or suppressed competition, the court instead instructing that if the jury found that the manufacturer entered into a contract with its dealers pursuant to which the manufacturer exercised dominion or control over the products sold to the dealer, after having parted with title to the products, any effort thereafter to restrict locations from which dealers resold the merchandise would be illegal regardless of the reasonableness of the location restrictions. On appeal from a verdict and judgment rendered in favor of the retailer in the United States District Court for the Northern District of California, the United States Court of Appeals for the Ninth Circuit reversed, concluding that the manufacturer's location restriction had less potential for competitive harm than the restrictions invalidated in Schwinn and thus should be judged under the "rule of reason" rather than the per se rule stated in Schwinn (537 F2d 980).

On certiorari, the United States Supreme Court affirmed. In an opinion by Powell, J., joined by Burger, Ch. J., and Stewart, Blackmun, and Stevens, JJ., it was held, overruling the Schwinn per se rule, that the legality of the manufacturer's location restriction should be determined by the "rule of reason" standard.

White, J., concurring in the judgment, expressed the view that the Schwinn rule need not be overruled since the instant case was distinguishable because it presented less potential for restraint of intrabrand competition and more potential for stimulating interbrand competition.

Brennan, J., joined by Marshall, J., dissenting, expressed the view that Schwinn should not be overruled, and, therefore, the Court of Appeals decision should be reversed.

Rehnquist, J., did not participate.

## **Headnotes**

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MONOPOLIES §50 > restrictions -- territory -- customers -- > Headnote:

[LEdHN\[1\]](#) [1]

For the purpose of determining whether 1 of the Sherman Act ([15 USCS 1](#)) has been violated, a retail customer restriction under which (1) each distributor has a defined geographic area in which it has the exclusive right to supply franchised retailers, (2) sales to public are made only through franchised retailers who are authorized to sell the product only from specified locations, and (3) the manufacturer prohibits both distributors and retailers from

selling the product to nonfranchised retailers, is indistinguishable in intent and competitive impact from a location restriction under which franchised retailers are permitted to sell the manufacturer's product only from the location or locations at which the retailer is franchised; both restrictions limit the freedom of the retailer to dispose of the products as he desires, and the fact that one restriction is addressed to territory and the other to customers is irrelevant to functional antitrust analysis.

COURTS §766 > stare decisis -- reconsideration -- > Headnote:

[LEdHN\[2\]](#) [2]

Despite the principle of stare decisis, the United States Supreme Court will reconsider its decision in an earlier case where the court is convinced that the need for clarification of the law in a particular area justifies reconsideration.

MONOPOLIES §16 > rule of reason -- > Headnote:

[LEdHN\[3\]](#) [3]

The prevailing standard of analysis under 1 of the Sherman Act ([15 USCS 1](#)) which prohibits every contract, combination, or conspiracy, in restraint of trade or commerce, is the "rule of reason," under which the factfinder weighs all of the circumstances of the case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

MONOPOLIES §16 > per se rule -- > Headnote:

[LEdHN\[4\]](#) [4]

There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal under 1 of the Sherman Act ([15 USCS 1](#))--which prohibits every contract, combination or conspiracy, in restraint of trade or commerce--without elaborate inquiry being necessary as to the precise harm they have caused or the business excuse for their use; such per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive.

MONOPOLIES §16 > per se rule -- > Headnote:

[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B]

Per se rules of illegality--under which certain practices are conclusively presumed to be unreasonable and therefore illegal under 1 of the Sherman Act ([15 USCS 1](#)) without elaborate inquiry being necessary as to the precise harm they have caused or the business excuse for their use--require the court to make broad generalizations about the social utility of particular commercial practices; the probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences.

433 U.S. 36, \*36; 97 S. Ct. 2549, \*\*2549; 53 L. Ed. 2d 568, \*\*\*568; 1977 U.S. LEXIS 134, \*\*\*\*1

MONOPOLIES §16 > per se rule -- > Headnote:

[LEdHN\[6A\]](#) [6A] [LEdHN\[6B\]](#) [6B]

Although per se rules--under which certain practices are presumed to be unreasonable and therefore illegal under 1 of the Sherman Act ([15 USCS 1](#)) without elaborate inquiry being necessary as to the precise harm they have caused or the business excuse for their use--tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex "rule of reason" trials, nevertheless, those advantages are not sufficient in themselves to justify the creation of per se rules.

MONOPOLIES §16 > rule of reason -- per se rule -- > Headnote:

[LEdHN\[7\]](#) [7]

In determining whether 1 of the Sherman Act ([15 USCS 1](#)) has been violated, a distinction drawn between sale and nonsale transactions is not sufficient to justify the application of a per se rule--under which certain practices are conclusively presumed to be unreasonable and therefore illegal--in one situation and a rule of reason--under which all circumstances are weighed in deciding whether a practice should be prohibited--in the other.

MONOPOLIES §16 > per se violations -- standard for finding -- > Headnote:

[LEdHN\[8\]](#) [8]

The standard for determining whether vertical restrictions are per se violations of 1 of the Sherman Act ([15 USCS 1](#)) which must be conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use, is whether the restrictions have a pernicious effect on competition and lack any redeeming virtue.

MONOPOLIES §16 > per se rule -- > Headnote:

[LEdHN\[9A\]](#) [9A] [LEdHN\[9B\]](#) [9B]

Although there may be occasional problems in differentiating vertical restrictions from horizontal restrictions originating in agreements among retailers--such horizontal restrictions between retailers being per se violations of the Sherman Act ([15 USCS 1 et seq.](#))--nevertheless, these problems of proof are not sufficiently great to justify a per se rule in regard to vertical restrictions.

MONOPOLIES §16 > per se rule -- nature of restraint -- > Headnote:

[LEdHN\[10A\]](#) [10A] [LEdHN\[10B\]](#) [10B]

The nature of a restriction is, generally, an undesirable basis for a per se rule of illegality under which certain practices are conclusively presumed to be unreasonable and therefore illegal under 1 of the Sherman Act ([15 USCS 1](#)).

MONOPOLIES §29 > vertical restrictions -- > Headnote:

[LEdHN\[11A\]](#) [11A] [LEdHN\[11B\]](#) [11B]

The advantages of vertical restrictions should not be limited to the categories of new entrants and failing firms.

COURTS §766 > stare decisis -- > Headnote:

[LEdHN\[12A\]](#) [12A] [LEdHN\[12B\]](#) [12B]

Stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

MONOPOLIES §16 > per se rule -- > Headnote:

[LEdHN\[13\]](#) [13]

Although particular applications of vertical restrictions might justify per se prohibition, nevertheless, departure from the rule of reason standard in determining violations of 1 of the Sherman Act ([15 USCS 1](#)) must be based upon demonstrable economic effect rather than upon formalistic line drawing.

MONOPOLIES §53 > restriction on location -- rule of reason -- > Headnote:

[LEdHN\[14\]](#) [14]

The rule of reason, under which all the circumstances of the case are weighed in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition, is the standard for determining whether 1 of the Sherman Act ([15 USCS 1](#)) is violated by a vertical restriction under which a manufacturer requires a franchised retailer to sell the manufacturer's products only from the location or locations at which the retailer was franchised. (Brennan and Marshall, JJ., dissented from this holding.)

## Syllabus

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In an attempt to improve its market position by attracting more aggressive and competent retailers, respondent manufacturer of television sets limited the number of retail franchises granted for any given area and required each franchisee to sell respondent's products only from the location or locations at which it was franchised. Petitioner Continental, one of respondent's franchised retailers, claimed that respondent had violated [§ 1](#) of the Sherman Act by entering into and enforcing franchise agreements that prohibited the sale of respondent's products other than from specified locations. The District Court rejected respondent's requested jury instruction that the location restriction was illegal only if it unreasonably restrained or suppressed competition. Instead, relying on [United States v. Arnold, Schwinn & Co., 388 U.S. 365](#), the District Court instructed the jury that it was a per se violation of [§ 1](#) if respondent entered into a contract, combination, or conspiracy with one or more of its retailers, [\*\*\*\*2] pursuant to

which it attempted to restrict the locations from which the retailers resold the merchandise they had purchased from respondent. The jury found that the location restriction violated § 1, and treble damages were assessed against respondent. Concluding that Schwinn was distinguishable, the Court of Appeals reversed, holding that respondent's location restriction has less potential for competitive harm than the restrictions invalidated in Schwinn and thus should be judged under the "rule of reason." Held:

1. The statement of the per se rule in Schwinn is broad enough to cover the location restriction used by respondent. And the retail customer restriction in Schwinn is functionally indistinguishable from the location restriction here, the restrictions in both cases limiting the retailer's freedom to dispose of the purchased products and reducing, but not eliminating, intrabrand competition. Pp. 42-47.
2. The justification and standard for the creation of per se rules was stated in *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5: "There are certain agreements or practices which because of their pernicious effect on competition and lack of any [\*\*\*3] redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Under this standard, there is no justification for the distinction drawn in Schwinn between restrictions imposed in sale and nonsale transactions. Similarly, the facts of this case do not present a situation justifying a per se rule. Accordingly, the per se rule stated in Schwinn is overruled, and the location restriction used by respondent should be judged under the traditional rule-of-reason standard. Pp. 47-59.

537 F.2d 980, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C.J., and STEWART, BLACKMUN, and STEVENS, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, post, p. 59. BRENNAN, J., filed a dissenting statement, in which MARSHALL, J., joined, post, p. 71. REHNQUIST, J., took no part in the consideration or decision of the case.

**Counsel:** Glenn E. Miller argued the cause for petitioners. With him on the briefs were Lawrence A. Sullivan and Jesse Choper.

M. Laurence Popofsky argued the cause for respondent. With him [\*\*\*4] on the brief were Richard L. Goff and Stephen V. Bomse.  
\*

**Judges:** BURGER, BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, STEVENS

**Opinion by:** POWELL

## Opinion

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[\*37] [\*\*\*572] [\*\*2551] MR. JUSTICE POWELL delivered the opinion of the Court.

Franchise agreements between manufacturers and retailers frequently include provisions barring the retailers from selling franchised products from locations other than those specified in the agreements. This case presents important questions concerning the appropriate antitrust analysis of these restrictions under § 1 of the Sherman Act, 26 Stat. 209, as amended, *15 U.S.C. § 1*, and the Court's decision in *United States v. Arnold, Schwinn & Co.*, 388 U. S. 365 (1967). [\*\*\*5] [\*38]

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\* Briefs of amici curiae urging affirmance were filed by Lawrence T. Zimmerman for the Associated Equipment Distributors; by Lloyd N. Cutler, James S. Campbell, William T. Lake, and Donald F. Turner for the Motor Vehicle Manufacturers Assn.; and by Philip F. Zeidman and John A. Dienelt for the International Franchise Assn.

Respondent GTE Sylvania Inc. (Sylvania) manufactures and sells television sets through its Home Entertainment Products Division. Prior [\*\*\*573] to 1962, like most other television manufacturers, Sylvania sold its televisions to independent or company-owned distributors who in turn resold to a large and diverse group of retailers. Prompted by a decline in its market share to a relatively insignificant 1% to 2% of national television sales,<sup>1</sup> Sylvania conducted an intensive reassessment of its marketing strategy, and in 1962 adopted the franchise plan challenged here. Sylvania phased out its wholesale distributors and began to sell its televisions directly to a smaller and more select group of franchised retailers. An acknowledged purpose of the change was to decrease the number of competing Sylvania retailers in the hope of attracting the more aggressive and competent retailers though necessary to the improvement of the company's market position.<sup>2</sup> To this end, Sylvania limited the number of franchises granted for any given area and required each franchisee to sell his Sylvania products only from the location or locations at which he was franchised.<sup>3</sup> A franchise [\*\*\*\*6] did not constitute an exclusive territory, and Sylvania retained sole discretion to increase the number of retailers in an area in light of the success or failure of existing retailers in developing their market. The revised marketing strategy appears to have been successful during the period at issue here, for by 1965 Sylvania's share of national television sales had increased to approximately 5%, and the [\*39] company ranked as the Nation's eighth largest manufacturer of color television sets.

This suit is the [\*\*\*\*7] result of the rupture of a franchiser-franchisee relationship that had previously prospered under the revised Sylvania plan. Dissatisfied with its sales in the city of San Francisco,<sup>4</sup> Sylvania decided in the spring of 1965 to franchise Young [\*\*2552] Brothers, an established San Francisco retailer of televisions, as an additional San Francisco retailer. The proposed location of the new franchise was approximately a mile from a retail outlet operated by petitioner Continental T. V., Inc. (Continental), one of the most successful Sylvania franchisees.<sup>5</sup> Continental protested that the location of the new franchise violated Sylvania's marketing policy, but Sylvania persisted in its plans. Continental then canceled a large Sylvania order and placed a large order with Phillips, one of Sylvania's competitors.

[\*\*\*\*8] During this same period, Continental expressed a desire to open a store in Sacramento, Cal., a desire Sylvania attributed at least in part [\*\*\*574] to Continental's displeasure over the Young Brothers decision. Sylvania believed that the Sacramento market was adequately served by the existing Sylvania retailers and denied the request.<sup>6</sup> In the face of this denial, Continental advised Sylvania in early September 1965, that it was in the process of moving Sylvania merchandise from its San Jose, Cal., warehouse to a new retail location that it had leased in Sacramento. Two weeks later, allegedly for unrelated reasons, Sylvania's credit department reduced Continental's [\*40] credit line from \$ 300,000 to \$ 50,000.<sup>7</sup> In response to the reduction in credit and the generally deteriorating relations with Sylvania, Continental withheld all payments owed to John P. Maguire & Co., Inc. (Maguire), the finance company that handled the credit arrangements between Sylvania and its retailers. Shortly thereafter, Sylvania terminated Continental's franchises, and Maguire filed this diversity action in the United

<sup>1</sup> RCA at that time was the dominant firm with as much as 60% to 70% of national television sales in an industry with more than 100 manufacturers.

<sup>2</sup> The number of retailers selling Sylvania products declined significantly as a result of the change, but in 1965 there were at least two franchised Sylvania retailers in each metropolitan center of more than 100,000 population.

<sup>3</sup> Sylvania imposed no restrictions on the right of the franchisee to sell the products of competing manufacturers.

<sup>4</sup> Sylvania's market share in San Francisco was approximately 2.5%-half its national and northern California average.

<sup>5</sup> There are in fact four corporate petitioners: Continental T.V. Inc., A & G Sales, Sylpac, Inc., and S. A. M. Industries, Inc. All are owned in large part by the same individual, and all conducted business under the trade style of "Continental T. V." We adopt the convention used by the court below of referring to petitioners collectively as "Continental."

<sup>6</sup> Sylvania had achieved exceptional results in Sacramento, where its market share exceeded 15% in 1965.

<sup>7</sup> In its findings of fact made in conjunction with Continental's plea for injunctive relief, the District Court rejected Sylvania's claim that its actions were prompted by independent concerns over Continental's credit. The jury's verdict is ambiguous on this point. In any event, we do not consider it relevant to the issue before us.

States District Court for the Northern District of California seeking recovery [\*\*\*\*9] of money owed and of secured merchandise held by Continental.

The antitrust issues before us originated in cross-claims brought by Continental against Sylvania and Maguire. Most important for our purposes was the claim that Sylvania had violated [§ 1](#) of the Sherman Act by entering into and enforcing franchise agreements that prohibited the sale of Sylvania products other than from specified locations.<sup>8</sup> At the close of evidence in the jury trial of Continental's claims, Sylvania requested the District Court to instruct the jury that its location restriction was illegal [\*\*\*\*10] only if it unreasonably restrained or suppressed competition. App. 5-6, 9-15. Relying on this Court's decision in [United States v. Arnold, Schwinn & Co., supra](#), the District Court rejected the proffered instruction in favor of the following one: S

"Therefore, if you find by a preponderance of the evidence that Sylvania entered into a contract, combination or conspiracy with one or more of its dealers pursuant to which Sylvania exercised dominion or control over the [\*41] products sold to the dealer, after having parted with title and risk to the products, you must find any effort thereafter to restrict outlets or store locations from which its dealers resold the merchandise which they had purchased from Sylvania to be a violation of [Section 1](#) of the Sherman Act, [\*\*2553] regardless of the reasonableness of the location restrictions." App. 492.I

[\*\*\*\*11] In answers to special interrogatories, the jury found that Sylvania had engaged "in a contract, combination or conspiracy in restraint of trade in violation of the antitrust laws with respect to location restrictions alone," and assessed Continental's [\*\*\*575] damages at \$ 591,505, which was trebled pursuant to [15 U.S.C. § 15](#) to produce an award of \$ 1,774,515. App. 498, 501.<sup>9</sup>

[\*\*\*\*12] On appeal, the Court of Appeals for the Ninth Circuit, sitting en banc, reversed by a divided vote. 537 F.2d 980 (1976). The court acknowledged that there is language in Schwinn that could be read to support the District Court's instruction but concluded that Schwinn was distinguishable on several grounds. Contrasting the nature of the restrictions, their competitive impact, and the market shares of the franchisers in the two cases, the court concluded that Sylvania's location restriction had less potential for competitive harm than the restrictions invalidated in Schwinn and thus should be judged under the "rule of reason" rather than the per se rule stated in Schwinn. The court found support for its [\*42] position in the policies of the Sherman Act and in the decisions of other federal courts involving nonprice vertical restrictions.<sup>10</sup>

[\*\*\*\*13] We granted Continental's petition for certiorari to resolve this important question of [antitrust law](#). 429 U.S. 893 (1976).<sup>11</sup>

<sup>8</sup> Although Sylvania contended in the District Court that its policy was unilaterally enforced, it now concedes that its location restriction involved understandings or agreements with the retailers.

<sup>9</sup> The jury also found that Maguire had not conspired with Sylvania with respect to this violation. Other claims made by Continental were either rejected by the jury or withdrawn by Continental. Most important was the jury's rejection of the allegation that the location restriction was part of a larger scheme to fix prices. A pendent claim that Sylvania and Maguire had willfully and maliciously caused injury to Continental's business in violation of California law also was rejected by the jury, and a pendent breach-of-contract claim was withdrawn by Continental during the course of the proceedings. The parties eventually stipulated to a judgment for Maguire on its claim against Continental.

<sup>10</sup> There were two major dissenting opinions. Judge Kilkenny argued that the present case is indistinguishable from Schwinn and that the jury had been correctly instructed. Agreeing with Judge Kilkenny's interpretation of Schwinn, Judge Browning stated that he found the interpretation responsive to and justified by the need to protect "individual traders from unnecessary restrictions upon their freedom of action." [537 F.2d, at 1021](#). See n. 21, infra.

<sup>11</sup> This Court has never given plenary consideration to the question of the proper antitrust analysis of location restrictions. Before Schwinn such restrictions had been sustained in [Boro Hall Corp. v. General Motors Corp., 124 F.2d 822 \(CA2 1942\)](#). Since the decision in Schwinn, location restrictions have been sustained by three Courts of Appeals, including the decision below. [Salco Corp. v. General Motors Corp., 517 F.2d 567 \(CA10 1975\)](#); [Kaiser v. General Motors Corp., 396 F.Supp. 33 \(ED Pa. 1975\)](#), affirmance order, [530 F.2d 964 \(CA3 1976\)](#).

II

A

We turn first to Continental's contention that Sylvania's restriction on retail locations is a per se violation of [§ 1](#) of the Sherman Act as interpreted in Schwinn. The restrictions at issue in Schwinn were part of a three-tier distribution system comprising, in [\*\*\*\*14] addition to Arnold, Schwinn & Co. (Schwinn), 22 intermediate distributors and a network of franchised retailers. Each distributor had a defined geographic area in which it had the exclusive right to supply franchised retailers. Sales to the public were made only through franchised retailers, who were authorized to sell Schwinn bicycles only from specified locations. In support of this limitation, Schwinn prohibited both distributors and retailers from selling Schwinn bicycles to nonfranchised retailers. [\*\*\*576] At the retail level, therefore, Schwinn was able to control the number of retailers of [\*43] its bicycles in any given area according to its view of the needs of that market.

[\*\*2554] As of 1967 approximately 75% of Schwinn's total sales were made under the "Schwinn Plan." Acting essentially as a manufacturer's representative or sales agent, a distributor participating in this plan forwarded orders from retailers to the factory. Schwinn then shipped the ordered bicycles directly to the retailer, billed the retailer, bore the credit risk, and paid the distributor a commission on the sale. Under the Schwinn Plan, the distributor never had title to or possession [\*\*\*\*15] of the bicycles. The remainder of the bicycles moved to the retailers through the hands of the distributors. For the most part, the distributors functioned as traditional wholesalers with respect to these sales, stocking an inventory of bicycles owned by them to supply retailers with emergency and "fill-in" requirements. A smaller part of the bicycles that were physically distributed by the distributors were covered by consignment and agency arrangements that had been developed to deal with particular problems of certain distributors. Distributors acquired title only to those bicycles that they purchased as wholesalers; retailers, of course, acquired title to all of the bicycles ordered by them.

In the District Court, the United States charged a continuing conspiracy by Schwinn and other alleged co-conspirators to fix prices, allocate exclusive territories to distributors, and confine Schwinn bicycles to franchised retailers. Relying on [United States v. Bausch & Lomb Co., 321 U.S. 707 \(1944\)](#), the Government argued that the nonprice restrictions were per se illegal as part of a scheme for fixing the retail prices of Schwinn bicycles. The District Court rejected the [\*\*\*\*16] price-fixing allegation because of a failure of proof and held that Schwinn's limitation of retail bicycle sales to franchised retailers was permissible under [§ 1](#). The court found a [§ 1](#) violation, however, in "a conspiracy to divide certain borderline or overlapping counties in the territories served by four Midwestern [\*44] cycle distributors." [237 F.Supp. 323, 342 \(ND Ill. 1965\)](#). The court described the violation as a "division of territory by agreement between the distributors... horizontal in nature," and held that Schwinn's participation did not change that basic characteristic. Ibid. The District Court limited its injunction to apply only to the territorial restrictions on the resale of bicycles purchased by the distributors in their roles as wholesalers. Ibid.

Schwinn came to this Court on appeal by the United States from the District Court's decision. Abandoning its per se theories, the Government argued that Schwinn's prohibition against distributors' and retailers' selling Schwinn bicycles to nonfranchised retailers was unreasonable under [§ 1](#) and that the District Court's injunction against exclusive distributor territories should extend to all [\*\*\*\*17] such restrictions regardless of the form of the transaction. The Government did not challenge the District Court's decision on price fixing, and Schwinn did not challenge the decision on exclusive distributor territories.

The Court acknowledged the Government's abandonment of its per se theories and stated that the resolution [\*\*\*\*577] of the case would require an examination of "the specifics of the challenged practices and their impact upon the marketplace in order to make a judgment as to whether the restraint is or is not 'reasonable' in the special sense in which [§ 1](#) of the Sherman Act must be read for purposes of this type of inquiry." [388 U.S., at 374](#). Despite this description of its task, the Court proceeded to articulate the following "bright line" per se rule of illegality for vertical restrictions: "Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it." [Id., at 379](#). But the Court expressly stated that the rule of reason governs when "the manufacturer retains title, dominion, and [\*\*\*\*18] risk with [\*45] respect to the product and the position and function of the dealer in

question are, in fact, indistinguishable from **[\*\*2555]** those of an agent or salesman of the manufacturer." *[Id., at 380.](#)*

Application of these principles to the facts of Schwinn produced sharply contrasting results depending upon the role played by the distributor in the distribution system. With respect to that portion of Schwinn's sales for which the distributors acted as ordinary wholesalers, buying and reselling Schwinn bicycles, the Court held that the territorial and customer restrictions challenged by the Government were *per se* illegal. But, with respect to that larger portion of Schwinn's sales in which the distributors functioned under the Schwinn Plan and under the less common consignment and agency arrangements, the Court held that the same restrictions should be judged under the rule of reason. The only retail restriction challenged by the Government prevented franchised retailers from supplying nonfranchised retailers. *[Id., at 377.](#)* The Court apparently perceived no material distinction between the restrictions on distributors and retailers, for it **[\*\*\*19]** held:

"The principle is, of course, equally applicable to sales to retailers, and the decree should similarly enjoin the making of any sales to retailers upon any condition, agreement or understanding limiting the retailer's freedom as to where and to whom it will resell the products." *[Id., at 378.](#)*

Applying the rule of reason to the restrictions that were not imposed in conjunction with the sale of bicycles, the Court had little difficulty finding them all reasonable in light of the competitive situation in "the product market as a whole." *[Id., at 382.](#)*

## B

In the present case, it is undisputed that title to the television sets passed from Sylvania to Continental. Thus, the Schwinn *per se* rule applies unless Sylvania's restriction on **[\*46]** locations falls outside Schwinn's prohibition against a manufacturer's attempting to restrict a "retailer's freedom as to where and to whom it will resell the products." *[Id., at 378.](#)* As the Court of Appeals conceded, the language of Schwinn is clearly broad **[\*\*\*578]** enough to apply to the present case. Unlike the Court of Appeals, however, we are unable to find a principled basis for distinguishing **[\*\*\*20]** Schwinn from the case now before us.

**LEdHN[1]↑** [1]Both Schwinn and Sylvania sought to reduce but not to eliminate competition among their respective retailers through the adoption of a franchise system. Although it was not one of the issues addressed by the District Court or presented on appeal by the Government, the Schwinn franchise plan included a location restriction similar to the one challenged here. These restrictions allowed Schwinn and Sylvania to regulate the amount of competition among their retailers by preventing a franchisee from selling franchised products from outlets other than the one covered by the franchise agreement. To exactly the same end, the Schwinn franchise plan included a companion restriction, apparently not found in the Sylvania plan, that prohibited franchised retailers from selling Schwinn products to nonfranchised retailers. In Schwinn the Court expressly held that this restriction was impermissible under the broad principle stated there. In intent and competitive impact, the retail-customer restriction in Schwinn is indistinguishable from the location restriction in the present **[\*\*\*21]** case. In both cases the restrictions limited the freedom of the retailer to dispose of the purchased products as he desired. The fact that one restriction was addressed to territory and the other to customers is irrelevant to functional antitrust analysis and, indeed, to the language and broad thrust of the opinion in Schwinn.<sup>12</sup> **[\*\*2556]** As Mr. Chief Justice Hughes

<sup>12</sup> The distinctions drawn by the Court of Appeals and endorsed in MR. JUSTICE WHITE's separate opinion have no basis in Schwinn. The intrabrand competitive impact of the restrictions at issue in Schwinn ranged from complete elimination to mere reduction; yet, the Court did not even hint at any distinction on this ground. Similarly, there is no suggestion that the *per se* rule was applied because of Schwinn's prominent position in its industry. That position was the same whether the bicycles were sold or consigned, but the Court's analysis was quite different. In light of MR. JUSTICE WHITE's emphasis on the "superior consumer acceptance" enjoyed by the Schwinn brand name, post, at 63, we note that the Court rejected precisely that premise in Schwinn. Applying the rule of reason to the restrictions imposed in nonsale transactions, the Court stressed that there was "no showing that [competitive bicycles were] not in all respects reasonably interchangeable as articles of competitive commerce with

433 U.S. 36, \*46; 97 S. Ct. 2549, \*\*2556; 53 L. Ed. 2d 568, \*\*\*578; 1977 U.S. LEXIS 134, \*\*\*\*21

stated in [\*47] [Appalachian Coals, Inc. v. United States, 288 U. S. 344, 360, 377 \(1933\)](#): "Realities must dominate the judgment.... The Anti-Trust Act aims at substance."

[\*\*\*\*22] III

[LEdHN\[2\]](#) [2]Sylvania argues that if Schwinn cannot be distinguished, it should be reconsidered. Although Schwinn is supported by the principle of stare decisis, [Illinois Brick Co. v. Illinois, 431 U. S. 720, 736](#) [\*\*\*579] (1977), we are convinced that the need for clarification of the law in this area justifies reconsideration. Schwinn itself was an abrupt and largely unexplained departure from [White Motor Co. v. United States, 372 U. S. 253](#) (1963), where only four years earlier the Court had refused to endorse a per se rule for vertical restrictions. Since its announcement, Schwinn has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts. The great weight of scholarly opinion [\*48] has been critical of the decision,<sup>13</sup> and a number of the federal courts confronted with analogous vertical restrictions have sought to limit its reach.<sup>14</sup>

[\*\*2557] In our view, the experience of the [\*49] past 10 years should be brought to bear on this subject of considerable commercial importance.

the Schwinn product" and that it did "not regard Schwinn's claim of product excellence as establishing the contrary." [388 U.S., at 381](#), and n. 7. Although Schwinn did hint at preferential treatment for new entrants and failing firms, the District Court below did not even submit Sylvania's claim that it was failing to the jury. Accordingly, MR. JUSTICE WHITE's position appears to reflect an extension of Schwinn in this regard. Having crossed the "failing firm" line, MR. JUSTICE WHITE attempts neither to draw a new one nor to explain why one should be drawn at all.

<sup>13</sup> A former Assistant Attorney General in charge of the Antitrust Division has described Schwinn as "an exercise in barren formalism" that is "artificial and unresponsive to the competitive needs of the real world." Baker, Vertical Restraints in Times of Change: From White to Schwinn to Where?, 44 Antitrust L.J. 537 (1975). See, e.g., Handler, The Twentieth Annual Antitrust Review - 1967, 53 Va. L. Rev. 1667 (1967); McLaren, Territorial and Customer Restrictions, Consignments, Suggested Retail Prices and Refusals to Deal, 37 Antitrust L. J. 137 (1968); Pollock, Alternative Distribution Methods After Schwinn, 63 Nw. U. L. Rev. 595 (1968); Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 Colum. L. Rev. 282 (1975); Robinson, Recent Antitrust Developments: 1974, 75 Colum. L. Rev. 243 (1975); Note, Vertical Territorial and Customer Restrictions in the Franchising Industry, 10 Colum. J. L. & Soc. Prob. 497 (1974); Note, Territorial and Customer Restrictions: A Trend Toward a Broader Rule of Reason?, 40 Geo. Wash. L. Rev. 123 (1971); Note, Territorial Restrictions and Per Se Rules - A Re-evaluation of the Schwinn and Sealy Doctrines, 70 Mich. L. Rev. 616 (1972). But see Louis, Vertical Distributional Restraints Under Schwinn and Sylvania: An Argument for the Continuing Use of a Partial Per Se Approach, 75 Mich. L. Rev. 275 (1976); Zimmerman, Distribution Restrictions After Sealy and Schwinn, 12 Antitrust Bull. 1181 (1967). For a more inclusive list of articles and comments, see [537 F.2d, at 988 n. 13](#).

<sup>14</sup> Indeed, as one commentator has observed, many courts "have struggled to distinguish or limit Schwinn in ways that are a tribute to judicial ingenuity." Robinson, *supra*, n. 13, at 272. Thus, the statement in Schwinn that post-sale vertical restrictions as to customers or territories are "unreasonable without more," [388 U. S., at 379](#), has been interpreted to allow an exception to the per se rule where the manufacturer proves "more" by showing that the restraints will protect consumers against injury and the manufacturer against product liability claims. See, e.g., [Tripoli Co. v. Wella Corp., 425 F.2d 932, 936-938 \(CA3 1970\)](#) (en banc). Similarly, the statement that Schwinn's enforcement of its restrictions had been "firm and resolute," [388 U. S., at 372](#), has been relied upon to distinguish cases lacking that element. See, e.g., [Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398, 406 \(CA2 1968\)](#). Other factual distinctions have been drawn to justify upholding territorial restrictions that would seem to fall within the scope of the Schwinn per se rule. See, e.g., [Carter-Wallace, Inc. v. United States, 196 Ct. Cl. 35, 44-46, 449 F.2d 1374, 1379-1380 \(1971\)](#) (per se rule inapplicable when purchaser can avoid restraints by electing to buy product at higher price); [Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637 \(CA10 1973\)](#) (apparent territorial restriction characterized as primary responsibility clause). One Court of Appeals has expressly urged us to consider the need in this area for greater flexibility. [Adolph Coors Co. v. FTC, 497 F.2d 1178, 1187 \(CA10 1974\)](#). The decision in Schwinn and the developments in the lower courts have been exhaustively surveyed in ABA Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition (1977) (ABA Monograph No. 2).

[\*\*\*\*23] [LEdHN\[3\]](#)<sup>↑</sup> [3][LEdHN\[4\]](#)<sup>↑</sup> [4][LEdHN\[5A\]](#)<sup>↑</sup> [5A][LEdHN\[6A\]](#)<sup>↑</sup> [6A]The traditional framework of analysis under [§ 1](#) of the Sherman Act is familiar and does not require extended discussion. [Section I\\*\\*\\*580](#) [1 HN1](#)<sup>↑</sup> prohibits "[e]very contract, combination..., or conspiracy, in restraint of trade or commerce." Since the early years of this century a judicial gloss on this statutory language has established the "rule of reason" as the prevailing standard of analysis. [Standard Oil Co. v. United States, 221 U. S. 1 \(1911\)](#). Under this rule, the fact-finding weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.<sup>15</sup> [\*\*\*\*25] [HN2](#)<sup>↑</sup> Per se rules of [\*50] illegality [\*\*\*\*24] are appropriate only when they relate to conduct that is manifestly anticompetitive. As the Court explained in [Northern Pac. R. Co. v. United States, 356 U. S. 1, 5 \(1958\)](#), "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."<sup>16</sup>

[LEdHN\[5B\]](#)<sup>↑</sup> [5B][LEdHN\[6B\]](#)<sup>↑</sup> [6B]

In [\*\*\*\*26] essence, the issue before us is whether Schwinn's per se rule can be justified under the demanding standards of Northern Pac. R. Co. The Court's refusal to endorse a per se rule in White Motor Co. was based on its uncertainty as to whether vertical restrictions satisfied those standards. Addressing this question for the first time, the Court stated: S

"We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on' [\*\*2558] competition and lack... any redeeming virtue' ( [Northern Pac. R. Co. v. United States, supra, p. 5](#)) and therefore should [\*51] be classified as per se violations of the Sherman Act." [372 U. S., at 263](#).I

Only four years later the Court in Schwinn announced its sweeping per se rule without even a reference to Northern Pac. R. Co. and with no explanation of its sudden change in position.<sup>17</sup> We turn now to consider Schwinn in light of Northern Pac. R. Co.

<sup>15</sup> One of the most frequently cited statements of the rule of reason is that of Mr. Justice Brandeis in [Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 \(1918\)](#):

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

<sup>16</sup> [HN3](#)<sup>↑</sup> Per se rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, per se rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials, see [Northern Pac. R. Co. v. United States, 356 U.S. 1, 5; United States v. Topco Associates, Inc., 405 U.S. 596, 609-610 \(1972\)](#), but those advantages are not sufficient in themselves to justify the creation of per se rules. If it were otherwise, all of [antitrust law](#) would be reduced to per se rules, thus introducing an unintended and undesirable rigidity in the law.

<sup>17</sup> After White Motor Co., the Courts of Appeals continued to evaluate territorial restrictions according to the rule of reason. [Sandura Co. v. FTC, 339 F.2d 847 \(CA6 1964\)](#); [Snap-On Tools Corp. v. FTC, 321 F.2d 825 \(CA7 1963\)](#). For an exposition of the history of the antitrust analysis of vertical restrictions before Schwinn, see ABA Monograph No. 2, pp. 6-8.

[\*\*\*\*27] The market impact of vertical restrictions<sup>18</sup> is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition. [\*52]<sup>19</sup> Significantly, the Court in Schwinn did not distinguish among the challenged restrictions on the basis of their individual potential for intrabrand harm or interbrand benefit. Restrictions that completely eliminated intrabrand competition among Schwinn distributors were analyzed no differently from those that merely moderated intrabrand competition among retailers. The pivotal factor was the passage of title: All restrictions were held to be per se illegal where title had passed, and all were evaluated and sustained under the rule of reason where it had not. The location restriction at issue here would be subject [\*\*\*582] to the same pattern of analysis under Schwinn.

[\*\*\*\*28] It appears that this distinction between sale and nonsale transactions resulted from the Court's effort to accommodate the perceived intrabrand harm and interbrand benefit of vertical restrictions. The per se rule for sale transactions reflected the view that vertical restrictions are "so obviously destructive" [\*\*2559] of intrabrand competition<sup>20</sup> that their use would "open the door to exclusivity of outlets and limitation of territory [\*53] further than prudence permits." [388 U. S., at 379-380](#).<sup>21</sup> Conversely, the continued adherence to the traditional rule of

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<sup>18</sup> As in Schwinn, we are concerned here only with nonprice vertical restrictions. The per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. As MR. JUSTICE WHITE notes, post, at 69-70, some commentators have argued that the manufacturer's motivation for imposing vertical price restrictions may be the same as for nonprice restrictions. There are, however, significant differences that could easily justify different treatment. In his concurring opinion in White Motor Co. v. United States, MR. JUSTICE BRENNAN noted that, unlike nonprice restrictions, "[r]esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing brands." [372 U.S. 268](#). Professor Posner also recognized that "industrywide resale price maintenance might facilitate cartelizing." Posner, *supra*, n. 13, at 294 (footnote omitted); see R. Posner, *Antitrust: Cases, Economic Notes and Other Materials* 134 (1974); E. Gellhorn, *Antitrust Law* and *Economics* 252 (1976); Note, 10 Colum. J. L. & Soc. Prob., *supra*, n. 13, at 498 n. 12. Furthermore, Congress recently has expressed its approval of a per se analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair trade pricing at the option of the individual States. Consumer Goods Pricing Act of 1975, 89 Stat. 801, amending [15 U.S.C. §§ 1, 45\(a\)](#). No similar expression of congressional intent exists for nonprice restrictions.

<sup>19</sup> Interbrand competition is the competition among the manufacturers of the same generic product - television sets in this case - and is the primary concern of *antitrust law*. The extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacturer. In contrast, intrabrand competition is the competition between the distributors - wholesale or retail - of the product of a particular manufacturer.

The degree of intrabrand competition is wholly independent of the level of interbrand competition confronting the manufacturer. Thus, there may be fierce intrabrand competition among the distributors of a product produced by a monopolist and no intrabrand competition among the distributors of a product produced by a firm in a highly competitive industry. But when interbrand competition exists, as it does among television manufacturers, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product.

<sup>20</sup> The Court did not specifically refer to intrabrand competition, but this meaning is clear from the context.

<sup>21</sup> The Court also stated that to impose vertical restrictions in sale transactions would "violate the ancient rule against restraints on alienation." [388 U. S., at 380](#). This isolated reference has provoked sharp criticism from virtually all of the commentators on the decision, most of whom have regarded the Court's apparent reliance on the "ancient rule" as both a misreading of legal history and a perversion of antitrust analysis. See, e.g., Handler, *supra*, n. 13, at 1684-1686; Posner, *supra*, n. 13, at 295-296; Robinson, *supra*, n. 13, at 270-271; but see Louis, *supra*, n. 13, at 276 n. 6. We quite agree with MR. JUSTICE STEWART's dissenting comment in Schwinn that "the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today." [388 U. S., at 392](#).

We are similarly unable to accept Judge Browning's interpretation of Schwinn. In his dissent below he argued that the decision reflects the view that the Sherman Act was intended to prohibit restrictions on the autonomy of independent businessmen even though they have no impact on "price, quality, and quantity of goods and services," **537 F.2d, at 1019**. This view is certainly not explicit in Schwinn, which purports to be based on an examination of the "impact [of the restrictions] upon the marketplace." [388 U. S., at 374](#). Competitive economies have social and political as well as economic advantages, see e.g., [Northern Pac. R. Co.](#)

reason for nonsale transactions reflected the view that the restrictions have too great a potential for the promotion of interbrand competition to justify complete prohibition.<sup>22</sup> [\*54] The Court's opinion provides no analytical support for these contrasting positions. Nor is there even an assertion in the opinion that the competitive impact of vertical restrictions [\*\*\*583] is significantly affected by the form of the transaction. Nonsale transactions appear to be excluded from the per se rule, not because of a greater danger of intrabrand harm or a greater promise of interbrand benefit, [\*\*\*\*29] but rather because of the Court's unexplained belief that a complete per se prohibition would be too "inflexibl[e]." *Id.*, at 379.

[\*\*\*30] Vertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers. Location restrictions have this effect because of practical constraints on the effective marketing area of retail outlets. Although intrabrand competition may be reduced, the ability of retailers to exploit the resulting market may be limited both by the ability of consumers to travel to other franchised locations and, perhaps more importantly, to purchase the competing products of other manufacturers. None of these key variables, however, is affected by the form of the transaction by which a manufacturer conveys his products to the retailers.

[\*\*2560] Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These "redeeming virtues" are implicit in every decision sustaining vertical restrictions under the rule of reason. Economists have identified a number [\*55] of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers. See, e.g., Preston, Restrictive Distribution [\*\*\*31] Arrangements: Economic Analysis and Public Policy Standards, 30 Law & Contemp. Prob. 506, 511 (1965).<sup>23</sup> For example, new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called "free rider" effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if [\*\*\*584] none did. Posner, *supra*, n. 13, at 285; cf. P. Samuelson, Economics 506-507 (10th ed. 1976).

*v. United States*, 356 U. S., at 4, but an antitrust policy divorced from market considerations would lack any objective benchmarks. As Mr. Justice Brandeis reminded us: "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *Chicago Bd. of Trade v. United States*, 246 U.S., at 238. Although MR. JUSTICE WHITE's opinion endorses Judge Browning's interpretation, post, at 66-68, it purports to distinguish Schwinn on grounds inconsistent with that interpretation, post, at 71.

<sup>22</sup> In that regard, the Court specifically stated that a more complete prohibition "might severely hamper smaller enterprises resorting to reasonable methods of meeting the competition of giants and of merchandising through independent dealers." *388 U.S., at 380*. The Court also broadly hinted that it would recognize additional exceptions to the per se rule for new entrants in an industry and for failing firms, both of which were mentioned in White Motor as candidates for such exceptions. *388 U.S., at 374*. The Court might have limited the exceptions to the per se rule to these situations, which present the strongest arguments for the sacrifice of intrabrand competition for interbrand competition. Significantly, it chose instead to create the more extensive exception for nonsale transactions which is available to all businesses, regardless of their size, financial health, or market share. This broader exception demonstrates even more clearly the Court's awareness of the "redeeming virtues" of vertical restrictions.

<sup>23</sup> Marketing efficiency is not the only legitimate reason for a manufacturer's desire to exert control over the manner in which his products are sold and serviced. As a result of statutory and common-law developments, society increasingly demands that manufacturers assume direct responsibility for the safety and quality of their products. For example, at the federal level, apart from more specialized requirements, manufacturers of consumer products have safety responsibilities under the Consumer Product Safety Act, *15 U.S.C. § 2051 et seq. (1970 ed., Supp. V)*, and obligations for warranties under the Consumer Product Warranties Act, *15 U. S. C. § 2301 et seq. (1970 ed., Supp. V)*. Similar obligations are imposed by state law. See, e.g., *Cal. Civ. Code § 1790 et seq.* (West 1973). The legitimacy of these concerns has been recognized in cases involving vertical restrictions. See, e.g., *Tripoli Co. v. Wella Corp.*, 425 F.2d 932 (CA3 1970).

[\*\*\*\*32] [\*56] Economists also have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division [II]*, 75 Yale L. J. 373, 403 (1966); Posner, *supra*, n. 13, at 283, 287-288.<sup>24</sup> Although the view that the manufacturer's interest necessarily corresponds with that of the public is not universally shared, even the leading critic of vertical restrictions concedes that Schwinn's distinction between sale and nonsale transactions is essentially unrelated to any relevant economic impact. Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath*, 81 Harv. L. Rev. 1419, 1422 (1968).<sup>25</sup> Indeed, to the extent that the form of the transaction is related [\*\*2561] to interbrand benefits, the Court's distinction is inconsistent with its articulated concern for the ability of smaller firms to compete effectively with larger ones. Capital requirements and administrative expenses may prevent smaller firms from using the exception for nonsale transactions. [\*\*\*\*33] See, e.g., Baker, *supra*, n. 13, at 538; Phillips, *Schwinn Rules and the "New Economics" of Vertical* [\*57] *Relation*, 44 Antitrust L. J. 573, 576 (1975); Pollock, *supra*, n. 13, at 610.<sup>26</sup>

[\*\*\*\*34] [LEdHN\[7\]\[↑\]](#) [7][HN4\[↑\]](#)

We conclude that the distinction drawn in Schwinn between sale and nonsale transactions is not sufficient to justify the application of a per se rule in one situation and a rule of reason in the other. The question remains whether the per se rule stated in Schwinn should be expanded to include nonsale transactions or abandoned in favor of a return to the rule of reason. We have found no persuasive support for expanding the per se rule. As noted above, the Schwinn Court recognized the undesirability of "prohibit[ing] all vertical restrictions of territory and all franchising...."  
[388 U. S., at 379-380.](#)<sup>27</sup> [\*\*585] And even Continental does not urge us to hold that all such restrictions are per se illegal.

[\*\*\*\*35] [LEdHN\[8\]\[↑\]](#) [8][LEdHN\[9A\]\[↑\]](#) [9A][LEdHN\[10A\]\[↑\]](#) [10A][LEdHN\[11A\]\[↑\]](#) [11A][LEdHN\[12A\]\[↑\]](#) [12A][LEdHN\[13\]\[↑\]](#) [13]We revert to the standard articulated in Northern Pac. R. Co., and reiterated in White Motor, for determining whether vertical restrictions must be "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."  
[356 U. S., at 5.](#) Such restrictions, in varying forms, are widely used in our free market economy. As indicated above, there is substantial scholarly and judicial authority [\*58] supporting their economic utility. There is relatively little authority to the contrary.<sup>28</sup> [\*\*\*\*37] Certainly, there has been no showing in this case, either generally or with

<sup>24</sup> "Generally a manufacturer would prefer the lowest retail price possible, once its price to dealers has been set, because a lower retail price means increased sales and higher manufacturer revenues." Note, 88 Harv. L. Rev. 636, 641 (1975). In this context, a manufacturer is likely to view the difference between the price at which it sells to its retailers and their price to the consumer as its "cost of distribution," which it would prefer to minimize. Posner, *supra*, n. 13, at 283.

<sup>25</sup> Professor Comanor argues that the promotional activities encouraged by vertical restrictions result in product differentiation and, therefore, a decrease in interbrand competition. This argument is flawed by its necessary assumption that a large part of the promotional efforts resulting from vertical restrictions will not convey socially desirable information about product availability, price, quality, and services. Nor is it clear that a per se rule would result in anything more than a shift to less efficient methods of obtaining the same promotional effects.

<sup>26</sup> We also note that per se rules in this area may work to the ultimate detriment of the small businessmen who operate as franchisees. To the extent that a per se rule prevents a firm from using the franchise system to achieve efficiencies that it perceives as important to its successful operation, the rule creates an incentive for vertical integration into the distribution system, thereby eliminating to that extent the role of independent businessmen. See, e.g., Keck, *The Schwinn Case*, 23 Bus. Law. 669 (1968); Pollock, *supra*, n. 13, at 608-610.

<sup>27</sup> Continental's contention that balancing intrabrand and interbrand competitive effects of vertical restrictions is not a "proper part of the judicial function," Brief for Petitioners 52, is refuted by Schwinn itself. [United States v. Topco Associates, Inc., 405 U.S., at 608](#), is not to the contrary, for it involved a horizontal restriction among ostensible competitors.

respect to Sylvania's agreements, [\*\*\*\*36] that vertical restrictions have or are likely to have a "pernicious effect on competition" or that they "lack... any redeeming virtue." *Ibid.*<sup>29</sup> Accordingly, [HN5](#) we conclude [\*\*2562] that the per se rule stated in *Schwinn* must be overruled.<sup>30</sup> In so holding we do not foreclose the possibility that particular applications of vertical restrictions might justify per se prohibition under *Northern Pac. R. Co.* But we do make clear that departure from the rule-of-reason standard [\*59] must be based upon demonstrable economic effect rather than - as in *Schwinn* - upon formalistic line drawing.

[LEdHN\[9B\]](#) [↑] [9B] [LEdHN\[10B\]](#) [↑] [10B] [LEdHN\[11B\]](#) [↑] [11B] [LEdHN\[12B\]](#) [↑] [12B]

[\*\*\*\*38] [LEdHN\[14\]](#) [↑] [14]In sum, we conclude that the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to *Schwinn*. [HN6](#) When anticompetitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive [\*\*\*586] practices challenged under [§ 1](#) of the Act. Accordingly, the decision of the Court of Appeals is

Affirmed.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

**Concur by:** WHITE

## Concur

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MR. JUSTICE WHITE, concurring in the judgment.

Although I agree with the majority that the location clause at issue in this case is not a per se violation of the Sherman Act and should be judged under the rule of reason, I cannot agree that this result requires the overruling of *United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)*. In my view this case is distinguishable from *Schwinn* because there is less potential for restraint of intrabrand competition and more potential for stimulating interbrand competition. [\*\*\*\*39] As to intrabrand competition, Sylvania, unlike *Schwinn*, did not restrict the customers to whom or the territories where its purchasers could sell. As to interbrand competition, Sylvania, unlike *Schwinn*, had an insignificant market share at the time it adopted its challenged distribution practice and enjoyed no consumer preference that would allow its retailers to charge a premium over other brands. In two short paragraphs, the majority disposes of the view, adopted after careful analysis by the Ninth Circuit en banc below, that these differences provide a "principled basis for distinguishing *Schwinn*," ante, at 46, despite holdings by three Courts of

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<sup>28</sup> There may be occasional problems in differentiating vertical restrictions from horizontal restrictions originating in agreements among the retailers. There is no doubt that restrictions in the latter category would be illegal per se, see, e.g., *United States v. General Motors Corp., 384 U.S. 127 (1966); United States v. Topco Associates, Inc., supra*, but we do not regard the problems of proof as sufficiently great to justify a per se rule.

<sup>29</sup> The location restriction used by Sylvania was neither the least nor the most restrictive provision that it could have used. See ABA Monograph No. 2, pp. 20-25. But we agree with the implicit judgment in *Schwinn* that a per se rule based on the nature of the restriction is, in general, undesirable. Although distinctions can be drawn among the frequently used restrictions, we are inclined to view them as differences of degree and form. See *Robinson, supra*, n. 13, at 279-280; *Averill, Sealy, Schwinn and Sherman One: An Analysis and Prognosis*, 15 N. Y. L. F. 39, 65 (1969). We are unable to perceive significant social gain from channeling transactions into one form or another. Finally, we agree with the Court in *Schwinn* that the advantages of vertical restrictions should not be limited to the categories of new entrants and failing firms. Sylvania was faltering, if not failing, and we think it would be unduly artificial to deny it the use of valuable competitive tools.

<sup>30</sup> The importance of stare decisis is, of course, unquestioned, but as Mr. Justice Frankfurter stated in *Helvering v. Hallock, 309 U. S. 106, 119 (1940)*, "STARE DECISIS is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

Appeals and the District Court on remand in Schwinn that [\*60] the per se rule established in that case does not apply to location clauses such as Sylvania's. To reach out to overrule one of this Court's recent interpretations of the Sherman Act, after such a cursory examination of the necessity for doing so, is surely an affront to the principle that considerations of stare decisis are to be given particularly strong weight in the area of statutory construction. [Illinois Brick Co. v. Illinois, 431 U.S. 720, 736-737 \(1977\)](#); [\*\*\*\*40] [Runyon v. McCrary, 427 U.S. 160, 175 \(1976\)](#); [Edelman v. Jordan, 415 U.S. 651, 671 \(1974\)](#).

One element of the system of interrelated vertical restraints invalidated in Schwinn was a retail-customer restriction prohibiting franchised retailers from selling Schwinn products to nonfranchised retailers. The Court rests its inability to distinguish Schwinn entirely on this retail-customer restriction, finding it "[i]n intent and competitive [\*\*2563] impact... indistinguishable from the location restriction in the present case," because "[i]n both cases the restrictions limited the freedom of the retailer to dispose of the purchased products as he desired." Ante, at 46. The customer restriction may well have, however, a very different "intent and competitive impact" than the location restriction: It prevents discount stores from getting the manufacturer's product and thus prevents intrabrand price competition. Suppose, for example, that interbrand competition is sufficiently [\*\*\*587] weak that the franchised retailers are able to charge a price substantially above wholesale. Under a location restriction, these franchisers are free to sell to discount [\*\*\*\*41] stores seeking to exploit the potential for sales at prices below the prevailing retail level. One of the franchised retailers may be tempted to lower its price and act in effect as a wholesaler for the discount house in order to share in the profits to be had from lowering prices and expanding volume.<sup>1</sup>

[\*61] Under a retail customer restriction, on the other hand, the franchised dealers cannot sell to discounters, who are cut off altogether from the manufacturer's product and the opportunity for intrabrand price competition. This was precisely the theory on which the Government successfully challenged Schwinn's customer restrictions in this Court. The District Court in that case found that "[e]ach one of [Schwinn's franchised retailers] knows also that he is not [\*\*\*\*42] a wholesaler and that he cannot sell as a wholesaler or act as an agent for some other unfranchised dealer, such as a discount house retailer who has not been franchised as a dealer by Schwinn." [237 F.Supp. 323, 333 \(ND Ill. 1965\)](#). The Government argued on appeal, with extensive citations to the record, that the effect of this restriction was "to keep Schwinn products out of the hands of discount houses and other price cutters so as to discourage price competition in retailing...." Brief for United States O. T. 1966. No. 25 P. 26 See *id.*, at 29-37.<sup>2</sup>

[\*\*\*\*43] It is true that, as the majority states, Sylvania's location restriction inhibited to some degree "the freedom of the retailer to dispose of the purchased products" by requiring the retailer to sell from one particular place of business. But the retailer is still free to sell to any type of customer - including discounters and other unfranchised dealers - from any area. I think this freedom implies a significant difference for the effect of a location clause on intrabrand competition. The [\*62] District Court on remand in Schwinn evidently thought so as well, for after enjoining Schwinn's customer restrictions as directed by this Court it expressly sanctioned location clauses, permitting Schwinn to "designat[e] in its retailer franchise agreements the location of the place or places of business for which the franchise is issued." [291 F.Supp. 564, 565-566 \(ND Ill. 1968\)](#).

An additional basis for finding less restraint of intrabrand competition in this case, emphasized by the Ninth Circuit en banc, is that Schwinn involved restrictions on competition among distributors at the [\*\*2564] wholesale level. As Judge Ely [\*\*\*588] wrote for the six-member majority [\*\*\*\*44] below: S

<sup>1</sup> The franchised retailers would be prevented from engaging in discounting themselves if, under the Colgate doctrine, see *infra*, at 67, the manufacturer could lawfully terminate dealers who did not adhere to his suggested retail price.

<sup>2</sup> Given the Government's emphasis on the inhibiting effect of the Schwinn restrictions on discounting activities, the Court may well have been referring to this effect when it condemned the restrictions as "obviously destructive of competition." [388 U. S., at 379](#). But the Court was also heavily influenced by its concern for the freedom of dealers to control the disposition of products they purchased from Schwinn. See *infra*, at 66-69. In any event, the record in Schwinn illustrates the potentially greater threat to intrabrand competition posed by customer as opposed to location restrictions.

"[Schwinn] had created exclusive geographical sales territories for each of its 22 wholesaler bicycle distributors and had made each distributor the sole Schwinn outlet for the distributor's designated area. Each distributor was prohibited from selling to any retailers located outside its territory....

"... Schwinn's territorial restrictions requiring dealers to confine their sales to exclusive territories prescribed by Schwinn prevented a dealer from competing for customers outside his territory.... Schwinn's restrictions guaranteed each wholesale distributor that it would be absolutely isolated from all competition from other Schwinn wholesalers." 537 F.2d 980, 989-990 (1976).I

Moreover, like its franchised retailers, Schwinn's distributors were absolutely barred from selling to nonfranchised retailers, further limiting the possibilities of intrabrand price competition.

The majority apparently gives no weight to the Court of Appeals' reliance on the difference between the competitive effects of Sylvania's location clause and Schwinn's interlocking "system of vertical restraints affecting both wholesale and retail distribution." *Id.*, at 989. [\*\*\*\*45] It also ignores post-Schwinn [\*63] decisions of the Third and Tenth Circuits upholding the validity of location clauses similar to Sylvania's here. *Salco Corp. v. General Motors Corp.*, 517 F.2d 567 (CA10 1975); *Kaiser v. General Motors Corp.*, 530 F.2d 964 (CA3 1976), aff'g 396 F.Supp. 33 (ED Pa. 1975). Finally, many of the scholarly authorities the majority cites in support of its overruling of Schwinn have not had to strain to distinguish location clauses from the restrictions invalidated there. E.g., Robinson, Recent Antitrust Developments: 1974, 75 Colum. L. Rev. 243, 278 (1975) (outcome in Sylvania not preordained by Schwinn because of marked differences in the vertical restraints in the two cases); McLaren, Territorial and Customer Restrictions, Consignments, Suggested Retail Prices and Refusals to Deal, 37 Antitrust L. J. 137, 144-145 (1968) (by implication Schwinn exempts location clauses from its per se rule); Pollock, Alternative Distribution Methods After Schwinn, 63 Nw. U. L. Rev. 595, 603 (1968) ("Nor does the Schwinn doctrine outlaw the use of a so-called 'location clause'...").

[\*\*\*\*46] Just as there are significant differences between Schwinn and this case with respect to intrabrand competition, there are also significant differences with respect to interbrand competition. Unlike Schwinn, Sylvania clearly had no economic power in the generic product market. At the time they instituted their respective distribution policies, Schwinn was "the leading bicycle producer in the Nation," with a national market share of 22.5%, *388 U. S., at 368, 374*, whereas Sylvania was a "faltering, if not failing" producer of television sets, with "a relatively insignificant 1% to 2%" share of the national market in which the dominant manufacturer had a 60% to 70% share. Ante, at 38, 58 n. 29. Moreover, the Schwinn brand name enjoyed superior consumer acceptance and commanded a premium price as, in the [\*\*\*589] District Court's words, "the Cadillac of the bicycle industry." *237 F.Supp., at 335*. This premium gave Schwinn dealers a margin of [\*64] protection from interbrand competition and created the possibilities for price cutting by discounters that the Government argued were forestalled by Schwinn's customer restrictions. <sup>3</sup> Thus, judged [\*\*\*\*47] by the criteria [\*\*2565] economists use to measure market power - product differentiation and market share <sup>4</sup> - Schwinn enjoyed a substantially stronger position in the bicycle market than did Sylvania in the television market. This Court relied on Schwinn's market position as one reason not to apply the rule of reason to the vertical restraints challenged there. "Schwinn was not a newcomer, seeking to break into or stay in the bicycle business. It was not a 'failing company.' On the contrary, at the initiation of these practices, it was the leading bicycle producer in the Nation." *388 U. S., at 374*. And the Court of Appeals below found "another significant distinction between our case and Schwinn" in Sylvania's "precarious market share," which

<sup>3</sup> Relying on the finding of the District Court, the Government argued:

"[T]he declared purpose of the Schwinn franchising system [was] to establish and exploit a distinctive identity and superior consumer acceptance for the Schwinn brand name as the Cadillac of bicycles, thereby enabling the charging of a premium price.... This scheme could not possibly succeed, and doubtless would long ago have been abandoned, if in the consumer's mind other bicycles were just as good as Schwinn's." Brief for United States, O.T. 1966, No. 25, p. 36.

<sup>4</sup> See, e.g., F. Scherer, Industrial Market Structure and Economics Performance 10-11 (1970); P. Samuelson, Economics 485-491 (10th ed. 1976).

"was so small when it adopted its locations practice that it was threatened with expulsion from the television market." 537 F.2d, at 991.<sup>5</sup>

[\*\*\*\*48] [\*65] In my view there are at least two considerations, both relied upon by the majority to justify overruling Schwinn, that would provide a "principled basis" for instead refusing to extend Schwinn to a vertical restraint that is imposed by a "faltering" manufacturer with a "precarious" position in a generic product market dominated by another firm. The first is that, as the majority puts it, "when interbrand competition exists, as it does among television manufacturers, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." Ante, at 52 n. 19. See also ante, at 54.<sup>6</sup> Second is the view, argued forcefully in the economic literature cited by the majority, that the potential benefits of vertical restraints in promoting interbrand [\*\*\*590] competition are particularly strong where the manufacturer imposing the restraints is seeking to enter a new market or to expand a small market share. Ibid.<sup>7</sup> The majority even recognizes that Schwinn "hinted" at an exception for new entrants and failing firms from its per se rule. Ante, at 53-54, n. 22.

[\*\*\*\*49] In other areas of antitrust law, this Court has not hesitated to base its rules of per se illegality in part on the defendant's market power. Indeed, in the very case from which the majority draws its standard for per se rules, Northern Pac. R. Co. v. United States, 356 U. S. 1, 5 (1958), the [\*66] Court stated the reach of the per se rule against tie-ins under § 1 of the Sherman Act as extending to all defendants with "sufficient economic power with respect to the tying product to appreciably restrain free competition in the [\*\*2566] market for the tied product...."  
356 U. S., at 6. And the Court subsequently approved an exception to this per se rule for "infant industries" marketing a new product. United States v. Jerrold Electronics Corp., 187 F.Supp. 545 (ED Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961). See also United States v. Philadelphia Nat. Bank, 374 U.S. 321, 363 (1963), where the Court held presumptively illegal a merger "which produces a firm controlling an undue percentage share of the relevant market...." I see no doctrinal obstacle to excluding firms with such minimal market power [\*\*\*\*50] as Sylvania's from the reach of the Schwinn rule.<sup>8</sup>

[\*\*\*\*51] I have, moreover, substantial misgivings about the approach the majority takes to overruling Schwinn. The reason for the distinction in Schwinn between sale and nonsale transactions was not, as the majority would have it, "the Court's effort to accommodate the perceived intrabrand harm and interbrand benefit of vertical restrictions," ante, at 52; the reason was rather, as Judge Browning argued in dissent below, the notion in many of our cases

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<sup>5</sup> Schwinn's national market share declined to 12.8% in the 10 years following the institution of its distribution program, at which time it ranked second behind a firm with a 22.8% share. 388 U. S., at 368-369. In the three years following the adoption of its locations practice, Sylvania's national market share increased to 5%, placing it eighth among manufacturers of color television sets. Ante, at 38-39. At this time Sylvania's shares of the San Francisco, Sacramento, and northern California markets were respectively 2.5%, 15%, and 5%. Ante, at 39 nn. 4, 6. The District Court made no findings as to Schwinn's share of local bicycle markets.

<sup>6</sup> For an extensive discussion of this effect of interbrand competition, see ABA Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition 60-67 (1977).

<sup>7</sup> Preston, Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards, 30 Law & Contemp. Prob. 506, 511 (1965); Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 Colum. L. Rev. 282, 293 (1975); Scherer, *supra*, n. 4, at 510.

<sup>8</sup> Cf. Sandura Co. v. FTC, 339 F.2d 847, 850 (CA6 1964) (territorial restrictions on distributors imposed by small manufacturer "competing with and losing ground to the 'giants' of the floor-covering industry" is not per se illegal); Baker, Vertical Restraints in Times of Change: From White to Schwinn to Where?, 44 Antitrust L.J. 537, 545-547 (1975) (presumptive illegality of territorial restrictions imposed by manufacturer with "any degree of market power"). The majority's failure to use the market share of Schwinn and Sylvania as a basis for distinguishing these cases is the more anomalous for its reliance, see *infra*, at 68-70, on the economic analysis of those who distinguish the anticompetitive effects of distribution restraints on the basis of the market shares of the distributors. See Posner, *supra*, at 299; Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division [II], 75 Yale L. J. 373, 391-429 (1966).

involving vertical restraints that independent [\*67] businessmen should have the freedom to dispose of the goods they own as they see fit. Thus the first case cited by the Court in Schwinn for the proposition that "restraints upon alienation... are beyond the power of the manufacturer to impose upon [\*\*\*591] its vendees and... are violations of § 1 of the Sherman Act," [388 U. S., at 377](#), was this Court's seminal decision holding a series of resale-price-maintenance agreements per se illegal, [Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 \(1911\)](#). In Dr. Miles the Court stated that "a general restraint upon alienation is ordinarily invalid," citing Coke on Littleton, and emphasized that the [\*\*\*\*52] case involved "agreements restricting the freedom of trade on the part of dealers who own what they sell." [Id., at 404, 407-408](#). Mr. Justice Holmes stated in dissent: "If [the manufacturer] should make the retail dealers also agents in law as well as in name and retain the title until the goods left their hands I cannot conceive that even the present enthusiasm for regulating the prices to be charged by other people would deny that the owner was acting within his rights." [Id., at 411](#).

This concern for the freedom of the businessman to dispose of his own goods as he sees fit is most probably the explanation for two subsequent cases in which the Court allowed manufacturers to achieve economic results similar to that in Dr. Miles where they did not impose restrictions on dealers who had purchased their products. In [United States v. Colgate & Co., 250 U. S. 300 \(1919\)](#), the Court found no antitrust violation in a manufacturer's policy of refusing to sell to dealers who failed to charge the manufacturer's suggested retail price and of terminating dealers who did not adhere to that price. It stated that the Sherman Act did not "restrict the [\*\*\*\*53] long recognized right of trader or manufacturer engaged in an entirely private [\*\*2567] business, freely to exercise his own independent discretion as to parties with whom he will deal." [Id., at 307](#). In [United States v. General Electric Co., 272 U.S. 476 \(1926\)](#), the Court upheld resale-price-maintenance [\*68] agreements made by a patentee with its dealers who obtained its goods on a consignment basis. The Court distinguished Dr. Miles on the ground that the agreements there were "contracts of sale rather than of agency" and involved "an attempt by the Miles Medical Company... to hold its purchasers, after the purchase at full price, to an obligation to maintain prices on a resale by them." [272 U. S., at 487](#). By contrast, a manufacturer was free to contract with his agents to "[fix] the price by which his agents transfer the title from him directly to [the] consumer... however comprehensive as a mass or whole in [the] effect [of these contracts]." [Id., at 488](#). Although these two cases have been called into question by subsequent decisions, see [United States v. Parke, Davis & Co., 362 U.S. 29 \(1960\)](#), [\*\*\*\*54] and [Simpson v. Union Oil Co., 377 U. S. 13 \(1964\)](#), their rationale runs through our case law in the area of distributional restraints. In Kiefer-Stewart Co. v. Joseph E. [Seagram & Sons, 340 U. S. 211, 213 \(1951\)](#), the Court held that an agreement to fix resale prices was per se illegal under § 1 because "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell [\*\*\*592] in accordance with their own judgment." Accord, [Albrecht v. Herald Co., 390 U. S. 145, 152 \(1968\)](#). See generally Judge Browning's dissent below, 537 F.2d, at 1018-1022; ABA Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition 29-31, 82-83, 87-91, 96-97 (1977); Blake & Jones, Toward a Three-Dimensional Antitrust Policy, 65 Colum. L. Rev. 422, 427-436 (1965).

After summarily rejecting this concern, reflected in our interpretations of the Sherman Act, for "the autonomy of independent businessmen," ante, at 53 n. 21, the majority not surprisingly finds "no justification" for Schwinn's distinction between sale and nonsale transactions [\*\*\*\*55] because the distinction is "essentially unrelated to any relevant economic impact." Ante, at 56. But while according some weight to the businessman's [\*69] interest in controlling the terms on which he trades in his own goods may be anathema to those who view the Sherman Act as directed solely to economic efficiency,<sup>9</sup> this principle is without question more deeply embedded in our cases than the notions of "free rider" effects and distributional efficiencies borrowed by the majority from the "new economics of vertical relationships." Ante, at 54-57. Perhaps the Court is right in partially abandoning this principle and in judging the instant nonprice vertical restraints solely by their "relevant economic impact"; but the precedents which reflect this principle should not be so lightly rejected by the Court. The rationale of Schwinn are no doubt difficult to discern from the opinion, and it may be wrong; it is not, however, the aberration the majority makes it out to be here.

[\*\*\*\*56] I have a further reservation about the majority's reliance on "relevant economic impact" as the test for retaining per se rules regarding vertical restraints. It is common ground among the leading advocates of a purely

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<sup>9</sup> E.g., Bork, Legislative Intent and the Policy of the Sherman Act, 9 J. Law & Econ. 7 (1966); Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division [I], 74 Yale L. J. 775 (1965).

economic approach to the question of distribution restraints that the economic arguments in favor of allowing vertical nonprice restraints generally apply to vertical price restraints as well.<sup>10</sup> Although [\*70] [\*\*2568] the majority asserts that "the per se illegality of price restrictions... involves significantly different questions of analysis and policy," ante, at 51 n. 18, I suspect this purported distinction may be as difficult to justify as that of Schwinn under the terms of the majority's analysis. Thus Professor Posner, in an article cited five times by the majority, concludes: "I believe that the law should treat price and nonprice restrictions the same and that it should make no distinction [\*\*\*593] between the imposition of restrictions in a sale contract and their imposition in an agency contract." Posner, *supra*, n. 7, at 298. Indeed, the Court has already recognized that resale price maintenance may increase output by inducing "demand [\*\*\*\*57] creating activity" by dealers (such as additional retail outlets, advertising and promotion, and product servicing) that outweighs the additional sales that would result from lower prices brought about by dealer price competition. *Albrecht v. Herald Co., supra, at 151 n. 7*. These same output-enhancing possibilities of nonprice vertical restraints are relied upon by the majority as evidence of their social utility and economic soundness, ante, at 55, 57-58, and as a justification for judging them under the rule of reason. The effect, if not the intention, of the Court's opinion is necessarily to call into question the firmly established per se rule against price restraints.

[\*\*\*\*58] Although the case law in the area of distributional restraints has perhaps been less than satisfactory, the Court would do well to proceed more deliberately in attempting to improve it. In view of the ample reasons for distinguishing Schwinn from this case and in the absence of contrary congressional action, I would adhere to the principle that S

"each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and... the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions [\*71] is to be applied." *Maple Flooring Mfrs. Assn. v. United States*, 268 U.S. 563, 579 (1925).I

In order to decide this case, the Court need only hold that a location clause imposed by a manufacturer with negligible economic power in the product market has a competitive impact sufficiently less restrictive than the Schwinn restraints to justify a rule-of-reason standard, even if the same weight is given here as in Schwinn to dealer autonomy. I therefore concur in the judgment. [\*\*\*\*59]

**Dissent by:** BRENNAN

## Dissent

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MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I would not overrule the per se rule stated in *United States v. Arnold, Schwinn & Co.*, 388 U. S. 365 (1967), and would therefore reverse the decision of the Court of Appeals for the Ninth Circuit.

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<sup>10</sup> Professor Posner writes, for example:

"There is no basis for choosing between [price fixing and market division] on social grounds. If resale price maintenance is like dealer price fixing, and therefore bad, a manufacturer's assignment of exclusive sales territories is like market division, and therefore bad too....

"[If helping new entrants break into a market] is a good justification for exclusive territories, it is an equally good justification for resale price maintenance, which as we have seen is simply another method of dealing with the free-rider problem.... In fact, any argument that can be made on behalf of exclusive territories can also be made on behalf of resale price maintenance." Posner, *supra*, n. 7, at 292-293. (Footnote omitted.)

See Bork, *supra*, n. 8, at 391-464.

## References

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21 Am Jur Trials 453, Franchise Litigation

[15 USCS 1](#)

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Federal Quick Index, Monopolies and Restraints of Trade

Annotation References:

Validity under federal antitrust laws of agreement conferring exclusive sales agency for designated territory. [9 L Ed 2d 1235.](#)

Vertical territorial and customer restraints as per se violations [\*\*\*\*60] of 1 of the Sherman Act ([15 USCS 1](#)). Post-Schwinn cases. 30 ALR Fed 19.

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## Vendo Co. v. Lektro-Vend Corp.

Supreme Court of the United States

Argued January 19, 1977 ; June 29, 1977; as amended Petition for Rehearing Denied October 3, 1977

No. 76-156

**Reporter**

433 U.S. 623 \*; 97 S. Ct. 2881 \*\*; 53 L. Ed. 2d 1009 \*\*\*; 1977 U.S. LEXIS 25 \*\*\*\*; 1977-1 Trade Cas. (CCH) P61,497

VENDO CO. v. LEKTRO-VEND CORP. ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**Disposition:** The court reversed the judgment.

## **Core Terms**

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injunction, federal court, state-court, proceedings, state court, Clayton Act, anti-injunction, authorize, enjoin, express authorization, antitrust, intended scope, Anti-Injunction Act, plurality, Appeals, anti trust law, antitrust violation, legislative history, federal policy, courts, violation of antitrust laws, injunctive relief, Sherman Act, covenant, rights, Manufacturing, principles, patent, restraint of trade, compete

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Federal & State Interrelationships > Anti-Injunction Act > Exceptions

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Anti-Injunction Act > General Overview

### **HN1** **Anti-Injunction Act, Exceptions**

See [28 U.S.C.S. § 2283](#).

Civil Procedure > ... > Federal & State Interrelationships > Anti-Injunction Act > Exceptions

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Anti-Injunction Act > General Overview

### **HN2** **Anti-Injunction Act, Exceptions**

I HHÁNEJÀ GHÀÀ GHÀÀ JUÈDÀG Ì FÄÄG Ì FLÄ HÄSEØAÈGÀÄEEJÄEEJÄFJÌ JÄMÈSØYQÀÄEEF

The Anti-Injunction Act, [28 U.S.C.S. § 2283](#), is an absolute prohibition against any injunction of any state-court proceedings, unless the injunction falls within one of the three specifically defined exceptions in the Act.

Civil Procedure > ... > Federal & State Interrelationships > Anti-Injunction Act > Exceptions

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Anti-Injunction Act > General Overview

### [\*\*HN3\*\*](#) Anti-Injunction Act, Exceptions

Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The cautious approach is mandated by the explicit wording of [28 U.S.C.S. § 2283](#) and the fundamental principle of a dual system of courts. The prohibition is not to be whittled away by judicial improvisation.

Antitrust & Trade Law > Clayton Act > General Overview

### [\*\*HN4\*\*](#) Antitrust & Trade Law, Clayton Act

See [15 U.S.C.S. § 26](#).

Civil Procedure > ... > Federal & State Interrelationships > Anti-Injunction Act > Exceptions

Governments > Federal Government > US Congress

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Anti-Injunction Act > General Overview

### [\*\*HN5\*\*](#) Anti-Injunction Act, Exceptions

In order to qualify as an "expressly authorized" exception to the Anti-Injunction Act, [28 U.S.C.S. § 2283](#), an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding. The test is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.

## **Lawyers' Edition Display**

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### **Summary**

Shortly after a corporation which had acquired most of the assets of another corporation brought an action in an Illinois state court seeking recovery for breach of covenants not to compete which the acquired corporation and one of its stockholders had entered into as part of the acquisition agreement, the acquired corporation, its stockholder, and another brought an action in the United States District Court for the Northern District of Illinois, alleging that the covenants against competition were unreasonable restraints of trade violative of the Sherman Act ([15 USCS 1 et seq.](#)). Ultimately, after nine years of litigation in the state courts (see [105 Ill App 2d 261](#), [245 NE2d 263](#), and [13 Ill](#)

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App 3d 291, 300 NE2d 632), the Supreme Court of Illinois affirmed a judgment in favor of the acquiring company for some \$ 7,000,000 (see 58 Ill 2d 289, 321 NE2d 1), and the plaintiffs in the Federal District Court antitrust action moved for a preliminary injunction against collection of the state court judgment that had been rendered against them. The District Court granted the motion, finding that the covenants against competition were overly broad and that the acquiring corporation's activities in the state litigation were not a genuine attempt to use the adjudicative process legitimately. The District Court held that injunctive relief was not barred by the Anti-Injunction Act (28 USCS 2283)--which prohibits a federal court from granting an injunction staying state court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments"--since 16 of the Clayton Act (15 USCS 26), which authorizes private injunctive relief in federal courts against threatened loss or damage from antitrust violations, constituted an express exception by Act of Congress to the Anti-Injunction Act, and since an injunction was necessary to protect the jurisdiction of the court in view of the fact that collection of the state court judgment would, in effect, eliminate two of the three plaintiffs in the federal action (403 F Supp 527). On appeal, the United States Court of Appeals for the Seventh Circuit affirmed, holding that 16 of the Clayton Act was an express exception by Act of Congress to the Anti-Injunction Act (545 F2d 1050).

On certiorari, the United States Supreme Court reversed and remanded. Although unable to agree on an opinion, five members of the court agreed that the District Court had erred in granting injunctive relief.

Rehnquist, J., announced the judgment of the court, and in an opinion joined by Stewart and Powell, JJ., expressed the view that 16 of the Clayton Act did not qualify under the "expressly authorized by Act of Congress" exception to the Anti-Injunction Act, and that the District Court's injunction was not "necessary in aid of its jurisdiction" for purposes of the Anti-Injunction Act.

Blackmun, J., joined by Burger, Ch. J., concurring in the result, expressed the view that 16 of the Clayton Act was an "expressly authorized by Act of Congress" exception to the Anti-Injunction Act under narrowly limited circumstances, but that, nevertheless, 16 did not authorize the District Court's injunction in the case at bar, since the state court proceeding, in and of itself, was not part of a pattern of baseless, repetitive claims used as an anticompetitive device.

Stevens, J., joined by Brennan, White, and Marshall, JJ., dissented, expressing the view that an injunction under 16 of the Clayton Act was within the "expressly authorized by Act of Congress" exception to the Anti-Injunction Act, that the District Court's injunction was authorized under 16, and that such injunction was not barred under principles of equity, comity, and federalism.

## **Headnotes**

COURTS §697 > MONOPOLIES §68 > federal court injunction -- collection of state court judgment -- > Headnote:  
[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C]

The United States Supreme Court will hold that under the Anti-Injunction Act ([28 USCS 2283](#)), providing that a federal court may not grant an injunction to stay proceedings in a state court "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments," a Federal District Court, in an action wherein the plaintiffs alleged that covenants against competition that had been entered into with the defendant were violative of federal antitrust laws, cannot preliminarily enjoin--pursuant to 16 of the Clayton Act ([15 USCS 26](#)), which authorizes private injunctive relief in federal courts against threatened loss or damage from antitrust violations--the collection of a state court judgment against the federal plaintiffs which had been rendered in a state court action brought by the federal defendant for breach of the covenants against competition, where (1) three Justices of the Supreme Court are of the view that, for purposes of the Anti-Injunction Act, 16 of the Clayton Act is not within the "expressly authorized by Act of Congress" exception and that an injunction by the District Court is not "necessary in aid of its jurisdiction," and (2) two other Justices are of the view that 16 of the Clayton Act is

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within the "expressly authorized by Act of Congress" exception to the Anti-Injunction Act under narrowly limited circumstances not present in the case at bar. [Per Rehnquist, J., Stewart, J., Powell, J., Blackmun, J., and Burger, Ch. J. Dissenting: Stevens, Brennan, White, and Marshall, JJ.]

COURTS §700.5 > Anti-Injunction Act -- Clayton Act provision as exception -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

For purposes of the Anti-Injunction Act ([28 USCS 2283](#)), prohibiting federal courts from granting injunctions staying state court proceedings "except as expressly authorized by Act of Congress," 16 of the Clayton Act ([15 USCS 26](#))--which authorizes private injunctive relief in federal courts against threatened loss or damage from antitrust violations--is, at least under some circumstances, an "expressly authorized" exception. [Per Blackmun, J., Burger, Ch. J., Stevens, J., Brennan, J., White, J., and Marshall, J. Contra: Rehnquist, Stewart, and Powell, JJ.]

## Syllabus

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Petitioner vending machine manufacturer acquired most of the assets of another vending machine manufacturing company controlled by respondent Stoner and his family. As part of the acquisition agreement the latter company undertook to refrain from owning or managing any business engaged in the manufacture or sale of vending machines, and respondent Stoner, who was employed by petitioner as a consultant under a 5-year contract, agreed not to compete with petitioner in the manufacture of such machines during the term of his contract and for five years thereafter. Subsequently, petitioner sued respondents (Stoner, the company which he and his family controlled, and another corporation with which he had a relationship) in a Illinois state court for breach of the noncompetition covenants. Shortly thereafter, respondents sued petitioner in Federal District Court, alleging that it had violated §§ 1 and 2 of the Sherman Act in that the covenant against competition was an unreasonable restraint of trade. After protracted litigation [\*\*\*2] in the state-court action, the Illinois Supreme Court affirmed a judgment in petitioner's favor in an amount exceeding \$7 million. Then in the antitrust action, which, in the meantime, had lain "dormant," the District Court granted respondents' motion for a preliminary injunction against collection of the Illinois judgment, holding that § 16 of the Clayton Act (which authorizes any person to seek injunctive relief against violations of the antitrust laws) constituted an "expressly authorized" exception to the Anti-Injunction Act, [28 U.S.C. § 2283](#) (which prohibits a federal court from enjoining state-court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments"), and further found that an injunction was necessary to protect the court's jurisdiction within the meaning of that exception in [§ 2283](#) by preserving a case or controversy, since the state collection efforts would eliminate the two corporate respondents (which would then be controlled by petitioner) as plaintiffs in the federal suit. The Court of Appeals affirmed, also finding that § 16 of the Clayton [\*\*\*3] Act was an express exception to [§ 2283](#), but not reaching the issue of whether an injunction was necessary to protect the District Court's jurisdiction. Held: The judgment is reversed, and the case is remanded. Pp. 630-643; 643-645.

[545 F.2d 1050](#), reversed and remanded.

MR. JUSTICE REHNQUIST, joined by MR. JUSTICE STEWART and MR. JUSTICE POWELL, concluded that the District Court's preliminary injunction violated the Anti-Injunction Act. Pp. 630-643.

(a) Having been enacted long after the Anti-Injunction Act, § 16 of the Clayton Act, on its face, is far from an express exception to the Anti-Injunction Act, and may be fairly read as virtually incorporating the prohibitions of that Act. Pp. 631-632.

(b) The test as to whether an Act of Congress qualifies as an "expressly authorized" exception to the Anti-Injunction Act is whether the "Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of

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equity, could be given its intended scope only by the stay of a state court proceeding." *Mitchum v. Foster, 407 U.S. 225, 238*. Here, while the private action conferred by § 16 of the Clayton Act meets the first part [\*\*\*\*4] of the test in that such an action may be brought only in a federal court, it does not meet the second part of the test, since, as is demonstrated by § 16's legislative history suggesting that § 16 was merely intended to extend to private citizens the right to enjoin antitrust violations, § 16 is not an "Act of Congress [which] could be given its intended scope only by the stay of a state court proceeding." *Mitchum, supra*, distinguished. Pp. 632-635.

(c) To hold that § 16 could be given its "intended scope" only by allowing an injunction against a pending state-court action would completely eviscerate the Anti-Injunction Act, because this would mean that virtually all federal statutes authorizing injunctive relief would be exceptions to that Act. While § 16 embodies an important congressional policy favoring private enforcement of the antitrust laws, the importance of the policy to be "protected" by an injunction under § 16 does not control for purposes of the Anti-Injunction Act, since the prohibitions of that Act exist separate and apart from the traditional principles of equity and comity that determine whether or not the state proceeding can be enjoined. [\*\*\*\*5] Pp. 635-639.

(d) For an Act countenancing a federal injunction to come within the "expressly authorized" exception to the Anti-Injunction Act, it must necessarily interact with, or focus upon, a state judicial proceeding, and § 16 of the Clayton Act is not such an Act. Pp. 640-641.

(e) The District Court's finding that the injunction was "necessary in aid of its jurisdiction" within the meaning of that exception to the Anti-Injunction Act is supported neither by precedent nor by the factual premises upon which such finding was based. Although such exception may be fairly read as incorporating cases where the federal court has obtained jurisdiction over a res prior to the state-court action, here both the federal and state actions are in personam actions, which traditionally may proceed concurrently, without interference from either court, and an injunction to "preserve" a case or controversy does not fit within the "necessary in aid of its jurisdiction" exception. It does not appear that even if the two corporate respondents ceased to litigate the federal action, respondent Stoner would lose his standing to vindicate his rights, or that the two corporate defendants would [\*\*\*\*6] necessarily be removed from the action. Pp. 641-643.

MR. JUSTICE BLACKMUN, joined by THE CHIEF JUSTICE, concluded that, although § 16 of the Clayton Act may be an "expressly authorized" exception to the Anti-Injunction Act in limited circumstances where the state proceedings are part of a "pattern of baseless, repetitive claims" being used as an anticompetitive device, all the traditional prerequisites for equitable relief are satisfied, and the only way to give the antitrust laws their intended scope is by staying the state proceedings, *California Motor Transport Co v. Trucking Unlimited, 404 U.S. 508*, the District Court failed properly to apply the California Motor Transport rule because it did not and could not find the state litigation to be part of a "pattern of baseless, repetitive claims" being used in and of itself as an anticompetitive device, and that therefore § 16 did not itself authorize the District Court's injunction. Pp. 643-645.

REHNQUIST, J., announced the Court's judgment and delivered an opinion, in which STEWART and POWELL, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result, in which BURGER, C.J., joined, post, p. 643. [\*\*\*\*7] STEVENS, J., filed a dissenting opinion, in which BRENNAN, WHITE, and MARSHALL, JJ., joined, post, p. 645.

**Counsel:** Earl E. Pollock argued the cause for petitioner. With him on the briefs was Lambert M. Ochsenschlager. Barnabas F. Sears argued the cause for respondents. With him on the brief were James E. S. Baker and Thomas L. Brejcha, Jr.

**Judges:** BURGER, BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, STEVENS

**Opinion by:** REHNQUIST

## Opinion

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[\*626] [\*1014] [\*2885] MR. JUSTICE REHNQUIST announced the judgment of the Court and delivered an opinion in which MR. JUSTICE STEWART and MR. JUSTICE POWELL join.

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After nine years of litigation in the Illinois state courts, the Supreme Court of Illinois affirmed [\*\*\*\*8] a judgment in favor of petitioner and against respondents in the amount of \$7,363,500. Shortly afterwards the United States District Court for the Northern District of Illinois enjoined, at the behest of respondents, state proceedings to collect the judgment. 403 F.Supp. 527 (1975). The order of the United States District Court was affirmed by the Court of Appeals for the Seventh Circuit, 545 F.2d 1050 (1976), and we granted certiorari to consider the important question of the relationship between state and federal courts which such an injunction raises. 429 U.S. 815 (1976).

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The Illinois state-court litigation arose out of commercial dealings between petitioner and respondents. In 1959 petitioner Vendo Co., a vending machine manufacturer located in Kansas City, Mo., acquired most of the assets of Stoner Manufacturing, which was thereupon reorganized as respondent Stoner Investments, Inc. Respondent Harry H. Stoner and members of his family owned all of the stock of Stoner Manufacturing, and that of Stoner Investments. Stoner Manufacturing had engaged in the manufacture of vending machines which dispensed candy, and as a part of [\*\*\*\*9] the acquisition agreement it undertook to refrain from owning or managing any business engaged in the manufacture or sale of vending machines. Pursuant to an employment contract, respondent Harry Stoner was employed by petitioner as a consultant for five years at a salary of \$50,000, and he agreed that during the term of his contract and for five years thereafter he would not [\*627] compete with petitioner in the business of manufacturing vending machines.

In 1965, petitioner sued respondents<sup>1</sup> in state court for breach of these noncompetition covenants. Shortly thereafter, respondents sued petitioner in the United States District Court for the Northern District of Illinois, complaining that petitioner had violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Respondents alleged that the covenants against competition were unreasonable restraints of trade because they were not reasonably limited as to time and place, and that the purpose of petitioner's state-court lawsuit was to "unlawfully harass" respondents and to "eliminate the competition" of respondents. App. 22, 25.

[\*\*\*\*10] Respondents set up this federal antitrust claim as an affirmative defense to petitioner's state-court suit. Id., at 31-32. However, prior to any ruling by the state courts on the merits of this defense, respondents voluntarily withdrew it. Id., at 82.

The state-court litigation ran its [\*\*\*1015] protracted course,<sup>2</sup> including [\*628] two trials, two appeals [\*\*2886] to the State Appellate Court, and an appeal to the Supreme Court of Illinois. In September 1974, the latter court

<sup>1</sup> In addition to respondents Stoner and Stoner Manufacturing, petitioner also sued respondent Lektro-Vend Corp. Lektro-Vend had developed a radically new vending machine, and it was Stoner's relationship with Lektro-Vend that formed the basis of the lawsuit.

<sup>2</sup> The Court of Appeals' summary of the state-court litigation is illustrative:

"The suit was filed in Kane County, Illinois on August 10, 1965; the complaint charged breach of noncompetition covenants; an amended complaint also charged theft of trade secrets. After a bench trial the court on December 16, 1966 found for Vendo. Judgments against Stoner for \$250,000 and against both defendants for \$1,100,000 were granted. Stoner and Stoner Investments were enjoined from further acts of competition.

"An appeal was taken to the Appellate Court of Illinois. That court entered its decision on January 30, 1969,... [105 Ill. App. 2d 261, 245 N.E. 2d 263](#). The court held that no trade secrets were involved, the noncompetition covenants were valid and enforceable, and the covenants had been breached by the defendants. The grant of injunctive relief was affirmed. The court

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affirmed a judgment in favor of petitioner and against respondents in an amount exceeding \$7 million. [Vendo Co. v. Stoner, 58 Ill. 2d 289, 321 N.E. 2d 1](#). The Supreme Court of Illinois predicated its judgment on its holding that Stoner had breached a fiduciary duty owed to petitioner, rather than upon any breach of the noncompetitive covenants.<sup>3</sup> This Court denied respondents' petition for a writ of certiorari. *420 U.S. 975* (1975).

[\*\*\*\*11] During the entire nine-year course of the state-court litigation, respondents' antitrust suit in the District Court was, in the words of the Court of Appeals, allowed to lie "dormant." [545 F.2d, at 1055](#). But the day after a Circuit Justice of this [\*629] Court had denied a stay of execution pending petition for certiorari to the Supreme Court of Illinois, respondents moved in the District Court for a preliminary injunction against collection of the Illinois judgment. The District Court in due course granted this motion.

That court found that it "appear[ed] that the [noncompetition] covenants... were overly broad," *403 F.Supp.*, at 533, and that there was "persuasive evidence that Vendo's activities in its litigation against the Stoner interests in Illinois state court were not a genuine attempt to use the adjudicative process legitimately." *Id.*, at 534-535. Recognizing that [\*\*\*1016] there is a "paucity of authority" on the issue, *id.*, at 536, the District Court held that the injunctive-relief provision of the Clayton Act, [15 U.S.C. § 26](#), constitutes an express exception to [28 U.S.C. § 2283](#), [\*\*\*\*12] the "Anti-Injunction Act." The court further found that collection efforts would eliminate two of the three plaintiffs and thus that the injunction was necessary to protect the jurisdiction of the court, within the meaning of that exception to [§ 2283](#).

The Court of Appeals affirmed, finding that § 16 of the Clayton Act was an express exception to [§ 2283](#). The court did not reach the issue of whether an injunction was necessary to protect the jurisdiction of the District Court.

[LEdHN/1A](#) [↑] [1A]In this Court, petitioner renews its contention that principles of equity, comity, and federalism, as well as the Anti-Injunction Act, barred the issuance of the injunction by the District Court. Petitioner also asserts in its brief on the merits that the [\*\*2887] United States District Court was required to give full faith and credit to the judgment entered by the Illinois courts.<sup>4</sup> Because we agree with petitioner that the District Court's order violated the Anti-Injunction Act, we reach none of its other contentions.

[\*\*\*\*13] [\*630] III

The Anti-Injunction Act, [28 U.S.C. § 2283](#), provides: S

also held that though the trial court erred in striking the affirmative defense based on the federal antitrust laws, it was correct in denying the defense based on the Illinois antitrust laws. The cause was remanded for a determination of damages and further proceedings.

"Upon remand the defendant withdrew its affirmative defense asserted under the federal antitrust laws. The trial court, after hearing evidence, entered judgments against Stoner and Stoner Investments which totaled \$7,363,500.

"Upon a second appeal to the Illinois Appellate Court, the court decided, on September 12, 1973, [13 Ill. App. 3d 291, 300 N.E. 2d 632](#), that the trial court erred in the measurement of damages. The case was remanded for assessment of damages in accordance with the Appellate Court's original opinion.

"Upon appeal to the Illinois Supreme Court on September 27, 1974., [58 Ill. 2d 289, 321 N.E. 2d 1](#), the appellate court was reversed and the trial court's judgments were affirmed. The Supreme Court in deciding the case constructed a different theory of recovery - the breach of a fiduciary obligation on the part of Stoner - than had been asserted by Vendo." [545 F.2d 1050, 1055 n. 4 \(CA7 1976\)](#).

<sup>3</sup> "Quite apart from any liability which may be predicated upon a breach of the covenants against competition contained in the sales agreement and the employment contract, it is clear that Stoner violated his fiduciary duties to plaintiff during the period when he was a director and an officer of plaintiff." [58 Ill. 2d, at 303, 321 N.E. 2d, at 9](#).

<sup>4</sup> This issue was not presented to this Court in the petition for certiorari, and the Court of Appeals did not discuss it in its opinion.

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**HN1** "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."<sup>1</sup>

The origins and development of the present Act, and of the statutes which preceded it, have been amply described in our prior opinions and need not be restated here. The most recent of these opinions are *Mitchum v. Foster*, 407 U.S. 225 (1972), and *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281 (1970). Suffice it to say that **HN2** the Act is an absolute prohibition against any injunction of any state-court proceedings, unless the injunction falls within one of the three specifically defined exceptions in the Act. The Act's purpose is to forestall the inevitable friction between the state and federal courts that ensues from [\*\*\*\*14] the injunction of state judicial proceedings by a federal court. *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 9 (1940). Respondents' principal contention is that, as the Court of Appeals held, § 16 of the Clayton Act, which authorizes a private action to redress violations of the antitrust laws, comes within the "expressly authorized" exception to § 2283.

We test this proposition mindful of our admonition that **HN3** ST "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine [\*\*\*1017] the controversy." *Atlantic Coast Line R. Co., supra, at 297*.<sup>1</sup>

This cautious approach is mandated by the "explicit wording of § 2283" and the "fundamental principle of a dual system of [\*631] courts." Ibid. We have no occasion to construe the section more broadly: S

"[It is] clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation." *Clothing Workers v. Richman Bros. Co.*, 348 U.S. 511, 514 (1955). [\*\*\*\*15]

Our inquiry, of course, begins with the language of § 16 of the Clayton Act, which is the statute claimed to "expressly authorize" the injunction issued here. It provides, in pertinent part: S

**HN4** "[A]ny person... shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws... when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings...." 38 Stat. 737, 15 U.S.C. § 26.<sup>1</sup>

On its face, the language merely authorizes private injunctive relief for antitrust violations. Not only does the statute not mention § 2283 or the enjoining of state-court proceedings, but the granting of injunctive relief under § 16 is by the terms of that section limited to "the same conditions and principles" employed by courts of equity, and by "the rules governing such proceedings." In 1793 the predecessor to [\*\*\*\*16] § 2283 was enacted specifically to limit the general equity powers of a federal court. *Smith v. Apple*, 264 U.S. 274, 279 (1924); *Toucey v. New York* [\*\*2888] Life Ins. Co., 3414 U.S. 118, 130 n. 2 (1941). When § 16 was enacted in 1914 the bar of the Anti-Injunction Act had long constrained the equitable power of federal courts to issue injunctions. Thus, on its face, § 16 is far from an express exception to the Anti-Injunction Act, and may be fairly read as virtually incorporating the prohibitions [\*632] of the Anti-Injunction Act with restrictive language not found, for example, in 42 U.S.C. § 1983. See discussion of *Mitchum v. Foster*, infra.

Respondents rely, as did the Court of Appeals and the District Court, on the following language from *Mitchum*: S

"... [It] is clear that, **HN5** in order to qualify as an 'expressly authorized' exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated [\*\*\*\*17] if the federal court were not empowered to enjoin a state court proceeding. This is not to say that in order to come within the exception an Act of Congress must, on its face and in every one of its provisions, be totally incompatible with the prohibition of the anti-injunction statute. The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity,

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could be given its [\*\*\*1018] intended scope only by the stay of a state court proceeding." [407 U.S., at 237-238](#). (Emphasis added, footnote omitted.)

But we think it is clear that neither this language from Mitchum nor Mitchum's ratio decidendi supports the result contended for by respondents.

The private action for damages conferred by the Clayton Act is a "uniquely federal right or remedy," in that actions based upon it may be brought only in the federal courts. See [General Investment Co. v. Lake Shore & Mich. So. R. Co., 260 U.S. 261, 287 \(1922\)](#). It thus meets the first part of the test laid down in the language quoted from Mitchum.

But that authorization for private actions does not meet the second part of the Mitchum test; [\*\*\*\*18] it is not an "Act of Congress... [which] could be given its intended scope only by the stay of a state court proceeding," [407 U.S., at 238](#). Crucial to our determination in Mitchum that [42 U.S.C. 1983](#) [\*633] fulfilled this requirement - but wholly lacking here - was our recognition that one of the clear congressional concerns underlying the enactment of [§ 1983](#) was the possibility that state courts, as well as other branches of state government, might be used as instruments to deny citizens their rights under the Federal Constitution. This determination was based on our review of the legislative history of [§ 1983](#); similar review of the legislative history underlying § 16 demonstrates that that section does not meet this aspect of the Mitchum test.

[Section 1983](#) on its face, of course, contains no reference to [§ 2283](#), nor does it expressly authorize injunctions against state-court proceedings. But, as Mitchum recognized, such language need not invariably be present in order for a statute to come within the "expressly authorized" exception if there exists sufficient evidence in the legislative history demonstrating that Congress recognized [\*\*\*19] and intended the statute to authorize injunction of state-court proceedings. In Part IV of our opinion in Mitchum we examined in extenso the purpose and legislative history underlying [§ 1983](#), originally [§ 1](#) of the Civil Rights Act of 1871. We recounted in detail that statute's history which made it abundantly clear that by its enactment Congress demonstrated its direct and explicit concern to make the federal courts available to protect civil rights against unconstitutional actions of state courts.

We summarized our conclusion in these words: S

"This legislative history makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities [\*\*2889] could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts." [407 U.S., at 242](#).  
[\*634]

Thus, in Mitchum, absence of express language authorization for enjoining state-court proceedings in [§ 1983](#) actions was cured by the [\*\*\*20] presence of relevant legislative history. [\*\*\*1019] In this case, however, neither the respondents nor the courts below have called to our attention any similar legislative history in connection with the enactment of § 16 of the Clayton Act. It is not suggested that Congress was concerned with the possibility that state-court proceedings would be used to violate the Sherman or Clayton Acts. Indeed, it seems safe to say that of the many and varied anticompetitive schemes which § 16 was intended to combat, Congress in no way focused upon a scheme using litigation in the state courts. The relevant legislative history of § 16 simply suggests that in enacting § 16 Congress was interested in extending the right to enjoin antitrust violations to private citizens. 5

<sup>5</sup> Prior to the enactment of § 16, private injunctive relief was not authorized for antitrust violations. [Paine Lumber Co. v. Neal, 244 U.S. 459 \(1917\)](#). As far as the legislative history indicates, the sole purpose of § 16 (§ 14 in the original drafts) was to extend to private parties the right to sue for injunctive relief. The following passage, taken in its entirety from H. R. Rep. No. 627, 63d Cong., 2d Sess., 21 (1914), demonstrates what Congress had in mind in enacting § 16:

"Section 14 authorizes a person, firm, or corporation or association to sue for and have injunctive relief against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against

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[\*635] The critical aspects of the legislative history recounted in Mitchum which led us to conclude that § 1983 was within the "expressly authorized" exception to § 2283 are wholly absent from the relevant history of § 16 of the Clayton Act. This void is not filled by other evidence of congressional authorization.

[\*\*\*\*21] Section 16 undoubtedly embodies congressional policy favoring private enforcement of the antitrust laws, and undoubtedly there exists a strong national interest in antitrust enforcement.<sup>6</sup> However, [\*\*2890] contrary to [\*\*\*1020] certain language in the opinion [\*636] of the District Court, 403 F.Supp., at 536, the importance of the federal policy to be "protected" by the injunction is not the focus of the inquiry. Presumptively, all federal policies enacted into law by Congress are important, and there will undoubtedly arise particular situations in which a particular policy would be fostered by the granting of an injunction against a pending state-court action. If we were to accept respondents' contention that § 16 could be given its "intended scope" only by allowing such injunctions, then § 2283 would be completely eviscerated since the ultimate logic of this position can mean no less than that virtually all federal statutes<sup>7</sup> authorizing injunctive relief are exceptions to § 2283. Certainly [\*637] all federal

threatened conduct that will cause loss or damage is granted by courts of equity under the rules governing such proceedings. Under section 7 of the act of July 2, 1890, a person injured in his business and property by corporations or combinations acting in violation of the Sherman antitrust law, may recover loss and damage for such wrongful act. There is, however, no provision in the existing law authorizing a person, firm, corporation, or association to enjoin threatened loss or damage to his business or property by the commission of such unlawful acts, and the purpose of this section is to remedy such defect in the law. This provision is in keeping with the recommendation made by the President in his message to Congress on the subject of trusts and monopolies."

See also S. Rep. No. 698, 63d Cong., 2d Sess., 17-18 (1914).

<sup>6</sup> In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), this Court held that harassing and sham state-court proceedings of a repetitive nature could be part of an anticompetitive scheme or conspiracy. In *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), one of the allegations was that the federal-court defendant had instituted and supported state-court litigation for anticompetitive purposes in violation of the antitrust laws. The District Court had enjoined the defendant from "[i]nstituting, supporting or engaging in litigation, directly or indirectly, against cities and towns, and officials thereof, which have voted to establish municipal power systems...." Jurisdictional Statement, in No. O.T. 1972, 71-991, p. A-115. This Court vacated and remanded to the District Court for consideration, in light of the intervening decision of California Motor Transport, of whether the state-court litigation came within the "mere sham" exception announced in *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). Those cases together may be cited for the proposition that repetitive, sham litigation in state courts may constitute an antitrust violation and that an injunction may lie to enjoin future state-court litigation. However, neither of those cases involved the injunction of a pending state-court proceeding, and thus the bar of § 2283 was not brought into play.

Nothing that we say today cuts back in any way on the holdings of these two cases; what we must here decide is whether such a lawsuit may be enjoined by a federal court after it has been commenced, notwithstanding the bar of the Anti-Injunction Act. While we conclude that it may not, nothing in our opinion today prevents a federal court in the proper exercise of its jurisdiction enjoin from the commencement of additional state-court proceedings if it concludes from the course and outcome of the first one that such proceedings would constitute a violation of the antitrust laws. With respect to this future litigation, the injunction will prevent even the commencement of a second such action, and the principles of federalism do not require the bar of § 2283. This distinction is totally consistent with the realization that the true bona fides of the initial state-court litigation is often not apparent:

"One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the fact finder to conclude that the administrative and judicial processes have been abused." *California Motor Transport, supra, at 513*.

Any "disadvantage" to which the federal plaintiff is put in the initial proceeding is diminished by his ability to set up the federal antitrust claim as an affirmative defense, reviewable by this Court under 28 U.S.C. § 1257 (3), and his ability to sue for treble damages resulting from the vexatious prosecution of that state-court litigation.

<sup>7</sup> Petitioner has catalogued the following federal statutes, and suggests that each would be so affected:

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[\*\*\*1021] injunctive statutes are enacted to provide for the suspension of activities antithetical to the federal policies underlying [\*\*\*22] the injunctive statute or related statutes. If the injunction would issue under the general rules of equity practice - requiring, inter alia, a showing of irreparable injury - but for the bar of [§ 2283](#), then clearly [§ 2283](#) in some sense may be viewed as frustrating or restricting federal policy since the activity inconsistent with the federal policy may not be enjoined because of [§ 2283](#)'s bar.<sup>8</sup> Thus, [\*\*2891] were we to accede [\*638] to respondent's interpretation of the "intended scope" language, an exception to [§ 2283](#) would always be found to be

"E.g., [7 U.S.C. § 216](#) (§ 315 of the Packers and Stockyards Act of 1921); [7 U.S.C. § 2050a](#) (Farm Labor Contractor Registration Act); [7 U.S.C. § 2305 \(a\)](#) (§ 6 of the Agricultural Fair Practices Act of 1967); [12 U.S.C. § 1731b \(i\)](#) (§ 513 of the National Housing Act); [12 U.S.C. § 1976](#) (Bank Holding Company Act); [15 U.S.C. § 78aa](#) (Securities Exchange Act of 1934); [15 U.S.C. § 298](#) (relating to the false stamping of gold and silver); [15 U.S.C. § 433](#) (providing for suits by farmers' cooperative associations against discrimination by boards of trade); [15 U.S.C. §§ 1114\(2\), 1116, 1121](#) (providing for injunctive relief against trademark infringement); [15 U.S.C. § 2073](#) (Consumer Product Safety Act); [15 U.S.C. § 2102](#) (Hobby Protection Act); [17 U.S.C. § 112](#) (providing for injunctions against violation of any right secured by the copyright laws); [26 U.S.C. § 9011 \(b\)](#) (Presidential Election Campaign Fund Act); [29 U.S.C. § 412](#) (Labor-Management Reporting and Disclosure Act); [42 U.S.C. § 2000e-5](#) (Title VII (Equal Employment Opportunities) of the Civil Rights Act of 1964); [42 U.S.C. §§ 6305, 6395 \(e\)](#) (Energy Policy and Conservation Act); [45 U.S.C. § 547](#) (Title III of the Rail Passenger Service Act of 1970); [49 U.S.C. §§ 1 \(20\), 322\(b\)\(2\), 916, 1017 \(b\)](#) (Interstate Commerce Act); [49 U.S.C. § 1487 \(a\)](#) (Federal Aviation Act). See also [16 U.S.C. § 1540 \(g\)](#) (Endangered Species Act of 1973); [33 U.S.C. § 1365](#) (Federal Water Pollution Control Act); [33 U.S.C. § 1415 \(g\)](#) (Marine Protection, Research, and Sanctuaries Act of 1972); [33 U.S.C. § 1515](#) (Deepwater Ports Act of 1974); [42 U.S.C. § 300j-8](#) (Safe Drinking Water Act); [42 U.S.C. § 1857h-2](#) (Clean Air Act); [42 U.S.C. § 4911](#) (Noise Control Act of 1972)." Reply Brief for Petitioner 10-11, n. 7.

<sup>8</sup> MR. JUSTICE STEVENS in his dissent, see post, at 649-654, would conclude that since certain types of state-court litigation may violate the antitrust laws, an injunction of such litigation while pending is "expressly authorized" under the provisions of the Anti-Injunction Act. But this conclusion does not at all follow from the premise that judicial decisions have construed the prohibition of the antitrust laws to include sham and frivolous state-court proceedings - a premise with which we do not at all disagree, see n. 6, *supra*. The conclusion is supportable only as a matter of policy preference, and not of statutory construction. Under MR. JUSTICE STEVENS' view, all a federal court need do is find a violation of the federal statute, then by the very force of that finding "express authorization" for the statute would be presumed. But this approach flies in the face of our past decisions. For example, in *Mitchum v. Foster*, [407 U.S. 225, 227 \(1972\)](#), the petitioner had alleged that the state courts "were depriving him of rights protected by the [First](#) and [Fourteenth Amendments](#)." Under MR. JUSTICE STEVENS' syllogistic formulation, since the state-court action is a violation of [§ 1983](#), the express authorization would be readily found on the face of the statute. However, the Court in *Mitchum* found no such ipso facto shortcut to the explicit prohibition of [§ 2283](#), but resorted to careful analysis of the legislative history in order to find evidence of congressional authorization. In short, MR. JUSTICE STEVENS' approach, which removes the bar of [§ 2283](#) from all federal injunctive statutes, is totally inconsistent with this Court's longstanding recognition that "[l]egislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions." *Clothing Workers v. Richman Bros. Co.*, [348 U.S. 511, 516 \(1955\)](#).

In reaching this conclusion, MR. JUSTICE STEVENS argues that the Anti-Injunction Act should be "considered wholly inapplicable to later enacted federal statutes that are enforceable exclusively in federal litigation." Post, at 659. But this view is inconsistent with the approach adopted by the Court in *Clothing Workers, supra*. In that case, an employer had sought an injunction against a union in state court. This Court found that the action before the state court was "outside state authority," [348 U.S., at 514](#), and that jurisdiction was vested solely in the National Labor Relations Board. But the Court found that the exclusive federal jurisdiction was not sufficient to render [§ 2283](#) inapplicable. See also *Atlantic Coast Line R. Co. v. Locomotive Engineers*, [398 U.S. 281 \(1970\)](#).

We think MR. JUSTICE STEVENS' view tends to confuse the jurisdiction granted to federal courts by § 16 of the Clayton Act with the separate question of whether a court having such jurisdiction has also been "expressly authorize[d]" to enjoin state-court proceedings. Post, at 650-654. But the question of whether an injunction against state-court proceedings has been "expressly authorized" under [§ 2283](#) never arises unless the federal court asked to issue the injunction has subject-matter jurisdiction of the case in which the injunction is sought. Here the District Court is entirely free to proceed with the litigation on the merits of respondents' antitrust claim against petitioner, and to grant damages and such other relief as may be appropriate if it determines the issues in favor of respondents. All that we conclude is that it may not include as a part of that relief an injunction against an already pending state-court proceeding.

"necessary" to give the injunctive Act its full intended scope, and [§ 2283](#) would place no additional limitation on the right [[\\*639](#)] to enjoin state proceedings. The Anti-Injunction Act, a fixture in federal law since 1793, would then be a virtual [[\\*\\*\\*1022](#)] dead letter whenever the plaintiff seeks an injunction under a federal injunctive statute. Whether or not the state proceeding could be enjoined would rest solely upon the traditional principles of equity and comity. However, as we emphasized in [Mitchum, 407 U.S., at 243](#), the prohibitions of [§ 2283](#) exist separate and apart from these traditional [[\\*\\*\\*\\*23](#)] principles, and we cannot read the "intended scope" language as rendering this specific and longstanding statutory provision inoperative simply because important federal policies are fostered by the statute under which the injunction is sought. Congress itself has found that these policies, in the ordinary case, must give way to the policies underlying [§ 2283](#). Given the clear prohibition of [§ 2283](#), the courts will not sit to balance and weigh the importance of various federal policies in seeking to determine which are sufficiently important to override historical concepts of federalism underlying [§ 2283](#); by the statutory scheme it has enacted, Congress has clearly reserved this judgment unto itself.<sup>9</sup>

[[\\*\\*\\*\\*24](#)] [[\\*640](#)] [[\\*\\*2892](#)] Our conclusion that the "importance," or the potential restriction in scope, of the federal injunction statute does not control for [§ 2283](#) purposes is consistent with the analysis of those very few statutes which we have in the past held to be exceptions to the Anti-Injunction Act. See [Mitchum, supra, at 234-235](#), and nn. 12-16. The original version of the Anti-Injunction Act itself was amended in 1874 to allow federal courts to enjoin state-court proceedings which interfere with the administration of a federal bankruptcy proceeding. Rev. Stat. § 720. The Interpleader Act of 1926, [28 U.S.C. § 2361](#), the Frazier-Lemke Act, 11 U.S.C. § 203 (1940 ed.), and the Federal Habeas Corpus Act, [28 U.S.C. § 2251](#), while not directly referring to [§ 2283](#), have nonetheless explicitly authorized injunctive relief against state-court proceedings. The Act of [[\\*\\*\\*1023](#)] 1851 limiting liability of shipowners, 46 U.S.C. § 185, provided that, after deposit of certain funds in the court by the shipowner, "all claims and proceedings against the owner with respect [[\\*\\*\\*\\*25](#)] to the matter in question shall cease." The statutory procedures for removal of a case from state court to federal court provide that the removal acts as a stay of the state-court proceedings. [28 U.S.C. § 1446\(e\)](#).

By limiting the statutory exceptions of [§ 2283](#) and its predecessors to these few instances, we have clearly recognized that the Act countenancing the federal injunction must necessarily [[\\*641](#)] interact with, or focus upon, a state judicial proceeding.<sup>10</sup> Section 16 of the Clayton Act, which does not by its very essence contemplate or envision any necessary interaction with state judicial proceedings, is clearly not such an Act.

#### IV

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<sup>9</sup> Much of MR. JUSTICE STEVENS' dissenting opinion is an able brief for the conceded importance of the Sherman and Clayton Acts. But however persuasive it might be in inducing Congress to lift the bar of [§ 2283](#) with respect to injunctions issued under § 16, we do not believe it is persuasive in determining whether, under the present state of the law, Congress has in fact "expressly authorized" the injunction issued by the District Court here. For example, MR. JUSTICE STEVENS laments that state-court proceedings may now become the vehicles by which an antitrust violator may put one independent businessman after another out of business. See post, at 652-654, 657. Federal courts are able to enjoin future repetitive litigation, see discussion of California Motor Transport and Otter Tail Power, *supra*, n. 6. But even if one were to agree with this broad speculation, the solution is simple and straightforward. If Congress determines that the use of state-court proceedings to foster anticompetitive schemes is of sufficient gravity, it may simply conclude that the need for greater antitrust enforcement outweighs the need to prevent friction in our federal system and amend § 16 to expressly authorize an injunction of state-court proceedings.

No desire for more vigorous antitrust enforcement should cause us to lose sight of our role as judges in interpreting the explicit command of a congressional statute; for notwithstanding the rhetoric of the dissenting opinion, the conclusion that § 16 is an "expressly authorized" exception to [§ 2283](#) is no more than an ipse dixit. The "explicit wording of [§ 2283](#)," [Atlantic Coast Line R. Co., supra, at 297](#), is lost on the dissent; the dissent's approach is the clearest form of judicial improvisation which the Court counseled against in [Clothing Workers v. Richman Bros. Co., supra, at 514](#).

<sup>10</sup> A possible exception is [Porter v. Dicken, 328 U.S. 252 \(1946\)](#), regarding § 205(a) of the Emergency Price Control Act of 1942. This Act, enacted in response to wartime exigencies, expired in 1947.

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LEDHN[1B] [1B] Although the Court of Appeals did [\*\*\*\*26] not reach the issue, the District Court found that, in addition to being "expressly authorized," the injunction was "necessary in aid of its jurisdiction," a separate exception to § 2283. The rationale of the District Court was as follows: S

"The Court also holds that § 2283 authorizes an injunction here because further collection efforts would eliminate two plaintiffs, Stoner Investments and Lektro-Vend Corp., as parties under the case or controversy provisions of Article III since they would necessarily be controlled by Vendo. Vendo's offer to place the Stoner Investment and Lektro-Vend stock under control of the Court does not meet this problem because as a matter of substance Vendo would control both plaintiff and defendant, requiring dismissal under Article III. Thus the injunction is also necessary to protect the jurisdiction of the Court." *403 F.Supp.*, at 536-537.I

[\*\*2893] In *Toucey v. New York Life Ins. Co.*, 314 U.S., at 134-135, we acknowledged the existence of a historical exception to the Anti-Injunction Act in cases where the federal court has obtained jurisdiction over the res, prior to the state-court action. Although the "necessary [\*\*\*\*27] in aid of" exception to § 2283 may be fairly read as incorporating this historical *n rem* exception, see C. Wright, *Federal Courts* § 47, p. 204 (3d ed. 1976), the federal and state actions here are simply *in personam*. [\*642] The traditional notion is that *in personam* actions in federal and state court may proceed concurrently, without interference from either court, and there is no evidence that the exception to § 2283 was intended to alter this balance. We have never viewed parallel *in personam* actions as interfering with the jurisdiction of either court; as we stated in *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922): S

"[A]nction brought to enforce [a personal liability] does not tend to impair or defeat the jurisdiction of the court in which a [\*\*\*1024] prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata*...." *Id. at 230* (emphasis added). [\*\*\*\*28] I

No case of this Court has ever held that an injunction to "preserve" a case or controversy fits within the "necessary in aid of its jurisdiction" exception; neither have the parties directed us to any other federal-court decisions so holding.

The District Court's legal conclusion is not only unsupported by precedent, but the factual premises upon which it rests are not persuasive. First, even if the two corporate plaintiffs would cease to litigate the case after execution of the state-court judgment, there is no indication that Harry Stoner himself would lose his standing to vindicate his rights, or that the case could not go forward. Nor does it appear that the two corporate plaintiffs would necessarily be removed from the lawsuit. As far as the record indicates, there are currently minority shareholders in those corporations whose ownership interests would not be affected by petitioner's acquisition of majority stock control of the corporations. Under the applicable rules for shareholder derivative actions, [\*643] see *Fed. Rule Civ. Proc. 23.1*, the shareholders could presumably pursue the corporate rights of action, which would inure to their benefit, even if the corporations [\*\*\*\*29] themselves chose not to do so. Finally, petitioner offered to enter a consent decree which assuredly would eliminate any possibility of petitioner's acquiring control of the corporations. See App. 209-210, 258. The injunction in this case was therefore, even under the District Courts' legal theory, not necessary in aid of that court's jurisdiction.

Our conclusion that neither of the bases relied upon by the District Court constitutes an exception to § 2283 is more than consistent with the recognition that any doubt must be resolved against the finding of an exception to § 2283, *Atlantic Coast Line R. Co.*, 398 U.S., at 297; a holding that there is an exception present in this case would demonstrably involve "judicial improvisation." *Clothing Workers*, 348 U.S., at 514.

Reversed and remanded.

**Concur by:** BLACKMUN

## Concur

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MR. JUSTICE **BLACKMUN**, with whom THE CHIEF JUSTICE joins, concurring in the result.

LEdHN[1C][<sup>↑</sup>] [1C] Although I agree that the decision of the Court of Appeals should be reversed, I do so for reasons that differ significantly from those expressed by the plurality. According [\*\*\*\*30] to the plurality's analysis, § 16 of the Clayton Act, 15 U.S.C. § 26, is not an expressly authorized exception to the Anti-Injunction Act, 28 U.S.C. § 2283, because it is not "an 'Act of Congress... [which] could be given its intended scope only by the stay of a state-court proceeding,' [*Mitchum v. Foster*, 407 U.S. 225, 238 (1972)]." Ante, at 632. I do not agree that this is [\*\*\*1025] invariably [\*\*2894] the case; since I am of the opinion, however, that the state-court proceeding in this case should not have been enjoined by the federal court, I concur in the result.

LEdHN[2A][<sup>↑</sup>] [2A] In my opinion, application of the Mitchum test for deciding whether a statute is an "expressly authorized" exception to the Anti-Injunction Act shows that § 16 is such an exception [\*644] under narrowly limited circumstances. Nevertheless, consistently with the decision in California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972), \* I would hold that no injunction may issue against currently pending state-court proceedings [\*\*\*\*31] unless those proceedings are themselves part of a "pattern of baseless, repetitive claims" that are being used as an anticompetitive device, all the traditional prerequisites for equitable relief are satisfied, and the only way to give the antitrust laws their intended scope is by staying the state proceedings. Cf. California Motor Transport Co. v. Trucking [\*645] Unlimited, 404 U.S., at 513. See also Otter Tail Power Co. v. United States, 410 U.S. 366, 380 (1973).

[\*\*\*\*32] In my view, the District Court failed properly to apply the California Motor Transport rule. The court believed that it was enough that Vendo's activities in the single state-court proceeding involved in this case were not genuine attempts to use the state adjudicative process legitimately. In reaching this conclusion, the court looked to Vendo's purpose in conducting the state litigation and to several negative consequences that the litigation had for respondents. The court, however, did not find a "pattern of baseless, repetitive claims," nor could it have done so under the circumstances. Only one state-court proceeding was involved in this case, and it resulted in the considered affirmance by the Illinois Supreme Court of a judgment for more than \$7 million. In my opinion, therefore, it cannot be said on this record that Vendo was using the [\*\*\*1026] state-court proceeding as an

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\* I cannot agree with MR. JUSTICE STEVENS post, at 661-662 that the examples given in the quoted portion of California Motor Transport Co. v. Trucking Unlimited, necessarily involve the use of the adjudicatory process in the same way that the state courts were being used in this case. For example, there is no reason to believe that the Court's reference to the use of a patent obtained by fraud to exclude a competitor contemplated only one lawsuit. The case cited in connection with that reference, Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965), held only that the enforcement of a patent procured by fraud on the Patent Office could state a claim under § 2 of the Sherman Act, where the monopolistic acts alleged included use of the fraudulent patent through a course of action involving both threats of suit and prosecution of an infringement suit.

MR. JUSTICE STEVENS' quotation from California Motor Transport stops just short of the language that I consider critical to the instant case. The Court's opinion continues:

"Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. Opponents before agencies or courts often think poorly of the other's tactics, motions, or defenses and may readily call them baseless. One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the fact finder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw." 404 U.S., at 513.

Since I believe that federal courts should be hesitant indeed to enjoin ongoing state-court proceedings, I am of the opinion that a pattern of baseless, repetitive claims or some equivalent showing of grave abuse of the state courts must exist before an injunction would be proper. No such finding was made by the District Court in this case.

anticompetitive device in and of itself. Thus, I believe that § 16 itself did not authorize the injunction below, and on this ground I would reverse.

**Dissent by:** STEVENS

## Dissent

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MR. JUSTICE **STEVENS**, with whom MR. JUSTICE **BRENNAN**, MR. JUSTICE **WHITE**, and MR. JUSTICE **MARSHALL** join, dissenting.

Quite [\*\*\*33] properly, the plurality does not question the merits of the preliminary injunction entered by the United States District Court for the Northern District of Illinois staying proceedings in the Illinois [\*\*2895] courts. It was predicated on appropriate findings of fact,<sup>1</sup> it was entered by a District Judge whose [\*646] understanding of the federal antitrust laws was unique,<sup>2</sup> and its entry was affirmed unanimously by the Court of Appeals.

[\*\*\*34] Judge McLaren found substantial evidence that petitioner intended to monopolize the relevant market; that one of the overt acts performed in furtherance thereof was the use of litigation as a method of harassing and eliminating competition; that two of the corporate plaintiffs in the case, respondents here, would be eliminated by collection of the Illinois judgment; and that the state litigation had already severely hampered, and collection of the judgment would prevent, the marketing of a promising, newly developed machine which would compete with petitioner's products. *403 F.Supp. 527, 534-535, 538 (1975)*.<sup>3</sup> The Court of Appeals implicitly endorsed these findings when it noted that "[h]ere Vendo seeks to thwart a federal antitrust suit by the enforcement of state court judgments which are alleged to be the very object of antitrust violations." [545 F.2d 1050, 1057 \(CA7 1976\)](#).

[\*\*\*35] The question which is therefore presented is whether the [\*647] anti-injunction statute<sup>4</sup> deprives the federal courts of power to stay state-court [\*\*\*1027] litigation which is being prosecuted in direct violation of the Sherman Act. I cannot believe that any of the members of Congress who unanimously enacted that basic charter of economic freedom<sup>5</sup> in 1890 would have answered that question the way the plurality does today.

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<sup>1</sup> Specific findings of likelihood of ultimate success on the merits, likelihood of irreparable harm, a balance of the equities in favor of respondent-movants, and of protection of the public interest by issuance of the injunction are recited and substantiated in the District Court opinion. *403 F.Supp. 527, 532-538 (1975)*. The Court of Appeals affirmed, specifically rejecting petitioner's attack on the finding of a likelihood of ultimate success on the merits. [545 F.2d 1050, 1058-1059 \(CA7 1976\)](#).

<sup>2</sup> The late Richard W. McLaren served as Assistant Attorney General in charge of the Antitrust Division of the Department of Justice from 1969 until his appointment to the bench in 1972. In private practice he had acted as Chairman of the Antitrust Section of the American Bar Association.

<sup>3</sup> It is well settled, and the District Court so held, that when the precise conduct proscribed by the antitrust laws is sought to be furthered by litigation, the antitrust laws forbid a court from giving judgment if to do so "would be to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act." *Kelly v. Kosuga*, *358 U.S. 516, 520*. See *403 F.Supp., at 535*, citing *Continental Wall Paper Co. v. Louis Voight & Sons*, *212 U.S. 227, 261*. See *Response of Carolina v. Leasco Response, Inc.*, *498 F.2d 314, 317-320 (CA5 1974)*, cert. denied, *419 U.S. 1050*; *Milsen Co. v. Southland Corp.*, *454 F.2d 363 (CA7 1971)*; *Helfenbein v. International Industries, Inc.*, *438 F.2d 1068, 1071 (CA8 1971)*; *Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc.*, *307 F.2d 207 (CA3 1962)*; *Tampa Electric Co. v. Nashville Coal Co.*, *276 F.2d 766 (CA6 1960)*; *United States v. Bayer Co.*, *135 F.Supp. 65 (SDNY 1955)*.

<sup>4</sup> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." [28 U.S.C. § 2283](#).

<sup>5</sup> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." [Northern Pacific R. Co. v. United States](#), *356 U.S. 1, 4*.

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【\*\*2896】 The plurality relies on the present form of a provision of the Judiciary Act of 1793.<sup>6</sup> In the ensuing century, there were changes in our economy which persuaded the Congress that the state courts could not adequately deal with contracts in restraint of trade that affected commerce in more than one 【\*648】 jurisdiction.<sup>7</sup>

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"The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. As a charter of freedom, the Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce." [Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-360.](#)

<sup>6</sup> Act of Mar. 2, 1793, § 5, 1 Stat. 335: "[N]or shall a writ of injunction be granted to stay proceedings in any court of a state...." For convenience, the plurality has referred to this clause as the "Anti-Injunction Act"; that, however, is not the proper name of the statute.

<sup>7</sup> In his first speech in support of his bill, Senator Sherman stated:

"The power of the State courts has been repeatedly exercised to set aside such combinations as I shall hereafter show, but these courts are limited in their jurisdiction to the State, and, in our complex system of government, are admitted to be unable to deal with the great evil that now threatens us.

"... The purpose of this bill is to enable the courts of the United States to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several States to protect local interests.

.....

"... The committee therefore deemed it proper by express legislation to confer on the circuit courts of the United States original jurisdiction of all suits of a civil nature at common law or in equity arising under this section, with authority to issue all remedial process or writs proper and necessary to enforce its provisions...." 21 Cong. Rec. 2456 (1890). Later the same day he said: [Congress] may 'regulate commerce;' can it not protect commerce, nullify contracts that restrain commerce, turn it from its natural courses, increase the price of articles, and therefore diminish the amount of commerce?

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"[The power of the 'combinations'] for mischief will be greatly crippled by this bill. Their present plan of organization was adopted only to evade the jurisdiction of State courts.

.....

"Suppose one of these combinations should unite all, or nearly all, the domestic producers of an article of prime necessity with a view to prevent competition and to keep the price up to the foreign cost and duty added, would not this be in restraint of trade and commerce and affect injuriously the operation of our revenue laws? Can Congress prescribe no remedy except to repeal its taxes? Surely it may authorize the executive authorities to appeal to the courts of the United States for such a remedy, as courts habitually apply in the States for the forfeiture of charters thus abused and the punishment of officers who practice such wrongs to the public. It may also give to our citizens the right to sue for such damages as they have suffered." Id., at 2462. Senator Sherman, 3 days later, discussing the rise of the "combinations" during the preceding 20 years, stated:

"... The State courts have attempted to wrestle with this difficulty. I produced decisions of the supreme courts of several of the States.

"Take the State of New York, where the sugar trust was composed of seventeen corporations. What remedy had the people of New York in the suit that they had against that combination? None whatever, except as against one corporation out of the seventeen. No proceeding could be instituted in the State of New York by which all those corporations could be brought in one suit under the common jurisdiction of the United States. No remedy could be extended by the courts, although they were eager and earnest in search of a remedy.

.....

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The Sherman Act was enacted virtually unanimously in 1890 to protect the national [\*\*\*1028] economy from the pernicious effects of regulation by private cartel and to vest the federal [\*649] courts with jurisdiction adequate to "exert such remedies [\*\*2897] as would fully accomplish the purposes intended."<sup>8</sup>

[\*\*\*\*37] Between 1890 and 1914, although private litigants could [\*650] recover treble damages, only the United States could invoke the jurisdiction of the federal courts to prevent and restrain violations of the Sherman Act.<sup>9</sup> When Congress authorized the federal courts to grant injunctive relief in private antitrust litigation, it conferred the same broad powers that the courts possess in cases brought by the Government.<sup>10</sup> Section [\*651] [\*\*\*1029] 16 of the Clayton Act expressly authorizes injunctions against "a violation of the antitrust laws."<sup>11</sup>

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"... When a man is injured by an unlawful combination why should he not have the power to sue in the courts of the United States? It would not answer to send him to a State court. It would not answer at all to send him to a court of limited jurisdiction. Then, besides, it is a court of the United States that alone has jurisdiction over all parts of the United States. The United States can send its writs into every part of a State and make parties in different States submit to its process. The States can not do that." Id., at 2568-2569.

Similarly, in the House debate Congressman Culberson, floor sponsor of the bill, had this to say during his introductory remarks:

"If Congress will legislate within its sphere and to the limit to which it may go, and if the legislatures of the several States will do their duty and supplement that legislation, the trusts and combinations which are devouring the substance of the people of the country may be effectually suppressed. The States are powerless unless Congress will take charge of the trade between the States and make unlawful traffic that operates in restraint of trade and which promotes and encourages monopoly." Id., at 4091.

See Letwin, Congress and the Sherman [Antitrust Law](#): 1887-1890, 23 U. Chi. L. Rev. 221 (1956).

<sup>8</sup> "... [F]ounded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute but the remedies which it provided were coextensive with such conceptions.... [T]he statute in express terms vested the Circuit Court[s] of the United States with 'jurisdiction to prevent and restrain violations of this act,' and besides expressly conferred the amplest discretion in such courts to join such parties as might be deemed necessary and to exert such remedies as would fully accomplish the purposes intended." [Wilder Mfg. Co. v. Corn Products Co.](#), 236 U.S. 165, 174. See [Northern Securities Co. v. United States](#), 193 U.S. 197, 343-347, 349-350. (opinion of Harlan, J.).

<sup>9</sup> Section 4 of the Sherman Act authorized equitable relief in actions brought by United States Attorneys; § 7 authorized any person injured in his business or property by reason of a violation of the antitrust laws to recover treble damages. 26 Stat. 209-210. In both sections, as is true of § 16 of the Clayton Act, the scope of the court's jurisdiction is limited only by the need to establish a violation of the Act.

<sup>10</sup> Although the kind of relief which is appropriate in private litigation may sometimes be different from that which the Government may obtain, cf. [United States v. Borden Co.](#), 347 U.S. 514, 518-520, there is no difference in the scope of the jurisdictional grant to the federal court in the two kinds of cases:

"[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws. E.g., [United States v. Borden Co.](#), 347 U.S. 514, 518 (1954). Section 16 should be construed and applied with this purpose in mind.... Its availability should be 'conditioned by the necessities of the public interest which Congress has sought to protect.' [[Hecht Co. v. Bowles](#), 321 U.S. 321, 330]. [Zenith Corp. v. Hazeltine](#), 395 U.S. 100, 130-131.

<sup>11</sup> Section 16 provides:

"[A]ny person... shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws... when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings..." 38 Stat. 737, [15 U.S.C. § 26](#). The legislative history of § 16 is thin. In addition to the nearly identical House and Senate Reports, ante, at 634 n. 5, the following comments from the House debate provide some idea of the congressional intent. Congressman McGillicuddy, a member of the Commerce Committee, described the perceived need:

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[\*\*\*\*38] [\*\*2898] The scope of the jurisdictional grant is just as broad as the definition of a violation of the antitrust laws. That definition was deliberately phrased in general language to be sure that "every conceivable act which could possibly come within [\*652] the spirit or purpose of the prohibition" would be covered by the statute, regardless of whether or not the particular form of restraint was actually foreseen by Congress.<sup>12</sup> In the decades following the formulation of the Rule of Reason in 1911, this Court has made it perfectly clear that the prosecution of litigation in a state court may itself constitute a form of violation of the federal statute.

[\*\*\*\*39] Thus, the attempt to enforce a [\*\*\*1030] patent obtained by fraud,<sup>13</sup> or a patent known to be invalid for other reasons,<sup>14</sup> may constitute an independent violation of the Sherman Act; and such litigation may be brought in a state court.<sup>15</sup> The prosecution of frivolous claims and objections before regulatory bodies, including state agencies, may violate the antitrust laws.<sup>16</sup> The enforcement of restrictive provisions in a license to use a patent or a trademark<sup>17</sup> may violate the Sherman Act; such enforcement may, of course, be sought in the state courts. Similarly, the provisions of a lease,<sup>18</sup> or a fair trade [\*653] agreement,<sup>19</sup> may become the focus of enforcement litigation which has a purpose or effect of frustrating rights guaranteed by the antitrust laws, either in a state or

"Under the present law any person injured in his business or property by acts in violation of the Sherman antitrust law may recover his damage.... There is no provision under the present law, however, to prevent threatened loss or damage even though it be irreparable. The practical effect of this is that a man would have to sit by and see his business ruined before he could take advantage of his remedy. In what condition is such a man to take up a long and costly lawsuit to defend his rights?

"The proposed bill solves this problem for the person, firm, or corporation threatened with loss or damage to property by providing injunctive relief against the threatened act that will cause such loss or damage. Under this most excellent provision a man does not have to wait until he is ruined in his business before he has his remedy." 51 Cong. Rec. 9261 (1914).

During consideration of the Conference Report Congressman Floyd described the scope of the § 16 remedy:

"[S]o that if a man is injured by a discriminatory contract, by a tying contract, by the unlawful acquisition of stock of competing corporations, or by reason of someone acting unlawfully as a director in two banks or other corporations, he can go into any court and enjoin or restrain the party from committing such unlawful acts." Id., at 16319.

<sup>12</sup> "[The] generic designation of the first and second sections of the [Sherman Act], when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held [in Standard Oil Co. v. United States, 221 U.S. 1] that in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute." United States v. American Tobacco Co., 221 U.S. 106, 81.

<sup>13</sup> Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172.

<sup>14</sup> MacGregor v. Westinghouse Co., 329 U.S. 402.

<sup>15</sup> Pratt v. Paris Gas Light & Coke Co., 168 U.S. 255, 260.

<sup>16</sup> Otter Tail Power Co. v. United States, 410 U.S. 366; 417 U.S. 901 (summary affirmance after remand); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508.

<sup>17</sup> Timken Co. v. United States, 341 U.S. 593; Farbenfabriken Bayer, A.G. v. Sterling Drug, Inc., 307 F.2d 207 (CA3 1962); Gray Line, Inc. v. Gray Line Sightseeing Cos., 246 F.Supp. 495 (ND Cal. 1965).

<sup>18</sup> International Salt Co. v. United States, 332 U.S. 392; United Shoe Machinery Corp. v. United States, 258 U.S. 451; Phillips v. Crown Central Petroleum Corp., 376 F.Supp. 1250 (Md. 1973).

<sup>19</sup> Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398 (CA2 1968), cert. denied, 393 U.S. 938; Katz Drug Co. v. W. A. Sheaffer Pen Co., 6 F.Supp. 212 (WD Mo. 1933).

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federal court.<sup>20</sup> Indeed, the enforcement of a covenant not to compete - the classic example of a contract in restraint of trade - typically takes place in a state court.<sup>21</sup>

**[\*\*\*\*40] [\*\*2899]** These examples are sufficient to demonstrate that "litigation in state courts may constitute an antitrust violation...." ante, at 635 n. 6. Since the judicial construction of a statute is as much a part of the law as the words written by the legislature, the illegal use of state-court litigation as a method of monopolizing or restraining trade is as plainly a violation of the antitrust laws as if Congress had specifically described each of the foregoing cases as an independent **[\*654]** violation. The **[\*\*\*1031]** language in § 16 of the Clayton Act which expressly authorizes injunctions against violations of the antitrust laws is therefore applicable to this species of violation as well as to other kinds of violations.

Since § 16 of the Clayton Act is an Act of Congress which expressly authorizes an injunction against a state-court proceeding which violates the antitrust laws, the plain language of the anti-injunction statute excepts this kind of injunction from its coverage.<sup>22</sup>

**[\*\*\*41] II**

There is nothing in this Court's precedents which is even arguably inconsistent with this rather obvious reading of the statutory language.<sup>23</sup> On at least three occasions the Court **[\*655]** has held that general grants of federal

<sup>20</sup> In litigation between a franchisee and franchisor the former may challenge the validity of various contract provisions under federal law, while the latter may rely heavily on state contract law as a basis for controlling the franchisee's conduct. State proceedings to obtain possession of disputed premises or equipment are powerful weapons in such litigation, even when the federal court has the power to maintain the status quo. See *Chmielecki v. City Products Corp.*, 71 F.R.D. 118, 141-142, 158 (WD Mo. 1976).

<sup>21</sup> The potential consequences of the plurality's view may perhaps best be illustrated by reference to a common-law decision that could not possibly survive scrutiny under the Sherman Act. In *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535, the House of Lords held that a 25-year, worldwide covenant not to compete in the arms business was an enforceable bargain. One of the parties to such a contract was therefore entitled to enjoin a breach of the agreement by another party. If such common-law relief should be granted by a state court in a comparable situation, and if the plurality's interpretation of the statute were accepted, a federal court would be powerless to interfere with state proceedings to enforce such a judgment.

<sup>22</sup> The text of the statute is quoted in n. 4, *supra*.

<sup>23</sup> Rather surprisingly the plurality seems to regard *Clothing Workers v. Richman Bros. Co.*, 348 U.S. 511, as supporting its position. That case involved a construction of the portion of the Taft-Hartley Act that conferred jurisdiction on the National Labor Relations Board to obtain injunctive relief in certain situations. The Court rejected the argument that the statute implicitly authorized similar relief for private parties:

"Congress explicitly gave such jurisdiction to the district courts only on behalf of the Board on a petition by it or 'the officer or regional attorney to whom the matter may be referred.' § 10 (j), (1), 61 Stat. 149, 29 U.S.C. § 160 (j), (1). To hold that the Taft-Hartley Act also authorizes a private litigant to secure interim relief would be to ignore the closely circumscribed jurisdiction given to the District Court and to generalize where Congress has chosen to specify. To find exclusive authority for relief vested in the Board and not in private parties accords with other aspects of the Act." *Id. at 517*.

Since the statute did not expressly authorize the requested relief, it was obviously not within the "expressly authorized" exception to § 2283. The fact that the Court simply read the relevant statutes literally in that case supports my view that we should use the same approach here.

In *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, on which the plurality also relies, the union did not even argue that injunctive relief was expressly authorized by federal statute. It unsuccessfully contended "that the federal injunction was proper either 'to protect or effectuate' the District Court's denial of an injunction in 1967, or as 'necessary in aid of' the District Court's jurisdiction." *Id. at 284*. That case is wholly inapposite to the issue presented today.

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jurisdiction which make no mention of either state-court proceedings, or of the anti-injunction statute, are within the "expressly authorized" exception. *Providence & N.Y.S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578, 599-601;<sup>24</sup> *Porter v. Dicken*, [\*\*2900] 328 U.S. 252; [\*\*\*1032]<sup>25</sup> *Mitchum v. Foster*, 407 U.S. 225.

[\*\*\*\*42] [\*656] In Mitchum the Court made it clear that a statute may come within the "expressly authorized" exception to § 2283 even though it does not mention the anti-injunction statute or contain any reference to state-court proceedings, provided that it creates a uniquely federal right or remedy that could be frustrated if the federal court were not empowered to enjoin the state proceeding.<sup>26</sup> The Court then formulated and applied this test: "The test... is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." *407 U.S., at 238*.

[\*\*\*\*43] Section 16 of the Clayton Act created a federal remedy which can only be given its intended scope if it includes the power to stay state-court proceedings in appropriate [\*657] cases. As one of the sponsors of the statute explained, under "this most excellent provision a man does not have to wait until he is ruined in his business before he has his remedy."<sup>27</sup> But if the plurality's interpretation of the legislation were correct, a private litigant might indeed be "ruined in his business before he has his remedy" against state-court litigation seeking

The fact that these two cases provide the plurality with its strongest support emphasizes the dramatic character of its refusal to accept the plain meaning of the words Congress has written.

<sup>24</sup> "But the power of the District Courts to issue an injunction to stay proceedings in a State court is questioned, since, by the Judiciary Act of 1973, 1 Stat. 335, it was declared that no writ of injunction shall be granted [by the United States courts] 'to stay proceedings in any court of a State.' But the act of 1851 was a subsequent statute, and by the 4th section of this act - after providing for proceedings to be had under it for the benefit of ship owners, and after declaring that it shall be deemed a sufficient compliance with its requirements on their part if they shall transfer their interest in ship and freight for the benefit of the claimants to a trustee to be appointed by the court - it is expressly declared, that 'from and after [such] transfer all claims and proceedings against the owners shall cease.' Surely this injunction applies as well to 'claims and proceedings' in State courts as to those in the federal courts...." *109 U.S., at 599-600*.

<sup>25</sup> The relevant portions of §§ 205(a) and (c) of the Emergency Price Control Act of 1942, 56 Stat. 33, simply provided:

"SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

. . .

"(c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act."

<sup>26</sup> "In the first place, it is evident that, in order to qualify under the 'expressly authorized' exception of the anti-injunction statute, a federal law need not contain an express reference to that statute. As the Court has said, 'no prescribed formula is required; an authorization need not expressly refer to § 2283.' *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U.S. 511, 516. Indeed, none of the previously recognized statutory exceptions contains any such reference. Secondly, a federal law need not expressly authorize an injunction of a state court proceeding in order to qualify as an exception. Three of the six previously recognized statutory exceptions contain no such authorization. Thirdly, it is clear that, in order to qualify as an 'expressly authorized' exception to the anti-injunction statute, an Act of Congress must have created a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding. This is not to say that in order to come within the exception an Act of Congress must, on its face and in every one of its provisions, be totally incompatible with the prohibition of the anti-injunction statute. The test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." *407 U.S., at 237-238* (footnotes omitted).

<sup>27</sup> See n. 11, supra.

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enforcement of an invalid patent, a covenant not to compete, or an executory merger agreement, to take only a few obvious [\*\*\*1033] examples of antitrust violations that might be consummated by state-court litigation.

The plurality assumes that Congress intended to distinguish between illegal state proceedings which are already pending and those which have not yet been filed at the time of a federal court's determination that [\*\*\*\*44] a violation of the antitrust laws has been consummated; the federal court may enjoin the latter, but is powerless to restrain the former. See ante, at 635-636, n. 6. Nothing in the history of the anti-injunction statute suggests any such logic-chopping distinction.<sup>28</sup> [\*\*2901] Indeed, it is squarely at odds with Senator Sherman's own explanation of the intended scope of the statutory power "to issue all remedial process or writs proper and necessary to enforce its provisions...."<sup>29</sup> It would demean the legislative [\*658] process to construe the eloquent rhetoric which accompanied the enactment of the antitrust laws as implicitly denying federal courts the power to restrain illegal state-court litigation simply because it was filed before the federal case was concluded.<sup>30</sup> A faithful application of the rationale of *Mitchum v. Foster* requires a like result in this case.

### [\*\*\*45] III

The plurality expresses the fear that if the Clayton Act is given its intended scope, the anti-injunction statute "would be completely eviscerated" since there are 26 other federal statutes which may also be within the "expressly authorized" exception. Ante, at 636-637, n. 7. That fear, stated in its strongest terms, is that in the 184 years since the anti-injunction statute was originally enacted, there are 26 occasions on which Congress has qualified its prohibition to some extent. There are at least three reasons why this argument should not cause panic.

First, the early history of the anti-injunction statute indicates that it was primarily intended to prevent the federal courts from exercising a sort of appellate review function in litigation in which the state and federal courts had equal competence. The statute imposed a limitation on [\*\*\*1034] the general equity powers of the federal courts which existed in 1793, and which have been exercised subsequently in diversity [\*659] and other private litigation. But the anti-injunction statute has seldom, if ever, been construed to interfere with a federal court's power to implement federal policy pursuant to [\*\*\*\*46] an express statutory grant of federal jurisdiction.<sup>31</sup> Although there is no need to resolve the question in this case, I must confess that I am not now persuaded that the concept of federalism is necessarily inconsistent with the view that the 1793 Act should be considered wholly inapplicable to later enacted federal statutes that are enforceable exclusively in federal litigation.<sup>32</sup> If a fair reading of the jurisdictional grant in

<sup>28</sup> Thus, the 1851 Act to limit the liability of shipowners, 9 Stat. 635, applied equally to "preventing or arresting the prosecution of separate suits," see *Providence & N.Y.S.S. Co. v. Hill Mfg. Co.*, 109 U.S., 578, 596. The Interpleader Act, [28 U.S.C. § 2361](#), in terms, applies equally to the "instituting or prosecuting" of other litigation. In terms of the interest in federalism, since the injunction against litigation typically runs against the parties rather than the court, there is little difference between denying a citizen access to the state forum and denying him the right to prosecute an existing case to its conclusion. In either situation, a federal injunction must rest on a determination that an important federal policy outweighs the interest in allowing a state court to resolve a particular controversy. But when the federal policy does justify that conclusion, the timing of the state-court action should rarely be controlling.

<sup>29</sup> See n. 7, *supra*.

<sup>30</sup> It is true that when the Sherman Act was passed, Congress did not expressly address "the possibility that state-court proceedings would be used to violate the Sherman or Clayton Acts." Ante, at 634. As the statute has been construed, however, it is now well settled that state courts can be used as the very instruments by which litigants, and the public, may be deprived of rights protected by the antitrust laws. When the state courts are so used and the antitrust laws thereby violated, the state litigation is as plainly a matter of federal legislative concern as if it had been expressly identified in the debates preceding the enactment of the 1890 statute.

<sup>31</sup> As already noted, [supra, at 654-655, n. 23](#), there was no such express grant of jurisdiction to private litigants in either [Clothing Workers v. Richman Bros. Co.](#), 348 U.S. 511 or [Atlantic Coast Line R. Co. v. Locomotive Engineers](#), 398 U.S. 281.

<sup>32</sup> Indeed, Mr. Justice Black's opinion for the Court in [Porter v. Dicken](#), 328 U.S. 252, seems to proceed on the assumption that the anti-injunction statute is inapplicable when the federal statute may be enforced in either a state or a federal court.

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any such statute does authorize an injunction against state court litigation frustrating the federal policy, nothing in our prior cases would foreclose the conclusion that it is within the "expressly authorized" exception to [§ 2283](#).

**[\*\*\*\*47] [\*\*2902]** Second in any event, the question whether the Packers and Stockyards Act of 1921, for example, gives the federal court the power to enjoin state litigation has little, if any, relevance to the issues presented by this case. Whatever the answer to that question may be,<sup>33</sup> that 56-year-old statute will not exacerbate federal-state relations and jeopardize the vitality of "our federalism." Indeed, even if all the statutes identified by the plurality are within the "expressly authorized" exception to [§ 2283](#), it is extremely doubtful that they would generate as much, or as significant, litigation as either **[\*660]** the Civil Rights Act of 1871 or the antitrust laws.<sup>34</sup> The answer to the important question presented by this case should not depend on speculation about potential consequences for other statutes of relatively less importance to the economy and the Nation.

**[\*\*\*\*48]** Third, concern about the Court's ability either to enlarge or to contain the exceptions to the anti-injunction statute, ante, at 635-639, is disingenuous at best. As originally enacted in 1793, the statute contained no express exception at all. Those few that were recognized in the ensuing century and a half were the product of judicial interpretation of the statute's prohibition in concrete situations. The codification of the Judicial Code in 1948 restated the exceptions in statutory language, but was not intended to modify the Court's power to accommodate the terms of the statute to overriding expressions of national policy embodied in statutes **[\*\*\*1035]** like the Ku Klux Klan Act of 1871 or the Sherman Act of 1890.<sup>35</sup>

#### **[\*\*\*\*49] IV**

Since the votes of THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN are decisive, a separate comment on MR. JUSTICE BLACKMUN's opinion concurring in the result is required.

**LEdHN[2B]** [2B] His agreement with the proposition that an injunction properly entered pursuant to § 16 of the Clayton Act is within the "expressly authorized" exception to the anti-injunction statute establishes that proposition as the law for the future. **[\*661]** His view that § 16 did not authorize the preliminary injunction entered by Judge McLaren is dispositive of this litigation but, for reasons which may be briefly summarized, is not a view that finds any support in the law.

Unlike the plurality, which would draw a distinction between ongoing litigation and future litigation, ante, at 635-636, n.6, MR. JUSTICE BLACKMUN differentiates between a violation committed by a multiplicity of lawsuits and a violation involving only one lawsuit. The very case on which he relies rejects that distinction. In [California Motor Transport Co. v. Trucking Unlimited](#), 404 U.S. 508, 512-513, the Court stated: S

"Yet unethical conduct **[\*\*\*\*50]** in the setting of the adjudicatory process often results in sanctions. Perjury of witnesses is one example. Use of a patent obtained by fraud to exclude a competitor from the market may involve a violation of the antitrust laws, as we held in [Walker Process Equipment v. Food Machinery & Chemical Corp.](#), 382 U.S. 172, 175-177. Conspiracy with a licensing authority to eliminate a competitor may also result in an antitrust transgression. [Continental Ore Co. v. Union Carbide & Carbon Corp.](#), 370 U.S. 690, 707; [Harman v. Valley National Bank](#), 339 F.2d 564 (CA9 1964). Similarly, **[\*\*2903]** bribery of a public purchasing agent may constitute a

<sup>33</sup> Cases in which [§ 2283](#) has been held to bar injunctive relief against state proceedings have seldom involved attempts to enforce federal statutes. Indeed, some courts have held that any federal statute expressly authorizing equitable relief is within the exception from [§ 2283](#).

<sup>34</sup> It is worthy of note that only 5 of the cited statutes predate the addition of the words "except as expressly authorized by Act of Congress" to the anti-injunction statute in 1948 (fully 16 were enacted in the last 10 years).

<sup>35</sup> The Reviser's Note to [§ 2283](#), which is taken from the House Report, H.R. Rep. No. 308, 80th Cong., 1st Sess., A181-A182 (1947), states that, with the exception of the addition of the words "to protect or effectuate its judgments," which were intended to overrule [Toucey v. New York Life Ins. Co.](#), 314 U.S. 118, "the revised section restores the basic law as generally understood and interpreted prior to the Toucey decision."

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violation of § 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851 (CA9 1965).

"There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations."<sup>1</sup>

Each of the examples given in this excerpt from the California Motor Transport opinion involves a single use of the adjudicatory process to violate the antitrust laws. [\*662] [\*\*\*\*51] Manifestly, when Mr. Justice Douglas wrote for the Court in that case and described "a pattern of baseless, repetitive claims," id., at 513, as an illustration of an antitrust violation, he did not thereby circumscribe the category to that one example. Nothing in his opinion even remotely implies [\*\*\*1036] that there would be any less reason to enjoin the "[u]e of a patent obtained by fraud to exclude a competitor from the market," id., at 512, for example, than to enjoin the particular violation before the Court in that case.

In this case we are reviewing the affirmance by the Court of Appeals of an order granting a preliminary injunction. Affirmance was required unless the exercise of the District Court's discretion was clearly erroneous. And when both the District Court and the Court of Appeals are in agreement, the scope of review in this Court is even more narrow, Faulkner v. Gibbs, 338 U.S. 267, 268; United States v. Dickinson, 331 U.S. 745, 751; Allen v. Trust Co., 326 U.S. 630, 636. Without the most careful review of the record, and the findings and conclusions of the District Court, it is most inappropriate for this Court to [\*\*\*\*52] reverse on the basis of a contrary view of the facts of the particular case.

The mere fact that the Illinois courts concluded that petitioner's state-law claim was meritorious does not disprove the existence of a serious federal antitrust violation. For if it did, invalid patents, price fixing agreements, and other illegal covenants in restraint of trade would be enforceable in state courts no matter how blatant the violation of federal law.

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Apart from the anti-injunction statute, petitioner has argued that principles of equity, comity, and federalism create a bar to injunctive relief in this case. Brief for Petitioner 36-39. This argument is supported by three facts: The Illinois litigation was pending for a period of nine years; the Illinois Supreme Court concluded tha respondents were guilty of [\*663] a breach of fiduciary duty; and respondents withdrew their antitrust defense from the state action.

Unfortunately, in recent years long periods of delay have been a characteristic of litigation in the Illinois courts. That is not a reason for a federal court to show any special deference to state courts; quite the contrary, it merely emphasizes the seriousness [\*\*\*\*53] of any decision by a federal court to abstain, on grounds of federalism, from the prompt decision of a federal question.

The Illinois Supreme Court's conclusion that respondents had violated a fiduciary obligation and that petitioner was entitled to a large damages recovery rested on that court's appraisal of the legality of a covenant in restraint of trade.<sup>36</sup> The fact that the covenant not to compete is valid as a matter of state law is irrelevant to the federal antitrust issue. If, for example, instead of a contract totally excluding respondents from the relevant market, the [\*\*2904] parties had agreed on a lesser restraint which merely required respondents to sell at prices fixed by [\*\*\*1037] petitioner, the Illinois court might also have concluded that respondents were bound by the contract even though the federal courts would have found it plainly violative of the Sherman Act. The Illinois decision on the merits

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<sup>36</sup> "In some situations there could be, of course, a violation of a covenant not to compete without the breach of a fiduciary duty, as would be the case if Stoner had not been an officer and director of plaintiff. In the present case, however, the acts of defendants in misappropriating the Lektro-Vend [machine] and their use of it to compete against plaintiff are intertwined, the latter being, so to speak, the means by which the former was brought to bear against plaintiff." Vendo Co. v. Stoner, 58 Ill. 2d 289, 306-307, 321 N.E. 2d 1, 11 (1974).

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merely highlights the fact that state and federal courts apply significantly different standards in evaluating contracts in restraint of trade.<sup>37</sup>

[\*\*\*\*54] [\*664] That fact provides the explanation for respondents' decision to withdraw their federal antitrust defense from the Illinois litigation and to present it to the federal courts. Congress has granted the federal courts exclusive jurisdiction over the prosecution of private antitrust litigation.<sup>38</sup> Since the state courts do not have the power to award complete relief for an antitrust violation, since state judges are unfamiliar with the complexities of this area of the law, and since state procedures are sometimes unsatisfactory for cases of nationwide scope, no adverse inference should be drawn from a state-court defendant's election to reserve his federal antitrust claim for decision by a federal court.

Indeed, since these respondents made that election, and since Congress has withheld jurisdiction of antitrust claims from the state courts, the plurality [\*\*\*\*55] properly ignores the argument that principles of federalism require abstention in this case. For a ruling requiring the federal court to abstain from [\*665] the decision of an antitrust issue that might have been raised in a state-court proceeding would be tantamount to holding that the federal defense must be asserted in the state action. Such a holding could not be reconciled with the congressional decision to confer exclusive jurisdiction of the private enforcement of the antitrust laws on the federal courts. Quite plainly, therefore, this is not the kind of case in which abstention is even arguably proper.

When principles of federalism are invoked to defend a violation of the Sherman Act, one is inevitably reminded of the fundamental issue [\*\*\*1038] that was resolved only a few years before the anti-injunction statute was passed. Perhaps more than any other provision in the Constitution, it was the *Commerce Clause* that transformed the ineffective coalition created by the Articles of Confederation into a great Nation. S

"It was... to secure freedom of trade, to break down the barriers to its free flow, that the Annapolis Convention was called, only to adjourn with [\*\*\*\*56] a view to Philadelphia. Thus the generating source of the Constitution lay in the rising volume of restraints upon commerce which the Confederation could not check. These were the proximate cause of our national existence down to today. I S

. . .  
" [\*\*2905] So by a stroke as bold as it proved successful, they founded a nation, although they had set out only to find a way to reduce trade restrictions. So also they solved the particular problem causative of their historic action, by introducing the *commerce clause* in the new structure of power.

<sup>37</sup> Indeed, a state court's conclusion that the breach of a covenant not to compete constitutes the violation of a fiduciary obligation as a matter of state law is not inconsistent with a federal-court determination that the litigation enforcing that covenant was "conducted in bad faith" as that concept is used in cases like *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611. While the District Court did not specifically address the question involved in *Huffman and Younger v. Harris*, 401 U.S. 37, it had the following to say in addressing the extent of the Sherman Act violation:

"There is persuasive evidence that Vendo's activities in its litigation against the Stoner interests in Illinois state court were not a genuine attempt to use the adjudicative process legitimately. Its theft of trade secret claim was clearly non-meritorious, and litigation of this claim might well be interpreted - considering the record as a whole - as an attempt to further harass the Stoner interests and limit the amount of aid Stoner could lend Lektro-Vend. The attempt to enforce the covenants not to compete... appears to have been to lengthen the period for which the noncompetition covenants would run. The purpose of this portion of the state litigation seems purely anticompetitive." *403 F.Supp., at 534-535*.

The Court of Appeals implicitly affirmed, *supra, at 646*. Thus while every state proceeding which clashes with the antitrust laws would not necessarily be motivated by a desire to harass or be conducted in bad faith, the findings indicate that such was the case here.

<sup>38</sup> See *Freeman v. Bee Machine Co.*, 319 U.S. 448; *General Investment Co. v. Lake Shore & Mich. So. R. Co.*, 260 U.S. 261.

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"... On this fact as much as any other we may safely say rests the vast economic development and present industrial power of the nation. Of it may be credited largely the fact we are an independent and democratic country today." W. Rutledge, A Declaration of Legal Faith 25-27 (1947).!

[\*666] Only by ignoring this chapter in our history could we invoke principles of federalism to defeat enforcement of the "Magna Carta of free enterprise" <sup>39</sup> enacted pursuant to Congress' plenary power to regulate commerce among the States.

I respectfully dissent.

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## References

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[42 Am Jur 2d, Injunctions 235; 54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 369](#)

[15 USCS 26; 28 USCS 2283](#)

US L Ed Digest, Courts 697, 700.5; Restraints of Trade and Monopolies 68

ALR Digests, Courts 313, 315; Restraints of Trade and Monopolies 15

L Ed Index to Annos, Injunction; Restraints of Trade and Monopolies

ALR Quick Index, Injunctions; Restraints of Trade and Monopolies

Federal Quick Index, Injunctions; Monopolies and Restraints of Trade

Annotation References:

Applicability of federal antitrust laws as affected by other federal statutes or by [Federal Constitution. 45 L Ed 2d 841.](#)

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<sup>39</sup> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the [Bill of Rights](#) is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete - to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." [United States v. Topco Associates, 405 U.S. 596, 610.](#) See also [Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 235-236.](#)

## Pfizer, Inc. v. Gov't of India

Supreme Court of the United States

November 1, 1977 Argued ; January 11, 1978 As Amended

No. 76-749

**Reporter**

434 U.S. 308 \*; 98 S. Ct. 584 \*\*; 54 L. Ed. 2d 563 \*\*\*; 1978 U.S. LEXIS 14 \*\*\*\*; 1978-1 Trade Cas. (CCH) P61,812

PFIZER INC. ET AL. v. GOVERNMENT OF INDIA ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

## **Core Terms**

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foreign nation, treble damages, anti trust law, treble-damages, foreign sovereign, Sherman Act, consumers, entitled to sue, sovereign, domestic, remedies, courts, legislative history, antitrust violation, Clayton Act, antitrust, practices, purchaser, commerce, Cooper, foreign corporation, anticompetitive, violators, purposes, district court, inclusion, immunity, damages, debates, deprive

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Clayton Act > General Overview

### [HN1](#) [down arrow] **Antitrust & Trade Law, Clayton Act**

See [15 U.S.C.S. § 15](#).

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

### [HN2](#) [down arrow] **Private Actions, Standing**

The Sherman and Clayton Acts each provide that the word person shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country. [15 U.S.C.S. §§ 7](#) and [12](#).

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > General Overview

### [HN3](#) [down arrow] **Antitrust & Trade Law, Clayton Act**

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The Clayton Act, [15 U.S.C.S. § 15](#), is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

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

Antitrust & Trade Law > Clayton Act > General Overview

#### [\*\*HN4\*\*](#) [down] **Private Actions, Remedies**

In light of the Clayton Act's expansive remedial purpose, the U.S. Supreme Court has not taken a technical or semantic approach in determining who is a "person" entitled to sue for treble damages.

Governments > Legislation > Interpretation

#### [\*\*HN5\*\*](#) [down] **Legislation, Interpretation**

The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate the proper scope of the law.

Civil Procedure > ... > Justiciability > Standing > General Overview

International Law > ... > Comity Doctrine > Areas of Law > Commercial Transactions

#### [\*\*HN6\*\*](#) [down] **Justiciability, Standing**

A foreign nation is generally entitled to prosecute any civil claim in the courts of the United States upon the same basis as a domestic corporation or individual might do.

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

International Law > Authority to Regulate > Anticompetitive Activities

International Law > Dispute Resolution > General Overview

#### [\*\*HN7\*\*](#) [down] **Private Actions, Standing**

A foreign nation otherwise entitled to sue in our courts is entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff. Neither the fact that parties are foreign nor the fact that they are sovereign is reason to deny them the remedy of treble damages Congress afforded to "any person" victimized by violations of the antitrust laws.

## **Lawyers' Edition Display**

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### **Summary**

Several foreign nations instituted separate antitrust actions against certain pharmaceutical manufacturing companies in different Federal District Courts, alleging damages as the purchasers of antibiotics, and seeking to

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recover treble damages under 4 of the Clayton Act ([15 USCS 15](#)), which authorizes "any person" injured by antitrust violations to sue for treble damages in the Federal District Courts. The actions were consolidated for pretrial purposes in the United States District Court for the District of Minnesota, which held that the foreign nations were "persons" entitled to sue under the Clayton Act, and which refused to dismiss the actions. On interlocutory appeal, the United States Court of Appeals for the Eighth Circuit affirmed (550 F2d 396).

On certiorari, the United States Supreme Court affirmed. In an opinion by Stewart, J., joined by Brennan, White, Marshall, and Stevens, JJ., it was held that a foreign nation was a "person" within the meaning of 4, and thus, if otherwise entitled to sue in the courts of the United States, could sue as a purchaser of goods for treble damages to the same extent as any other plaintiff, since (1) even though Congress' foremost concern in passing the antitrust laws was the protection of Americans, nevertheless the treble-damage remedy of 4 was not restricted to consumers in the United States, (2) the word "person" in 4 did not automatically exclude all sovereign governments or governmental bodies from suing for treble damages, and (3) absent clear legislative intent, foreign nations could not be excluded from the protection of the antitrust laws as an exception to the general rule that a foreign nation was entitled to prosecute any civil claim in the courts of the United States upon the same basic as a domestic corporation or individual.

Burger, Ch. J., joined by Powell and Rehnquist, JJ., dissented, expressing the view that (1) the legislative history of the antitrust laws did not indicate that Congress intended to allow foreign nations to sue Americans for treble damages, and (2) since the question whether foreign sovereigns should be allowed to sue involved a sensitive political decision and had not been considered by Congress when the antitrust laws were enacted, the issue should be left to Congress and the Executive.

Powell, J., dissenting, expressed the view that major policy questions, particularly those involving foreign sovereigns as in the case at bar, were beyond the province of the Judicial Branch and were matters for legislative judgment.

Blackmun, J., did not participate.

## Headnotes

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MONOPOLIES §67 > suit for treble damages -- availability to foreign nation -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B]

A foreign nation is a "person" within the meaning of 4 of the Clayton Act ([15 USCS 15](#)), which authorizes "any person" injured by antitrust violations to sue for treble damages in the Federal District Courts; thus if otherwise entitled to sue in the courts of the United States, a foreign nation may sue as a purchaser of goods for treble damages under the antitrust laws to the same extent as any other plaintiff. (Burger, Ch. J., and Powell and Rehnquist, JJ., dissented from this holding.)

MONOPOLIES §8 > federal statutes -- definition of "person" -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

Under the provisions of the Sherman Act ([15 USCS 7](#)) and the Clayton Act ([15 USCS 12](#)) which define the word "person," as used in the Acts, as including corporations and associations existing under or authorized by the laws of either the United States, any of the territories, any state, or any foreign country, the definition of "person" is inclusive

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rather than exclusive, and does not by itself imply that a foreign government, any more than a natural person, falls without its bounds.

MONOPOLIES §67 > suit for treble damages -- persons entitled to sue -- > Headnote:

[LEdHN\[3\]](#) [3]

Under 4 of the Clayton Act ([15 USCS 15](#)), which authorizes "any person" injured by antitrust violations to sue for treble damages in the Federal District Courts, the phrase "any person" is intended to have its naturally broad and inclusive meaning.

MONOPOLIES §67 > suits for treble damages -- availability to foreign plaintiffs -- > Headnote:

[LEdHN\[4\]](#) [4]

Even though Congress' foremost concern in passing the antitrust laws was the protection of Americans, nevertheless the treble-damage remedy of 4 of the Clayton Act ([15 USCS 15](#)), which authorizes "any person" injured by antitrust violations to sue for treble damages in the Federal District Courts, is available to foreign plaintiffs, and is not restricted to consumers in the United States.

MONOPOLIES §67 > suits for treble damages -- availability to foreign corporations -- > Headnote:

[LEdHN\[5\]](#) [5]

Under 4 of the Clayton Act ([15 USCS 15](#)), which authorizes "any person" injured by antitrust violations to sue for treble damages in the Federal District Courts, a foreign corporation is entitled to sue for treble damages, since the definition of "person" contained in the Sherman Act ([15 USCS 7](#)) and the Clayton Act ([15 USCS 12](#)) explicitly includes corporations and associations existing under or authorized by the laws of any foreign country.

MONOPOLIES §10 > Sherman Act -- conspiracies affecting imports and exports -- > Headnote:

[LEdHN\[6A\]](#) [6A] [LEdHN\[6B\]](#) [6B]

The Sherman Act's reference to commerce with foreign nations ([15 USCS 1, 2](#)) does not reach only conspiracies affecting goods imported into the United States; the antitrust laws apply to exports as well.

MONOPOLIES §67 > suit for treble damages -- purposes of statute -- > Headnote:

[LEdHN\[7\]](#) [7]

The purposes of 4 of the Clayton Act ([15 USCS 15](#)), which authorizes any person injured by antitrust violations to sue for treble damages in the Federal District Courts, are (1) to deter violators and deprive them of the fruits of their illegality, and (2) to compensate victims of antitrust violations for their injuries.

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MONOPOLIES §67 > suits for treble damages -- availability to sovereign governments -- > Headnote:  
[LEdHN\[8\]](#) [8]

The word "person" in 4 of the Clayton Act ([15 USCS 15](#)), which authorizes any "person" injured by antitrust violations to sue for treble damages in the Federal District Courts, does not automatically exclude all sovereign governments or governmental bodies from suing for treble damages.

STATUTES §178 > interpretation -- meaning of "person" -- > Headnote:  
[LEdHN\[9\]](#) [9]

As used in statutes, the word "person" is not a term of art with a fixed meaning wherever it is used.

MONOPOLIES §67 > suits for treble damages -- availability to foreign nations and domestic states -- > Headnote:  
[LEdHN\[10\]](#) [10]

Under 4 of the Clayton Act ([15 USCS 15](#)), which authorizes "any person" injured by antitrust violations to sue for treble damages in the Federal District Courts, a foreign nation, like a domestic state, is entitled to pursue the remedy of treble damages when it has been injured in its business or property by antitrust violations.

LAW §15 > MONOPOLIES §67 > suits for treble damages -- availability to foreign nations -- > Headnote:  
[LEdHN\[11\]](#) [11]

A foreign nation is generally entitled to prosecute any civil claim in the courts of the United States upon the same basis as a domestic corporation or individual, and allowing a foreign sovereign to sue under 4 of the Clayton Act ([15 USCS 15](#)) for treble damages to the same extent as any other person is a specific application of the general rule; excluding foreign nations from the protection of the antitrust laws cannot be justified as an exception to the general rule in the absence of clear legislative intent.

COURTS §57 > LAW §15 > suits by foreign governments -- power of Executive Branch -- > Headnote:  
[LEdHN\[12\]](#) [12]

Only governments recognized by, and at peace with, the United States are entitled to access to the courts of the United States, and it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue, there being a rule of complete judicial deference to the Executive Branch in such area.

## Syllabus

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A foreign nation otherwise entitled to sue in the courts of this country held to be a "person" within the meaning of § 4 of the Clayton Act and thus to be entitled to sue for treble damages under the federal antitrust laws to the same extent as any other plaintiff. Pp. 311-320.

(a) Though no statutory provision or legislative history clearly covers the question whether a foreign nation is a "person" as the word is used in § 4 (which gives "any person" injured by antitrust violations the right to sue in district courts), Congress intended the word to have a broad and inclusive meaning, and in light of the antitrust laws' expansive remedial purpose, the Court has not narrowly construed the term. Pp. 311-313.

(b) Congress did not intend to make the treble-damages remedy available only to consumers in this country as is manifest from the inclusion of foreign corporations within the statutory definition of "person" and the fact that the antitrust laws extend to trade "with foreign countries." Pp. 313-314.

(c) To deny [\*\*\*\*2] a foreign plaintiff injured by an antitrust violation the right to sue would defeat the two purposes of § 4: to deter violators and deprive them of the "fruits of their illegality," and "to compensate victims of antitrust violations for their injuries." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746. Pp. 314-315.

(d) When a foreign nation enters our commercial markets as a purchaser of goods or services, it can be victimized by anticompetitive practices just as surely as a private person or a domestic State, which in *Georgia v. Evans*, 316 U.S. 159, was held to be a "person" within the meaning of the antitrust laws; and there is no reason why Congress would have wanted to deprive a foreign nation of the treble-damages remedy available to others who suffer through violations of the antitrust laws. Pp. 315-318.

(e) Foreign nations are generally entitled to prosecute civil claims in the courts of the United States upon the same basis as domestic corporations or individuals. To afford foreign nations the protection of the antitrust laws does not involve a judicial encroachment upon foreign policy, since only governments recognized by and at peace [\*\*\*\*3] with the United States are entitled to access to this country's courts, and it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue. Pp. 318-320.

550 F. 2d 396, affirmed.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. BURGER, C.J., filed a dissenting opinion, in which POWELL and REHNQUIST, JJ., joined, post, p. 320. POWELL, J., filed a dissenting opinion, post, p. 329. BLACKMUN, J., took no part in the consideration or decision of the case.

**Counsel:** Samuel W. Murphy, Jr., argued the cause for petitioners. With him on the briefs were Kenneth N. Hart, William J. T. Brown, Peter Dorsey, Allen F. Maulsby, Gordon G. Busdicker, Julian O. von Kalinowski, Joe A. Walters, John H. Morrison, John P. Lynch, Merrell E. Clark, Jr., and Roberts B. Owen.

Douglas V. Rigler argued the cause for respondents. With him on the brief were Julius Kaplan, James W. Schroeder, Harold C. Petrowitz, Ralph E. Becker, Joseph B. Friedman, and James H. Mann. \*

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**Judges:** Burger, Brennan, Stewart, White, Marshall, Powell, Rehnquist, Stevens; Blackmun took no part in the consideration or decision of the case.

**Opinion by:** STEWART

\* Briefs of amici curiae urging affirmance were filed by Solicitor General McCree, Acting Assistant Attorney General Shenefield, Barry Grossman, and Frederic Freilicher for the United States; and by Paul C. Sprenger and Eric L. Olson for the Federal Republic of Germany.

## Opinion

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[\*309] [\*\*\*567] [\*\*586] MR. JUSTICE STEWART delivered the opinion of the court.

LEdHN[1A] [1A] In this case we are asked to decide whether a foreign nation is entitled to sue in our courts for treble damages under the antitrust laws. The respondents are the Government of India, the Imperial Government of Iran, and the Republic of the Philippines. They brought separate actions in Federal District Courts against the petitioners, six pharmaceutical manufacturing companies. The actions were later consolidated for pretrial purposes in the United States District Court for the District of Minnesota.<sup>1</sup> The complaints alleged that the petitioners [\*310] had conspired to restrain and monopolize interstate and foreign trade in the manufacture, distribution, and sale of broad spectrum antibiotics, in violation of §§ 1 and 2 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2. Among the practices [\*\*\*5] the petitioners allegedly engaged in were price fixing, market division, and fraud upon the United States Patent Office.<sup>2</sup> India and Iran each [\*\*\*568] alleged that it was a "sovereign foreign state with whom the United States of America maintains diplomatic relations"; the Philippines alleged that it was a "sovereign and independent government." Each respondent claimed that as a purchaser of antibiotics it had been damaged in its business or property by the alleged antitrust violations and sought treble damages under § 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, on its own behalf and on behalf of several classes of foreign purchasers of antibiotics.<sup>3</sup>

[\*\*\*6] [\*311] The petitioners asserted as an affirmative defense to the complaints that the respondents as foreign nations were not "persons" entitled to sue for treble damages under § 4. In response to pretrial motions<sup>4</sup> the District Court held that the respondents were "persons" and refused to dismiss the [\*\*587] actions.<sup>5</sup> The trial court certified the question for appeal pursuant to 28 U.S.C. § 1292 (b).<sup>6</sup> The Court of Appeals for the Eighth

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<sup>1</sup> Similar actions were also brought by Spain, South Korea, West Germany, Colombia, Kuwait, and the Republic of Vietnam. Vietnam was a party to this case in the Court of Appeals and was named as a respondent in the petition for certiorari. Subsequent to the filing of the petition Vietnam's complaint was dismissed by the District Court on the ground that the United States no longer recognized the Government of Vietnam; the dismissal was affirmed by the Court of Appeals. Republic of Vietnam v. Pfizer Inc., 556 F. 2d 892 (CA8). Vietnam has not participated as a party in this Court. Some of the other suits have been withdrawn and the rest are pending.

<sup>2</sup> The antibiotic antitrust litigation originated with a proceeding brought by the Federal Trade Commission which resulted in an order requiring petitioners Pfizer and American Cyanamid to grant domestic applicants licenses under their patents for broad spectrum antibiotics. See Charles Pfizer & Co. v. FTC, 401 F. 2d 574 (CA6). Criminal antitrust proceedings against petitioners Pfizer, American Cyanamid, and Bristol-Myers were eventually dismissed. United States v. Chas. Pfizer & Co., 367 F. Supp. 91 (SDNY); see also United States v. Chas. Pfizer & Co., 426 F. 2d 32 (CA2), modified, 437 F. 2d 957, aff'd by an equally divided Court, 404 U.S. 548. Most of the large number of civil suits have been settled. See West Virginia v. Chas Pfizer & Co., 314 F. Supp. 710 (SDNY), aff'd, 440 F. 2d 1079 (CA2).

<sup>3</sup> Respondents India and Iran also sued in a parens patriae capacity; those claims were dismissed in a separate appeal and are not at issue here. Pfizer Inc. v. Lord, 522 F. 2d 612, 615-620 (CA8).

<sup>4</sup> Petitioners moved to dismiss the suits brought by India and Iran. The Philippines moved to strike petitioners' affirmative defense.

<sup>5</sup> The District Court relied upon an earlier decision denying a motion to dismiss a related suit brought by the State of Kuwait, see n. 1, supra. In re Antibiotic Antitrust Actions, 333 F. Supp. 315 (SDNY). An appeal was taken from that decision but was dismissed by stipulation of the parties. Thus, the Court of Appeals' decision in the present case marked the first appellate consideration of the issue.

<sup>6</sup> A petition for mandamus had previously been denied. Pfizer Inc. v. Lord, *supra*.

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Circuit affirmed, 550 F. 2d 396, and adhered to its decision upon rehearing en banc.<sup>7</sup> *Id.*, at 400. We granted certiorari to resolve an important and novel question in the administration of the antitrust laws. 430 U.S. 964.

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[LEdHN\[2A\]](#) [2A] As the Court of Appeals observed, this case "turns on the interpretation of the statute." 550 F. 2d, at 397. A treble-damages remedy for persons injured by antitrust violations was first provided in § 7 of the Sherman Act, and was re-enacted in 1914 without substantial change as § 4 of the Clayton Act.<sup>8</sup> Section 4 provides: S

[HN1](#) [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust [\*312] laws may sue therefor in any district court of the United States in the district in which the [\*\*\*569] defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."|

Thus, whether a foreign nation is entitled to sue for treble damages depends upon whether it is a "person" as that word is used in § 4. There is no statutory provision or legislative history that provides a clear answer; [\*\*\*\*8] it seems apparent that the question was never considered at the time the Sherman and Clayton Acts were enacted.

It is apparent that this definition is inclusive rather than exclusive, and does not by itself imply that a foreign government, any more than a natural person, falls without its bounds. Cf. [Helvering v. Morgan's Inc.](#), 293 U.S. 121, 125 n. 1; [United States v. New York Telephone Co.](#), ante, at 169 n. 15.<sup>9</sup>

[\*\*\*\*9] [LEdHN\[3\]](#) [3] The Court has previously noted the broad scope of the remedies provided by the antitrust laws. [HN3](#) [The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.] [Mandeville Island Farms, Inc. v. American Crystal Sugar Co.](#), 334 U.S. 219, 236; cf. [Perma Life Mufflers, Inc. v. International Parts Corp.](#), 392 U.S. 134, 138-139. And the legislative history of the Sherman Act demonstrates that Congress used the phrase "any person" intending it to have its naturally broad and inclusive meaning. There was no mention in the floor debates of any more restrictive definition. Indeed, during the course of those debates the word "person" was used interchangeably with other terms even [\*313] broader in connotation. For example, Senator Sherman said that the treble-damages remedy was being given to "any party," and Senator Edmunds, one of the principal [\*\*588] draftsmen of the final bill,<sup>10</sup> said that [\*\*\*\*10] it established "the right of anybody to sue who chooses to sue." 21 Cong. Rec. 2569, 3148 (1890).

[HN4](#) [In light of the law's expansive remedial purpose, the Court has not taken a technical or semantic approach in determining who is a "person" entitled to sue for treble damages. Instead, it has said that [HN5](#)] "[t]he purpose,

<sup>7</sup> Two judges dissented, believing that Congress, in passing the Sherman and Clayton Acts, did not intend to include foreign sovereigns within the scope of the term "person." **550 F. 2d, at 400**. Three judges in the majority also joined a concurring opinion noting the absence of controlling legislative history and urging congressional action. *Id., at 399-400*.

<sup>8</sup> [Section 7](#) of the Sherman Act was repealed in 1955 as redundant. § 3, 69 Stat. 283; see S. Rep. No. 619, 84th Cong., 1st Sess., 2 (1955).

<sup>9</sup> [LEdHN\[2B\]](#) [2B]

[HN2](#) [The Sherman and Clayton Acts each provide that the word "person"

"shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." [15 U.S.C. §§ 7, 12](#).

<sup>10</sup> See [Apex Hosiery Co. v. Leader](#), 310 U.S. 469, 489 n. 10.

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the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate" the proper scope of the law. [United States v. Cooper Corp., 312 U.S. 600, 605.](#)

II

The respondents in this case possess two attributes that could arguably exclude them from the scope of the sweeping phrase "any person." They are foreign, and they are sovereign nations.

A

[\*\*\*\*11] [LEdHN\[4\]](#)<sup>↑</sup> [4] [LEdHN\[5\]](#)<sup>↑</sup> [5] [LEdHN\[6A\]](#)<sup>↑</sup> [6A]As to the first of these attributes, the petitioners argue that, in light of statements made during [\*\*\*570] the debates on the Sherman Act and the general protectionist and chauvinistic attitude evidenced by the same Congress in debating contemporaneous tariff bills, it should be inferred that the Act was intended to protect only American consumers. Yet it is clear that a foreign corporation is entitled to sue for treble damages, since the definition of "person" contained in the Sherman and Clayton Acts explicitly includes "corporations and associations existing under or authorized by... the laws of any foreign country." See n. 9, *supra*. Moreover, the antitrust laws extend to trade "with foreign nations" as well as among the several States of the Union. [15 U.S.C. §§ 1, 2.](#)<sup>11</sup> Clearly, therefore, Congress [\*314] did not intend to make the treble-damages remedy available only to consumers in our own country.<sup>12</sup>

[\*\*\*\*12] In addition, the petitioners' argument confuses the ultimate purposes of the antitrust laws with the question of who can invoke their remedies. The fact that Congress' foremost concern in passing the antitrust laws was the protection of Americans does not mean that it intended to deny foreigners a remedy when they are injured by antitrust violations. Treble-damages suits by foreigners who have been victimized by antitrust violations clearly may contribute to the protection of American consumers.

[LEdHN\[7\]](#)<sup>↑</sup> [7]The Court has noted that § 4 has two purposes: to deter violators and deprive them of "the fruits of their illegality," and "to compensate victims of antitrust violations for their injuries." [Illinois Brick Co. v. Illinois, 431 U.S. 720, 746; Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-486; Perma Life Mufflers, Inc. v. International Parts Corp., supra, at 139.](#) To deny a foreign plaintiff injured by an antitrust violation the right to sue would defeat these purposes. [\*\*589] It would permit a price fixer or a monopolist to escape full liability [\*\*\*\*13] for his illegal actions and would deny [\*315] compensation to certain of his victims, merely because he happens to deal with foreign customers.

Moreover, an exclusion of all foreign plaintiffs would lessen the deterrent effect of treble damages. The conspiracy alleged by the respondents in this case operated in domestically as well as internationally.<sup>13</sup> If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing [\*\*\*571] business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home.

<sup>11</sup> [LEdHN\[6B\]](#)<sup>↑</sup> [6B]

THE CHIEF JUSTICE'S dissent seems to contend that the Sherman Act's reference to commerce with foreign nations was intended only to reach conspiracies affecting goods imported into this country. Post, at 323-324. But the scope of congressional power over foreign commerce has never been so limited, and it is established that the antitrust laws apply to exports as well. See, e.g., [Timken Roller Bearing Co. v. United States, 341 U.S. 593, 599; United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947](#) (Mass.).

<sup>12</sup> Moreover, in the Webb-Pomerene Act, ch. 50, 40 Stat. 516, as amended, [15 U.S.C. § 61 et seq.](#), Congress has provided a narrow and carefully limited exception for export activity that would otherwise violate the antitrust laws. See [United States v. Concentrated Phosphate Export Assn., 393 U.S. 199](#). A judicial rule excluding all non-Americans as plaintiffs in treble-damages cases would hardly be consistent with the precisely limited exception Congress has established to the general applicability of the antitrust laws to foreign commerce.

<sup>13</sup> See n. 2, *supra*.

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If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators.<sup>14</sup>

[\*\*\*\*14] B

[LEdHN\[8\]](#) [8] [LEdHN\[9\]](#) [9] The second distinguishing characteristic of these respondents is that they are sovereign nations. The petitioners contend that the word "person" was clearly understood by Congress when it passed the Sherman Act to exclude sovereign governments. The word "person," however, is not a term of art with a fixed meaning wherever it is used, nor was it in 1890 when the Sherman Act was passed.<sup>15</sup> Cf. [Towne v. Eisner, 245 U.S. \[\\*316\] 418, 425](#). Indeed, this Court has expressly noted that use of the word "person" in the Sherman and Clayton Acts did not create a "hard and fast rule of exclusion" of governmental bodies. [United States v. Cooper Corp., 312 U.S., at 604-605](#).

[\*\*\*\*15] On the two previous occasions that the Court has considered whether a sovereign government is a "person" under the antitrust laws, the mechanical rule urged by the petitioners has been rejected.<sup>16</sup> In [United States v. Cooper Corp.](#), the United States sought to maintain a treble-damages action under [§ 7](#) of the Sherman Act for injury to its business or property. The Court considered the question whether the [\*\*\*572] United States was a "person" entitled to sue for treble damages as one to be decided not "by a strict construction of the words of the [\*\*590] Act, nor by the application of artificial canons of construction," but by analyzing the language of the statute "in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction." [Id., at 605](#). The Court noted that the Sherman Act provides several [\*317] separate and distinct remedies: criminal prosecutions, injunctions, and seizure of property by the United States on the one hand, and suits for treble damages "granted to redress private injury" on the other. [Id., at 607-608](#). Statements made during the congressional debates on the Sherman and Clayton [\*\*\*\*16] Acts provided further evidence that Congress affirmatively intended to exclude the United States from the treble-damages remedy. [Id., at 611-612](#). Thus, the Court found that the United States was not a "person" entitled to bring suit for treble damages.<sup>17</sup>

In [Georgia v. Evans, 316 U.S. 159](#), decided the very next Term, the question was whether Georgia was entitled to sue for treble damages under [§ 7](#) of the Sherman Act. The Court of Appeals, believing that the Cooper case

<sup>14</sup> It has been suggested that depriving foreign plaintiffs of a treble-damages remedy and thus encouraging illegal conspiracies would affect American consumers in other ways as well: by raising worldwide prices and thus contributing to American inflation; by discouraging foreign entrants who might undercut monopoly prices in this country; and by allowing violators to accumulate a "war chest" of monopoly profits to police domestic cartels and defend them from legal attacks. [Velvel, Antitrust Suits by Foreign Nations](#), 25 Cath. U.L. Rev. 1, 7-8 (1975).

<sup>15</sup> The case relied on by petitioners as establishing a general rule, [United States v. Fox, 94 U.S. 315](#), merely adopted New York's construction of its Statute of Wills, as a matter of state law. [Id., at 320](#). Even in New York the word "person" did not have a settled meaning. Compare [In re Will of Fox, 52 N.Y. 530](#), aff'd sub nom. [United States v. Fox, supra](#), with [Republic of Honduras v. Soto, 112 N.Y. 310, 19 N.E. 845](#). In fact, contemporaneous cases generally held that the sovereign was entitled to have the benefit of a statute extending a right to "persons." See, e.g., [Stanley v. Schwalby, 147 U.S. 508, 514-517](#); [Dollar Savings Bank v. United States, 19 Wall. 227, 239](#); [Cotton v. United States, 11 How. 229, 231](#).

Cases construing federal statutes of the same era also indicate that the use of the term "person" did not invariably imply an intent to exclude governmental bodies. See, e.g., [Ohio v. Helvering, 292 U.S. 360](#) ("person" in §§ 3140 and 3244 of the Revised Statutes of 1878 includes a State); [California v. United States, 320 U.S. 577, 585-586](#) ("person" in the Shipping Act, 1916, 46 U.S.C. § 801 et seq., includes both a State and a city); [Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390, 396](#) ("person" in the Sherman Act includes a city).

<sup>16</sup> Even earlier, in [Chattanooga Foundry, supra, at 396](#), the Court held without extended discussion that a city was entitled to sue for treble damages.

<sup>17</sup> In 1955 Congress amended the Clayton Act to allow the United States to sue for single damages when it is injured in its business or property. Ch. 283, [§ 1](#), 69 Stat. 282, [15 U.S.C. § 15a](#).

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controlled, had held that a State, like the Federal Government, was not a "person." This Court reversed, noting that Cooper did not hold "that the [\*\*\*\*17] word 'person,' abstractly considered, could not include a governmental body." [316 U.S., at 161](#). As in Cooper, the Court did not rest its decision upon a bare analysis of the word "person," but relied instead upon the entire statutory context to hold that Georgia was entitled to sue. Unlike the United States, which "had chosen for itself three potent weapons for enforcing the Act," [316 U.S., at 161](#), a State had been given no other remedies to enforce the prohibitions of the law. To deprive it also of a suit for damages "would deny all redress to a State, when mulcted by a violator of the Sherman Law, merely because it is a State." [Id., at 162-163](#). Although the legislative history of the Sherman Act did not indicate that Congress ever considered whether a State would be entitled to sue, the Court found no reason to believe that Congress had intended to deprive a State of the remedy made available to all other victims of antitrust violations.

[\*318] [LEdHN\[10\]](#) [10]It is clear that in Georgia v. Evans the Court rejected the proposition that the word "person" as used [\*\*\*\*18] in the antitrust laws excludes all sovereign states. And the reasoning of that case leads to the conclusion that a foreign nation, like a domestic State, is entitled to pursue the remedy of treble damages when it has been injured in its business or property by antitrust violations. When a foreign nation enters our commercial markets as a purchaser of goods or services, it can be victimized by anticompetitive practices just as surely as a private person or a domestic State. The antitrust laws provide no alternative remedies for [\*\*\*573] foreign nations as they do for the United States.<sup>18</sup> The words of Georgia v. Evans are thus equally applicable here: S

"We can perceive no reason for believing that Congress wanted to deprive a [foreign nation], as purchaser of commodities shipped in [international] commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act.... Nothing in the Act, its history, or its policy, could justify so restrictive a construction of the word 'person' in [§ 7](#) . . . . Such a construction would deny all redress to a [foreign nation], when mulcted by a violator of the Sherman [\[\\*\\*591\]](#) [\[\\*\\*\\*19\]](#) Law, merely because it is a [foreign nation]."  
[316 U.S., at 162-163](#).

### III

[LEdHN\[11\]](#) [11]The result we reach does not involve any novel concept of the jurisdiction of the federal courts. This Court has long recognized the rule that [HN6](#) [1] a foreign nation is generally entitled to prosecute any civil claim in the courts of the United States [\[\\*319\]](#) upon the same basis as a domestic corporation or individual might do. "To deny him this privilege would manifest a want [\[\\*\\*\\*20\]](#) of comity and friendly feeling." [The Sapphire, 11 Wall. 164, 167](#); [Monaco v. Mississippi, 292 U.S. 313, 323 n. 2](#); [Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408-409](#); see [U.S. Const., Art. III, § 2, cl. 1](#).<sup>19</sup> To allow a foreign sovereign to sue in our courts for treble damages to the same extent as any other person injured by an antitrust violation is thus no more than a specific application of a long-settled general rule. To exclude foreign nations from the protections of our antitrust laws

<sup>18</sup> While THE CHIEF JUSTICE's dissent says there are "weapons in the arsenals of foreign nations" sufficient to enable them to counter anticompetitive conduct, such as cartels or boycotts, post, at 327-328, such a political remedy is hardly available to a foreign nation faced with monopolistic control of the supply of medicines needed for the health and safety of its people.

<sup>19</sup> Congress has explicitly conferred jurisdiction upon the federal courts to entertain such suits:

"The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between --

.....

"(4) a foreign state... as plaintiff and citizens of a State or of different States." [28 U.S.C. § 1332\(a\)\(4\) \(1976 ed.\)](#)

Among the actions foreign sovereign governments were entitled to maintain at the time of the passage of the Sherman and Clayton Acts were suits for common-law business torts, such as unfair competition, similar in general nature to antitrust claims. See [French Republic v. Saratoga Vichy Spring Co., 191 U.S. 427 \(1903\)](#); [La Republique Francaise v. Schultz, 94 F. 500 \(SDNY 1899\)](#).

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would, on the other hand, create a conspicuous exception to this rule, an exception that could not be justified in the absence of clear legislative intent.

[\*\*\*\*21] [LEdHN\[12\]](#) [12]Finally, the result we reach does not require the Judiciary in any way to interfere in sensitive matters of foreign policy.<sup>20</sup> It has long been [\*\*\*574] established that only governments recognized by the United States and at peace with us are entitled to access [\*320] to our courts, and that it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue. *Jones v. United States, 137 U.S. 202, 212*; *Guaranty Trust Co. v. United States, 304 U.S. 126, 137-138*; *Banco Nacional de Cuba v. Sabbatino, supra, at 408-412*. Nothing we decide today qualifies this established rule of complete judicial deference to the Executive Branch.<sup>21</sup>

[\*\*\*\*22] [LEdHN\[1B\]](#) [1B]We hold today only that [HN7](#) a foreign nation otherwise entitled to sue in our courts is entitled to sue for treble damages under the antitrust laws to the same extent as any other plaintiff. Neither the fact that the respondents are foreign nor the fact that they are sovereign is reason to deny them the remedy of treble damages Congress afforded to "any person" victimized by violations of the antitrust laws.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

**Dissent by:** BURGER; POWELL

## Dissent

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[\*\*592] MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST join, dissenting.

The Court today holds that foreign nations are entitled to bring treble-damages actions in American courts against American suppliers for alleged violations of the antitrust laws; the Court reaches this extraordinary result by holding that for purposes of § 4 of the Clayton Act, foreign sovereigns are "persons," while conceding paradoxically that the question "was never considered at the time the Sherman and [\*\*\*\*23] Clayton Acts were enacted." *Ante, at 312*.

I dissent from this undisguised exercise of legislative power, since I find the result plainly at odds not only with the language of the statute but also with its legislative history and precedents of this Court. The resolution of the delicate and [\*321] important policy issue of giving more than 150 foreign countries the benefits and remedies enacted to protect American consumers should be left to the Congress and the Executive. Congressional silence over a period of almost a century provides no license for the Court to make this sensitive political decision vastly expanding the scope of the statute Congress enacted.

A

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975)* (POWELL, J., concurring). The relevant provisions here are [§ 1](#) of

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<sup>20</sup> In a letter that was presented to the Court of Appeals when it reconsidered this case en banc, the Legal Adviser of the Department of State advised "that the Department of State would not anticipate any foreign policy problems if... foreign governments [were held to be] 'persons' within the meaning of Clayton Act § 4." A copy of this letter is contained in the Memorandum for the United States as Amicus Curiae in opposition to the petition for a writ of certiorari filed in this Court.

<sup>21</sup> Cf. n. 1, *supra*.

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the Clayton Act in which the word "person" is defined, and § 4 in which the treble-damages remedy is conferred on those falling within the precisely [\*\*\*575] enumerated categories. Section 1 provides, in relevant part: S

"The word 'person' or 'persons' wherever used [\*\*\*\*24] in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."1

Section 4 then incorporates this definition by providing: S

"That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."1

Even on the most expansive reading, these two sections provide not the slightest indication that Congress intended to allow foreign nations to sue Americans for treble damages under our antitrust laws. The very fact that foreign sovereigns [\*322] were not included within the definition of "person" despite the explicit reference to corporations and associations existing under the "laws of any foreign country" in the same definition ought to be dispositive under [\*\*\*\*25] established doctrine governing interpretation of statutes. I therefore see no escape from the conclusion that the omission by Congress of foreign nations was deliberate.

The inclusion of foreign corporations within the statutory definition in no sense argues for a different characterization of Congress' intent. At the time of the passage of both the Sherman and Clayton Acts, foreign sovereigns, even when acting in their commercial capacities, were immune from suits in the courts of this country under the doctrine of sovereign immunity. See *The Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812); *Ex parte Peru*, 318 U.S. 578 (1943); *Mexico v. Huffman*, 324 U.S. 30 (1945). Foreign corporations, of course, had no such immunity. See, e.g., *Shaw v. Quincy Mining Co.*, 145 U.S. 444, 453 (1892); *In re Hohorst*, 150 U.S. 653, 662-663 (1893). Given that "person" as used in the Clayton and Sherman Acts refers to both antitrust plaintiffs and defendants, see [\*\*593] *United States v. Cooper Corp.*, 312 U.S. 600, 606 (1941), the decision of Congress to include foreign corporations while omitting foreign sovereigns [\*\*\*\*26] from the definition most likely reflects this differential susceptibility to suit rather than any intent to benefit foreign consumers or to enlist their help in enforcing our antitrust laws. It would be little short of preposterous to think that Congress in 1890 was concerned about giving such rights to foreign nations, even though it might well decide to do so now.

Respondents' claim that this disparate treatment cannot be justified today when foreign states effectively control many large foreign corporations and when sovereign immunity has been limited by the Foreign Sovereign Immunities Act of 1976, Pub. [\*\*\*576] L. 94-583, 90 Stat. 2891, is not an argument appropriately addressed to or considered by this Court. If [\*323] revisions in the statute are required to take into account contemporary circumstances, that task is properly one for Congress particularly in light of the sensitive political nature and foreign policy implications of the question.

The Court's reliance on the references to "foreign nations" in §§ 1 and 2 of the Sherman Act and § 1 of the Clayton Act to support an argument that Congress was specifically concerned with foreign commerce and foreign [\*\*\*\*27] nations in 1890 when the disputed definition was enacted is similarly unavailing. As a threshold matter, congressional concern with the foreign commerce of the United States does not entail either a desire to protect foreign nations or a willingness to allow them to sue Americans for treble damages in our courts. The Webb-Pomerene Act, ch. 50, 40 Stat. 516, as amended, 15 U.S.C. § 61 et seq., passed within only a few years of the Clayton Act, indicates that such a concern may instead be served at the expense of foreign states and consumers.

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<sup>1</sup> The Webb-Pomerene Act exempts certain actions of export associations from the antitrust laws, but the exemption applies only if the association's actions do not restrain trade or affect the price of exported products within the United States and do not restrain the export trade of any domestic competitor of the association. 15 U.S.C. § 62. Although the Act was subsequently

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[\*\*\*\*28] In any event, the relevant language of §§ 1 and 2 of the Sherman Act, as subsequently incorporated in the Clayton Act, does not support respondents' contention. The reference to "commerce... with foreign nations" appeared only in the final draft of the Act as reported by the Senate Judiciary Committee, and replaced language in the numerous earlier drafts of Senator Sherman to the following effect: S

"That all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made [**\*324**] with a view or which tend to prevent full and free competition in the production, manufacture, or sale of articles of domestic growth or production, or of the sale of articles imported into the United States,... are hereby declared to be against public policy, unlawful and void...." 21 Cong. Rec. 2598 (1890) (first draft) (emphasis added).<sup>21</sup>

The focus of this language on protecting domestic consumers from anticompetitive practices affecting the importation of goods into the United States could not be more clear, nor could the absence of any attention to affording comparable protection for foreign consumers of American exports. The language substituted by the Judiciary [\*\*\*\*29] Committee -- language tracking that appearing in the *Commerce Clause* -- was chosen to mollify the objections of those Senators who felt the proposed statute exceeded Congress' constitutional power to regulate commerce, see, e.g., id., at 2600, 3147 (remarks of [\*\*\*577] Sen. George); id., at 2728 (remarks [\*\*594] of Sen. Edmunds); id., at 3149 (remarks of Sen. Reagan); cf. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 434-435 (1932); that language was not intended to work any substantive change in the focus or scope of the Act. See *United States v. Wise*, 370 U.S. 405, 420 (1962) (Harlan, J., concurring). To read this language as evidencing an intent to protect foreign nations or foreign consumers simply belies its lineage.

B

The legislative history of the treble-damages remedy gives no more [\*\*\*\*30] support to the result reached by the Court than does the language of the statute. As five of the eight judges of the Court of Appeals concluded -- and indeed as the majority here concedes, ante, at 312 -- "Congress, in passing § 4 of the Clayton Act, 15 U.S.C. § 15, gave no consideration nor did [\*325] it have any legislative intent whatsoever, concerning the question of whether foreign governments are 'persons' under the Act." 550 F. 2d 396, 399 (Ross, J., concurring) (emphasis added). The conversion of this silence in 1890 into an affirmative intent in 1978 is indeed startling.

The failure of Congress even to consider the question of granting treble-damages remedies to foreign nations provides the clearest possible argument for leaving the question to the same political process that gave birth to the Sherman and Clayton Acts. To rely on the absence of any express congressional intent to exclude foreign nations from taking advantage of the treble-damages remedy is a remarkable innovation in statutory interpretation. It is a strange way to camouflage the unassailable conclusion that the legislative history offers no affirmative support [\*\*\*\*31] for the result reached today. Further, as this Court observed just last Term, the legislative history of the treble-damages remedy which does exist "indicate[s] that it was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers." *Brunswick Corp. v. Pueblo Bowl-OMat, Inc.*, 429 U.S. 477, 486 n. 10 (1977), quoting from 21 Cong Rec. 1767-1768 (1890) (remarks of Sen. George). What we so recently saw as primarily a remedy for American consumers is now extended to all the nations of the world -- a boon Congress might choose to grant but has not done so.

C

In the absence of any helpful language in the statute or any affirmative legislative history, the Court attempts to base its expansive reading of "person" on Mr. Justice Frankfurter's decision in *Georgia v. Evans*, 316 U.S. 159

regarded as carving out an exemption from the antitrust laws, the legislative history indicates considerable question at the time whether the conduct of exporters meeting the conditions specified in the Act would have violated the antitrust laws even without the putative exemption. See H.R. Rep. No. 50, 65th Cong., 1st Sess., 2 (1917).

<sup>2</sup> The equivalent language of subsequent drafts can be found at 21 Cong. Rec. 2598-2600 (1890).

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(1942), granting the State of Georgia and all other domestic States the right to sue for treble damages. I fail to see how that result dictates this one.

In Georgia v. Evans, Mr. Justice Frankfurter concluded that absent the right to sue for treble damages, our States would [\*326] be left without any remedy against [\*\*\*\*32] violators of the antitrust laws. The Court today analogizes the situation of foreign nations to that of the States in Evans, and [\*\*\*578] finds the analogy dispositive. When viewed solely in terms of the remedies specifically provided by the antitrust laws, the plight of domestic States and foreign sovereigns may, in this limited respect, be roughly comparable. But the very limited scope of the inquiry in Evans precludes consideration of the manifold and patently obvious respects in which foreign nations and our own domestic States differ -- cogent difference bearing on the question under consideration here, though obviously not at all on the Court's inquiry in Evans.

First, the disparate treatment of foreign and domestic States is a legitimate source of concern only on the assumption that Congress in passing the Sherman Act intended -- or even contemplated -- that these two categories of political entities were so essentially [\*\*595] alike that they were entitled to the same remedies against anticompetitive conduct. As I have already suggested, this assumption derives no support from either the statutory language or anything in the legislative history. Although our own [\*\*\*\*33] States were also not the expressly intended beneficiaries of the Act, to deny them the treble-damages remedy would, as Mr. Justice Frankfurter perceived, have the unmistakable result of effectively denying surrogate protection to American citizens in whose behalf the State acts and for whose benefit the Sherman Act was enacted. Thus, while the result in Evans is a tolerable taking of certain liberties with the literal language of the statute, the congruence of that result with Congress' purpose can scarcely be doubted. This same logic, however, does not even remotely apply to the situation of foreign nations.

Second, it simply is not the case that absent a treble-damages remedy, foreign nations would be denied any effective means of redress against anticompetitive practices by American corporations. Unlike our own States, whose freedom of action in this regard is constrained by the Commerce and Supremacy [\*327] Clauses, foreign sovereigns remain free to enact and enforce their own comprehensive antitrust statutes and to impose other more drastic sanctions on offending corporations. One need look no further than the laws of respondents India and the Philippines for evidence [\*\*\*\*34] that such remedies are possessed by foreign nations. And indeed, amicus West Germany has demonstrated that such laws are not mere idle enactments. During the pendency of this action, it notified petitioner Pfizer that a proceeding under German antitrust law was being commenced involving some of the same allegations which are made in the complaint filed by respondents in their treble-damages actions in this country.

While problems of jurisdiction and discovery may render antitrust actions against foreign defendants somewhat more problematic than a suit against a corporation in its own country, the limited experience of the Common Market nations in applying their antitrust laws to foreign corporations suggests that such difficulties are certainly not insoluble and are likely exaggerated. See, e.g., Europemballage Corp. v. E.C. Commission, 12 Comm. Mkt. L.R. 199 (1973); Commercial Solvents Corp. v. E.C. Commission, 13 Comm. Mkt. L.R. 309 (1974). And, as the presently [\*\*\*579] existing treaty between the United States and West Germany indicates, reciprocal agreements providing for cooperation in antitrust investigations undertaken by foreign nations are an effective means of [\*\*\*\*35] mitigating the rigors of discovery in foreign jurisdictions. See Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, entered into force Sept. 11, 1976. United States -- Federal Republic of Germany, [1976] 27 U.S.T. 1956, T.I.A.S. No. 8291.

Third, it takes little imagination to realize the dramatic and very real differences in terms of coercive economic power and political interests which distinguish our own States from foreign sovereigns. The international price fixing, boycotts, and other current anticompetitive practices undertaken by some Middle Eastern nations are illustrative of the weapons [\*328] in the arsenals of foreign nations which no domestic State could ever employ. Nor do our domestic States, in any meaningful sense, have the conflicting economic interests or antagonistic ideologies which characterize and enliven the relations among nation states.

I HÌ ÁMÈRÌKÀ ËNG LÀI ÁU ĐÀI Ì ËU JÍ LÀI ÁSÈOÀCÁ Ì HÈU Ì JLAFJÌ Ì ÁMÈRSÓYÓAÍ ËUHÌ

Viewed in this light, it is clear that the decision to allow foreign sovereigns to seek treble damages from Americans and to rely on standards of competitive behavior in fixing liability which those very same nations flout in their business relationships with this country is a decision [\*\*\*36] dramatically different from the one Mr. Justice Frankfurter faced in Evans. To consider the result reached there as to Georgia determinative of the result here is to substitute a "hard and fast rule of inclusion" for the "hard and fast rule of exclusion" which Justices Frankfurter and Roberts eschewed in Evans and Cooper, respectively. Only the [\*\*596] most mechanical reading of our prior precedent will justify such a result.

Further, the result reached by the Court today confronts us with the anomaly that while the United States Government cannot sue for treble damages under our antitrust laws, other nations are free to engage in the most flagrant kinds of combinations for price fixing, totally at odds with our antitrust concepts, and nevertheless are given the right by the Court to sue American suppliers in American courts for treble damages plus attorneys' fees. It is no answer to say that the United States needs no civil treble-damages remedy since it has reserved for itself the power to pursue criminal remedies against American suppliers for antitrust violations. What that response overlooks is that our criminal antitrust remedies hardly compare with the infinite array [\*\*\*37] of political and commercial weapons available to a foreign nation for use against the United States itself or against American producers and suppliers. This, again, underscores how completely the problem is a matter of policy to be resolved by the political branches without the intrusion of the Judiciary.

[\*329] D

Finally, the Court's emphasis on the deterrent effects of treble-damages actions by foreign sovereigns also will not withstand critical scrutiny. We acknowledged in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S., at 485-486*, that while treble damages do play an important role in deterring wrongdoers, "the treble-damages [\*\*\*580] provision... is designed primarily as a remedy." To allow foreign sovereigns who were clearly not the intended beneficiaries of this remedy to nevertheless invoke it reverses this priority of purposes, and does so solely on the basis of this Court's uninformed speculation about some possible beneficiaial consequences to American consumers of this "maximum deterrent." Ante, at 315. In areas of far less political delicay, we have been unwilling to expand the scope of the right to sue under the antitrust laws without [\*\*\*38] express congressional intent to do so. See, e.g., *Hawaii v. Standard Oil Co., 405 U.S. 251, 264-265 (1972)*.<sup>3</sup>

For these reasons I dissent from the Court's intrusion into the legislative sphere.

MR. JUSTICE POWELL, dissenting.

I join THE CHIEF JUSTICE in his dissent, and add a word to emphasize my difficulty with the Court's decision.

The issue is whether the antitrust laws of this country are to be made available for treble-damages suits against American businesses by the governments of other countries. The Court resolves this issue in favor of such [\*\*\*39] governments by construing the word "person" in § 4 of the Clayton Act to include [\*330] "foreign governments." No one argues seriously that this was the intent of Congress in 1890 when the term "person" was included in the Act. Indeed, the Court acknowledges that this "question was never considered at the time the Sherman and Clayton Acts were enacted." Ante, at 312.

Despite this conclusion as to the absence of any congressional consideration, the inviting possibility of treble damages is extended today by judicial action to the sovereign nations of the world.<sup>1</sup> With minor exceptions, the United States recognizes the governments of all of these nations. We may assume that most of them have no

<sup>3</sup>The Court adverts to a letter from the Legal Adviser of the State Department to the Court of Appeals advising that no foreign policy problems were anticipated from a decision holding foreign governments to be persons within the meaning of § 4 of the Clayton Act. The significance of this communication escapes me. Nothing in the Constitution suggests legislative power may be exercised jointly by the courts and the Department of State.

<sup>1</sup>At present there are 162 sovereign nations.

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equivalent of our antitrust laws and would be unlikely to afford reciprocal opportunities to the United States to sue and recover damages in their courts.

The [\*\*597] Court has resolved a major policy question. As the Acting Solicitor General stated in his [\*\*\*\*40] Memorandum for the United States as Amicus Curiae, filed March 23, 1977: S

"Whether foreign sovereigns are 'persons' entitled to sue under Section 4 depends largely upon the general policy reflected in the statute, and the general policy of the United States opening its courts to foreign sovereigns." I

I had thought it was accepted doctrine that questions of "general policy" -- especially with respect to foreign sovereigns and absent explicit legislative authority -- are beyond the province of the Judicial Branch. If the statute truly reflected a general [\*\*581] policy that dictated the inclusion of foreign sovereigns, the Court might be justified in reaching today's result. In *Georgia v. Evans*, 316 U.S. 159 (1942), a clear policy to protect the States of the Union was reflected in the antitrust laws and in the legislative history. The Court could "perceive no reason for believing that Congress wanted to deprive a State, as purchaser of commodities shipped in interstate commerce, of the civil remedy of treble damages which is available [\*331] to other purchasers who suffer through violation of the Act." *Id.* at 162.

Unlike the majority, [\*\*\*\*41] I do not believe the same can be said with respect to foreign sovereigns. See ante, at 318. It is not only the absence of specific congressional intent to include them. It is that the predicate for the Court's approach in *Georgia v. Evans* is not present in the case before us. The solicitude that we assume Congress has for the welfare of each of the United States, especially when the subject matter of legislation largely has been removed from the competence of the States and has been entrusted to the United States, cannot be assumed with respect to foreign nations. Putting it differently, it was not illogical for the Evans Court to include the States within the reach of § 4, but it is a quantum leap to include foreign governments.

A court, without the benefit of legislative hearings that would illuminate the policy considerations if the question were left to Congress, is not competent in my opinion to resolve this question in the best interest of our country. It is regrettable that the Court today finds it necessary to rush to this essentially legislative judgment.<sup>2</sup>

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## References

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Supreme Court's views as to right of foreign nation or its representative to sue in courts of United States

[55 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 289, 299-301, 360](#)

12 Federal Procedural Forms L Ed, Monopolies and Restraints of Trade 48:69

18 Am Jur PI & Pr Forms (Rev Ed), Monopolies, Restraints of Trade, and Unfair Trade Practices, Forms 11 et seq.

[15 USCS 15](#)

US L Ed Digest, Restraints of Trade and Monopolies 67

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<sup>2</sup> The Court quotes a letter to the effect that "the Department of State would not anticipate any foreign policy problems" if § 4 were held to embrace suits by foreign governments. Ante, at 319 n. 20 (emphasis supplied). But resolution of the issue here depends not only upon foreign policy considerations but also upon considerations relevant to the general welfare of the United States. The latter are quite beyond the concern of the Department of State and should be considered by the Legislative Branch. The international business conducted by American corporations has economic and social ramifications of great importance to our country.

ALR Digests, Restraints of Trade and Monopolies 15

L Ed Index to Annos, Damages; Foreign Countries; Restraints of Trade and Monopolies

ALR Quick Index, Double or Treble Damages; Foreign State or Country; Restraints of Trade and Monopolies

Federal Quick Index, Foreign Country; Monopolies and Restraints of Trade

Annotation References:

Supreme Court's views as to right of foreign nation or its representative to sue in courts of [United States. 54 L Ed 2d 854.](#)

Authority of state to sue as parens patriae to recover treble damages under 4 of Clayton Act ([15 USCS 15](#)). [\*\*\*\*43] 23 ALR Fed 878.

Measure and elements of damages under [15 USCS 15](#) entitling person injured in his business or property by reason of anything forbidden in federal antitrust laws to recover treble damages. 16 ALR Fed 14.

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## Lafayette v. La. Power & Light Co.

Supreme Court of the United States

Argued October 4, 1977 ; March 29, 1978; As Amended

No. 76-864

**Reporter**

435 U.S. 389 \*; 98 S. Ct. 1123 \*\*; 55 L. Ed. 2d 364 \*\*\*; 1978 U.S. LEXIS 19 \*\*\*\*; 1978-1 Trade Cas. (CCH) P61,936; 24 P.U.R.4th 395

CITY OF LAFAYETTE, LOUISIANA, ET AL. v. LOUISIANA POWER & LIGHT CO.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## **Core Terms**

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municipalities, anti trust law, Sherman Act, anticompetitive, antitrust, plurality, immunity, exemption, sovereign, regulation, monopoly, government action, electric, political subdivision, state legislature, petitioners', state policy, proprietary, customers, limits, purposes, state action, enterprise, displace, cases, government body, district court, counterclaim, competitors, policies

## **LexisNexis® Headnotes**

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

### [HN1](#) **Exemptions & Immunities, Parker State Action Doctrine**

Federal antitrust laws do not prohibit a state as sovereign from imposing certain anticompetitive restraints as an act of government.

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

### [HN2](#) **Private Actions, Remedies**

It is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent.

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

### [HN3](#) **Exemptions & Immunities, Parker State Action Doctrine**

Whether a governmental body's actions are comprehended within the powers granted to it by the legislature is, of course, a determination which can be made only under the specific facts in each case. A district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent.

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

Governments > Local Governments > Claims By & Against

#### **HN4[] Exemptions & Immunities, Parker State Action Doctrine**

The definition of "person" or "persons" in the antitrust statutes embraces both cities and states.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Sherman Act > General Overview

#### **HN5[] Remedies, Damages**

Section 8 of the Sherman Act, [15 U.S.C.S. § 7](#), and § 1 of the Clayton Act, [15 U.S.C.S. § 12](#), are general definitional sections which define person or persons, wherever used in this Act to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. Section 4 of the Clayton Act, [15 U.S.C.S. § 15](#), provides, in pertinent part, that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court, and shall recover threefold the damages by him sustained.

Antitrust & Trade Law > Sherman Act > General Overview

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

See [15 U.S.C.S. § 7](#).

Antitrust & Trade Law > Clayton Act > General Overview

#### **HN7[] Antitrust & Trade Law, Clayton Act**

See [15 U.S.C.S. § 12](#).

Antitrust & Trade Law > Sherman Act > General Overview

#### **HN8[] Antitrust & Trade Law, Sherman Act**

Cases reviewing the legislative history of the Sherman Act, [15 U.S.C.S. § 1](#), have concluded that Congress, exercising the full extent of its constitutional power, sought to establish a regime of competition as the fundamental principle governing commerce in this country.

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

#### [HN9](#) **Exemptions & Immunities, Parker State Action Doctrine**

United States Supreme Court cases have held that even when Congress by subsequent legislation establishes a regulatory regime over an area of commercial activity, the antitrust laws will not be displaced unless it appears that the antitrust and regulatory provisions are plainly repugnant. The presumption against repeal by implication reflects the understanding that the antitrust laws establish overarching and fundamental policies, a principle which argues with equal force against implied exclusions.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

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

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

#### [HN10](#) **Exemptions & Immunities, Collectives & Cooperatives**

All governmental entities, whether state agencies or subdivisions of a state, are not, simply by reason of their status as such, exempt from the antitrust laws.

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

#### [HN11](#) **Exemptions & Immunities, Parker State Action Doctrine**

For purposes of the Parker doctrine, not every act of a state agency is that of the state as sovereign.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

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

#### [HN12](#) **Exemptions & Immunities, Parker State Action Doctrine**

In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the nation's economic goals reflected in the antitrust laws, the court is especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Public Improvements > General Overview

Real Property Law > Subdivisions > State Regulations

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

#### [\*\*HN13\*\*](#) [L] Exemptions & Immunities, Parker State Action Doctrine

Since municipal corporations are instrumentalities of the state for the convenient administration of government within their limits the actions of municipalities may reflect state policy. The United States Supreme Court therefore concludes that the Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the state as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > Local Governments > Claims By & Against

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

Governments > State & Territorial Governments > General Overview

#### [\*\*HN14\*\*](#) [L] Exemptions & Immunities, Parker State Action Doctrine

In the absence of evidence that the state authorized or directed a given municipality to act as it did, the actions of a particular city hardly can be found to be pursuant to the state's command, or to be restraints that the state as sovereign imposed. The most that could be said is that state policy may be neutral. This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a Parker defense to an antitrust suit. While a subordinate governmental unit's claim to Parker immunity is not as readily established as the same claim by a state government sued as such, an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.

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

#### [\*\*HN15\*\*](#) [L] Exemptions & Immunities, Parker State Action Doctrine

The Parker doctrine preserves to the states their freedom under the dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the nation's free-market goals.

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

#### [\*\*HN16\*\*](#) [L] Exemptions & Immunities, Parker State Action Doctrine

Parker and its progeny make clear that a State properly may direct or authorize its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws.

## **Lawyers' Edition Display**

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### **Summary**

Two Louisiana cities, as operators of electric utility systems, instituted an action under federal antitrust laws ([15 USCS 1 et seq.](#)) against certain private utility companies in the United States District Court for the Eastern District of Louisiana. One of the defendants counterclaimed, alleging that the plaintiffs had committed various antitrust offenses. The plaintiffs moved to dismiss the counterclaim on the ground that as cities, they were not subject to the antitrust laws because of the "state action" exemption, whereby the federal antitrust laws did not prohibit a state as sovereign from imposing anticompetitive restraints as an act of government. The District Court entered a judgment dismissing the counterclaim, but the United States Court of Appeals for the Fifth Circuit reversed and remanded, holding that cities were not automatically exempt from federal antitrust laws under the state action exemption ([532 F2d 431](#)).

On certiorari, the United States Supreme Court affirmed. In that part of the opinion (part I) by Brennan, J., which constituted the opinion of the court (Burger, Ch. J., and Marshall, Powell, and Stevens, JJ., joining in part I of the opinion), it was held that apart from the applicability of the state action exemption, (1) as defined in federal antitrust laws, the terms "person" or "persons" included cities as municipal utility operators, whether suing as plaintiffs or being sued as defendants, and (2) there was no implied exclusion, based on public policy, of cities as municipal utility operators from coverage as "persons" under the antitrust laws. With regard to the question of the applicability of the state action exemption, five members of the court, although unable to agree on an opinion, agreed that the exemption did not automatically exempt cities from the operation of the antitrust laws. In the balance of his opinion (parts II and III), Brennan, J., joined by Marshall, Powell, and Stevens, JJ., expressed the view that the state action exemption exempted only anticompetitive conduct engaged in as an act of government by a state as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or with monopoly public service--an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units existing only when it was found from the authority given a governmental entity to operate in a particular area that the legislature contemplated the kind of action complained of.

Marshall, J., concurring, expressed the view that (1) the state action exemption from the antitrust laws should be no broader than was necessary to serve the state's legitimate purposes, and (2) it was not enough that a state desired to insulate anticompetitive practices, it being necessary that the state imposed the practices as an act of government.

Burger, Ch. J., concurring in part I of the opinion of Brennan, J., and in the judgment, expressed the view that (1) the threshold inquiry in determining if an anticompetitive activity was state action exempt from the federal antitrust laws was whether the activity was required by the state acting as sovereign, (2) in addition to determining that an area of conflict between a state's regulatory policies and the federal antitrust laws was the result of a state policy to displace competition with regulation or with monopoly public service, it should also be determined that the implied exemption from federal law was necessary to make the state regulatory scheme work, and (3) the exemption was applicable only if the state compelled the anticompetitive activity, and only if the cities demonstrated that the exemption was essential to the state's plan.

Stewart, J., joined by White and Rehnquist, JJ., and joined in pertinent part by Blackmun, J., dissented, expressing the view that (1) cities engaged in activities such as those involved in the case at bar should not be subjected to possible antitrust liability, since they were governmental bodies, not private persons, and their actions were acts of government, and thus they should be relieved of antitrust liability under the established doctrine that where a restraint of trade or monopolization was the result of valid governmental action, as opposed to private action, no violation of the antitrust laws could be made out, (2) while private action must be compelled by a state legislature in order to escape the reach of the antitrust laws, it was senseless to require a showing of state compulsion when the state itself acted through one of its governmental subdivisions, and (3) the court's decision marked an extraordinary intrusion into the operation of state and local government, compelling a municipality to seek passage of a state statute requiring it to engage in any activity which might be considered anticompetitive, and imposing staggering costs on municipal governments, both in the sense of possible liability for treble damages under the antitrust laws and in the sense of the costs of defending antitrust actions.

Blackmun, J., dissenting, expressed the view that in light of the holding that municipalities were subject to broad antitrust liability, the court should also have considered the question of the appropriate remedy, especially since the prospect of insolvency for the cities, through liability for treble damages, threatened the welfare of their inhabitants.

## **Headnotes**

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MONOPOLIES §8 > federal antitrust laws -- cities as "persons" covered -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B]

As defined in federal antitrust laws ([15 USCS 1 et seq.](#)), the terms "person" or "persons" include cities as municipal utility operators, whether suing as plaintiffs or being sued as defendants.

MONOPOLIES §11 > federal antitrust laws -- applicability to cities -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

There is no implied exclusion, based on public policy, of cities as municipal utility operators from coverage as "persons" under the federal antitrust laws ([15 USCS 1 et seq.](#)), such an exclusion cannot be inferred on the grounds that (1) it would be anomalous to subject municipalities to the liabilities imposed upon violators of the antitrust laws, (2) the antitrust laws are intended to protect the public only from abuses of private power and not from actions of municipalities that exist to serve the public weal, or (3) federal antitrust regulation is unnecessary because government is subject to political control and the welfare of its citizens is thus assured through the political process.

MONOPOLIES §7 > federal laws -- coverage -- > Headnote:

[LEdHN\[3\]](#) [3]

There is a presumption against implied exclusions from coverage under the federal antitrust laws ([15 USCS 1 et seq.](#)).

MONOPOLIES §4 > antitrust laws -- freedom to compete -- > Headnote:

[LEdHN\[4A\]](#) [4A] [LEdHN\[4B\]](#) [4B]

The freedom guaranteed under antitrust laws in general, and the Sherman Act (15 USCS 1-7) in particular, to each and every business, no matter how small, is the freedom to compete, that is, to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

STATUTES §248.5 > implied repeal -- federal antitrust laws -- > Headnote:

[LEdHN\[5\]](#) [5]

There is a presumption against repeal by implication of federal antitrust laws.

MONOPOLIES §30 > federal laws -- tying arrangements -- > Headnote:

[LEdHN\[6A\]](#) [ ] [6A] [LEdHN\[6B\]](#) [ ] [6B]

With regard to the purposes of the rule under federal antitrust laws against tying arrangements, the purpose of protecting competing sellers from competition unrelated to the merits of the product involved and, concomitantly, to protect the market from distortion, is equally important to the purpose of protecting against injury to the buyer.

MONOPOLIES §11 > federal laws -- applicability to local governments -- > Headnote:

[LEdHN\[7A\]](#) [ ] [7A] [LEdHN\[7B\]](#) [ ] [7B]

While local governments, acting as agents at the direction of the state, are free to implement state policies without being subject to federal antitrust laws to the same extent as would be the state itself, nevertheless local governments are not exempt from such laws on the theory that applying antitrust principles to local governments will necessarily interfere with the execution of governmental programs.

MONOPOLIES §7 > Sherman Act -- construction -- > Headnote:

[LEdHN\[8A\]](#) [ ] [8A] [LEdHN\[8B\]](#) [ ] [8B]

The Sherman Act (15 USCS 1-7) is to be interpreted in the light of its legislative history and of the particular evils at which the legislation was aimed.

MONOPOLIES §9 > federal antitrust laws -- state action exemption -- cities -- > Headnote:

[LEdHN\[9A\]](#) [ ] [9A] [LEdHN\[9B\]](#) [ ] [9B] [LEdHN\[9C\]](#) [ ] [9C] [LEdHN\[9D\]](#) [ ] [9D] [LEdHN\[9E\]](#) [ ] [9E]

The United States Supreme Court will affirm a Federal Court of Appeals' decision that the "state action" exemption from federal antitrust laws ([15 USCS 1 et seq.](#))--whereby federal antitrust laws do not prohibit a state as sovereign from imposing anticompetitive restraints as an act of government--does not automatically exempt cities as municipal utility operators from the operation of the antitrust laws, where (1) four members of the Supreme Court are of the opinion that (a) the state action exemption exempts only anticompetitive conduct engaged in as an act of government by a state as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or with monopoly public service, and (b) an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists only when it is found from the authority given a governmental entity to operate in a particular area that the legislature contemplated the kind of action complained of; and (2) a fifth member of the Supreme Court is of the opinion that (a) the threshold inquiry in determining if an anticompetitive activity is state action exempt from the antitrust laws is whether the activity is required by the state acting as sovereign, (b) in addition to determining that an area of conflict between a state's regulatory policies and the federal antitrust laws is the result of a state policy to displace competition with regulation or with monopoly public service, it must be determined that the implied exemption from federal law is necessary to make the state regulatory scheme work, and (c) the exemption is applicable only if the state compels the anticompetitive activity, and only if the cities

demonstrate that the exemption is essential to the state's plan. [Per Brennan, J., Marshall, J., Powell, J., Stevens, J., and Burger, Ch. J. Dissenting: Stewart, White, Blackmun, and Rehnquist, JJ.]

## Syllabus

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Petitioner cities, which own and operate electric utility systems both within and beyond their respective city limits as authorized by Louisiana law, brought an action in District Court against respondent investor-owned electric utility with which petitioners compete, alleging that it committed various federal antitrust offenses that injured petitioners in the operation of their electric utility systems. Respondent counterclaimed, alleging that petitioners had committed various antitrust offenses that injured respondent in its business and property. Petitioners moved to dismiss the counterclaim on the ground that, as cities and subdivisions of the State, the "state action" doctrine of [Parker v. Brown, 317 U.S. 341](#), rendered federal antitrust laws inapplicable to them. The District Court granted the motion, but the Court of Appeals reversed and remanded. Held: Apart from whether petitioners are exempt from the antitrust laws as agents of the State under the Parker doctrine there [\*\*\*\*2] are insufficient grounds for inferring that Congress did not intend to subject cities to antitrust liability. Pp. 394-408.

(a) The definition of "person" or "persons" covered by the antitrust laws clearly includes cities, whether as municipal utility operators suing as plaintiffs seeking damages for antitrust violations or as such operators being sued as defendants. [Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390](#); [Georgia v. Evans, 316 U.S. 159](#). Pp. 394-397.

(b) Petitioners have failed to show the existence of any overriding public policy inconsistent with a construction of coverage of the antitrust laws. The presumption against implied exclusion from such laws cannot be negated either on the ground that it would be anomalous to subject municipalities to antitrust liability or on the ground that the antitrust laws are intended to protect the public only from abuses of private power and not from action of municipalities that exist to serve the public weal. Pp. 400-408.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE MARSHALL, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS, concluded:

1. Parker v. Brown does not automatically exempt from the [\*\*\*\*3] antitrust laws all governmental entities, whether state agencies or subdivisions of a State, simply by reason of their status as such, but exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service. Pp. 408-413.

2. The Court of Appeals did not err in holding that further inquiry should be made to determine whether petitioners' actions were directed by the State, since when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws. While a subordinate governmental unit's claim to Parker immunity is not as readily established as the same claim by a state government sued as such, an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." Pp. 413-417.

THE CHIEF JUSTICE, while agreeing with the directions [\*\*\*\*4] for remand in Part III because they represent at a minimum what is required to establish an exemption, would insist that the State compel the alleged anticompetitive activity and that the cities demonstrate that the exemption is essential to the state regulatory scheme. Pp. 425-426, and n.6.

[532 F. 2d 431](#), affirmed.

BRENNAN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Part I, in which BURGER, C.J., and MARSHALL, POWELL, and STEVENS, JJ., joined; and an opinion with respect to Parts II and III, in which MARSHALL, POWELL, and STEVENS, JJ., joined. MARSHALL, J., filed a concurring opinion,

post, p. 417. BURGER, C.J., filed an opinion concurring in part and concurring in the judgment, post, p. 418. STEWART, J., filed a dissenting opinion, in which WHITE and REHNQUIST, JJ., joined, and in all but Part II-B of which BLACKMUN, J., joined, post, p. 426. BLACKMUN, J., filed a dissenting opinion, post, p. 441.

**Counsel:** Jerome A. Hochberg argued the cause for petitioners. With him on the briefs were James F. Fairman, Jr., and Ivor C. Armistead III.

Andrew P. Carter argued the cause for respondent. With him on the brief was William T. Tete.

William T. Crisp argued the cause for the National Rural Electric Cooperative Assn. et al. as amici curiae urging affirmance. With him on the brief were Robert D. Tisinger, James H. Eddleman, J. J. Davidson, Jr., C. Pinckney Roberts, and B. D. St. Clair. \*

**Judges:** Burger, Brennan, Stewart, White, Marshall, Blackmun, [\*\*\*\*6] Powell, Rehnquist, Stevens

**Opinion by:** BRENNAN

## Opinion

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[\*391] [\*369] [\*\*1125] MR. JUSTICE BRENNAN delivered the opinion of the Court (Part I), together with an opinion (Parts II and III), in which MR. JUSTICE MARSHALL, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS joined.

*Parker v. Brown*, 317 U.S. 341 (1943), held that the [HN1](#) federal antitrust laws do not prohibit a State "as sovereign" from imposing certain anticompetitive restraints "as an act of government." The question in this case is the extent to which the antitrust laws prohibit a State's cities from imposing such anticompetitive restraints.

Petitioner cities are organized under the laws of the State of Louisiana,<sup>1</sup> which grant them power to own and operate electric utility systems both within and beyond their city limits.<sup>2</sup> Petitioners brought this action in the District Court for the Eastern District of Louisiana, alleging that, among others,<sup>3</sup> Louisiana Power & Light Co. (LP&L), an investor-owned electric service utility with which petitioners compete [\*392] in [\*\*1126] the areas beyond their city limits,<sup>4</sup> committed various antitrust offenses which injured petitioners in the operation [\*\*\*\*7] of their electric utility [\*\*\*370] systems.<sup>5</sup> LP&L counterclaimed, seeking damages and injunctive relief for various antitrust offenses which petitioners had allegedly committed and which injured it in its business and property.<sup>6</sup>

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\* Solicitor General McCree, Acting Assistant Attorney General Shenefield, and Barry Grossman filed a brief for the United States as amicus curiae urging affirmance.

Frederick T. Searls and Michael P. Graney filed a brief for the Columbus and Southern Ohio Electric Co. et al. as amici curiae.

<sup>1</sup> See [La. Const. Art. 6, §§ 2, 7\(A\)](#) (effective Jan. 1, 1975); La. Const., Art. XIV, § 40(d) (1921) (effective prior to Jan. 1, 1975); see generally [La. Rev. Stat. Ann. §§ 33:621, 33:361, 33:506](#) (West 1951).

<sup>2</sup> [La. Rev. Stat. Ann. § 33:1326](#) (West 1951); §§ 33:4162, 33:4163 (West 1966).

<sup>3</sup> The complaint named as parties defendant Middle-South Utilities, Inc., a Florida corporation of which LP&L is a subsidiary, Central Louisiana Electric Co., Inc., and Gulf States Utilities, Louisiana and Texas corporations respectively, engaged in the generation, transmission, and sale of electric power at wholesale and retail in Louisiana.

<sup>4</sup> LP&L does not allege that it directly competes with the city of Lafayette, but does allege that the city of Plaquemine imposed tying arrangements which injured it. See Respondent's Second Amended Counterclaim, App. 33-34; Affidavit of J. M. Wyatt, Senior Vice President of LP&L, Id., at 37.

<sup>5</sup> Petitioners' complaint charged that the defendants conspired to restrain trade and attempted to monopolize and have monopolized the generation, transmission, and distribution of electric power by preventing the construction and operation of

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Petitioners moved to dismiss the counterclaim on the ground that, as cities and subdivisions of the State of Louisiana, the "state action" doctrine of Parker v. Brown, rendered federal antitrust laws inapplicable to them. The District Court granted the motion, holding that the decision of the Court of Appeals for the Fifth Circuit in [Saenz v. University Interscholastic League, 487 F. 2d 1026 \(1973\)](#), [\*\*\*\*10] required dismissal, notwithstanding that "[t]hese plaintiff cities are engaging in what is clearly a business activity ... in which a profit is realized," and "for this reason ... this court is reluctant to [\*393] hold that the antitrust laws do not apply to any state activity." <sup>7</sup> App. 47 (emphasis in original). The District Court in this case read Saenz to interpret the "state action" exemption <sup>8</sup> as requiring the "holding that purely state government activities are not subject to the requirements of the antitrust laws of the United States," App. 48, thereby making petitioners' status as cities determinative against maintenance of antitrust suits against them. The Court of Appeals for the Fifth Circuit reversed and remanded for further proceedings. <sup>9</sup> [532 F. 2d 431 \(1976\)](#). The Court of Appeals noted that the District Court had acted before this Court's decision in [Goldfarb v. Virginia State Bar, 421 U.S. 773 \(1975\)](#), and held that "taken together" Parker v. Brown and Goldfarb [\*\*371] "require the following analysis":S"A subordinate state governmental body is not ipso facto exempt from the operation of the antitrust laws. Rather, a district court [\*\*\*\*11] must ask whether the state [\*\*1127] legislature contemplated a certain type of anticompetitive restraint. In our opinion, though, [HN2](#) it is not necessary to point to an [\*394] express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent. Thus, a trial judge may ascertain, from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of. On the other hand, as in Goldfarb, the connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct. [HN3](#) Whether a governmental body's actions are comprehended within the powers granted to it by the legislature is, of course, a determination which can be made only under the specific facts in each case. A district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent." [532 F.2d, at 434-435](#) (footnotes omitted).l

We [\*\*\*\*12] granted certiorari, 430 U.S. 944 (1977). We affirm.

competing utility systems, by improperly refusing to wheel power, by foreclosing supplies from markets served by defendants, by engaging in boycotts against petitioners, and by utilizing sham litigation and other improper means to prevent the financing of construction of electric generation facilities beneficial to petitioners.

<sup>6</sup>The counterclaim, as amended, alleged that the petitioners, together with a nonparty electric cooperative, had conspired to engage in sham litigation against LP&L to prevent the financing with the purpose and effect of delaying or preventing the construction of a nuclear electric-generating plant, to eliminate competition within the municipal boundaries by use of covenants in their respective debentures, to exclude competition in certain markets by using long-term supply agreements, and to displace LP&L in certain areas by requiring customers of LP&L to purchase electricity from petitioners as a condition of continued water and gas service.

<sup>7</sup>Saenz was a treble-damages action by a slide-rule manufacturer who alleged a conspiracy between a state agency, the University Interscholastic League(UIL), its director, and a private competitor of Saenz to effect the rejection of Saenz products for use in interscholastic competition among Texas public schools. In Saenz the Court of Appeals affirmed the District Court's dismissal of the action against the UIL and its director on the ground that as a state agency and a state official, they were not answerable under the Sherman Act.

<sup>8</sup>The word "exemption" is commonly used by courts as a shorthand expression for Parker' s holding that the Sherman Act was not intended by Congress to prohibit the anticompetitive restraints imposed by California in that case.

<sup>9</sup>In entering its order dismissing the counterclaim, the District Court made an express determination that there was no just reason for delay and expressly directed the entry of judgment for plaintiffs pursuant to [Fed. Rule Civ. Proc. 54\(b\)](#). This action designated the dismissal as a final appealable order. See [Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 742-743 \(1976\)](#).

[\*\*\*\*13] I

LEdHN/1A[] [1A]Petitioners' principal argument is that "since a city is merely a subdivision of a state and only exercises power delegated to it by the state, Parker's findings regarding the congressionally intended scope of the Sherman Act apply with equal force to such political subdivisions." Brief for Petitioners 5. Before addressing this question, however, we shall address the contention implicit in petitioners' arguments in their brief that, apart from the question of their exemption as agents of the State under the Parker doctrine, Congress never intended to subject local governments to the antitrust laws.

A

The antitrust laws impose liability on and create a cause of action for damages for a "person" or "persons" as defined in [\*395] the Acts.<sup>10</sup> Since the [\*\*\*372] Court has held that HN4[] the definition of "person" or "persons" embraces both cities and States, it is understandable that the cities do not argue that they are not "persons" within the meaning of the antitrust laws.

[\*\*\*\*14] Section 8 of the Sherman Act, ch. 647, 26 Stat. 210, 15 U.S.C. § 7 (1976 ed.), and § 1 of the Clayton Act, 38 Stat. 730, 15 U.S.C. § 12 (1976 ed.), HN5[] are general definitional sections which define "person" or "persons," "wherever used in this [Act] . . . to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."<sup>11</sup> Section 4 of the [\*\*1128] Clayton Act, 38 Stat. 731, 15 U.S.C. § 15 (1976 ed.), provides, [\*396] in pertinent part, that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . , and shall recover threefold the damages by him sustained. . . ." <sup>12</sup>

[\*\*\*15]

Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906), held that a municipality is a "person" within the meaning of § 8 of the Sherman Act, the general definitional section, and that the city of Atlanta therefore could maintain a treble-damages action under § 7, the predecessor of § 4 of the Clayton Act,<sup>13</sup> against a supplier from

<sup>10</sup> The word "person" or "persons" is used repeatedly in the antitrust statutes. For examples, see 15 U.S.C. § 1 (1976 ed.) ("Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . ."); 15 U.S.C. § 2 (1976 ed.) ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ."); 15 U.S.C. § 3 (1976 ed.) ("Every person [making a contract or engaging in a combination or conspiracy in restraint of trade in any Territory or the District of Columbia] shall be deemed guilty of a felony . . ."); 15 U.S.C. § 7 (1976 ed.) (defining the word "person" or "persons"); 15 U.S.C. § 8 (1976 ed.) (declaring illegal every contract, combination, or conspiracy in restraint of trade by persons or corporations engaged in importing articles into the United States, and providing that any person so engaged shall be guilty of a misdemeanor).

<sup>11</sup> Section 8 of the Sherman Act provides in full:

HN6[] "That the word 'person,' or 'persons,' wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Section 8 has remained unchanged since its enactment in 1890.

Section 1 of the Clayton Act defines the word "person" or "persons" in language identical to that of § 8 of the Sherman Act, and it also has remained unchanged since its enactment in 1914.

<sup>12</sup> Section 4 is quoted in full in n. 13, infra.

<sup>13</sup> Section 7 of the Sherman Act, ch. 647, 26 Stat. 210 (1890) (repealed in 1955), provided in full:

whom the city purchased water pipe which it used to furnish water as a municipal utility service. Some 36 years later, [Georgia v. Evans, 316 U.S. 159 \(1942\)](#), held that the words "any person" in [§ 7](#) of the Sherman Act included States. Under that decision, the State of Georgia was permitted to bring an action in its own name charging injury from a combination to fix prices and suppress competition [\\*\\*\\*373](#) in the market for asphalt which the [\[\\*397\]](#) State purchased annually for use in the construction of public roads. The Court reasoned that "[n]othing in the Act, its history, or [\[\\*\\*\\*\\*16\]](#) its policy, could justify so restrictive a construction of the word 'person' in [§ 7](#) as to exclude a State." [316 U.S., at 162.](#)

[\[\\*\\*\\*\\*17\]](#) [LEdHN\[1B\]](#) [↑](#) [1B] Although both Chattanooga Foundry and Georgia v. Evans involved the public bodies as plaintiffs, whereas petitioners in the instant case are defendants to a counterclaim, the basis of those decisions plainly precludes a reading of "person" or "persons" to include municipal utility operators that sue as plaintiffs but not to include such municipal operators when sued as defendants. Thus, the conclusion that the antitrust laws are not to be construed as meant by Congress to subject cities to liability under the antitrust laws must rest on the impact of some overriding public policy which negates the construction of coverage, and not upon a reading of "person" or "persons" as not including them.<sup>14</sup>

[\[\\*\\*\\*\\*18\]](#) B

[\[\\*\\*1129\]](#) [LEdHN\[2A\]](#) [↑](#) [2A] [LEdHN\[3\]](#) [↑](#) [3] Petitioners suggest several reasons why, in addition to their arguments for exemption as agents of the State under the Parker doctrine, a congressional purpose not to subject cities [\[\\*398\]](#) to the antitrust laws should be inferred. Those arguments, like the Parker exemption itself, necessarily must be considered in light of the presumption against implied exclusions from coverage under the antitrust laws.

(1)

[LEdHN\[4A\]](#) [↑](#) [4A] The purposes and intended scope of the Sherman Act have been developed in prior cases and require only brief mention here. Commenting upon the language of the Act in rejecting a claim that the insurance business was excluded from coverage, the Court stated: "Language more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." [United States v. South-Eastern](#)

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Section 4 of the Clayton Act provides in full:

[HNT](#) [↑](#) "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 4 has remained unchanged since its enactment in 1914. It is made applicable to all of the antitrust statutes by [§ 1](#) of the Clayton Act, [15 U.S.C. § 12 \(1976 ed.\)](#).

<sup>14</sup> When Congress wished to exempt municipal service operations from the coverage of the antitrust laws, it has done so without ambiguity. The Act of May 26, 1938, ch. 283, 52 Stat. 446, [15 U.S.C. § 13c \(1976 ed.\)](#), grants a limited exemption to certain not-for-profit institutions for "purchases of their supplies for their own use" from the provisions of the Clayton Act as amended by the Robinson-Patman Act, 49 Stat. 1526, [15 U.S.C. §§ 13 to 13b](#) and [21a \(1976 ed.\)](#), which otherwise make it unlawful for a supplier to grant, or for an institution to induce, a discriminatory discount with respect to such supplies. Congress expressly included public libraries in this exemption. (Public libraries are, by definition, operated by local government. See 1 U.S. Office of Education, Biennial Surveys of Education in the United States, ch. 8 (Library Service 1938-1940), p. 27 (1947); 2 U.S. Office of Education, ch. 2 (Statistical Summary of Education, 1941-1942), p. 38; 32 Am. Library Assn. Bull. 272 (1938).

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Underwriters Assn., 322 U.S. 533, 553 (1944). That and subsequent HN8[] cases reviewing the legislative history of the Sherman Act have concluded [\*\*\*\*19] that Congress, exercising the full extent of its constitutional power,<sup>15</sup> sought to establish a regime of competition as the [\*\*\*374] fundamental principle governing commerce in this country.<sup>16</sup>

[\*\*\*\*20] LEdHN5[] [5]For this reason, HN9[] our cases have held that even when Congress by subsequent legislation establishes a regulatory regime over an area of commercial activity, the antitrust laws will not be displaced unless it appears that the antitrust and regulatory provisions are plainly repugnant. E.g., United States v. First National Bank, 374 U.S. 321, 350-351, and n. 28 (1963) (collecting cases). The presumption against repeal by implication reflects the understanding that the antitrust laws establish overarching and fundamental policies, a principle which argues with equal force against implied exclusions. See Goldfarb, 421 U.S., at 786-788.

Two policies have been held sufficiently weighty to override the presumption against implied exclusions from coverage of the antitrust laws. In Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), the Court held that, regardless of anticompetitive purpose or intent, a concerted effort by persons to influence lawmakers to enact legislation beneficial to themselves or detrimental to competitors was not within the scope of the antitrust laws. Although [\*\*\*\*21] there is nothing in the language of the statute or its history which would indicate that Congress considered such an exclusion, the impact of two correlative principles was held to require the conclusion that the presumption should not support a finding of coverage. The first is that a contrary construction would impede the open communication between the polity and its lawmakers which is vital to the functioning of a representative democracy. Second, "and of at least equal significance," is the threat to the constitutionally protected right of petition which a contrary construction would entail. Id., at 137-138.<sup>17</sup>

[\*\*\*\*22] [\*400] Parker [\*\*1130] v. Brown<sup>18</sup> identified a second overriding policy, namely that "[i]n a dual system of government in [\*\*\*375] which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S., at 351.

Common to the two implied exclusions was potential conflict with policies of signal importance in our national traditions and governmental structure of federalism. Even then, however, the recognized exclusions have been unavailing to prevent antitrust enforcement which, though implicating those fundamental policies, was not thought

<sup>15</sup> See Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 229-235 (1948).

<sup>16</sup> LEdHN4B[] [4B]

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete -- to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." United States v. Topco Associates, 405 U.S. 596, 610 (1972).

<sup>17</sup> See also Mine Workers v. Pennington, 381 U.S. 657, 669-672 (1965). Pennington held that, regardless of the anticompetitive purpose or effect on small competing mining companies, the joint action of certain large mining companies and labor unions in lobbying before the Secretary of Labor in favor of legislation establishing a minimum wage for employees of contractors selling coal to the Tennessee Valley Authority and in lobbying before TVA to avoid coal purchases exempted from the legislation was not subject to antitrust attack. Cases subsequent to Pennington have emphasized the possible constitutional infirmity in the antitrust laws that a contrary construction would entail in light of the serious threat to First Amendment freedoms that would have been presented. See Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707-708 (1962); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 516 (1972) (STEWART, J., concurring in judgment).

<sup>18</sup> See also Olsen v. Smith, 195 U.S. 332, 344-345 (1904).

severely to impinge upon them. See, e.g., [\*Goldfarb, supra\*](#); [\*California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 \(1972\)\*](#).

Petitioners' arguments [\*\*\*\*23] therefore cannot prevail unless they demonstrate that there are countervailing policies which are sufficiently weighty to overcome the presumption. We now turn to a consideration of whether, apart from the question of their exemption as agents of the State under the Parker doctrine, petitioners have made that showing.

(2)

Petitioners argue that their exclusion must be inferred because it would be anomalous to subject municipalities to the criminal and civil liabilities imposed upon violators of the antitrust laws. The short answer is that it has not been regarded as anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose such sanctions upon "persons." See [\*Union Pacific R. I\\*401 Co. v. United States, 313 U.S. 450 \(1941\)\*](#).<sup>19</sup> See generally [\*\*1131] [\*Ohio v. Helvering, 292 U.S. 360, 370 \(1934\)\*](#);<sup>20</sup> [\*\*\*376] [\*California v. United\*](#)

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<sup>19</sup> Union Pacific considered the applicability to a city of [§ 1](#) of the Elkins Act, 32 Stat. 847, as amended, 34 Stat. 587, 49 U.S.C. § 41 (1). That statute, in definitional language similar to that used in [§ 8](#) of the Sherman Act, makes it unlawful for "any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any [covered] common carrier...." (Emphasis added.) Kansas City, Kan. (hereinafter Kansas), decided to develop its Public Levee as a metropolitan rail food terminal with wholesale and retail produce markets. Kansas constructed, operated, and owned the market, financing the development with municipal revenue bonds.

Another city, Kansas City, Mo. (hereinafter Missouri), also operated a rail food terminal within the same metropolitan area. Because Kansas believed that there was insufficient business in the metropolitan area to support both markets, it developed a plan to induce Missouri produce dealers to lease its facilities by offering cash payments and temporary reduction or abatement of rent. These payments exceeded the amounts needed to compensate the merchants for the costs of moving, settlement of existing leases, and disruption to business. Kansas adopted the payment plan by resolution, and its legality under Kansas law was sustained by the Kansas Supreme Court in a quo warranto proceeding. [\*State ex rel. Parker v. Kansas City, 151 Kan. 1, 97 P.2d 104, 98 P.2d 101 \(1939\)\*](#).

The Missouri terminal was served by a number of railroads, but the Kansas terminal was served virtually exclusively by the Union Pacific Railroad. As merchants moved from Missouri to Kansas, the Union Pacific's traffic necessarily increased while that of the other railroads shrank. The United States charged that the effect of Kansas' concessions to merchants was to permit them to ship produce over the Union Pacific more cheaply than on the competing railroads serving the Missouri terminal and, in effect, amounted to a rebate from Union Pacific's tariffs. The District Court permanently enjoined Kansas from giving cash or rental credits to Missouri dealers to move or for moving to Kansas.

On appeal to this Court, Kansas argued that because the concessions were lawful under state law, it could not be enjoined from making them, and the United States argued that the municipality was a "person" within the meaning of the statute and therefore subject to the Act on the same terms as a private corporation. See Brief for Appellants, O.T. 1940, No. 594, pp. 233-235, 244-256; Brief for United States, O.T. 1940, No. 594, p. 72. See generally [\*id. at 59-68, 69-75\*](#).

The Court held that the municipality was a "person" subject to the Act, and, with a modification not important here, upheld the permanent injunction against it. Mr. Justice Roberts, in dissent, made the argument made by the cities here, that the statutory phrase "every person" was not sufficiently specific to justify the conclusion that Congress wished to subject municipal corporations and their officers to the criminal penalties for which the Act provided. It is significant that the cities' argument was rejected in the context of the antirebate provisions of the Elkins Act, a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act. Accord, Slater, Antitrust and Government Action: A Formula For Narrowing Parker v. Brown, 69 Nw. U.L. Rev. 71, 89 n. 100 (1974).

<sup>20</sup> *Ohio v. Helvering* sustained a federal tax liability imposed upon the State of Ohio in its business as a distributor of alcoholic beverages. The statute, Rev. Stat. § 3244 (1878), imposed a tax upon "[e]very person who sells or offers for sale [alcoholic beverages]." The applicable definitional section, Rev. Stat. § 3140 (1878), provided: "[W]here not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word 'person,' as used in this title, shall be construed to mean and include

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States, 320 U.S. 577 (1944).<sup>21</sup> But those cases do not [\*402] necessarily require the conclusion that remedies appropriate to redress violations by private corporations would be equally appropriate for municipalities; nor need we decide any [\*\*\*\*24] question of remedy in this case.<sup>22</sup>

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[\*403] Petitioners next argue that the antitrust laws are intended to protect the public only from abuses of private power and not from actions of municipalities that exist to serve the public weal.

Petitioners' contention that their goal is not [\*\*\*\*27] private profit but public service is only partly correct. Every business enterprise, public or private, operates its business in furtherance of its own goals. In the case of a municipally owned utility, that goal is likely to be, broadly speaking, the benefit of its citizens. But the economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national [\*\*\*377] economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders. The allegations of the counterclaim, which for present purposes we accept as true,<sup>23</sup> aptly [\*\*1132] illustrate the impact which local governments, acting as providers of services, may have on other individuals and business enterprises with which they interrelate as purchasers, suppliers, and sometimes, as here, as competitors.<sup>24</sup>

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LEdHN[6A] [6A]LP&L alleged that the city of Plaquemine contracted to provide LP&L's electric customers outside its city limits gas and water service only on condition that the customers purchase [\*404] electricity from the city and not from LP&L.<sup>25</sup> The effect of such a tie-in is twofold. First, the tying contract might injure former LP&L customers in two ways. The net effect of the tying contract might be to increase the cost of electric service to these customers. Moreover, a municipality conceivably might charge discriminatorily higher rates to such captive customers outside its jurisdiction without a cost justified basis. Both of these practices would provide maximum benefits for its constituents, while diserving the interests of the affected [\*\*\*\*29] customers. Second, the practice would necessarily have an impact on the regulated public utility whose service is displaced.<sup>26</sup> The elimination of

a partnership, association, company, or corporation, as well as a natural person." Helvering stated that "[w]hether the word 'person' or 'corporation' includes a state or the United States depends upon the connection in which the word is found," 292 U.S. at 370, and held that "the state itself, when it becomes a dealer in intoxicating liquors, falls within the reach of the tax either as a 'person' under the statutory extension of that word to include a corporation, or as a 'person' without regard to such extension."  
Id., at 371.

<sup>21</sup> California held that a city and State are subject to §§ 16 and 17 of the Shipping Act, 1916, 39 Stat. 734, as amended, 46 U.S.C. §§ 815, 816, making unlawful certain practices of "person[s]," defined by § 1, 46 U.S.C. § 801, as including "corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State. . . ."

<sup>22</sup> The question of remedy can arise only if the District Court, on the Court of Appeals remand, determines that petitioners' activities are prohibited by the antitrust laws.

<sup>23</sup> Cf. Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976). We use the allegations of the counterclaim only as a ready and convenient example of the kinds of activities in which a municipality may engage in the operation of its utility business which would have an anticompetitive effect transcending its municipal borders.

<sup>24</sup> See generally Duke & Co. v. Foerster, 521 F. 2d 1277 (CA3 1975); New Mexico v. American Petrofina, Inc., 501 F. 2d 363 (CA9 1974); Hecht v. Pro-Football, Inc., 144 U.S. App. D.C. 56, 444 F. 2d 931 (1971).

<sup>25</sup> See Respondent's Second Amended Counterclaim, App. 33.

<sup>26</sup> LEdHN[6B] [6B]

customers in an established service area would likely reduce revenues, and possibly require abandonment or loss of existing equipment the effect of which would be to reduce its rate base and possibly affect its capital structure. The surviving customers and the investor-owners would bear the brunt of these consequences. The decision to displace existing service, rather than being made on the basis of efficiency in the distribution of services, may be made by the municipality in the interest of realizing maximum benefits to itself without regard to extra-territorial impact and regional efficiency.<sup>27</sup>

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[\*405] The second allegation of LP&L's counterclaim,<sup>28</sup> is that petitioners conspired with others to engage in sham and frivolous litigation against [\*\*\*378] LP&L before various federal agencies<sup>29</sup> and federal courts for the purpose, and with the effect, of delaying approval and construction of LP&L's proposed nuclear electric generating plant. It is alleged that this course of conduct was designed to deprive LP&L of needed financing and to impose delay costs, amounting to \$ 180 million, which would effectively block construction of the proposed project. Such activity may benefit the citizens of Plaquemine and Lafayette by eliminating a competitive [\*\*\*\*31] threat to expansion of the municipal utilities in still undeveloped areas beyond the cities' territorial limits. But that kind of activity, if truly anticompetitive,<sup>30</sup> may impose enormous unnecessary costs on the potential customers of the nuclear generating facility both within and beyond the [\*\*1133] cities' proposed area of expansion. In addition, it may cause significant injury to LP&L, interfering with its ability to provide expanded service.

[\*\*\*\*32] [LEdHN\[7A\]](#) [↑] [7A] [LEdHN\[8A\]](#) [↑] [8A] Another aspect of the public-service argument<sup>31</sup> is that [\*406] because government is subject to political control, the welfare of its citizens is assured through the political process and that federal antitrust regulation is therefore unnecessary. The argument that consumers dissatisfied with the service provided by the municipal utilities may seek redress through the political process is without merit. While petitioners recognize, as they must, that those consumers living outside the municipality who are forced to take municipal service have no political recourse at the municipal level, they argue nevertheless that the customers may take their complaints to the state legislature. It fairly may be questioned whether the consumers in question or the Florida corporation of which LP&L is a subsidiary have a meaningful chance of influencing the state legislature to outlaw on an ad hoc basis whatever anticompetitive practices petitioners may direct against them from time to time. More fundamentally, however, that argument cuts far too broadly; the same argument may be made regarding anticompetitive activity in which any corporation [\*\*\*\*33] engages. Mulcted consumers and unfairly displaced

As one commentator has noted, our cases indicate that the protection against injury to the buyer is only one purpose of the rule against tying arrangements. Equally important is the need to protect competing sellers from competition unrelated to the merits of the product involved, and, concomitantly, to protect the market from distortion. Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50, 60 (1958).

<sup>27</sup> While the investor-owned utilities in Louisiana are subject to regulation by the Louisiana Public Utilities Commission, municipally owned utilities are not subject to the jurisdiction of the PUC and hence apparently need not conform their expansion policies to whatever plans the PUC might deem advisable for coordinating service. See n. 44, infra.

<sup>28</sup> See Respondent's Answer & Counterclaim, App. 18-20.

<sup>29</sup> The counterclaim alleged that petitioners engaged in sham litigation before the Securities and Exchange Commission, the Federal Power Commission, the Atomic Energy Commission, and the United States Department of Justice.

<sup>30</sup> See generally [California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 \(1972\)](#).

<sup>31</sup> [LEdHN\[7B\]](#) [↑] [7B]

Petitioners have urged that the antimonopoly principles of the antitrust laws are inconsistent with the very nature of government operating as a monopoly in the public interest. They suggest that to apply antitrust principles to local governments will necessarily interfere with the execution of governmental programs. We do not agree. Acting as agents at the direction of the State, local governments are free to implement state policies without being subject to the antitrust laws to the same extent as would the State itself. See infra, at 413-417. On the other hand, it would not hinder governmental programs to require that cities authorized to provide services on a monopoly basis refrain from, for example, predatory conduct not itself directed by the State.

competitors may always seek redress through the political process. In enacting the Sherman Act, however, Congress mandated competition as the polestar by which all must be guided in ordering their business affairs. It did not leave this fundamental national policy to the vagaries of the political process, but established a broad policy, to be administered [\*\*\*379] by neutral courts,<sup>32</sup> which [\*407] would guarantee every enterprise the right to exercise "whatever economic muscle it can muster," *United States v. Topco Associates, 405 U.S. 596, 610 (1972)*, without regard to the amount of influence it might have with local or state legislatures.<sup>33</sup>

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In [\*\*1134] 1972, there were 62,437 different units of local government in this country.<sup>34</sup> Of this number 23,885 were special districts which had a defined goal or goals for the provision of one or several services,<sup>35</sup> while the remaining 38,552 represented [\*408] the number of counties, municipalities, [\*\*\*\*36] and townships, most of which have broad authority for general governance subject to limitations in one way or another imposed by the State.<sup>36</sup> These units may, and do, participate in and affect the economic life of this Nation in a great number and variety of ways. When these bodies act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender.<sup>37</sup> If municipalities were free [\*\*\*380] to make economic choices counseled solely by

<sup>32</sup> [\*\*\*\*34] *LEdHN[8B]* [8B]

"The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, [\*] the courts have been left to give content to the statute, and in the performance of that function it is appropriate that courts should interpret its word in the light of its legislative history and of the particular evils at which the legislation was aimed. . . ." S

[\*]See Debates, 21 Cong. Rec. 2460, 3148; 2 Hoar, Autobiography of Seventy Years 364; Senator Edmunds, The Interstate Trust and Commerce Act of 1890, 194 No. Am. Rev. 801, 813, 'after most careful and earnest consideration by the judiciary Committee of the Senate it was agreed by every member that it was quite impracticable to include by specific description all the acts which should come within the meaning and purpose of the words "trade" and "commerce" or "trust," or the words "restraint" or "monopolize," by precise and all-inclusive definitions; and that these were truly matters for judicial consideration.'

"See also Senator Hoar who with Senator Edmunds probably drafted the bill (see A. H. Walker, History of the Sherman Law (1910), p. 27-28) in 36 Cong. Rec. 522, Jan. 6, 1903: 'We undertook by law to clothe the courts with the power and impose on them and the Department of Justice the duty of preventing all combinations in restraint of trade....'" I

*Apex Hosiery Co. v. Leader, 310 U.S. 469, 489, and n. 10 (1940).*

<sup>33</sup> The political-redress argument could also be made in the context of anticompetitive actions engaged in by the State itself. Our rejection of the argument here is not, however, inconsistent with the Parker doctrine. Parker did not reason that political redress is an adequate substitute for direct enforcement of the antitrust laws. Rather, Parker held that, in the absence of congressional intent to the contrary, a purpose that the antitrust laws be used to strike down the State's regulatory program imposed as an act of government would not be inferred. To the extent that the actions of a State's subdivisions are the actions of the State, the Parker exemption applies. See *infra*, at 413-417.

<sup>34</sup> 1 U. S. Bureau of the Census, 1972 Census of Governments, Governmental Organization 1 (1973). This figure (62,437) represents the total of county, municipal, township, and special district governments, but does not include the 15,781 independent school districts in the United States which, of course, have a much more narrowly defined range of functions and powers than those of local governmental units generally. See *id., at 1-5.*

<sup>35</sup> See *id., at 4-5.*

<sup>36</sup> See *id., at 1-3.*

<sup>37</sup> See, e. g., *Apex Hosiery Co. v. Leader, supra, at 493-495, n. 15* (reviewing legislative history).

their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.<sup>38</sup>

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LEdHN[2B] [↑] [2B] [\*\*\*\*38] We conclude that these additional arguments for implying an exclusion for local governments from the antitrust laws must be rejected. We therefore turn to petitioners' principal argument, that "Parker's findings regarding the congressionally intended scope of the Sherman Act apply with equal force to such political subdivisions." Brief for Petitioners 5.

II

Plainly petitioners are in error in arguing that Parker held that HN10 [↑] all governmental entities, whether state agencies or subdivisions of a State, are, simply by reason of their status as such, exempt from the antitrust laws.

Parker v. Brown involved the California Agricultural Prorate [\*409] Act enacted by the California Legislature as a program to be enforced "through action of state officials ... to restrict competition among the growers [of raisins] and maintain prices in the distribution of their commodities to packers." 317 U.S., at 346. The Court held that the program was not prohibited by the federal antitrust laws since "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature, [\*\*\*\*39] " id., at 350-351, and "[t]he state . . . as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." Id., at 352.

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), underscored the significance of Parker's holding that the determinant of the exemption was whether the challenged action was "an act of government" by the State as "[\*\*1135] sovereign." Parker repeatedly emphasized that the anticompetitive effects of California's prorate program derived from "the state[s] command"; the State adopted, organized, and enforced the program "in the execution of a governmental policy."<sup>39</sup> 317 U.S., at 352. Goldfarb, on the other hand, presented the question "whether a minimum-fee schedule for lawyers published by the Fairfax County Bar Association and enforced by the Virginia State Bar," 421 U.S., at 775, violated the Sherman Act. Exemption was claimed on the ground that the Virginia State Bar was "a state agency by law." Id., at 790. The Virginia [\*\*\*381] Legislature had empowered the Supreme Court of Virginia to regulate the practice of law and [\*\*\*\*40] had assigned the State Bar a role in that regulation as an administrative agency of the Virginia Supreme Court. But no Virginia statute referred to lawyers' fees and the Supreme Court of Virginia had taken no action requiring the use of and adherence to minimum [\*410] fee schedules. Goldfarb therefore held that it could not be said that the anticompetitive effects of minimum fee schedules were directed by the State acting as sovereign. Id., at 791. The State Bar, though acting within its broad powers, had "voluntarily joined in what is essentially a private anticompetitive activity," id., at 792, and was not executing the mandate of the State. Thus, the actions of the State Bar had failed to meet "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe. . . ." Id., at 790. Goldfarb therefore made it clear that, HN11 [↑] for purposes of the Parker doctrine, not every act of a state agency is that of the State as sovereign.

[\*\*\*\*41] Bates v. State Bar of Arizona, 433 U.S. 350 (1977), involved the actions of a state agency to which the Parker exemption applied. Bates considered the applicability of the antitrust laws to a ban on attorney advertising directly imposed by the Arizona Supreme Court. In holding the antitrust laws inapplicable, Bates noted that "[t]hat court is the ultimate body wielding the State's power over the practice of law, see Ariz. Const., Art. 3; In re Bailey, 30 Ariz. 407, 248 P. 29 (1926), and, thus, the restraint is 'compelled by direction of the State acting as a

<sup>38</sup> See United States v. Topco Associates, 405 U.S., at 610; Apex Hosiery Co. v. Leader, supra, at 492-495, and n. 15; Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 229-235 (1948).

<sup>39</sup> The state regulatory program involved in Parker furthered an important state interest which was consistent with federal policy. See Parker, 317 U.S., at 352-359.

sovereign." *Id.*, at 360, quoting *Goldfarb, supra, at 791*. We emphasized, moreover, the significance to our conclusion of the fact that the state policy requiring the anticompetitive restraint as part of a comprehensive regulatory system, was one clearly articulated and affirmatively expressed as state policy, and that the State's policy was actively supervised by the State Supreme Court as the policymaker.<sup>40</sup>

[\*\*\*\*42] [\*411] These [\*\*\*382] [\*\*1136] decisions require rejection of petitioners' proposition that their status as such automatically affords governmental entities the "state action" exemption.<sup>41</sup> Parker's limitation [\*412] of the exemption, as applied by Goldfarb and Bates, to "official action directed by [the] state," arises from the basis for the "state action" doctrine -- that given our "dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority," *317 U.S., at 351*, a congressional purpose to subject to antitrust control the States' acts of government will not lightly be inferred. To extend that doctrine to municipalities would be inconsistent with that limitation. Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them. See, e.g., *Edelman v. Jordan, 415 U.S. 651, 667 n. 12 (1974)*; *Lincoln County v. Luning, 133 U.S. 529 (1890)* (political subdivisions not protected by *Eleventh Amendment* from immunity from suit in federal court). Parker's limitation of the exemption to [\*\*\*\*43] "official action directed by a state," *317 U.S., at 351*, is consistent with the fact that the States' subdivisions generally have not been treated as equivalents of the States themselves.<sup>42</sup> *HN12* [↑] In light of the serious

<sup>40</sup> The plurality opinion in *Cantor v. Detroit Edison Co., 428 U.S. 579 (1976)*, also analyzed a "state action" exemption claim in terms of whether the challenged anticompetitive action was taken pursuant to state command. Detroit Edison, an electric utility regulated by Michigan, was charged by an independent seller of light bulbs with antitrust violations in the operation of a program which provided light bulbs without extra cost to electricity customers. Detroit Edison, relying on Parker, defended on the ground that the light-bulb program was included in its rate filed with and approved by the State Public Service Commission and that state law required it to follow the terms of the tariff as long as it was in effect. Cantor rejected the claim, holding that since no Michigan statutes regulated the light-bulb industry, and since neither the Michigan Legislature nor the Public Service Commission had passed upon the desirability of such a light-bulb program, the Commission's approval of Detroit Edison's program did not "implement any statewide policy relating to light blubs" and that "the State's policy is neutral on the question whether a utility should, or should not, have such a program." *428 U.S., at 585*. THE CHIEF JUSTICE, while not joining all of the plurality opinion, agreed with this analysis. *Id., at 604-605*.

Cantor's analysis is not, however, necessarily applicable here. Cantor was concerned with whether anticompetitive activity in which purely private parties engaged could, under the circumstances of that case, be insulated from antitrust enforcement. The situation involved here, on the other hand, presents the issue of under what circumstances a State's subdivisions engaging in anticompetitive activities should be deemed to be acting as agents of the State.

<sup>41</sup> Petitioners argue that Goldfarb, like *Cantor v. Detroit Edison Co., supra*, expresses a limitation upon the circumstances under which private parties may be immunized from suit under the antitrust laws. They seek to avoid our holding in Goldfarb by suggesting that the State Bar, although a state agency by law acting in its official capacity, was somehow not a state agency because its official actions in issuing ethical opinions, see *421 U.S., at 791 n. 21*, benefited its member-lawyers by discouraging price competition. We think it obvious that the fact that the ancillary effect of the State Bar's policy, or even the conscious desire on its part, may have been to benefit the lawyers it regulated cannot transmute the State Bar's official actions into those of a private organization. In addition to the decision in this case, every other Court of Appeals which has considered the immunity of state instrumentalities after Goldfarb has regarded it as having held that anticompetitive actions of a state instrumentality not compelled by the State acting as sovereign are not immune from the antitrust laws. *Fairfax v. Fairfax Hospital Assn., 562 F. 2d 280, 284-285 (CA4 1977)*; *id., at 288* (concurring opinion); *Kurek v. Pleasure Driveway & Park Dist., 557 F. 2d 580, 588-591 (CA7 1977)*, cert. pending, No. 77-440; *Duke & Co. v. Foerster, 521 F. 2d at 1280*.

The acknowledgment of our Brother STEWART's dissent, post, at 433, that, as noted in *Indian Towing Co. v. United States, 350 U.S. 61, 67-68 (1955)*, "Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it" (citation omitted), discloses the fallacy of his effort to distinguish Goldfarb on the ground that, although the State Bar was "a state agency for some limited purposes, . . . the price fixing it fostered was for the private benefit of its members and its actions were essentially those of a private professional group." Post, at 431.

economic [\*\*\*383] dislocation which [\*413] could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, see *supra, at 403-408*, we are especially unwilling to [\*\*1137] presume that Congress intended to exclude anticompetitive municipal action from their reach.

[\*\*\*\*44] *LEdHN[9A]*[<sup>↑</sup>] [9A]On the other hand, the fact that municipalities, simply by their status as such, are not within the Parker doctrine, does not necessarily mean that all of their anticompetitive activities are subject to antitrust restraints. *HN13*[<sup>↑</sup>] Since "[m]unicipal corporations are instrumentalities of the State for the convenient administration of government within their limits." *Louisiana ex rel. Folsom v. Mayor of New Orleans, 109 U.S. 285, 287 (1883)*, the actions of municipalities may reflect state policy. We therefore conclude that the Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service. There remains the question whether the Court of Appeals erred in holding that further inquiry should be made to determine whether petitioners' actions were directed by the State.

### III

*LEdHN[9B]*[<sup>↑</sup>] [9B] The petitioners and our Brother STEWART's dissent focus their arguments upon the fact that municipalities may exercise the sovereign power of the State, concluding from this that any actions [\*\*\*45] which municipalities take necessarily reflect state policy and must therefore fall within the Parker doctrine. [\*414] But, the fact that the governmental bodies sued are cities, with substantially less than statewide jurisdiction, has significance. When cities, each of the same status under state law, are equally free to approach a policy decision in their own way, the anticompetitive restraints adopted as policy by any one of them, may express its own preference, rather than that of the State.<sup>43</sup> Therefore, *HN14*[<sup>↑</sup>] in the absence of evidence that the State authorized or directed a given municipality to act as it did, the actions of a particular city hardly can be found to be pursuant to "the state[s] command," or to be restraints that "the state . . . as sovereign" imposed. *317 U.S., at 352*. [\*\*\*384] The most<sup>44</sup> that could be said is that state policy [\*\*1138] may be neutral. [\*415] To permit municipalities to be

<sup>42</sup> Without explication, our Brother STEWART's dissent states that our "reliance . . . on the basically irrelevant body of law under the *Eleventh Amendment*" is unfounded. Ibid. Rather, it is the statement that is unfounded. For the longstanding principle, of which Congress in 1890 was well aware, see *Lincoln County v. Luning, 133 U.S. 529 (1890)*, is that political subdivisions are not as such sovereign. Certainly, nothing in *National League of Cities v. Usery, 426 U.S. 833 (1976)*, even remotely suggested the contrary; we search in vain for anything in that case that establishes a constitutional principle of presumptive congressional deference in behalf of cities. Indeed our emphasis today in our conclusion, that municipalities are "exempt" from antitrust enforcement when acting as state agencies implementing state policy to the same extent as the State itself makes it difficult to see how National League of Cities is even tangentially implicated.

<sup>43</sup> "While state legislatures exercise extensive power over their constituents and over the various units of local government, the States universally leave much policy and decisionmaking to their governmental subdivisions. Legislators enact many laws but do not attempt to reach those countless matters of local concern necessarily left wholly or partly to those who govern at the local level." *Avery v. Midland County, 390 U.S. 474, 481 (1968)*.

Although Avery concluded that the actions of local government are the actions of the State for purposes of the *Fourteenth Amendment*, state action required under Parker has different attributes. Cf. *Edelman v. Jordan, 415 U.S. 651, 667 n. 12 (1974)*.

<sup>44</sup> Indeed, state policy may be contrary to that adopted by a political subdivision, yet, for a variety of reasons, might not render the local policy unlawful under state law. For example, a state public utilities commission might adopt, though we are not aware that the Louisiana PUC has done so, a policy prohibiting the specific anticompetitive practices in which the municipality engages, yet be unable to enforce that policy with respect to municipalities because it lacks jurisdiction over them. (The Louisiana PUC, in litigation unrelated to this case, has been held to lack jurisdiction over municipal utility systems whether operating within or without the municipality. *City of Monroe v. Louisiana Public Serv. Comm'n, No. 177, 757 -- Div. "I" (19th Jud. Dist. Ct., Sept. 14, 1976)*.) If that were the case, and assuming that there were no other evidence to the contrary, it would be difficult to say that state policy fosters, much less compels, the anticompetitive practices.

shielded from the antitrust laws in such circumstances would impair the goals Congress sought to achieve by those laws, see *supra, at 403-408*, without furthering the policy underlying the Parker "exemption." This does not mean, however, that [\*\*\*\*46] a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a Parker defense to an antitrust suit. While a subordinate governmental unit's claim to Parker immunity is not as readily established as the same claim by a state government sued as such, we agree with the Court of Appeals that an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."<sup>45</sup> *532 F. 2d, at 434.*

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**HN15** The Parker doctrine, so understood, preserves to the States their freedom under our dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the [\*416] same time permitting purely parochial interests to disrupt the Nation's free-market goals.

Our Brother STEWART's dissent argues that the result we reach will "greatly ... impair the ability of a State to delegate governmental power broadly to its municipalities." Post, at 438 (footnote [\*\*\*\*49] omitted). That, with respect, is simply hyperbole. Our decision will render a State no less able to allocate governmental power [\*\*\*385] between itself and its political subdivisions. It means only that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws. The dissent notwithstanding, it is far too late to argue that a State's desire to insulate anticompetitive practices not imposed by it as an act of government falls within the Parker doctrine. *Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951)*. Moreover, by characterizing the Parker exemption as fully applicable to local governmental units simply by virtue of their status as such, the approach taken by the dissent would hold anticompetitive municipal action free from federal antitrust enforcement even when state statutes specifically provide that municipalities shall be subject to the antitrust laws of the United States. See generally *La. Rev. Stat. Ann. § 33:1334 (G)* (West Supp. 1977), quoted in n. 44, *supra*. That result would be a perversion of federalism. [\*\*\*\*50] <sup>46</sup>

Today's decision does not threaten the legitimate exercise of governmental power, nor does it preclude municipal government [\*417] from providing services on a monopoly basis. **HN16** Parker and its progeny make clear that a State properly may, as States did in Parker and Bates, direct or authorize its instrumentalities to act in a way

*Louisiana Rev. Stat. Ann. § 33:1334(G)* (West Supp. 1977) provides another illustration of the fact that a particular activity in which a subdivision technically has power to engage does not necessarily conform to, and may conflict with, state policy. Louisiana has authorized municipalities to create intergovernmental commissions as municipal instrumentalities jointly to construct and operate public services including utilities. §§ 33:1324, 33:1331-33:1334 (West Supp. 1977). Such commissions are, by definition, political subdivisions of the State. *§ 33:1334(D)* (West Supp. 1977). Section 1334 (G) nevertheless provides that "[n]othing in this Chapter shall be construed to grant an immunity to or on behalf of any [such] public instrumentality . . . from any antitrust laws of the state or of the United States."

<sup>45</sup> We reject petitioners' fallback position that an antitrust claim will not lie for anticompetitive municipal action which, though not state directed, is lawful under state law. See *Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951)*; *Northern Securities Co. v. United States, 193 U.S. 197, 344-351 (1904)*; cf. *Union Pacific R. Co. v. United States, 313 U.S. 450 (1941)* (discussed in n. 19, *supra*). See also n. 44, *supra*.

<sup>46</sup> Restating a theme made and rejected before, see *Cantor v. Detroit Edison Co., 428 U.S., at 640* (STEWART, J., dissenting), our Brother STEWART's dissent, post, at 438-440, likens judicial enforcement of the antitrust laws to a regime of substantive due process used by federal judges to strike down state and municipal economic regulation thought by them unfair. That analogy, of course, ignores the congressional judgment mandating broad scope in enforcement of the antitrust laws and simply reflects the dissent's view that such enforcement with respect to cities is unwise.

which, if it did not reflect state policy, would be inconsistent with the antitrust laws. [\*\*\*\*51] Compare Bates with Goldfarb. True, even a lawful monopolist may be subject to antitrust restraints when it seeks to [\*\*1139] extend or exploit its monopoly in a manner not contemplated by its authorization. Cf. *Otter Tail Power Co. v. United States*, [410 U.S. 366, 377-382 \(1973\)](#).<sup>47</sup> But assuming that the municipality is authorized to provide a service on a monopoly basis, these limitations on municipal action<sup>48</sup> will not hobble the execution of legitimate governmental programs.

[\*\*\*\*52] Affirmed.

**Concur by:** MARSHALL; BURGER (In Part)

## Concur

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MR. JUSTICE MARSHALL, concurring.

I agree with THE CHIEF JUSTICE, post, at 425-426, that any implied "state action" [\*\*\*386] "exemption from the antitrust laws should be no broader than is necessary to serve the State's legitimate purposes. I join the plurality opinion, however, because the test there established, relating to whether it is "state policy to displace competition," ante, at 413, incorporates within it the core of THE CHIEF JUSTICE's concern. As the plurality opinion makes clear, it is not enough that the State [\*418] "desire[s] to insulate anticompetitive practices." Ante, at 416. For there to be an antitrust exemption, the State must "impose" the practices "as an act of government." Ibid. State action involving more anticompetitive restraint than necessary to effectuate governmental purposes must be viewed as inconsistent with the plurality's approach.

MR. CHIEF JUSTICE BURGER, concurring in the Court's opinion in Part I and in the judgment.

This case turns, or ought to, on the District Court's explicit conclusion,<sup>1</sup> unchallenged here, that "[t]hese plaintiff cities are engaging in what is [\*\*\*\*53] clearly a business activity; activity in which a profit is realized." There is nothing in [Parker v. Brown, 317 U.S. 341 \(1943\)](#), or its progeny, which suggests that a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality. Parker was a case involving a suit against state officials who were administering a state program which had the conceded purpose of replacing competition in a segment of the agricultural market with a regime of governmental regulation. The instant lawsuit is entirely different. It arises because respondent took the perfectly natural step of answering a federal antitrust complaint -- [\*419] filed by competitors -- with a counterclaim alleging serious violations of the Sherman Act.

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<sup>47</sup> While the majority and dissent disagreed in *Otter Tail* over whether the specific practices of which plaintiffs complained could be regarded as unlawful anticompetitive restraints in light of the existence of federal regulation, there was agreement that a lawful monopolist could violate the antitrust laws. Compare [410 U.S., at 377-382](#) with [id., at 390-391, n. 7](#) (STEWART, J., concurring in part and dissenting in part).

<sup>48</sup> It may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government. See generally Posner, The Proper Relationship Between State Regulation and the Federal Antitrust Laws, 49 N.Y.U.L. Rev. 693, 705 (1974).

<sup>1</sup> The District Court did not, of course, make a formal finding of fact to this effect since the counterclaim was disposed of on the basis of pleadings. Nonetheless, the District Court could reasonably conclude, as a matter of law, that these Cities are engaging in business activities which have as their aim the production of revenues in excess of costs. It certainly is the case that the Cities are attempting to provide a public service, but it is likewise undeniable that they seek to do so in the most profitable way. The Cities allege in their complaint, for example, that they have "been prevented from profitably expanding their businesses." App. 14. While it is correct that the Cities are ordinarily constrained from applying their net earnings as a private corporation would, this does not detract from their competitive posture and resulting incentive to engage in anticompetitive practices.

[\*\*\*\*54] There is nothing in this record to support any assumption other than that this is an ordinary dispute among competitors in the same market. It is true that petitioners are municipalities, but we should not ignore the reality that this is the only difference between [\*\*1140] the Cities and any other entrepreneur in the economic community. Indeed, the injuries alleged in petitioners' complaint read as a litany of economic woes suffered by a business which has been unfairly treated by a competitor: S

"As a direct and proximate result of the unlawful conduct hereinabove alleged, plaintiffs have: (1) been prevented from and continue to be prevented from profitably expanding their businesses; (2) lost [\*\*\*387] and continue to lose the profits which would have resulted from the operation of an expanded, more efficient and lower cost business; (3) been deprived of and continue to be deprived of economies in the financing and operation of their systems; (4) sustained and continue to sustain losses in the value of their businesses and properties; and (5) incurred and continue to incur excessive costs and expenses they otherwise would not have incurred." App. 14. (Emphasis added. [\*\*\*\*55] ) I

It strikes me as somewhat remarkable to suggest that the same Congress which "meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade," [Atlantic Cleaner & Dyers, Inc. v. United States, 286 U.S. 427, 435 \(1932\)](#), would have allowed these petitioners to complain of such economic damage while baldly asserting that any similar harms they might unleash upon competitors or the economy are absolutely beyond the purview of federal law. To allow the defense asserted by the petitioners in this case would inject a wholly arbitrary variable into a "fundamental national economic policy," [\*420] [Carnation Co. v. Pacific Conference, 383 U.S. 213, 218 \(1966\)](#), which strongly disfavors immunity from its scope. See [United States v. Philadelphia Nat. Bank, 374 U.S. 321, 350-351 \(1963\)](#); [California v. FPC, 369 U.S. 482, 485 \(1962\)](#).

As I indicated, concurring in [Cantor v. Detroit Edison Co., 428 U.S. 579, 604 \(1976\)](#), "in interpreting Parker, the Court has heretofore focused on the challenged activity, not upon the identity of the parties to the suit. [\*\*\*\*56]" Such an approach is surely logical in light of the fact that the Congress which passed the Sherman Act very likely never considered the kinds of problems generated by Parker and the cases which have arisen in its wake. E.g., [Bates v. State Bar of Arizona, 433 U.S. 350 \(1977\)](#); [Cantor, supra](#); [Goldfarb v. Virginia State Bar, 421 U.S. 773 \(1975\)](#); see Slater, Antitrust and Government Action: A Formula for Narrowing Parker v. Brown, 69 Nw. U.L. Rev. 71, 84 (1974). It is even more dubious to assume that the Congress specifically focused its attention on the possible liability of a utility operated by a subdivision of a State. Not only were the States generally considered free to regulate commerce within their own borders, see, e.g., [United States v. E. C. Knight Co., 156 U.S. 1 \(1895\)](#); [Kidd v. Pearson, 128 U.S. 1 \(1888\)](#), but manufacturing enterprises, in and of themselves, were not taken to be interstate commerce. [Id. at 20.](#)

By the time Parker was decided, however, this narrow view of "interstate commerce" had broadened via the "affection doctrine" to include intrastate events which had a sufficient [\*\*\*\*57] effect on interstate commerce. See [NLRB v. Fainblatt, 306 U.S. 601, 605, and n. 1 \(1939\)](#); cf. [Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. 738, 743 \(1976\)](#). Given this development, [\*\*\*388] and the Court's interpretation of "person" or "persons" in the Sherman Act to include States and municipalities, ante, at 394-397, along with the trend of allowing the reach of the Sherman Act to expand with broadening conceptions of congressional power under the [Commerce Clause](#), see [\*421] [Rex Hospital Trustees, supra, at 743 n. 2](#), one might reasonably wonder how the Court reached its result in Parker.

[\*\*1141] The holding in Parker is perfectly understandable, though, in light of the historical period in which the case was decided. The Court had then but recently emerged from the era of substantive due process, and was undoubtedly not eager to commence a new round of invalidating state regulatory laws on federal principles. See Verkuil, State Action, Due Process and Antitrust: Reflections on Parker v. Brown, 75 Colum. L. Rev. 328, 331-334 (1975). Responding to this concern, the Parker Court's interpretation of legislative [\*\*\*\*58] intent reflects a "policy[ ] of signal importance in our national traditions and governmental structure of federalism." Ante, at 400. S"In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." [Parker, 317 U.S., at 351.](#) I

The Parker decision was thus firmly grounded on principles of federalism, the ambit of its inquiry into congressional purpose being defined by the Court's view of the requirements of "a dual system of government."<sup>2</sup>

[\*\*\*\*59] This mode of analysis is as sound today as it was then, and I am surprised that neither the plurality opinion nor the dissents focus their attention on this aspect of Parker. Indeed, [\*422] it is even more puzzling that so much judicial energy is expended here on deciding a question not presented by the parties or by the facts of this case: that is, to what extent the Sherman Act impinges generally upon the monopoly powers of state and local governments. As I suggested at the outset, the issue here is whether the Sherman Act reaches the proprietary enterprises of municipalities.<sup>3</sup>

The answer to the question presented ought not [\*\*\*\*60] to be so difficult. When Parker was decided there was certainly no question that a State's operation of a common carrier, even without profit and as a "public function," would be subject to federal [\*\*\*389] regulation under the *Commerce Clause*. *United States v. California*, 297 U.S. 175, 183-186 (1936) ("[W]e think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity." *Id.*, at 183); see *Parden v. Terminal R. Co.*, 377 U.S. 184, 189-193 (1964); *California v. Taylor*, 353 U.S. 553, 568 (1957). Likewise, it had been held in *Ohio v. Helvering*, 292 U.S. 360 (1934), that a State, upon engaging in business, became subject to a federal statute imposing a tax on those dealing in intoxicating liquors, although States were not specifically mentioned in the statute. In short, the Court had already recognized, for purposes of federalism, the difference between a State's entrepreneurial personality and a sovereign's decision - - as in Parker -- to replace competition with regulation.<sup>4</sup>

[\*\*\*\*61] [\*423] I [\*\*1142] see nothing in the last 35 years to question this conclusion. In fact, the Court's recent decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which rekindled a commitment to tempering the *Commerce Clause* power with the limits imposed by our structure of government, employs language strikingly similar to the words of Mr. Chief Justice Stone in Parker: S"It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." *426 U.S., at 845*.I

<sup>2</sup> Our conceptions of the limits imposed by federalism are bound to evolve, just as our understanding of Congress' power under the *Commerce Clause* has evolved. Consequently, since we find it appropriate to allow the ambit of the Sherman Act to expand with evolving perceptions of congressional power under the *Commerce Clause*, a similar process should occur with respect to "state action" analysis under Parker. That is, we should not treat the result in the Parker case as cast in bronze; rather, the scope of the Sherman Act's power should parallel the developing concepts of American federalism.

<sup>3</sup> I use the term "proprietary" only to focus attention on the fact that all of the parties are in a competitive relationship such that each should be constrained, when necessary, by the federal antitrust laws. It is highly unlikely that Congress would have meant to impose liability only on some of these parties, when each possesses the means to thwart federal antitrust policy.

<sup>4</sup> MR. JUSTICE STEWART's dissent, post, at 433-434, attempts to blunt this analysis by noting that the "nongovernmental-governmental" distinction was criticized in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). I suggest no more, however, than what is obvious from our past cases: Petitioners' business activities are not entitled to per se exemption from the Sherman Act. This much ought to be quite clear from *United States v. California*, 297 U.S. 175 (1936), where the State operated a railroad, albeit without profit, and as a "public function." I cannot comprehend why the Cities here should be treated in a different manner. The only authority which MR. JUSTICE STEWART cites to the contrary, *Lowenstein v. Evans*, 69 F. 908 (CCSC 1895), was a case in which a State's complete monopolization of the liquor industry was challenged as violating the Sherman Act. But in that circumstance the State clearly directed the creation of a monopoly, thus bringing the matter within the Parker rationale. Compare *Ohio v. Helvering*, 292 U.S. 360 (1934).

The National League of Cities opinion focused its delineation [\*\*\*\*62] of the "attributes of sovereignty" alluded to above on a determination as to whether the State's interest involved "functions essential to separate and independent existence." Ibid., [\*424] quoting *Coyle v. Oklahoma*, 221 U.S. 559, 580 (1911). [\*\*\*390] It should be evident, I would think, that the running of a business enterprise is not an integral operation in the area of traditional government functions. See *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 695-696 (1976); *Bank of United States v. Planters' Bank of Georgia*, 9 Wheat. 904, 907 (1824). Indeed, the reaffirmance of the holding in *United States v. California*, *supra*, by *National League of Cities, supra, at 854 n. 18*, strongly supports this understanding. Even if this proposition were not generally true, the particular undertaking at issue here -- the supplying of electric service -- has not traditionally been the prerogative of the State. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-353 (1974).<sup>5</sup>

[\*\*\*\*63] Following the path outlined above should lead us to a logical destination: Petitioners should be treated, for purposes of applying the federal antitrust laws, in essentially the same manner as respondent. This is not to say, of course, that the conduct in which petitioners allegedly engaged is automatically subject to condemnation under the Sherman Act. As the Court recognized in *Cantor v. Detroit Edison Co.*, 428 U.S., at 592-598, state-regulated [\*\*1143] utilities pose special analytical problems under Parker. It may very well be, for example, that a State, acting as sovereign, has imposed a system of governmental control in order "to avoid the consequences of unrestrained [\*425] competition." *Cantor, supra, at 595*. This is precisely what occurred in Parker, and there is no question that a utility's action taken pursuant to the command of such an "act of government," *Parker*, 317 U.S., at 352, would not be prohibited by the Sherman Act.

LEdHN[9C] [↑] [9C]I agree with the plurality, then, that "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to [\*\*\*\*64] proscribe is whether the activity is required by the State acting as sovereign." *Goldfarb*, 421 U.S., at 790.(Emphasis added.) But this is only the first, not the final step of the inquiry, for Cantor recognized that "all economic regulation does not necessarily suppress competition." *428 U.S., at 595*. "There is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive [\*\*\*391] areas of the economy." *Id., at 596*.

LEdHN[9D] [↑] [9D]I would therefore remand, directing the District Court to take an additional step beyond merely determining -- as the plurality would -- that any area of conflict between the State's regulatory policies and the federal antitrust laws was the result of a "state policy to displace competition with regulation or monopoly public service."<sup>6</sup> Ante, at 413. This supplemental [\*426] inquiry would consist of determining whether the implied

<sup>5</sup> Such an ascertainment dovetails precisely with the law of Louisiana. There it is recognized that the powers of a municipal corporation are both public and private: As to the former, the city represents the State, discharging duties incumbent upon the State; as to the latter, it represents pecuniary and proprietary interests of individuals, and is held to the same responsibility as a private person. *Hall v. Shreveport*, 157 La. 589, 594, 102 So. 680, 681 (1925). A long line of Louisiana cases dealing explicitly with the subject of municipally owned electrical utilities holds that cities are to be governed by the same rules applicable to private corporations and individuals. See *Hicks v. City of Monroe Utilities Comm'n*, 237 La. 848, 112 So. 2d 635 (1959); *Elias v. Mayor of New Iberia*, 137 La. 691, 69 So. 141 (1915); *Hart v. Lake Providence*, 5 La. App. 294 (1926); *Bannister v. City of Monroe*, 4 La. App. 182 (1926).

<sup>6</sup> While I agree with the plurality that a State may cause certain activities to be exempt from the federal antitrust laws by virtue of an articulated policy to displace competition with regulation, I would require a strong showing on the part of the defendant that the State so intended. Thus, I would not be satisfied, as the plurality and Court of Appeals apparently are, that the highest policymaking body in the State of Louisiana merely "contemplated" the activities being undertaken by the cities. See ante, at 415. I would insist, as the Court did in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975), that the State compel the anticompetitive activity. Moreover, I would have the Cities demonstrate that the exemption was not only part of a regulatory scheme to supersede competition, but that it was essential to the State's plan. Consequently, I do not disagree with the terms of

exemption from federal law "was necessary in order to make the regulatory Act work, [\*\*\*\*65] 'and even then only to the minimum extent necessary.'" [428 U.S., at 597](#).<sup>7</sup>

[LEdHN\[9E\]](#) [↑] [9E]

[\*\*\*\*66]

**Dissent by:** STEWART; BLACKMUN

## Dissent

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MR. JUSTICE STEWART, with whom MR. JUSTICE **WHITE**, MR. JUSTICE BLACKMUN,<sup>\*</sup> and MR. JUSTICE **REHNQUIST** join, dissenting.

In [Parker v. Brown, 317 U.S. 341](#), a California statute restricted competition among raisin [\*\*\*\*67] growers in order to keep the price of raisins artificially high. The Court found that California's program did not violate the antitrust laws but was "an act of government which the Sherman Act did not undertake to prohibit." [Id., at 352](#). Parker v. Brown thus made clear that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of [\*\*1144] the [Sherman] Act can be made out." [Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 136](#).

The principle of Parker v. Brown controls this case. The petitioners are governmental bodies, not private persons, and their actions are "act[s] of government" which Parker v. Brown held are not subject to the Sherman Act. But instead of applying the Parker doctrine, the Court today imposes new [\*427] and unjustifiable limits upon it. According to the plurality, governmental action will henceforth be immune from the antitrust [\*\*\*392] laws<sup>1</sup> only when "authorized or directed" by the State "pursuant to state policy to displace competition with regulation or monopoly public service." Ante, at 414, 413. Such [\*\*\*68] a "direction" from the State apparently will exist only when it can be shown "'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'" Ante, at 415. By this exclusive focus on a legislative mandate the plurality has effectively limited the governmental action immunity of the Parker case to the acts of a state legislature. This is a sharp and I think unjustifiable departure from our prior cases.

[\*\*\*69] THE CHIEF JUSTICE adopts a different approach, at once broader and narrower than the plurality's. In his view, municipalities are subject to antitrust liability when they engage in "proprietary enterprises," ante, at 422, but apparently retain their antitrust immunity for other types of activity. But a city engaged in proprietary activity is to be treated as if it were a private corporation: that is, it is immune from the antitrust laws only if it shows not

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the plurality's remand as such; I would simply ask for a stronger showing on the part of the Cities. I join the judgment, however, and the directions of the remand, because they represent at a minimum what I believe we should demand of petitioners.

<sup>7</sup> In Cantor this mode of analysis effectively answered Detroit Edison's claim that it was required by state law to engage in the allegedly anticompetitive activities. We "infer[red] that the State's policy [was] neutral on the question whether a utility should, or should not, have such a program," [428 U.S., at 585](#) (opinion of STEVENS, J.) (emphasis added), 604-605 (opinion of BURGER, C.J.), and consequently it could not be said that an exemption "was necessary in order to make the regulatory Act work."

\* MR. JUSTICE BLACKMUN joins all but Part II-B of this opinion.

<sup>1</sup> As the plurality acknowledges, ante, at 393 n. 8, Parker v. Brown did not create any exemption from the antitrust laws, but simply recognized that it was the intent of Congress that the Sherman Act should not apply to governmental action. It is thus hard to understand why the plurality invokes the doctrine that exemptions from the antitrust laws will not be lightly implied by subsequent enactment of a regulatory statute. This rule, which effects the accommodation of two federal statutes and rests on the principle that implied repeals are not favored, has no relevance to the Parker doctrine, which is based on an interpretation of the Sherman Act itself.

merely that its action was "required by the State acting as sovereign" but also that such immunity is "necessary in order to make the [State's] regulatory Act work." Ante, at 425, 426. THE CHIEF JUSTICE's approach seems to me just as mistaken as the plurality's.

[\*428] I

The fundamental error in the opinions of the plurality and THE CHIEF JUSTICE is their failure to recognize the difference between private activities authorized or regulated by government on the one hand, and the actions of government itself on the other.

A

In determining whether the actions of a political subdivision of a State as well as those of a state legislature are immune from the Sherman Act, we must interpret the provisions of the [\*\*\*\*70] Act "in the light of its legislative history and of the particular evils at which the legislation was aimed." [Apex Hosiery Co. v. Leader, 310 U.S. 469, 489](#). Those "particular evils" did not include acts of governmental bodies. Rather, Congress was concerned with attacking concentrations of private economic power unresponsive to public needs, such as "these great trusts, these great corporations, these large moneyed institutions." 21 Cong. Rec. 2562 (1890).<sup>2</sup>

[\*\*\*\*71] Recognizing [\*\*\*393] [\*\*1145] this congressional intent, the Court in *Parker v. Brown* held that the antitrust laws apply to private and not governmental action. The program there at issue was in [\*429] fact established by California's legislature, and not by one of its political subdivisions. But the Court nowhere held that the actions of municipal governments should not equally be immune from the antitrust laws. On the contrary, it expressly equated "the state or its municipality." [317 U.S., at 351](#). The *Parker* opinion repeatedly and carefully<sup>3</sup> emphasized that California's program was not the action of "private persons, individual or corporate." [Id., at 350](#).<sup>4</sup> The distinction established in *Parker v. Brown* was not one between actions of a state legislature and those of other governmental units. Rather, the Court drew the line between private action and governmental action.

[\*\*\*\*72] There can be no doubt on which side of this line the petitioners' actions fall. "Municipal corporations are instrumentalities of the State for the convenient administration of government within their limits." [Louisiana ex rel. Folsom v. Mayor of New Orleans, 109 U.S. 285, 287](#); cf. [Reynolds v. Sims, 377 U.S. 533, 575](#).<sup>5</sup> They have only such powers as are delegated them by the State of which they are a subdivision, and when they act they exercise

<sup>2</sup> See also, e.g., 20 Cong. Rec. 1458 (1889) ("the practice, now becoming too common, of large corporations, and of single persons, too, of large wealth, so arranging that they dictate to the people of this country what they shall pay when they purchase, and what they shall receive when they sell"); 21 Cong. Rec. 2728 (1890) ("transaction[s] the only purpose of which is to extort from the community, monopolize, segregate, and apply to individual use, for the purposes of individual greed, wealth which ought properly and lawfully and for the public interest to be generally diffused over the whole community"); id., at 3147 (remarks of Sen. George).

That the Sherman Act was enacted to deal with combinations of individuals and corporations for private business advantage has long been recognized by this Court. [Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-136](#); [Apex Hosiery Co. v. Leader, 310 U.S., at 492-493](#), and n. 15; [Standard Oil Co. v. United States, 221 U.S. 1, 50, 58](#).

<sup>3</sup> See [Cantor v. Detroit Edison Co., 428 U.S. 579, 591](#), and n. 24.

<sup>4</sup> The Court assumed that California's program would violate the Sherman Act "if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate," but noted that the program "was never intended to operate by force of individual agreement or combination." [317 U.S., at 350](#). The Court found nothing in the Sherman Act or its legislative history to suggest that "it was intended to restrain state action or official action directed by a state"; rather, the Act was intended "to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations." [Id., at 351](#). It was "a prohibition of individual and not state action." [Id., at 352](#).

<sup>5</sup> See also, e.g., [Trenton v. New Jersey, 262 U.S. 182, 185-186](#); [Hunter v. Pittsburgh, 207 U.S. 161, 178](#); [The Mayor v. Ray, 19 Wall. 468, 475](#); [Bradford v. Shreveport, 305 So. 2d 487](#) (La.).

435 U.S. 389, \*429; 98 S. Ct. 1123, \*\*1145; 55 L. Ed. 2d 364, \*\*\*393; 1978 U.S. LEXIS 19, \*\*\*\*72

the State's sovereign power. *Avery v. Midland County*, 390 U.S. 474, 480; *Brard v. [\*\*430] Alexandria*, 341 U.S. 622, 640. City governments are not unaccountable to the public but are subject to direct popular control through their own electorates and through the state legislature.<sup>6</sup> They are thus a far cry from the private [\*\*\*394] accumulations of wealth that the Sherman Act was intended to regulate.

[\*\*\*\*73]

B

The plurality today advances two reasons for holding nonetheless that the Parker doctrine is inapplicable to municipal governments. First, the plurality notes that municipalities cannot claim the State's sovereign immunity under the *Eleventh Amendment*. Ante, at 412. But this is hardly relevant to the question of whether they are within the reach of the Sherman Act. That question must be answered by reference to congressional intent, and not constitutional [\*\*1146] principles that apply in entirely different situations.<sup>7</sup> And if constitutional analogies are to be looked to, a decision much more directly related to this case than those under the *Eleventh Amendment* is *National League of Cities v. Usery*, 426 U.S. 833. [\*\*\*\*74] That case, like this one, involved an exercise of Congress' power under the *Commerce Clause*, and held that States and their political subdivisions must be given equal deference. *Id.*, at 855-856, n. 20. The plurality does not advance any basis for its disregard of National League of Cities and its [\*431] reliance instead on the basically irrelevant body of law under the *Eleventh Amendment*.

Secondly, the plurality relies on *Goldfarb v. Virginia State Bar*, 421 U.S. 773. [\*\*\*\*75] The Goldfarb case, however, did not overrule Parker v. Brown but rather applied it. Goldfarb concerned a scheme regulating economic competition among private parties, namely, lawyers. The Court held that this "private anticompetitive activity," 421 U.S., at 792, could not be sheltered under the umbrella of the Parker doctrine unless it was compelled by the State. Since the bar association and State Bar could show no more than that their minimum-fee schedule "complemented" actions of the State, *id.*, at 791, the scheme was not immune from the antitrust laws. Cf. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384.

Unlike Goldfarb, this case does not involve any anticompetitive activity by private persons. As noted in *Bates v. State Bar of Arizona*, 433 U.S. 350, 361, actions of governmental bodies themselves present "an entirely different case" falling squarely within the rule of Parker v. Brown. Although the State Bar in Goldfarb was "a state agency for some limited purposes," 421 U.S., at 791, the price fixing [\*\*\*395] it fostered was for the private benefit of its members and its actions were essentially [\*\*\*76] those of a private professional group. Cf. *Asheville Tobacco Board of Trade, Inc. v. FTC*, 263 F. 2d 502, 508-510 (CA4). Unlike a city, the Virginia State Bar surely is not "a political subdivision of the State."<sup>8</sup>

By requiring that a city show a legislative mandate for its activity, the plurality today blurs, if indeed it does not erase, this logical distinction between private and governmental action. In Goldfarb and in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, the Court held that private action must be compelled by the state legislature in order to escape the reach of the Sherman Act. State compulsion is an appropriate requirement [\*432] when private persons claim that their anticompetitive actions are not their own but the State's, since a State cannot immunize private anticompetitive conduct merely by permitting it.<sup>9</sup> But it is senseless to require a showing of state compulsion when

<sup>6</sup> Cf. *Barnes v. District of Columbia*, 91 U.S. 540, 544-545; *The Mayor v. Ray*, *supra*, at 475; *East Hartford v. Hartford Bridge Co.*, 10 How. 511. Under Louisiana law the petitioners' powers are subject to complete legislative control. See *Bradford v. Shreveport*, *supra*.

<sup>7</sup> That the particular factual and legal context is all important is shown by the fact that under other provisions of the Constitution a municipality is equated with a State. E.g., *Waller v. Florida*, 397 U.S. 387 (*Double Jeopardy Clause*); *Avery v. Midland County*, 390 U.S. 474, 480 (*Fourteenth Amendment*); *Trenton v. New Jersey*, *supra* (Impairment of *Contract Clause*). See also *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 n. 2 (28 U.S.C. § 1254 (2)).

<sup>8</sup> *Worcester v. Street R. Co.*, 196 U.S. 539, 548.

the State itself acts [\*\*\*\*77] through one of its governmental subdivisions. See [\*New Mexico v. American Petrofina, Inc., 501 F.2d 363, 369-370\*](#) (CA9).

C

The separate opinion of THE CHIEF JUSTICE does not rely on any distinctions between States and their political subdivisions. It purports to find a simpler reason for subjecting the petitioners to antitrust [\*\*1147] liability despite the fact that they are governmental bodies, namely that Parker v. Brown does not protect "a State's entrepreneurial personality." Ante, at 422.<sup>10</sup> But this distinction is no more substantial a basis for disregarding the governmental action immunity in this case than the reasons advanced by the plurality.

[\*\*\*\*78] A State may choose to regulate private persons providing certain goods or services, or it may provide the goods and services itself. The State's regulatory body in the former case, or a state-owned utility in the latter, will necessarily make economic decisions. These decisions may be responsive to similar concerns, and they may have similar anticompetitive effects.<sup>11</sup> Yet, according to THE CHIEF JUSTICE, the former [\*433] type of governmental decision is immune from antitrust liability while the latter is not.

There is no basis for this distinction either in the Sherman Act itself or in our prior cases interpreting [\*\*\*\*79] it. To the contrary, Parker v. Brown [\*\*\*396] established that governmental actions are not regulated by the Sherman Act. See [\*supra, at 428-430\*](#). And, as this Court has previously said: S"Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it.' [\*Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 383-384\*](#). On the other hand, it is level,' our present concern, which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed." [\*Indian Towing Co. v. United States, 350 U.S. 61, 67-68.I\*](#)

Nonetheless THE CHIEF JUSTICE would treat some governmental actions as governmental for purposes of the antitrust laws, and some as if they were not governmental at all.

Moreover, the scope of the immunity envisioned by THE CHIEF JUSTICE is virtually impossible to determine. The distinction between "proprietary" and "governmental" activities has aptly been described as a "quagmire." [\*Id., at 65\*](#). The "distinctions [are] so finespun and capricious as [\*\*\*\*80] to be almost incapable of being held in the mind for adequate formulation." [\*Id., at 65-68\*](#). The separate opinion of THE CHIEF JUSTICE does nothing to make these distinctions any more substantial or understandable.<sup>12</sup> Indeed, even a moment's [\*434] consideration of the range of services provided today by governments shows how difficult it is to determine whether or not they are "proprietary." For example, if a city or State decides to provide water service to its citizens at cost on a monopoly basis, is its action to be characterized as "proprietary"? Whether it is "proprietary" or not, it is surely an act of government, as are the petitioners' actions in this case. Cf. [\*Lowenstein v. Evans, 69 F. 908\*](#) (CC S.C.).<sup>13</sup> But THE

<sup>9</sup> See [\*Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384; Northern Securities Co. v. United States, 193 U.S. 197, 346\*](#).

<sup>10</sup> However, the District Court's "conclusion," ante, at 418, that the petitioners' electric utility service was a business activity engaged in for profit was not supported by any evidence (since the case was decided on a motion to dismiss) and is indeed challenged here by the petitioners in their reply brief.

<sup>11</sup> Of course, the fact -- heavily relied upon both by the plurality and THE CHIEF JUSTICE -- that the actions of cities may have anticompetitive effects misses the point. The whole issue before the Court today is whether conduct that would concededly subject a private individual to liability because of its anticompetitive nature is proscribed by the antitrust laws when undertaken by a city.

<sup>12</sup> In various places, the separate opinion of THE CHIEF JUSTICE refers to "'business activit[ies] . . . in which a profit is realized,'" to "proprietary enterprises," to activities which have "the inherent capacity for economically disruptive anticompetitive effects," to those which are not "integral operation[s] in the area of traditional government functions," and to those not "the prerogative of the State."

CHIEF JUSTICE, **[\*\*1148]** like the plurality, ignores what seems to me the controlling distinction in this case, that between private and governmental action.

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II

The Court's decision in this case marks an extraordinary intrusion into the operation of state and local government in this country. Its impact can hardly be overstated.

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Under our federal system, a State is generally free to allocate its governmental power to its political subdivisions **[\*\*\*397]** as it wishes.<sup>14</sup> A State may decide to permit its municipalities to exercise its police power without having to obtain approval of each law from the legislature.<sup>15</sup> Such local self-government **[\*435]** serves important state interests. It allows a state legislature to devote more time to statewide problems without being burdened with purely local matters, and allows municipalities to deal quickly and flexibly with local problems. But today's decision, by demanding extensive legislative control over municipal action, will necessarily diminish the extent to which a State can **[\*\*\*82]** share its power with autonomous local governmental bodies.

This will follow from the plurality's emphasis on state legislative action, and the vagueness of the criteria it announces.<sup>16</sup> First, it is not clear from the plurality opinion whether a municipal government's **[\*\*\*83]** actions will be immune from the Sherman Act if they are merely "authorized" by a state legislature or whether they must be legislatively "directed" in order to enjoy immunity. While the plurality uses these terms interchangeably, they can have very different meanings. See *Cantor v. Detroit Edison Co.*, 428 U.S., at 592-593. A municipality that is merely "authorized" by a state statute to provide a monopoly service thus cannot be certain it will not be subject to antitrust liability if it does so.

Second, the plurality gives no indication of how specifically the legislature's "direction" must relate to the "action complained of." Reference to the facts of this case will show how elusive **[\*\*\*84]** the plurality's test is. Stripped to its essentials, the counterclaim alleged that the petitioners engaged in sham litigation, maintained their monopolies by debenture covenants, foreclosed competition by long-term supply contracts, **[\*436]** and tied the sale of gas and water to the sale of electricity. Broadly speaking, these actions could be characterized as bringing lawsuits, issuing bonds, and providing electric and gas service, all of which are activities authorized by state statutes.<sup>17</sup> But in

<sup>13</sup> This case, involving a state liquor monopoly, was cited with approval in *Parker v. Brown*, 317 U.S., at 352.

<sup>14</sup> See, e.g., *Lockport v. Citizens for Community Action*, 430 U.S. 259, 269; *Avery v. Midland County*, 390 U.S., at 481-482.

<sup>15</sup> Local self-government is broadest in "home rule" municipalities, which can be almost entirely free from legislative control in local matters. See Vanlandingham, Municipal Home Rule in the United States, 10 Wm. & Mary L. Rev. 269 (1968). Although the petitioners are not home rule cities, Louisiana's Constitution has a home rule provision, La. Const. of 1974, Art. 6, §§ 5, 6; La. Const. of 1921, Art. XIV, §§ 22, 40 (c), as do the constitutions or statutes of at least 33 other States. Note, *Antitrust Law* and *Municipal Corporations*, 65 Geo. L.J. 1547, 1559 n. 77 (1977).

<sup>16</sup> While THE CHIEF JUSTICE has not joined those portions of the plurality opinion that discuss what is necessary to show that a challenged activity was required by the State, he would apparently require a still stronger, and hence less justifiable, showing of state legislative compulsion. Ante, at 425-426, n. 6.

<sup>17</sup> *La. Rev. Stat. Ann. § 33:621* (West 1951):

"The inhabitants of the city shall continue a body politic and corporate by its present name and, as such,... may sue and be sued;... may acquire by condemnation or otherwise, construct, own, lease, and operate and regulate public utilities within or without the corporate limits of the city subject only to restrictions imposed by general law for the protection of other

[\*\*\*398] affirming the judgment of the Court [\*\*1149] of Appeals the Court makes evident that it does not consider these statutes alone a sufficient "mandate" to the cities.

[\*\*\*\*85] On the other hand, the plurality states that a city need not "point to a specific, detailed legislative authorization before it properly may assert a Parker defense to an antitrust suit." Ante, at 415. Thus, it seems that the petitioners need not identify a statute compelling each lawsuit, each contract, and each debenture covenant.<sup>18</sup> But what intermediate showing [**\*437**] of legislative authorization, approval, or command will meet the plurality's test I am unable to fathom.<sup>19</sup>

#### [\*\*\*\*86]

Finally, state statutes often are enacted with little recorded legislative history, [\*\*\*\*87]<sup>20</sup> and the bare words of a statute will often be unilluminating in interpreting legislative intent. For example, do the Louisiana statutes permitting the petitioners to operate public utilities<sup>21</sup> "contemplate" that the petitioners might tie the sale of gas to the sale of electricity? Do those statutes, indeed, "contemplate" that electric service will be provided to city residents on a monopoly basis? Without legislative history or relevant statutory language, any answer to these questions would be purely a creation of judicial imagination.<sup>22</sup>

[\*\*\*\*88] [**\*438**] As a practical result of the uncertainties in today's opinions,<sup>23</sup> and of [\*\*\*399] the plurality's emphasis on state legislative action, a prudent municipality will probably believe itself compelled to seek passage of a state statute requiring it to engage in any activity which might be considered anticompetitive. Each time a city grants an exclusive franchise, or chooses to provide a service itself on a monopoly basis, or refuses to grant a

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communities;... [and] may borrow money on the faith and credit of the city by issue or sale of bonds, notes, or other evidences of debt. . . ."

See also [La. Rev. Stat. Ann. §§ 33:1326](#) (West 1951), 33:4162, 33:4163 (West 1966).

<sup>18</sup> The plurality's suggestion that the Louisiana Legislature has expressed a state policy that the activities of cities should be subject to the antitrust laws, ante, at 414-415, n. 44, and 416, is both erroneous and irrelevant. [Louisiana Rev. Stat. Ann. § 33:1334 \(G\)](#) (West Supp. 1977) applies not to municipalities but only to utility commissions created jointly by several cities or counties; there is no comparable statute applicable to the petitioners. Moreover, the applicability of the federal antitrust laws is a matter of federal, not state, law; conversely, a State's restrictions on municipal action are a matter of state, not federal, law. A State can no more bring a person's conduct within the coverage of federal law when Congress has not done so than it can exempt a person's conduct from the operation of federal law if Congress has provided otherwise. Cf. [Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384](#).

<sup>19</sup> The Court imposes yet another unwarranted limitation upon governmental immunity from the antitrust laws. Apparently, a municipality can claim immunity only if the state legislature has mandated its action "pursuant to state policy to displace competition with regulation or monopoly public service." Ante, at 413 (plurality opinion); see ante, at 425 (opinion of BURGER, C.J.). Even had the Louisiana State Legislature passed a law specifically compelling the petitioners to litigate in an effort to prevent respondent from constructing its nuclear generating facility, compelling them to insert restrictive covenants in their debentures, and compelling the tying arrangements complained of, could such a law fairly be described as "displac[ing] competition with regulation or monopoly public service"? Would the Court thus deny the cities immunity for their actions even if they were compelled by the State which controlled them?

<sup>20</sup> See M. Price & H. Bitner, Effective Legal Research 73, 103 (3d ed. 1969).

<sup>21</sup> See n. 17, *supra*.

<sup>22</sup> This problem of statutory interpretation is exacerbated by the fact that today's decision will have "retroactive" application in two senses. First, antitrust liability can be premised on actions that have occurred in the past. Second, many of the statutes governing contemporary and future municipal activities were enacted years ago. Thus, municipalities will be faced with the difficult problem of establishing their antitrust immunity based on statutes that were enacted without any foreknowledge of the criteria announced by the Court today.

<sup>23</sup> The vagueness of the test proposed in the separate opinion of THE CHIEF JUSTICE, see [supra, at 433-434](#), will only add to the confusion of a city trying to protect itself from antitrust liability.

zoning variance to a business,<sup>24</sup> or even -- as alleged in this case -- brings litigation on behalf of its citizens, state legislative [\*\*1150] action will be necessary to ensure that a federal court will not subsequently decide that the activity was not "contemplated" by the legislature. Thus, the effect of today's decision is greatly to impair the ability of a State to delegate governmental power broadly to its municipalities.<sup>25</sup> Such extensive interference with the fundamentals of state government is not a proper function of the federal judiciary.<sup>26</sup>

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Today's decision will cause excessive judicial interference not only with the procedures by which a State makes its governmental decisions, but with their substance as well.

[\*439] States should be "accorded wide latitude in the regulation of their local economies," *New Orleans v. Dukes* [427 U.S. 297, 303](#), and in "the manner in which they will structure delivery of those governmental services which their citizens require." *National League of Cities v. Usery*, [426 U.S., at 847](#). The antitrust liability the Court today imposes on municipal governments will sharply limit that latitude.

First, the very vagueness and uncertainty of the new test for antitrust immunity is bound to discourage state agencies and subdivisions in their experimentation with innovative social and economic programs.<sup>27</sup> In the exercise of their powers local governmental entities often take actions that might violate the antitrust laws if taken by private persons, such as granting exclusive franchises, enacting restrictive zoning ordinances and providing public services on a monopoly basis. But a city contemplating such action in the interest of its citizens will be able to [\*\*\*\*91] do so after today only at the risk of discovering too late that a federal court believes that insufficient statutory "direction" existed, or that the activity is "proprietary" in nature.

Second, [\*\*\*400] the imposition of antitrust liability on the activities of municipal governments will allow the sort of wide-ranging inquiry into the reasonableness of state regulations that this Court has forsaken.<sup>28</sup> For example, in *New Orleans v. Dukes, supra*, a city ordinance which, to preserve the character of a historic area, prohibited the sale of food from pushcarts unless the vendor had been in business for at least eight years, was challenged under the *Equal Protection Clause of the Fourteenth Amendment*. The Court upheld the constitutional validity of the ordinance. But it now appears that if Dukes had proceeded under the antitrust laws and claimed that the ordinance was an unreasonably anticompetitive [\*\*\*92] limit [\*440] on the number of pushcart vendors, he might well have prevailed unless New Orleans could establish that the Louisiana Legislature "contemplated" the exclusion of all but a few pushcart vendors from the historic area. The "wide latitude" of the States "in the regulation of their local economies," exercised in Dukes by the city to which this power to regulate had been delegated, could thus be wholly stifled by the application of the antitrust laws.

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<sup>24</sup> See *Whitworth v. Perkins*, [559 F. 2d 378](#) (CA5).

<sup>25</sup> By imposing antitrust liability on "proprietary" governmental activities, the test adopted in the opinion of THE CHIEF JUSTICE would further deter States from choosing to provide services themselves rather than regulating others.

<sup>26</sup> See *Sailors v. Board of Education*, [387 U.S. 105](#); *Williams v. Eggleston*, [170 U.S. 304, 310](#); see also *Baker v. Carr*, [369 U.S. 186, 289-290](#), and n. 23, and cases cited (Frankfurter, J., dissenting).

The plurality's emphasis on legislative action also leaves in doubt the status of state delegations of power to administrative agencies, unless they, too, can show that the legislature "directed" their actions. This, of course, defeats the whole purpose of establishing such agencies.

<sup>27</sup> See *New State Ice Co. v. Liebmann*, [285 U.S. 262, 311](#) (Brandeis, J., dissenting).

<sup>28</sup> *Ferguson v. Skrupa*, [372 U.S. 726](#).

[\*\*1151] Finally, today's decision will impose staggering costs on the thousands of municipal governments in our country. In this case, a not atypical antitrust action, the respondent claimed that it had suffered damages of \$ 180 million as a result of only one of the antitrust violations it alleged. Trebled, this amounts to \$ 540 million on this claim alone, to be recovered from cities with a combined population (in 1970) of about 75,000.<sup>29</sup> A judgment of this magnitude would assure bankruptcy [\*\*\*\*93] for almost any municipality against which it might be rendered.<sup>30</sup> Even if the petitioners ultimately prevail, their citizens will have to bear the rapidly mounting [\*441] costs of antitrust litigation through increased taxes or decreased services.<sup>31</sup> The prospect of a city closing its schools, discharging its policemen, and curtailing its fire department in order to defend an antitrust suit would surely dismay the Congress that enacted the Sherman Act.<sup>32</sup>

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For [\*\*\*401] all of the [\*\*\*\*95] reasons discussed in this opinion, I respectfully dissent.

MR. JUSTICE BLACKMUN, dissenting.

I join MR. JUSTICE STEWART's dissent with the exception of Part II-B, but wish to note that I do not take his opinion as reaching the question whether petitioners should be immune under the Sherman Act even if found to have been acting in concert with private parties. To grant immunity to municipalities in such a circumstance would go beyond the protections previously accorded officials of the States themselves. See *Parker v. Brown, 317 U.S. 341, 351-352 (1943)* ("[W]e have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade, cf. *Union Pacific R. Co. v. United States, 313 U.S. 450*"). The Court of Appeals did not have the opportunity to rule on how a "conspiracy with private parties" exception to municipalities' general immunity should be limited, if indeed such an exception is appropriate at all. If the view that municipalities are not subject to the full reach [\*442] of Sherman Act liability had commanded a majority, a remand for consideration of this more limited [\*\*\*\*96] exception would be in order.

In light of the fact that the plurality and THE CHIEF JUSTICE have concluded that municipalities should be subject to broad Sherman Act liability, I must question the nonchalance with which the Court puts aside the question of remedy. Ante, at 402, and n.22. It is a grave act to make governmental units potentially liable for massive treble damages when, however "[\*\*1152] proprietary" some of their activities may seem, they have fundamental responsibilities to their citizens for the provision of life-sustaining services such as police and fire protection. The several occasions in the past when the Court has found that Congress intended to subject municipalities and States to liability as "persons" or "corporations" do not provide the support for today's holding that the plurality opinion would pretend. Ante, at 400-402, and nn. 19-21. The Court cites previous constructions of the Elkins Act; the

<sup>29</sup> U.S. Department of Commerce, Bureau of the Census, 1970 Census of Population, Number of Inhabitants, United States Summary, Table 31 (1971).

<sup>30</sup> The Court indicates that the remedy of treble damages might not be "appropriate" in antitrust actions against a municipality. Ante, at 401-402, and n.22. But the language of § 4 of the Clayton Act, *15 U.S.C. § 15 (1976 ed.)*, is mandatory on its face: It requires that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws ... shall recover threefold the damages by him sustained" (emphasis supplied). Cf., e.g., *35 U.S.C. § 284*. And the legislative history cited by MR. JUSTICE BLACKMUN, post, at 443 n. 2, demonstrates that Congress has understood the treble-damages provision to be mandatory and has refused to change it. The Court does not say on what basis a district court could possibly disregard this clear statutory command. Cf. *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134*.

<sup>31</sup> Legal fees to defend one current antitrust suit have been estimated as at least one-half million dollars a month. N.Y. Times, June 27, 1977, p. 41, col. 6; id., Sept. 4, 1977, *section 3*, p. 5, col. 1.

<sup>32</sup> Treble-damages liability can, of course, be ruinous to a private corporation as well. But a private corporation, organized for the purpose of seeking private profit, is surely very different from a city providing essential governmental functions, and shareholders do not stand in the same relation to their corporation as do residents or taxpayers to the city in which they live. An investment in a corporation is essentially a business decision; a shareholder takes the risks of corporate losses in the hope of corporate profits. A citizen's relationship to his city government is obviously far different.

federal tax on sellers of alcoholic beverages; and the Shipping Act, 1916. But the financial penalties available under those Acts do not even approach the magnitude of the treble-damages remedy provided by the antitrust laws.

<sup>1</sup> Nor has [\*443] [\*\*\*\*97] the Court come to grips with the [\*\*\*402] plainly mandatory language of § 4 of the Clayton Act, [15 U.S.C. § 15 \(1976 ed.\)](#): "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws ... shall recover threefold the damages by him sustained" (emphasis supplied), and the repeated occasions on which Congress has rejected proposals to make the treble-damages remedy discretionary.<sup>2</sup> It is one thing to leave open the question of remedy if there is a conceivable defense to damages whose theory is consistent with the mandatory language of the Clayton Act (e.g., in the case of private utilities subject to state tariffs, that their conduct was required by state law and hence was involuntary). See [Cantor v. Detroit Edison Co., 428 U.S. 579, 614-615, n.6 \(1976\)](#) (opinion concurring in judgment). It is quite another to delay the question of remedy in the absence of any suggested basis for a defense, especially where the prospect of insolvency for petitioner cities would so threaten the welfare of their inhabitants. The sensible course, it seems to me, is to consider the range of liability in light of [\*\*\*\*98] the range of defendants for whom Sherman Act penalties would be appropriate.

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## References

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[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 15-18, 246, 286, 301](#)

12 Federal Procedural Forms L Ed, Monopolies and Restraints of Trade 48:61 et seq.

18 Am Jur PI & Pr Forms (Rev), Monopolies, Restraints of Trade, and Unfair Trade Practices, Forms 11 et seq.

24 Am Jur Trials 1, Defending Antitrust Lawsuits

### [15 USCS 1 et seq.](#)

US L Ed Digest, Restraints of Trade and Monopolies 8, 9, 11, 64

ALR Digests, Restraints of Trade and Monopolies 12, 13

L Ed Index to Annos, Restraints of Trade and Monopolies

ALR Quick Index, Restraints of Trade and Monopolies

Federal Quick Index, Monopolies and Restraints of Trade

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<sup>1</sup> Respondent seeks treble damages in excess of \$ 540 million in this case. If divided among Plaquemine and Lafayette residents, that penalty would exceed \$ 28,000 for each family of four.

Under the federal tax on sellers of alcoholic beverages, [26 U.S.C. §§ 11](#) and 205 (1926 ed.), construed in [Ohio v. Helvering, 292 U.S. 360, 370-371 \(1934\)](#), the potential liability of the State of Ohio was \$ 25 for each retail, and \$ 100 for each wholesale, outlet. Under §§ 16 and 17 of the Shipping Act, 1916, 46 U.S.C. §§ 815, 816 (1940 ed.), construed in [California v. United States, 320 U.S. 577, 585-586 \(1944\)](#), a violation was a misdemeanor punishable by a \$ 5,000 fine. The Court's only arguable support lies in [§ 1](#) of the Elkins Act, 49 U.S.C. § 41, construed in [Union Pacific R. Co. v. United States, 313 U.S. 450 \(1941\)](#). Even there, the potential liability of a municipality not acting as a common carrier is a \$ 20,000 fine, and, were illegal transportation rebates to be received by the municipality, three times the amount of the rebate. Even if a municipality were held to be operating a common carrier under that Act, potential financial liability is limited to the fine and the actual damages caused by the prohibited conduct. 49 U.S.C. § 8.

<sup>2</sup> E.g., H.R. 4597, 83d Cong., 1st Sess. (1953); H.R. 6875, 84th Cong., 1st Sess. (1955); H.R. 978, 85th Cong., 1st Sess. (1957); H.R. 1184, 86th Cong., 1st Sess. (1959); H.R. 190, 87th Cong., 1st Sess. (1961). See also Hearings on H.R. 4597 before Subcommittee No. 3 of the House Committee on the Judiciary, 83d Cong., 1st Sess. (1953); Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 1st Sess., 189, 509-522, 2246-2249 (1955).

435 U.S. 389, \*443; 98 S. Ct. 1123, \*\*1152; 55 L. Ed. 2d 364, \*\*\*402; 1978 U.S. LEXIS 19, \*\*\*\*99

Annotation References:

Applicability of federal antitrust laws as affected by other federal statutes or by Federal Constitution . 45 L Ed 2d 841.

Valid governmental action as conferring immunity or [\*\*\*\*100] exemption from private liability under the federal antitrust laws. 12 ALR Fed 329.

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## National Soc. of Professional Engineers v. United States

Supreme Court of the United States

January 18, 1978, Argued ; April 25, 1978, Decided

No. 76-1767

### **Reporter**

435 U.S. 679 \*; 98 S. Ct. 1355 \*\*; 55 L. Ed. 2d 637 \*\*\*; 1978 U.S. LEXIS 47 \*\*\*\*; 1978-1 Trade Cas. (CCH) P61,990

NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS v. UNITED STATES

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

**Disposition:** [181 U. S. App. D. C. 41, 555 F.2d 978](#), affirmed.

## **Core Terms**

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ethical, Sherman Act, profession, competitive bidding, district court, engineers, antitrust, customer, engineering services, prices, bids, restraint of trade, injunction, ban, price information, anticompetitive, deceptively, inferior

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN1\*\*](#) **Antitrust & Trade Law, Sherman Act**

The fact that a restraint operates upon a profession as distinguished from a business is relevant in determining whether that particular restraint violates the Sherman Act. The public service aspect, and other features of the professions may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN2\*\*](#) **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 1](#).

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

### [\*\*HN3\*\*](#) **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The rule of reason is used to give the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), both flexibility and definition, and its central principle of antitrust analysis remains constant. Contrary to its name, the rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

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

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

#### [HN4](#) Collectives & Cooperatives, Capper-Volstead Act

Restraints of trade within the purview of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), cannot be taken out of rule of reason category by indulging in general reasoning as to the expediency or nonexpediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made.

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

#### [HN5](#) Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In a restraint of trade case, the test is whether the challenged contracts or acts were unreasonably restrictive of competitive conditions. Unreasonableness under that test can be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.

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

#### [HN6](#) Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

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

#### [HN7](#) Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Price is the central nervous system of the economy, and an agreement that interferes with the setting of price by free market forces is illegal on its face.

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

#### **HN8** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The Sherman Act, [15 U.S.C.S. § 1 et seq.](#), reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

#### **HN9** Regulated Industries, Higher Education & Professional Associations

The equation of competition with deception, like the similar equation with safety hazards, is simply too broad; courts may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), for doing away with competition.

Antitrust & Trade Law > Sherman Act > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

#### **HN10** Antitrust & Trade Law, Sherman Act

The [First Amendment](#) does not make it impossible ever to enforce laws against agreements in restraint of trade.

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

International Trade Law > General Overview

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

A district court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do. When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Burdens of Proof > General Overview

#### **HN12** Antitrust & Trade Law, Sherman Act

The burden is upon the proved transgressor to bring any proper claims for relief to the court's attention.

## Lawyers' Edition Display

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### Summary

The United States brought an action in the United States District Court for the District of Columbia, against an association of professional engineers under 1 of the Sherman Act ([15 USCS 1](#))--which declares illegal every contract, combination, or conspiracy in restraint of trade or commerce--seeking to nullify the association's canon of ethics which prohibited association members from submitting competitive bids for their engineering services. Rejecting the association's contention that the canon was justified under the "rule of reason" allegedly because the canon was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering public safety, the District Court granted an injunction against the canon, which it found to be a combination and conspiracy in unreasonable restraint of interstate trade and commerce violative of 1 of the Act (389 F Supp 1193). Ultimately, the United States Court of Appeals for the District of Columbia Circuit affirmed, modifying the injunction so that the association was prohibited from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding was unethical ([555 F2d 978](#)).

On certiorari, the United States Supreme Court affirmed. In an opinion by Stevens, J., joined by Stewart, White, Marshall, and Powell, JJ., and joined in part by Blackmun and Rehnquist, JJ. (as to holding 3 below), it was held that (1) the association's canon of ethics, which constituted an agreement among competitors to refuse to discuss prices with potential customers until after negotiations had resulted in the initial selection of an engineer, was not price fixing as such, but, on its face, restrained trade within the meaning of 1 of the Sherman Act, since it operated as an absolute ban on competitive bidding, impeding the ordinary give and take of the market place and substantially depriving customers of the ability to utilize and compare prices in selecting engineering services, (2) the canon could not be justified under the "rule of reason" standard of analysis for 1 of the Act, since such rule, under which the inquiry was whether a challenged agreement was one that promoted competition or one that suppressed competition, did not support a defense based on the assumption that competition itself was unreasonable, and (3) the injunction, as modified by the Court of Appeals, was not unconstitutional under the [First Amendment](#) as a prior restraint on speech and as a prohibition against free association, but was proper under the appropriate standard, being a reasonable method of eliminating the consequences of the association's illegal conduct, notwithstanding that the injunction went beyond a simple proscription against the precise conduct found to constitute an [antitrust law](#) violation.

Blackmun, J., joined by Rehnquist, J., concurring in part and concurring in the judgment, expressed the view that not every ethical rule which was promulgated by a professional society and which had an anticompetitive effect was forbidden under the Sherman Act.

Burger, Ch. J., concurred in the court's judgment to the extent it sustained the finding of a Sherman Act violation, but dissented from the judgment's prohibiting the association from stating in its public standards of ethics the view that competitive bidding was unethical, since the [First Amendment](#) guaranteed the right to express such a position.

Brennan, J., did not participate.

### Headnotes

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A canon of ethics of an association of engineers prohibiting association members from engaging in competitive bidding for their engineering services, and thus constituting an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer, is not price fixing as such, yet, on its face, restrains trade in violation of 1 of the Sherman Act ([15 USCS 1](#)), which prohibits contracts, combinations, or conspiracies in restraint of trade or commerce, since it operates as an absolute ban on competitive bidding, impeding the ordinary give and take of the market place, and substantially depriving customers of the ability to utilize and compare prices in selecting engineering services; such canon cannot be justified under the "rule of reason" standard of analysis for 1 of the Act on the ground that the canon was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering public safety, since such rule, under which the inquiry is whether the challenged agreement is one that promotes competition or one that suppresses competition, does not support a defense based on the assumption that competition itself is unreasonable.

MONOPOLIES §7 > construction -- Sherman Act -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

Section 1 of the Sherman Act ([15 USCS 1](#)), providing that "every" contract that restrains trade is unlawful, cannot be read literally, since 1 would outlaw the entire body of private contract law which establishes the enforceability of commercial agreements and enables competitive markets to function effectively; the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition.

MONOPOLIES §16 > "rule of reason" -- scope -- > Headnote:

[LEdHN\[3\]](#) [3]

The "rule of reason" standard of analysis for the prohibition of 1 of the Sherman Act ([15 USCS 1](#)) against contracts, combinations, or conspiracies in restraint of trade or commerce--under which rule the inquiry is whether a restraint promotes or suppresses competition--does not open the field of antitrust inquiry to any argument in favor or a challenged restraint that may fall within the realm of reason, but instead, focuses directly on the challenged restraint's impact on competitive conditions.

MONOPOLIES §36 > "rule of reason" -- reasonableness of prices -- > Headnote:

[LEdHN\[4\]](#) [4]

The "rule of reason" standard of analysis for the prohibition of 1 of the Sherman Act ([15 USCS 1](#)) against contracts, combinations, or conspiracies in restraint of trade or commerce--under which rule the inquiry is whether a challenged agreement is one that promotes or suppresses competition--does not permit an inquiry into the reasonableness of prices set by private agreement.

MONOPOLIES §11 > exemption of industry -- Sherman Act -- Congress -- > Headnote:

[LEdHN\[5\]](#) [5]

It is for Congress to determine whether a specific industry should be exempt from federal antitrust laws because the special characteristics of the industry are such that monopolistic arrangements will better promote trade and commerce than competition.

MONOPOLIES §14 > "rule of reason" -- special characteristics of industry -- justification for monopoly -- > Headnote:

[LEdHN\[6\]](#) [6]

For purposes of the "rule of reason" standard of analysis for the prohibition of 1 of the Sherman Act ([15 USCS 1](#)) against contracts, combinations, or conspiracies in restraint of trade or commerce--under which rule the inquiry is whether the challenged restraint is one that promotes or suppresses competition--it cannot be argued that monopolistic arrangements in a particular industry having special characteristics should be allowed because such monopolistic arrangements will better promote trade and commerce than competition; restraints of trade cannot be taken out of that category by indulging in general reasoning as to the expediency or nonexpediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made.

MONOPOLIES §16 > "unreasonableness" -- Sherman Act -- test -- > Headnote:

[LEdHN\[7\]](#) [7]

For purposes of 1 of the Sherman Act ([15 USCS 1](#)), which prohibits contracts, combinations, or conspiracies in restraint of trade or commerce, and the test which considers whether challenged contracts or acts are unreasonably restrictive of competitive conditions, "unreasonableness" may be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices; under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.

MONOPOLIES §8 > Sherman Act -- interpretation of "every" -- anticompetitive conduct. -- > Headnote:

[LEdHN\[8A\]](#) [8A] [LEdHN\[8B\]](#) [8B]

The discretion which the courts have in interpreting the word "every" in 1 of the Sherman Act ([15 USCS 1](#))--which prohibits "every" contract, combination, or conspiracy in restraint of trade or commerce--is confined to consideration of whether in each case the conduct being reviewed under the Act constitutes an undue restraint of competitive conditions, or a monopolization, or an attempt to monopolize; such standard permits the courts to decide whether conduct is significantly and unreasonably anticompetitive in character or effect.

MONOPOLIES §16 > "rule of reason" -- Sherman Act -- > Headnote:

[LEdHN\[9\]](#) [9]

The inquiry mandated by the "rule of reason" standard of analysis for the prohibition of 1 of the Sherman Act ([15 USCS 1](#)) against contracts, combinations, or conspiracies in restraint of trade or commerce, is whether the challenged agreement is one that promotes or suppresses competition; the true test of legality is whether the

435 U.S. 679, \*679; 98 S. Ct. 1355, \*\*1355; 55 L. Ed. 2d 637, \*\*\*637; 1978 U.S. LEXIS 47, \*\*\*\*1

restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

MONOPOLIES §9 > per se illegality -- anticompetitive agreements -- > Headnote:

[LEdHN\[10\]](#) [10]

For purposes of federal **antitrust law** analysis, agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality are "illegal per se."

MONOPOLIES §36 > interference with price setting -- Sherman Act -- per se illegality -- > Headnote:

[LEdHN\[11\]](#) [11]

An agreement that interferes with the setting of price by free market forces is illegal on its face under the Sherman Act ([15 USCS 1 et seq.](#)).

MONOPOLIES §9 > Sherman Act -- competitive bidding -- > Headnote:

[LEdHN\[12\]](#) [12]

The Sherman Act ([15 USCS 1 et seq.](#)) does not require competitive bidding; it prohibits unreasonable restraints on competition.

MONOPOLIES §16 > "rule of reason" -- ethical norms of profession -- > Headnote:

[LEdHN\[13\]](#) [13]

Ethical norms for learned professions may serve to regulate and promote competition for professional services, and--for purposes of analysis under 1 of the Sherman Act ([15 USCS 1](#)), which prohibits contracts, combinations, or conspiracies in restraint of trade or commerce--thus be valid under the "rule of reason" standard where the inquiry is whether a challenged agreement is one that promotes or suppresses competition.

LAW §935.5 > MONOPOLIES §75 > free speech -- free association -- injunction -- restraint on professional society --

> Headnote:

[LEdHN\[14A\]](#) [14A] [LEdHN\[14B\]](#) [14B] [LEdHN\[14C\]](#) [14C]

A federal court injunction against a professional society whose canon of ethics prohibiting society members from submitting competitive bids for engineering services had been found to restrain trade in violation of 1 of the Sherman Act ([15 USCS 1](#))--which injunction prohibits the society from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical--is not unconstitutional under the [First Amendment](#) as a prior restraint on speech or as a prohibition against free association, but rather, under the

appropriate standard, the injunction is proper as being a reasonable method of eliminating the consequences of the society's illegal conduct, notwithstanding that the injunction goes beyond a simple proscription against the precise conduct previously pursued. (Burger, Ch. J., dissented from this holding.)

MONOPOLIES §75 > Sherman Act violation -- power of court -- remedy -- > Headnote:

[LEdHN\[15\]](#) [15]

Upon finding a party guilty of a violation of the Sherman Act ([15 USCS 1 et seq.](#)), a Federal District Court is empowered to fashion appropriate restraints on the party's future activities both to avoid a recurrence of the violation and to eliminate its consequences.

LAW §935.5 > First Amendment -- enforcement of law -- agreements in restraint of trade -- > Headnote:

[LEdHN\[16\]](#) [16]

With respect to the rights of free speech and association, the [First Amendment](#) does not make it impossible ever to enforce laws against agreements in restraint of trade.

MONOPOLIES §74 > antitrust violations -- remedy -- considerations -- > Headnote:

[LEdHN\[17\]](#) [17]

In fashioning a remedy for violations of federal antitrust laws, a Federal District Court may consider the fact that its injunction may impinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying the antitrust violations.

MONOPOLIES §75 > injunctive relief -- scope limitations -- burden upon transgressor -- > Headnote:

[LEdHN\[18\]](#) [18]

In granting injunctive relief for a violation of federal antitrust laws when the purpose to restrain trade appears from a clear violation of law, it is not necessary that the court leave open all of the untraveled roads and close only the worn one by framing its injunction as a simple proscription against the precise conduct constituting the violation; the burden is upon the proven transgressor to bring any proper claims for relief to the court's attention if it is fearful that the injunction will restrain it as to conduct which is legitimate.

## Syllabus

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The United States brought this civil antitrust suit against petitioner, the National Society of Professional Engineers, alleging that petitioner's canon of ethics prohibiting its members from submitting competitive bids for engineering services suppressed competition in violation of [§ 1](#) of the Sherman Act. Petitioner defended on the ground, *inter alia*, that under the Rule of Reason the canon was justified because it was adopted by members of a learned

profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety. The District Court, granting an injunction against the canon, rejected this justification, holding that the canon on its face violated [§ 1](#) of the Sherman Act, thus making it unnecessary to make findings on the likelihood that competition would produce the dire consequences envisaged by petitioner. [\*\*\*\*2] The Court of Appeals affirmed, although modifying the District Court's injunction in certain respects so that, as modified, it prohibits petitioner from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical. *Held*:

1. On its face, the canon in question restrains trade within the meaning of [§ 1](#) of the Sherman Act, and the Rule of Reason, under which the proper inquiry is whether the challenged agreement is one that promotes, or one that suppresses, competition, does not support a defense based on the assumption that competition itself is unreasonable. Pp. 686-696.

(a) The canon amounts to an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer, and, while it is not price fixing as such, it operates as an absolute ban on competitive bidding, applying with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers. Pp. 692-693.

(b) Petitioner's affirmative defense confirms rather than refutes the anticompetitive purpose and effect of its canon, and its attempt [\*\*\*\*3] to justify, under the Rule of Reason, the restraint on competition imposed by the canon on the basis of the potential threat that competition poses to the public safety and the ethics of the engineering profession is nothing less than a frontal assault on the basic policy of the Sherman Act. Pp. 693-695.

(c) That engineers are often involved in large-scale projects significantly affecting the public safety does not justify any exception to the Sherman Act. Pp. 695-696.

(d) While ethical norms may serve to regulate and promote competition in professional services and thus fall within the Rule of Reason, petitioner's argument here is a far cry from such a position; and, although competition may not be entirely conducive to ethical behavior, that is not a reason, cognizable under the Sherman Act, for doing away with competition. P. 696.

2. The District Court's injunction, as modified by the Court of Appeals, does not abridge [First Amendment](#) rights. Pp. 696-699.

(a) The [First Amendment](#) does not "make it . . . impossible ever to enforce laws against agreements in restraint of trade," [Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502](#), and, although the [\*\*\*\*4] District Court may consider the fact that its injunction may impinge upon rights that would otherwise be constitutionally protected, those protections do not prevent it from remedying the antitrust violations. Pp. 697-698.

(b) The standard against which the injunction must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct, and the injunction meets this standard. P. 698.

(c) If petitioner wishes to adopt some other ethical guideline more closely confined to the legitimate objective of preventing deceptively low bids, it may move the District Court to modify its injunction. Pp. 698-699.

**Counsel:** Lee Loewinger argued the cause for petitioner. With him on the briefs was Martin Michaelson.

Howard E. Shapiro argued the cause for the United States. With him on the brief were Solicitor General McCree, Assistant Attorney General Shenefield, and Robert B. Nicholson.

**Judges:** STEVENS, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, and POWELL, JJ., joined, and in Parts I and III of which BLACKMUN and REHNQUIST, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in [\*\*\*\*5] the judgment, in which REHNQUIST, J., joined, post, p. 699. BURGER, C. J., filed an opinion concurring in part and dissenting in part, post, p. 701. BRENNAN, J., took no part in the consideration or decision of the case.

Opinion by: STEVENS

## Opinion

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[\*681] [\*\*\*643] [\*\*1360] MR. JUSTICE STEVENS delivered the opinion of the Court.

LEdHN[1A] [1A] This is a civil antitrust case brought by the United States to nullify an association's canon of ethics prohibiting competitive bidding by its members. The question is whether the canon may be justified under the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1 et seq. (1976 ed.), because it was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety. The District Court rejected this justification without making any findings on the likelihood that competition would produce the dire consequences foreseen by the association.<sup>1</sup> The Court of Appeals affirmed.<sup>2</sup> [\*\*\*644] We granted certiorari to decide whether the District [\*\*\*6] Court should have considered the factual basis for the proffered justification before rejecting it. 434 U.S. 815. Because we are satisfied that the asserted defense rests on a fundamental misunderstanding of the Rule of Reason frequently applied in antitrust litigation, we affirm.

I

Engineering is an important and learned profession. There are over 750,000 graduate engineers in the United States, of whom [\*\*\*7] about 325,000 are registered as professional engineers. Registration requirements vary from State to State, but usually require the applicant to be a graduate engineer with at least [\*682] four years of practical experience and to pass a written examination. About half of those who are registered engage in consulting engineering on a fee basis. They perform services in connection with the study, design, and construction of all types of improvements to real property -- bridges, office buildings, airports, and factories are examples. Engineering fees, amounting to well over \$ 2 billion each year, constitute about 5% of total construction costs. In any given facility, approximately 50% to 80% of the cost of construction is the direct result of work performed by an engineer concerning the systems and equipment to be incorporated in the structure.

The National Society of Professional Engineers (Society) was organized in 1935 to deal with the nontechnical aspects of engineering practice, including the promotion of the professional, social, and economic interests of its members. Its present membership of 69,000 resides throughout the United States and in some foreign countries. [\*\*\*8] Approximately 12,000 members are consulting engineers who offer their services to governmental, industrial, and private clients. Some Society members are principals or chief executive officers of some of the largest engineering firms in the country.

The charges of a consulting engineer may be computed in different ways. He may charge the client a percentage of the cost of the project, may set his fee at his actual cost plus overhead plus a reasonable profit, may charge fixed rates per hour for different types of work, may perform an assignment for a specific sum, or he may combine one or more of these approaches. Suggested fee schedules for particular types of services in certain areas have been promulgated from time to time by various local societies. This case does not, however, involve any claim that the National Society has tried to fix specific fees, or even a [\*\*1361] specific method of calculating fees. It involves a charge that the members of the Society have unlawfully agreed to refuse to negotiate or even to discuss the

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<sup>1</sup> 389 F.Supp. 1193 (DC 1974).

<sup>2</sup> 181 U. S. App. D. C. 41, 555 F.2d 978 (1977). When the District Court's original judgment was entered, petitioner was entitled to appeal directly to this Court. We vacated the District Court's judgment for reconsideration in the light of our then recent decision in Goldfarb v. Virginia State Bar, 421 U.S. 773, 422 U.S. 1031. After reconsideration, the District Court re-entered its original judgment, 404 F.Supp. 457 (DC 1975), and petitioner then appealed to the Court of Appeals.

question of fees until after a prospective client has selected [\*\*\*645] the [\*683] engineer for a particular project. Evidence of this [\*\*\*\*9] agreement is found in § 11 (c) of the Society's Code of Ethics, adopted in July 1964.<sup>3</sup>

[\*\*\*\*10] The District Court found that the Society's Board of Ethical Review has uniformly interpreted the "ethical rules against competitive bidding for engineering services as prohibiting the submission of any form of price information to a prospective customer which would enable that customer to make a price comparison on engineering services."<sup>4</sup> [\*\*\*\*11] If the client requires that such information be provided, then § 11 (c) imposes an [\*684] obligation upon the engineering firm to withdraw from consideration for that job. The Society's Code of Ethics thus "prohibits engineers from both soliciting and submitting such price information," 389 F.Supp. 1193, 1206 (DC 1974),<sup>5</sup> and seeks to preserve the profession's "traditional" method of selecting professional engineers. Under the traditional method, the client initially selects an engineer on the basis of background and reputation, not price.<sup>6</sup>

In 1972 the Government filed its complaint against the Society alleging that members had agreed to abide by canons of ethics prohibiting the submission of competitive bids for engineering services and that, in consequence, price competition among the members had been suppressed and customers had been deprived of the benefits [\*\*\*\*12] of free and open competition. The complaint [\*\*\*646] prayed for an injunction terminating the unlawful agreement.

In its answer the Society admitted the essential facts alleged by the Government and pleaded a series of affirmative defenses, only one of which remains in issue. In that defense, the Society averred that the standard set out in the Code of Ethics was reasonable because competition among professional [\*1362] engineers was contrary to the public interest. It was averred that it would be cheaper and easier for an engineer "to design and specify inefficient and unnecessarily expensive structures and [\*685] methods of construction."<sup>7</sup> Accordingly, competitive pressure

<sup>3</sup> That section, which remained in effect at the time of trial, provided:

"Section 11 -- The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding . . . .

"c. He shall not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding for professional engineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding. An Engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but if not successful he shall withdraw from consideration for the proposed work. These principles shall be applied by the Engineer in obtaining the services of other professions." App. 9951.

<sup>4</sup> **389 F.Supp., at 1206.** In addition to § 11 (c) of the Society's Code of Ethics, see n. 3, *supra*, the Society's Board of Directors has adopted various "Professional Policy" statements. Policy statement 10-F was issued to "make it clear beyond all doubt" that the Society opposed competitive bidding for all engineering projects. **389 F.Supp., at 1206.** This policy statement was replaced in 1972 by Policy 10-G which permits price quotations for certain types of engineering work -- in particular, research and development projects.

<sup>5</sup> Although the Society argues that it has never "enforced" its ban on competitive bidding, Reply Brief for Petitioner 15-18, the District Court specifically found that the record "[supports] a finding that NSPE and its members actively pursue a course of policing adherence to the competitive bid ban through direct and indirect communication with members and prospective clients." **389 F.Supp., at 1200.** This finding has not been challenged as clearly erroneous.

<sup>6</sup> Having been selected, the engineer may then, in accordance with the Society's canons of ethics, negotiate a satisfactory fee arrangement with the client. If the negotiations are unsuccessful, then the client may withdraw his selection and approach a new engineer. **Id., at 1215.**

<sup>7</sup> The entire defense pleaded in the answer reads as follows:

to offer engineering services at the lowest possible price would adversely affect the quality of engineering. Moreover, the practice of awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety, and welfare. For these reasons, the Society claimed that its Code of Ethics was not an "unreasonable restraint of interstate trade or commerce."

[\*\*\*\*13] The parties compiled a voluminous discovery and trial record. The District Court made detailed findings about the [\*686] engineering profession, the Society, its members' participation in interstate commerce, the history of the ban on competitive bidding, and certain incidents in which the ban appears to have been violated or enforced. The District Court did not, however, make any finding on the question whether, or to what extent, competition had led to inferior engineering work which, in turn, had adversely affected the public health, safety, or welfare. That inquiry was considered unnecessary because the court was convinced that the ethical prohibition against competitive bidding was "on its face a tampering with the price structure of engineering fees in violation of § 1 of the Sherman Act." *389 F.Supp.*, at 1200.

[\*\*\*647] Although it modified the injunction entered by the District Court,<sup>8</sup> the Court of Appeals affirmed its conclusion that the agreement was unlawful on its face and therefore "illegal without regard to claimed or possible benefits." *181 U. S. App. D. C. 41, 47, 555 F.2d 978, 984*.

[\*\*\*14] II

In *Goldfarb v. Virginia State Bar*, *421 U.S. 773*, the Court held that a bar association's rule prescribing minimum fees for legal services violated § 1 of the Sherman Act. In that opinion the Court noted that certain practices by members of a learned profession might survive scrutiny under the Rule of Reason even though they would be viewed as a violation of the Sherman Act in another context. The Court said:

[\*\*1363] **HN1** [↑] "The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the [\*687] Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions may require that a particular practice, which could properly be viewed as a violation of

"18. (a) The principles and standards contained in the NSPE Code of Ethics, particularly those contained in that part of the NSPE Code of Ethics set out above, are reasonable, necessary to the public health, safety and welfare insofar as they are affected by the work of professional engineers, and serve the the public interest.

"(b) Experience has demonstrated that competitive bidding for professional engineering services is inconsistent with securing for the recipients of such services the most economical projects or structures. Testing, calculating and designing the most economical and efficient structures and methods of construction is complex, difficult and expensive. It is cheaper and easier to design and specify inefficient and unnecessarily expensive structures and methods of construction. Consequently, if professional engineers are required by competitive pressures to submit bids in order to obtain employment of their services, the inevitable tendency will be to offer professional engineering services at the lowest possible price. Although this may result in some lowering of the cost of professional engineering services it will inevitably result in increasing the overall cost and decreasing the efficiency of those structures and projects which require professional engineering design and specification work.

"(c) Experience has also demonstrated that competitive bidding in most instances and situations results in an award of the work to be performed to the lowest bidder, regardless of other factors such as ability, experience, expertise, skill, capability, learning and the like, and that such awards in the case of professional engineers endanger the public health, welfare and safety.

"(d) For the aforesaid reasons, the provisions of the NSPE Code of Ethics set out above are not, in any event, in unreasonable restraint of interstate trade or commerce." App. 21-22.

<sup>8</sup>The Court of Appeals struck down the portion of the District Court's decree that ordered the Society to state that it did not consider competitive bidding to be unethical. *181 U. S. App. D. C., at 47, 555 F.2d, at 984*. The court reasoned that this provision was "more intrusive than necessary to achieve fulfillment of the governmental interest." *Ibid.* The Government has not petitioned for review of that decision.

the Sherman Act in another context, be treated differently. We intimate no view on any [\*\*\*\*15] other situation than the one with which we are confronted today." [421 U.S., at 788-789, n. 17.](#)

Relying heavily on this footnote, and on some of the major cases applying a Rule of Reason -- principally *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711); *Standard Oil Co. v. United States*, [221 U.S. 1](#); *Chicago Board of Trade v. United States*, [246 U.S. 231](#); and *Continental T. V., Inc. v. GTE Sylvania Inc.*, [433 U.S. 36](#) -- petitioner argues that its attempt to preserve the profession's traditional method of setting fees for engineering services is a reasonable method of forestalling the public harm which might be produced by unrestrained competitive bidding. To evaluate this argument it is necessary to identify the contours of the Rule of Reason and to discuss its application to the kind of justification asserted by petitioner.

#### A. The Rule of Reason.

[LEdHN/2A](#)[][2A]One problem presented by the language of [§ 1](#) of the Sherman Act is that it cannot mean what it says. The statute says that "every" contract [\*\*\*\*16] that restrains trade is unlawful.<sup>9</sup> But, as Mr. Justice Brandeis perceptively noted, restraint is the [\*\*\*648] very [\*688] essence of every contract;<sup>10</sup> read literally, [§ 1](#) would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets -- indeed, a competitive economy -- to function effectively.

[\*\*\*\*17] [LEdHN/3](#)[][3]Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.<sup>11</sup> The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served that purpose. [HN3](#)[] It has been used to give the Act both flexibility and definition, and its central principle of antitrust analysis has remained constant. Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.

[\*\*\*\*18] This principle is apparent in even the earliest of cases applying the Rule of Reason, *Mitchel v. Reynolds*, *supra*. *Mitchel* involved the enforceability of a promise by [\*\*1364] the seller of a bakery that he would not compete with the purchaser of his business. The covenant was for a limited time and applied only to the area in which the bakery had operated. It was therefore upheld as reasonable, even though it deprived the [\*689] public of the benefit of potential competition. The long-run benefit of enhancing the marketability of the business itself -- and

<sup>9</sup> [Section 1](#) of the Sherman Act, as set forth in [15 U. S. C. § 1 \(1976 ed.\)](#), provides:

[HN2](#)[] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

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[LEdHN/2B](#)[][2B]"But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." [Chicago Board of Trade v. United States](#), [246 U.S. 231, 238](#).

See also [United States v. Topco Associates](#), [405 U.S. 596, 606](#):

"Were [§ 1](#) to be read in the narrowest possible way, any commercial contract could be deemed to violate it."

<sup>11</sup> See 21 Cong. Rec. 2456 (1890) (comments of Sen. Sherman); see generally H. Thorelli, *Federal Antitrust Policy* 228-229 (1955).

435 U.S. 679, \*689; 98 S. Ct. 1355, \*\*1364; 55 L. Ed. 2d 637, \*\*\*648; 1978 U.S. LEXIS 47, \*\*\*\*18

thereby providing incentives to develop such an enterprise -- outweighed the temporary and limited loss of competition.<sup>12</sup>

[\*\*\*\*19] [LEdHN/4](#)<sup>13</sup> [4]The Rule of Reason suggested by *Mitchel v. Reynolds* has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business. Judge (later Mr. Chief Justice) Taft so interpreted the Rule in his classic rejection of the argument that competitors may lawfully agree to sell their goods at the same price as long as the agreed-upon price is reasonable. [United States v. Addyston Pipe & Steel Co., 85 F. 271, 282-283 \(CA6 1898\)](#), aff'd, [175 U.S. 211](#). [\*\*\*649] That case, and subsequent decisions by this Court, unequivocally foreclose an interpretation of the Rule as permitting an inquiry into the reasonableness of the prices set by private agreement.<sup>14</sup>

[\*\*\*\*20] [LEdHN/5](#)<sup>15</sup> [5]

[LEdHN/6](#)<sup>16</sup> [6]The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. [United States v. Trans-Missouri Freight Assn., 166 U.S. 290](#); [United States v. Joint Traffic Assn., 171 U.S. 505, 573-577](#). That kind of argument is properly addressed to Congress and may justify an exemption from the statute for [\*690] specific industries,<sup>17</sup> but it is not permitted by the Rule of Reason. As the Court observed in *Standard Oil Co. v. United States, 221 U.S., at 65*, [HN4](#)<sup>18</sup> "restraints of trade within the purview of the statute . . . [cannot] be taken out of that category by indulging in general reasoning as to the expediency or nonexpediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made. [\*\*\*\*21] "

[LEdHN/7](#)<sup>19</sup> [7][LEdHN/8A](#)<sup>20</sup> [8A][HN5](#)<sup>21</sup> The test prescribed in *Standard Oil* is whether the challenged contracts or acts "were unreasonably restrictive of competitive conditions." Unreasonableness under that test could be based either (1) on the nature or character of the contracts, or (2) on surrounding [\*\*\*\*22] circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices.<sup>22</sup> [\*\*\*\*23] Under either branch of the [\*\*1365] test, the inquiry is confined to a consideration of impact on competitive conditions.<sup>23</sup>

<sup>12</sup>"4thly, The fourth reason is in favour of these contracts, and is, that there may happen instances wherein they may be useful and beneficial, as . . . in case of an old man, who finding himself under such circumstances either of body or mind, as that he is likely to be a loser by continuing his trade, in this case it will be better for him to part with it for a consideration, that by selling his custom, he may procure to himself a livelihood, which he might probably have lost, by trading longer." 1 P. Wms., at 191, 24 Eng. Rep., at 350.

<sup>13</sup>[85 F., at 293](#). See also [United States v. Trans-Missouri Freight Assn., 166 U.S. 290, 340-342](#).

<sup>14</sup>Congress has exempted certain industries from the full reach of the Sherman Act. See, e. g., [7 U. S. C. §§ 291-292 \(1976 ed.\)](#) (Capper-Volstead Act, agricultural cooperatives); [15 U. S. C. §§ 1011-1013 \(1976 ed.\)](#) (McCarran-Ferguson Act, insurance); 49 U. S. C. § 5b (Reed-Bulwinkle Act, rail and motor carrier rate-fixing bureaus); [15 U. S. C. § 1801 \(1976 ed.\)](#) (newspaper joint operating agreements).

<sup>15</sup>"Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of

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[\*691] [LEdHN\[9\]](#) [9]In [\*\*\*650] this respect the Rule of Reason has remained faithful to its origins. From Mr. Justice Brandeis' opinion for the Court in *Chicago Board of Trade* to the Court opinion written by MR. JUSTICE POWELL in *Continental T. V., Inc.*, the Court has adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition. [HN6](#) "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." [246 U.S., at 238](#), quoted in [433 U.S., at 49 n. 15](#).<sup>17</sup>

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[\*692] [LEdHN\[10\]](#) [10]There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are "illegal *per se*." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.<sup>18</sup>

[\*\*\*\*26] [LEdHN\[1B\]](#) [1B] [LEdHN\[11\]](#) [11]B. The Ban on Competitive Bidding.

the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." [221 U.S., at 58](#).

<sup>16</sup> Throughout the Court's opinion the emphasis is on economic conceptions. For instance, the Court's description of the common-law treatment of engrossing and forestalling statutes noted that contracts which had been illegal on their face were later recognized as reasonable because they tended to promote competition. [Id., at 55](#). As was pointed out in the Report of the Attorney General's National Committee To Study the Antitrust Laws 11 (1955):

[LEdHN\[8B\]](#) [8B]"While *Standard Oil* gave the courts discretion in interpreting the word 'every' in [Section 1](#), such discretion is confined to consideration of whether in each case the conduct being reviewed under the Act constitutes an undue restraint of competitive conditions, or a monopolization, or an attempt to monopolize. This standard permits the courts to decide whether conduct is significantly and unreasonably anticompetitive in character or effect; it makes obsolete once prevalent arguments, such as, whether monopoly arrangements would be socially preferable to competition in a particular industry, because, for example, of high fixed costs or the risks of 'cut-throat' competition or other similar unusual conditions."

<sup>17</sup> In *Continental T. V., Inc.*, the Court explained the Rule of Reason standard as follows:

"Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." [433 U.S., at 49](#).

The Court then analyzed the "market impact" of vertical restraints, noting their complexity because of the potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition. [Id., at 50-51](#). "Competitive impact" and "economic analysis" were emphasized throughout the opinion.

<sup>18</sup> See generally Attorney General's Report, *supra* n. 16, at 10-11; Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 74 Yale L. J. 775 (1965); L. Sullivan, Law of Antitrust 165-197 (1977).

**HN7** Price is the "central nervous system of the economy," [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n. 59](#), and an agreement that "[interferes] with the setting of price by free market forces" is illegal on its face. [United States v. Container Corp., 393 U.S. 333, 337](#). In this case we are presented with an agreement among [\*\*651] competitors to refuse to discuss prices with potential customers until after negotiations have resulted [\*\*1366] in the initial selection of an engineer. While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. It operates as an absolute ban on competitive bidding, applying with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers. As the District Court found, [\*\*\*\*27] the ban "impedes the ordinary give and take of the market place," and substantially deprives the customer of "the ability to utilize [\*693] and compare prices in selecting engineering services." [404 F.Supp. 457, 460](#). On its face, this agreement restrains trade within the meaning of [§ 1](#) of the Sherman Act.

The Society's affirmative defense confirms rather than refutes the anticompetitive purpose and effect of its agreement. The Society argues that the restraint is justified because bidding on engineering services is inherently imprecise, would lead to deceptively low bids, and would thereby tempt individual engineers to do inferior work with consequent risk to public safety and health.<sup>19</sup> The logic of this argument rests on the assumption that the agreement will tend to maintain the price level; if it had no such effect, it would not serve its intended purpose. The Society nonetheless invokes the Rule of Reason, arguing that its restraint on price competition ultimately inures to the public benefit by preventing the [\*694] production of inferior work and by insuring ethical behavior. As the preceding discussion of the Rule of Reason reveals, this Court [\*\*\*\*28] has never accepted such an argument.

[\*\*\*\*29] It may be, as petitioner argues, that competition tends to force prices down and that an inexpensive item may be inferior to one that is more costly. There is some risk, therefore, that competition will cause some suppliers to market a defective product. Similarly, competitive bidding for engineering projects may be inherently imprecise and incapable of taking into account all the variables which will be involved in the actual performance of the [\*\*\*652] project.<sup>20</sup> Based on these considerations, a purchaser might conclude that his interest in quality -- which may embrace the safety of the end product -- outweighs the advantages of achieving cost savings by pitting one competitor against another. Or an individual vendor might independently refrain from price negotiation until he has satisfied himself that he fully understands the scope of his customers' needs. These decisions might be [\*\*1367] reasonable; indeed, petitioner has provided ample documentation for that thesis. But these are not reasons that satisfy the Rule; nor are such individual decisions subject to antitrust [\*\*\*\*30] attack.

<sup>19</sup> The Society also points out that competition, in the form of bargaining between the engineer and customer, is allowed under its canon of ethics once an engineer has been initially selected. See n. 6, *supra*. It then contends that its prohibition of competitive bidding regulates only the *timing* of competition, thus making this case analogous to *Chicago Board of Trade*, where the Court upheld an exchange rule which forbade exchange members from making purchases after the close of the day's session at any price other than the closing bid price. Indeed, petitioner has reprinted the Government's brief in that case to demonstrate that the Solicitor General regarded the exchange's rule as a form of price fixing. Reply Brief for Petitioner A1-A28. We find this reliance on *Chicago Board of Trade* misplaced for two reasons. First, petitioner's claim mistakenly treats negotiation between a single seller and a single buyer as the equivalent of competition between two or more potential sellers. Second, even if we were to accept the Society's equation of bargaining with price competition, our concern with *Chicago Board of Trade* is in its formulation of the proper test to be used in judging the legality of an agreement; that formulation unquestionably stresses impact on competition. Whatever one's view of the application of the Rule of Reason in that case, see Sullivan, *supra* n. 18, at 175-182, the Court considered the exchange's regulation of price information as having a positive effect on competition. [246 U.S., at 240-241](#). The District Court's findings preclude a similar conclusion concerning the effect of the Society's "regulation."

<sup>20</sup> We, of course, express no view on the truth of this assertion, although it might be noted that the Society has allowed competitive bidding for some types of engineering projects in this country, see n. 4, *supra*, and, at one time, allowed competitive bidding for all engineering work in foreign countries "as required by the laws, regulations or practices of the foreign country." App. 6487. This rule, called the "When-in-Rome" clause, was abolished in 1968. *Id.*, at 6344.

LEdHN[12] [12]The Sherman Act does not require competitive bidding;<sup>21</sup> [\*695] it prohibits unreasonable restraints on competition. Petitioner's ban on competitive bidding prevents all customers from making price comparisons in the initial selection of an engineer, and imposes the Society's views of the costs and benefits of competition on the entire marketplace. It is this restraint that must be justified under the Rule of Reason, and petitioner's [\*\*\*\*31] attempt to do so on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act.

[\*\*\*\*32] HN8

The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. "The heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co. v. FTC*, 340 U.S. 231, 248. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain -- quality, service, safety, and durability -- and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

The fact that engineers are often involved in large-scale projects significantly affecting the public safety does not alter our analysis. Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute. In our complex economy the number of items that may cause serious harm is almost endless -- automobiles, [\*\*\*\*33] [\*\*\*653] drugs, foods, aircraft components, heavy equipment, and countless others, cause serious harm to individuals or to the public at large if defectively made. The judiciary cannot [\*696] indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers.

LEdHN[13] [13]By the same token, the cautionary footnote in *Goldfarb*, 421 U.S., at 788-789, n. 17, quoted *supra*, cannot be read as fashioning a broad exemption under the Rule of Reason for learned professions. We adhere to the view expressed in *Goldfarb* that, by their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary. Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason.<sup>22</sup> But the Society's argument in this case is a far cry from such a position. We are faced with a contention that a total ban on competitive bidding is necessary because otherwise engineers will be tempted to submit deceptively low bids. Certainly, the problem [\*\*\*\*34] of professional deception is a proper [\*\*1368] subject of an ethical canon. But, once again, HN9 the equation of competition with deception, like the similar equation with safety hazards, is simply too broad; we may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition.

In sum, the Rule of Reason does not support a defense based on the assumption that competition itself [\*\*\*\*35] is unreasonable. Such a view of the Rule would create the "sea of doubt" on which Judge Taft refused to embark in *Addyston*, 85 F., at 284, and which this Court has firmly avoided ever since.

<sup>21</sup>Indeed, Congress has decided not to require competitive bidding for Government purchases of engineering services. The Brooks Act, 40 U. S. C. §§ 541-544 (1970 ed., Supp. V), requires the Government to use a method of selecting engineers similar to the Society's "traditional method." See n. 6, *supra*. The Society relies heavily on the Brooks Act as evidence that its ban on competitive bidding is reasonable. The argument is without merit. The Brooks Act does not even purport to exempt engineering services from the antitrust laws, and the reasonableness of an individual purchaser's decision not to seek lower prices through competition does not authorize the vendors to conspire to impose that same decision on all other purchasers.

<sup>22</sup>Courts have, for instance, upheld marketing restraints related to the safety of a product, provided that they have no anticompetitive effect and that they are reasonably ancillary to the seller's main purpose of protecting the public from harm or itself from product liability. See, e. g., *Tripoli Co. v. Wella Corp.*, 425 F.2d 932 (CA3 1970) (en banc); cf. *Continental T. V.*, 433 U.S., at 55 n. 23.

## III

[LEdHN\[14A\]](#) [14A] The judgment entered by the District Court, as modified by [\*697] the Court of Appeals,<sup>23</sup> prohibits the Society from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical.<sup>24</sup> Petitioner argues that this judgment abridges its [First Amendment](#) rights.<sup>25</sup> We find no merit in this contention.

[LEdHN\[15\]](#) [15] [\*\*\*\*36] [LEdHN\[16\]](#) [16] [LEdHN\[17\]](#) [17] Having found the Society guilty of a violation of the Sherman Act, the District Court was empowered to fashion appropriate restraints on the Society's future activities both to avoid a recurrence of the violation and to eliminate its consequences. See, e. g., *International Salt Co. v. United States*, 332 U.S. 392, 400-401; *United States v. Glaxo Group, Ltd.*, 410 U.S. 52, 64. While the resulting order may curtail the exercise [\*\*\*654] of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. Just as an injunction against price fixing abridges the freedom of businessmen to talk to one another about prices, so too the injunction in this case must restrict the Society's range of expression on the ethics of competitive bidding.<sup>26</sup> [HN10](#) [10] The [First Amendment](#) does not "make it . . . impossible ever to enforce laws [\*\*\*\*37] against agreements in restraint of trade . . . ." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502. In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may impinge upon rights that would otherwise be constitutionally [\*698] protected, but those protections do not prevent it from remedying the antitrust violations.

[LEdHN\[14C\]](#) [14C] [LEdHN\[18\]](#) [18] The standard against [\*\*\*\*38] which the order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct. We agree with the Court of Appeals that the injunction, as modified, meets this standard. While it goes beyond a simple proscription against the precise conduct previously pursued, that is entirely appropriate.

[HN11](#) [11] "The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do. And advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market. When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." [\*\*1369] *International Salt Co.*, *supra*, at 400.

The Society apparently fears that the District Court's injunction, if broadly read, will block legitimate paths of expression [\*\*\*\*39] on all ethical matters relating to bidding.<sup>27</sup> But the answer to these fears is, as the Court held

<sup>23</sup> See n. 8, *supra*.

<sup>24</sup> See App. 9974-9980.

<sup>25</sup> [LEdHN\[14B\]](#) [14B] Petitioner contends the judgment is both an unconstitutional prior restraint on speech and an unconstitutional prohibition against free association.

<sup>26</sup> Thus, in *Goldfarb*, although the bar association believed that its fee schedule accurately reflected ethical price levels, it was nonetheless enjoined "from adopting, publishing, or distributing any future schedules of minimum or suggested fees." *Goldfarb v. Virginia State Bar*, 355 F.Supp. 491, 495-496 (ED Va. 1973). See also *United States v. National Assn. of Real Estate Boards*, 339 U.S. 485.

<sup>27</sup> For instance, the Society argues that the injunction can be read as prohibiting it from opposing repeal of statutes such as the Brooks Act, see n. 21, *supra*, and that such a prohibition would violate the principles of the *Noerr-Pennington* doctrine. See *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127; *Mine Workers v. Pennington*, 381 U.S. 657. By its terms the injunction contains no such prohibition, and indeed the Government contends that "[nothing] in the judgment prevents NSPE and its members from attempting to influence governmental action . . ." Brief for United States 60.

in *International Salt*, that [HN12](#)<sup>↑</sup> the burden is upon the proved transgressor "to bring any proper claims for relief to the court's attention." *Ibid.* In [\*699] this case, the Court of Appeals specifically stated that "[if] the Society wishes to adopt some other ethical guideline more closely confined to the legitimate objective of preventing deceptively low bids, it [\*\*\*655] may move the district court for modification of the decree." [181 U. S. App. D. C. at 46, 555 F.2d, at 983](#). This is, we believe, a proper approach, adequately protecting the Society's interests. We therefore reject petitioner's attack on the District Court's order.

[\*\*\*\*40] The judgment of the Court of Appeals is

*Affirmed.*

MR. JUSTICE BRENNAN took no part in the consideration or decision of this case.

**Concur by:** BLACKMUN (In Part); BURGER (In Part)

## Concur

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MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, concurring in part and concurring in the judgment.

I join Parts I and III of the Court's opinion and concur in the judgment. I do not join Part II because I would not, at least for the moment, reach as far as the Court appears to me to do in intimating, *ante*, at 696, and n. 22, that any ethical rule with an overall anticompetitive effect promulgated by a professional society is forbidden under the Sherman Act. In my view, the decision in [Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-789, n. 17 \(1975\)](#), properly left to the Court some flexibility in considering how to apply traditional Sherman Act concepts to professions long consigned to self-regulation. Certainly, this case does not require us to decide whether the "Rule of Reason" as applied to the professions ever could take account of benefits other than increased competition. For even accepting petitioner's assertion that product quality is one such [\*\*\*\*41] benefit, and that maintenance of the quality of engineering services requires that an engineer not bid before he has made full acquaintance with the scope of a client's desired project, Brief for Petitioner 49-50, 54, petitioner Society's rule is still grossly overbroad. As petitioner concedes, Tr. of Oral [\*700] Arg. 47-48, § 11 (c) forbids any simultaneous consultation between a client and several engineers, even where the client provides complete information to each about the scope and nature of the desired project before requesting price information. To secure a price estimate on a project, the client must purport to engage a single engineer, and so long as that engagement continues no other member of the Society is permitted to discuss the project with the client in order to provide comparative price information. Though § 11 (c) does not fix prices directly, and though the customer retains the option of rejecting a particular engineer's offer and beginning negotiations all over again with another engineer, the forced process of sequential search inevitably increases the cost of gathering price information, and hence will dampen price competition, without any calibrated [\*\*\*\*42] role to play in preventing uninformed bids. Then, too, the Society's rule is overbroad in the aspect noted by Judge Leventhal, when it prevents any dissemination of competitive price information in regard to real property improvements prior to the engagement of a single engineer regardless [\*\*1370] of "the sophistication of the purchaser, the complexity of the project, or the procedures for evaluating price information." [181 U. S. App. D. C. 41, 45, 555 F.2d 978, 982 \(1977\)](#).

My skepticism about going further in this case by shaping the Rule of Reason to such a narrow last as does [\*\*\*656] the majority, \* arises from the fact that there may be ethical rules which have a more than *de minimis*

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\* This Court has not always applied the Rule of Reason with such rigor even to commercial businesses. See *Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933)*; *Chicago Board of Trade v. United States, 246 U.S. 231 (1918)*; L. Sullivan, Law of Antitrust 175-182 (1977); R. Bork, The Antitrust Paradox 41-47, 56 (1978). I intimate no view as to the correctness of those decisions.

anticompetitive effect and yet are important in a profession's proper ordering. A medical association's prescription of standards of minimum competence for licensing or certification may lessen the number of [\*701] entrants. A bar association's regulation of the permissible forms of price advertising for nonroutine legal services or limitation of in-person solicitation, see *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), may also have the [\*\*\*\*43] effect of reducing price competition. In acknowledging that "professional services may differ significantly from other business services" and that the "nature of the competition in such services may vary," *ante*, at 696, but then holding that ethical norms can pass muster under the Rule of Reason only if they promote competition, I am not at all certain that the Court leaves enough elbowroom for realistic application of the Sherman Act to professional services.

**Dissent by:** BURGER (In Part)

## Dissent

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MR. CHIEF JUSTICE **BURGER**, concurring in part and dissenting in part.

I concur in the Court's [\*\*\*\*44] judgment to the extent it sustains the finding of a violation of the Sherman Act but dissent from that portion of the judgment prohibiting petitioner from stating in its published standards of ethics the view that competitive bidding is unethical. The *First Amendment* guarantees the right to express such a position and that right cannot be impaired under the cloak of remedial judicial action.

## References

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Propriety and scope of injunctive relief in federal antitrust case

[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 30, 31](#)

12 Federal Procedural Forms L Ed, Monopolies and Restraints of Trade 48:61 et seq.

18 Am Jur PI & Pr Forms (Rev), Monopolies, Restraints of Trade, and Unfair Trade Practices 11 et seq.

24 Am Jur Trials 1, Defending Antitrust Lawsuits

### [15 USCS 1](#)

US L Ed Digest, Restraints of Trade and Monopolies 16, 42

ALR Digests, Restraints of Trade and Monopolies 16.5

L Ed Index to Annos, Restraints of Trade and Monopolies

ALR Quick Index, Restraints of Trade and Monopolies

Federal Quick Index, Monopolies and Restraints of Trade

[\*\*\*\*45] Annotation References:

The Supreme Court and the *First Amendment* right of association. [33 L Ed 2d 865](#).

The Supreme Court and the right of free speech and press. [93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116, 21 L Ed 2d 976](#).

"Learned profession" exemption in federal antitrust laws. 39 ALR Fed 774.

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## St. Paul Fire & Marine Ins. Co. v. Barry

Supreme Court of the United States

March 27, 1978, Argued ; June 29, 1978, Decided

No. 77-240

### **Reporter**

438 U.S. 531 \*; 98 S. Ct. 2923 \*\*; 57 L. Ed. 2d 932 \*\*\*; 1978 U.S. LEXIS 40 \*\*\*\*; 1978-1 Trade Cas. (CCH) P62,102

ST. PAUL FIRE & MARINE INSURANCE CO. ET AL. v. BARRY ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

**Disposition:** [555 F.2d 3](#), affirmed.

## **Core Terms**

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boycott, Sherman Act, intimidation, insurance company, coercion, practices, regulation, terms, policyholders, coverage, insurers, insurance business, conspiracy, concerted refusal, anti trust law, Underwriters, combinations, state regulation, insurance industry, state law, antitrust, competitors, target, medical malpractice insurance, legislative history, McCarran-Ferguson Act, customers, coerce, rates, respondents'

## **LexisNexis® Headnotes**

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Insurance Law > Industry Practices > Federal Regulations > General Overview

### [\*\*HN1\*\*](#) **Industry Practices, Federal Regulations**

See [§ 2\(a\)](#) of the McCarran-Ferguson Act, [15 U.S.C.S. § 1012\(a\)](#).

Insurance Law > Industry Practices > Federal Regulations > General Overview

### [\*\*HN2\*\*](#) **Industry Practices, Federal Regulations**

See [§ 2\(b\)](#) of the McCarran-Ferguson Act, [15 U.S.C.S. § 1012\(b\)](#).

Insurance Law > Industry Practices > Federal Regulations > General Overview

### [\*\*HN3\*\*](#) **Industry Practices, Federal Regulations**

See [§ 3\(b\)](#) the McCarran-Ferguson Act, [15 U.S.C.S. § 1013\(b\)](#).

Insurance Law > Claim, Contract & Practice Issues > Claims Made Policies > Coverage

Insurance Law > Claim, Contract & Practice Issues > Claims Made Policies > General Overview

Insurance Law > Claim, Contract & Practice Issues > Claims Made Policies > Occurrence Policies

#### **HN4** **Claims Made Policies, Coverage**

An "occurrence" policy protects the policyholder from liability for any act done while the policy is in effect, whereas a "claims made" policy protects the holder only against claims made during the life of the policy.

Civil Procedure > ... > Justiciability > Mootness > General Overview

#### **HN5** **Justiciability, Mootness**

Although not raised by the parties, a mootness issue implicates the court's jurisdiction.

Governments > Legislation > Interpretation

#### **HN6** **Legislation, Interpretation**

The starting point in any case involving construction of a statute is the language itself.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Insurance Law > Industry Practices > Federal Regulations > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

#### **HN7** **Horizontal Refusals to Deal, Boycotts**

Under [§ 3\(b\)](#) of the McCarran-Ferguson Act, [15 U.S.C.S. § 1013\(b\)](#), the boycotters and the ultimate target need not be in a competitive relationship with each other.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

#### **HN8** **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

The enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, is conduct supporting a finding of unlawful boycott.

Governments > Legislation > Interpretation

## [\*\*HN9\*\*](#) Legislation, Interpretation

Words or phrases in a statute come freighted with the meaning imparted to them by the mischief to be remedied and by contemporaneous discussion. In such conditions, history is a teacher that is not to be ignored.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Insurance Law > Industry Practices > Federal Regulations > General Overview

## [\*\*HN10\*\*](#) Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

The term "boycott" is not limited to concerted activity against insurance companies or agents or, more generally, against competitors of members of the boycotting group.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Insurance Law > Industry Practices > Federal Regulations > General Overview

## [\*\*HN11\*\*](#) Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Where a group of insurers decides to resolve by private action the problem of escalating damages claims and verdicts by coercing the policyholders to accept a severe limitation of coverage essential to the provision of medical services, this conduct constitutes a boycott under [§ 3\(b\)](#) of the McCarran-Ferguson Act, [15 U.S.C.S. § 1013\(b\)](#).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Insurance Law > Industry Practices > General Overview

Insurance Law > Industry Practices > Federal Regulations > General Overview

## [\*\*HN12\*\*](#) Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Conduct by individual actors falling short of concerted activity is simply not a boycott within the McCarran-Ferguson Act [§ 3\(b\)](#), [15 U.S.C.S. § 1013\(b\)](#).

## **Lawyers' Edition Display**

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### **Summary**

Licensed physicians practicing in Rhode Island and their patients brought a class action, in part under the Sherman Act ([15 USCS 1 et seq.](#)), against four insurance companies writing medical malpractice insurance in the state,

alleging a private conspiracy of the four companies in which three refused to deal on any terms with the physicians, policyholders of the fourth company, as a means of compelling their submission to new, restrictive ground rules of coverage set by the fourth company. The United States District Court for the District of Rhode Island dismissed the antitrust complaint, holding that it was barred by the McCarran-Ferguson Act (15 USCS 1011-1015). The United States Court of Appeals reversed, holding that the complaint stated a claim within the "boycott" exception in 3(b) of the [McCarran-Ferguson Act \(555 F2d 3\)](#).

On certiorari, the United States Supreme Court affirmed. In an opinion by Powell, J., joined by Burger, Ch. J., and Brennan, White, Marshall, Blackmun, and Stevens, JJ., it was held that (1) the boycott exception of 3(b) was not limited to concerted activity against insurance companies or agents or, more generally, against competitors of members of the boycotting group, but also provided protection under the Sherman Act for policyholders victimized by private conspiracies of insurers, and (2) the private conduct alleged to have occurred constituted a boycott within the meaning of 3(b), since the agreement binding the four companies erected a barrier between the policyholders and any alternative source of the desired coverage, effectively foreclosing all possibility of coverage anywhere in the relevant market, and since the conduct with which the companies were charged appeared to have occurred outside of any regulatory or cooperative arrangement established by the laws of Rhode Island.

Stewart, J., joined by Rehnquist, J., dissented, expressing the view that 3(b) required that the agreement or act of boycott must be aimed ultimately at a member of the insurance industry and that it did not apply where the immediate targets were policyholders or others outside the industry, unless they were boycotted for the purpose of forcing other insurance companies or agents to comply with industry rules.

## Headnotes

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MONOPOLIES §29 > McCarran-Ferguson Act -- boycott exception -- construction -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B]

The "boycott" exception of 3(b) of the McCarran-Ferguson Act ([15 USCS 1013\(b\)](#)) is not limited to concerted activity against insurance companies or agents or, more generally, against competitors of members of the boycotting group, but also provides protection under the Sherman Act ([15 USCS 1 et seq.](#)) for policyholders victimized by private practices of insurers; the language of 3(b) is broad and unqualified, and it covers any act or agreement amounting to a boycott, coercion, or intimidation. (Stewart and Rehnquist, JJ., dissented from this holding.)

MONOPOLIES §29 > McCarran-Ferguson Act -- boycott exception -- conduct constituting boycott -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

Private conduct alleged to have been engaged in by insurance companies--whereby four insurance companies writing medical malpractice insurance in a state agreed that three of the four would not deal on any terms with the policyholders of the fourth as a means of insuring policyholder submission to new, restrictive ground rules of coverage--constitutes a "boycott" within the meaning of 3(b) of the McCarran-Ferguson Act ([15 USCS 1013\(b\)](#)), since the agreement binding the four companies erected a barrier between the policyholders and any alternative source of the desired coverage, effectively foreclosing all possibility of coverage anywhere in the relevant market, where the conduct with which the companies are charged appears to have occurred outside of any regulatory or cooperative arrangement established by the laws of the state in which they were writing the policies. (Stewart and Rehnquist, JJ., dissented from this holding.)

COURTS §763 > mootness -- state law affecting subject of suit -- > Headnote:

[LEdHN\[3\]](#) [3]

A suit under the Sherman Act ([15 USCS 1 et seq.](#)) against four insurance companies writing medical malpractice insurance in a state, alleging a private conspiracy of the four companies in which three refused to sell policyholders of the fourth any type of insurance as a means of compelling their submission to new, restrictive ground rules of coverage set by the fourth, is not mooted by the State's formation, after the initial complaint has been filed, of a joint underwriting association to provide malpractice insurance to all licensed providers of health services and to require the participation of all personal-injury liability insurers in the state in a scheme to pool expenses and losses in providing such insurance, where the state's act does not extinguish the plaintiffs' every claim for relief, since it cannot be said that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.

STATUTES §163 > construction -- language -- > Headnote:

[LEdHN\[4\]](#) [4]

The starting point in any case involving construction of a statute is the language itself.

BOYCOTT §1 > concept -- > Headnote:

[LEdHN\[5\]](#) [5]

The generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target.

MONOPOLIES §30 > Sherman Act -- offenses -- > Headnote:

[LEdHN\[6\]](#) [6]

The Sherman Act ([15 USCS 1 et seq.](#)) makes it an offense for businessmen to agree among themselves to stop selling to particular customers.

STATUTES §145 > construction -- history -- > Headnote:

[LEdHN\[7\]](#) [7]

History is not to be ignored where words or phrases in a statute come freighted with the meaning imparted to them by the mischief to be remedied and by contemporaneous discussion.

MONOPOLIES §29 > McCarran-Ferguson Act -- boycott exception -- conduct by individuals -- > Headnote:

[LEdHN\[8\]](#) [8]

Conduct by individual actors falling short of concerted activity is not a "boycott" within 3(b) of the McCarran-Ferguson Act ([15 USCS 1013\(b\)](#)).

## Syllabus

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Respondents, licensed physicians practicing in Rhode Island and their patients, brought a class action against petitioners, four insurance companies writing medical malpractice insurance in the State, alleging a conspiracy in violation of the Sherman Act in which three of the four companies refused to deal on any terms with the policyholders of the fourth as a means of compelling them to submit to new ground rules set by the fourth, whereby coverage on an "occurrence" basis would not be renewed and coverage would issue only on a "claims made" basis. Petitioners' motion to dismiss the antitrust claim on the ground that it was barred by the McCarran-Ferguson Act was granted by the District Court. The Court of Appeals reversed, holding that the complaint stated a claim within the "boycott" exception in [§ 3 \(b\)](#) of that Act, which provides that the Sherman Act shall remain applicable "to any agreement to boycott, coerce, or intimidate, or act of boycott, [\*\*\*\*2] coercion, or intimidation." *Held*:

1. The antitrust claim is not mooted by the fact that after the complaint was filed Rhode Island formed a Joint Underwriters Association to provide medical malpractice insurance and to require all personal-injury liability insurers in the State to pool expenses and losses in providing such insurance. Since Rhode Island now permits the writing of such insurance outside of the Association, it cannot be said that "subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," [United States v. Phosphate Export Assn., 393 U.S. 199, 203](#). Pp. 537-538.
2. The "boycott" exception of [§ 3 \(b\)](#) applies to certain types of disputes between policyholders and insurers and is not limited to concerted activity directed against competitor insurers or agents or, more generally, against competitors of members of the boycotting group. Pp. 538-551.
  - (a) The language of [§ 3 \(b\)](#) is broad and unqualified, covering "any" act or agreement amounting to a "boycott, coercion, or intimidation." Had Congress intended to limit its scope to boycotts of competitor insurer companies or agents, [\*\*\*\*3] and to preclude all Sherman Act protection for policyholders, it presumably would have made this explicit. The customary understanding of "boycott" at the time of enactment, as elaborated in the Sherman Act decisions of this Court, does not support a definition of the term that embraces only those combinations that target competitors of the boycotters as the ultimate objects of a concerted refusal to deal. Pp. 541-546.
  - (b) The legislative history, while not unambiguous, provides no substantial evidence that Congress sought to attach a special meaning to the language of [§ 3 \(b\)](#) that would exclude policyholders from all Sherman Act protection from restrictive agreements and practices by insurers falling outside of the realm of state-supervised cooperative action. Congress intended to preserve Sherman Act review of certain forms of regulation by private combinations and groups, including but not limited to the eradication of "blacklisting" and other exclusionary devices directed at independent insurance companies or agents. Pp. 546-550.
  - (c) Nor does the structure of the McCarran-Ferguson Act support the proposed limitation on the reach of [§ 3 \(b\)](#). [Section 3 \(b\)](#) is an exception [\*\*\*\*4] to [§ 2 \(b\)](#), which limits the general applicability of the federal antitrust laws "to the business of insurance to the extent that such business is not regulated by State law." Congress intended in the "boycott" clause of [§ 3 \(b\)](#) to carve out of the overall framework of plenary state regulation an area that would remain subject to Sherman Act scrutiny. Pp. 550-551.
3. The type of private conduct alleged to have taken place here, directed against policyholders, constitutes a "boycott" within the meaning of [§ 3 \(b\)](#). Pp. 552-555.

(a) Such conduct accords with the common understanding of a boycott. The agreement binding petitioners erected a barrier between respondents and any alternative source of the desired coverage, effectively foreclosing all possibility of competition anywhere in the relevant market. Pp. 552-553.

(b) The conduct with which petitioners are charged appears to have occurred outside of any regulatory or cooperative arrangement established by the laws of Rhode Island. This is not a case where a State has decided that regulatory policy requires that certain risks be allocated in a particular fashion among insurers or has authorized insurers to decline to insure [\*\*\*\*5] particular risks. Here a group of insurers decided to resolve by private action the problem of escalating damages claims and verdicts by coercing policyholders of one of the insurers to accept a severe limitation of coverage. Pp. 553-555.

**Counsel:** Sidney S. Rosdeitcher argued the cause for petitioners. With him on the briefs were Howard S. Veisz, Thomas D. Gidley, Stephen J. Carlotti, Charles Lister, Joseph A. Kelly, Walker B. Comegys, Kirk Hanson, and Joseph V. Cavanagh.

Leonard Decof argued the cause and filed a brief for respondents.

Deputy Solicitor General Friedman argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Solicitor General McCree, Assistant Attorney General Shenefield, Richard A. Allen, and John J. Powers III.\*

[\*\*\*\*6]

**Judges:** POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. STEWART, J., filed a dissenting opinion, in which REHNQUIST, J., joined, post, p. 555.

**Opinion by:** POWELL

## Opinion

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[\*533] [\*\*\*936] [\*\*2925] MR. JUSTICE POWELL delivered the opinion of the Court.

LEdHN[1A] [1A] LEdHN[2A] [2A] Respondents, licensed physicians practicing in the State of Rhode Island and their patients, brought a class action, in part under the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1 et seq. (1976 ed.), against petitioners, the four insurance companies writing medical malpractice insurance in the State. The complaint alleged a [\*\*2926] private conspiracy of the four companies in which three refused to sell respondents insurance of any type as a means of compelling their submission to new ground rules of coverage set by the fourth. Petitioner insurers successfully moved in District Court to dismiss the antitrust claim on the ground that it was [\*\*\*\*7] barred by the McCarran-Ferguson Act (Act), 59 Stat. 33, as amended, 15 U. S. C. [\*534] §§ 1011-1015 (1976 ed.).<sup>1</sup> The Court of Appeals reversed, holding that respondents' complaint stated a claim within

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\* Briefs of amici curiae urging reversal were filed by Richard A. Whiting and Loren Kieve for the American Insurance Assn. et al.; and by Jon S. Hanson for the National Association of Insurance Commissioners.

Roger Tilbury and Henry Kane filed a brief for the Portland Retail Druggists Assn., Inc., as amicus curiae urging affirmance.

Eugene Greener, Jr., filed a brief for Lakeside Hospital, Inc., as amicus curiae.

<sup>1</sup> The McCarran-Ferguson Act provides in relevant part:

HN1 [Sec. 2]. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

the "boycott" exception in § 3 (b) of the Act, which provides that the Sherman Act shall remain applicable "to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation," 15 U. S. C. § 1013 (b) (1976 ed.). 555 F.2d 3 (CA1 1977). We are required to decide whether the "boycott" exception applies to disputes between policyholders and insurers.

[\*\*\*\*8] I

As this case comes to us from the reversal of a successful motion to dismiss, we treat the factual allegations of respondents' amended complaint as true.<sup>2</sup> During the period in [\*535] question, petitioners St. Paul Fire & [\*\*\*937] Marine Insurance Co. (St. Paul), Aetna Casualty & Surety Co., Travelers Indemnity of Rhode Island (and two affiliated companies), and Hartford Casualty Co. (and an affiliated company) were the only sellers of medical malpractice insurance in Rhode Island. In April 1975, St. Paul, the largest of the insurers, announced that it would not renew medical malpractice coverage on an "occurrence" basis, but would write insurance only on a "claims made" basis.<sup>3</sup> [\*535] Following St. Paul's announcement, and in furtherance of the alleged conspiracy, the other petitioners refused to accept applications for any type of insurance from physicians, hospitals, or other medical personnel whom St. Paul then insured. The object of the conspiracy was to restrict St. Paul's policyholders to "claims made" coverage by compelling them to "purchase medical malpractice insurance from one insurer only, to wit defendant, St. Paul, and that [such] purchase must be made on [\*\*\*9] terms dictated by the defendant, St. Paul." App. 25. It is alleged that this scheme was effectuated by a collective refusal to deal, by unfair rate discrimination, by agreements not to compete, [\*\*2927] and by horizontal price fixing, and that petitioners engaged in "a purposeful course of coercion, intimidation, boycott and unfair competition with respect to the sale of medical malpractice insurance in the State of Rhode Island." Id. at 24-27.<sup>4</sup>

HN2[] "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

....

HN3[] "Sec. 3 (b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 59 Stat. 34, as amended, 61 Stat. 448, 15 U. S. C. §§ 1012, 1013 (b) (1976 ed.).

<sup>2</sup> Both the amended complaint and a second amended complaint, filed after the District Court's dismissal of the antitrust claim, also alleged several state-law claims. Review of the disposition of those claims has not been sought in this Court.

To the extent the complaint alleges a violation of the Clayton Act, 38 Stat. 730, as amended, 15 U. S. C. § 12 et seq. (1976 ed.), that claim is barred by respondents' concession that the requirements of § 2 (b) of the McCarran-Ferguson Act are satisfied in this case. See n. 9, *infra*.

<sup>3</sup> HN4[] An "occurrence" policy protects the policyholder from liability for any act done while the policy is in effect, whereas a "claims made" policy protects the holder only against claims made during the life of the policy. The Court of Appeals noted that "a doctor who practiced for only one year, say 1972, would need only one 1972 'occurrence' policy to be fully covered, but he would need several years of 'claims made' policies to protect himself from claims arising out of his acts in 1972." 555 F.2d 3, 5 n. 1 (CA1 1977).

<sup>4</sup> Respondents further assert that "it is virtually impossible for a physician, hospital or other medical personnel to engage in the practice of medicine or provide medical services or treatment without medical malpractice insurance," App. 22, and that as a result of petitioners' conspiracy, they "may be forced to withhold medical services and disengage from the practice of medicine, except on an emergency basis," id. at 26.

[\*536] On November 19, 1975, the District Court for the District of Rhode Island granted petitioners' motion to dismiss. The District Court declined to give the "boycott" exception the reading suggested by its "broad wording," declaring instead that "the purpose of the boycott, coercion, and intimidation exception was solely to protect insurance agents or other insurance companies from being 'black-listed' by powerful combinations of insurance companies, not to affect the insurer-insured relationship." *Id.*, at 44.

On May 16, 1977, a divided panel of the Court of Appeals for the First Circuit reversed in pertinent part. The majority [\*\*\*\*11] reasoned that the "boycott" exception was broadly framed, and that there was no reason to decline to give the term "boycott" its "normal Sherman Act scope." *555 F.2d, at 8*. "In **antitrust law**, a boycott is a 'concerted refusal' [\*\*\*938] to deal" with a disfavored purchaser or seller." *Id., at 7*. The court thought that this reading would not undermine state regulation of the industry. "Regulation by the state would be protected; concerted boycotts against groups of consumers not resting on state authority would have no immunity." *Id., at 9*.

On August 12, 1977, petitioners sought a writ of certiorari in this Court. To resolve the conflicting interpretations of § 3 (b) adopted by several Courts of Appeals,<sup>5</sup> we granted the writ on October 31, 1977. 434 U.S. 919. We now affirm.

[\*\*\*\*12] [\*537] II

**LEdHN[3]↑** [3]At the threshold, we confront a question of mootness. **HN5↑** Although not raised by the parties, this issue implicates our jurisdiction. See, e. g., *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 7-8 (1978); Sosna v. Iowa, 419 U.S. 393, 398 (1975).

The Court of Appeals requested the parties to brief the question whether the antitrust claim was mooted by Rhode Island's formation, after the initial complaint was filed, of a Joint Underwriting Association (JUA) to provide malpractice insurance to all licensed providers of health-care services and to require the participation of all personal-injury liability insurers in the State in a scheme to pool expenses and losses in providing such insurance.<sup>6</sup> The [\*2928] court noted that while the State's action prevented St. Paul from "[gathering] the fruits of the alleged conspiracy," it was "convinced that, for purposes of [its] jurisdiction, the state's act did not extinguish plaintiffs' every claim for relief." *555 F.2d, at 5-6, n. 2*. We agree.

[\*\*\*\*13] Although later developments may have "[reduced] the [\*538] practical importance of this case" for the parties, it cannot be said that "subsequent [\*\*\*939] events [make] it absolutely clear that the allegedly wrongful

<sup>5</sup> Following the rendition of the legislative history in *Transnational Ins. Co. v. Rosenlund*, 261 F.Supp. 12 (Ore. 1966), two Circuits squarely have held that § 3 (b) reaches only "blacklists" of insurance companies or agents by other insurance companies or agents. See *Meicler v. Aetna Casualty & Surety Co.*, 506 F.2d 732, 734 (CA5 1975); but cf. *Battle v. Liberty National Life Ins. Co.*, 493 F.2d 39, 51 (CA5 1974), cert. denied, 419 U.S. 1110 (1975); *Addrissi v. Equitable Life Assurance Soc.*, 503 F.2d 725, 729 (CA9 1974), cert. denied, 420 U.S. 929 (1975).

Two other Circuits have adopted a broader reading of § 3 (b). See *Ballard v. Blue Shield of Southern W. Va., Inc.*, 543 F.2d 1075, 1078 (CA4 1976), cert. denied, 430 U.S. 922 (1977) (alleged conspiracy between insurers and physicians to deny health insurance coverage for chiropractic services); *Proctor v. State Farm Mut. Auto. Ins. Co.*, 182 U. S. App. D. C. 264, 276-277, 561 F.2d 262, 274-275 (1977), cert. pending, No. 77-580 (alleged conspiracy between insurers and automobile repair shops to boycott noncooperative repair shops). See also *Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co.*, 326 F.2d 841, 846 (CA2 1963) (dictum), cert. denied, 376 U.S. 952 (1964).

<sup>6</sup> To establish a stable market for medical malpractice insurance, the JUA was created on a temporary basis by Emergency Regulation XXI, R. I. Dept. of Business Regulation, Insurance Div., June 16, 1975, App. 114-127, and received legislative sanction in *R. I. Gen. Laws § 42-14.1-1* (1977). The emergency regulation was revised in April 1976 to permit the writing of medical malpractice insurance outside the JUA for all providers of health-care services other than physicians. App. 150-151. A subsequent change in state law authorizes the Director to promulgate regulations permitting the selling of such insurance outside of the JUA to physicians as well. 1976 R. I. Pub. Laws, ch. 79, § 1.

behavior could not reasonably be expected to recur." *United States v. Phosphate Export Assn.*, 393 U.S. 199, 203 (1968); see *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-633 (1953). Since Rhode Island now permits the writing of medical malpractice insurance outside of the JUA, see n. 6, *supra*, we cannot assume that petitioners will not re-enter the market in some fashion. The conditions that gave rise to the controversy have not been shown to have abated. And the possibility of a resurgence of the alleged conspiracy is further evidenced by petitioners' acknowledgment in the Court of Appeals "that the alleged antitrust violations could recur in the future." 2 Record 83.  
7

### [\*\*\*\*14] III

The McCarran-Ferguson Act was passed in reaction to this Court's decision in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944). Prior to that decision, it had been assumed, in light of *Paul v. Virginia*, 8 Wall. 168, 183 [\*539] (1869), that the issuance of an insurance policy was not a transaction in interstate commerce and that the States enjoyed a virtually exclusive domain over the insurance industry. *South-Eastern Underwriters* held that a fire insurance company which conducted a substantial part of its transactions across state lines is engaged in interstate commerce, and that Congress did not intend to exempt the business of insurance from the operation of the Sherman Act.<sup>8</sup> The decision provoked widespread [\*2929] concern that the States would no longer be able to engage in taxation and effective regulation of the insurance industry. Congress moved quickly, enacting the McCarran-Ferguson Act within a year of the decision in *South-Eastern Underwriters*.

[\*\*\*\*15] As [\*940] this Court observed shortly afterward, "[obviously] Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 429 (1946). Our decisions have given effect to this purpose in construing the operative terms of the § 2 (b) proviso, which is the critical provision limiting the general applicability of the federal antitrust laws "to the business of insurance to the extent that such business is not regulated by State Law." See *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969); *FTC v. National Casualty Co.*, 357 U.S. 1[\*540] 560 (1958); *infra*, at 550-551. Section 2 (b) is not in issue in this case.<sup>9</sup> Rather, we are called upon to interpret, for the first time, the scope of § 3 (b), the principal exception to this scheme of pre-emptive state regulation of the "business of insurance."

<sup>7</sup> Although this case is technically not moot, the parties are not barred from showing, "on remand, that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary." *United States v. Phosphate Export Assn.*, 393 U.S. 199, 203 (1968); see *United States v. W. T. Grant Co.*, 345 U.S. 629, 633-636 (1953).

We have not addressed respondents' claim for damages arising out of their inability "to obtain medical malpractice insurance on a reasonable basis after June 30, 1975," App. 26. Such a claim might itself preclude a finding of mootness, see e. g., *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8-9 (1978), but the parties have not advised the Court whether this claim survives the formation of the JUA. The Court of Appeals stated that respondents were "entitled to seek both injunctive relief and treble damages," noting, in a separate discussion, that "the change in malpractice coverage has increased costs for the doctors." 555 F.2d, at 12, and n. 7. The validity of the damages claim, in light of the role of the JUA and the considerations identified in this decision, is a matter for initial determination by the courts below.

<sup>8</sup> The Government in that case brought a Sherman Act prosecution against the South-Eastern Underwriters Association (SEUA), its membership of nearly 200 private stock fire insurance companies, and 27 individuals. The indictment alleged conspiracies to maintain arbitrary and noncompetitive premium rates on fire and "allied lines" of insurance in several States, and to monopolize trade and commerce in the same lines of insurance. It was asserted that the conspirators not only fixed rates but also, in the Court's words, "employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from [SEUA] members on [SEUA] terms." *United States v. South-Eastern Underwriters Assn.*, 322 U.S., at 535.

<sup>9</sup> Respondents did not contest below "that [petitioners'] acts were related to the business of insurance and that Rhode Island effectively regulates that business." 555 F. d, at 6. They do not argue to the contrary in this Court.

[\*\*\*\*16] The Court of Appeals in this case determined that the word "boycott" in [§ 3 \(b\)](#) should be given its ordinary Sherman Act meaning as "a concerted refusal to deal." The "boycott" exception, so read, covered the alleged conspiracy of petitioners, conducted "outside any state-permitted structure or procedure, [to] agree among themselves that customers dissatisfied with the coverage offered by one company shall not be sold any policies by any of the other companies." [555 F.2d, at 9.](#)

Petitioners take strong exception to this reading, arguing that the "boycott" exception "should be limited to cases where concerted refusals to deal are used to exclude or penalize insurance companies or other traders which refuse to conform their competitive practices to terms dictated by the conspiracy." Brief for Petitioners 13. This definition is said to accord with the plain meaning and judicial interpretations of the term "boycott," with the evidence of specific legislative intent, and with the overall structure of the Act. Respondents counter that the language of [§ 3 \(b\)](#) is sweeping, and that there is no warrant for the view that the exception protects insurance companies "or other [\*\*\*\*17] traders" from anticompetitive practices, but withholds similar protection from policyholders victimized by private, predatory agreements. They urge that this case involves a "traditional boycott," defined as a concerted refusal to deal on any terms, as opposed to a refusal to deal except on specified terms. Brief for Respondents 43.

[\*541] We consider first petitioners' definition of "boycott" in view of the language, legislative history, and structure of the Act.<sup>10</sup>

IV

A

[LEdHN\[1B\]](#) [↑] [1B][LEdHN\[4\]](#) [↑] [4][HN6](#) [↑] The starting [\*\*\*\*18] point in any [\*\*\*941] case involving construction of a statute is the language itself. See [Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 \(1975\)](#) (POWELL, J., concurring). With economy of expression, Congress provided in [§ 3 \(b\)](#) for the continued applicability of the Sherman Act to "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." Congress thus employed terminology that evokes a tradition of meaning, as elaborated in the body of decisions interpreting the Sherman Act. It may be assumed, in the absence of indications [\*\*2930] to the contrary, that Congress intended this language to be read in light of that tradition.

[LEdHN\[5\]](#) [↑] [5]The generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target.<sup>11</sup> The word gained currency in this country largely as a term of opprobrium to describe certain tactics employed by parties to labor disputes. See, e. g., [State v. Glidden, 55 Conn. 46, 8 A.890](#) [\*\*\*\*19] (1887); Laidler, Boycott, in 2 Encyclopaedia of the Social Sciences 662-666 (1930). Thus it is not surprising that the term first entered the lexicon of [antitrust law](#) in decisions involving attempts by labor unions to encourage third parties [\*542] to cease or suspend doing business with employers unwilling to permit unionization.<sup>12</sup> [\*\*\*\*20] See, e. g., [Loewe v. Lawlor, 208 U.S. 274](#)

<sup>10</sup> The Court of Appeals' ruling rested on the determination that respondents charged petitioners "with an unlawful boycott," [id. at 12](#). In light of our disposition of this case, we do not decide the scope of the terms "coercion" and "intimidation" in [§ 3 \(b\)](#).

<sup>11</sup> See Bird, Sherman Act Limitations on Noncommercial Concerted Refusals to Deal, 1970 Duke L. J. 247, 248; Webster's New International Dictionary of the English Language 321 (2d ed. 1949); 1 The Oxford English Dictionary 1040 (1933); Black's Law Dictionary 234 (4th ed. 1968).

<sup>12</sup> The first decision of this Court dealing with a boycott situation, although without using the term, appears to be *Montague & Co. v. Lowry*, 193 U.S. 38 (1904), a nonlabor case involving an association of wholesalers and manufacturers that provided in its bylaws that no dealer member could buy from any manufacturer who was not a member of the association or sell for less than list price to a nonmember. See Kirkpatrick, Commercial Boycotts as Per Se Violations of the Sherman Act, 10 Geo. Wash. L. Rev. 302, 306-307 (1942).

(1908); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911); *Lawlor v. Loewe*, 235 U.S. 522 (1915); *Duplex Co. v. Deering*, 254 U.S. 443 (1921); *Bedford Stone Co. v. Stone Cutters' Assn.*, 274 U.S. 37 (1927).<sup>13</sup>

Petitioners define "boycott" as embracing only those combinations which target *competitors* of the boycotters as the ultimate objects of a concerted refusal to deal. They cite commentary that attempts to develop a test for distinguishing the types of restraints that warrant *per se* invalidation from other concerted refusals to deal that are not inherently [\*\*\*942] destructive of competition.<sup>14</sup> But the issue before us is whether the conduct in question involves a boycott, not whether it is *per se* unreasonable. In this regard, we have not been referred [\*543] to any decision of this Court holding [\*\*\*\*21] that petitioners' test states the necessary elements of a boycott within the purview of the Sherman Act. Indeed, the decisions reflect a marked lack of uniformity in defining the term.

Petitioners refer to cases stating that "group boycotts" are "concerted refusals by traders to deal with other traders," *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959), [\*\*\*\*22] or are combinations of businessmen "to deprive others of access to merchandise which the latter wish to sell to the public," *United States v. General Motors Corp.*, 384 U.S. 127, 146 (1966). We note that neither standard in terms excludes respondents -- for whom medical malpractice insurance is necessary [\*\*2931] to ply their "trade" of providing health-care services, see n. 4, *supra* -- from the class of cognizable victims. But other verbal formulas also have been used. In *FMC v. Svenska Amerika Linien*, 390 U.S. 238, 250 (1968), for example, the Court noted that "[under] the Sherman Act, any agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal *per se*." The Court also has stated broadly that "group boycotts, or concerted refusals to deal, clearly run afoul of § 1 [of the Sherman Act]." *Times-Picayune v. United States*, 345 U.S. 594, 625 (1953). Hence, "boycotts are not a unitary phenomenon." P. Areeda, Antitrust Analysis 381 (2d ed. 1974).

**LEdHN[6]** [6]As the labor-boycott cases illustrate, [\*\*\*\*23] **HNT** the boycotters and the ultimate target need not be in a competitive relationship with each other. This Court also has held unlawful, concerted refusals to deal in cases where the target is a customer of some or all of the conspirators who is being denied access to desired goods or services because of a refusal to accede to particular terms set by some or all of the sellers. See, e.g., *Paramount Famous Corp. v. United States*, 282 U.S. 30 (1930); *United States v. First Nat. Pictures, Inc.*, 282 U.S. 44 (1930); *Binderup v. Pathe Exchange*, 263 U.S. 291 (1923). See also *Anderson v. Shipowners Assn.*, 272 U.S. 359 (1926). As the [\*544] Court put it in *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 214 (1951), "the Sherman Act makes it an offense for [businessmen] to agree among themselves to stop selling to particular customers."<sup>15</sup>

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<sup>13</sup> The cases cited in the text are significant for their general interpretation of the Sherman Act even though they are no longer controlling as to the applicability of the antitrust laws to the activities of labor unions. See *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 621-623 (1975); *United States v. Hutcheson*, 312 U.S. 219, 234 (1941); *Drivers' Union v. Lake Valley Co.*, 311 U.S. 91, 102-103 (1940).

<sup>14</sup> See L. Sullivan, Handbook of the Law of Antitrust 256-259 (1977). Other commentators have framed a somewhat broader definition for a *per se* offense in this area. See Barber, Refusals to Deal under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847, 875 (1955) ("group action to coerce third parties to conform to the pattern of conduct desired by the group or to secure their removal from competition"); Kirkpatrick, *supra* n. 12, at 305 ("interference with the relations between a nonmember of the combination and its members or others"). We express no opinion, however, as to the merit of any of these definitions.

<sup>15</sup> *Kiefer-Stewart Co.* involved a horizontal resale price maintenance scheme, see *White Motor Co. v. United States*, 372 U.S. 253, 260 (1963), but it has been cited as a "group boycott" case, see *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 212 n. 5 (1959); *Times-Picayune v. United States*, 345 U.S. 594, 625 (1953). See also *United States v. Frankfort Distilleries*, 324 U.S. 293, 295-296 (1945) (alleged conspiracy of producers, wholesalers, and retailers to maintain local retail prices by means of a "boycott program").

[\*\*\*\*24] Whatever [\*\*\*943] other characterizations are possible,<sup>16</sup> petitioners' conduct fairly may be viewed as "an organized boycott," *Fashion Guild v. FTC*, 312 U.S. 457, 465 (1941), of St. Paul's policyholders. Solely for the purpose of forcing physicians and hospitals to accede to a substantial curtailment of the coverage previously available, St. Paul induced its competitors to refuse to deal on any terms with its customers. This agreement did not simply fix rates or terms of coverage; it effectively barred St. Paul's policyholders from all access to alternative sources of coverage and even from negotiating for more favorable terms elsewhere in the market. The pact served as a tactical weapon invoked by St. Paul in support of a dispute with its policyholders. [HN8](#)<sup>17</sup> The enlistment of third parties in an agreement not to trade, as a means of compelling capitulation by the boycotted group, long has been [\*545] viewed as conduct supporting a finding of unlawful boycott. *Eastern States Lumber Assn. v. United States*, 234 U.S. 600, 612-613 (1914), citing [\*\*\*\*25] *Loewe v. Lawlor, supra*; see *Klor's v. Broadway-Hale Stores, supra, at 213*; *Anderson v. Shipowners Assn., supra, at 362-363, 364-365*. As in *Binderup v. Pathe Exchange, supra, at 312*, where film distributors had [\*\*2932] conspired to cease dealing with an exhibitor because he had declined to purchase films from some of the distributors, "[the] illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the [target]."<sup>18</sup>

[\*\*\*\*26] [LEdHN7](#)<sup>19</sup> [7]Thus if the statutory language is read in light of the customary understanding of "boycott" at the time of enactment, respondents' complaint states a claim under [§ 3 \(b\)](#).<sup>20</sup> But, as Mr. Justice Cardozo [\*\*\*944] observed, [HNG](#)<sup>21</sup> words or phrases in a statute come "freighted with the meaning imparted to them by the mischief to be remedied and by contemporaneous discussion. In such conditions history is a teacher that is not [\*546] to be ignored." *Duparquet Co. v. Evans*, 297 U.S. 216, 221 (1936) (citation omitted). We therefore must consider whether Congress intended to attach a special meaning to the word "boycott" in [§ 3 \(b\)](#).

#### [\*\*\*\*27] B

In the Court of Appeals, petitioners argued that only insurance companies and agents could be victims of practices within the reach of the "boycott" exception.<sup>22</sup> That position enjoys some support in the legislative history because the principal targets of the practices termed "boycotts" and "other types of coercion and intimidation" in *South-*

See generally Report of the U.S. Attorney General's National Committee to Study the Antitrust Laws 137 (1955) ("[approving] the established legal doctrines which condemn group boycotts of customers or suppliers as routine unreasonable restraints forbidden by [Section 1](#) of the Sherman Act").

<sup>16</sup> Petitioners suggest that the alleged conspiracy in this case presents a horizontal agreement not to compete, as distinguished from a boycott. See *United States v. Topco Associates*, 405 U.S. 596, 612 (1972); *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573-575 (CA2 1961).

<sup>17</sup> As one commentator has noted: "If an individual competitor lacks the bargaining power to get a particular contract term, the courts apparently will not let him join with other competitors and use their collective bargaining power to compel the insertion of such a term in the contract, no matter how desirable." Bird, *supra* n. 11, at 263, discussing, *inter alia*, *Binderup v. Pathe Exchange*; *Paramount Famous Corp. v. United States*, 282 U.S. 30 (1930).

<sup>18</sup> We note our disagreement with MR. JUSTICE STEWART's expression of alarm that a reading of the operative terms of [§ 3 \(b\)](#), consistent with traditional Sherman Act usage, "would plainly devour the broad antitrust immunity bestowed by [§ 2 \(b\)](#)." Post, at 559. Whatever the precise reach of the terms "boycott," "coercion," and "intimidation," the decisions of this Court do not support the dissent's suggestion that they are coextensive with the prohibitions of the Sherman Act. See, e. g., *Eastern States Lumber Assn. v. United States*, 234 U.S. 600, 611 (1914), quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 438 (1911). In this regard, we are not cited to any decision illustrating the assertion, post, at 559 n. 6, that price fixing, in the absence of any additional enforcement activity, has been treated either as "a boycott" or "coercion."

<sup>19</sup> Brief for Appellees Aetna Casualty & Surety Co. et al. in No. 76-1226, p. 18 (CA1); Brief for Appellees St. Paul et al. in No. 76-1226, p. 14 (CA1).

*Eastern Underwriters* were insurance companies that did not belong to the industry association charged with the conspiracy, as well as agents and customers who dealt with those nonmembers. See [322 U.S., at 535-536](#). Moreover, there are references in the debates to the need for preventing insurance companies and agents from "blacklisting" and imposing other sanctions against uncooperative competitors or agents. See 91 Cong. Rec. 1087 (1945) (remarks of Rep. Celler); *id.*, at 1485-1486 (remarks of Sen. O'Mahoney). In this Court, however, petitioners expanded the list of potential targets of [§ 3 \(b\)](#) conduct to include any victim -- even one outside the insurance industry -- who is in a competitive relationship with any of the members of the boycotting group. Tr. of Oral Arg. 22, 57-58.

[\*\*\*\*28] The principal exception in the McCarran-Ferguson bill to the pre-emptive role of state regulation was for acts or agreements amounting to a "boycott, coercion, or intimidation" violative of the Sherman Act. Both Committee Reports stated: "[At] no time are the prohibitions in the Sherman Act against any agreement or act of boycott, coercion, or intimidation [**\*547**] suspended. These provisions of the Sherman Act remain in full force and effect." S. Rep. No. 20, 79th Cong., 1st Sess., 3 (1945); H. R. Rep. No. 143, 79th Cong., 1st Sess., 3 (1945). The debates make clear that the "boycott" exception was viewed by the Act's proponents [**\*\*2933**] as an important safeguard against the danger that insurance companies might take advantage of purely permissive state legislation to establish monopolies and enter into restrictive agreements falling outside the realm of state-supervised cooperative action.

The bill ultimately enacted emerged from Conference Committee as a compromise between conflicting Senate and House proposals.<sup>20</sup> [\*\*\*\*30] Although [**\*\*\*945**] the conference substitute quickly gained approval in the House, it encountered opposition in the Senate. Senator Pepper spoke at [\*\*\*\*29] length against privileging the States "[to enact] some mild form of legislation which they may call regulatory, thereby defeating the purpose of the Supreme Court decision and defeating the act itself." 91 Cong. Rec. 1443 (1945). The responses of Senators Ferguson and O'Mahoney, floor managers of the conference bill, indicate [**\*548**] that while Congress was willing to permit the States to substitute regulation for competition with respect to matters such as rates and terms of coverage, the "boycott" clause defined a range of conduct that would remain within the purview of the Sherman Act.<sup>21</sup>

Petitioners cite passages of the debates in which Senator O'Mahoney refers to "blacklisting" and other exclusionary devices directed at independent insurance companies or agents. But those passages also provide support for respondents' position that the eradication [**\*\*\*31**] of such practices was not the only objective of Congress in enacting [§ 3 \(b\)](#). In Senator O'Mahoney's view, "[the] vice in the insurance industry . . . was not that there were rating bureaus, but that there was in the industry a system of private government which had been built up by a small

<sup>20</sup> The bill introduced by Senators McCarran and Ferguson (S. 340) provided that only federal legislation specifically dealing with insurance could override state laws relating to the regulation or taxation of that business, and created a moratorium period, staying the operation of the Sherman and Clayton Acts to enable the States to adjust their statutes to *South-Eastern Underwriters*. S. Rep. No. 20, 79th Cong., 1st Sess. (1945); 91 Cong. Rec. 478 (1945). Largely at the insistence of Senator O'Mahoney, it was amended on the floor of the Senate to provide that the Sherman and Clayton Acts would not be pre-empted at the expiration of the moratorium. [Id. at 488](#). The bill introduced in the House and reported favorably out of committee contained provisions that were similar to the original bill in the Senate. H. R. Rep. No. 143, 79th Cong., 1st Sess., 1 (1945); 91 Cong. Rec. 1085 (1945). The bill as reported passed the House. A Conference Committee then was appointed, composed of Senators McCarran, O'Mahoney, and Ferguson, and Representatives Sumners, Walter, and Hancock. In place of the Senate floor amendment, the conference substitute added the proviso to [§ 2 \(b\)](#) that is presently in the Act. H. R. Conf. Rep. No. 213, 79th Cong., 1st Sess., 1-2 (1945).

<sup>21</sup> Senator Ferguson perceived a distinction between legislation authorizing "rating bureaus," which would not be disturbed by the bill, 91 Cong. Rec. 1481 (1945), and legislation permitting insurance companies to engage in practices constituting a "boycott, coercion, or intimidation," which would remain subject to the Sherman Act, *ibid.*

Senator O'Mahoney noted that the conference substitute would permit "certain agreements which can normally be made in the insurance business which are in the public interest, but which might conceivably be a violation of the [antitrust law](#)," such as a "rating bureau" operating "under the supervision and regulation of the State . . ." *Id.*, at 1444. But other practices constituting "regulation by private combinations and groups," *id.*, at 1483, would have to pass muster under the Sherman Act.

group of insurance companies, which companies undertook by their agreements and understandings to invade the field of Congress to regulate commerce." 91 Cong. Rec. 1485 (1945). The conference substitute, he insisted, "outlaws completely all steps by which small groups have attempted to establish themselves in control in the great interstate and international business of insurance." *Ibid.* Perhaps the most revealing discussion is found in his explanation of why the language of § 3 (b) was limited to "boycotts, [\*549] coercion, or intimidation," and did not reach all combinations among insurance companies and their agents. He stated:

"[The] committee was cognizant of [\*\*\*946] the fact that many salutary combinations might be proposed and which ought to be [\*\*2934] approved, to which there was no objection. From the very beginning, Mr. President, of this controversy [\*\*\*\*32] over insurance I have always taken the position that I saw no objection to combinations or agreements among the companies in the public interest *provided those combinations and agreements were in the open and approved by law. Public supervision of agreements is essential.*

....

"[My] judgment is that *every effective combination or agreement to carry out a program against the public interest of which I have had any knowledge* in this whole industry study *would be prohibited by [§ 3 (b)].*" 91 Cong. Rec. 1486 (1945) (emphasis supplied).

The rules and regulations of private associations in the industry, while providing Senator O'Mahoney with a vivid example of "the sort of agreement which ought to be condemned," *ibid.*, exemplified a larger evil -- "regulation by private combinations and groups," *id.*, at 1483 -- that required the continued application of the Sherman Act.<sup>22</sup>

[\*\*\*\*33] [\*550] The language of § 3 (b) is broad and unqualified; it covers "any" act or agreement amounting to a "boycott, coercion, or intimidation." If Congress had intended to limit its scope to boycotts of competing insurance companies or agents, and to preclude all Sherman Act protection for policyholders, it is not unreasonable to assume that it would have made this explicit. While the legislative history does not point unambiguously to the answer, it provides no substantial support for limiting language that Congress itself chose not to limit.<sup>23</sup>

<sup>22</sup> The dissenting opinion of MR. JUSTICE STEWART advances the view, abandoned by petitioners in this Court, see *supra, at 546*, that § 3 (b) applies only "to the kinds of antitrust violations alleged in *South-Eastern Underwriters . . . .*" *Post*, at 565. The dissent refers to no statement, either in the Committee Reports or the debates, asserting that § 3 (b)'s only purpose was to keep alive the *South-Eastern Underwriters* indictment or purporting to restrict its scope to the practices specifically alleged therein. There is nothing in the proposal of the National Association of Insurance Commissioners, identified by the dissent as the model for the Senate bill, S. 340, that evinces such a limited purpose. The report accompanying the proposal stated in pertinent part:

"No exemption is sought nor expected for oppressive or destructive practices. On the whole, insurance has been conducted on a high plane, with great benefit to the public, *and if inconsistent procedures are found they must be eradicated.* Provision is made that the Sherman Act shall not now or hereafter be inapplicable to any act of boycott, coercion, or intimidation." 90 Cong. Rec. A4406 (1944) (emphasis supplied).

It is difficult to view this language as supporting the dissent's interpretation.

It also is asserted that the "boycott" clause in the Senate bill was intended to apply only during the moratorium period, a fact which supposedly supports the dissent's narrow reading of the clause. But the dissent concedes that "[whatever] its initial impetus . . . , there is no indication that the provision was finally thought to be applicable only to the *South-Eastern* litigation." *Post*, at 563-564, n. 20. Moreover, neither the Committee Reports, see *supra, at 546-547*, nor the insurance commissioners' statement, quoted above, suggests an intent to suspend the operation of the "boycott" clause at any time. Certainly Senator Ferguson disclaimed such an intent, stating he saw "no reason for not changing the word 'section' to 'act,' because I am of the opinion that that was the intention of all concerned." 91 Cong. Rec. 479 (1945). There simply is no persuasive evidence of an original design merely to preserve the *South-Eastern Underwriters* indictment.

<sup>23</sup> The legislative materials do not demonstrate with necessary clarity "that [Congress] has in fact used a private code, so that what appears to be violence to language is merely respect to special usage." Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 543-544 (1947).

C

[\*\*\*947] Petitioners also contend that the structure of the Act supports their reading of § 3 (b). They note that this Court [\*551] [\*\*\*\*34] has interpreted the term "business of insurance" in § 2 (b) broadly to encompass "[the] relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement," SEC v. National Securities, Inc., 393 U.S., at 460, and has held that the mere enactment of "prohibitory legislation" and provision for "a scheme of [\*\*2935] administrative supervision" constitute adequate regulation to satisfy the proviso to § 2 (b), FTC v. National Casualty Co., 357 U.S., at 564-565. Thus, petitioners conclude, § 3 (b) cannot be interpreted in a fashion that would undermine the congressional judgment expressed in § 2 (b) that the protection of policyholders is the primary responsibility of the States and that the state regulation which precludes application of federal law is not limited to regulation specifically authorizing the conduct challenged.

Petitioners rely on a syllogism that is faulty in its premise, for it ignores the fact that § 3 (b) is an exception to § 2 (b), and that Congress intended in the "boycott" clause to carve out of the overall framework of plenary state regulation [\*\*\*\*35] an area that would remain subject to Sherman Act scrutiny. The structure of the Act embraces this exception. Unless § 3 (b) is read to limit somewhat the sweep of § 2 (b), it serves no purpose whatever. Petitioners do not press their argument that far, but they suggest no persuasive reason for engraving a particular limitation on § 3 (b) that is justified neither by its language nor by the legislative history.<sup>24</sup>

[\*\*\*\*36] [\*552] [\*\*\*948] V

LEdHN/2B [↑] [2B] We hold that HN10 [↑] the term "boycott" is not limited to concerted activity against insurance companies or agents or, more generally, against competitors of members of the boycotting group. It remains to consider whether the type of private conduct alleged to have taken place in this case, directed against policyholders, constitutes a "boycott" within the meaning of § 3 (b).

A

The conduct in question accords with the common understanding of a boycott. The four insurance companies that control the market in medical malpractice insurance are alleged to have agreed that three of the four would not deal on any terms with the policyholders of the fourth. As a means of ensuring policyholder submission to new, restrictive ground rules of coverage, St. Paul obtained the agreement of the other petitioners, strangers to the immediate dispute, to refuse to sell any insurance to its policyholders. "A valuable service germane to [respondents'] business and important to their effective competition [\*\*\*\*37] with others was withheld from them by [\*553] collective action." Silver v. New York Stock Exchange, 373 U.S. 341, 348-349, n. 5 (1963).

<sup>24</sup> Even under petitioners' reading, certain cooperative arrangements among insurance companies may constitute a "boycott" under § 3 (b) notwithstanding the applicability of § 2 (b) to activities that "relate . . . closely to their status as reliable insurers," SEC v. National Securities, Inc., 393 U.S. 453, 460 (1969), and the adequacy of state regulation of the industry. Hence, petitioners' line may not be as "bright" as they suggest.

The dissenting opinion of MR. JUSTICE STEWART also argues that the structure of the Act supports a restrictive reading of § 3 (b). We do not think the dissent's restatement of the holding in FTC v. National Casualty Co., 357 U.S. 560, 564 (1958), see *post*, at 557-558, n. 4, furthers resolution of the problem at hand. It is not disputed that Congress intended that certain forms of "regulation by private combinations and groups," 91 Cong. Rec. 1483 (1945) (remarks of Sen. O'Mahoney), remain subject to Sherman Act scrutiny, notwithstanding enactment of the type of "prohibitory legislation," coupled with "enforcement through a scheme of administrative supervision," that was deemed sufficient for § 2 (b) purposes in *National Casualty Co.* In that case the Court rejected the Federal Trade Commission's argument that "where a statute, instead of sanctioning a particular type of transaction, prohibits conduct in general terms and provides for enforcement through administrative action, there is realistically, in the absence of such enforcement, no 'regulation' in fact." Brief for Federal Trade Commission, O. T. 1957, Nos. 435 and 436, p. 53. The question that nonetheless remains is whether Congress intended to foreclose *all* Sherman Act protection for policyholders victimized by private conspiracies of insurers when a State has engaged in generally comprehensive regulation under § 2 (b). We think the record does not support such a foreclosure.

The agreement binding petitioners erected a barrier between St. Paul's customers [\*\*2936] and any alternative source of the desired coverage, effectively foreclosing all possibility of competition anywhere in the relevant market. This concerted refusal to deal went well beyond a private agreement to fix rates and terms of coverage, as it denied policyholders the benefits of competition in vital matters such as claims policy and quality of service. Cf. *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977). St. Paul's policyholders became the captives of their insurer. In a sense the agreement imposed an even greater restraint on competitive forces than a horizontal pact not to compete with respect to price, coverage, claims policy, and service, since the refusal to deal in any fashion reduced the likelihood that a competitor might have broken ranks as to one or more of the fixed terms.<sup>25</sup> The conduct alleged here is certainly not, in Senator O'Mahoney's terms, within the category [\*\*\*\*38] of "agreements which can normally be made in the insurance business," 91 Cong. Rec. 1444 (1945), or "agreements and combinations in the public interests [sic] which can safely be permitted," *id.*, at 1486.

B

We emphasize that the conduct with which petitioners are charged appears to have occurred outside of any regulatory or cooperative arrangement established by the laws of Rhode Island. There was no state authorization of the conduct in question. This was the explicit premise of [\*\*\*949] the Court of [\*554] [\*\*\*\*39] Appeals' decision, see [555 F.2d, at 9](#), and petitioners do not aver that state law or regulatory policy can be said to have required or authorized the concerted refusal to deal with St. Paul's customers.<sup>26</sup>

[\*\*\*\*40] Here the complaint alleges an attempt at "regulation by private combinations and groups," 91 Cong. Rec. 1483 (1945) (remarks of Sen. O'Mahoney). This is not a case where a State has decided that regulatory policy requires that certain categories of risks be allocated in a particular fashion among insurers, or where a State authorizes insurers to decline to insure particular risks because the continued provision of that insurance would undermine certain regulatory goals, such as the maintenance of insurer solvency. In this case, [HN11](#) a group of insurers decided to resolve by private action the problem of escalating damages claims and verdicts by coercing the policyholders of St. Paul to accept a severe limitation of coverage essential to the provision of medical services. See n. 4, *supra*. We conclude that this conduct, as alleged in the complaint, constitutes a "boycott" under [§ 3 \(b\)](#).<sup>27</sup>

[\*\*\*\*41]

[\*555] [LEdHN\[8\]](#) [8]Our ruling does not alter [§ 2 \(b\)](#)'s protection of state regulatory and tax laws, [\*\*2937] its recognition of the primacy of state regulation, or the limited applicability of the federal antitrust laws generally "to the

<sup>25</sup> "[Even] where prices are rigidly fixed, the members of a cartel will be able to compete with each other with respect to product quality unless a homogeneous product is involved. Indeed, even if the product is homogeneous there will be room for rivalry in such matters as promptness in filling orders and the provision of ancillary services. An effective division of markets, by contrast, might substantially wash out all opportunity for rivalry." Sullivan, *supra* n. 14, at 224-225.

<sup>26</sup> Counsel for petitioners stated at oral argument that he was not sure whether St. Paul had filed the specific policy change in issue with the director of the state insurance division. Tr. of Oral Arg. 8. Even if we assume that such a filing had been made, there is no suggestion that the State, in furtherance of its regulatory policies, authorized the concerted refusal to deal on any terms with St. Paul's policyholders.

Although the dissenting opinion below noted "that Rhode Island has exercised its right to regulate all material aspects of the business of insurance and that the actions complained of relative to withholding malpractice insurance were all part of such regulated business," [555 F.2d, at 14](#), this statement refers to the requirements of the proviso to [§ 2 \(b\)](#). The dissent did not argue that the agreement in question was within the contemplation of any state regulatory scheme.

<sup>27</sup> We have no occasion here to decide whether the element of state regulatory direction or authorization of the particular practice, absent in this case, is a factor to be considered in the definition of "boycott" within the meaning of [§ 3 \(b\)](#), or whether it comes into play as part of a possible defense under the "state action" doctrine, as elaborated in [Parker v. Brown](#), 317 U.S. 341 (1943), and its progeny.

extent that" the "business of insurance" is not regulated by state law. Moreover, [HN12](#) conduct by individual actors falling short of concerted activity is simply not a "boycott" within [§ 3 \(b\)](#). Cf. [Times-Picayune v. United States, 345 U.S., at 625](#). Finally, while we give force to the congressional intent to preserve Sherman Act review for certain types of private collaborative activity by insurance companies, we do not hold that all concerted activity violative of the Sherman Act comes within [§ 3 \(b\)](#). Nor does our decision address insurance practices that are compelled or specifically authorized by state regulatory policy.

The judgment of the Court of Appeals therefore is

*Affirmed.*

**Dissent by:** STEWART

## Dissent

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MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST [\*\*\*\*42] joins, dissenting.

[Section 2 \(b\)](#) of the McCarran-Ferguson Act provides that the Sherman Act "shall be applicable to the [\*\*\*950] business of insurance to the extent that such business is not regulated by State Law." <sup>1</sup> [\[\\*\\*\\*\\*43\]](#) [Section 3 \(b\)](#) limits the antitrust immunity [[\\*556](#)] which the States may confer by providing that the Sherman Act shall remain applicable to agreements or acts of "boycott, coercion, or intimidation." <sup>2</sup> Today the Court holds that the term "boycott" found in [§ 3 \(b\)](#) should be given the same broad meaning that it has been given in Sherman Act case law. It seems clear to me, however, that the "boycott, coercion, or intimidation" language of [§ 3 \(b\)](#) was intended to refer, not to the practices defined and condemned by the Sherman Act, but to the narrower range of practices involved in [United States v. South-Eastern Underwriters Assn., 322 U.S. 533](#), the case that prompted Congress to enact the McCarran-Ferguson Act.

I

The Court accurately reads the Act as not conferring broadscale antitrust immunity on the insurance industry, at least not for practices that "occurred outside of any regulatory or cooperative arrangement established by the laws of Rhode Island." *Ante*, at 553. Although Congress plainly intended to give the States priority in regulating the

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<sup>1</sup> [Section 2](#) provides in full:

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law." 59 Stat. 34, as amended, 61 Stat. 448, [15 U. S. C. § 1012 \(1976 ed.\)](#).

<sup>2</sup> [Section 3](#) provides in full:

"(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

"(b) Nothing contained in this chapter [Act] shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 59 Stat. 34, as amended, 61 Stat. 448, [15 U. S. C. § 1013 \(1976 ed.\)](#).

insurance industry, it just [\*\*\*\*44] as plainly intended not to immunize that industry from federal antitrust liability "to the extent that such business is not regulated by State Law."<sup>3</sup> In thus construing the Act's [\*557] general purpose, the Court is true to the legislative history. But I cannot understand why the Court then tries to achieve that statutory purpose by giving an unduly expansive reading to § 3 (b), when the provision that obviously was meant to accomplish [\*\*2938] that purpose was § 2 (b). Properly read, § 2 (b) suspends the federal antitrust laws only to the extent that an area or practice is regulated by state law.<sup>4</sup> Although the [\*558] Court correctly notes that § 2 (b) "[\*\*\*951] is not in issue in this case," *ante*, at 540, neither section can be construed entirely independently of the other.

[\*\*\*\*45] The broad reading the Court gives to § 3 (b) seems to me not only to misconceive the larger design of the Act, but also to distort its basic purpose. Section 3 (b) is an absolute exception to § 2 (b). It brings back under the Sherman Act a range of practices, whether authorized by state law or not.<sup>5</sup> By construing § 3 (b) very expansively, the Court narrows the field of regulation open to the States. Yet it was clearly Congress' intent to give the States generous license to govern the business of insurance free of interference from the antitrust laws.

Because I believe that the Court's construction of § 3 (b) overlooks the role of § 2 (b) and misperceives congressional intent, I respectfully dissent.

## II

It is [\*\*\*\*46] true, as the Court says, that the McCarran-Ferguson Act fails to tell us in so many words that the phrase "boycott, coercion, or intimidation" should be read in some light other than that "tradition of meaning, as

<sup>3</sup> See n. 1, *supra*, and n. 4, *infra*.

<sup>4</sup> In the present case the District Court in an oral opinion held that various Rhode Island laws, including state antitrust statutes, made the federal antitrust laws generally inapplicable to the petitioners under § 2 (b). That ruling was implicitly accepted by the Court of Appeals, and has not been questioned here. See *ante*, at 540 n. 9.

The legislative history in the Senate indicates that two kinds of state regulation were thought capable of suspending the federal antitrust laws under § 2 (b). See 91 Cong. Rec. 1444 (1945) (remarks of Sen. O'Mahoney). First, a State could enact its own antitrust laws. Senator Murdock explained that "[insofar] as [the state laws] fail to cover the same ground covered by the Sherman Act and the Clayton Act, those [federal] acts become effective again" after the moratorium. *Ibid.* Second, a State could enact laws regulating various aspects of the business of insurance, such as rates and terms of coverage. Senator Ferguson explained that "if the States were specifically to legislate upon a particular point, and that legislation were contrary to the Sherman Act, the Clayton Act, or the Federal Trade Commission Act, then the State law would be binding." *Id.*, at 1481. See also *id.*, at 1443 (remarks of Sen. McCarran and of Sen. Ferguson); *id.*, at 1444 (remarks of Sen. White).

This Court has had few occasions to consider the operation of § 2 (b). In SEC v. National Securities, Inc., 393 U.S. 453, the Court held that certain Arizona regulations protecting insurance company stockholders did not regulate the "business of insurance" within the meaning of § 2 (b) and thus did not pre-empt the Securities Exchange Act of 1934. The case did not involve the antitrust proviso of § 2 (b), and hence did not decide to what extent a State must regulate the "business of insurance" to pre-empt the federal antitrust laws.

FTC v. National Casualty Co., 357 U.S. 560, is the only case in this Court involving that question. There, the Court held that state statutes "prohibiting unfair and deceptive insurance practices," *id.*, at 562, pre-empted Federal Trade Commission regulations "prohibiting respondent insurance companies from carrying on certain advertising practices found by the Commission to be false, misleading, and deceptive, in violation of the Federal Trade Commission Act . . ." *Id.*, at 561-562. Noting that no one had alleged that the state regulation was "mere pretense," the Court rejected the FTC's argument that the state regulation was "too 'inchoate' to be 'regulation' until [the State's statutory] prohibition has been crystallized into 'administrative elaboration of these standards and application in individual cases.'" *Id.*, at 564.

<sup>5</sup> In Senator Ferguson's words:

"There are certain things which a State cannot interfere with. It cannot interfere with the application of the Sherman Act to any agreement to boycott, coerce, or intimidate, or an act of boycotting, coercion, or intimidation." 91 Cong. Rec. 1443 (1945).

elaborated in the body of [\*\*\*952] decisions interpreting the Sherman Act." *Ante*, at 541. Yet, the very selection of precisely those three words from the entire antitrust lexicon indicates that they were intended to [\*559] have some special meaning apart from traditional usage. Indeed, if "boycott" is to be given the same scope it has in Sherman Act case law, then so should " [\*\*2939] coercion" and "intimidation." But that reading of § 3(b) would plainly devour the broad antitrust immunity bestowed by § 2(b).<sup>6</sup> Congress could not logically have intended that result. To understand the special sense in which it used the words "boycott, coercion, or intimidation," therefore, we must turn to the legislative history of the McCarran-Ferguson Act.

[\*\*\*47] On November 20, 1942, the Justice Department secured an indictment against a private association of stock fire insurance companies and 27 individuals for alleged violations of §§ 1 and 2 of the Sherman Act. The prosecution came as a surprise to many, because Supreme Court precedents dating back 75 years had implied that the insurance industry was not a part of interstate commerce subject to congressional regulation under the Commerce Clause.<sup>7</sup> On this ground, the District Court sustained the defendants' demurrer to the indictment on August 15, 1943,<sup>8</sup> and the Government took an appeal directly to the Supreme Court.

Uncertain about the continuing validity of many state regulations that conflicted with federal law, various insurance companies and organizations immediately sought relief from Congress. Some threatened to withhold state taxes on [\*\*\*48] the ground that States were then thought to be prohibited from [\*560] taxing interstate commerce.<sup>9</sup> These threats prompted state officials to press for congressional action too. Months before the Supreme Court even heard arguments in the case, duplicate bills had been introduced in both Houses of Congress which would have given the insurance industry blanket immunity from the Sherman and Clayton Acts.<sup>10</sup> A joint congressional committee held extensive hearings from September 1943 into June 1944, but a vote on the bills was delayed until after the Court announced its decision.

That decision came on June 5, 1944. The Court held that the business of insurance is part of interstate commerce, and that the Congress which enacted the Sherman Act had not intended to exempt that industry. *United States v. South-Eastern Underwriters Assn., 322 U.S. 533*. Of particular relevance to our inquiry [\*\*\*49] is the Court's description of the unlawful activities alleged in the [\*\*\*953] *South-Eastern Underwriters* indictment:

"The member companies of S. E. U. A. controlled 90 per cent of the fire insurance and 'allied lines' sold by stock fire insurance companies in the six states where the conspiracies were consummated. Both conspiracies consisted of a continuing agreement and concert of action effectuated through S. E. U. A. The conspirators not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies, and to compel persons who needed insurance to buy only from S. E. U. A. members on S. E. U. A. terms. Companies not members of S. E. U. A. were cut off from the opportunity to reinsure their risks, and their services and facilities were disparaged; independent sales agencies who defiantly represented non-S. E. U. A. [\*561] companies were punished by a withdrawal of the right to represent the members of S. E. U. A.; and persons needing insurance who purchased from [\*\*2940] non-S. E. U. A. companies were threatened with boycotts and withdrawal [\*\*\*50] of all patronage." *Id. at 535-536* (footnote omitted).

<sup>6</sup> Most practices condemned by the Sherman Act can be cast as an act or agreement of "boycott, coercion, or intimidation." For example, price fixing can be seen either as a refusal to deal except at a uniform price (*i. e.*, a boycott), or as an agreement to force buyers to accept an offer on the sellers' common terms (*i. e.*, coercion). Yet state-sanctioned price fixing immunized by § 2(b) was plainly not intended to fall within the § 3(b) exception. See 91 Cong. Rec. 1481 (1945) (remarks of Sen. Ferguson).

<sup>7</sup> See H. R. Rep. No. 143, 79th Cong., 1st Sess., 2 (1945).

<sup>8</sup> *United States v. South-Eastern Underwriters Assn., 51 F.Supp. 712* (ND Ga.).

<sup>9</sup> See H. R. Rep. No. 143, supra, at 2.

<sup>10</sup> H. R. 3270, S. 1362, 78th Cong., 1st Sess. (1943).

The Court concluded:

"Few states go so far as to permit private insurance companies, without state supervision, to agree upon and fix uniform insurance rates. . . . No states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner here alleged, and it cannot be that any companies have acquired a vested right to engage in such destructive business practices." *Id., at 562.*

Before announcement of the Court's opinion, the phrase "boycott, coercion, or intimidation" had appeared in none of the lengthy debates or numerous legislative proposals in Congress from September 1943 to May 1944.

The bill totally exempting the insurance industry from the Sherman and Clayton Acts passed the House of Representatives on June 22, 1944.<sup>11</sup> Although a majority of the Senate Committee recommended enactment of the House bill,<sup>12</sup> six members urged that the Senate not pass the bill but wait for the legislative proposal then being drafted by the National Association of Insurance Commissioners, an organization of state officials.<sup>13</sup> [\*\*\*\*51] The Senate let the House bill die that session,<sup>14</sup> and the Committee turned its attention to the recommendation of the state insurance commissioners.

The state officials proposed a statute that, after a moratorium [\*562] period of several years, would have exempted from the Sherman Act a specific list of cooperative practices.<sup>15</sup> The proposed statute also provided: "Nothing contained in this section shall render the said Sherman Act inapplicable to any act of boycott, [\*\*\*954] coercion, or intimidation."<sup>16</sup> The accompanying report explained the operation and the relationship of these two provisions:<sup>17</sup>

"A suspension until July 1, 1948, is requested, in which the Sherman and Clayton Acts shall not apply, in order to allow adjustments within the business and time for enactment by States of such further legislation as they may deem necessary [\*\*\*\*52] or desirable. After July 1, 1948, it is provided that the Sherman Act shall not apply to the use of cooperative rates, forms, and underwriting plans where State-approved, to adjustment, inspection and similar agreements[,] to acts of reinsurance or co-insurance, to commission agreements, to the collection of statistics, nor to cooperative action for making of rates, rules, or plans where their use is not mandatory.

<sup>11</sup> 90 Cong. Rec. 6510 (1944).

<sup>12</sup> S. Rep. No. 1112, 78th Cong., 2d Sess. (1944).

<sup>13</sup> *Id.*, pt. 2, at 6.

<sup>14</sup> 90 Cong. Rec. 8054 (1944).

<sup>15</sup> *Id.*, at A4406.

<sup>16</sup> *Ibid.*

<sup>17</sup> The report also appeared to reflect the testimony of Attorney General Biddle, who, on the day after H. R. 3270, see n. 10 *supra*, passed the House, appeared before the Senate Judiciary Subcommittee that was considering this same legislation. He assured the Subcommittee that the Government did not intend to bring new prosecutions while Congress was considering legislation on the subject, but he insisted that the *South-Eastern* case should and would go forward because of the seriousness of the charges. After quoting a portion of the Court's opinion set out in the text, *supra, at 560-561*, he stated:

"[That] case was not merely a price-fixing case, but involved very serious boycotting. It involved boycotting by insurance companies of agents who would not belong to the association, and under the laws of the State in which the association operated, many of the acts alleged in the indictment would have been illegal." Joint Hearing on S. 1362 et al. before the Subcommittees of the Committees on the Judiciary, 78th Cong., 2d Sess., 636 (1944).

[\*563] "No exemption is sought nor expected for oppressive or destructive practices. . . . Provision is made that the Sherman Act shall not now or hereafter be inapplicable to any act of boycott, coercion, or intimidation." 90 Cong. Rec. A4406 (1944).

[\*\*\*\*53] [\*\*2941] This proposal formed the basis for S. 340, which was reported out with the unanimous support of the Senate Committee on the Judiciary in January 1945.<sup>18</sup> The list of specific practices immunized from antitrust liability was dropped, leaving the provision that suspended the Clayton and Sherman Acts for several years, during which time the States could accommodate their regulatory activities to the federal antitrust laws.<sup>19</sup> [\*\*\*\*54] Even during the moratorium, however, the Sherman Act was to remain applicable to "any act of boycott, coercion, or intimidation."<sup>20</sup> This provision was not [\*\*\*955] needed [\*564] after the moratorium because the antitrust laws would take full effect after that time. Thus, the Senate bill as finally passed made federal antitrust policy paramount to state regulation.

[\*\*\*\*55] The House passed a version of the bill striking the opposite balance. Its bill, too, carried a moratorium provision with the boycott limitation, but at the end of that period the federal antitrust laws would be pre-empted by state regulations even insofar as acts of "boycott, coercion, or intimidation" were concerned.<sup>21</sup>

A Conference Committee then within a short period worked out a compromise bill which became the present McCarran-Ferguson Act. Section 2 (b) of this bill steered a middle course by making the Sherman Act, the Clayton Act, and the Federal Trade Commission Act applicable to the business of insurance after a moratorium period, but only "to the extent that such business is not regulated by State law."<sup>22</sup> [\*\*\*\*56] At the same time, the "boycott, coercion, and intimidation" limitation on the States' power to confer antitrust immunity was extended beyond the moratorium period to the full life of the Act.<sup>23</sup>

### III

From this review of the legislative history, it should be clear that the scope given both §§ 2 (b) and 3 (b) is crucial to the effectuation of the compromise struck by the 79th Congress. If § 2 (b) is construed broadly to pre-empt federal law without the need for specific state legislation and if § 3 (b) is given no effect as a limitation on that pre-emption, the original House position prevails. On the other hand, if § 3 (b) is construed as broadly as the Sherman Act itself,

<sup>18</sup> S. Rep. No. 20, 79th Cong., 1st Sess. (1945).

<sup>19</sup> In the floor debates, several Senators pointed out that the bill could be read to support pre-emption of the federal antitrust laws by state regulations. 91 Cong. Rec. 480 (1945). To clarify its intent, the Senate amended S. 340 on the floor to make the antitrust laws expressly and fully applicable after the moratorium period. Id., at 488.

<sup>20</sup> As the bill came out of committee, the boycott provision applied only to the section establishing a short-term moratorium. Id., at 479. A proposal to extend the boycott provision to the full Act was offered by Senator Murdock and accepted by Senator Ferguson, *ibid.*, but was never ratified by the Senate.

That the boycott exception was originally drafted only to keep the Sherman Act partially in effect during the moratorium suggests that the provision may have been initially intended to prevent interference with the prosecution of the defendants in *South-Eastern Underwriters*, who still faced trial following the decision of this Court. Certainly, many Congressmen expressed their opposition to legislation that would free those defendants from liability. See, e. g., 90 Cong. Rec. 6450 (1944) (remarks of Rep. Celler); *id.*, at 6452 (remarks of Rep. LaFollette); Joint Hearings, *supra* n. 17, at 637 (remarks of Sen. Hatch). On its face, the boycott provision removed any doubt about the Government's authority to continue with that prosecution. Whatever its initial impetus, however, there is no indication that the provision was finally thought to be applicable only to the *South-Eastern* litigation.

<sup>21</sup> See 91 Cong. Rec. 1085 (1945); see also *id.*, at 1484-1485.

<sup>22</sup> See n. 1, *supra*.

<sup>23</sup> See n. 2, *supra*.

then the original Senate version largely prevails, no matter how § 2 (b) is interpreted. [\*\*565] Congress clearly intended a middle position between these extremes. That position cannot be given effect unless § 2 (b) is read to pre-empt federal law only to the [\*\*2942] extent the States have actually regulated a particular area, and § 3 (b) is viewed as referring to a range of evils considerably narrower than those prohibited by the Sherman Act.

From the legislative debates on S. 340, the Committee Reports, and the design of the statute itself, it is evident that the "boycott, [\*\*\*\*57] coercion, or intimidation" provision is most fairly read as referring to the kinds of antitrust violations alleged in *South-Eastern Underwriters* -- that is, attempts by members of the insurance business to force other members to follow the industry's private rules and practices. Repeatedly, Congressmen involved in the drafting of the statute drew a distinction between state regulation and private [\*\*\*956] regulation.<sup>24</sup> Congress plainly wanted to allow the States to authorize anticompetitive practices which they determined to be in the public interest, as indicated by formal state approval.<sup>25</sup> Section 2 (b) does just that. Congress just as plainly wanted to make sure that private organizations set up to govern the industry, such as the South-Eastern Underwriters Association, would not escape the reach of the federal antitrust laws. Section 2 (b) also meets this concern to the extent that States do not authorize or sanction anticompetitive practices promoted by such organizations. But § 2 (b) leaves open the possibility that States might, at the prompting of these powerful organizations, enact merely permissive regulations sufficiently specific to confer antitrust immunity, [\*\*\*\*58] thus leaving those organizations free to coerce compliance from uncooperative competitors. Properly construed, § 3 (b) fills this gap by keeping the Sherman Act fully applicable to *private enforcement* -- by the means described in the *South-Eastern* [\*566] *Underwriters* case -- of industry rules and practices, even if those rules and practices are permitted by state law.<sup>26</sup> Similarly, where a State enacts its own antitrust laws conferring § 2 (b) immunity, § 3 (b) retains Sherman Act coverage for those especially "destructive . . . practices," 322 U.S., at 562, involved in *South-Eastern Underwriters*.

The key feature of § 3 (b), then, is that the agreement or act of "boycott, coercion, or intimidation" must be aimed ultimately [\*\*\*\*59] at a member of the insurance industry. As in *South-Eastern Underwriters*, the immediate targets may be policyholders or others outside the industry, but unless they are boycotted, coerced, or intimidated for the purpose of forcing other insurance companies or agents to comply with industry rules, § 3 (b) does not apply.

It follows, then, that § 3 (b) does not reach the boycott alleged in this case. The respondents' complaint does not contend that petitioner insurance companies refused to sell them insurance with the ultimate aim of disciplining or coercing other insurance companies. Rather, if there was an agreement among the petitioners, the complaint would indicate that it was entirely voluntary.

I would reverse the judgment of the Court of Appeals.

## References

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54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 227

12 Federal Procedural Forms L Ed, Monopolies and Restraints of Trade 48:109, 48:126, 48:146

24 Am Jur Trials 1, Defending Antitrust Lawsuits

15 USCS 1013(b)

US L Ed Digest, Restraints of Trade and Monopolies 29

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<sup>24</sup> See, e.g., 91 Cong. Rec. 1480, 1483, 1485 (1945) (remarks of Sen. O'Mahoney); *id.*, at 1481 (remarks of Sen. Ferguson).

<sup>25</sup> See *id.*, at 1486 (remarks of Sen. O'Mahoney).

<sup>26</sup> See *id.*, at 1485-1486 (remarks of Sen. O'Mahoney).

438 U.S. 531, \*566; 98 S. Ct. 2923, \*\*2942; 57 L. Ed. 2d 932, \*\*\*956; 1978 U.S. LEXIS 40, \*\*\*\*59

ALR Digests, Restraints of Trade and [\*\*\*\*60] Monopolies 25

L Ed Index to Annos, McCarran-Ferguson Act; Restraints of Trade and Monopolies

ALR Quick Index, Restraints of Trade and Monopolies

Federal Quick Index, McCarran-Ferguson Act; Monopolies and Restraints of Trade

Annotation References:

What circumstances render civil case, or issues arising therein, moot so as to preclude Supreme Court's consideration of their merits. *44 L Ed 2d 745*.

Validity, construction, and application of McCarran-Ferguson Act (15 USCS 1011-1015), dealing with regulations of insurance business by state or federal law. *21 L Ed 2d 938*.

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## **United States v. United States Gypsum Co.**

Supreme Court of the United States

March 1, 1978, Argued ; June 29, 1978, Decided

No. 76-1560

**Reporter**

438 U.S. 422 \*; 98 S. Ct. 2864 \*\*; 57 L. Ed. 2d 854 \*\*\*; 1978 U.S. LEXIS 131 \*\*\*\*; 1978-1 Trade Cas. (CCH) P62,103

UNITED STATES v. UNITED STATES GYPSUM CO. ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

**Disposition:** [550 F.2d 115](#), affirmed.

### **Core Terms**

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Sherman Act, seller, prices, deliberations, conspiracy, Robinson-Patman Act, foreman, verification, competitors, jurors, price information, instructions, exchanges, antitrust, buyer, circumstances, stabilize, good faith, indictment, withdrawal, cases, undertaken, gypsum board, interseller, effects, criminal law, price-fixing, customer, price discrimination, anti trust law

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

Antitrust & Trade Law > Clayton Act > Penalties

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Sherman Act

#### **HN1[] Criminal Actions, Intent**

An effect on prices, without more, will not support a criminal conviction under the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), but that conclusion is not based on the existence of any conflict between the requirements of the Robinson-Patman and the Sherman Acts. Rather, a defendant's state of mind or intent is an element of a criminal antitrust

438 U.S. 422, \*422; 98 S. Ct. 2864, \*\*2864; 57 L. Ed. 2d 854, \*\*\*854; 1978 U.S. LEXIS 131, \*\*\*\*1

offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

## **HN2** [down] **US Department of Justice Actions, Civil Actions**

A civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect. Of course, consideration of intent may play an important role in divining the actual nature and effect of the alleged anticompetitive conduct.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

## **HN3** [down] **Mens Rea, Specific Intent**

The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence. Intent generally remains an indispensable element of a criminal offense. This is as true in a sophisticated criminal antitrust case as in one involving any other criminal offense.

Governments > Legislation > Interpretation

Governments > Legislation > Interpretation > Rule of Lenity

## **HN4** [down] **Legislation, Interpretation**

Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

Evidence > ... > Presumptions > Exceptions > Common Law Presumptions

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

## **HN5** [down] **Mens Rea, Specific Intent**

At least with regard to crimes having their origin in the common law, there is an interpretative presumption that mens rea is required. Mere omission of intent in the statute will not be construed as eliminating that element from the crimes denounced; instead Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor, and absence of contrary direction will be taken as satisfaction with widely accepted definitions, not as a departure from them.

438 U.S. 422, \*422; 98 S. Ct. 2864, \*\*2864; 57 L. Ed. 2d 854, \*\*\*854; 1978 U.S. LEXIS 131, \*\*\*\*1

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

#### **HN6** Monopolies & Monopolization, Attempts to Monopolize

The Sherman Act (Act), [15 U.S.C.S. § 1 et seq.](#), unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes. Both civil remedies and criminal sanctions are authorized with regard to the same generalized definitions of the conduct proscribed -- restraints of trade or commerce and illegal monopolization -- without reference to or mention of intent or state of mind. Nor has judicial elaboration of the Act always yielded the clear and definitive rules of conduct which the statute omits; instead open-ended and fact-specific standards like the "rule of reason" have been applied to broad classes of conduct falling within the purview of the Act's general provisions. Simply put, the Act has not been interpreted as if it were primarily a criminal statute; it has been construed to have a generality and adaptability comparable to that found to be desirable in constitutional provisions.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

#### **HN7** US Department of Justice Actions, Criminal Actions

With certain exceptions for conduct regarded as per se illegal because of its unquestionably anticompetitive effects, the behavior proscribed by the Sherman Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct.

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

Antitrust & Trade Law > Sherman Act > General Overview

#### **HN8** Per Se Rule & Rule of Reason, Per Se Violations

The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. For this reason, such exchanges of information do not constitute a per se violation of the Sherman Act, [15 U.S.C.S. § 1 et seq.](#). A number of factors including most prominently the structure of the industry involved and the nature of the information exchanged are generally considered in divining the procompetitive or anticompetitive effects of this type of interseller communication. Exchanges of current price information, of course, have the greatest potential for generating anticompetitive effects and although not per se unlawful have consistently been held to violate the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

438 U.S. 422, \*422; 98 S. Ct. 2864, \*\*2864; 57 L. Ed. 2d 854, \*\*\*854; 1978 U.S. LEXIS 131, \*\*\*\*1

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Sherman Act

#### **HN9**[] Antitrust & Trade Law, Sherman Act

The criminal offenses defined by the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), should be construed as including intent as an element.

Antitrust & Trade Law > Sherman Act > General Overview

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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

#### **HN10**[] Antitrust & Trade Law, Sherman Act

In a conspiracy, two different types of intent are generally required -- the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

#### **HN11**[] Antitrust & Trade Law, Sherman Act

Recognizing that mens rea is not a unitary concept, the Code enumerates four possible levels of intent -- purpose, knowledge, recklessness, and negligence. In dealing with the kinds of business decisions upon which the antitrust laws focus, the concepts of recklessness and negligence have no place. Action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws. In so holding, it is not meant to suggest that conduct undertaken with the purpose of producing anticompetitive effects would not also support criminal liability, even if such effects did not come to pass. This elevated standard of intent need not be established in cases where anticompetitive effects have been demonstrated; instead, proof that the defendant's conduct was undertaken with knowledge of its probable consequences will satisfy the Government's burden.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > Actus Reus

#### **HN12**[] US Department of Justice Actions, Criminal Actions

It is now generally accepted that a person who acts or omits to act intends a result of his act or omission under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that the result is practically certain to follow from his conduct, whatever his desire may be as to that result. Generally this limited distinction between knowledge and purpose has not been considered important since there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results. In either circumstance, the defendants are consciously behaving in a way the law prohibits, and such conduct is a fitting object of criminal punishment.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Intent

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > General Intent

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Knowledge

### **HN13** [blue icon] **Criminal Actions, Intent**

The business behavior which is likely to give rise to criminal antitrust charges is conscious behavior normally undertaken only after a full consideration of the desired results and a weighing of the costs, benefits, and risks. A requirement of proof not only of this knowledge of likely effects, but also of a conscious desire to bring them to fruition or to violate the law would seem, particularly in such a context, both unnecessarily cumulative and unduly burdensome. Where carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, the perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Elements of Offense

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > General Overview

### **HN14** [blue icon] **US Department of Justice Actions, Criminal Actions**

A conclusive presumption of intent which testimony could not overthrow will effectively eliminate intent as an ingredient of the offense.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

## [\*\*HN15\*\*](#) [down] **Robinson-Patman Act, Claims**

A purpose of complying with the Robinson-Patman Act, [15 U.S.C.S. § 13 \(1976 ed.\)](#), by exchanging price information is not inconsistent with knowledge that such exchanges of information will have the probable effect of fixing or stabilizing prices. Since knowledge of the probable consequences of conduct to be the requisite mental state in a criminal prosecution, a defendant's purpose in engaging in the proscribed conduct will not insulate him from liability unless it is deemed of sufficient merit to justify a general exception to the Sherman Act's, [15 U.S.C.S. § 1 et seq.](#), proscriptions.

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Contracts Law > Personal Property > Bona Fide Purchasers

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

Antitrust & Trade Law > Exemptions & Immunities > Robinson-Patman Act Exemptions

## [\*\*HN16\*\*](#) [down] **Robinson-Patman Act, Defenses**

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, [15 U.S.C.S. § 13\(a\) \(1976 ed.\)](#), embodies a general prohibition of price discrimination between buyers when an injury to competition is the consequence. The primary exception to the § 2(a) bar is the meeting-competition defense which is incorporated as a proviso to the burden-of-proof requirements set out in § 2(b): provided, however, that nothing herein contained shall prevent a seller rebutting the *prima facie* case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > ... > Price Discrimination > Types of Price Discrimination > Brokerage, Commissions & Compensation

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

## **HN17** [] **Robinson-Patman Act, Defenses**

The kind of showing which a seller must make in order to satisfy the good-faith requirement of the § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, [15 U.S.C.S. § 13\(b\) \(1976 ed.\)](#), defense is that section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitor's price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's. The statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Defenses

## **HN18** [] **Price Discrimination, Buyer Liability**

A good-faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, [15 U.S.C.S. § 13\(b\) \(1976 ed.\)](#), defense. While casual reliance on uncorroborated reports of buyers or sales representatives without further investigation may not, as we noted earlier, be sufficient to make the requisite showing of good faith, nothing in the language of § 2(b) indicates that direct discussions of price between competitors are required. It is the concept of good faith which lies at the core of the meeting-competition defense, and good faith is a flexible and pragmatic, not technical or doctrinaire, concept. Rigid rules and inflexible absolutes are especially inappropriate in dealing with the § 2(b) defense; the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application.

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

438 U.S. 422, \*422; 98 S. Ct. 2864, \*\*2864; 57 L. Ed. 2d 854, \*\*\*854; 1978 U.S. LEXIS 131, \*\*\*\*1

International Trade Law > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

## **HN19** [ ] Antitrust & Trade Law, Robinson-Patman Act

The good-faith standard remains the benchmark against which the seller's conduct is to be evaluated, and this standard can be satisfied by efforts falling short of interseller verification in most circumstances where the seller has only vague, generalized doubts about the reliability of its commercial adversary -- the buyer. Given the fact-specific nature of the inquiry, it is difficult to predict all the factors the Federal Trade Commission or a court would consider in appraising a seller's good faith in matching a competing offer in these circumstances. Certainly, evidence that a seller had received reports of similar discounts from other customers, or was threatened with a termination of purchases if the discount were not met, would be relevant in this regard. Efforts to corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market data would also be probative as would the seller's past experience with the particular buyer in question.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Defenses

## **HN20** [ ] Price Discrimination, Buyer Liability

Section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, [15 U.S.C.S. § 13\(f\)](#) imposes liability on buyers for inducing illegal price discounts.

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

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

## **HN21** [ ] Robinson-Patman Act, Defenses

The good-faith requirement of the § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act (Act), [15 U.S.C.S. § 13\(b\) \(1976 ed.\)](#), defense implicitly suggests a somewhat imperfect matching between competing offers actually made and those allowed to be met. Unless this requirement is to be abandoned, it seems clear that inadequate information will, in a limited number of cases, deny the defense to some who, if all the facts had been known, would have been entitled to invoke it. Interseller verification does not provide a satisfactory solution to this seemingly inevitable problem of inadequate information. Moreover, § 2(b) affords only a defense to liability and not

an affirmative right under the Act. While sellers are, of course, entitled to take advantage of the defense when they can satisfy its requirements, efforts to increase its availability at the expense of broader, affirmative antitrust policies must be rejected.

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

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

Criminal Law & Procedure > Trials > Jury Instructions > Objections

## **HN22** [ ] **Conspiracy, Elements**

Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment.

## **Lawyers' Edition Display**

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### **Summary**

In addition to questions relating to the propriety of certain trial procedures during a prosecution of certain manufacturers and certain of their officers for an alleged price-fixing conspiracy in violation of 1 of the Sherman Act ([15 USCS 1](#)), this case presented issues as to the requisite intent for an antitrust conviction, and as to whether, as contended by the defendants, the exchange of price information between sellers--for the purpose of the sellers' taking advantage of the Robinson-Patman Act's 2(b) ([15 USCS 13\(b\)](#)) "meeting competition" defense to illegal price discrimination--was exempt from Sherman Act scrutiny. During the trial in the United States District Court for the Western District of Pennsylvania, the focus of the government's price-fixing case was the defendants' practice of telephoning each other to determine the price currently being offered to a specific customer. The defendants maintained that any such exchanges of price information were solely for the purposes of complying with the Robinson-Patman Act and preventing customer fraud in representing prices at which the defendants were offering their products. The trial court's charge to the jury included instructions that if the price information exchanges were found to have been undertaken in good faith to comply with 2(b) of the Robinson-Patman Act, then price verification alone would not be sufficient to establish an illegal price fixing agreement, but that if the jury found that the effect of price verification was to fix prices, then the defendants would be "presumed, as a matter of law, to have intended that result." The defendants were convicted on the basis of the jury's guilty verdicts, but the United States Court of Appeals for the Third Circuit reversed the convictions on various grounds and remanded the case, holding, *inter alia*, that if certain conditions were met, price verification among competitors for the sole purpose of taking advantage of the "meeting competition" defense of the Robinson-Patman Act constituted a "controlling circumstance" precluding liability under the [Sherman Act \(550 F2d 115\)](#).

On certiorari, the United States Supreme Court affirmed. In an opinion by Burger, Ch. J., joined by Brennan, Marshall, and White, JJ., and joined in part by Stewart (as to holdings 1, 2, 4, and 5 below), Powell (as to holdings 1, 2, 4, and 5), Rehnquist (as to holding 4), and Stevens (as to holdings 2-5), JJ., it was held that (1) a defendant's state of mind or intent was an element of a federal criminal antitrust offense which had to be established by evidence and inferences drawn therefrom and could not be taken from the trier of fact through reliance on a legal presumption of wrongful intent from mere proof of an effect on prices (action undertaken with knowledge of its probable consequences, and having the requisite anticompetitive effects, being a sufficient predicate for a finding of criminal liability), and thus the trial court's instruction in the case at bar, relating to the presumption of intent if the effect of the defendants' price verification was to fix prices, was improper; (2) price verification among competitors for the purpose of taking advantage of the "meeting competition" defense of the Robinson-Patman Act could not be

treated as a "controlling circumstance" precluding criminal liability for price-fixing under 1 of the Sherman Act, such verification instead remaining subject to close scrutiny under the Sherman Act; (3) an ex parte meeting that had taken place between the trial judge and the jury foreman--the foreman having requested the meeting on the morning of the seventh day of deliberations (after a lengthy trial, and after various supplemental instructions had been given during the jury's deliberations, including "Allen" charges), to discuss the jury's condition and to seek further guidance from the judge, and counsel having agreed to the ex parte meeting when the judge stated that his purpose would be to determine the jury's physical condition and the prospects for a verdict, and that no instructions on the law would be given--was improper, and alone warranted reversal of the convictions, where the foreman had referred several times during the meeting to the jury's deadlock, and where the exchange with the judge suggested the strong likelihood that the foreman carried away from the meeting, and restated to his fellow jurors, the impression that the judge wanted a verdict one way or the other; (4) the trial court's charge concerning participation in the conspiracy was sufficient, since (a) the jury had been instructed repeatedly that only a single conspiracy was alleged and that liability could only be predicated on the knowing involvement of each defendant, considered individually, in the conspiracy charged, and (b) in any event, the instruction differed in only immaterial respects from the defendants' requested instruction; and (5) the trial court's instruction that in order to find that a defendant had abandoned or withdrawn from the conspiracy, the jury must find that the defendant took some affirmative action to disavow or defeat its purpose, and that to withdraw, a defendant "either must have affirmatively notified each other member of the conspiracy he will no longer participate in the undertaking so they understand they can no longer expect his participation or acquiescence or he must make disclosures of the illegal scheme to law enforcement officials," was improper and alone constituted reversible error, since the charge, fairly read, limited the jury's consideration to only two circumscribed and arguably impractical methods of demonstrating withdrawal from the conspiracy, whereas affirmative acts inconsistent with the conspiracy's object and communicated in a manner reasonably calculated to reach co-conspirators were generally regarded as sufficient to establish withdrawal or abandonment.

Powell, J., concurring in part, stated that (1) with regard to holding 2 above, he joined the portion of the court's opinion which held that a seller's intention to establish a "meeting competition" defense under 2(b) of the Robinson-Patman Act was not in itself a "controlling circumstance" excusing liability under the Sherman Act for otherwise unlawful price verification practices, (2) he did not join any portions of the court's opinion which might be read as suggesting that there were cases where the 2(b) defense was unavailable even though a seller made every reasonable, lawful effort to corroborate his buyer's report that a competitor had offered a lower price, and (3) it was not necessary to consider the issue as to the trial judge's ex parte meeting with the jury foreman, since such issue was unlikely to arise at any retrial.

Rehnquist, J., concurring in part and dissenting in part, expressed the view that (1) it was not necessary to consider either the intent required for criminal liability under the Sherman Act or the interrelationship of the Robinson-Patman Act's "meeting competition" defense and the Sherman Act, since the District Court's instructions on such matters, when considered as a whole, were adequate, (2) the communications between the judge and the jury foreman, having been consented to by all the parties, did not justify a reversal of the jury's verdict, and (3) the instruction as to withdrawal from the conspiracy, considered either alone or with the other instructions, did not warrant reversal of the verdict.

Stevens, J., concurred in part and dissented in part, expressing the view that as applied to an agreement among producers to exchange current price information, the rule of reason required an element in addition to proof of the agreement itself--either an actual market effect or an express purpose to affect market price--but once that element was shown, any additional showing of intent was unnecessary.

Blackmun, J., did not participate.

## Headnotes

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438 U.S. 422, \*422; 98 S. Ct. 2864, \*\*2864; 57 L. Ed. 2d 854, \*\*\*854; 1978 U.S. LEXIS 131, \*\*\*\*1

MONOPOLIES §36 > TRIAL §290 > price-fixing conspiracy -- criminal intent -- instructions -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B]

In a prosecution of certain manufacturers for violating 1 of the Sherman Act ([15 USCS 1](#)) by allegedly engaging in a price-fixing conspiracy, where one of the allegations was that the defendants exchanged price information in verifying prices being offered to specific customers, jury instructions on the issue of intent--charging that if the jury found that the effect of price verification was to fix prices, then the defendants would be "presumed, as a matter of law, to have intended that result"--are improper, since (1) an effect on prices, without more, will not support a criminal conviction under the Sherman Act, and (2) the requisite criminal intent cannot be established by reliance on a legal presumption of wrongful intent from proof of an effect on prices; although an effect on prices may support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted, the jury must remain free to consider additional evidence before accepting or rejecting the inference, and thus, while it would be correct to instruct the jury that it may infer intent from an effect on prices, ultimately the decision on the issue of intent must be left to the trier of fact alone. (Stevens, J., dissented from this holding.)

EVIDENCE §172 > MONOPOLIES §15 > criminal intent -- presumption -- > Headnote:

[LEdHN\[2\]](#) [2]

A defendant's state of mind or intent is an element of a federal criminal antitrust offense which must be established by evidence and inferences drawn therefrom, and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices.

MONOPOLIES §15 > criminal offenses -- intent -- > Headnote:

[LEdHN\[3A\]](#) [3A] [LEdHN\[3B\]](#) [3B]

The Sherman Act ([15 USCS 1 et seq.](#)) is not to be construed as mandating a regime of strict liability criminal offenses; instead, the criminal offenses defined by the Act should be construed as including intent as an element.

MONOPOLIES §15 > civil violations -- intent -- > Headnote:

[LEdHN\[4A\]](#) [4A] [LEdHN\[4B\]](#) [4B]

As a general rule, a civil violation of the federal antitrust laws can be established by proof of either an unlawful purpose or an anticompetitive effect, although consideration of intent may play an important role in divining the actual nature and effect of the alleged anticompetitive conduct.

LAW §6 > MONOPOLIES §15 > intent -- > Headnote:

[LEdHN\[5\]](#) [5]

The general rule that intent is an indispensable element of a criminal offense is as true in a sophisticated criminal antitrust case as in one involving any other criminal offense.

LAW §6 > statutory offense -- intent -- > Headnote:

[LEdHN\[6\]](#) [6]

Far more than the simple omission of the appropriate phrase from the statutory definition of a crime is necessary to justify dispensing with an intent requirement.

MONOPOLIES §33 > exchange of price information -- per se illegality -- > Headnote:

[LEdHN\[7A\]](#) [7A] [LEdHN\[7B\]](#) [7B]

Exchanges of current price information between competitors are not per se unlawful under federal antitrust laws.

CONSPIRACY §1 > intent -- > Headnote:

[LEdHN\[8A\]](#) [8A] [LEdHN\[8B\]](#) [8B]

In a conspiracy, two different types of intent are generally required--the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy.

MONOPOLIES §15 > criminal offenses-intent -- > Headnote:

[LEdHN\[9\]](#) [9]

With regard to the element of intent in federal criminal antitrust violations, the concepts of recklessness and negligence have no place in dealing with the kinds of business decisions upon which the antitrust laws focus.

MONOPOLIES §15 > criminal offenses -- intent -- > Headnote:

[LEdHN\[10\]](#) [10]

Action undertaken with knowledge of its probable consequences, and having the requisite anticompetitive effects, can be a sufficient predicate for a finding of criminal liability under the federal antitrust laws, it not being necessary to show that the conduct was undertaken with the "conscious object" of producing anticompetitive effects; where carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, the perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent.

MONOPOLIES §36 > exchanging price information -- criminal liability -- "meeting competition" defense -- > Headnote:

[LEdHN\[11A\]](#) [11A] [LEdHN\[11B\]](#) [11B]

Sellers' verification between themselves of price concessions offered to their customers--such verification by exchange of price information being for the sole purpose of the sellers' taking advantage of the Robinson-Patman Act's 2(b) ([15 USCS 13\(b\)](#)) "meeting competition" defense to illegal price discrimination--may not be treated as a "controlling circumstance" precluding criminal liability for price-fixing under 1 of the Sherman Act ([15 USCS 1](#)); exchanges of price information, even when putatively for purposes of Robinson-Patman Act compliance, must remain subject to close scrutiny under the Sherman Act.

MONOPOLIES §36 > price discrimination -- "meeting competition" defense -- > Headnote:

[LEdHN\[12\]](#) [down] [12]

With regard to the "meeting competition" defense to price discrimination under 2(b) of the Robinson-Patman Act ([15 USCS 13\(b\)](#)), the statute does not require sellers to justify price discriminations by showing that in fact they met a competitor's price, but it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's; the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.

MONOPOLIES §36 > price discrimination -- "meeting competition" defense -- > Headnote:

[LEdHN\[13\]](#) [down] [13]

A good-faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the Robinson Patman Act's 2(b) ([15 USCS 13\(b\)](#)) "meeting competition" defense to price discrimination charges.

MONOPOLIES §36 > price discrimination -- "meeting competition" defense -- > Headnote:

[LEdHN\[14\]](#) [down] [14]

The concept of good faith which lies at the core of the "meeting competition" defense to price discrimination under 2(b) of the Robinson-Patman Act ([15 USCS 13\(b\)](#)) is a flexible and pragmatic, not a technical or doctrinaire, concept; rigid rules and inflexible absolutes are especially inappropriate in dealing with the 2(b) defense; the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application.

EVIDENCE §852 > MONOPOLIES §36 > price discrimination -- "meeting competition" defense -- good faith -- > Headnote:

[LEdHN\[15\]](#) [down] [15]

The good-faith standard of the "meeting competition" defense to price discrimination under 2(b) of the Robinson-Patman Act ([15 USCS 13\(b\)](#)) can be satisfied by efforts falling short of interseller verification in most circumstances where the seller has only vague, generalized doubts about the reliability of a buyer who represents that he has been offered a lower price; evidence that a seller had received reports of similar discounts from other customers, or was threatened with a termination of purchases if the discount was not met, is relevant in this regard; also probative

are (1) efforts to corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market data, and (2) the seller's past experience with the particular buyer in question.

ERROR §1631 > TRIAL §36 > criminal prosecution -- ex parte meeting of judge and jury foreman -- reversible error --

> Headnote:

[LEdHN\[16A\]](#) [16A] [LEdHN\[16B\]](#) [16B]

In a federal antitrust prosecution, an ex parte meeting between the judge and the jury foreman--the foreman having requested the meeting on the morning of the seventh day of deliberations (after a lengthy trial, and after various supplemental instructions had been given during the jury's deliberations, including "Allen" charges), to discuss the condition of the jury and to seek further guidance from the judge, and counsel having agreed to the ex parte meeting when the judge stated that his purpose would be to determine the jury's physical condition and the prospects for a verdict, and that no instructions on the law would be given--is improper, where the foreman referred several times during the meeting to the jury's deadlock, and where the exchange with the judge suggested the strong likelihood that the foreman carried away from the meeting, and restated to his fellow jurors, the impression that the judge wanted a verdict one way or the other; the reversal of convictions (the jury having returned guilty verdicts on the morning following the ex parte meeting) would be justified solely because of the risk that the foreman believed that the court was insisting on a dispositive verdict. (Rehnquist, J., dissented in part from this holding.)

TRIAL §277.5 > criminal case -- instructions -- judge's personal views -- > Headnote:

[LEdHN\[17\]](#) [17]

A judge's subjective personal views have no place in his instructions to the jury in a federal criminal trial.

TRIAL §290 > antitrust prosecution -- conspiracy -- instructions -- > Headnote:

[LEdHN\[18\]](#) [18]

In a federal prosecution of certain companies and certain of their officers for an alleged conspiracy in violation of 1 of the Sherman Act ([15 USCS 1](#)), the trial court's charge concerning participation in the conspiracy is sufficient, where (1) the jury was informed repeatedly that only a single conspiracy was alleged and that liability could only be predicated on the knowing involvement of each defendant, considered individually, in the conspiracy charged, and (2) in any event, the instruction differed in only immaterial respects from the defendants' requested instruction, which would have directed the jury to determine what kind of agreement or understanding, if any, existed as to each defendant before any defendant could be found to be a member of the conspiracy.

ERROR §1604 > TRIAL §290 > antitrust prosecution -- withdrawal from conspiracy -- instructions -- > Headnote:

[LEdHN\[19\]](#) [19]

In a federal prosecution resulting in the convictions of certain companies and certain of their officers for an alleged conspiracy in violation of 1 of the Sherman Act ([15 USCS 1](#)), the trial court's charge concerning withdrawal from the conspiracy--the jury having been instructed that in order to find that a defendant abandoned or withdrew from a conspiracy, it must find that the defendant took some affirmative action to disavow or defeat its purpose, and that to withdraw, a defendant "either must have affirmatively notified each other member of the conspiracy he will no longer participate in the undertaking so they understand they can no longer expect his participation or acquiescence or he must make disclosures of the illegal scheme to law enforcement officials"--is improper, and standing alone constitutes reversible error, since the charge, fairly read, limited the jury's consideration to only two circumscribed and arguably impractical methods of demonstrating withdrawal from the conspiracy, whereas affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators are generally regarded as sufficient to establish withdrawal or abandonment. (Rehnquist, J., dissented in part from this holding.)

## Syllabus

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Several major gypsum board manufacturers and various of their officials were indicted for violations of [§ 1](#) of the Sherman Act by allegedly engaging in a price-fixing conspiracy. One of the types of actions allegedly taken in formulating and effectuating the conspiracy was interseller price verification, *i. e.*, the practice of telephoning a competing manufacturer to determine the price being currently offered on gypsum board to a specific customer. After some of the defendants pleaded *nolo contendere* and were sentenced, the remaining defendants were convicted after a trial of some 19 weeks. The Government's case focused on the interseller price-verification charge, which the defendants defended on the ground that the price-information exchanges were to enable them to take advantage of the meeting-competition defense contained in § 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act (which permits a seller to rebut a *prima facie* [\*\*\*\*2] price-discrimination charge by showing that a lower price to a purchaser was made in good faith to meet an equally low price of a competitor). On the verification issue, the trial judge charged the jury that if the price-information exchanges were found to have been undertaken in good faith to comply with the Robinson-Patman Act, verification alone would not suffice to establish an illegal price-fixing agreement, but that if the jury found that the effect of verification was to fix prices, then the parties would be presumed, as a matter of law, to have intended that result. The judge further charged that since only a single conspiracy was alleged, liability could only be predicated on the knowing involvement of each defendant, considered individually, in the conspiracy alleged, the judge having refused the defendants' requested charge directing the jury to determine what kind of agreement, if any, existed as to each defendant before any could be found to be a member of the conspiracy. With respect to the defendants' evidence as to withdrawal from the conspiracy, the judge instructed the jury that withdrawal had to be established by either affirmative notice to every other member [\*\*\*\*3] of the conspiracy or by disclosure of the illegal enterprise to law enforcement officials. The judge refused the defendants' requested instruction that vigorous price competition during the period in question could also be considered as evidence of abandonment of the conspiracy. After all the testimony had been presented, the jurors were sequestered for deliberation, and apparently disagreement among them arose. After approximately seven days of deliberations, the foreman of the jury informed the judge that he wanted to discuss the jury's condition, and this resulted, with the parties' consent, in an *ex parte* meeting between the judge and the foreman. Most of the discussion at the meeting involved the jurors' deteriorating health but the foreman also referred to the jury's deadlock; there followed an exchange strongly suggesting that the foreman may have carried away from the meeting the impression that the judge wanted a verdict "one way or the other." The jury rendered its guilty verdict the following morning. The Court of Appeals reversed the convictions on various grounds, holding, *inter alia*, that verification of price concessions with competitors for the sole purpose [\*\*\*\*4] of taking advantage of the meeting-competition defense of § 2 (b) constitutes a "controlling circumstance" precluding liability under [§ 1](#) of the Sherman Act, and thus an instruction allowing the jury to ignore the defendants' purpose in engaging in the alleged misconduct could not be sustained. *Held:*

1. A defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal

presumption of wrongful intent from proof of an effect on prices. Since the trial judge's instruction on the verification issue had this prohibited effect, it was improper. Pp. 434-446.

(a) The Sherman Act is not to be construed as mandating a regime of strict-liability crimes; rather the criminal offenses defined therein are to be construed as including intent as an element. Pp. 436-443.

(b) Action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws. Where carefully planned and calculated conduct is being scrutinized [\*\*\*\*5] in the context of a criminal prosecution, the perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent. Pp. 443-446.

2. A good-faith belief, rather than an absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor suffices to invoke the § 2 (b) defense; exchanges of price information, even when putatively for the purpose of Robinson-Patman Act compliance, must remain subject to close scrutiny under the Sherman Act. Therefore, the Court of Appeals erred in treating interseller price verification even as a limited "controlling circumstance" exception precluding Sherman Act liability. Pp. 447-459.

3. The *ex parte* meeting between the trial judge and the jury foreman was improper, and the Court of Appeals would have been justified in reversing the convictions solely because of the risk that the foreman believed the judge was insisting on a dispositive verdict. Such a meeting is pregnant with possibilities for error, since it is difficult to contain, much less to anticipate, the direction the conversation will take at such a meeting, any occasion which leads to communication [\*\*\*\*6] with the whole jury panel through one juror inevitably risks innocent misstatements of the law and misinterpretations despite the undisputed good faith of the participants, and the absence of counsel from the meeting aggravates the problems of having one juror serve as a conduit for communication with the whole panel. Here the meeting was allowed to drift into a supplemental instruction relating to the jury's obligation to reach a verdict, and counsel were denied any chance to correct whatever mistaken impression the foreman might have taken from the meeting. Pp. 459-462.

4. The trial judge's charge concerning participation in the conspiracy, although perhaps not completely clear, was sufficient, but his charge on withdrawal from the conspiracy was erroneous, since it limited the jury's consideration to only two circumscribed and arguably impractical methods of demonstrating withdrawal, rather than permitting consideration of any affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach coconspirators. Pp. 462-465.

**Counsel:** Deputy Solicitor General Friedman argued the cause for the United States. With him on the [\*\*\*\*7] briefs were Solicitor General McCree, Assistant Attorney General Shenefield, Frank H. Easterbrook, Robert B. Nicholson, Rodney O. Thorson, and Robert J. Wiggers.

H. Francis DeLane, W. Donald McSweeney, and Fred H. Bartlit, Jr., argued the cause for respondents. With them on the briefs were Stephen A. Stack, Jr., Mari M. Gursky, William A. Montgomery, Joseph R. Lundy, Thomas A. Gottschalk, Robert C. Keck, James G. Hiering, Cloyd R. Mellott, William B. Mallin, J. Gary Kosinski, D. Richard Funk, Clark M. Clifford, Carson M. Glass, and Thomas Richard Spradlin. \*

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\* A brief of amici curiae urging reversal was filed for their respective States by Evelle J. Younger, Attorney General of California, Sanford N. Gruskin, Chief Assistant Attorney General, Warren J. Abbott, Assistant Attorney General, and Michael I. Spiegel and Charles M. Kagay, Deputy Attorneys General; William J. Baxley, Attorney General of Alabama, and Thomas Troy Zieman, Jr., Jerry L. Weidler, and Susan Beth Farmer, Assistant Attorneys General; Bruce E. Babbitt, Attorney General of Arizona, and Alison B. Swan, Assistant Attorney General; J. D. McFarlane, Attorney General of Colorado, and Robert F. Hill, First Assistant Attorney General; Carl R. Ajello, Attorney General of Connecticut; Theodore L. Sendak, Attorney General of Indiana; Curt Schneider, Attorney General of Kansas, and Thomas W. Regan, Assistant Attorney General; William J. Guste, Jr., Attorney General of Louisiana; Francis B. Burch, Attorney General of Maryland; John Ashcroft, Attorney General of Missouri; William F. Hyland, Attorney General of New Jersey; Toney Anaya, Attorney General of New Mexico; Louis J. Lefkowitz, Attorney General of New York, and John M. Desiderio, Assistant Attorney General; Rufus L. Edmisten, Attorney General of North Carolina, and David S. Crump, Special Deputy Attorney General; James A. Redden, Attorney General of Oregon, and Stephen L. Dunne; John L. Hill, Attorney General of Texas; Robert B. Hansen, Attorney General of Utah; M. Jerome Diamond, Attorney General of

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**Judges:** BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, and WHITE, JJ., joined; in all but Part IV of which STEWART, J., joined; in Parts I, II, V, and a portion of Part III of which POWELL, J., joined; in Part I and a portion of Part V of which REHNQUIST, J., joined; and in all but Part II of which STEVENS, J., joined. POWELL, J., filed an opinion concurring in part, post, p. 469. REHNQUIST, J., post, p. 471, and STEVENS, J., post, p. 474, filed opinions concurring in part and dissenting in part. BLACKMUN, J., took no part in the consideration or decision of the case.

**Opinion by:** BURGER

## Opinion

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[\*426] [\*\*\*862] [\*\*2868] MR. CHIEF JUSTICE **BURGER** delivered the opinion of the Court.

This case presents the following questions: (a) whether intent is an element of a criminal antitrust offense; (b) whether an exchange of price information for purposes of compliance with the Robinson-Patman Act is exempt from Sherman Act scrutiny; (c) the adequacy of jury instructions on membership in and withdrawal from the alleged conspiracy; and (d) the propriety of an *ex parte* meeting between the trial judge and the foreman of the jury.

I

Gypsum board, a laminated [\*\*\*\*9] type of wallboard composed of paper, vinyl, or other specially treated coverings over a gypsum core, has in the last 30 years substantially replaced wet plaster as the primary component of interior walls and ceilings in residential and commercial [\*\*\*863] construction. The product is essentially fungible; differences in price, credit terms, and delivery services largely dictate the purchasers' choice between competing suppliers. Overall demand, however, is governed by the level of construction activity and is only marginally affected by price fluctuations.

The gypsum board industry is highly concentrated, with the number of producers ranging from 9 to 15 in the period 1960-1973. The eight largest companies accounted for some 94% of the national sales with the seven "single-plant producers" <sup>1</sup> accounting for the remaining 6%. Most of the major producers and a large number of the single-plant producers are members of the Gypsum Association which since 1930 has served as a trade association of gypsum board manufacturers.

[\*\*\*\*10] [\*427] A

Beginning in 1966, the Justice Department, as well as the Federal Trade Commission, became involved in investigations into possible antitrust violations in the gypsum board industry. In 1971, a grand jury was empaneled and the investigation continued for an additional 28 months. In late 1973, an indictment was filed in the United

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Vermont; Anthony F. Troy, Attorney General of Virginia; Slade Gorton, Attorney General of Washington, and Thomas L. Boeder, Assistant Attorney General; Bronson C. LaFollette, Attorney General of Wisconsin, and Michael L. Zaleski, Assistant Attorney General.

Stanley T. Kaleczyc, Lawrence B. Kraus, and Stephen A. Bokat filed a brief for the Chamber of Commerce of the United States as amicus curiae.

<sup>1</sup> The major producers operate numerous plants to serve a wide range of geographical markets. The single-plant producers are limited in terms of the markets they can serve because of the difficulties and expense involved in long-distance transportation of gypsum board.

States District Court for the Western District of Pennsylvania charging six major manufacturers and various of their corporate officials with violations of § 1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U. S. C. § 1.<sup>2</sup>

[\*\*\*\*11] The indictment charged that the defendants had engaged in a combination and conspiracy "[beginning] sometime prior to 1960 and continuing thereafter at least until sometime in 1973," App. 34, in restraint of interstate trade and commerce in the manufacture and sale of gypsum board. The alleged combination and conspiracy consisted of:

"[A] continuing agreement understanding and concert of action among the defendants and co-conspirators to (a) raise, fix, maintain and stabilize the prices of gypsum board; (b) fix, maintain and stabilize the terms and conditions of sale thereof; and (c) adopt and maintain uniform methods of packaging and handling such gypsum board." *Ibid.*

[\*428] The indictment proceeded to specify some 13 types of actions taken by conspirators "[in] formulating and effectuating" the [\*\*2869] combination and conspiracy, the most relevant of which, for our purposes, is specification (h) which alleged that the conspirators

[\*\*\*864] "telephoned or otherwise contacted one another to exchange and discuss current and future published or market prices and published or standard terms and conditions of sale and to ascertain alleged deviations [\*\*\*\*12] therefrom."

The bill of particulars provided additional details about the continuing nature of the alleged exchanges of competitive information and the role played by such exchanges in policing adherence to the various other illegal agreements charged.

## B

The first skirmish in the protracted litigation of this case was a motion for dismissal filed by the defendants alleging that their due process rights had been denied because of unreasonable preindictment delay. The District Court, after holding a five-day evidentiary hearing on the motion, concluded that there was "no evidence of unreasonable delay on the part of the Government," 383 F.Supp. 462, 470 (WD Pa. 1974), and that the defendants were not "prejudiced to any extraordinary degree whatsoever by the chain of events leading to this indictment." *Ibid.* The District Court denied a motion to dismiss the indictment. Thereafter nine of the defendants entered pleas of *nolo contendere* and were sentenced.<sup>3</sup> The trial of the remaining seven defendants commenced on March 3, 1975, and lasted some 19 weeks.

[\*\*\*13] [\*429] The focus of the Government's price-fixing case at trial was interseller price verification -- that is, the practice allegedly followed by the gypsum board manufacturers of telephoning a competing producer to determine the price currently being offered on gypsum board to a specific customer. The Government contended that these price exchanges were part of an agreement among the defendants, had the effect of stabilizing prices and policing agreed-upon price increases, and were undertaken on a frequent basis until sometime in 1973. Defendants disputed both the scope and duration of the verification activities, and further maintained that those exchanges of price information which did occur were for the purposes of complying with the Robinson-Patman Act<sup>4</sup>

<sup>2</sup>The corporate defendants named in the indictment were: United States Gypsum Co., National Gypsum Co., Georgia Pacific Corp., Kaiser-Gypsum Co., Inc., Celotex Corp., and Flintkote Co. The individual defendants included: the Chairman of the Board and the Executive Vice-President of United States Gypsum, the Chairman of the Board and Vice-President for Sales of National Gypsum, the President of Georgia Pacific, the President and the Vice-President and General Manager of Kaiser-Gypsum, the President of Celotex, and the Chairman of the Board and the President of Flintkote. The Gypsum Association was named as an unindicted coconspirator as were two other gypsum board producers -- Johns-Manville Corp. and Fibreboard Corp.

<sup>3</sup>The remaining corporate defendants were United States Gypsum, National Gypsum, Georgia Pacific, and Celotex, and the remaining individual defendants were the Chairman of the Board and the Vice-President of Sales of National Gypsum and the Executive Vice-President of United States Gypsum.

and preventing customer fraud. These purposes, in defendants' view, brought the disputed communications among competitors within a "controlling circumstance" exception to Sherman Act liability -- at the extreme, precluding, as a matter of law, consideration of verification by the jury in determining defendants' guilt on the price-fixing charge, and at the minimum, making the defendants' purposes in engaging in such communications [\*\*\*\*14] a threshold factual question.

The instructions on the verification issue given by the trial judge provided that if the exchanges of price information were deemed by the jury to have been undertaken [\*\*\*865] "in a good faith effort to comply with the Robinson-Patman Act," verification standing alone would not be sufficient to establish an illegal price-fixing agreement. The paragraphs immediately following, however, provided that the purpose was essentially irrelevant if the jury found that the effect of verification was to raise, [\*430] fix, maintain, or stabilize prices. The instructions on verification closed with the observation:

"The law presumes [\*\*\*\*15] that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information [\*\*2870] was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result."

The aspects of the charge dealing with the Government's burden in linking a particular defendant to the conspiracy, and the kinds of evidence the jury could properly consider in determining if one or more of the alleged conspirators had withdrawn from or abandoned the conspiracy were also a subject of some dispute between the judge and defense counsel. On the former, the disagreement was essentially over the proper specificity of the charge. Defendants requested a charge directing the jury to determine "what kind of agreement or understanding, if any, existed as to each defendant" before any could be found to be a member of the conspiracy. The trial judge was unwilling to give this precise instruction and instead emphasized at several points in the charge the jury's obligation to consider the evidence regarding the involvement of each defendant individually, and to find, as a precondition to [\*\*\*\*16] liability, that each defendant was a knowing participant in the alleged conspiracy.<sup>5</sup>

On the matter of withdrawal from the conspiracy, defendants sought an instruction stating explicitly that evidence of vigorous price competition during the period covered by the indictment could be considered by the jury as indicating abandonment of the charged conspiracy by one or more of the defendants. Substantial evidence on this subject had been [\*431] presented by the defendants in the course of the trial. The judge again was unwilling to accept defendants' construction of the applicable law and substituted an instruction specifying that withdrawal had to be established by either affirmative notice to each other member of the conspiracy or by disclosure of the illegal enterprise to law enforcement [\*\*\*\*17] officials. The trial judge allowed the defendants to argue their theory of withdrawal to the jury despite his unwillingness to refer to it explicitly in his charge.

## C

The jury retired to deliberate early on the evening of Tuesday, July 8, 1975. Supplemental instructions were given in response to questions from the jury on Wednesday and Thursday, and the hours of deliberation were shortened on Friday after the court was informed that some of the jurors were exhausted and not feeling well. On Saturday, after responding to further requests [\*\*\*866] from the jury, the judge, *sua sponte*, in open court, used the supplemental instruction approved by the Court of Appeals<sup>6</sup> to remind the jurors of their obligation to continue the

<sup>4</sup> Defendants contended that the exchange of price information or verification was necessary to enable them to take advantage of the meeting-competition defense contained in § 2 (b) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, *15 U. S. C. § 13 (b)* (1976 ed.); see Part III, *infra*.

<sup>5</sup> Relevant portions of the charge dealing with this issue are excerpted in the opinion of the Court of Appeals. *550 F.2d 115, 127 n. 12* (1977); *id. at 137-138* (Weis, J., dissenting).

<sup>6</sup> See *United States v. Fioravanti*, 412 F.2d 407 (CA3), cert. denied *sub nom. Panaccione v. United States*, 396 U.S. 837 (1969).

deliberations. Essentially the same instruction was given to the jury again on Sunday, after the judge had received a note detailing the jury's inability to reach a unanimous verdict.

[\*\*\*\*18] On Monday, the court received yet another note from the jury, this time stating that the foreman wished to "discuss the condition of the Jury" and to seek "further guidance" from the judge. The judge suggested to counsel that he confer privately with the foreman and that a transcript of the meeting be kept but impounded. The judge indicated that if his suggestion was rejected he would simply deny the foreman's request for the meeting. In response to questions from counsel, the judge stated that the purpose of the meeting would be to determine if the jury was in serious physical condition, and [\*\*432] he further indicated that no instructions on the law would be given to the foreman without calling in the jury and instructing them in open court with counsel present.<sup>7</sup> After further discussion, all counsel [\*\*2871] agreed, albeit somewhat reluctantly, to the proposed meeting.

[\*\*\*\*19] Most of the discussion between the jury foreman and the judge concerned the deteriorating state of health of the jurors after almost five months on the case followed by five days of intensive deliberations and the existence of personality conflicts among the members of the panel. The foreman also stressed at least twice during the conversation with the judge his belief that the jury was unable to reach a verdict and that further discussion would not eliminate the disagreements which existed. The judge indicated that while he would take into consideration what the foreman had said, he wanted the jury to continue its deliberations. Near the close of the meeting, the following colloquy took place:

"THE COURT. I would like to ask the jurors to continue their deliberations and I will take into consideration what you have told me. That is all I can say."

"MR. RUSSELL. I appreciate it. It is a situation I don't know how to help you get what you are after."

"THE COURT. Oh, I am not after anything."

"MR. RUSSELL. You are after a verdict one way or the other."

"THE COURT. Which way it goes doesn't make any difference to me."<sup>8</sup>

[\*\*\*\*20] Shortly thereafter, the foreman returned to the jury room and deliberations continued. The judge then informed counsel, in abbreviated fashion, what had transpired at the meeting with the foreman, and of [\*\*\*867] his direction that the deliberations [\*433] continue.<sup>9</sup> Defense counsel asked to see the transcript of the *in camera* meeting and moved for a mistrial because of the jury's apparent deadlock. These requests were denied,<sup>10</sup> although the judge indicated that if no verdict were rendered by the following Friday, he would then reconsider the mistrial motions. The following morning, the jury returned guilty verdicts against each of the defendants.

[\*\*\*\*21] D

The Court of Appeals for the Third Circuit reversed the convictions. [550 F.2d 115 \(1977\)](#). The panel was unanimous in its rejection of the claim of preindictment delay, but divided over the proper disposition of the remaining issues.

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<sup>7</sup> The judge observed that the only instruction he might give the foreman was "to go back and continue his deliberations." App. 1823.

<sup>8</sup> The complete colloquy between the foreman and the judge is reproduced as an appendix to this opinion.

<sup>9</sup> "Significantly, the judge did not tell counsel about the foreman's opinion that the jury was hopelessly deadlocked; did not indicate that the foreman was under the impression that the court wanted a definite verdict either for the prosecution or the defendants; and did not mention the directive to the jury that it should 'see if [it] can come to a verdict.'" [550 F.2d, at 132](#) (Adams, J., concurring).

<sup>10</sup> After the conclusion of the trial, the Court of Appeals ordered the transcript of the meeting between the judge and the foreman released to counsel to aid them in preparation of the appeal.

Two judges agreed that the trial judge erred in instructing the jury that an effect on prices resulting from an agreement to exchange price information made out a Sherman Act violation regardless of whether respondents' sole purpose in engaging in such exchanges was to establish a defense to price-discrimination charges. Instead, they regarded such a purpose, if certain conditions were met,<sup>11</sup> as constituting a "controlling [\*434] circumstance" which, under *United States v. Container Corp.*, 393 U.S. 333 (1969), would excuse what might otherwise constitute an antitrust violation. One judge considered the instructions regarding the purpose and scope of the conspiracy and the [\*\*2872] kinds of conduct necessary to demonstrate a withdrawal therefrom to be infirm, while another concluded that the convictions should be reversed because the trial judge "improperly induced" the jury into reaching a verdict [\*\*\*\*22] during the *in camera* conversation with the foreman.

One judge, in dissent, would have sustained the convictions. He regarded the charge on verification to be consistent with *Container Corp.*, and rejected the notion that the Robinson-Patman Act required the exchange of price information even in the limited circumstances identified by the majority. Neither of the alleged infirmities in the general conspiracy instructions, in his view, afforded any basis for reversal, and he [\*\*\*\*23] disagreed with the characterization of the trial judge's conduct as coercing a verdict.

We granted certiorari, 434 U.S. 815 (1977), and we affirm.

[\*\*\*868] //

We turn first to consider the jury instructions regarding the elements of the price-fixing offense charged in the indictment. Although the trial judge's instructions on the price-fixing issue are not without ambiguity, it seems reasonably clear that he regarded an effect on prices as the crucial element of the charged offense. The jury was instructed that if it found interseller verification had the effect of raising, fixing, maintaining, or stabilizing the price of gypsum board, then such verification could be considered as evidence of an agreement to so affect prices. They were further charged, and it is this point which gives rise to our present concern, that "if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result." App. 1722. (Emphasis added.)

[\*435] The Government characterizes this charge as entirely consistent with "this Court's long-standing rule that [\*\*\*\*24] an agreement among sellers to exchange information on current offering prices violates *Section 1* of the Sherman Act if it has either the purpose or the effect of stabilizing prices," Reply Brief for United States 1, and relies primarily on our decision in *United States v. Container Corp.*, *supra*, a civil case, to support its position. See also *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923); *Maple Flooring Mfg. Assn. v. United States*, 268 U.S. 563 (1925); *Cement Mfrs. Protective Assn. v. United States*, 268 U.S. 588 (1925). In this view, the trial court's instructions would not be erroneous, even if interpreted, as they were by the Court of Appeals, to direct the jury to convict if it found that verification had an effect on prices, regardless of the purpose of the respondents. The Court of Appeals rejected the Government's "effects alone" test, holding instead that in certain limited circumstances, a purpose of complying with the Robinson-Patman Act would constitute a controlling circumstance [\*\*\*\*25] excusing Sherman Act liability, and hence an instruction allowing the jury to ignore purpose could not be sustained.

LEdHN[1A] [↑] [1A] LEdHN[2A] [↑] [2] LEdHN[3A] [↑] [3A] LEdHN[4A] [↑] [4A] We agree with the Court of Appeals that HN1 [↑] an effect on prices, without more, will not support a criminal conviction under the Sherman Act, but we do not base that conclusion on the existence of any conflict between the requirements of the Robinson-Patman and the Sherman Acts.<sup>12</sup> Rather, we hold that a defendant's state of mind or intent is an element of a

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<sup>11</sup> "Therefore, appellants were entitled to an instruction that their verification practice would not violate the Sherman Act if the jury found: (1) the appellants engaged in the practice solely to comply with the strictures of Robinson-Patman; (2) they had first resorted to all other reasonable means of corroboration, without success; (3) they had good, independent reason to doubt the buyers' truthfulness; and (4) their communication with competitors was strictly limited to the one price and one buyer at issue." *Id.*, at 126.

<sup>12</sup> See Part III, *infra*.

criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices. Cf. [Morissette v. United States, 342 U.S. 246, 274-275 \(1952\)](#). [\*\*\*\*26] Since the challenged instruction, [\*\*2873] as we read it, had this prohibited [\*436] effect, it is disapproved. We are unwilling to construe the Sherman Act as mandating a [\*\*\*869] regime of strict-liability criminal offenses.<sup>13</sup>

[\*\*\*\*27] A

[LEdHN\[5\]](#) [5]We start with the familiar proposition that [HN3](#) "[the] existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." [Dennis v. United States, 341 U.S. 494, 500 \(1951\)](#). See also [United States v. Freed, 401 U.S. 601, 613 \(1971\)](#) (BRENNAN, J., concurring in judgment); [United States v. Balint, 258 U.S. 250, 251-253 \(1922\)](#). In a much-cited passage in [Morissette v. United States, supra, at 250-251](#), Mr. Justice Jackson speaking for the Court observed:

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as [\*\*\*\*28] the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common [\*437] law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.'" (Footnotes omitted.)

Although Blackstone's requisite "vicious will" has been replaced by more sophisticated and less colorful characterizations of the mental state required to support criminality, see ALI, Model Penal Code § 2.02 (Prop. Off. Draft 1962), intent generally remains an indispensable element of a criminal offense. This is as true in a sophisticated criminal antitrust case as in one involving any other criminal offense.

This Court, in keeping with the common-law tradition and with the general injunction that [HN4](#) "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," [Rewis v. United States, 401 U.S. 808, 812 \(1971\)](#), [\*\*\*\*29] has on a number of occasions read a state-of-mind component into an offense even when the statutory definition did not in terms so provide. See, e. g., [Morissette v. United States, supra](#). Cf. [Lambert v. California, 355 U.S. 225 \(1957\)](#). Indeed, the holding in *Morissette* can be fairly read as establishing, [HN5](#) at least with regard to crimes having their origin in the common law, an interpretative presumption that [\*\*\*870] *mens rea* is required. "[Mere] omission . . . of intent [in the statute] will not be construed as eliminating that element from the crimes denounced"; instead Congress will be presumed to have legislated against the background of our traditional legal concepts which render intent a critical factor, and "absence of contrary direction [will] be taken as satisfaction with widely accepted definitions, not as a departure from them." [342 U.S., at 263](#).

[LEdHN\[6\]](#) [6]While strict-liability offenses are not unknown to the criminal law and do not [\*\*\*\*30] invariably offend constitutional requirements, see [Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 \(1910\)](#), [\*\*2874] the limited circumstances in which Congress has created and this Court has recognized such offenses, see e. g., [\*438] [United States v. Balint, supra](#); [United States v. Behrman, 258 U.S. 280 \(1922\)](#); [United States v. Dotterweich, 320 U.S. 277 \(1943\)](#); [United States v. Freed, supra](#), attest to their generally disfavored status. See generally ALI, Model Penal Code, Comment on § 2.05, p. 140 (Tent. Draft No. 4, 1955); W. LaFave & A. Scott,

<sup>13</sup> [LEdHN\[4B\]](#) [4B]

Our analysis focuses solely on the elements of a criminal offense under the antitrust laws, and leaves unchanged the general rule that [HN2](#) a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect. See [United States v. Container Corp., 393 U.S. 333, 337 \(1969\)](#); *id., at 341* (MARSHALL, J., dissenting). Of course, consideration of intent may play an important role in divining the actual nature and effect of the alleged anticompetitive conduct. See [Chicago Board of Trade v. United States, 246 U.S. 231, 238 \(1918\)](#).

Criminal Law 222-223 (1972). Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement. In the context of the Sherman Act, this generally inhospitable attitude to non-*mens rea* offenses is reinforced by an array of considerations arguing against treating antitrust violations as strict-liability crimes.

B

**HN6** [↑] The Sherman Act, unlike [\*\*\*\*31] most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes.<sup>14</sup> Both civil remedies and criminal sanctions are authorized with regard to the same generalized definitions of the conduct proscribed -- restraints of trade or commerce and illegal monopolization -- without reference to or mention of intent or state of mind. Nor has judicial elaboration of the Act always yielded the clear and definitive rules of conduct which the statute omits; instead open-ended and fact-specific standards like the "rule of reason" have been applied to broad classes of conduct falling within the purview of the Act's general provisions. See, e. g., *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911); *United I<sup>\*</sup>439] States v. Topco Associates*, 405 U.S. 596, 607 (1972); *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). Simply put, the Act has not been interpreted as if it were primarily a criminal statute; it has been construed to have a "generality and adaptability comparable to that found to be desirable in constitutional provisions." *Appalachian* [\*\*\*\*32] *Coals*, [\*\*871] *Inc. v. United States*, 288 U.S. 344, 359-360 (1933). See generally 2 P. Areeda & D. Turner, *Antitrust Law* § 310 (1978).

Although in *Nash v. United States*, 229 U.S. 373, 376-378 (1913), the Court held that the indeterminacy of the Sherman Act's standards did not constitute a fatal constitutional objection to their criminal enforcement, nevertheless, this [\*\*\*\*33] factor has been deemed particularly relevant by those charged with enforcing the Act in accommodating its criminal and remedial sanctions. The 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws concluded that the criminal provisions of the Act should be reserved for those circumstances where the law was relatively clear and the conduct egregious:

"The Sherman Act, inevitably perhaps, is couched in language broad and general. Modern business patterns moreover are so complex that market effects of proposed conduct are only imprecisely predictable. Thus, it may be difficult for today's businessman to tell in advance whether projected actions will run afoul of the Sherman Act's criminal strictures. With this hazard in mind, we believe that criminal process should be used only where the law is clear and the facts reveal a flagrant offense and plain intent unreasonably to restrain trade." Report of the Attorney General's National Committee [\*\*2875] to Study the Antitrust Laws 349 (1955).

The Antitrust Division of the Justice Department took a similar, though slightly more moderate, position in its enforcement [\*440] guidelines issued [\*\*\*\*34] contemporaneously with the 1955 Report of the Attorney General's Committee:

"In general, the following types of offenses are prosecuted criminally: (1) price fixing; (2) other violations of the Sherman Act where there is proof of a specific intent to restrain trade or to monopolize; (3) a less easily defined category of cases which might generally be described as involving proof of use of predatory practices (boycotts for example) to accomplish the objective of the combination or conspiracy; (4) the fact that a defendant has previously been convicted of or adjudged to have been, violating the antitrust laws may warrant indictment for a second offense. . . . The Division feels free to seek an indictment in any case where a prospective defendant has

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<sup>14</sup> Senator Sherman adverted to the open texture of the statutory language in 1890 and accurately forecast its consequence -- a central role for the courts in giving shape and content to the Act's proscriptions.

"I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law . . ." 21 Cong. Rec. 2460 (1890).

knowledge that practices similar to those in which he is engaging have been held to be in violation of the Sherman Act in a prior civil suit against other persons." <sup>15</sup> *Id., at 350.*

**[\*\*\*\*35]** While not dispositive of the question now before us, the recommendations of the Attorney General's Committee and the guidelines promulgated by the Justice Department highlight the same basic concerns which are manifested in our general requirement of *mens rea* in criminal statutes and suggest that these concerns **[\*\*\*872]** are at least equally salient in the antitrust context.

**LEdHN[7A]** [7A] Close attention to the type of conduct regulated by the Sherman Act buttresses this conclusion. **HN7** [7B] With certain exceptions for conduct regarded as *per se* illegal because of its unquestionably anticompetitive effects, see, e. g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), the behavior **[\*441]** proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct. Indeed, the type of conduct charged in the indictment in this case -- the exchange of price information among competitors -- is illustrative in this regard. <sup>16</sup> **[\*\*\*\*38]** The imposition of criminal liability on a corporate official, or for that matter on **[\*\*\*36]** a corporation directly, for engaging in such conduct which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken, holds out the distinct possibility of overdeterrence; salutary and procompetitive conduct lying close to the borderline of impermissible conduct might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment **[\*\*2876]** for even a good-faith error of judgment. <sup>17</sup> See 2 P. Areeda & D. Turner, *Antitrust Law* 29 **[\*442]** (1978); R. Bork, *The Antitrust Paradox* 78 (1978); Kadish, *Some Observations On the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. Chi. L. Rev. 423, 441-442 (1963). Further, the use of criminal sanctions in such circumstances would be difficult to square with the generally accepted functions of the criminal law. See Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401, 422-425 (1958); ALI, **[\*\*\*873]** *Model Penal Code*, Comment on § 2.05, p. 140 (Tent. Draft No. 4, 1955). The criminal sanctions would be used, not **[\*\*\*37]** to punish conscious and calculated wrongdoing at odds with statutory proscriptions, but instead simply to regulate business practices regardless of the intent with which they were undertaken. While in certain cases we have imputed a regulatory purpose to Congress in choosing to employ criminal sanctions, see, e.

<sup>15</sup> In 1967, the Antitrust Division refined its guidelines to emphasize that criminal prosecutions should only be brought against willful violations of the law. See The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Crime and Its Impact -- An Assessment 110 (1967).

<sup>16</sup> **LEdHN[7B]** [7B]

**HN8** [7B] The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive. For this reason, we have held that such exchanges of information do not constitute a *per se* violation of the Sherman Act. See, e. g., *United States v. Citizens & Southern Nat. Bank*, 422 U.S. 86, 113 (1975); *United States v. Container Corp.*, 393 U.S., at 338 (Fortas, J., concurring). A number of factors including most prominently the structure of the industry involved and the nature of the information exchanged are generally considered in divining the procompetitive or anticompetitive effects of this type of interseller communication. See *United States v. Container Corp.*, *supra*. See generally L. Sullivan, *Law of Antitrust* 265-274 (1977). Exchanges of current price information, of course, have the greatest potential for generating anticompetitive effects and although not *per se* unlawful have consistently been held to violate the Sherman Act. See *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921); *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923); *United States v. Container Corp.*, *supra*.

<sup>17</sup> The possibility that those subjected to strict liability will take extraordinary care in their dealings is frequently regarded as one advantage of a rule of strict liability. See J. Hall, *General Principles of Criminal Law* 344 (2d ed. 1960); W. LaFave & A. Scott, *Criminal Law* 222-223 (1972). However, where the conduct proscribed is difficult to distinguish from conduct permitted and indeed encouraged, as in the antitrust context, the excessive caution spawned by a regime of strict liability will not necessarily redound to the public's benefit. The antitrust laws differ in this regard from, for example, laws designed to insure that adulterated food will not be sold to consumers. In the latter situation, excessive caution on the part of producers is entirely consistent with the legislative purpose. See *United States v. Park*, 421 U.S. 658, 671-672 (1975).

g., [United States v. Balint, 258 U.S. 250 \(1922\)](#), the availability of a range of nonpenal alternatives to the criminal sanctions of the Sherman Act negates the imputation of any such purpose to Congress in the instant context.<sup>18</sup> See generally Baker, To Indict or Not To Indict: [\*443] Prosecutorial Discretion in Sherman Act Enforcement, 63 Cornell L. Rev. 405 (1978).

[\*\*\*\*39] [LEdHN\[3B\]](#) [3B]For these reasons, we conclude that [HN9](#) the criminal offenses defined by the Sherman Act should be construed as including intent as an element.<sup>19</sup>

[\*\*\*\*40] C

[LEdHN\[8A\]](#) [8A]Having concluded that intent is a necessary element of a criminal antitrust violation, the task remaining is to treat the [\*2877] practical aspects of this requirement.<sup>20</sup> As we have noted, the language of the Act provides minimal assistance in determining what standard of intent is appropriate, and the sparse legislative [\*444] history of the criminal provisions is similarly unhelpful. We must therefore turn to more general sources and traditional understandings of the nature of the element of intent in the criminal law. In so doing, we must try to avoid "the [\*874] variety, disparity and confusion" of judicial definitions of the "requisite but elusive mental element" of criminal offenses. [Morissette v. United States, 342 U.S., at 252.](#)

[\*\*\*\*41] [LEdHN\[9\]](#) [9] [LEdHN\[10\]](#) [10]The ALI Model Penal Code is one source of guidance upon which the Court has relied to illuminate questions of this type. Cf. [Leary v. United States, 395 U.S. 6, 46 n. 93 \(1969\)](#); [Turner v. United States, 396 U.S. 398, 416 n. 29 \(1970\)](#). [HN11](#) Recognizing that "mens rea is not a unitary concept," [United States v. Freed, 401 U.S., at 613](#) (BRENNAN, J., concurring in judgment), the Code enumerates four possible levels of intent -- purpose, knowledge, recklessness, and negligence. In dealing with the kinds of business decisions upon which the antitrust laws focus, the concepts of recklessness and negligence have no place. Our question instead is whether a criminal violation of the antitrust laws requires, in addition to proof of anticompetitive effects, a demonstration that the disputed conduct was undertaken with the "conscious object" of

<sup>18</sup> Congress has recently increased the criminal penalties for violation of the Sherman Act. Individual violations are now treated as felonies punishable by a fine not to exceed \$ 100,000, or by imprisonment for up to three years, or both. Corporate violators are subject to a \$ 1 million fine. [15 U. S. C. § 1 \(1976 ed.\)](#). The severity of these sanctions provides further support for our conclusion that the Sherman Act should not be construed as creating strict-liability crimes. Cf. [Morissette v. United States, 342 U.S. 246, 256 \(1952\)](#); Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 72 (1933) (strict liability generally inappropriate when offense punishable by imprisonment). Respondents here were not prosecuted under the new penalty provisions since they were indicted prior to the December 21, 1974, effective date for the increased sanctions.

<sup>19</sup> An accommodation of the civil and criminal provisions of the Act similar to that which we approve here was suggested by Senator Sherman in response to Senator George's argument during floor debate that the Act was primarily a penal statute to be construed narrowly in accord with traditional maxims:

"The first section, being a remedial statute, would be construed liberally with a view to promote its object. It defines a civil remedy, and the courts will construe it liberally . . . .

"In providing a remedy the intention of the combination is immaterial. . . .

"The third section is a criminal statute, which would be construed strictly and is difficult to be enforced. In the present state of the law it is impossible to describe, in precise language, the nature and limits of the offense in terms specific enough for an indictment." 21 Cong. Rec. 2456 (1890).

Although the bill being debated by Senators George and Sherman differed in form from the Act as ultimately passed, the colloquy between them indicates that Congress was fully aware of the traditional distinctions between the elements of civil and criminal offenses and apparently did not intend to do away with them in the Act.

<sup>20</sup> [LEdHN\[8B\]](#) [8B]

[HN10](#) In a conspiracy, two different types of intent are generally required -- the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy. See W. LaFave & A. Scott, Criminal Law 464-465 (1972). Our discussion here focuses only on the second type of intent.

producing such effects, or whether [\*\*\*\*42] it is sufficient that the conduct is shown to have been undertaken with knowledge that the proscribed effects would most likely follow. While the difference between these formulations is a narrow one, see ALI, Model Penal Code, Comment on § 2.02, p. 125 (Tent. Draft No. 4, 1955), we conclude that action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws.<sup>21</sup>

[\*\*\*\*43] [\*445] Several considerations fortify this conclusion. The element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness.

"[It] is [HN12](#)<sup>↑</sup> now generally accepted that a person who acts (or omits to act) intends a result of his act (or omission) under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that the result is practically certain to follow from his conduct, whatever his desire may be as to that result." W. LaFave & A. Scott, Criminal Law 196 (1972).

See also G. Williams, Criminal Law: The General Part §§ 16, 18 (2d ed. 1961); Cook, Act, Intention, and Motive in the Criminal Law, 26 Yale L. J. 645, 653-658 (1917); Perkins, A Rationale of Mens Rea, 52 Harv. L. Rev. 905, 910-911 (1939). Generally this limited distinction between knowledge and purpose has not been considered important since [\*\*\*\*44] "there is good reason for imposing liability whether the defendant desired or [\[\\*\\*\\*875\]](#) merely knew of the practical certainty of the results." LaFave & Scott, *supra*, at 197. See also ALI, Model Penal Code, Comment [\[\\*\\*2878\]](#) on § 2.02, p. 125 (Tent. Draft No. 4, 1955). In either circumstance, the defendants are consciously behaving in a way the law prohibits, and such conduct is a fitting object of criminal punishment. See 1 Working Papers of the National Commission on Reform of Federal Criminal Laws 124 (1970).

Nothing in our analysis of the Sherman Act persuades us that this general understanding of intent should not be applied to criminal antitrust violations such as charged here. [HN13](#)<sup>↑</sup> The business behavior which is likely to give rise to criminal antitrust charges is conscious behavior normally undertaken [\*446] only after a full consideration of the desired results and a weighing of the costs, benefits, and risks. A requirement of proof not only of this knowledge of likely effects, but also of a conscious desire to bring them to fruition or to violate the law would [\*\*\*\*45] seem, particularly in such a context, both unnecessarily cumulative and unduly burdensome. Where carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, the perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent.

D

[LEdHN1B](#)<sup>↑</sup> [1B] When viewed in terms of this standard, the jury instructions on the price-fixing charge cannot be sustained. [HN14](#)<sup>↑</sup> "A conclusive presumption [of intent] which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense." [Morissette, supra, at 275](#). The challenged jury instruction, as we read it, had precisely this effect; the jury was told that the requisite intent followed, as a *matter of law*, from a finding that the exchange of price information had an impact on prices. Although an effect on prices may well support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted, the jury [\*\*\*\*46] must remain free to consider additional evidence before accepting or rejecting the inference. Therefore, although it would be correct to instruct the jury that it may infer intent from an effect on prices, ultimately

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<sup>21</sup> In so holding, we do not mean to suggest that conduct undertaken with the purpose of producing anticompetitive effects would not also support criminal liability, even if such effects did not come to pass. Cf. [United States v. Griffith, 334 U.S. 100, 105 \(1948\)](#). We hold only that this elevated standard of intent need not be established in cases where anticompetitive effects have been demonstrated; instead, proof that the defendant's conduct was undertaken with knowledge of its probable consequences will satisfy the Government's burden.

the decision on the issue of intent must be left to the trier of fact alone. The instruction given invaded this factfinding function.<sup>22</sup>

[\*\*\*\*47] [\*447] [\*\*\*876] [\*\*2879] III

**LEdHN[11A]** [11A]Our construction of the Sherman Act to require proof of intent as an element of a criminal antitrust violation leaves [\*448] unresolved the question upon which the Court of Appeals focused, whether verification of price concessions with competitors for the sole purpose of taking advantage of the § 2 (b) meeting-competition defense should be treated as a "controlling circumstance" precluding liability under § 1 of the Sherman Act. We now turn to that question.<sup>23</sup>

[\*\*\*\*48] A

In *Cement Mfrs. Protective Assn. v. United States*, 268 U.S. 588 (1925), the Court held exempt from Sherman Act § 1 liability an exchange of price information among competitors because the exchange of information was necessary to protect the cement manufacturers from fraudulent behavior by contractors.<sup>24</sup> Over 40 years later, in United

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<sup>22</sup> Respondents contend that "prior to the trial of this case, no court had ever held that a mere exchange of information which had a stabilizing effect on prices violated the Sherman Act, regardless of the purpose for the exchange." Joint Brief for Respondents 50. Retroactive application of "this judicially expanded definition of the crime" would, the argument continues, contravene the "principles of fair notice embodied in the Due Process Clause." *Ibid.* While we have rejected on other grounds the "effects only" test in the context of criminal proceedings, we do not agree with respondents that the prior case law dealing with the exchange of price information required proof of a purpose to restrain competition in order to make out a Sherman Act violation.

Certainly our decision in *United States v. Container Corp.*, 393 U.S. 333 (1969), is fairly read as indicating that proof of an anticompetitive effect is a sufficient predicate for liability. In that case, liability followed from proof that "the exchange of price information has had an anticompetitive effect in the industry," *id.*, at 337, and no suggestion was made that proof of a purpose to restrain trade or competition was also required. Thus, at least in the post-*Container* period, which comprises almost the entire time period at issue here, respondents' claimed lack of notice cannot be credited.

Nor are the prior cases treating exchanges of information among competitors more favorable to respondents' position. See *American Column & Lumber Co. v. United States*, 257 U.S., at 400 ("[Any] concerted action . . . to cause, or which in fact does cause, . . . restraint of competition . . . is unlawful"); *United States v. American Linseed Oil Co.*, 262 U.S. 371, 389 (1923) ("[A] necessary tendency . . . to suppress competition . . . [is] unlawful"); *Maple Flooring Mfrs. Assn. v. United States*, 268 U.S. 563, 585 (1925) (purpose to restrain trade or conduct which "had resulted, or would necessarily result, in tending arbitrarily to lessen production or increase prices" sufficient for liability). While in *Cement Mfrs. Protective Assn. v. United States*, 268 U.S. 588 (1925), an exception from Sherman Act liability was recognized for conduct intended to prevent fraud, we do not read that case as repudiating the rule set out in prior cases; instead *Cement* highlighted a narrow limitation on the application of the general rule that either purpose or effect will support liability.

We do not understand respondents to be making the related claim that they relied on the several lower court cases exempting interseller verification for purposes of complying with the Robinson-Patman Act from scrutiny under the Sherman Act, see *infra*, at 452-453, and thus should not be penalized if those decisions turn out to have been incorrect. Whatever the merits of such an argument, respondents would appear unable to invoke it since the initiation of their verification practices antedated those lower court decisions.

<sup>23</sup> This question was not resolved by the prior discussion because **HN15** [a purpose of complying with the Robinson-Patman Act by exchanging price information is not inconsistent with knowledge that such exchanges of information will have the probable effect of fixing or stabilizing prices. Since we hold knowledge of the probable consequences of conduct to be the requisite mental state in a criminal prosecution like the instant one where an effect on prices is also alleged, a defendant's purpose in engaging in the proscribed conduct will not insulate him from liability unless it is deemed of sufficient merit to justify a general exception to the Sherman Act's proscriptions. Cf. *Cement Mfrs. Protective Assn. v. United States*, *supra*.

<sup>24</sup> Respondents maintain that their verification practices not only were for the purpose of complying with the Robinson-Patman Act, but also served to protect them from fraud on the part of their customers, and thus fall squarely within the *Cement* exception. The Court of Appeals rejected this claim, *550 F.2d*, at 123 n. 9, and we find no reason to upset this determination.

States v. Container Corp., 393 U.S., at 335, Mr. Justice Douglas characterized the *Cement* holding in the following terms:

"While there was present here, as in *Cement Mfrs. Protective Assn. v. United States*, 268 U.S. 588, an exchange of prices to specific [\*\*\*877] customers, there was absent the controlling [\*449] circumstance, *viz.*, that cement manufacturers, to protect themselves from delivering to contractors more cement than was needed for a specific job and thus receiving a lower price, exchanged price information as a means of protecting their legal rights from fraudulent inducements to deliver more cement than needed for a specific job."

The use of the phrase "controlling circumstance" in *Container Corp.* implied that the exception from Sherman [\*\*\*\*49] Act liability recognized in *Cement Mfrs.* was not necessarily limited to the special circumstances of that case, although the exact scope of the exception remained largely undefined.

Since *Container Corp.*, several courts have read the controlling-circumstance exception as encompassing exchanges of price information when undertaken for the purpose of compliance with § 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act. See, e. g., *Belliston v. Texaco, Inc.*, 455 F.2d 175, 181-182 (CA10 1972); *Wall Products Co. v. National Gypsum Co.*, 326 F.Supp. 295, 312-315 (ND Cal. 1971). [\*\*\*\*50] <sup>25</sup> [\*\*\*\*51] The Court of Appeals in the instant case essentially adopted the same tack -- albeit [\*\*2880] with some additional limitations <sup>26</sup> -- finding such a step necessary to eliminate a perceived conflict between the Sherman Act's proscriptions regarding the exchange of price information among competitors and the claimed necessity of such exchanges to perfect the § 2 (b) defense. The Government challenges that resolution on two grounds: first, that there is no general controlling-circumstance exception to the Sherman Act, and second, that, in any event, there is no conflict between the two antitrust statutes which would require the prohibitions of the Sherman Act to [\*450] be tempered even to the degree mandated by the Court of Appeals' carefully circumscribed holding in this case. We agree generally with the Government as to the proper accommodation of the Sherman and Robinson-Patman Acts, and therefore find it unnecessary to address the more general question going to the existence and proper scope of the so-called controlling-circumstance exception.

B

HN16 [↑] Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, *15 U. S. C. § 13 (a)* (1976 ed.), embodies a general prohibition of price discrimination between buyers when an injury to competition is the consequence. The primary exception to the § 2 (a) bar is the meeting-competition defense which is incorporated as a proviso to the burden-of-proof requirements set out in § 2 (b):

*"Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services [\*\*\*878] or facilities furnished by a competitor."*

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<sup>25</sup> Although the *Belliston* court did not specifically refer to *Cement's* "controlling circumstance" exception, it adopted the rationale of the *Wall Products* case where that exception was explicitly relied upon to immunize verification from the proscriptions of the Sherman Act.

<sup>26</sup> See n. 11, *supra*.

The role of the § 2 (b) proviso in tempering the § 2 (a) prohibition of price discrimination was highlighted in *Standard Oil Co. v. FTC*, [340 U.S. 231 \(1951\)](#). There [\*\*\*\*52] we recognized the potential tension between the rationales underlying the Sherman and Robinson-Patman Acts and sought to effect a partial accommodation by construing § 2 (b) to provide an absolute defense to liability for price discrimination.

"We need not now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts. It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense [\*451] against a price raid by a competitor. For example, if a large customer requests his seller to meet a temptingly lower price offered to him by one of his seller's competitors, the seller may well find it essential, as a matter of business survival, to meet that price rather than to lose the customer. . . . There is . . . plain language and established practice which permits a seller, through § 2 (b), to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers." [340 U.S., at 249-250](#). [\*\*\*\*53]

LEdHN[12]<sup>↑</sup> [12]In *FTC v. A. E. Staley Mfg. Co.*, [324 U.S. 746 \(1945\)](#), the Court provided the first and still the most complete explanation of HN17<sup>↑</sup> the kind of showing which a seller must make in order to satisfy the good-faith requirement of the § 2 (b) defense:

"Section 2 (b) does not require the seller to justify price discriminations by showing that in fact they met a competitor's price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's. . . . We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of [\*\*2881] facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *Id., at 759-760*.

Application of these standards to the facts in *Staley* led to the conclusion that the § 2 (b) defense had not been made out. The record [\*\*\*\*54] revealed that the lower price had been based simply on reports of salesmen, brokers, or purchasers with no efforts having been made by the seller "to investigate or verify" the reports or the character and reliability of the informants. [324 U.S., at 758](#). Similarly, in *Corn Products Co. v. FTC*, [324 U.S. 726 \(1945\)](#), decided the same day, the § 2 (b) defense was not allowed because "[the] only evidence said to [\*452] rebut the *prima facie* case . . . of the price discriminations was given by witnesses who had no personal knowledge of the transactions, and was limited to statements of each witness's assumption or conclusion that the price discriminations [\*\*\*879] were justified by competition." [324 U.S., at 741](#).

*Staley*'s "investigate or verify" language coupled with *Corn Products*' focus on "personal knowledge of the transactions" have apparently suggested to a number of courts that, at least in certain circumstances, direct verification of discounts between competitors may be necessary to meet the burden-of-proof requirements of the § 2 (b) defense. See *Gray v. Shell Oil Co.*, [469 F.2d 742, 746-747 \(CA9 1972\)](#); [\*\*\*\*55] *Belliston v. Texaco, Inc.*, [455 F.2d, at 181-182](#); *Webster v. Sinclair Refining Co.*, [338 F.Supp. 248, 251-252 \(SD Ala. 1971\)](#); *Wall Products Co. v. National Gypsum Co.*, [326 F.Supp., at 312-315](#); *Di-Wall, Inc. v. Fibreboard Corp.*, 1970 Trade Cases para. 73,155 (ND Cal. 1970). In none of these cases were the courts called upon to address directly the question of whether interseller verification was actually required to satisfy § 2 (b)'s good-faith standard; instead, the issue was presented only obliquely in the form of a defense to the alleged Sherman Act violation. The *Belliston* and *Webster* cases accepted the defense despite the absence of evidence that alternative means of corroborating the claimed price reduction had been exhausted, while the *Gray* and *Wall Products* courts found the communication between sellers

permissible only after other alternatives had been exhausted.<sup>27</sup> The Court of Appeals critically and perceptively analyzed these cases and concluded that only a very narrow exception to Sherman Act liability should be recognized; that exception would cover the relatively [\*\*\*\*56] few situations where the veracity of the buyer seeking the matching discount was legitimately in doubt, other [\*453] reasonable means of corroboration were unavailable to the seller, and the interseller communication was for the sole purpose of complying with the Robinson-Patman Act. Despite the court's efforts to circumscribe the scope of the exception it was constrained to recognize, we find its analysis unacceptable.

C

[LEdHN\[13\]](#) [↑] [13] [LEdHN\[14\]](#) [↑] [14] [HN18](#) [↑] A good-faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally [\*\*\*\*57] low price offered by a competitor is sufficient to satisfy the § 2 (b) defense. While casual reliance on uncorroborated reports of buyers or sales representatives without further investigation may not, as we noted earlier, be sufficient to make the requisite showing of good faith, nothing in the language of § 2 (b) or the gloss on that language in *Staley* and *Corn Products* indicates that direct discussions of price between competitors are required. Nor has any court, so far as we are aware, ever imposed such a requirement.<sup>28</sup> See Rowe, Pricing and the [\*\*\*880] [\*\*2882] Robinson-Patman Act, 41 A. B. A. Antitrust L. J. 98, 100-102 (1971); ABA Section of *Antitrust Law, Antitrust Law* Developments 145 n. 241 (1975). On the contrary, the § 2 (b) defense has been successfully invoked in the absence of interseller verification on numerous occasions, see, e. g., *International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714, 725-726 (CA5 1975); *Cadigan v. Texaco, Inc.*, [\*454] 492 F.2d 383 (CA9 1974); *Jones v. Borden Co.*, 430 F.2d 568, 572-574 (CA5 1970); *National Dairy Products Corp.* [\*\*\*\*58] v. *FTC*, 395 F.2d 517, 523 (CA7 1968). And in *Kroger Co. v. FTC*, 438 F.2d 1372, 1376-1377 (CA6 1971), aff'g *Beatrice Foods Co.*, 76 F. T. C. 719 (1969), the defense was recognized despite the fact that the price concession was ultimately found to have undercut that of the competition and thus technically to have fallen outside the "meet not beat" strictures of the defense. As these cases indicate, and as the Federal Trade Commission observed, it is the concept of good faith which lies at the core of the meeting-competition defense, and good faith

"is a flexible and pragmatic, not technical or doctrinaire, concept. . . . Rigid rules and inflexible absolutes are especially inappropriate in dealing with the § 2 (b) defense; the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application." [Continental Baking Co.](#), 63 F. T. C. 2071, 2163 (1963).

[\*\*\*\*59] [LEdHN\[15\]](#) [↑] [15] The so-called problem of the untruthful buyer which concerned the Court of Appeals does not in our view call for a different approach to the § 2 (b) defense. [HN19](#) [↑] The good-faith standard remains the benchmark against which the seller's conduct is to be evaluated, and we agree with the Government and the FTC that this standard can be satisfied by efforts falling short of interseller verification in most circumstances where the seller has only vague, generalized doubts about the reliability of its commercial adversary -- the buyer.<sup>29</sup> [\*\*\*\*61] Given the [\*455] fact-specific nature of the inquiry, it is difficult to predict all the factors the FTC or a

<sup>27</sup> The decision in *Di-Wall* is ambiguous on the question of whether alternatives short of verification were exhausted prior to the exchange of price information. 1970 Trade Cases, para. 73,155, p. 88,557.

<sup>28</sup> In *Viviano Macaroni Co. v. FTC*, 411 F.2d 255 (CA3 1969), the § 2 (b) defense was not recognized because the seller had relied solely on the report of its customer regarding other competitive offers without undertaking any investigation to corroborate the offer or the reliability of the customer. The Court of Appeals in the instant case read *Viviano* as at least suggesting, if not requiring, interseller verification when the veracity of the buyer was in doubt. As we read that case, however, it simply reaffirms the teaching of *Staley*, and does not compel the further conclusion that only interseller verification will satisfy the good-faith requirement, even in the particular circumstances identified by the Court of Appeals. See [550 F.2d, at 135](#) (Weis, J., dissenting).

court would consider in appraising a seller's good faith in matching a competing offer in these circumstances. Certainly, evidence that a seller had received reports of similar discounts from other customers, cf. Jones v. Borden Co., supra, at 572-573; or was threatened with a termination of purchases if the discount were not met, cf. International [\*\*\*\*60] Air Industries, Inc. v. American Excelsior Co., supra, at 726; Cadigan v. Texaco, I\*\*\*881 Inc., supra, at 386, would be relevant in this regard. Efforts to corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market data would also be probative as would the seller's past experience with the particular buyer in question.<sup>30</sup>

[\*\*\*\*62] There remains the possibility that in a limited number of situations a seller may [\*\*2883] have substantial reasons to doubt the accuracy of reports of a competing offer and may be unable to corroborate such reports in any of the generally accepted ways. Thus the defense may be rendered unavailable since unanswered [\*456] questions about the reliability of a buyer's representations may well be inconsistent with a good-faith belief that a competing offer had in fact been made.<sup>31</sup> As an abstract proposition, resort to interseller verification as a means of checking the buyer's reliability seems a possible solution to the seller's plight, but careful examination reveals serious problems with the practice.

[\*\*\*\*63] Both economic theory and common human experience suggest that interseller verification -- if undertaken on an isolated and infrequent basis with no provision for reciprocity or cooperation -- will not serve its putative function of corroborating the representations of unreliable buyers regarding the existence of competing offers. Price concessions by oligopolists generally yield competitive advantages only if secrecy can be maintained; when the terms of the concession are made publicly known, other competitors are likely to follow and any advantage to the initiator is lost in the process. See generally F. Scherer, Industrial Market Structure and Economic Performance 208-209, 449 (1970); P. Areeda, Antitrust Analysis 230-231 (2d ed. 1974); Note, Meeting Competition Under the Robinson-Patman Act, 90 Harv. L. Rev. 1476, 1480-1481 (1977). See also United States v. Container Corp., 393 U.S., at 337. Thus, if one seller offers a price concession for the purpose of winning over one of his competitor's customers, it is unlikely that the same seller will freely inform its competitor of the details of the concession so that it can be promptly matched and [\*\*\*\*64] diffused. Instead, such a seller would appear to have at least as great an incentive to misrepresent the existence [\*457] or size [\*\*\*\*882] of the discount as would the buyer who received it. Thus verification, if undertaken on a one-shot basis for the sole purpose of complying with the § 2 (b) defense, does not hold out much promise as a means of shoring up buyers' representations.

The other variety of interseller verification is, like the conduct charged in the instant case, undertaken pursuant to an agreement, either tacit or express, providing for reciprocity among competitors in the exchange of price

<sup>29</sup> "Although a seller may take advantage of the meeting competition defense only if it has a commercially reasonable belief that its price concession is necessary to meet an equally low price of a competitor, a seller may acquire this belief, and hence perfect its defense, by doing everything reasonably feasible -- short of violating some other statute, such as the Sherman Act -- to determine the veracity of a customer's statement that he has been offered a lower price. If, after making reasonable, lawful, inquiries, the seller cannot ascertain that the buyer is lying, the seller is entitled to make the sale. . . . There is no need for a seller to discuss price with his competitors to take advantage of the meeting competition defense." (Citations omitted.) Brief for United States 86-87, and n. 78. See also App. to Pet. for Cert. 97a-99a.

<sup>30</sup> It may also turn out that sustained enforcement of § 2 (f) HN20 of the Clayton Act, as amended by the Robinson-Patman Act, which imposes liability on buyers for inducing illegal price discounts, will serve to bolster the credibility of buyers' representations and render reliance thereon by sellers a more reasonable and secure predicate for a finding of good faith under § 2 (b). See generally Note, Meeting Competition Under the Robinson-Patman Act, 90 Harv. L. Rev. 1476, 1495-1496 (1977). In both *Great Atlantic & Pacific Tea Co. v. FTC, 557 F.2d 971 (CA2 1977)*, and *Kroger v. FTC, 438 F.2d 1372 (CA6 1971)*, buyers have been held liable under § 2 (f) despite the fact that the sellers were either found not to have violated the Robinson-Patman Act (*Kroger*) or were not charged with such a violation (*A&P*). Certiorari has been granted in *Great Atlantic & Pacific Tea Co.* to consider the permissibility of enforcing the Robinson-Patman Act in this manner. *435 U.S. 922 (1978)*.

<sup>31</sup> We need not and do not decide that in all such circumstances the defense would be unavailable. The case-by-case interpretation and elaboration of the § 2 (b) defense is properly left to the other federal courts and the FTC in the context of concrete fact situations. We note also that our conclusions regarding the proper interpretation of § 2 (f), see n. 30, *supra*, may well affect subsequent application of the § 2 (b) defense.

information. Such an agreement would make little economic sense, in our view, if its sole purpose were to guarantee all participants the opportunity to match the secret price concessions of other participants under § 2 (b). For in such circumstances, each seller would know that his price concession could not be kept from his competitors and no seller participating in the information-exchange arrangement would, therefore, have any incentive for deviating from the prevailing price level in the industry. See *United States v. Container Corp., supra, at 336-337.* [\*\*\*\*65] Regardless of its putative purpose, the most likely consequence of any such agreement to exchange price information would be the stabilization of industry prices. See Scherer, *supra*, at 449; Note, Antitrust Liability for an Exchange of Price Information -- What Happened to *Container Corp.*, 63 Va. L. Rev. 639, 666 [\*\*2884] (1977). Instead of facilitating use of the § 2 (b) defense, such an agreement would have the effect of eliminating the very price concessions which provide the main element of competition in oligopolistic industries and the primary occasion for resort to the meeting-competition defense.

Especially in oligopolistic industries such as the gypsum board industry, the exchange of price information among competitors carries with it the added potential for the development of concerted price-fixing arrangements which lie at the core of the Sherman Act's prohibitions. The Department of Justice's 1977 Report on the Robinson-Patman Act focused on the growing use of the Act as a cover for price fixing; former [\*458] Antitrust Division Assistant Attorney General Kauper discussed the mechanics of the process:

"And thus you find in some industries [\*\*\*\*66] relatively extensive exchanges of price information for the purpose, at least the stated purpose, of complying with the Robinson-Patman Act . . . .

"Now, the mere exchange of price information itself may tend to stabilize prices. But I think it is also relatively common that once that exchange process begins, certain understandings go along with it -- that we will exchange prices, but it will be understood, for example, you will not undercut my prices.

"And from there it is a rather easy step into a full-fledged price-fixing agreement. I think we have seen that from time to time, and I suspect we will continue to see it as long as there continues to be a need to justify particular price discriminations in the terms of the Robinson-Patman Act." United States Department of Justice, Report on the Robinson-Patman Act 58-61 (1977).

LEdHN[11B] [↑] [11B] We are left, therefore, on the one hand, with doubts about both the need for and the efficacy of interseller verification as a means of facilitating [\*\*\*883] compliance with § 2 (b), and, on the other, with recognition of the tendency for price discussions between competitors [\*\*\*\*67] to contribute to the stability of oligopolistic prices and open the way for the growth of prohibited anticompetitive activity. To recognize even a limited "controlling circumstance" exception for interseller verification in such circumstances would be to remove from scrutiny under the Sherman Act conduct falling near its core with no assurance, and indeed with serious doubts, that competing antitrust policies would be served thereby. In *Automatic Canteen Co. v. FTC, 346 U.S. 61, 74 (1953)*, the Court suggested that as a general rule the Robinson-Patman Act should be construed so as to insure its coherence with "the broader antitrust policies that have been laid down by Congress"; that observation [\*459] buttresses our conclusion that exchanges of price information -- even when putatively for purposes of Robinson-Patman Act compliance -- must remain subject to close scrutiny under the Sherman Act.<sup>32</sup>

[\*\*\*\*68] IV

<sup>32</sup> That the § 2 (b) defense may not be available in every situation where a competing offer has in fact been made is not, in our view, a meaningful objection to our holding. HN21 [↑] The good-faith requirement of the § 2 (b) defense implicitly suggests a somewhat imperfect matching between competing offers actually made and those allowed to be met. Unless this requirement is to be abandoned, it seems clear that inadequate information will, in a limited number of cases, deny the defense to some who, if all the facts had been known, would have been entitled to invoke it. For reasons already discussed, interseller verification does not provide a satisfactory solution to this seemingly inevitable problem of inadequate information. Moreover, § 2 (b) affords only a defense to liability and not an affirmative right under the Act. While sellers are, of course, entitled to take advantage of the defense when they can satisfy its requirements, efforts to increase its availability at the expense of broader, affirmative antitrust policies must be rejected.

LEdHN[16A] [16A] One judge of the Court of Appeals was of the view that reversal was required not only because of infirmities in the antitrust instruction, but also because the trial judge had "[encroached] on [the] [jury's] authority" and had foreclosed "a possible 'no verdict' [\*\*2885] outcome." 550 F.2d, at 134 (Adams, J., concurring). Our own review of the record and the circumstances surrounding the deliberations of the jury, and in particular the *ex parte* communications between the judge and jury foreman, leads us to the same conclusion.

After hearing a mass of testimony for nearly five months, the jurors were sequestered when deliberations commenced. On the second and third days of deliberations, supplemental instructions were given in response to jury questions; on the fourth day, the hours of deliberations were shortened because of reported nervous tension among the jurors; on the fifth day, the judge *sua sponte* delivered what amounted to a modified [\*460] *Allen* charge<sup>33</sup> [\*\*\*\*70] in the course of providing further answers to questions from the jury; and on the sixth [\*\*\*\*69] day, the modified *Allen* charge was repeated, this time in response to a note from the jury that it was unable to reach a verdict. Against this [\*\*\*884] background of internal pressures and apparent disagreements and confusion among the jurors, the jury foreman, on the morning of the seventh day of deliberations, requested a meeting with the judge "to discuss the condition of the Jury and further guidance." The District Judge suggested that he meet alone with the jury foreman and counsel acquiesced. The transcript of the meeting, which was initially impounded but released for purposes of the appeal, contained several references by the foreman to the jury's deadlock, as well as an exchange suggesting the strong likelihood that the foreman carried away from the meeting the impression that the judge wanted a verdict "one way or the other." The judge's report to counsel summarizing the discussion made no reference to either of these matters.<sup>34</sup>

LEdHN[17] [17] We find this sequence of events disturbing for a number of reasons. Any *ex parte* meeting or communication between the judge and the foreman of a deliberating jury is pregnant with possibilities for error. This record amply demonstrates that even an experienced trial judge cannot be certain to avoid all the pitfalls inherent in such an enterprise. First, it is difficult to contain, much less to anticipate, the direction the conversation will take at such a meeting. Unexpected questions or comments can generate unintended and misleading impressions of the judge's subjective personal views which have no place in his instruction to the jury -- all the more so when counsel are not present to challenge the statements. Second, [\*461] any occasion which leads to communication with the whole jury panel through one juror inevitably risks innocent misstatements of the law and misinterpretations despite the undisputed good faith of the participants. Here, there developed a set of circumstances [\*\*\*\*71] in which it can fairly be assumed that the foreman undertook to restate to his fellow jurors what he understood the judge to have implied regarding the resolution of the case in a definite verdict "one way or the other." There is, of course, no way to determine precisely what the foreman said when he returned to the jury room.

Finally, the absence of counsel from the meeting and the unavailability of a transcript or full report of the meeting aggravate the problems of having one juror serve as a conduit for communicating instructions to the whole panel. While all counsel acquiesced to the judge's *ex parte* conference with the jury foreman, they did so on the express understanding that the judge merely intended -- as no doubt at the time he did -- to receive from the foreman a report on the state of affairs in the jury room and the prospects for a verdict. Certainly none of the parties waived the right to a full and accurate report of what transpired at the meeting nor did they agree that the judge [\*\*2886] was to repeat the instructions as to his understandable reluctance to accept the jury's inability to reach a verdict. Because neither counsel received a full report from [\*\*\*\*72] the judge, they were not aware of the scope of the conversation between the foreman and the judge, of the judge's statement that the jury should continue to deliberate in order to reach a verdict, or of the real risk that the foreman's impression was that a verdict [\*\*\*885] "one way or the other" was required. Counsel were thus denied any opportunity to clear up the confusion regarding the judge's direction to the foreman, which could readily have been accomplished by requesting that the whole jury

<sup>33</sup> Allen v. United States, 164 U.S. 492 (1896). An injunction to the jury "to deliberate with a view toward reaching an agreement if you can, without violence, to individual judgment," was also included in the judge's original instruction prior to the commencement of deliberations.

<sup>34</sup> See n. 9, *supra*.

438 U.S. 422, \*461; 98 S. Ct. 2864, \*\*2886; 57 L. Ed. 2d 854, \*\*\*885; 1978 U.S. LEXIS 131, \*\*\*\*72

be called into the courtroom for a clarifying instruction. See *Rogers v. United States*, 422 U.S. 35, 38 (1975); *Filippon v. Albion Vein Slate Co.*, 250 U.S. 76, 81 (1919). [\*462] Thus, it is not simply the action of the judge in having the private meeting with the jury foreman, standing alone -- undesirable as that procedure is -- which constitutes the error; rather, it is the fact that the *ex parte* discussion was inadvertently allowed to drift into what amounted to a supplemental instruction to the foreman relating to the jury's obligation to return a verdict, coupled with the fact that counsel were denied any chance to correct [\*\*\*\*73] whatever mistaken impression the foreman might have taken from this conversation, that we find most troubling.

While it is, of course, impossible to gauge what part the disputed meeting played in the jury's action of returning a verdict the following morning, this swift resolution of the issues in the face of positive prior indications of hopeless deadlock, at the very least, gives rise to serious questions in this regard. Cf. *Rogers v. United States, supra, at 40-41*. In *Jenkins v. United States*, 380 U.S. 445 (1965), we held an instruction directing the jury that it *had* to reach a verdict was reversible error; the logic of *Jenkins* cannot be said to be inapposite here, given the peculiar circumstances in which discussions between the judge and the foreman took place.

**LEdHN[16B]** [16B] We are persuaded that the Court of Appeals would have been justified in reversing the convictions solely because of the risk that the foreman believed the court was insisting on a dispositive verdict; a belief which we must assume was promptly conveyed to the jurors. The unintended [\*\*\*\*74] direction of the colloquy between the judge and the jury foreman illustrates the hazards of *ex parte* communications with a deliberating jury or any of its members.

V

**LEdHN[18]** [18] Respondents also challenged in the Court of Appeals the jury instructions regarding participation in the conspiracy and withdrawal therefrom; one judge on the panel concluded that these instructions were infirm. We agree with the Government [\*463] that the charge concerning participation in the conspiracy, while perhaps not as clear as it might have been, was sufficient. The jury was informed repeatedly that only a single conspiracy was alleged and that liability could only be predicated on the knowing involvement of each defendant, considered individually, in the conspiracy charged. As given,<sup>35</sup> the instruction was substantially in accord with those generally given in similar antitrust cases. See ABA Antitrust Section, Jury Instructions in Criminal Antitrust Cases 1964-1976, chs. 10, 28 (1978); 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions §§ 55.09, 55.17 (3d ed., 1977). And in any event, the disputed [\*\*\*\*75] instruction [\*\*\*886] differed in only minor and immaterial respects from the instruction requested by respondents.<sup>36</sup>

[\*\*2887] **LEdHN[19]** [19] [\*\*\*\*76] We have more difficulty with the instruction on withdrawal from the conspiracy. The jury was charged in the following terms:

"In order to find that a defendant abandoned or withdrew from a conspiracy prior to December 27, 1968, you must find, from the evidence, that he or it took some affirmative action to disavow or defeat its purpose. Mere inaction would not be enough to demonstrate abandonment. To withdraw, a defendant *either must have affirmatively notified each other member of the conspiracy* [\*464] *he will no longer participate in the undertaking so they understand they can no longer expect his participation or acquiescence, or he must make disclosures of the illegal scheme to law enforcement officials.*

<sup>35</sup> See n. 5, *supra*.

<sup>36</sup> The requested charge was as follows:

"Because the gist of the offense charged is a continuing agreement to raise, fix, maintain and stabilize prices of gypsum products, it is essential for you to determine what kind of agreement or understanding, if any, existed as to each defendant. Each defendant is chargeable with the acts of his or its fellow defendants and alleged co-conspirators only if the acts are done in furtherance of the joint venture as he or it understood it. No defendant is to be held responsible for what some of the alleged conspirators, unknown to the rest, do beyond the reasonable intendment of the common agreement or understanding, if any, to which you may find him or it a party." *550 F.2d, at 128-129, n. 13* (emphasis omitted).

"Thus, once a defendant is shown to have joined a conspiracy, in order for you to find he abandoned the conspiracy, the evidence must show that the defendant took some definite, decisive step, indicating a complete disassociation from the unlawful enterprise." (Emphasis added).

Respondents had requested a more expansive instruction which would have specifically allowed the jury to consider a "[resumption] of competitive behavior, such as intensified price [\*\*\*\*77] cutting or price wars," as affirmative action showing a withdrawal from the price-fixing enterprise. While the judge allowed this theory to be argued to the jury, he declined to include it in his instructions. The Government now seeks to defend the charge as given on the ground that the first sentence was sufficiently broad to satisfy respondents' concerns, and the third sentence, to which respondents principally object, did not in any meaningful way detract from the generality of the first.

We cannot agree. The charge, fairly read, limited the jury's consideration to only two circumscribed and arguably impractical methods of demonstrating withdrawal from the conspiracy.<sup>37</sup> Nothing that we have been able to find in the case law suggests, much less commands, that such confining blinders be placed on the jury's freedom to consider evidence regarding the continuing participation of alleged conspirators in the charged conspiracy. [HN22](#) Affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally [\*465] [\*\*\*\*78] been regarded as sufficient to establish withdrawal or abandonment. See, e. g., [Hyde v. United States, 225 U.S. 347, 369 \\*\\*\\*8871 \(1912\)](#); [United States v. Borelli, 336 F.2d 376, 385 \(CA2 1964\)](#). See also Note, Developments in the Law -- Criminal Conspiracy, 72 Harv. L. Rev. 920, 958 (1959). We conclude that the unnecessarily confining nature of the instruction, standing alone, constituted reversible error.<sup>38</sup> If a new trial takes place, an instruction correcting this error and giving the jury broader compass on the question of withdrawal must be given.

[\*\*\*\*79] Accordingly, the judgment of the Court of Appeals is

*Affirmed.*

MR. JUSTICE STEWART joins all but Part IV of this opinion.

MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case.

#### **[\*\*2888] APPENDIX TO OPINION OF THE COURT**

[Present: The foreman of the jury and the Court.]

The COURT. What is your problem, sir?

Mr. RUSSELL. I have two problems. And first of all, if I refer to a juror with a sexual gender, I would like it struck, because I would like to say juror.

The COURT. In other words, if he says he or she, make it neutral.

Mr. RUSSELL. The two problems are health and the status of the count.

The COURT. You can't tell me that now.

Mr. RUSSELL. I am not going to tell you what the status is in no way. In fact, I can't tell you, because I can't remember.

<sup>37</sup> In this case the obligation to notify "each other member" of the charged conspiracy would be a manageable task; in other situations all "other" members might not be readily identifiable.

<sup>38</sup> The instruction on withdrawal and proper evidence thereof may have been of particular importance here because respondents vigorously argued throughout the trial that competition within the industry resumed before December 27, 1968, the critical date for purposes of the applicable five-year statute of limitations.

[\*466] The COURT. All right.

Mr. RUSSELL. But first of all, I would like to thank you for that 6:30, because I don't think you would have a jury left. I am not a doctor, but these people are getting very distraught. It is not that they go into a depression and stay there; they go into a depression and they're coming out high. Now I would say at least eight of the jurors [\*\*\*\*80] are taking some kind of pill. Some of the pills have been even issued by the doctor downstairs. I am not a doctor and I can't judge these things, but I have seen one of [3] these jurors at one time I thought she was going to jump out the window. And I, just for my own sake, without telling you this, I cannot take the responsibility that this could happen. I know this is part of Mr. Keene's job, but like I say, they go high and low, and sometimes by the time I get to Mr. Keene and get him down there, they are perfectly normal again.

In fact, one of the instances was when I saw this one girl --

The COURT. May I ask this: If we discharged -- we can excuse one juror for health reasons. Is there any juror we could excuse that would help the situation? If it is more than that, there is no point.

Mr. RUSSELL. I think there is more than that, Judge. I am not a doctor, so I can't say. I'm not even sure these are true sicknesses. They seem -- [\*\*\*888] I mean, with the high and low, they seem induced, but when a person thinks they are sick, they're generally sick.

The COURT. It is just as bad, if they think they are.

Mr. RUSSELL. As I say, I am not a doctor. I don't like [\*\*\*\*81] to be a judge, but I think for my own sake, my feelings, it is my responsibility as foreman to tell you these things. I do not want to be responsible for anybody's health.

The COURT. I don't, either.

[4] You recall, though, that before -- when I had two alternate jurors, I asked all the jurors if there was anybody who was not physically able to go ahead and everybody wanted to do it.

[\*467] Mr. RUSSELL. I realize that. I think every juror out there wants to do their duty.

The COURT. See, we have tried this case now for four months.

Mr. RUSSELL. This is part of it, I will grant you, but it is not the whole part of it. There is some personality conflicts on the jury that have led to certain situations and I think we have overcome those.

The COURT. If we continue to deliberate from 9 to 6:30, with a lunch hour, for a while longer --

Mr. RUSSELL. What I want to tell you next is -- and that is, again, my opinion -- and you can tell me I am wrong -- and I have to look at it in a different way. We have taken enough ballots now, and we have had enough discussions, and the way it is divided is not going to be settled by any document, any remembrance of testimony. [\*\*\*\*82] It is based on a belief and even if they -- even if they would sign a document today, and you would ask me to get up in the jury box and swear I think this is a true and just verdict, I would have to say no, because I believe in the twelve or multiple system of a jury; that if we are to decide beyond a [5] reasonable doubt, when you get twelve, or whatever the number has to be --

[\*\*2889] The COURT. That is what you have to decide.

Mr. RUSSELL. --- it proves it beyond a shadow of a doubt.

The COURT. Not beyond a shadow of a doubt.

438 U.S. 422, \*467; 98 S. Ct. 2864, \*\*2889; 57 L. Ed. 2d 854, \*\*\*888; 1978 U.S. LEXIS 131, \*\*\*\*82

Mr. RUSSELL. I know. Each individual proves it to himself, but for a man to be convicted guilty, or the company, we do it beyond a reasonable doubt, but if you have twelve, you know it is beyond a shadow of a doubt and you cannot have any conscience over it as far as a juror or anything else. That is the way I feel, Judge.

The COURT. What are you suggesting?

Mr. RUSSELL. I am asking you what I should do. I am to the point - - - -

The COURT. I would like this jury to deliberate longer. I [\*468] say that because, as I say, we have tried it for a considerable period of time.

Mr. RUSSELL. Everybody realizes that and I do.

[\*\*\*\*83] The COURT. We have individual people here who are concerned and the jury has now deliberated -- they deliberated three full days, Wednesday, Thursday and [6] Friday. They deliberated a half a day on Saturday and a half day on Sunday. They are not deliberating a full day, because jurors usually deliberate until eleven or ten at night.

[\*\*\*89] Mr. RUSSELL. We know that and we want to thank you.

The COURT. You have not deliberated that long yet.

Mr. RUSSELL. I know that is the way you would like it, but what I am trying to tell you is I don't think deliberation is going to change it. It is not a matter of time anymore.

The COURT. Are you telling me this jury is hopelessly deadlocked and will never reach a verdict?

Mr. RUSSELL. In my opinion, it is. I have to rely on that. I have no experience in this kind of thing. I don't know what people go through in a jury. This is the first time I have ever served on one and it is a new experience and I will never forget it. But it is a terrible responsibility and what I said, if it was a matter of finding a document or finding a part of a testimony that would convince somebody, I would say sure, and good.

The COURT. All [\*\*\*\*84] right.

For the time being continue your deliberations. I will take into consideration what you have told me.

[7] Mr. RUSSELL. As I said, the health problem is something that I think has to be looked at. I don't know how you are going to judge this or whether you call Mr. Keene and ask him or the Marshal's opinion, but I think something ought to be done.

The COURT. All right. I will take it into consideration. I have to talk to counsel.

Mr. RUSSELL. I appreciate that. I didn't expect a decision, but I would like some kind of guidance.

[\*469] The COURT. I would like to ask the jurors to continue their deliberations and I will take into consideration what you have told me. That is all I can say.

Mr. RUSSELL. I appreciate it. It is a situation I don't know how to help you get what you are after.

The COURT. Oh, I am not after anything.

Mr. RUSSELL. You are after a verdict one way or the other.

The COURT. Which way it goes doesn't make any difference to me.

Mr. RUSSELL. They keep saying, "If you will tell him what the situation is, he might accept it."

I said, "He doesn't want to know. He told me that he doesn't want to know what the decision is."

438 U.S. 422, \*469; 98 S. Ct. 2864, \*\*2889; 57 L. Ed. 2d 854, \*\*\*889; 1978 U.S. LEXIS 131, \*\*\*\*84

[8] [\*\*\*\*85] The COURT. No, I don't want to know that. It would not be proper for me to know.

Mr. RUSSELL. You may imply something from what I said.

[\*\*2890] The COURT. I can imply something from just watching, but I don't want you to tell me. That would be a breach of your duty.

Mr. RUSSELL. I have told you as best I can.

The COURT. Thank you. You tell them to keep deliberating and see if they can come to a verdict.

[At 12:04 p.m. the jury foreman returned to the deliberation room.]

Certified true and correct transcript.

/s/ MARION C. WIKE

Marion C. Wike

Official Reporter

[App. 1837-1840.]

**Concur by:** POWELL (In Part)

## Concur

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[\*\*\*890] MR. JUSTICE POWELL, concurring in part.

I join the judgment and Parts I, II, and V of the Court's opinion.<sup>1</sup> I also join so much of Part III as holds that a [\*470] seller's intention to establish a meeting-competition defense under § 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act, to a charge of price discrimination under § 2 (a) is not in itself a "controlling circumstance" excusing liability under § 1 of the Sherman Act for otherwise unlawful direct price-verification practices.

[\*\*\*\*86] I do not join those portions of Part III, however, that might be read as suggesting that there are cases where the § 2 (b) defense is unavailable even though a seller made every reasonable, lawful effort to corroborate his buyer's report that a competitor had offered a lower price before reducing his own price to that buyer. See, e. g., *ante*, at 455-456, 459 n. 32.<sup>2</sup> In my view, a proper accommodation between the policies of the Robinson-Patman Act and the Sherman Act would result in recognition of the § 2 (b) defense in such cases. Otherwise, sellers sometimes would face the unenviable choice of reducing prices to one buyer and risking Robinson-Patman Act liability, refusing to do so and losing the sale, or reducing prices to all buyers.

A prudent businessman faced with this choice often would forgo the price reduction altogether. This reaction would disserve the procompetitive policy of the Sherman [\*\*\*\*87] Act without advancing materially the antidiscrimination policy of the Robinson-Patman Act. The Court already has made clear that the Robinson-Patman Act "does not require the seller to justify price discriminations by showing that in fact they met a competitive price." *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 759 (1945). Today the Court confirms that "it is the concept of good faith which lies at the core of the meeting-competition defense, and good faith 'is a flexible and pragmatic, not technical or

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<sup>1</sup> Because the issue discussed in Part IV of the Court's opinion is unlikely to arise at any retrial, I find it unnecessary to express a view as to it.

<sup>2</sup> I do not understand the Court to take a firm position on this issue. See *ante*, at 456 n. 31.

doctrinaire, concept." *Ante*, at 454, quoting *Continental Baking Co., 63 F. T. C. 2071, 2163 (1963)*. A seller who has attempted to verify his buyer's [\*471] report by every reasonable, lawful means before reducing his price to meet a competitor's price, in my view, has met the test of "good faith." In such a case, if the buyer's report proves to have been untruthful, it is the buyer alone, not the seller, who has acted in bad faith.

**Dissent by:** REHNQUIST (In Part); STEVENS (In Part)

## Dissent

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MR. JUSTICE REHNQUIST concurring in part and dissenting in part.

I concur in Part I and in the first portion of Part V of the Court's opinion approving [\*\*\*\*88] the jury instruction on participation in the conspiracy. I dissent from the remaining portions of the opinion and set forth as briefly as possible my reasons for doing so.

Part II of the Court's opinion uses [\*\*\*891] as its point of departure jury instructions on price fixing which the Court correctly characterizes as "not without ambiguity." *Ante*, at 434. However, these jury instructions are but a starting point for the discourse in Part II of the Court's opinion dealing with [\*\*2891] the element of intent in a criminal case, a discourse which I believe goes beyond any reasoning necessary to dispose of the contentions with respect to that point in this case.

I do not find it necessary to decide the intent which Congress required as a prerequisite for criminal liability under the Sherman Act, because I believe that the instructions given by the District Court, when considered as a whole and in connection with the objections made to them, are sufficiently close to respondents' tendered instructions so as to afford respondents no basis upon which to challenge the verdict. The jury instructions in this case take up some 40 pages of the record and are both detailed and complex. [\*\*\*\*89] The judge instructed the jury as to both respondents' contention that they exchanged price information solely to comply with the Robinson-Patman Act, and the Government's contention that

"the Defendants' purpose was not merely to establish their good faith under the Robinson-Patman Act, but that [\*472] *they exchanged competitive information for the purpose of raising, fixing, maintaining, and stabilizing prices*.

"It will be up to you, members of the jury, to resolve these issues.

"First, you must determine whether there was an agreement, either implied or express, to engage in the practice of price checking or verification. . . .

. . .

"Secondly, you must determine *whether the purpose* for the exchange of competitive information between the Defendants and their alleged co-conspirators was to insure a good faith meeting of competition, as a defense to the Robinson-Patman Act.

"If you decide that, if you decide that this was *merely done in a good faith effort to comply with the Robinson-Patman Act, then you could not consider verification, standing alone, as establishing an agreement to fix, raise, maintain, and stabilize prices as charged*.

"However, if [\*\*\*\*90] you decide that the effect of these exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider these changes *[sic]* as evidence of the mutual agreement or understanding alleged in the indictment to raise, fix, maintain, and stabilize list prices." App. 1720-1721 (emphasis added).

Read in conjunction with the above, the portions of the instructions quoted by the Court, *ante*, at 430, are not reversible error. The jury was instructed that it must find a purpose "to raise, fix, maintain, and stabilize list prices" and that this purpose could be presumed from the effect of respondents' agreement. Respondents' proposed

[\*\*\*892] instruction \* does not [\*473] significantly differ from that given by the District Court. I might add that in my view it would take plainly erroneous instructions, the error of which was both quite precisely and reasonably pointed out to the District Court, to warrant reversal of a judgment entered upon a jury's verdict following five months of trial.

[\*\*\*\*91] The portions of Part II which I find most troubling are not those which expressly address the congressionally prescribed requirement of intent for criminal liability under the Sherman Act, but those which discourse at length upon the role of intent in the imposition of criminal liability in general, particularly those which might be [\*\*2892] taken to import any special constitutional difficulty if criminal liability is imposed without fault. While the Court emphasizes that its result is not constitutionally required, *ante*, at 437, the Court's broad policy statements may be misread by the lower courts. I also feel bound to say that while I am willing to respectfully defer to the views of the distinguished authors of the American Law Institute's Model Penal Code, and to the authors of law review articles and treatises such as those sprinkled throughout the text of Part II of the Court's opinion, I have serious reservations about the undiscriminating emphasis and weight which the Court appears to give them in this case.

For similar reasons, I do not believe that it is necessary in this case to address the interrelationship of the Robinson-Patman Act's meeting-competition [\*\*\*\*92] defense and the Sherman Act, and I cheerfully refrain from that task. The jury was clearly instructed that if price information was exchanged "in a good faith effort to comply with the Robinson-Patman Act," [\*474] this exchange by itself would not make out a violation of the Sherman Act. I believe that the communications between the judge and the jury foreman described in Part IV of the Court's opinion, having been consented to by all parties to the case, would not justify a reversal of the verdict of the jury. I agree with that portion of Part V of the Court's opinion which approves the charge given the jury concerning participation in the conspiracy, but disagree with that portion of Part V which seems to approve a more expansive instruction with respect to withdrawal from the conspiracy. In my opinion, neither of these instructions of the District Court was sufficient, either separately or together, to warrant reversal of the jury's verdict of guilty.

I therefore conclude that the judgment of the Court of Appeals should be reversed, and the judgment of the District Court based upon the jury's verdict should be reinstated.

[\*\*\*893] MR. JUSTICE STEVENS, concurring in part [\*\*\*\*93] and dissenting in part.

There are three reasons why I am unable to subscribe to the bifurcated construction of S.1 of the Sherman Act which the Court adopts in Part II of its opinion.

In 1955 I subscribed to the view that criminal enforcement of the Sherman Act is inappropriate unless the defendants have deliberately violated the law.<sup>1</sup> I adhere to that view today. But since 1890 when the Sherman Act was enacted, the statute has had the same substantive reach in criminal and civil cases. No matter how wise the new rule that the Court adopts today may be, I believe it is an amendment only Congress may enact.

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\* "There has been evidence in this case of a defendant's contacting a competitor to verify the existence or nonexistence of a reported lower price or other competitive condition in the market place. This practice has been referred to as 'verification.' There is evidence that verification was engaged in by defendants for the purpose of compliance with the Robinson-Patman Act, one of the federal antitrust laws. I charge you as a matter of law that no finding of guilt may be made in this case based on verification engaged in for the purpose of compliance with the Robinson-Patman Act. Further, to consider verification as any evidence whatsoever of an alleged price-fixing conspiracy you must first determine beyond a reasonable doubt that the purpose of verification was *not* compliance with the Robinson-Patman Act." App. 1857.

<sup>1</sup> Report of the Attorney General's National Committee to Study the Antitrust Laws 349-351 (1955).

If I were fashioning a new test of criminal liability, I would require proof of a specific purpose to violate the law rather than mere knowledge that the defendants' agreement has had [\*475] an adverse effect on the market.<sup>2</sup> Under the lesser standard adopted by the Court, I believe MR. JUSTICE [\*\*\*\*94] REHNQUIST is quite right in viewing the error in the trial judge's instructions as harmless. *Ante*, at 471-473. There is, of course, a theoretical possibility that defendants could engage in a practice of exchanging current price information that was sufficiently prevalent to have had a marketwide impact that they did not know about, but as a practical matter that possibility is surely remote.

Finally, I am afraid that the new civil-criminal dichotomy may work mischief in the civil enforcement of the prohibition against tampering with prices in a free [\*\*2893] market. Conclusive presumptions play a central role in the enforcement, both civil and criminal, of the Sherman Act. Thus, [\*\*\*\*95] an agreement to charge the same price,<sup>3</sup> [\*\*\*\*96] or to adopt a common purchasing policy that determines the market price,<sup>4</sup> is unreasonable, and therefore unlawful, without any proof of the purpose or the actual effect of the agreement. The law presumes that those who entered the price-fixing agreement knew that forbidden effects would follow, and it also presumes, conclusively, that those effects will follow. In a criminal prosecution for price fixing in violation of the Sherman Act it is, therefore, irrelevant whether the prices fixed were reasonable or whether the defendant's intentions were good.<sup>5</sup> See [United States v. \[\\*476\] Trenton Potteries Co., 273 U.S. 392](#). [\*\*\*894] As Mr. Justice Stone explained for the Court in that case, "the Sherman law is not only a prohibition against the infliction of a particular type of public injury. It is a limitation of rights, . . . which may be pushed to evil consequences and therefore restrained."[Id. at 398](#) (citation omitted).

To be sure, cases such as *Trenton Potteries* involved conduct that was determined to be illegal on its face, while in this case the trial court appraised respondents' agreement under "rule of reason" analysis.<sup>6</sup> But properly understood, rule-of-reason analysis is not distinct from "per se" analysis. On the contrary, agreements that are illegal *per se* are merely a species within the broad category of agreements that unreasonably restrain trade; less proof is required to [\*\*\*\*97] establish their illegality, but they nonetheless violate the basic rule of reason.<sup>7</sup>

As applied to an agreement among major producers to exchange current price information, the rule of reason requires an element in addition to proof of the agreement itself -- either an actual market effect or an express purpose to affect market price -- but once that element is shown, any additional showing of intent is unnecessary. See [United States v. Container Corp., 393 U.S. 333](#). [\*\*\*\*98] The rule is premised on the assumption that if the practice of exchanging current price information is sufficiently prevalent to affect the market price, then there is [\*477] an extremely high probability that the sales representatives of these companies had actual knowledge of

<sup>2</sup>The distinction between the two standards is explained *ante*, at 444-445. The Report of the Attorney General's Committee recommended that "criminal process should be used only where the law is clear and the facts reveal a flagrant offense and plain intent unreasonably to restrain trade." Report, *supra* n. 1, at 349.

<sup>3</sup>[United States v. Trenton Potteries Co., 273 U.S. 392](#).

<sup>4</sup>[United States v. Socony-Vacuum Oil Co., 310 U.S. 150](#).

<sup>5</sup>In fact, early in the development of criminal enforcement of the Sherman Act, this Court stated:

"[The] conspirators must be held to have intended the necessary and direct consequences of their acts and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result." [United States v. Patten, 226 U.S. 525, 543](#).

<sup>6</sup>An argument can be made that an agreement among the major producers in the market to exchange current price information should be considered illegal on its face. As the Court points out, "[exchanges] of current price information . . . have the greatest potential for generating anticompetitive effects and . . . have consistently been held to violate the Sherman Act." *Ante*, at 441 n. 16.

<sup>7</sup>Rahl, Price Competition and the Price Fixing Rule -- Preface and Perspective, 57 Nw. L. Rev. 137, 139 (1962).

that fact. Given the language of [§ 1](#), that premise is as valid in the context of a criminal prosecution as it is in the context of a treble-damages civil action.

Accordingly, although I agree with much of the abstract discussion in Part II of the Court's opinion, I concur only in Parts I, III, IV, and V, and in the judgment.

## References

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[15 USCS 1, 13\(b\)](#)

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Construction and application of "good faith meeting competition" defense of Robinson-Patman Act ([15 USCS 13\(b\)](#)). [9 L Ed 2d 1138](#).

Robinson-Patman Act as construed by Supreme Court. [2 L Ed 2d 1737](#).

Discounts permissible under Robinson-Patman Amendment to Clayton Act. 1 ALR2d 276.

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## Great Atlantic & Pacific Tea Co. v. Federal Trade Comm'n

Supreme Court of the United States

December 4, 1978, Argued ; February 22, 1979, Decided

No. 77-654

### **Reporter**

440 U.S. 69 \*; 99 S. Ct. 925 \*\*; 59 L. Ed. 2d 153 \*\*\*; 1979 U.S. LEXIS 59 \*\*\*\*; 1979-1 Trade Cas. (CCH) P62,475

GREAT ATLANTIC & PACIFIC TEA CO., INC. v. FEDERAL TRADE COMMISSION

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

**Disposition:** [557 F.2d 971](#), reversed.

## **Core Terms**

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buyer, seller, bid, meeting-competition, price discrimination, competitor's, Robinson-Patman Act, dairy, defenses, induce, meeting competition, milk, lower price, good faith, derivative, disclosure, Automatic, affirmative defense, Administrative Law, Federal Trade Commission Act, discriminations, circumstances, differentials, knowingly, label, beat

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

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

### **[HN1](#) [⬇️] Price Discrimination, Buyer Liability**

See [15 U.S.C.S. § 13\(f\)](#).

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

### **[HN2](#) [⬇️] Regulated Practices, Trade Practices & Unfair Competition**

See [15 U.S.C.S. § 45\(a\)](#).

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Cost Justification Defense

Criminal Law & Procedure > Defenses > General Overview

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Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Antitrust & Trade Law > Sherman Act > Defenses

### **HN3** [↓] **Defenses, Cost Justification Defense**

Under the Robinson-Patman Act, [15 U.S.C.S. §§ 2\(a\), \(b\)](#), a seller who can establish either that a price differential was cost justified or offered in good faith to meet competition has a complete defense to a charge of price discrimination under the statute.

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

### **HN4** [↓] **Antitrust & Trade Law, Robinson-Patman Act**

See [15 U.S.C.S. § 2\(f\)](#).

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Criminal Law & Procedure > Defenses > General Overview

### **HN5** [↓] **Price Discrimination, Buyer Liability**

A buyer cannot be liable for an illegal price discrimination if a prima facie case could not be established against a seller or if the seller has an affirmative defense.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

### **HN6** [↓] **Price Discrimination, Defenses**

If a seller has a valid meeting-competition defense, there is simply no prohibited price discrimination.

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

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

### **HN7** [↓] **Antitrust & Trade Law, Robinson-Patman Act**

See [15 U.S.C.S. § 13\(e\)](#).

Antitrust & Trade Law > Sherman Act > General Overview

#### [\*\*HN8\*\*](#) [blue icon] Antitrust & Trade Law, Sherman Act

The exchange of price information by competitors violates the Sherman Act.

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Sherman Act > Defenses

#### [\*\*HN9\*\*](#) [blue icon] Robinson-Patman Act, Defenses

A buyer who has done no more than accept the lower of two prices competitively offered does not violate the Robinson-Patman Act [§ 2\(f\)](#), [15 U.S.C.S. § 2\(f\)](#), provided the seller has a meeting-competition defense.

Antitrust & Trade Law > Sherman Act > Defenses

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Defenses

#### [\*\*HN10\*\*](#) [blue icon] Sherman Act, Defenses

The test for determining when a seller has a valid meeting-competition defense is whether a seller can show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor. A good-faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the defense under Robinson-Patman Act, [15 U.S.C.S. § 2\(b\)](#). Since good faith, rather than absolute certainty, is the touchstone of the meeting-competition defense, a seller can assert the defense even if it has unknowingly made a bid that in fact not only met but beat his competition.

**Lawyers' Edition Display**

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## Decision

Buyer purchasing, from seller having meeting competition defense under [15 USCS 13\(b\)](#), at lowest price competitively offered, held not to have induced or received illegal price discrimination under [15 USCS 13\(f\)](#).

## Summary

A grocery store chain, after deciding to switch from the sale of brand label milk to the sale of private label milk, solicited an offer from its longtime supplier to supply milk under the chain's private label. The chain was dissatisfied with the supplier's initial offer and solicited offers from other dairies, one of which submitted an offer lower than that of the supplier. The chain's buyer subsequently contacted the supplier and told it that it had another offer, that the supplier was "not even in the ballpark," and that a \$ 50,000 improvement in the offer "would not be a drop in the bucket." The supplier then submitted a new bid, lower than the competing offer, emphasizing that it needed to keep the chain's business and that it made the new offer in order to meet the other dairy's bid. After the chain accepted the supplier's second offer, the Federal Trade Commission filed a complaint against the chain, charging, among other things, that it had violated 2(f) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(f\)](#)) by knowingly inducing or receiving a price discrimination prohibited by 2 of the Act ([15 USCS 13](#)), namely the price discrimination of a seller, which is prohibited under 2(a) ([15 USCS 13\(a\)](#)). After proceedings before an administrative law judge, the Commission--rejecting the chain's contention that it could utilize, as a defense to its 2(f) liability, the meeting competition defense of 2(b) of the Act, which allows a seller to rebut a *prima facie* case of price discrimination by showing that the seller's lower price was made in good faith to meet a competitor's equally low price--held that the chain had violated 2(f). The United States Court of Appeals for the Second Circuit affirmed on review of the Commission's decision ([557 F2d 971](#)).

On certiorari, the United States Supreme Court reversed. In an opinion by Stewart, J., joined by Burger, Ch. J., and Brennan, Blackmun, Powell, and Rehnquist, JJ., it was held that a buyer who has done no more than accept the lower of two prices competitively offered does not induce or receive price discrimination in violation of 2(f) provided the seller has a valid meeting competition defense, the chain thus not being in violation of 2(f) since the supplier had a valid meeting competition defense under 2(b).

White, J., concurring in part and dissenting in part, expressed the view that the court should not have decided whether the supplier had a valid meeting competition defense, since neither the Commission nor the Court of Appeals had reached the issue.

Marshall, J., dissenting in part, agreed that the Commission and the Court of Appeals had applied an incorrect legal standard in assessing the chain's liability under 2(f), but disagreed with the court's ruling that 2(f) precluded buyer liability under the Act unless the seller could also be found liable for price discrimination, expressing the view that a buyer could claim the meeting competition defense if he acted in good faith to induce a seller to meet a competitor's price, regardless of whether the seller's price happened to beat the competitor's, but that a buyer who induced the lower bid by misrepresentation could not escape liability, and that the United States Supreme Court should not have resolved disputed factual issues in the case without a remand.

Stevens, J., did not participate.

## Headnotes

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MONOPOLIES §36 > buyer's inducement of price discrimination -- effect of seller's meeting competition defense --

> Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C]

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A buyer who has done no more than accept the lower of two prices competitively offered does not knowingly induce or receive a seller's illegal price discrimination in violation of 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, ([15 USCS 13\(f\)](#)) where the seller from whom the buyer purchases has a meeting competition defense under 2(b) of the Act ([15 USCS 13\(b\)](#)) to the Act's prohibition against price discrimination by sellers ([15 USCS 13\(a\)](#)). (Marshall, J., dissented from this holding.)

MONOPOLIES §36 > price discrimination -- seller's defenses -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

Under 2(a) and (b) of the Clayton Act, as amended by the Robinson-Patman Act, ([15 USCS 13\(a\)](#) and [\(b\)](#)), a seller who can establish that a price differential was cost justified or offered in good faith to meet competition has a complete defense to a charge of price discrimination under the Act.

MONOPOLIES §36 > price discrimination -- buyer's liability -- > Headnote:

[LEdHN\[3\]](#) [3]

Under 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, ([15 USCS 13\(f\)](#)), a buyer cannot be liable for inducing or receiving a discrimination in price if a prima facie case of price discrimination under 2(a) and (b) of the Act ([15 USCS 13\(a\)](#) and [\(b\)](#)) could not be established against a seller or if the seller has an affirmative defense. (Marshall, J., dissented from this holding.)

MONOPOLIES §36 > price discrimination -- meeting competition defense -- > Headnote:

[LEdHN\[4\]](#) [4]

The test for determining whether a seller has a valid defense against illegal price discrimination under 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, ([15 USCS 13\(b\)](#)) is whether a seller can show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor; a good faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the 2(b) defense, and a seller can assert the defense even if it has unknowingly made a bid that in fact not only met but beat his competition.

MONOPOLIES §36 > price discrimination -- seller's meeting competition defense -- buyer's inducing or receiving price discrimination -- > Headnote:

[LEdHN\[5\]](#) [5]

A seller is entitled to a meeting competition defense under 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, ([15 USCS 13\(b\)](#)) to any illegal price discrimination under 2(a) of the Act ([15 USCS 13\(a\)](#)) arising from its sale to a buyer who had purchased under the seller's second bid at a price lower than the low bid made by prospective seller in a bid submitted after the buyer had rejected the eventual seller's initial bid, where (1) the seller submitted its second bid after the buyer had informed the seller that, as to the prospective seller's bid, its initial bid

was "not even in the ballpark" and that a \$ 50,000 improvement "would not be a drop in the bucket," (2) the seller could justifiably conclude, in light of its established business relationship with the buyer, that it was necessary to make the second bid offering substantial concessions in order to avoid loss of the buyer's account, (3) the seller had made the second bid without knowing of the details of the competing bid, and, thus, the buyer, who does no more than accept such seller's second offer, is not liable under 2(f) of the Act ([15 USCS 13\(f\)](#)) for inducing or receiving an illegal discrimination in price. (Marshall, J., dissented in part from this holding.)

## Syllabus

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Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, prohibits price discrimination by sellers, but under § 2 (b) the seller may rebut a prima facie case of price discrimination by showing that his lower price was made in good faith to meet a competitor's equally low price. Section 2 (f) makes it unlawful "for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." Petitioner, in an effort to achieve cost savings, entered into an agreement with its longtime supplier, Borden Co., under which Borden would supply "private [\*\*\*\*2] label" (as opposed to "brand label") milk to petitioner's stores in the Chicago area. Petitioner refused Borden's initial offer in implementation of the agreement and solicited offers from other companies, resulting in a lower offer from one of Borden's competitors. At this point petitioner's buyer informed Borden that its offer was "not even in the ball park" and that a \$ 50,000 improvement in the offer "would not be a drop in the bucket." Borden then submitted a new offer that was substantially better than its competitor's and petitioner accepted it. Based on these facts, the Federal Trade Commission charged petitioner with violating § 5 of the Federal Trade Commission Act for allegedly misleading Borden during contract negotiations by failing to inform it that its second offer was better than its competitor's, and with violating § 2 (f) by knowingly inducing or receiving price discrimination from Borden. The FTC dismissed the § 5 charge on the ground that the issue was what amount of disclosure is required of the buyer during contract negotiations and that to impose a duty of affirmative disclosure would be "contrary to normal business practice" and "contrary to the public [\*\*\*\*3] interest," but held that petitioner had violated § 2 (f), the FTC rejecting, *inter alia*, petitioner's defense that the Borden offer had been made to meet competition. The Court of Appeals affirmed. Held: A buyer who has done no more than accept the lower of two prices competitively offered does not violate § 2 (f) provided the seller has a meeting-competition defense, and here where Borden had such a defense and thus could not be liable under § 2 (b) petitioner, who did no more than accept Borden's offer, cannot be liable under § 2 (f). Pp. 75-85.

(a) Since liability under § 2 (f) is limited to price discrimination "prohibited by this section," and since only §§ 2 (a) and (b) deal with seller liability for price discrimination, a buyer, under § 2 (f)'s plain meaning, cannot be liable if a prima facie case cannot be established against a seller or if the seller has an affirmative defense. Automatic Canteen Co. of America v. FTC, 346 U.S. 61. In either situation, there is no price discrimination "prohibited by this section." And the legislative history of § 2 (f) confirms the conclusion that buyer liability under § 2 (f) is dependent on seller [\*\*\*\*4] liability under § 2 (a). Pp. 75-78.

(b) To rewrite § 2 (f) to hold a buyer liable even though there is no price discrimination "prohibited by this section" would contravene the rule that this Court "cannot supply what Congress has studiously omitted," FTC v. Simplicity Pattern Co., 360 U.S. 55, 67. Pp. 78-79.

(c) Imposition of § 2 (f) liability on petitioner would lead to price uniformity and rigidity contrary to the purposes of other antitrust legislation. P. 80.

(d) A duty of affirmative disclosure requiring a buyer to inform a seller that his bid has beaten competition would frustrate competitive bidding and, by reducing uncertainty, would lead to price matching and anticompetitive cooperation among sellers. P. 80.

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(e) The effect of the finding that petitioner's same conduct violated § 2(f) as violated § 5 of the Federal Trade Commission Act is to impose the same duty of affirmative disclosure that the FTC condemned as anticompetitive, "contrary to the public interest," and "contrary to normal business practice," in dismissing the § 5 charge. Pp. 80-81.

(f) The test for determining when a seller has a valid meeting-competition defense is whether [\*\*\*\*5] he can "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." *FTC v. A. E. Staley Mfg. Co., 324 U.S. 746*. Under the circumstances of this case, Borden did act reasonably and in good faith when it made its second bid, since, in light of its established business relationship with petitioner, it could justifiably conclude that petitioner's statements about the first offer were reliable and that it was necessary to make another bid offering substantial concessions to avoid losing its account with petitioner. Pp. 82-84.

**Counsel:** Denis McInerney argued the cause for petitioner. With him on the briefs were Raymond L. Falls, Jr., and William T. Lifland.

Deputy Solicitor General Easterbrook argued the cause for respondent. With him on the brief were Solicitor General McCree, Michael N. Sohn, Gerald P. Norton, W. Dennis Cross, and Jerold D. Cummins.\*

**Judges:** STEWART, J., delivered the opinion of the Court, in which BURGER, [\*\*\*6] C. J., and BRENNAN, BLACKMUN, POWELL, and REHNQUIST, JJ., joined, and in Parts I, II, and III of which WHITE, J., joined. WHITE, J., filed an opinion concurring in part and dissenting in part, post, p. 85. MARSHALL, J., filed an opinion dissenting in part, post, p. 85. STEVENS, J., took no part in the consideration or decision of the case.

**Opinion by: STEWART**

Opinion

[\*71] [\*157] [\*928] MR. JUSTICE STEWART delivered the opinion of the Court.

LEdHN[1A] [↑] [1A] The question presented in this case is whether the petitioner, the [\*\*\*158] Great Atlantic & Pacific Tea Co. (A&P), violated § 2 (f) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13 (f),<sup>1</sup> by knowingly inducing or [\*\*929] receiving illegal price discriminations from the Borden Co. (Borden).

<sup>\*</sup>Thomas A. Rothwell and Arthur H. Brendtson filed a brief for the Small Business Legislative Council as amicus curiae.

<sup>1</sup> Title 15 U. S. C. § 13(f) provides:

**HN1** "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

Title 15 U. S. C. §§ 13(a) and (b) provide in pertinent part:

"(a) . . . It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . .

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[\*\*\*\*7] [\*72] The alleged violation was reflected in a 1965 agreement between A&P and Borden under which Borden undertook to supply "private label" milk to more than 200 A&P stores in a Chicago area that included portions of Illinois and Indiana. This agreement resulted from an effort by A&P to achieve cost savings by switching from the sale of "brand label" milk (milk sold under the brand name of the supplying dairy) to the sale of "private label" milk (milk sold under the A&P label).

To implement this plan, A&P asked Borden, its longtime supplier, to submit an offer to supply under private label certain of A&P's milk and other dairy product requirements. After prolonged negotiations, Borden offered to grant A&P a discount for switching to private-label milk provided A&P would accept limited delivery service. Borden claimed that this offer would save A&P \$ 410,000 a year compared to what it had been paying for its dairy products. A&P, however, was not satisfied with this offer and solicited offers from other [\*73] dairies. A competitor of Borden, Bowman Dairy, then submitted an offer which was lower than Borden's.<sup>2</sup>

[\*\*\*\*8] At this point, A&P's Chicago buyer contacted Borden's chain store sales manager and stated: "I have a bid in my pocket. You [Borden] people are so far out of line it is not [\*\*\*159] even funny. You are not even in the ball park." When the Borden representative asked for more details, he was told nothing except that a \$ 50,000 improvement in Borden's bid "would not be a drop in the bucket."

Borden was thus faced with the problem of deciding whether to rebid. A&P at the time was one of Borden's largest customers in the Chicago area. Moreover, Borden had just invested more than \$ 5 million in a new dairy facility in Illinois. The loss of the A&P account would result in underutilization of this new plant. Under these circumstances, Borden decided to submit a new bid which doubled the estimated annual savings to A&P, from \$ 410,000 to \$ 820,000. In presenting its offer, Borden emphasized to A&P that it needed to keep A&P's business and was making the new offer in order to meet Bowman's bid. A&P then accepted Borden's bid after concluding that it was substantially better than Bowman's.

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Based on these facts, the Federal Trade Commission filed a three-count complaint against [\*\*\*\*9] A&P. Count I charged that A&P had violated § 5 of the Federal Trade Commission Act by misleading Borden in the course of negotiations for the private-label contract, in that A&P had failed to inform Borden that its second offer was better than the Bowman bid.<sup>3</sup> [\*74] Count II, involving the same conduct, charged that A&P had violated § 2 (f) of the Clayton Act, as [\*\*\*930] amended by the Robinson-Patman Act, by knowingly inducing or receiving price discriminations from Borden. Count III charged that Borden and A&P had violated § 5 of the Federal Trade Commission Act by combining to stabilize and maintain the retail and wholesale prices of milk and other dairy products.

[\*\*\*\*10] An Administrative Law Judge found, after extended discovery and a hearing that lasted over 110 days, that A&P had acted unfairly and deceptively in accepting the second offer from Borden and had therefore violated §

"(b) . . . Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

<sup>2</sup>The Bowman bid would have produced estimated annual savings of approximately \$ 737,000 for A&P as compared with the first Borden bid, which would have produced estimated annual savings of \$ 410,000.

<sup>3</sup>Section 5 (a) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45 (a), provides in relevant part:

HN2[↑] "(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

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5 of the Federal Trade Commission Act as charged in Count I. The Administrative Law Judge similarly found that this same conduct had violated [§ 2 \(f\)](#). Finally, he dismissed Count III on the ground that the Commission had not satisfied its burden of proof.

[LEdHN\[2A\]](#) [↑] [2A]On review, the Commission reversed the Administrative Law Judge's finding as to Count I. Pointing out that the question at issue was what amount of disclosure is required of the buyer during contract negotiations, the Commission held that the imposition of a duty of affirmative disclosure would be "contrary to normal business practice and, we think, contrary to the public interest." Despite this ruling, however, the Commission held as to Count II that the identical conduct on the part of A&P had violated [§ 2 \(f\)](#), finding that Borden had discriminated in price between A&P and its competitors, that the discrimination had been injurious [\*\*\*\*11] to competition, and that A&P had known or [\*\*\*160] should have known that it was the beneficiary of unlawful price discrimination.<sup>4</sup> The Commission rejected A&P's defenses that the Borden bid had been made to meet competition and was cost justified.<sup>5</sup>

[\*\*\*\*12] [\*75] A&P filed a petition for review of the Commission's order in the Court of Appeals for the Second Circuit. The court held that substantial evidence supported the findings of the Commission and that as a matter of law A&P could not successfully assert a meeting-competition defense because it, unlike Borden, had known that Borden's offer was better than Bowman's.<sup>6</sup> Finally, the court held that the Commission had correctly determined that A&P had no cost-justification defense. [557 F.2d 971](#). Because the judgment of the Court of Appeals raises important issues of federal law, we granted certiorari. 435 U.S. 922.

[\*\*\*\*13] II

The Robinson-Patman Act was passed in response to the problem perceived in the increased market power and coercive practices of chainstores and other big buyers [\*\*931] that threatened [\*76] the existence of small independent retailers. Notwithstanding this concern with buyers, however, the emphasis of the Act is in [§ 2 \(a\)](#), which prohibits price discriminations by sellers. Indeed, the original Patman bill as reported by Committees of both Houses prohibited only seller activity, with no mention of buyer liability.<sup>7</sup> [Section 2 \(f\)](#), making buyers liable for

<sup>4</sup> The Commission also found that the interstate commerce requirement of [§ 2 \(f\)](#) was satisfied.

<sup>5</sup>

[LEdHN\[2B\]](#) [↑] [2B][HN3](#) [↑] Under [§ 2 \(a\)](#) and [\(b\)](#) of the Act, a seller who can establish either that a price differential was cost justified or offered in good faith to meet competition has a complete defense to a charge of price discrimination under the Act. *Standard Oil Co. v. FTC*, [340 U.S. 231](#). See n. 1, *supra*.

With respect to the meeting-competition defense, the Commission stated that even though Borden as the seller might have had a meeting-competition defense, A&P as the buyer did not have such a defense because it knew that the bid offered was, in fact, better than the Bowman bid. With respect to the cost-justification defense, the Commission found that Commission counsel had met the initial burden of going forward as required by this Court's decision in *Automatic Canteen Co. of America v. FTC*, [346 U.S. 61](#), and that A&P had not then satisfied its burden of showing that the prices were cost justified, or that it did not know that they were not.

The Commission upheld the Administrative Law Judge's dismissal of Count III of the complaint.

<sup>6</sup> The Court of Appeals, like the Commission, relied on *Kroger Co. v. FTC*, [438 F.2d 1372](#) (CA6), for the proposition that a buyer can be liable under [§ 2 \(f\)](#) of the Act even if the seller has a meeting-competition defense. The *Kroger* case involved a buyer who had made deliberate misrepresentations to a seller in order to induce price concessions. While the Court of Appeals in this case did not find that A&P had made any affirmative misrepresentations, it viewed the distinction between a "lying buyer" and a buyer who knowingly accepts the lower of two bids as without legal significance. See n. 15, *infra*.

<sup>7</sup> H. R. 8442, 74th Cong., 1st Sess. (1935); S. 3154, 74th Cong., 1st Sess. (1935).

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inducing or receiving price discriminations by sellers, was the product of a belated floor amendment near the conclusion of the Senate debates.<sup>8</sup>

[\*\*\*\*14] [LEdHN\[3\]](#) [↑] [3] As finally enacted, [§ 2 \(f\)](#) provides:

[HN4](#) [↑] " [\*\*161] That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price *which is prohibited by this section.*" (Emphasis added.)

Liability under [§ 2 \(f\)](#) thus is limited to situations where the price discrimination is one "which is prohibited by this section." While the phrase "this section" refers to the entire [§ 2](#) of the Act, only subsections (a) and (b) dealing with seller liability involve discriminations in price. Under the plain meaning of [§ 2 \(f\)](#), therefore, [HN5](#) [↑] a buyer cannot be liable if a *prima facie* case could not be established against a seller or if the seller has an affirmative defense. In either situation, there is no price discrimination "prohibited by this section."<sup>9</sup> [\*77] The legislative history of [§ 2 \(f\)](#) fully confirms the conclusion that buyer liability [\*\*\*\*15] under [§ 2 \(f\)](#) is dependent on seller liability under [§ 2 \(a\)](#).<sup>10</sup>

[\*\*\*\*16] The derivative nature of liability under [§ 2 \(f\)](#) was recognized by this Court in [Automatic Canteen Co. of America v. FTC, 346 U.S. 61](#). In that case, the Court stated that even if the Commission has established a *prima facie* case of price discrimination, a buyer does not violate [§ 2 \(f\)](#) if the lower prices received are either within one of the seller's defenses or not known by the buyer not to be within one of those defenses. The Court stated:

"Thus, at the least, we can be confident in reading the words in [§ 2 \(f\)](#), 'a discrimination in price which is prohibited by this section,' as a reference to the substantive prohibitions against discrimination by sellers defined elsewhere in the Act. It is therefore apparent that the discriminatory price that buyers are forbidden by [§ 2 \(f\)](#) to induce cannot include price differentials that are not forbidden to sellers in other sections of the Act . . . . For we are not dealing simply with a 'discrimination in price'; the 'discrimination in price' in [§ 2 \(f\)](#) must be one 'which is prohibited by this section.' Even if any price differential were to be comprehended within the term 'discrimination in price,' [§ 1\\*\\*\\*\\*171 2 \(f\)](#), which speaks of prohibited discriminations, cannot be read as declaring out of bounds price differentials within one or more of the 'defenses' available to sellers, such as that the price differentials [\*78] reflect cost differences, fluctuating market conditions, or bona fide attempts to meet competition, as those defenses [\*\*932] are set out in the [\*\*\*\*162] provisos of [§§ 2 \(a\)](#) and [2 \(b\)](#)." [346 U.S., at 70-71](#) (footnotes omitted).

The Court thus explicitly recognized that a buyer cannot be held liable under [§ 2 \(f\)](#) if the lower prices received are justified by reason of one of the seller's affirmative defenses.

### III

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<sup>8</sup> F. Rowe, Price Discrimination Under the Robinson-Patman Act 423 (1962). [Section 2 \(f\)](#) has been described by commentators as an "afterthought." *Id.*, at 421; J. McCord, Commentaries on the Robinson-Patman Act 96 (1969).

<sup>9</sup> Commentators have recognized that a finding of buyer liability under [§ 2 \(f\)](#) is dependent on a finding of seller liability under [§ 2 \(a\)](#). McCord, *supra*, at 96 ("[[Section 2 \(f\)](#) cannot be enforced if a *prima facie* case could not be established against the seller on the basis of the transaction in question under [Section 2 \(a\)](#) or if he could sustain an affirmative defense thereto"); Rowe, *supra*, at 421 ("the legal status of the buyer is derivative from the seller's pricing legality under the Act"); H. Shniderman, Price Discrimination in Perspective 136 (1977) (a buyer can be liable under [§ 2 \(f\)](#) only if the price received "cannot be excused by any defenses provided to the seller").

<sup>10</sup> In presenting the Conference Report to the House, Representative Utterback summarized the meaning of [§ 2 \(f\)](#) by stating: "This paragraph makes the buyer liable for knowingly inducing or receiving any discrimination in price which is unlawful under the first paragraph [[§ 2 \(a\)](#)] of the amendment." 80 Cong. Rec. 9419 (1936).

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LedHN[1B] [1B] The petitioner, relying on this plain meaning of § 2 (f) and the teaching of the *Automatic Canteen* case, argues that it cannot be liable under § 2 (f) if Borden had a valid meeting-competition defense. The respondent, on the other hand, argues that the petitioner may be liable even assuming that Borden had such a defense. The meeting-competition defense, the respondent contends, must in these circumstances be judged from the point of view of [\*\*\*\*18] the buyer. Since A&P knew for a fact that the final Borden bid beat the Bowman bid, it was not entitled to assert the meeting-competition defense even though Borden may have honestly believed that it was simply meeting competition. Recognition of a meeting-competition defense for the buyer in this situation, the respondent argues, would be contrary to the basic purpose of the Robinson-Patman Act to curtail abuses by large buyers.

A

The short answer to these contentions of the respondent is that Congress did not provide in § 2 (f) that a buyer can be liable even if the seller has a valid defense. The clear language of § 2 (f) states that a buyer can be liable only if he receives a price discrimination "prohibited by this section." HN6 If a seller has a valid meeting-competition defense, there is simply no prohibited price discrimination.

A similar attempt to amend the Robinson-Patman Act judicially was rejected by this Court in FTC v. Simplicity Pattern Co., [\*79] 360 U.S. 55. There the Federal Trade Commission had found that a manufacturer of dress patterns had [\*\*\*\*19] violated § 2 (e) of the Clayton Act, as amended by the Robinson-Patman Act, by providing its larger customers services and facilities not offered its smaller customers.<sup>11</sup> The manufacturer attempted to defend against this charge by asserting that there had been no injury to competition and that its discriminations in services were cost justified. Since liability under § 2 (e), unlike § 2 (a), does not depend upon competitive injury or the absence of a cost-justification defense, the manufacturer's primary argument was that "it would be 'bad law and bad economics' to make discriminations unlawful even where they may be accounted for by cost differentials or where there is no competitive injury." 360 U.S., at 67 (footnote omitted). The Court rejected this argument. Recognizing that "this Court is not in a position to review the economic wisdom of Congress," [\*\*\*163] "the Court stated that "[we] cannot supply what Congress has studiously omitted." *Ibid.* (footnote omitted). The respondent's attempt in the present case to rewrite § 2 (f) to hold a buyer liable even though there is no discrimination in price "prohibited by this section" must be rejected for [\*\*\*\*20] the same reason.<sup>12</sup>

[\*\*\*\*21] [\*80] [\*\*933] B

In the *Automatic Canteen* case, the Court warned against interpretations of the Robinson-Patman Act which "extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." 346 U.S., at 63. Imposition of § 2 (f) liability on the petitioner in this case would lead to just such price uniformity and rigidity.<sup>13</sup>

<sup>11</sup> Section 2 (e) provides:

HN7 "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms." 15 U. S. C. § 13 (e).

<sup>12</sup> Contrary to the respondent's suggestion, this interpretation of § 2 (f) is in no way inconsistent with congressional intent. "[The] buyer whom Congress in the main sought to reach was the one who, knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices." Automatic Canteen Co. of America v. FTC, 346 U.S., at 79. Here, by contrast, we conclude that a buyer is not liable if the seller does have a defense under § 2 (b).

<sup>13</sup> More than once the Court has stated that the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws. United States v. United States Gypsum Co., 438 U.S. 422; Automatic Canteen Co. of America v. FTC, supra, at 74.

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In a competitive market, uncertainty among sellers will cause them to compete for business by offering buyers lower prices. Because of the evils of collusive action, the Court has held that [\*\*\*22] [HN8](#)<sup>14</sup> the exchange of price information by competitors violates the Sherman Act. [United States v. Container Corp., 393 U.S. 333](#). Under the view advanced by the respondent, however, a buyer, to avoid liability, must either refuse a seller's bid or at least inform him that his bid has beaten competition. Such a duty of affirmative disclosure would almost inevitably frustrate competitive bidding and, by reducing uncertainty, lead to price matching and anticompetitive cooperation among sellers.<sup>14</sup>

Ironically, the Commission itself, in dismissing the charge under § 5 of the Federal Trade Commission Act in this case, recognized the dangers inherent in a duty of affirmative disclosure:

"The imposition of a duty [\*\*\*23] of affirmative disclosure, applicable to a buyer whenever a seller states that his offer is [\*81] intended to meet competition, is contrary to normal business practice and, we think, contrary to the public interest.

....

"We fear a scenario where the seller automatically attaches a meeting competition caveat to every bid. The buyer would then state whether such bid meets, beats, or loses to another bid. The seller would then submit a second, a third, and perhaps a fourth bid until finally he is able to ascertain his competitor's bid." [87 F. T. C. 1047, 1050-1051](#).

The effect of the finding that the [\*\*\*164] same conduct of the petitioner violated [§ 2 \(f\)](#), however, is to impose the same duty of affirmative disclosure which the Commission condemned as anticompetitive, "contrary to the public interest," and "contrary to normal business practice," in dismissing the charge under § 5 of the Federal Trade Commission Act. Neither the Commission nor the Court of Appeals offered any explanation for this apparent anomaly.

As in the *Automatic Canteen* case, we decline to adopt a construction of [§ 2 \(f\)](#) that is contrary to its plain meaning and would lead [\*\*\*24] to anticompetitive results. Accordingly, we hold that [HN9](#)<sup>15</sup> a buyer who has done no more than accept the lower of two prices competitively offered does not violate [§ 2 \(f\)](#) provided the seller has a meeting-competition defense.<sup>15</sup>

<sup>14</sup> A duty of affirmative disclosure might also be difficult to enforce. In cases where a seller offers differing quantities or a different quality product, or offers to serve the buyer in a different manner, it might be difficult for the buyer to determine when disclosure is required.

<sup>15</sup> In *Kroger Co. v. FTC*, [438 F.2d 1372](#), the Court of Appeals for the Sixth Circuit held that a buyer who induced price concessions by a seller by making deliberate misrepresentations could be liable under [§ 2 \(f\)](#) even if the seller has a meeting-competition defense.

This case does not involve a "lying buyer" situation. The complaint issued by the FTC alleged that "A&P accepted the said offer of Borden with knowledge that Borden had granted a substantially lower price than that offered by the only other competitive bidder and without notifying Borden of this fact." The complaint did not allege that Borden's second bid was induced by any misrepresentation. The Court of Appeals recognized that the *Kroger* case involved a "lying buyer," but stated that there was no meaningful distinction between the situation where "the buyer lies or merely keeps quiet about the nature of the competing bid." [557 F.2d 971, 983](#).

Despite this background, the respondent argues that A&P did engage in misrepresentations and therefore can be found liable as a "lying buyer" under the rationale of the *Kroger* case. The misrepresentation relied upon by the respondent is a statement allegedly made by a representative of A&P to Borden after Borden made its second bid which would have resulted in annual savings to A&P of \$ 820,000. The A&P representative allegedly told Borden to "sharpen your pencil a little bit because you are not quite there." But the Commission itself referred to this comment only to note its irrelevance, and neither the Commission nor

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[\*\*\*25] [\*82] [\*\*934] IV

Because both the Commission and the Court of Appeals proceeded on the assumption that a buyer who accepts the lower of two competitive bids can be liable under [§ 2 \(f\)](#) even if the seller has a meeting-competition defense, there was not a specific finding that Borden did in fact have such a defense. But it quite clearly did.

A

[LEdHN\[4\]](#) [4] [HN10](#) The test for determining when a seller has a valid meeting-competition defense is whether a seller can "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." [FTC v. A. E. Staley Mfg. Co., 324 U.S. 746, 759-760](#). "A good-faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the [§ 2 \(b\)](#) defense." [United States v. United States Gypsum Co., 438 U.S. 422, 453](#).<sup>16</sup> [\*\*\*165] [\*\*\*26] Since good faith, rather than absolute certainty, is the touchstone of the meeting-competition defense, a seller can assert the defense even if it has unknowingly made a bid that in fact not only met but beat his competition. [Id., at 454](#).

B

[LEdHN\[5\]](#) [5] [\*\*\*27] Under the circumstances of this case, Borden did act reasonably and in good faith when it made its second bid. The petitioner, despite its longstanding relationship with Borden, was dissatisfied with Borden's first bid and solicited offers from other dairies. The subsequent events are aptly described in the opinion of the Commission:

"Thereafter, on August 31, 1965, A&P received an offer from Bowman Dairy that was lower than Borden's August 13 offer. On or about September 1, 1965, Elmer Schmidt, A&P's Chicago unit buyer, telephoned Gordon Tarr, Borden's Chicago chain store sales manager, and stated, 'I have a bid in my pocket. You [Borden] people are so far out of line it is not even funny. You are not even in the ball park.' Although Tarr asked Schmidt for some details, Schmidt said that he could not tell Tarr anything except that a \$ 50,000 improvement in Borden's bid 'would not be a drop in the [bucket].' Contrary to its usual practice, A&P then offered Borden the opportunity [\*84] to submit another bid." [87 F. T. C., at 1048](#) (Footnotes and record citations omitted.)

Thus, Borden was informed by the petitioner that it was in danger of losing its [\*\*\*28] [\*\*935] A&P business in the Chicago area unless it came up with a better offer. It was told that its first offer was "not even in the ball park" and that a \$ 50,000 improvement "would not be a drop in the bucket." In light of Borden's established business relationship with the petitioner, Borden could justifiably conclude that A&P's statements were reliable and that it was necessary to make another bid offering substantial concessions to avoid losing its account with the petitioner.

the Court of Appeals mentioned it in considering the [§ 2 \(f\)](#) charge against A&P. This is quite understandable, since the comment was allegedly made *after* Borden made its second bid and therefore cannot be said to have induced the bid as in the *Kroger* case.

Because A&P was not a "lying buyer," we need not decide whether such a buyer could be liable under [§ 2 \(f\)](#) even if the seller has a meeting-competition defense.

<sup>16</sup> Recognition of the right of a seller to meet a lower competitive price in good faith may be the primary means of reconciling the Robinson-Patman Act with the more general purposes of the antitrust laws of encouraging competition between sellers. As the Court stated in *Standard Oil Co. v. FTC*, 340 U.S., at 249:

"We need not now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts. It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor."

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Borden was unable to ascertain the details of the Bowman bid. It requested more information about the bid from the petitioner, but this request was refused. It could not then attempt to verify the existence and terms of the competing offer from Bowman without risking Sherman Act liability. *United States v. United States Gypsum Co., supra*. Faced with a substantial loss of business and unable to find out the precise details of the competing bid, Borden made another offer stating that it was doing so in order to meet competition. Under these circumstances, the conclusion is virtually inescapable that in making that offer Borden acted in a reasonable and good-faith effort to meet [\*\*\*29] its competition, [\*\*\*166] and therefore was entitled to a meeting-competition defense.<sup>17</sup>

[\*\*\*30]

[\*85] *LEdHN[1C]↑* [1C]Since Borden had a meeting-competition defense and thus could not be liable under § 2 (b), the petitioner who did no more than accept that offer cannot be liable under § 2 (f).<sup>18</sup>

Accordingly, the judgment is reversed.

*It is so ordered.*

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

**Concur by:** WHITE (In Part)

**Dissent by:** WHITE (In Part); MARSHALL (In Part)

## Dissent

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MR. JUSTICE WHITE, concurring in part and dissenting in part.

I concur in Parts I, II, and III of the Court's opinion, but dissent from Part IV. Because it was thought the issue was irrelevant where the buyer knows that the price offered is lower than necessary to meet competition, neither the Commission nor the Court of Appeals decided whether [\*\*\*31] Borden itself would have had a valid meeting-competition defense. The Court should not decide this question here, but should remand to the Commission, whose job it is initially to consider such matters.

For the reason stated by the Commission and the Court of Appeals, I am also convinced that the United States made a sufficient, unrebutted showing that Borden would not have a cost-justification defense to a Robinson-Patman Act charge.

MR. JUSTICE MARSHALL, dissenting in part.

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<sup>17</sup> The facts of this case are thus readily distinguishable from *Corn Products Co. v. FTC*, 324 U.S. 726, and *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, in both of which the Court held that a seller had failed to establish a meeting-competition defense. In the *Corn Products* case, the only evidence to rebut the prima facie case of price discrimination was testimony by witnesses who had no personal knowledge of the transactions in question. Similarly, in the *Staley Mfg.* Co. case, unsupported testimony from informants of uncertain character and reliability was insufficient to establish the defense. In the present case, by contrast, the source of the information was a person whose reliability was not questioned and who had personal knowledge of the competing bid. Moreover, Borden attempted to investigate by asking A&P for more information about the competing bid. Finally, Borden was faced with a credible threat of a termination of purchases by A&P if it did not make a second offer. All of these factors serve to show that Borden did have a valid meeting-competition defense. See *United States v. United States Gypsum Co.*, 438 U.S., at 454.

<sup>18</sup> Because we hold that the petitioner is not liable under § 2 (f), we do not reach the question whether Borden might also have had a cost-justification defense under § 2 (a).

II ÉÁWÉJÁA JÉÉÍ LÁJÁUÉDÁGÍ ÉÉEHÍ LÁ JÄÉDÅÉCA ÁFÍ HÄÉÉÉÍ I LÄFJÍ JÄÉÉSÖYÖUÁ JÄÉÉÉH

I agree with the Court that the Federal Trade Commission and the Court of Appeals applied the wrong legal standard in [\*86] assessing A&P's liability under the Robinson-Patman Act. However, I cannot join the Court's interpretation of § 2 (f) as precluding buyer liability under this Act unless the seller could also be found liable for price [\*\*936] discrimination. Neither the language nor the sparse legislative history of § 2 (f) justifies this enervating standard for the determination of buyer liability. To the contrary, the Court's construction disregards the congressional purpose to curtail the coercive practices of chainstores and other large buyers. [\*\*\*167] Having formulated a new legal [\*\*\*32] standard, the Court then applies it here in the first instance rather than remanding the case to the Commission. Given the numerous ambiguities in the record, I believe the Court thereby improperly arrogates to itself the role of the trier of fact.

I

Section 2 (f) provides that "[it] shall be unlawful for any person . . . knowingly to induce or receive a discrimination in price *which is prohibited by this section.*" (Emphasis added.) The Court interprets the italicized language as "plainly meaning" that a buyer can be found liable for knowingly inducing price discrimination only if his seller is first proved liable under §§ 2 (a) and 2 (b). *Ante*, at 76, 81. Under this construction, proceedings involving only the Commission and a buyer will turn upon proof of a seller's liability, and whenever a seller could successfully claim the meeting-competition defense, the buyer must be exonerated.

In my view, the language of § 2 (f) does not compel this circuitous method of establishing buyer liability. Sections 2 (a) and 2 (b) of the Act define the elements of price discrimination and the affirmative defenses available to sellers. When Congress extended liability to buyers [\*\*\*33] who encourage price discrimination, a ready means of defining the prohibition was to rely on the elements and defenses already delineated in §§ 2 (a) and 2 (b). Thus, the phrase "which is prohibited by this section" in § 2 (f) incorporates these elements and [\*87] defenses by reference, making them applicable to buyers. So construed, § 2 (f) simply means that the same elements of a *prima facie* case must be established and the same basic affirmative defenses available, whether buyer or seller liability is in issue. The section does not require that another party actually satisfy all of the conditions of §§ 2 (a) and 2 (b) before buyer liability can even be considered. Determining buyer and seller liability independently, I believe, places less strain on the "plain meaning" of the language of § 2 (f) than does the absolutely derivative standard the majority announces today.

In construing § 2 (f), the Court relies on Congress' delay in adding the section to the final bill and on a remark by Representative Utterback during the legislative debates. *Ante*, at 75-77, and n. 10. The delay provides little logical justification for the Court's interpretation; rather, it more [\*\*\*34] likely reflects Congress' late realization that halting the abusive practices of buyers<sup>1</sup> could not be accomplished solely through imposition of liability on sellers. Representative Utterback's statement, 80 Cong. Rec. 9419 (1936), amounts to a slight paraphrase of § 2 (f) and in no way supports [\*\*\*168] the Court's derivative standard.

[\*\*\*35] I agree with the Court's suggestion, *ante*, at 80, that we must resolve the dilemma confronting a buyer who properly invites a seller to meet a competitor's price and then fortuitously [\*88] obtains a lower bid. Congress could not have expected the buyer to choose between asking the seller to increase the bid to a specific price or accepting the lower bid and facing liability under § 2 (f). Rather, it must have intended some accommodation [\*\*937] for buyers who act in good faith yet receive bids that beat competition. This does not mean, however, that a buyer should be liable under § 2 (f) only if his seller also would be liable. That solution to the buyer's dilemma would enable him to manufacture his own defense by misrepresenting to a seller the response needed to meet a

<sup>1</sup> See S. Rep. No. 1502, 74th Cong., 2d Sess. (1936); H. R. Rep. No. 2287, 74th Cong., 2d Sess., 3-7, 17 (1936); H. R. Conf. Rep. No. 2951, 74th Cong., 2d Sess. (1936); FTC, Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935); *FTC v. Henry Broch & Co.*, 363 U.S. 166, 168-169 (1960); W. Patman, Complete Guide to the Robinson-Patman Act 7-10 (1963); F. Rowe, Price Discrimination Under the Robinson-Patman Act 8-14 (1962). See generally Hearings on Price Discrimination (S. 4171) before a Subcommittee of the Senate Committee on the Judiciary, 74th Cong., 2d Sess. (1936); Hearings on H. R. 8442, H. R. 4995, and H. R. 5062 before the House Committee on the Judiciary, 74th Cong., 1st Sess. (1935).

II ÉÁMÉJÉA JÉHÉ Í LÁJÁUÉOÉGÍ ÉEJHÍ LÁ JÄSÉOáÉCA ÁFÍ HÄÉHÉ Í LÁFJÍ JÁNÉÉSÓYÓUÁ JÉHÉHÍ

competitor's bid and then allowing the seller to rely in good faith on incorrect information. The Court purports to reserve this "lying buyer" issue, *ante*, at 81-82, n. 15, but the derivative standard it adopts today belies the reservation. If "prohibited by this section" means that a buyer's liability depends on that of the seller, then absent seller liability, the buyer's conduct and bad [\*\*\*36] faith are necessarily irrelevant.

I would hold that under § 2 (f), the Robinson-Patman Act defenses must be available to buyers on the same basic terms as they are to sellers. To be sure, some differences in the nature of the defenses would obtain because of the different bargaining positions of sellers and buyers. With respect to the meeting-competition defense at issue here, a seller can justify a price discrimination by showing that his lower price was offered in "good faith" to meet that of a competitor. *Ante*, at 82-83; *United States v. United States Gypsum Co.*, 438 U.S. 422, 450-455 (1978). In my view, a buyer should be able to claim that defense -- independently of the seller -- if he acted in good faith to induce the seller to meet a competitor's price, regardless of whether the seller's price happens to beat the competitor's. But a buyer who induces the lower bid by misrepresentation should not escape Robinson-Patman Act liability. See *Kroger Co. v. FTC*, 438 F.2d 1372 (CA6) (Clark, J.), cert. denied, 404 U.S. 871 (1971). This definition of the meeting-competition defense both extricates buyers from an impossible [\*\*\*37] dilemma and respects the congressional [\*89] intent to prevent buyers from abusing their market power to gain competitive advantage.<sup>2</sup>

[\*\*\*38] [\*\*\*169] *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61 (1953), is entirely consistent with this interpretation of § 2 (f). The issue there concerned the allocation of "the burden of coming forward with evidence under § 2 (f) of the Act," 346 U.S., at 65, not the precise contours of the elements and defenses that determine the scope of buyer liability. *Automatic Canteen*'s general discussion of § 2 (f)'s substantive requirements, quoted *ante*, at 77-78, merely explains that the affirmative defenses "available to sellers" must also be available to buyers. Far from pronouncing that buyer liability is derivative, *Automatic Canteen* began with the observation that § 2 (f) is "roughly the counterpart, as to buyers, of sections of the Act dealing with discrimination by sellers." 346 U.S., at 63 (emphasis added).<sup>3</sup>

[\*\*\*39] [\*90] [\*\*938] II

In my judgment, the numerous ambiguities in the record dictate that this case be remanded to the Commission. The Court, however, avoids a remand by concluding in the first instance that A&P's seller necessarily had a meeting-competition defense.<sup>4</sup> In so doing, the Court usurps the factfinding function best performed by the

<sup>2</sup> See S. Rep. No. 1502, 74th Cong., 2d Sess., 3-4, 7 (1936); H. R. Rep. No. 2287, 74th Cong., 2d Sess., 3-7, 14-17 (1936); Patman, *supra*, at 7-10, 148-151; Rowe, *supra*, at 8-23.

The Court recently noted in *United States v. United States Gypsum Co.*, 438 U.S. 422, 455 n. 30 (1978), that "[it] may also turn out that sustained enforcement of § 2 (f) . . . will serve to bolster the credibility of buyers' representations and render reliance thereon by sellers a more reasonable and secure predicate for a finding of good faith under § 2 (b)." (Citation omitted.) But if neither a buyer nor a seller can be liable when the seller relies in good faith on the buyer's misrepresentations, then enforcement of § 2 (f) will not "bolster the credibility" of buyers. Thus, the derivative standard of liability adopted by the Court today is inconsistent with the premise underlying the Court's suggestion in *United States Gypsum*, see Note, The Supreme Court, 1977 Term, 92 Harv. L. Rev. 57, 288, 291-294 (1978), and it eliminates one means of reassuring sellers that they may rely on buyer representations.

<sup>3</sup> Given this preface to *Automatic Canteen*, language in that opinion provides little support for the Court's adoption today of a derivative standard with respect to the buyer's meeting-competition defense. Moreover, to the extent the majority believes its resort to literal construction of § 2 (f) forecloses further inquiry, it ignores the broader teaching of *Automatic Canteen*. That case adopted a common-sense approach for interpreting the often ambiguous Robinson-Patman Act, tempering a "merely literal reading of the language" with considerations of "fairness and convenience" when necessary to achieve Congress' purpose. 346 U.S., at 79, and n. 23. On that basis, *Automatic Canteen* allocated to the Commission the burden of production regarding a buyer's cost-justification defense, even though the Commission does not bear that burden in a proceeding against a seller. *Id. at 75-76*; *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948). Indeed, the Court's interpretation of § 2 (f) today, which places buyers in the litigating position of their sellers, may also be incompatible with *Automatic Canteen*'s specific holding on the burden of production.

Commission.<sup>5</sup> Neither the Administrative Law Judge, the Commission, nor the Court of Appeals determined that Borden would have been entitled to claim the meeting-competition defense. Indeed, the Administrative Law Judge suggested the opposite, [87 F. T. C. 962, 1021 \(1976\)](#), and the Commission stated:

"We believe that it is very probable that Borden did *not* have such a defense. To have a meeting competition [\*91] defense, the record must demonstrate the existence of facts [\*\*\*170] which would lead a reasonable and prudent person to conclude that the lower price would, in fact, meet the competitor's price. As noted, Borden had serious doubts concerning whether the competing bid was legal. Specifically, it believed that the other bid only considered direct costs. It should have asked A&P for more information [\*\*\*40] about the competing bid. By not making the request, it was not acting prudently. As the record clearly indicates, A&P had knowledge of Borden's belief that other dairies might submit bids that did not include all costs." [87 F. T. C. 1047, 1057 n. 19 \(1976\)](#) (citations omitted; emphasis in original).

[\*\*\*\*41] Furthermore, if the Court truly intends to avoid deciding the "lying buyer" issue, then it should remand the case for determination of whether the exception applies here. Testimony before the Administrative Law Judge directly raised the possibility that A&P misled Borden to believe a still lower price was necessary than Borden had offered when it first responded to the Bowman bid. App. 117a-118a, 123a-124a, 141a-142a.<sup>6</sup> Both the Administrative Law [\*\*939] Judge and the [\*92] Commission credited that testimony, see [87 F. T. C., at 979, 1021-1022; 87 F. T. C., at 1049 n. 3](#), but since evidence of misrepresentation was not material under the standard they applied, there were no clear findings of fact on the point. Under these circumstances, this Court should not attempt to elide such testimony by the unsubstantiated conclusion that Borden's final bid was unaffected by any misrepresentation. *Ante*, at 81-82, n. 15; see n. 6, *supra*.

[\*\*\*\*42] Accordingly, I dissent from the Court's adoption of a derivative standard for determining buyer liability and its resolution of disputed factual issues without a remand.

## References

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<sup>4</sup> Because the Court reverses the judgment without remanding for further consideration and does not expressly reach the merits of the cost-justification issue raised by A&P, *ante*, at 85 n. 18, I need not address that issue either.

<sup>5</sup> Considering the recent admonition in [United States Gypsum, supra, at 456 n. 31](#), that "[the] case-by-case interpretation and elaboration of the § 2 (b) defense is properly left to the other federal courts and the FTC in the context of concrete fact situations," the Court's action is particularly inappropriate.

While I question the Court's decision to undertake resolution of this factual question, without even determining which party bore the burden of persuasion, I do not understand Part IV of its opinion as purporting to modify in any sense what was said last Term in *United States Gypsum* about the scope of the meeting-competition defense for sellers.

<sup>6</sup> The Court's opinion creates the impression that Borden submitted only two proposals, *ante*, at 81-82, n. 15, 83-84. In fact, A&P induced Borden to make a third proposal, even though the second was already more favorable than Bowman's.

When Borden initially responded to Bowman's bid, the A&P representative rejected Borden's offer on the ground that it included milk sold in glass gallon containers, whereas other bidders supposedly had not included that item. Actually, Bowman's bid had included glass gallons and A&P had subsequently decided against using glass containers. [87 F. T. C. 962, 979 \(1976\)](#); App. 73a-74a, 116a-118a, 257a-260a, 774a-775a. The effect of forcing Borden to delete milk sold in glass gallons from the proposal without raising the overall bid, was to increase the savings to A&P on other products still covered because part of the promised savings had been derived from the sale of the cheaper glass gallons. See [87 F. T. C., at 979-980](#). In addition, while Borden was preparing a third proposal to reflect the deletion, A&P suggested that Borden make further price reductions, saying "sharpen your pencil a little bit because you are not quite there." App. 118a. As a result, Borden reduced its prices still further to yield additional savings of approximately \$ 5,000 to \$ 8,000. The bid finally accepted by A&P incorporated these price reductions as well as those attributable to the deletion of glass gallons. See [id., at 117a-118a, 123a-124a, 141a-142a](#).

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Construction and application of "good faith meeting competition" defense of Clayton Act, as amended by Robinson-Patman Act ([15 USCS 13\(b\)](#))

[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 150](#)

12 Federal Procedural Forms L Ed, Monopolies and Restraints of Trade 48:111

18 Am Jur PI & Pr Forms (Rev), Monopolies, Restraints of Trade, and Unfair Trade Practices, Form 29

24 Am Jur Trials 1, Defending Antitrust Lawsuits

#### [15 USCS 13](#)

US L Ed Digest, Restraints of Trade and Monopolies 36

L Ed Index to Annos, Restraints of Trade and Monopolies

ALR Quick Index, Restraints of Trade and Monopolies

Federal Quick Index, Robinson Patman Act

Annotation References:

Construction and application of "good faith meeting competition" defense of Clayton Act, as amended by Robinson-Patman Act ([15 USCS 13\(b\)](#)). [\*\*\*\*43] 59 L Ed 2d 810.

Robinson-Patman Act as construed by Supreme Court. [2 L Ed 2d 1737](#).

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## Group Life & Health Ins. Co. v. Royal Drug Co.

Supreme Court of the United States

October 11, 1978, Argued ; February 27, 1979, Decided

No. 77-952

**Reporter**

440 U.S. 205 \*; 99 S. Ct. 1067 \*\*; 59 L. Ed. 2d 261 \*\*\*; 1979 U.S. LEXIS 29 \*\*\*\*; 1979-1 Trade Cas. (CCH) P62,479

GROUP LIFE & HEALTH INSURANCE CO., AKA BLUE SHIELD OF TEXAS, ET AL. v. ROYAL DRUG CO., INC., DBA ROYAL PHARMACY OF CASTLE HILLS, ET AL.

**Subsequent History:** [\*\*\*\*1] Petition For Rehearing Denied April 16, 1979.

**Prior History:** CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT.

**Disposition:** [556 F.2d 1375](#), affirmed.

## **Core Terms**

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insurance business, Pharmacy, insurer, exemption, policyholders, McCarran-Ferguson Act, regulation, insurance company, underwriting, anti trust law, provider, plans, service-benefit, contracts, reliability, premiums, insurance industry, rates, benefits, costs, legislative history, participating, obligations, spreading, cooperative, drugs, insurance commissioner, transactions, agrees, risks

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

**[HN1](#) [down arrow] Exemptions & Immunities, McCarran-Ferguson Act Exemption**

See [15 U.S.C.S. § 1011](#).

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Governments > Legislation > Interpretation

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

**[HN2](#) [down arrow] Exemptions & Immunities, McCarran-Ferguson Act Exemption**

The starting point in any case involving the meaning of a statute is the language of the statute itself.

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Insurance Law > Contract Formation > General Overview

Insurance Law > Contract Formation

### **HN3** Insurance Law, Contract Formation

The primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk. It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Contract Formation > General Overview

### **HN4** Exemptions & Immunities, McCarran-Ferguson Act Exemption

In enacting the McCarran-Ferguson Act [15 U.S.C.S. § 1011](#), Congress was concerned with: The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement--these were the core of the "business of insurance." The focus is on the relationship between the insurance company and the policyholder.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Governments > Legislation > Enactment > Veto

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Insurance Law > Industry Practices > General Overview

### **HN5** Exemptions & Immunities, McCarran-Ferguson Act Exemption

Congress provided in [15 U.S.C.S. § 1012\(b\)](#) that the antitrust laws shall be applicable unless the activities of insurance companies are the business of insurance and regulated by state law. Moreover, under [15 U.S.C.S. § 1013\(b\)](#) the Sherman Act, [15 U.S.C.S. § 1](#), was made applicable in any event to acts of boycott, coercion, or intimidation. To allow the states time to adjust to the applicability of the antitrust laws to the insurance industry, Congress imposed a 3-year moratorium. After the expiration of the moratorium on July 1, 1948, however, Congress clearly provided that the antitrust laws would be applicable to the business of insurance to the extent that such business is not regulated by state law.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Insurance Law > Industry Practices > General Overview

### **HN6** Exemptions & Immunities, McCarran-Ferguson Act Exemption

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While the power of the states to tax and regulate insurance companies was reaffirmed, the McCarran-Ferguson Act (the Act), [15 U.S.C.S. § 1011](#), also established that the insurance industry would no longer have a blanket exemption from the antitrust laws. It is true that [§ 2 \(b\)](#) of the Act, [15 U.S.C.S. § 1012\(b\)](#) does create a partial exemption from those laws. Perhaps more significantly, however, that section, and the Act as a whole, embody a legislative rejection of the concept that the insurance industry is outside the scope of the antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

### [\*\*HN7\*\*](#) Exemptions & Immunities, McCarran-Ferguson Act Exemption

References to the meaning of the business of insurance in the legislative history of the McCarran-Ferguson Act, [15 U.S.C.S. § 1011](#), strongly suggest that Congress understood the business of insurance to be the underwriting and spreading of risk.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

### [\*\*HN8\*\*](#) Exemptions & Immunities, McCarran-Ferguson Act Exemption

Congress certainly did not intend the definition of the business of insurance to be broader than its commonly understood meaning.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > Legislation > Interpretation

### [\*\*HN9\*\*](#) Antitrust & Trade Law, Exemptions & Immunities

Exemptions from the antitrust laws are to be narrowly construed. This doctrine is not limited to implicit exemptions from the antitrust laws, but applies with equal force to express statutory exemptions.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Capper-Volstead Act

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

### [\*\*HN10\*\*](#) Collectives & Cooperatives, Capper-Volstead Act

An exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties.

## **Lawyers' Edition Display**

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### **Decision**

Insurer-pharmacy agreements implementing prescription drug benefit for insurer's policyholders, held not exempt from antitrust laws as "business of insurance" under McCarran-Ferguson Act ([15 USCS 1012\(b\)](#)).

## Summary

In order to implement provisions of its insurance policies which entitled policyholders to obtain prescription drugs, a Texas insurance company entered into agreements with pharmacies in Texas whereby the pharmacies agreed to furnish the insurer's policyholders with prescription drugs at the price of two dollars per prescription and the insurance company agreed to reimburse the pharmacies for their costs in acquiring prescription drugs sold to policyholders. Alleging violations of federal antitrust laws arising from the insurer-pharmacy agreements, certain pharmacies which had not entered into agreements with the insurance company brought an action in the United States District Court for the Western District of Texas, claiming that the insurance company and pharmacies with which it had entered into agreements had violated 1 of the Sherman Act ([15 USCS 1](#)) by agreeing to fix the retail prices of drugs and pharmaceuticals, and that their activities had caused the insurance company's policyholders not to deal with certain of the plaintiffs. The District Court granted summary judgment to the defendants on the ground that the agreements were exempt from federal antitrust laws under the McCarran-Ferguson Act ([15 USCS 1011 et seq.](#)), which, through 2(b) of the Act ([15 USCS 1012\(b\)](#)), renders the federal antitrust laws inapplicable to the "business of insurance" to the extent such business is regulated by state law and is not subject to the "boycott" exception of 3(b) of the Act ([15 USCS 1013\(b\)](#)), the District Court having found that for purposes of 2(b) of the Act, the agreements constituted the "business of insurance" regulated by Texas and that the agreements were not "boycotts" within the meaning of 3(b) of the [Act \(415 F Supp 343\)](#). The United States Court of Appeals for the Fifth Circuit reversed on appeal, holding that the agreements in question were not the "business of insurance" within the meaning of 2(b) of the [Act \(556 F2d 1375\)](#).

On certiorari, the United States Supreme Court affirmed. In an opinion by Stewart, J., joined by White, Blackmun, Rehnquist, and Stevens, JJ., it was held that the agreements between the insurance company and the pharmacies did not constitute the "business of insurance" for purposes of 2(b) of the McCarran-Ferguson Act, since the agreements did not involve any underwriting or spreading of risks, but were mere arrangements for the purchase of goods and services by the insurance company, and since the agreements were not between an insurer and insureds, but were separate contractual arrangements between the insurance company and parties engaged in the sale and distribution of goods and services other than insurance.

Brennan, J., joined by Burger, Ch. J., and Marshall, and Powell, JJ., dissenting, expressed the view that some "provider" agreements negotiated to carry out an insurer's policy obligations to its insureds should be considered part of the "business of insurance" for purposes of the McCarran-Ferguson Act, and that the specific agreements at issue in the case at bar should be considered part of such business.

## Headnotes

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MONOPOLIES §29 > McCarran-Ferguson Act -- "business of insurance" -- exemption from federal antitrust laws -- agreements between insurer and pharmacies -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D]

Agreements between an insurance company and pharmacies, whereby the pharmacies agree to furnish the insurer's policyholders with prescription drugs at a stated, fixed, relatively small price per prescription in return for the insurer's agreeing to reimburse the pharmacies for their costs in acquiring such prescription drugs do not constitute the "business of insurance" for purposes of the McCarran-Ferguson Act ([15 USCS 1011 et seq.](#)), which operates so as to render the federal antitrust laws inapplicable to the "business of insurance" to the extent such business is regulated by state law ([15 USCS 1012\(b\)](#)) and is not subject to the Act's "boycott" exception ([15 USCS 1013\(b\)](#)), since the agreements do not involve any underwriting or spreading of risk, but constitute mere

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arrangements for the purchase of goods and services by the insurer, and since the agreements are not between an insurer and insureds, but are separate contractual arrangements between an insurance company and parties engaged in the sale and distribution of goods and services other than insurance. (Brennan, J., Burger, Ch. J., and Marshall and Powell, JJ., dissented from this holding.)

COMMERCE §103(1) > STATUTES §163 > construction -- McCarran-Ferguson Act -- language -- > Headnote:

LEdHN[2] [  ] [2]

The starting point in a case involving construction of the McCarran-Ferguson Act ([15 USCS 1011 et seq.](#)), setting forth the policy favoring regulation of the business of insurance by the state--like the starting point in any case involving the meaning of a statute--is the language of the statute itself.

MONOPOLIES §29 > McCarran-Ferguson Act -- exemption from federal antitrust laws -- "business of insurance" --

> Headnote:

LEdHN[3] [  ] [3]

Section 2(b) of the McCarran-Ferguson Act ([15 USCS 1012\(b\)](#)), declaring that a federal statute is not to be construed to invalidate state laws enacted for the purpose of regulating the business of insurance unless the federal law specifically relates to the business of insurance, does not exempt the business of insurance companies from the scope of federal antitrust laws, the exemption being for the "business of insurance," not the "business of insurers"; 2(b) applies only when insurance companies are engaged in the "business of insurance."

INSURANCE §46 > contract -- primary elements -- policyholder's risk -- > Headnote:

LEdHN[4] [  ] [4]

The primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk.

INSURANCE §1 > underwriting or spreading of risk -- indispensable characteristic -- > Headnote:

LEdHN[5] [  ] [5]

Underwriting or spreading of risk is an indispensable characteristic of insurance.

COMMERCE §103(1) > McCarran-Ferguson Act -- "business of insurance" -- agreement necessary for insurer's providing insurance -- > Headnote:

LEdHN[6A] [  ] [6A] LEdHN[6B] [  ] [6B]

Simply because an agreement between an insurer and another party is necessary in order for the insurer to provide insurance does not mean that such an agreement constitutes the "business of insurance" for purposes of the

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provisions of 2(b) of the McCarran-Ferguson Act ([15 USCS 1012\(b\)](#)), which direct that a federal law is not to be construed to invalidate, impair, or supersede state laws enacted for the purpose of regulating the business of insurance unless the federal law specifically relates to the business of insurance; and thus, the fact that a line of credit agreement or other commercial arrangement with a bank is necessary in order for an indemnity insurer to pay off monetary claims does not mean that such an agreement constitutes the "business of insurance."

COMMERCE §103(1) > McCarran-Ferguson Act -- "business of insurance" -- acquisitions by insurer -- > Headnote:  
[LEdHN\[7A\]](#) [7A] [LEdHN\[7B\]](#) [7B]

For purposes of the provisions of 2(b) of the McCarran-Ferguson Act ([15 USCS 1012\(b\)](#)), providing that a federal law is not to be construed to invalidate, impair, or supersede any state laws enacted for the purpose of regulating the business of insurance unless the federal law specifically relates to the business of insurance, an insurance company's acquisition of a manufacturer or a retail chain in order to lower the insurer's cost of meeting its obligations to policyholders does not constitute the "business of insurance."

MONOPOLIES §7 > federal antitrust laws -- exemption -- construction -- > Headnote:  
[LEdHN\[8\]](#) [8]

The rule that exemptions from federal antitrust laws are to be narrowly construed is not limited to implicit exemptions from the antitrust laws, but applies with equal force to express statutory exemptions.

MONOPOLIES §46 > labor unions -- pattern bargaining -- > Headnote:  
[LEdHN\[9A\]](#) [9A] [LEdHN\[9B\]](#) [9B]

A union may make wage agreements with a multi-employer bargaining unit and may, in pursuance of its own union interests, seek to obtain the same terms from other employers without violating federal antitrust laws.

MONOPOLIES §9 > labor unions -- agreement for pattern bargaining -- > Headnote:  
[LEdHN\[10A\]](#) [10A] [LEdHN\[10B\]](#) [10B]

A union forfeits its exemption from federal antitrust laws when it agrees with one set of employers to impose a certain wage scale on other bargaining units; one group of employers may not conspire to eliminate competitors from an industry, and the union is liable with the employers if it becomes a party to the conspiracy.

## **Syllabus**

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Petitioner Blue Shield, a Texas insurance company, offers policies that entitle the insured to obtain prescription drugs. The insured may obtain the drugs from a pharmacy participating in a "Pharmacy Agreement" with Blue Shield (in which case the insured must pay only \$ 2 for every prescription drug, with the remainder of the cost being

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paid directly by Blue Shield to the participating pharmacy) or from a nonparticipating pharmacy (in which case the insured pays the full price and may be reimbursed by Blue Shield for 75% of the difference between that price and \$ 2). Blue Shield offered to enter into a Pharmacy Agreement with each licensed [\*\*\*\*2] pharmacy in Texas, the participating pharmacy to agree to furnish Blue Shield policyholders prescription drugs at \$ 2 each, with Blue Shield to agree to reimburse the pharmacy for its cost in acquiring the drug. Respondents, nonparticipating pharmacies, brought this antitrust action alleging that Blue Shield and three participating pharmacies, also petitioners, had violated § 1 of the Sherman Act by entering into agreements fixing the retail prices of drugs and that petitioners' activities had caused Blue Shield policyholders to boycott certain respondents. The trial court granted petitioners summary judgment on the ground that the agreements are exempt from the antitrust laws under § 2 (b) of the McCarran-Ferguson Act (Act), because the agreements are the "business of insurance," are regulated by Texas, and are not boycotts within the meaning of the Act. The Court of Appeals reversed. *Held:* The Pharmacy Agreements are not the "business of insurance" within the meaning of § 2 (b). Pp. 210-233.

- (a) Section 2 (b) exempts the "business of insurance," not the "business of insurers." Pp. 210-211.
- (b) A primary element of an insurance contract is the underwriting or spreading [\*\*\*\*3] of risk, SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, but that element is not involved in the Pharmacy Agreements, which are merely arrangements for the purchase of goods and services by Blue Shield, enabling it to effect cost savings. Pp. 211-215.
- (c) The Pharmacy Agreements involve contractual arrangements between Blue Shield and the pharmacies, not its policyholders. Pp. 215-217.
- (d) The legislative history of the Act confirms the conclusion that the "business of insurance" was understood by Congress to involve the underwriting of risk and the relationship and transactions between insurance companies and their policyholders, and no legislative intention is disclosed to exempt agreements or transactions between insurance companies and entities outside the insurance industry. Moreover, at the time of the Act's enactment health-care plans such as those of Blue Shield were not considered to constitute insurance at all, and it is difficult to assume that Congress, contrary to that contemporary view, could have considered such plans to be the "business of insurance" within the meaning of the Act. Even if Congress did consider certain aspects of such plans [\*\*\*\*4] to be the "business of insurance," however, it still does not follow that the Pharmacy Agreements in this case are within the meaning of that phrase. Pp. 217-230.
- (e) This result is consistent with the principle that exemptions from the antitrust laws are to be construed narrowly. Pp. 231-233.

**Counsel:** Keith E. Kaiser argued the cause for petitioners. With him on the briefs were J. Burleson Smith, R. Laurence Macon, Richard A. Whiting, Charles R. Shaddox, D. Dudley Oldham, Martin D. Beirne, William R. Pakalka, William C. Church, Jr., and Richard B. Moore.

Joel H. Pullen argued the cause and filed a brief for respondents.

Richard A. Allen argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Solicitor General McCree, Assistant Attorney General Shenefield, and Barry Grossman.\*

\* Briefs of amici curiae urging reversal were filed by Thomas E. Kauper, John A. Fillion, M. Jay Whitman, J. Albert Woll, and Laurence Gold for the International Union, UAW, et al.; by James W. Rankin and Roger G. Wilson for the Blue Shield Assn.; by Peter F. Sloss and Godfrey L. Munter, Jr., for the California Dental Service et al.; by Chester Inwald for the District Council 37 Health & Security Plan et al.; by John H. Pickering, Arnold M. Lerman, C. Loring Jetton, Jr., and William H. Crabtree for the Motor Vehicle Manufacturers Assn. of the United States, Inc.; and by Stephen F. Gordon for the United Federation of Teachers Welfare Fund.

Briefs of amici curiae urging affirmance were filed by William J. Brown, Attorney General, and Charles D. Weller for the State of Ohio; by Donald A. Randall and Jonathan T. Howe for the Automotive Service Councils, Inc.; by Richard M. Rindler and Phillip

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[\*\*\*5]

**Judges:** STEWART, J., delivered the opinion of the Court, in which WHITE, BLACKMUN, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which BURGER, C. J., and MARSHALL and POWELL, JJ., joined, post, p. 233.

**Opinion by:** STEWART

## Opinion

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[\*207] [\*\*\*266] [\*\*1071] MR. JUSTICE STEWART delivered the opinion of the Court.

**LEdHN[1A]** [1A]The respondents, 18 owners of independent pharmacies in San Antonio, Tex., brought an antitrust action in a Federal District Court against the petitioners, Group Life and Health Insurance Co., known as Blue Shield of Texas (Blue Shield), and three pharmacies also doing business in San Antonio. The complaint alleged that the petitioners had violated § 1 of the Sherman Act, 15 U. S. C. § 1, by entering agreements to fix the retail prices of drugs and pharmaceuticals, and that the activities of the petitioners had caused Blue Shield's policyholders not to deal with certain of the respondents, thereby constituting an unlawful group boycott. The trial court granted summary judgment to the petitioners on the ground that the challenged [\*\*\*6] agreements are exempt from the antitrust laws under § 2 (b) of the McCarran-Ferguson Act, 59 Stat. 34, as amended, 61 Stat. 448, 15 U. S. C. § 1012 (b), because the agreements are the "business of insurance," are "regulated by [Texas] law," and are not "boycotts" within the meaning of § 3 (b) of the Act, 59 Stat. 34, 15 U. S. C. [\*208] § 1013 (b).<sup>1</sup> [\*\*\*7] 415 F.Supp. 343 (WD Tex.). [\*\*1072] The Court of Appeals for the Fifth Circuit reversed the judgment. Holding that the agreements in question are not the "business of insurance" within the meaning of § 2 (b), the appellate

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A. Proger for the National Assn. of Retail Druggists; by A. Stewart Kerr for the Pharmacists Guild of Michigan; and by Roger Tilbury and Henry Kane for the Portland Retail Druggists Assn., Inc.

Briefs of amici curiae were filed by Max Thelen, Jr., for the Kaiser-Permanente Medical Care Program; and by Jon S. Hanson, Richard A. Hemmings, and David J. Brummond for the National Assn. of Insurance Commissioners.

<sup>1</sup> The Act provides in relevant part:

**HN1** [↑] "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"Sec. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

"Sec. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, . . . and the Act of June 19, 1936, known as the Robinson-Patman Anti-discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

"(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 59 Stat. 33-34, as amended, 61 Stat. 448.

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court did not reach the other questions decided by the trial court. [556 F.2d 1375](#). We granted certiorari because of intercircuit conflicts as to the meaning of the phrase "business of insurance" in [§ 2 \(b\)](#) of the Act.<sup>2</sup> 435 U.S. 903.

[\*209] I

[\*\*\*267] Blue Shield offers insurance policies which entitle the policyholders to obtain prescription drugs. If the pharmacy selected by the insured has entered into a "Pharmacy Agreement" with Blue Shield, and is therefore a participating pharmacy, the insured is required to pay only \$ 2 for every prescription drug. The remainder of the cost is paid directly by Blue Shield to the participating pharmacy. If, on the other hand, the insured selects a pharmacy which has not entered into a Pharmacy Agreement, and is therefore a nonparticipating pharmacy, he is required to pay the full price charged by the pharmacy. The insured may then [\*\*\*8] obtain reimbursement from Blue Shield for 75% of the difference between that price and \$ 2.

Blue Shield offered to enter into a Pharmacy Agreement with each licensed pharmacy in Texas. Under the Agreement, a participating pharmacy agrees to furnish prescription drugs to Blue Shield's policyholders at \$ 2 for each prescription, and Blue Shield agrees to reimburse the pharmacy for the pharmacy's cost of acquiring the amount of the drug prescribed. Thus, only pharmacies that can afford to distribute prescription drugs for less than this \$ 2 markup can profitably participate in the plan.<sup>3</sup>

[\*\*\*9]

[\*210] [LEdHN\[1B\]](#) [↑] [1B]The only issue before us is whether the Court of Appeals was correct in concluding that these Pharmacy Agreements are not the "business of insurance" within the meaning of [§ 2 \(b\)](#) of the McCarran-Ferguson Act. If that conclusion is correct, then the Agreements are not exempt from examination under the antitrust laws.<sup>4</sup> Whether the Agreements are *illegal* under the antitrust laws is an entirely separate question, not now before us.<sup>5</sup>

[\*\*\*10] [\*\*\*268] [\*\*1073] II

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<sup>2</sup>The position of the Fifth Circuit is in conflict with that of the Third, Fourth, and District of Columbia Circuits. See *Frankford Hospital v. Blue Cross of Greater Philadelphia*, 554 F.2d 1253 (CA3 1977); *Anderson v. Medical Service of District of Columbia*, 551 F.2d 304 (CA4 1977); *Proctor v. State Farm Mutual Automobile Ins. Co.*, 182 U. S. App. D. C. 264, 561 F.2d 262 (1977).

<sup>3</sup>The *amicus curiae* brief of the United States provides a useful illustration of the operation of the Pharmacy Agreement:

"Suppose the usual and customary retail price for a quantity of Drug X charged both by 'participating' Pharmacy A and 'non-participating' Pharmacy B is \$ 10.00, and the wholesale price (or acquisition cost) to both is \$ 8.00. If an insured buys Drug X from Pharmacy A, the insured pays \$ 2.00. Pharmacy A receives \$ 2.00 from the insured and \$ 8.00 from Blue Shield, or \$ 10.00 total. If an insured buys Drug X from Pharmacy B, the insured pays Pharmacy B \$ 10.00, and receives \$ 6.00 (75 percent of the difference between the retail price and \$ 2.00) from Blue Shield. While Pharmacy B receives the same as Pharmacy A, the insured must pay \$ 4.00 for the drug and also must take steps to obtain reimbursement."

"If the pharmacy's acquisition cost for the drug is \$ 5.00 rather than \$ 8.00, the situations of Pharmacy B and the insured are unchanged. But now Pharmacy A will receive only \$ 5.00 from Blue Shield, for a total of \$ 7.00."

<sup>4</sup>Even if they are the "business of insurance," the Agreements are exempt from the antitrust laws only if they are also "regulated by State law" within the meaning of [§ 2 \(b\)](#) and not "boycotts" or other conduct described by § 3 (b). See n. 1, *supra*. See also *St. Paul Fire & Marine Ins. Co. v. Barry*, [438 U.S. 531](#).

<sup>5</sup>It is axiomatic that conduct which is not exempt from the antitrust laws may nevertheless be perfectly legal. The United States in its *amicus* briefs urging affirmance has taken the position that the Pharmacy Agreements probably do not violate the antitrust laws, though recognizing that that issue is not presented here.

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[LEdHN\[1C\]](#) [1C] [LEdHN\[2\]](#) [2] [LEdHN\[3\]](#) [3] As the Court stated last Term in *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 541,<sup>6</sup> the starting point in a case involving construction of the McCarran-Ferguson Act, like [HN2](#) the starting point in any case involving the meaning of a statute, is the language of the statute itself. See also *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (POWELL, J., concurring). It is important, therefore, to observe at the outset that the statutory language in question [\*211] here does not exempt the business of insurance companies from the scope of the antitrust laws. The exemption is for the "business of insurance," not the "business of insurers":

"The statute did not purport to make the States supreme in regulating all the activities of insurance *companies*; its language [\*\*\*\*11] refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the *business* of insurance.' Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the 'business of insurance' does the statute apply." [SEC v. National Securities, Inc.](#), 393 U.S. 453, 459-460. (Emphasis in original.)

Since the law does not define the "business of insurance," the question for decision is whether the Pharmacy Agreements fall within the ordinary understanding of that phrase, illuminated by any light to be found in the structure of the Act and its legislative history. Cf. [Ernst & Ernst v. Hochfelder](#), 425 U.S. 185, 199, and n. 19.

B

[LEdHN\[4\]](#) [4] [\*\*\*\*12] [HN3](#) The primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk. "It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it." 1 G. Couch, *Cyclopedia of Insurance Law* § 1:3 (2d ed. 1959). See also R. Keeton, *Insurance Law* § 1.2 (a) (1971) ("Insurance is an arrangement for transferring and distributing risk"); 1 G. Richards, *The Law of Insurance* [§ 2](#) (W. Freedman 5th ed. 1952).<sup>7</sup>

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[\*212] [LEdHN\[5\]](#) [5] The significance of underwriting or spreading of risk as an indispensable characteristic of insurance was recognized by this Court in [SEC v. Variable Annuity Life Ins. Co.](#), 359 U.S. 65. That case involved several corporations, representing themselves as "life insurance" companies, that offered variable annuity contracts for sale in interstate commerce. [\*\*\*269] The companies were regulated by the insurance commissioners of several States. Purchasers of the contracts were not entitled to any fixed return, but only to a pro rata participation in the investment portfolios of the companies. Thus a policyholder could receive substantial sums if investment decisions were successful, but very little if they were not. One of the questions presented was whether these variable annuity contracts were the "business of insurance" under [§ 2 \(b\)](#) of the McCarran-Ferguson Act.<sup>8</sup> The

<sup>6</sup> The issue in that case was the meaning of the "boycott" exception in § 3 (b) of the Act. The issue here, the meaning of the "business of insurance" exemption in [§ 2 \(b\)](#) of the Act, was not before the Court.

<sup>7</sup> Webster's New International Dictionary of the English Language 1289 (unabr. 2d ed. 1958) defines insurance as:

"Act of insuring, or assuring, against loss or damage by a contingent event; a contract whereby, for a stipulated consideration, called a *premium*, one party undertakes to indemnify or guarantee another against loss by a certain specified contingency or peril, called a *risk*, the contract being set forth in a document called the *policy*. . . ."

<sup>8</sup> The issue in *SEC v. Variable Annuity Life Ins. Co.* was whether the variable annuity contracts were subject to regulation under the Securities Act of 1933 and the Investment Company Act of 1940. The Court held that the contracts were subject to such

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Court held that the [\*\*1074] annuity contracts were not insurance, even though they were regulated as such under state law and involved actuarial prognostications of mortality. Central to the [\*\*\*14] Court's holding was the premise that "the concept of 'insurance' involves some investment risk-taking on the part of the company." [359 U.S., at 71](#). Since the variable annuity contracts offered no guarantee of fixed income, they placed all the investment risk on the annuitant and none on the company. *Ibid.* The Court concluded, therefore, that the annuities involved "no true underwriting of risks, the one earmark of insurance as it has commonly been conceived of in popular understanding and usage." [Id. at 73](#) (footnote omitted). Cf. *German Alliance Ins. Co. v. Lewis*, [233 U.S. 389, 412](#) ("The effect of insurance -- indeed [\*213] it has been said to be its fundamental object -- is to distribute the loss over as wide an area as possible").

[\*\*\*15] The petitioners do not really dispute that the underwriting or spreading of risk is a critical determinant in identifying insurance. Rather they argue that the Pharmacy Agreements do involve the underwriting of risks. As they state in their brief:

"In *Securities and Exchange Commission v. Variable Annuity Life Insurance Co.*, [359 U.S. 65, 73 \(1959\)](#), the 'earmark' of insurance was described as the 'underwriting of risks' in exchange for a premium. Here the risk insured against is the possibility that, during the term of the policy, the insured may suffer a financial loss arising from the purchase of prescription drugs, or that he may be financially unable to purchase such drugs. In consideration of the premium, Blue Shield assumes this risk by agreeing with its insureds to contract with Participating Pharmacies to furnish the needed drugs and to reimburse the Pharmacies for each prescription filled for the insured. In short, each of the fundamental elements of insurance is present here -- the payment of a premium in exchange for a promise to indemnify the insured against losses upon the happening of a specified contingency."

[LEdHN\[6A\]](#) [6A] [\*\*\*16] The fallacy of the petitioners' position is that they confuse the obligations [\*\*\*270] of Blue Shield under its insurance policies, which insure against the risk that policyholders will be unable to pay for prescription drugs during the period of coverage, and the agreements between Blue Shield and the participating pharmacies, which serve only to minimize the costs Blue Shield incurs in fulfilling its underwriting obligations.<sup>9</sup> [\*\*\*17] The [\*214] benefit promised to Blue Shield policyholders is that their premiums will cover the cost of prescription drugs except for a \$ 2 charge for each prescription.<sup>10</sup> So long as that promise is kept, policyholders are basically unconcerned with arrangements made between Blue Shield and participating pharmacies.<sup>11</sup>

[\*\*1075] The Pharmacy Agreements thus do not involve any underwriting or spreading of risk, but are merely arrangements for the purchase of goods and services by Blue Shield. By agreeing with pharmacies on the maximum prices it will pay for drugs, Blue Shield effectively reduces the total amount it must pay to its policyholders. The Agreements thus enable Blue Shield to minimize costs and maximize profits. Such [\*\*\*18]

regulation as securities since they were not "insurance" or "annuity" policies specifically exempt from the Securities Act, and because they were not the "business of insurance" within the meaning of the McCarran-Ferguson Act.

<sup>9</sup> [LEdHN\[6B\]](#) [6B] It is true that some type of provider agreement is necessary for a service benefit plan to exist. But it does not follow that because an agreement is necessary to provide insurance, it is also the "business of insurance." Assume, for example, that an indemnity insurer must have a line of credit or other commercial arrangement with a bank in order to pay off monetary claims. Despite the fact that the line of credit is "necessary" for the insurer to fulfill its obligations, it is nevertheless not the "business of insurance."

<sup>10</sup> Thus, the benefit promised to Blue Shield policyholders under the policy is that they "shall be required to pay no more than the drug deductible for each of such covered drugs."

<sup>11</sup> As the Court of Appeals stated:

"Blue Shield's policyholders are basically unconcerned with the contract between the insurer and the Participating Pharmacy. They are obligated to pay a Participating Pharmacy two dollars (\$ 2.00) for a prescription regardless of the presence or absence of a price fixing arrangement. Thus, by minimizing costs and maximizing profits, the Participating Pharmacy Agreements inure principally to the benefit of Blue Shield." [556 F.2d 1375, 1381](#).

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costsavings arrangements may well be sound business practice, and may well inure ultimately to the benefit of policyholders in the form of lower premiums, but they are not the "business of insurance." <sup>12</sup>

[\*215] [LEdHN\[7A\]](#) [7A]The Pharmacy Agreements are thus legally indistinguishable from countless other business arrangements that may be made by insurance companies to keep their costs low and thereby also keep low the level of premiums charged to their policyholders. Suppose, for example, that an insurance company entered into a contract with a large retail drug chain whereby its policyholders [\*\*\*19] could obtain drugs under their policies only from stores operated by this chain. The justification for such an agreement would be administrative and bulk-purchase savings resulting from obtaining all of the company's drug needs from a single dealer. Even though these cost savings might ultimately be reflected in lower premiums to policyholders, would such a contract be the "business of insurance"? Or suppose that the insurance company should decide [\*\*\*271] to acquire the chain of drug stores in order to lower still further its costs of meeting its obligations to its policyholders. Such an acquisition would surely not be the "business of insurance." [SEC v. National Securities, Inc., 393 U.S. 453](#).<sup>13</sup>

[\*\*\*20] C

Another commonly understood aspect of the business of insurance relates to the contract between the insurer and the insured. [HN4](#) In enacting the McCarran-Ferguson Act Congress was concerned with:

"The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, [\*216] and enforcement -- these were the core of the 'business of insurance.' Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was -- it was on the relationship between the insurance company and the policyholder." [SEC v. National Securities, Inc., supra, at 460](#).

The Pharmacy Agreements are not "between insurer and insured." They are separate contractual arrangements between Blue Shield and pharmacies engaged in the sale and distribution of goods and services other than insurance.

The petitioners argue that nonetheless the Pharmacy Agreements so closely affect [\*\*\*21] the "reliability, interpretation, and enforcement" of the insurance contract and "relate so closely to their status as reliable insurers [\*\*\*1076]" as to fall within the exempted area.<sup>14</sup> This argument, however, proves too much.

<sup>12</sup> As the United States points out in its *amicus* brief, there is an important distinction between risk underwriting and risk reduction. By reducing the total amount it must pay to policyholders, an insurer reduces its liability and therefore its risk. But unless there is some element of spreading risk more widely, there is no underwriting of risk.

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[LEdHN\[7B\]](#) [7B]In *National Securities*, the Arizona Director of Insurance approved, pursuant to statute, a merger between two insurance companies. This Court held, however, that the Arizona statute was not enacted for the purpose of regulating the "business of insurance." [393 U.S., at 460](#). If a merger between two insurance companies is not the "business of insurance," then an acquisition by an insurer of a manufacturer or a retail chain, although conceptually indistinguishable from the Pharmacy Agreements in this case, is also not the "business of insurance."

<sup>14</sup> The petitioners argue that the absence of the Pharmacy Agreements "which permit the insured to obtain drugs on the terms and for the amounts stated in the policies would constitute a breach of the contract of insurance." But the benefit Blue Shield provides its policyholders is the assurance that they can obtain drugs in return for a direct maximum payment of \$ 2 for each prescription. The Pharmacy Agreements are separate contractual arrangements between Blue Shield and certain pharmacists fixing the cost Blue Shield will pay for drugs. The wholly separate nature of the two categories of agreements is in no way affected by the fact that the Pharmacy Agreements are indirectly referred to in the insurance policies.

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At the most, the petitioners have demonstrated that the Pharmacy [\*\*\*22] Agreements result in cost savings to Blue Shield which may be reflected in lower premiums if the cost savings are passed on to policyholders. But, in that sense, every business decision made by an insurance company has some impact on its reliability, its ratemaking, and its status as a [\*217] reliable insurer. The manager of an insurance company is no different from the manager of any enterprise with the responsibility to minimize costs and maximize profits. If terms such as "reliability" and "status as a reliable insurer" were to be interpreted in the broad sense urged by [\*\*\*272] the petitioners, almost every business decision of an insurance company could be included in the "business of insurance." Such a result would be plainly contrary to the statutory language, which exempts the "business of insurance" and not the "business of insurance companies."

III

A

LEdHN[1D] [1D]The conclusion that the Pharmacy Agreements are not the "business of insurance" is fully confirmed by the legislative history of the McCarran-Ferguson Act. The law was enacted in 1945 in response to this Court's decision in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533. [\*\*\*23] The indictment in that case charged that the defendants had conspired to fix insurance rates and commissions, and had conspired to boycott and coerce noncooperating insurers, agents, and insureds. In the District Court the defendants had successfully demurred to the indictment on the ground that the insurance industry was not a part of interstate commerce subject to regulation under the *Commerce Clause*.<sup>15</sup> On direct appeal, this Court reversed the judgment, holding that the business of insurance is interstate commerce, and that the Congress which enacted the Sherman Act had not intended to exempt the insurance industry from its coverage.

B

The primary concern of Congress in the wake of that decision was in enacting legislation that would ensure that [\*218] the States would continue to have the ability to tax and regulate [\*\*\*24] the business of insurance.<sup>16</sup> [\*\*\*25] This concern is reflected in §§ 1 [\*1077] and 2 (a) of the Act,<sup>17</sup> neither of which is involved in this case. A secondary concern was the applicability of the antitrust laws to the insurance industry.<sup>18</sup> [\*\*\*26] Months

<sup>15</sup> Since the leading case of *Paul v. Virginia*, 8 Wall. 168, 183, it had been understood that "[issuing] a policy of insurance is not a transaction of commerce."

<sup>16</sup> S. Rep. No. 20, 79th Cong., 1st Sess., 2 (1945); H. R. Rep. No. 143, 79th Cong., 1st Sess., 2-3 (1945). The problem was that if insurance was interstate commerce, then the constitutionality of state regulation and taxation would be questionable. As the House Report stated:

"Inevitable uncertainties . . . followed the handing down of the decision in the *Southeastern Underwriters Association* case . . . .

"[Your] committee believes there is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective States. Already many insurance companies have refused, while others have threatened refusal to comply with State tax laws, as well as with other State regulations, on the ground that to do so, when *such laws may subsequently be held unconstitutional* in keeping with the precedent-smashing decision in the *Southeastern Underwriters* case, will subject insurance executives to both civil and criminal actions for misappropriation of company funds." *Ibid.* (Emphasis added.)

<sup>17</sup> See text of statute at n. 1, *supra*.

<sup>18</sup> There is no question that the *primary* purpose of the McCarran-Ferguson Act was to preserve state regulation of the activities of insurance companies, as it existed before the *South-Eastern Underwriters* case. The power of the States to regulate and tax insurance companies was threatened after that case, because of its holding that insurance companies are in interstate commerce. The McCarran-Ferguson Act operates to assure that the States are free to regulate insurance companies without

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before [\*219] this Court's [\*\*\*273] decision in *South-Eastern Underwriters* was announced, proposed legislation to totally exempt the insurance industry from the Sherman and Clayton Acts had been introduced in Congress.<sup>19</sup> Less than three weeks after the actual decision, the House of Representatives passed a bill which would also have provided the insurance industry with a blanket exemption from the antitrust laws, thus restoring the state of law that had existed before the decision in *South-Eastern Underwriters*.<sup>20</sup>

Congress, however, rejected this approach.<sup>21</sup> Instead of a total exemption, HN5[↑] Congress provided in § 2 (b) that the antitrust laws "shall be applicable" unless the activities of insurance companies are the business of insurance and regulated by state law. Moreover, under § 3 (b) the Sherman Act was made applicable in any event to acts of boycott, coercion, or intimidation. To allow the States time to adjust to the applicability of the antitrust laws to the insurance industry, [\*220] Congress imposed a 3-year moratorium.<sup>22</sup> After the expiration of the moratorium on July 1, 1948, however, Congress clearly provided that the [\*\*\*27] antitrust laws would be applicable to the business of insurance "to the extent that such business is not regulated by State law."<sup>23</sup>

By making the antitrust laws applicable to the insurance industry except as to conduct that is the business of insurance, regulated [\*\*\*28] by state law, and not a boycott, Congress did not intend to and did not overrule the *South-Eastern Underwriters* [\*\*1078] case.<sup>24</sup> HN6[↑] While the power of the States [\*\*\*274] to tax and regulate insurance companies was reaffirmed, the McCarran-Ferguson Act also established that the insurance industry would no longer have a blanket exemption from the antitrust laws. It is true that § 2 (b) of the Act does create a

fear of *Commerce Clause* attack. The question in the present case, however, is one under the quite different secondary purpose of the McCarran-Ferguson Act -- to give insurance companies only a limited exemption from the antitrust laws.

The repeated insistence in the dissenting opinion that the McCarran-Ferguson Act should be read as protecting the right of the States to regulate what they traditionally regulated is thus entirely correct -- and entirely irrelevant to the issue now before the Court. See n. 38, *infra*. For the question here is not whether the McCarran-Ferguson Act made state regulation of these Pharmacy Agreements exempt from attack under the *Commerce Clause*. It is the quite different question whether the Pharmacy Agreements are exempt from the antitrust laws.

In short, the McCarran-Ferguson Act freed the States to continue to regulate and tax the business of insurance companies, in spite of the *Commerce Clause*. It did not, however, exempt the business of insurance companies from the antitrust laws. It exempted only "the business of insurance." See *SEC v. National Securities, Inc.*, 393 U.S. 453.

<sup>19</sup> H. R. 3270, 78th Cong., 1st Sess. (1943); S. 1362, 78th Cong., 1st Sess. (1943). These bills would have provided that nothing in the Sherman or Clayton Acts "shall be construed to apply to the business of insurance or to acts in the conduct of that business or in any wise to impair the regulation of that business by the several States."

<sup>20</sup> 90 Cong. Rec. 6565 (1944).

<sup>21</sup> The total exemption bill failed in the Conference Committee because of a fear that it could not pass in the Senate and in any event would be vetoed by the President. 91 Cong. Rec. 1087 (1945) (remarks of Rep. Hancock). Also important was the opposition of the National Association of Insurance Commissioners to a blanket antitrust exemption. 90 Cong. Rec. 8482 (1944).

<sup>22</sup> See n. 1, *supra*. The purpose of the moratorium was to allow the States three years to take steps to regulate the business of insurance. 91 Cong. Rec. 1443 (1945) (remarks of Sen. McCarran).

<sup>23</sup> *Ibid.* (remarks of Sen. Ferguson); McCarran, Federal Control of Insurance: Moratorium Under Public Law 15 Expired July 1, 34 A. B. A. J. 539, 540 (1948).

<sup>24</sup> That Congress did not intend to restore the law to what it had been before *South-Eastern Underwriters* is made dramatically clear in the following exchange between Senator McKellar and Senator Ferguson:

"Mr. McELLAR. As I understand the bill its purpose and effect will be to establish the law as it was supposed to be prior to the rendering of the recent opinion of the Supreme Court of the United States. Is that correct?

"Mr. FERGUSON. No." 91 Cong. Rec. 478 (1945).

See also *id., at 1444* (exchange between Sens. Pepper and McCarran).

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partial exemption from those laws. Perhaps more significantly, however, that section, and the Act as a whole, embody a legislative rejection of the concept that the insurance industry is outside the scope of the antitrust laws -- a concept that had prevailed before the *South-Eastern Underwriters* decision.

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**HN7** References to the meaning of the "business of insurance" in the legislative history of the McCarran-Ferguson Act [\*221] strongly suggest that Congress understood the business of insurance to be the underwriting and spreading of risk. Thus, one of the early House Reports stated: "The theory of insurance is the distribution of risk according to hazard, experience, and the laws of averages. These factors are not within the control of insuring companies in the sense that the producer or manufacturer may control cost factors." H. R. Rep. No. 873, 78th Cong., 1st Sess., 8-9 (1943).<sup>25</sup> See also S. Rep. No. 1112, 78th Cong., 2d Sess., 6 (1944); 90 Cong. Rec. 6526 (1944) (remarks of Rep. Hancock).

[\*\*\*\*30] Because of the widespread view that it is very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation, the primary concern of both representatives of the insurance industry and the Congress was that cooperative ratemaking efforts be exempt from the antitrust laws. The passage of the McCarran-Ferguson Act was preceded by the introduction in the Senate Committee of a report and a bill submitted by the National Association of Insurance Commissioners on November 16, 1944.<sup>26</sup> The views of the NAIC are particularly significant, because the Act ultimately passed was based in large part on the NAIC bill.<sup>27</sup> The report emphasized that the concern of the insurance commissioners was that smaller enterprises and insurers other than life insurance companies were unable to underwrite risks accurately, and it therefore concluded:

"For these and other reasons this subcommittee believes it would be a mistake to permit or require the unrestricted competition contemplated by the antitrust laws to apply to the insurance business. To prohibit combined [\*222] efforts for statistical and rate-making purposes would be a backward step in the development [\*\*\*\*31] of a progressive business. We do not regard it as necessary to labor this point any [\*\*\*275] further because Congress itself recently recognized the necessity for concert of action in the collection of statistical data and rate making when it enacted the District of Columbia Fire Insurance Rating Act." *Id.*, at A4405 (emphasis added).

The bill proposed by the NAIC enumerated seven specific practices to which the Sherman Act was not to apply.<sup>28</sup> [\*\*\*\*32] Each of the specific practices involved intra-industry cooperative or concerted activities. [\*\*1079] None involved contractual arrangements that insurance companies might make with providers of goods or services to reduce the costs to the companies of meeting their underwriting obligations to their policyholders.<sup>29</sup>

<sup>25</sup> The recognition by Congress that the ability to control costs was not within the ability of insurance companies is further evidence that the Pharmacy Agreements, which are solely designed to minimize costs, are not insurance.

<sup>26</sup> 90 Cong. Rec. A4403-4408 (1944).

<sup>27</sup> 91 Cong. Rec. 483 (1945) (remarks of Sen. O'Mahoney).

<sup>28</sup> 90 Cong. Rec. A4406 (1944). This specific list of exempted activities was not included in the law ultimately enacted.

<sup>29</sup> The dissenting opinion makes the argument that because Congress rejected bills that would have limited the "business of insurance" to a specific list of insurance company practices, Congress intended that the exemption it finally enacted be interpreted "broadly." Precisely the opposite is true.

At the time Congress was considering one of the early versions of the Act, H. R. 3270, 78th Cong., 1st Sess. (1943), which would have wholly exempted from the antitrust laws "the business of insurance or . . . acts in the conduct of that business," an amendment was introduced which would have exempted specific activities. 90 Cong. Rec. 6561 (1944). The proponent of the amendment, Representative Anderson, explained that its purpose was to provide broader protection than provided by H. R. 3270: "But I say to this House that some legislation should be passed which asserts the right of the States to control the questions of risks, rates, premiums, commissions, policies, investments, reinsurance, capital requirements, and items of that nature. It is for that purpose I have insisted upon bringing this at this time to the attention of the House. If you pass H. R. 3270 as it now stands and go back home and any of your insurance friends ask you what you did to safeguard the protection of

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[\*\*\*\*33] [\*223] The floor debates also focused simply on whether cooperative ratemaking should be exempt. Thus, Senator Ferguson, in explaining the purpose of the bill, stated:

"This bill would permit -- and I think it is fair to say that it is intended to permit -- rating bureaus, because in the last session we passed a bill for the District of Columbia allowing rating. What we saw as wrong was the fixing of rates without statutory authority in the States; but we believe that State rights should permit a State to say that it believes in a rating bureau. I think the insurance companies have convinced many members of the legislature that we cannot have open competition in fixing rates on insurance. If we do, we shall have chaos. There will be failures, and failures always follow losses." 91 Cong. Rec. 1481 (1945).

The consistent theme of the remarks of other Senators also indicated a primary concern that cooperative ratemaking would be protected from the antitrust laws. *Id., at 1444* and 1485 (remarks of Sen. O'Mahoney); [\*\*\*276] 485 (remarks of Sen. Taft).<sup>30</sup> [\*\*\*35] President Roosevelt, in signing the bill, also emphasized [\*224] that the bill would allow cooperative [\*\*\*34] rate regulation. He stated that "Congress did not intend to permit private rate fixing, which the Antitrust Act forbids, but was willing to permit actual regulation [\*\*1080] of rates by affirmative action of the States." S. Rosenman, *The Public Papers and Addresses of Franklin D. Roosevelt, 1944-1945 Vol.*, p. 587 (1950).<sup>31</sup> There is not the slightest suggestion in the legislative history that Congress in any way contemplated that arrangements such as the Pharmacy Agreements in this case, which involve the mass purchase of goods and services from entities outside the insurance industry, are the "business of insurance."<sup>32</sup>

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insurance by the State, you must answer them in all truth that all you did was to pass a bill which provided antitrust protection for companies now under indictment."

The amendment was defeated. 90 Cong. Rec. 6562 (1944).

Thus, Congress rejected an amendment which exempted specific activities of insurance companies (not including anything remotely resembling the Pharmacy Agreements in this case) which was perceived to be broader than H. R. 3270. Since H. R. 3270 was itself broader than the Act as eventually enacted, it necessarily follows that the exemption of the Act is narrower than the bills which would have exempted specific practices. This pattern is consistent with the entire legislative history of the McCarran-Ferguson Act, which was characterized by a continual narrowing of the original blanket exemption.

<sup>30</sup> The dissenting opinion states that the "compelling explanation" for the lack of discussion of provider agreements in the legislative history was the congressional concern about fire insurance companies. *Post*, at 234, n. 2. However, input from all types of insurance companies was sought through the Insurance Commissioners of the various States "because the Commissioners were aware of the chaotic condition which exists at the present time." 91 Cong. Rec. 484 (1945) (remarks of Sen. Ferguson). Moreover, the National Association of Insurance Commissioners, whose concern was surely not limited to fire insurance, was certainly aware of provider agreements since it drafted model state enabling legislation to govern service-benefit health plans. But this Association, which played a major role in the drafting of the McCarran-Ferguson Act, did not include provider agreements in its proposed bill exempting specific practices of insurance companies from the scope of the antitrust laws. 90 Cong. Rec. A4406 (1944). Given this background, the failure of Congress to mention provider agreements, or anything in any way resembling them, suggests that Congress did not intend that provider agreements were to be exempt.

<sup>31</sup> The dissenting opinion states that the *National Securities* case recognized that the legislative history of the Act "sheds little light" on the meaning of the "business of insurance." *Post*, at 234. In *National Securities*, however, the Court went on to state that the legislative history indicated that "Congress was mainly concerned with the relationship between insurance ratemaking and the antitrust laws, and with the power of the States to tax insurance companies." *393 U.S., at 458-459*.

<sup>32</sup> One question not resolved by this legislative history is which of the various practices alleged in the *South-Eastern Underwriters* indictment Congress intended to be covered by the phrase "business of insurance." The indictment in that case had charged, for example, that the defendants had fixed their agents' commissions as well as premium rates. It is clear from the legislative history that the fixing of rates is the "business of insurance." The same conclusion does not so clearly emerge with respect to the fixing of agents' commissions.

The bills introduced before the *South-Eastern Underwriters* decision which would have totally exempted the insurance industry from the antitrust laws specifically included agreements regarding agents' commissions as an exempt practice. *E. g.*, H. R. 4444, 78th Cong., 2d Sess. (1944). Similarly, the bill proposed by the National Association of Insurance Commissioners two

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[\*\*\*277] At the time of the enactment of the McCarran-Ferguson Act, corporations organized for the purpose of providing their [\*226] members with medical services and hospitalization were not considered to be engaged in the insurance business at all, and thus were not subject to state insurance laws. E. g., *Jordan v. Group Health Assn.*, 71 App. D. C. 38, 107 F.2d 239 (1939); *California Physicians' Service v. Garrison*, 155 P. 2d 885 (Cal. App. 1945), aff'd, 28 Cal. 2d 790, 172 P. 2d 4 (1946); *Commissioner of Banking & Insurance v. Community Health Service*, 129 N. J. L. 427, 30 A. 2d 44 (1943); *State ex rel. Fishback v. Universal Service Agency*, 87 Wash. 413, 151 P. 768 (1915).<sup>33</sup> Similarly, States which regulated [\*\*1081] prepaid health-service plans at the time the Act was enacted either exempted them from the requirements of the state insurance code or provided that they "shall not be construed as being engaged in the business of insurance" under state law. Rorem, Enabling Legislation for Non-Profit Hospital Service Plans, 6 Law & Contemp. Prob. 528, 534 (1939). [\*\*\*\*37]<sup>34</sup> Since the legislative

months after the *South-Eastern Underwriters* case was decided would have also exempted agents' commissions. 90 Cong. Rec. A4406 (1944). The subsequent bill that followed the approach of the NAIC and exempted specific activities, however, was limited to traditional underwriting activities and made no mention of agreements with insurance agents:

§ 4 (b). "On and after March 1, 1946, the provisions of said Sherman Act shall not apply to any agreement or concerted or cooperative action between two or more insurance companies for making, establishing, or using rates for insurance, rating methods, premiums, insurance policy or bond forms, or underwriting rules . . ." S. 12, 79th Cong., 1st Sess. (1945).

One inference that can be drawn from this pattern is that Congress was aware of the existence of agreements regarding agents' commissions, and chose not to include them within the exemption for the "business of insurance." On the other hand, the fact that the indictment in *South-Eastern Underwriters* had included a charge that insurance companies did boycott agents who insisted on selling other lines of insurance, together with the fact that § 3 (b) presumably removes an exemption that, but for its absence, would be conferred by § 2, suggests that the "business of insurance" may have been intended to include dealings within the insurance industry between insurers and agents.

Even if it be assumed, however, that transactions between an insurer and its agents, including independent agents, are the "business of insurance," it still does not follow that the Pharmacy Agreements also fall within the definition. Transactions between an insurer and an agent, unlike the Pharmacy Agreements, are wholly intra-industry; an insurance agent sells insurance while a pharmacy sells goods and services. Moreover, there are historical reasons why the Pharmacy Agreements should not be considered the "business of insurance," whatever may be the status of agreements between an insurer and its agents. See Part III-D, *infra*.

<sup>33</sup> The only case to the contrary was *Cleveland Hospital Service Assn. v. Ebright*, 142 Ohio St. 51, 49 N. E. 2d 929 (1943). There have been few cases dealing with the issue since the enactment of the McCarran-Ferguson Act; most of them have also held that Blue Cross and Blue Shield plans are not insurance. See, e. g., *Michigan Hospital Service v. Sharpe*, 339 Mich. 357, 63 N. W. 2d 638 (1954); *Hospital Service Corp. v. Pennsylvania Ins. Co.*, 101 R. I. 708, 227 A. 2d 105 (1967).

<sup>34</sup> The dissenting opinion argues that "regulation of the service-benefit plans was a part of the system of state regulation of insurance that the McCarran-Ferguson Act was designed to preserve." Post, at 240. It is not at all clear that States that passed enabling statutes regarded the plans as insurance. These statutes typically authorized the plans to operate but did not specify whether or not they were insurance. E. g., 1935 Ill. Laws, p. 621 ("An Act to provide for the Incorporation and Regulation of nonprofit Hospital Service Corporations"); 1939 Mich. Pub. Acts No. 109 ("An Act to provide for and to regulate the incorporation of non-profit hospital service corporations"); 1938 N. J. Laws, ch. 336 ("An Act concerning hospital service corporations and regulating the establishment, maintenance and operation of hospital service plans"); ch. 698, 53 Stat. 1412 (1939) ("Providing for the incorporation of certain persons as Group Hospitalization, Inc."). This latter statute enacted by Congress also provided in § 7: "This corporation shall not be subject to the provisions of statutes regulating the business of insurance in the District of Columbia, but shall be exempt therefrom unless specifically designated therein." The Senate Report stated: "This bill does not change existing law but merely creates a private corporation which did not heretofore exist in the District of Columbia." S. Rep. No. 1012, 76th Cong., 1st Sess., 2 (1939). At the time this statute was passed in 1939, the group health services plan in the District of Columbia had been construed not to be engaged in the business of insurance. *Group Health Assn. v. Moor*, 24 F.Supp. 445 (DC 1938).

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[\*227] history makes clear that [\*\*278] [HN8↑](#) Congress certainly did not intend the definition of the "business of insurance" to be *broader* than its commonly understood meaning, the contemporary perception that health-care organizations were not engaged in providing insurance is highly significant in ascertaining congressional intent.

[\*\*\*\*38] The *Jordan v. Group Health Assn.* case, *supra*, is illustrative of the contemporary view of health-care plans. Group Health was organized as a nonprofit corporation to provide various medical services and supplies to members who paid a fixed annual premium. To implement the plan, Group Health contracted with physicians, hospitals, and others, to provide medical services. These groups were compensated exclusively by Group Health. By contracting with the various medical groups directly, Group Health was able to obtain [\*228] services at a lower cost than if each member contracted separately. The plan, therefore, was somewhat similar to the Pharmacy Agreements in this case. The court in *Group Health* held that this type of arrangement was not insurance:

"Whether the contract is one of insurance or of indemnity there must be a risk of loss to which one party may be subjected by contingent or future events and an assumption of it by legally binding arrangement by another. Even the most loosely stated conceptions of insurance . . . require these elements. Hazard is essential and equally so a shifting of its incidence.

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"Although Group Health's [\*\*\*\*39] activities may be considered in one aspect as creating security against loss from illness or accident, more truly they constitute the [\*\*1082] quantity purchase of well-rounded, continuous medical service by its members. Group Health is in fact and in function a consumer cooperative. The functions of such an organization are not identical with those of insurance or indemnity companies. The latter are concerned primarily, if not exclusively, with risk . . . . On the other hand, the cooperative is concerned principally with *getting service rendered to its members* and doing so at lower prices made possible by quantity purchasing and economies in operation." [71 App. D. C., at 44, 46, 107 F.2d, at 245, 247](#). (Emphasis supplied in part; footnotes omitted.)<sup>35</sup>

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Indeed, courts have continued to hold that Blue Shield plans are not insurance even in States that have enacted enabling statutes. *E. g.*, [Michigan Hospital Service v. Sharpe, supra](#). In that case, the court specifically rejected the proposition that the existence of the enabling statute was sufficient to demonstrate that the plan was insurance.

But even if certain aspects of a Blue Shield plan are the "business of insurance," the Pharmacy Agreements in this case are not -- for all the reasons set out in this opinion. It is to be emphasized that the question whether provider agreements like the Pharmacy Agreements in this case, or other aspects of insurance companies, were in 1945 or are now regulated by state law is irrelevant to the issue before the Court in the present case. See n. 38, *infra*.

<sup>35</sup> Despite the fact that courts did not view plans like Blue Cross and Blue Shield as insurance at the time of the passage of the McCarran-Ferguson Act, the petitioners argue that Attorney General Biddle's remarks when testifying in the Joint Hearing before the Subcommittees of the Committees on the Judiciary on S. 1362, H. R. 3269, and H. R. 3270, 78th Cong., 1st Sess., 41-42 (1943), indicate a congressional understanding that such plans were indeed insurance.

The thrust of Attorney General Biddle's remarks was that this Court's decision in *American Medical Assn. v. United States, 317 U.S. 519*, justified the indictment in the *South-Eastern Underwriters* case. In the *AMA* case, the Court had held that a health-maintenance organization was engaged in "trade" within the meaning of the Sherman Act. Based on this decision, Attorney General Biddle expressed the view that the plan was insurance and that therefore the Court had already held that insurance was commerce. Thus, he argued that the indictment in *South-Eastern Underwriters* was proper.

It seems clear, however, why this testimony does not demonstrate that Congress believed that Blue Cross or Blue Shield plans are insurance. First, the statement of the Attorney General that the plan in the *AMA* case was insurance was not accepted by Congress. Senator Bailey rejected the characterization, pointing out that the Court had not referred to the plan as insurance. To Senator Bailey, the plan was not insurance but a "group cooperative movement." (Indeed, the precise plan at issue was held not to be insurance in [Jordan v. Group Health Assn., 71 App. D. C. 38, 107 F.2d 239 \(1939\)](#).) But even if it can nonetheless be inferred that some Members of Congress may have agreed with the Attorney General that prepaid health plans are insurance, his testimony did not remotely suggest that agreements between an insurer and a third party fixing the cost at which goods and services will be purchased is also insurance.

[\*\*\*40] [\*229] [\*\*\*279] Indeed, Blue Cross and Blue Shield organizations themselves have historically taken the position that they are not insurance companies in seeking to avoid state regulation and taxation.<sup>36</sup> [\*\*\*41] It is thus difficult to assume that contrary to this historical position and a majority of court decisions, Congress in 1945 understood that advance-payment medical-benefits [\*230] plans are the "business of insurance."<sup>37</sup> It is next to impossible to assume that Congress could have thought that agreements (even by insurance companies) which provide for the purchase of goods and services from third parties at a set price are within the meaning of that phrase.<sup>38</sup>

[\*\*\*42] [\*231] [\*280] [\*\*1083] IV

LEdHN[8]↑ [8]LEdHN[9A]↑ [9A]LEdHN[10A]↑ [10A]It is well settled that HN9↑ exemptions from the antitrust laws are to be narrowly construed. E. g., *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U.S. 1; *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616; *FMC v. Seatrail Lines, Inc.*, 411 U.S. 726; *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305. This doctrine is not limited to implicit exemptions from the antitrust laws, but applies with equal force to express statutory exemptions. E. g., *Abbott Laboratories v. Portland Retail Druggists Assn., Inc., supra, at 11-12* (the Nonprofit Institutions Act); *FMC v. Seatrail Lines, Inc.*,

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Similarly, the fact that a few years later some witnesses at a Senate Committee hearing referred to Blue Cross as insurance in discussing alternatives to national health insurance, e. g., Hearings before the Senate Committee on Education and Labor on S. 1606, 79th Cong., 2d Sess., pt. 1, pp. 172-176 (1946), does not establish that Congress shared this view, let alone that provider agreements like the Pharmacy Agreements in this case are insurance.

<sup>36</sup> Weller, The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy, 1978 Duke L. J. 587, 624 n. 174. As one commentator has stated about the effectiveness of the traditional opposition of these organizations to being characterized as insurance:

"[Insurance] experts are fond of expressing amazement at Blue Cross and Blue Shield opinion that the Blues are not insurance but something else, such as 'pre-payment plans.' The insurance experts should control their incredulity of this view, or at least save some for the courts. For the fact is that the majority of cases have in effect upheld these so-called 'outrageous' opinions of Blue Cross adherents." Denenberg, The Legal Definition of Insurance, 30 J. Ins. 319, 322 (1963).

<sup>37</sup> This is not to say that the contracts offered by Blue Shield to its policyholders, as distinguished from its provider agreements with participating pharmacies, may not be the "business of insurance" within the meaning of the Act.

<sup>38</sup> This conclusion is in no way affected by the existence of state enabling statutes regulating advance-payment medical-benefits plans at the time the McCarran-Ferguson Act was enacted. E. g., 1937 Cal. Stats., ch. 882, as amended by 1941 Cal. Stats., ch. 311; 1939 Conn. Pub. Acts, ch. 150; 1935 Ill. Laws, p. 621; 1936 Miss. Gen. Laws, ch. 177; 1939 Mich. Pub. Acts, No. 109; 1938 N. J. Laws, ch. 719. These statutes generally provided that the plans were not insurance. See *supra, at 226-227*, and n. 34. Even if it is assumed that some state legislatures believed that these plans are insurance, however, it still does not follow that provider agreements like the Pharmacy Agreements in this case were considered by Congress to be the "business of insurance."

Many aspects of insurance companies are regulated by state law, but are not the "business of insurance." Similarly, the enabling statutes in existence at the time the Act was enacted typically regulated such diverse aspects of the plans as the composition of their boards of directors, when their books and records could be inspected, how they could invest their funds, when they could liquidate or merge, as well as how they could purchase goods and services by entering into provider agreements.

Provider agreements are no more the "business of insurance" because they were regulated by state law at the time of the McCarran-Ferguson Act than are these other facets of the plans which were similarly regulated. If Congress had exempted the "business of insurance companies," then these aspects of the plans which are not themselves insurance as that term is commonly understood would nevertheless be arguably exempt. But since Congress explicitly rejected this approach, they are not within the exemption even though they are the subject of state regulation.

This Court has implicitly recognized that state regulation of a practice of an insurance company does not mean that the practice is the "business of insurance" within the meaning of the McCarran-Ferguson Act. In both cases, *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, and *SEC v. National Securities, Inc.*, 393 U.S. 453, the challenged conduct was regulated by the State Insurance Commissioner, but this Court held that the practices were not the "business of insurance."

supra, at 733 (§ 15 of the Shipping Act); United States v. McKesson & Robbins, supra, at 316 [\*\*\*\*43] (the Miller-Tydings and McGuire Acts).

Application of this principle is particularly appropriate in this case because the Pharmacy Agreements involve parties wholly outside the insurance industry. In analogous contexts, the Court has held that HN10 [↑] an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties. The Court has held, for example, that an exempt agricultural cooperative under the Capper-Volstead Act loses its exemption if it conspires with nonexempt parties. Case-Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384; United States v. Borden Co., 308 U.S. 188. Similarly, the Court has consistently stated that a union forfeits its exemption from the antitrust laws if it agrees with one set of employers to impose a wage scale on other bargaining units. Ramsey v. Mine Workers, [\*232] 401 U.S. 302, 313; Mine Workers v. Pennington, 381 U.S. 657, 665-666.<sup>39</sup>

[\*\*\*\*44] [\*\*\*281] [\*\*1084] If agreements between an insurer and retail pharmacists are the "business of insurance" because they reduce the insurer's costs, then so are all other agreements insurers may make to keep their costs under control -- whether with automobile body repair shops or landlords.<sup>40</sup> [\*\*\*\*45] Such agreements [\*233] would be exempt from the antitrust laws if Congress had extended the coverage of the McCarran-Ferguson Act to the "business of insurance companies."<sup>41</sup> But that is precisely what Congress did not do.

For all these reasons, the judgment of the Court of Appeals is

*Affirmed.*

**Dissent by:** BRENNAN

## Dissent

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LEdHN[9B] [↑] [9B] LEdHN[10B] [↑] [10B] As the Court stated in Pennington, 381 U.S., at 665-666 (footnote omitted):

"[A] union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior. But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it had agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy."

<sup>40</sup> There is no principled basis upon which a line could rationally be drawn that would extend the McCarran-Ferguson Act exemption only to an insurer's agreement with providers of goods and services to be furnished to its policyholders -- such as agreements with hospitals, doctors, lawyers, and the like. But assuming that such a line could rationally be drawn, to hold that even such provider agreements are the "business of insurance" is to ignore the language and purpose of the Act not to exempt the insurance industry as such from the antitrust laws.

Moreover, exempting provider agreements from the antitrust laws would be likely in at least some cases to have serious anticompetitive consequences. Recent studies have concluded that physicians and other health-care providers typically dominate the boards of directors of Blue Shield plans. Thus, there is little incentive on the part of Blue Shield to minimize costs, since it is in the interest of the providers to set fee schedules at the highest possible level. This domination of Blue Shield by providers is said to have resulted in rapid escalation of health-care costs to the detriment of consumers generally. See *Skyrocketing Health Care Costs: The Role of Blue Shield*, Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 95th Cong., 2d Sess., 4-34 (1978) (remarks of Michael Pertschuk, Chairman, Federal Trade Commission).

<sup>41</sup> It might be argued that some such agreements are exempt from the antitrust laws under the state-action exemption of Parker v. Brown, 317 U.S. 341. But that exemption would exist because of the extent of state regulation and not because the agreements are the "business of insurance."

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MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL join, dissenting.

The McCarran-Ferguson Act, 59 Stat. 33, as amended, [15 U. S. C. §§ 1011-1015](#), renders the federal antitrust laws inapplicable to the "business of insurance" to the extent such business is regulated by state law and is not subject to the "boycott" exception stated in [§ 1013 \(b\)](#).<sup>1</sup> The single question presented by this case is whether the "business of insurance" [\[\\*234\]](#) [\[\\*\\*\\*282\]](#) includes direct contractual arrangements ("provider agreements") between petitioner Blue Shield and third parties to provide benefits owed to the insurer's policyholders. [\[\\*\\*\\*\\*46\]](#) The Court today holds that it does not.

[\[\\*\\*\\*\\*47\]](#) I disagree: Since (a) there is no challenge to the status of Blue Shield's drug-benefits *policy* as the "business of insurance," I conclude (b) that some provider agreements negotiated to carry out the policy obligations of the insurer to the insured should be considered part of such business, and (c) that the specific Pharmacy Agreements at issue in this case should be included in such part. Before considering this analysis, however, it is necessary to set forth the background of the enactment of the McCarran-Ferguson Act.

[\[\\*\\*1085\]](#) I

[SEC v. National Securities, Inc., 393 U.S. 453, 459 \(1969\)](#), recognized that the legislative history of the McCarran-Ferguson Act sheds little light on the meaning of the words "business of insurance." See S. Rep. No. 20, 79th Cong., 1st Sess. (1945); H. R. Rep. No. 143, 79th Cong., 1st Sess. (1945). But while the legislative history is largely silent on the matter,<sup>2</sup> [\[\\*\\*\\*\\*49\]](#) it does indicate that Congress deliberately chose [\[\\*235\]](#) to phrase the exemption broadly. Congress had draft bills before it which would have limited the "business of insurance" to a

<sup>1</sup> [Section 2 \(b\)](#) of the Act, as set forth in [15 U. S. C. § 1012 \(b\)](#), provides:

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [\[15 U. S. C. 41 et seq.\]](#), shall be applicable to the business of insurance to the extent that such business is not regulated by State Law."

Section 3 (b), as set forth in [15 U. S. C. § 1013 \(b\)](#), provides:

"(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

<sup>2</sup> The Court argues that the silence with respect to agreements between insurers and third parties, coupled with the fact that Congressmen did discuss horizontal agreements between insurance companies, establishes by negative inference that third-party agreements were not considered "the business of insurance." There is, however, a compelling explanation for the lack of mention of provider agreements. As the Court has noted in several cases, see, e. g., [SEC v. National Securities, Inc., 393 U.S. 453, 459 \(1969\)](#); *St. Paul Fire & Marine Ins. Co. v. Barry*, [438 U.S. 531, 538-539 \(1978\)](#), the McCarran-Ferguson Act was a reaction to the decision in [United States v. South-Eastern Underwriters Assn.](#), [322 U.S. 533 \(1944\)](#). See *infra*, at 236-237. That case involved an organization of fire insurance companies, and much of the congressional discussion accordingly concerned alleged abuses by and regulation of such companies. See, e. g., 91 Cong. Rec. 1091-1092, 1479 (1945); 90 Cong. Rec. 6449-6455, 6527 (1944). Indeed, health insurers did not even participate in the hearings on the Act. See Joint Hearing before the Subcommittees of the Committees on the Judiciary on S. 1362 et al., 78th Cong., 1st Sess. (1943). Since fire insurers paid their policyholders cash indemnities, these companies had no reason to contract with third parties for the provision of goods or services. That fact fully explains the absence of discussion of such contracts in the congressional debates. Such absence no more indicates a congressional intent to exclude provider agreements from the "business of insurance" than does the absence of any mention of health insurance companies indicate a congressional intent arbitrarily to exclude all health insurance from the "business of insurance."

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narrow range of specified insurance company practices, but chose [\*\*\*\*48] instead the more general language which ultimately became law.<sup>3</sup>

[\*\*\*\*50] [\*236] The [\*\*\*283] historical background of the statute's enactment, developed by the Court in *SEC v. National Securities, Inc., supra*, provides the guide to congressional purpose:

"The McCarran-Ferguson Act was passed in reaction to this Court's decision in *United States v. South-Eastern Underwriters Assn., 322 U.S. 533 (1944)*. Prior to that decision, it had been assumed, in the language of the leading case, that 'issuing] a policy of insurance is not a transaction of commerce.' *Paul v. Virginia, 8 Wall. 168, 183 (1869)*. Consequently, regulation of insurance transactions was thought to rest exclusively with the States. In *South-Eastern Underwriters*, this Court held that insurance transactions were subject to federal regulation [\*\*1086] under the *Commerce Clause*, and that the antitrust laws, in particular, were applicable to them. Congress reacted quickly . . . [, being] concerned about the inroads the Court's decision might make on the tradition of state regulation of insurance. The McCarran-Ferguson Act was the product of this concern. Its purpose was stated quite clearly in its first [\*\*\*\*51] section; Congress declared that 'the continued regulation and taxation by the several States of the business of insurance is in the public interest.' 59 Stat. 33 (1945), *15 U. S. C. § 1011*. As this Court said shortly afterward, '[obviously] Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance.' *Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 429 (1946)*.

"The . . . Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *393 U.S., at 458-459*.

See also *St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 538-539 (1978)*; 90 Cong. Rec. 6524 (1944) (Cong. Walter) [\*237] ("[The] legislation . . . is designed to restore to the status quo the position the insurance business of this Nation occupied before the Supreme Court recently legislated [in *South-Eastern Underwriters*]").

Since continuation of state regulation as it existed before *South-Eastern* was Congress' goal,<sup>4</sup> [\*\*\*\*52] evidence of [\*\*\*284] what States [\*238] might reasonably have considered to be and regulated as insurance at the time the

<sup>3</sup> S. 12, 79th Cong., 1st Sess. (1945), would have specified

"any agreement or concerted or cooperative action between two or more insurance companies for making, establishing, or using rates for insurance, rating methods, premiums, insurance policy or bond forms, or underwriting rules." (Emphasis added.)

See also § 4 (b) of a draft bill of the National Association of Insurance Commissioners, 90 Cong. Rec. A4406 (1944). A significant Senate floor debate with regard to such limiting bills is the following:

"MR. PEPPER. Would it not be better that those agreements, if there are such that are legitimatized, be identified in the statute?

"MR. O'MAHONEY. I quite agree with the Senator, and I endeavored to the very best of my ability to induce the committees of Congress to write into the law specific exemptions from the *antitrust law*, but I was unable to prevail in the Committee on the Judiciary and I was unable to prevail on the floor of the Senate." 91 Cong. Rec. 1444 (1945).

The Court challenges the conclusion that Congress intended to phrase the exemption broadly by referring to the legislative history of one obscure amendment to an early House version of the Act. *Ante*, at 222-223, n. 29. Closer examination of the short debate surrounding that amendment reveals only the Representatives' repeated expressions of their confusion over what the amendment meant. See 90 Cong. Rec. 6562 (1944) (remarks of Reps. Summers, Hobbs, and Fernandez).

<sup>4</sup> There can be no quarrel with the Court's statement, *ante*, at 220, and n. 24, that the McCarran-Ferguson Act was not intended to restore the law, *in all respects*, to what it had been before *South-Eastern Underwriters*. But the principal differences between pre-*South-Eastern* and post-McCarran-Ferguson law are irrelevant for purposes of this case, and do not detract from the Court's oft-repeated statement that the purpose of the Act was to preserve state regulatory schemes as they existed before *South-Eastern Underwriters*.

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McCarran-Ferguson Act was passed in 1945 is clearly relevant to our decision. This does not mean that a transaction not viewed as [\*\*1087] insurance in 1945 cannot be so viewed today.

"We realize that . . . insurance is an evolving institution. Common knowledge tells us that the forms have greatly changed even in a generation. And we would not undertake to freeze the [concept] of 'insurance' . . . into the mold [it] fitted when these Federal Acts were passed." [SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65, 71 \(1959\).](#)

It is thus logical to suppose that if elements common to the ordinary understanding of "insurance" are present, new forms of the business should constitute the "business of insurance" for purposes of the McCarran-Ferguson Act. The determination of the scope of the Act, therefore, involves both an analysis of the proximity between the challenged transactions and those well recognized as elements of "insurance," and an examination of the historical setting of the Act. On both counts, Blue Shield's [\*\*\*\*53] Pharmacy Agreements constitute the "business of insurance."

[\*\*\*\*54] [\*239] II

I start with common ground. Neither the Court, [\*\*\*285] *ante*, at 230 n. 37, nor the parties challenge the fact that the drug-benefits policy offered by Blue Shield to its policyholders -- as distinguished from the contract between Blue Shield and the pharmacies -- is the "business of insurance." Whatever the merits of scholastic argument over the technical definition of "insurance," the policy both transfers and distributes risk. The policyholder pays a sum certain -- the premium -- against the risk of the uncertain contingency of illness, and if the company has calculated correctly, the premiums of those who do not fall ill pay the costs of benefits above the premiums of those who do. See R. Mehr & E. Cammack, *Principles of Insurance* 31-32 (6th ed. 1976). An important difference between Blue Shield's policy and other forms of health insurance is that Blue Shield "pays" the policyholder in goods and services (drugs and their dispensation), rather than in cash. Since we will not "freeze the [concept] of 'insurance' . . . into the

Before *South-Eastern*, insurance companies might boycott, coerce, and intimidate without violating federal antitrust statutes since insurance was not considered "commerce" and hence was beyond the reach of federal law. For the same reason, even unregulated insurance transactions were free from antitrust attack. Finally, Congress, because of the "commerce" problem, could not otherwise regulate insurance. None of these elements survived the decision in *South-Eastern*, and none was revived by McCarran-Ferguson. These differences between pre-*South-Eastern* and post-McCarran-Ferguson law were what Senator Ferguson had in mind when he answered "no" to Senator McKellar's question, cited by the Court, *ante*, at 220 n. 24, asking whether the effect of the Act was to re-establish the law as it stood prior to *South-Eastern*. This is revealed by quotation of Senator Ferguson's full answer to Senator McKellar.

"MR. FERGUSON. No. I would say that subsection (b), at the bottom of page 2, would allow the provisions of the Sherman Act to apply to all agreements or acts of boycott, coercion, or intimidation, and subsection 4 (a) would suspend the application of the provisions of the Sherman Act and the Clayton Act, insofar as States may regulate and tax such companies, until certain dates or until Congress may act in the meantime in respect to what Congress thinks should be done with the business of insurance." 91 Cong. Rec. 478 (1945).

These discrete differences between pre-*South-Eastern* and post-McCarran-Ferguson law are not applicable here, and do not conflict with the holdings of this Court's prior opinions that, with respect to *state-regulated insurance practices not constituting boycotts*, McCarran-Ferguson was intended to preserve pre-existing state insurance regulation.

This analysis also explains, and renders irrelevant for this case, Congress' rejection of the "total" exemption bills cited by the Court, *ante*, at 218-219, and n. 21. Those bills, unlike the one that passed, would have exempted boycotts and unregulated transactions. It was this aspect of the "total" exemption bills to which the National Association of Insurance Commissioners objected. See 90 Cong. Rec. 8482 (1944). These bills were rejected not because of a decision to narrow the scope of the nonboycott activities to be exempted, but because Congress determined that the business of insurance should be exempted only where regulated by the States, rather than unconditionally.

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mold it fitted" when McCarran-Ferguson was passed, this difference cannot be a reason for holding that the drug-benefits policy [\*\*\*\*55] falls outside the "business of insurance" even if our inquiry into the understandings of what constituted "insurance" in the 1930's and 1940's were to suggest that a contrary view prevailed at that time.<sup>5</sup>

Fortunately, logic and history yield the same result. It is true that the first health insurance policies provided only cash indemnities. However, although policies that specifically provided drug benefits were not available during the 1930's and 1940's, analogous policies providing hospital and medical services -- rather than cash -- were available.

The hospital service-benefit concept originated in Texas in [\*240] 1929; medical services were first offered in 1939. R. Eilers, Regulation of Blue Cross and Blue Shield Plans 10, 15 (1963) (hereinafter [\*\*\*\*56] Eilers). In 1940, 4,500,000 people in 60 communities were covered by Blue Cross or related hospital-benefits plans. C. Rorem, Non-Profit Hospital Service Plans 1-2 (1940) (hereinafter Rorem I). During the 1940's, health insurance became a subject of collective bargaining, with unions demanding the service-benefit approach of Blue Cross and Blue Shield. S. Law, Blue Cross 11 (1974) (hereinafter Law). By 1945, the year the McCarran-Ferguson Act was enacted, over 20 million people were enrolled in service-benefit programs, with service-benefit plans comprising 61% of the total hospitalization insurance market. See Hearings before the Senate Committee on Education and Labor, A National Health Program, 79th Cong., 2d Sess., pt. 1, p. 173 (1946); Eilers 19; Law 11.

[\*\*1088] Moreover, regulation of the service-benefit plans was a part of the system of state regulation of insurance that the McCarran-Ferguson Act was designed to preserve. Led by New York in 1934, 24 States passed enabling Acts by 1939 which, while relieving the plans of certain reserve requirements and tax obligations, specifically subjected service-benefit plans to the supervision and control of state departments [\*\*\*\*57] of insurance.

<sup>6</sup> [\*\*\*\*58] [\*\*\*286] See Rorem, Enabling Legislation for Non-Profit Hospital Service Plans, 6 Law & Contemp. Prob. 528, 531, 534 (1939) (hereinafter Rorem II); N. Sinai, O. Anderson, & M. Dollar, Health Insurance in the United States [\*241] 48-49 (1946) (hereinafter Sinai); Comment, Group Health Plans: Some Legal and Economic Aspects, 53 Yale L. J. 162, 174 (1943). Another 16 States apparently limited the issuance of hospitalization insurance to stock and mutual insurance companies. Nine acted on the premise that the plans were not "insurance" and authorized operation under general corporation laws, exempt from reserve requirements. Rorem II, p. 532. By the time the McCarran-Ferguson Act was passed, 35 States had enabling legislation.<sup>7</sup> During this period, the National Association of Insurance Commissioners (NAIC), the organization of state insurance directors which played a major role in drafting the McCarran-Ferguson Act,<sup>8</sup> was also drafting model state enabling legislation to govern service-benefit health plans. Proceedings of the NAIC, 75th Sess., 226 (1944); *id.*, 76th Sess., 250 (1945).<sup>9</sup>

<sup>5</sup> See [SEC v. National Securities, Inc., 393 U.S., at 460](#) ("The relationship between insurer and insured, [and] *the type of policy which could be issued . . . [are] the core of the 'business of insurance'*"). (Emphasis added.)

<sup>6</sup> See 1935 Ala. Acts No. 544; 1935 Cal. Stats., ch. 386; 1939 Conn. Pub. Acts, ch. 150; ch. 698, 53 Stat. 1412 (1939) (District of Columbia); 1937 Ga. Laws, p. 690; 1935 Ill. Laws, p. 621; 1939 Iowa Acts, ch. 222; 1938 Ky. Acts, ch. 23; 1939 Me. Acts, ch. 149; 1937 Md. Laws, ch. 224; 1936 Mass. Acts, ch. 409; 1939 Mich. Pub. Acts No. 109; 1936 Miss. Gen. Laws, ch. 177; 1939 N. H. Laws, ch. 80; 1938 N. J. Laws, ch. 366; 1939 N. M. Laws, ch. 66; 1934 N. Y. Laws, ch. 595; 1939 Ohio Leg. Acts, p. 154; 1937 Pa. Laws No. 378; 1939 R. I. Acts, ch. 719; 1939 S. C. Acts No. 296; 1939 Tex. Gen. Laws, p. 123; 1939 Vt. Laws No. 174; 1939 Wis. Laws, ch. 118.

<sup>7</sup> F. Hedinger, The Social Role of Blue Cross as a Device for Financing the Costs of Hospital Care 51 (1966). The additional statutes were: 1945 Ariz. Sess. Laws, ch. 13 (1st Spec. Sess.); 1939 Fla. Laws, ch. 19108; 1941 Kan. Sess. Laws, ch. 259; 1940 La. Acts No. 267; 1941 Minn. Laws, ch. 53; 1941 Neb. Laws, ch. 43; 1941 N. C. Pub. Laws, ch. 338; 1943 N. D. Laws, ch. 103; 1945 Tenn. Pub. Acts, ch. 98; 1940 Va. Acts, ch. 230; 1943 W. Va. Acts, ch. 8.

<sup>8</sup> See 91 Cong. Rec. 483 (1945) (remarks of Sen. O'Mahoney).

<sup>9</sup> Debate arose during this period as to whether service-benefit plans were technically insurance. See *ante*, at 225-230. Most state insurance commissioners ruled during the 1930's that the plans constituted insurance, and therefore had to meet the capital stock, reserve, and assessment requirements applicable to the commercial stock and mutual insurance companies which offered cash indemnity policies. Eilers 101. In addition, this meant that the plans were subject to special state taxation. *Ibid.*

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[\*\*\*59] [\*242] [\*\*287] [\*\*1089] Thus, when the McCarran-Ferguson Act became law, service-benefit plans similar to the Blue Shield plan at issue here were a widespread and well-recognized form of insurance, subject to regulation in most of the States. Congress itself treated these important programs as insurance. In 1939, Congress adopted an enabling Act incorporating a hospitalization-benefits plan in the District of Columbia, with supervisory [\*243] authority placed in the hands of the Superintendent of Insurance. See H. R. 6266, 76th Cong., 1st Sess. (1939); H. R. Rep. No. 1247, 76th Cong., 1st Sess. (1939); 84 Cong. Rec. 11224 (1939). And in hearings held the year after passage of the McCarran-Ferguson Act, the same Congress that approved that Act debated Blue Shield-type programs as alternatives to national health insurance, with participating Congressmen frequently referring to them as "insurance." Hearings before the Senate Committee on Education and Labor, A National Health Program, 79th Cong., 2d Sess., pt. 1, pp. 55, 83, 108, 172, pt. 2, p. 558 (1946).<sup>10</sup> The status of service-benefit policies as "insurance," both logically and historically, is therefore sufficiently [\*\*\*60] established to make that the first premise in an analysis of the status of the Pharmacy Agreements at issue in this case.

### III

The next question is whether at least some contracts with third parties to procure delivery of benefits to Blue Shield's insureds would also constitute the "business of insurance." Such contracts, like those between Blue Shield and the druggists in this case, are known as "provider agreements." The Court, adopting the view of the Solicitor General, today holds that no provider agreements can be considered part of the "business of insurance."<sup>11</sup> It contends that the "underwriting or [\*\*\*61] spreading of risk [is] an indispensable characteristic of [\*244] insurance," *ante*, at 212,<sup>12</sup> and that [\*\*\*288] "[another] commonly understood aspect of the business of insurance

Such holdings limited the feasibility of the plans at a time when they were widely perceived as being socially beneficial. Moreover, it was argued that these rulings were inappropriate to service-benefit plans, which were generally "nonprofit," and often included guarantees by hospitals to provide services regardless of the financial state of the insurer -- potentially an adequate substitute for the cash reserves needed by indemnity plans. *Id.*, at 135-136, 239.

Some courts, and even some Blue Cross-type organizations, attempted to surmount these barriers to effectuation of plans deemed to be in the public interest by arguing that the plans were not technically "insurance" subject to the jurisdiction of state insurance commissioners, and hence were not bound by the requirements of the stock and mutual insurance companies. See, e. g., *Jordan v. Group Health Assn.*, 71 App. D. C. 38, 107 F.2d 239 (1939). But see *Cleveland Hospital Service Assn. v. Ebright*, 142 Ohio St. 51, 49 N. E. 2d 929 (1943) (hospital service plans are insurance); *McCarty v. King County Medical Service Corp.*, 26 Wash. 2d 660, 175 P. 2d 653 (1946) (same). But contemporary commentators questioned the soundness of such views and argued that the plans should be treated as insurance, although as a special kind not subject to the traditional requirements. See, e. g., Note, The Legal Problems of Group Health, 52 Harv. L. Rev. 809, 815 (1939); Comment, Group Health Plans: Some Legal and Economic Aspects, 53 Yale L. J. 162, 172 (1943). The 35 state enabling Acts governing service-benefit health plans reflected the States' agreement that the plans were "a special type of insurance" differing from the stock and mutual companies. Rorem II, p. 534; Sinai 48. This is most clearly demonstrated by the fact that the vast majority of the state statutes, while relieving the plans of "other" insurance law requirements (primarily the reserve requirements and special insurance taxes), subjected their activities to the control of the state insurance commissioner. The 1939 New Mexico Statute, for example, amended the State's *Insurance Code* by adding a new section entitled "Non-Profit Hospital Service Plans." The amendment subjected the plans, and in particular both their premiums and rates of payment to hospitals, to the approval of the *Superintendent of Insurance*, while exempting them from "all other provisions of the insurance law." 1939 N. M. Laws, ch. 66 (emphasis added). This approach was in accord with the commonly held view that such plans were forms of "insurance," as reflected by the statements of numerous Congressmen in the congressional hearings on the proposed National Health Program, see *infra*, at 243. And everyday meaning, rather than some technical term of art, is what Congress intended by its use of the word "insurance" in the McCarran-Ferguson Act.

<sup>10</sup> Messages of two Presidents to the Congress on the subject of national health care also referred to service-benefit plans as forms of insurance. Message from the President of the United States, Report and Recommendations on National Health, H. R. Doc. No. 120, 76th Cong., 1st Sess., 63 (1939); Message from the President, A National Health Program, H. R. Doc. No. 380, 79th Cong., 1st Sess., 9, 10 (1945).

<sup>11</sup> The respondents do not argue this view. They agree that some provider contracts may constitute the "business of insurance." Brief for Respondents 33.

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relates to the contract between the insurer and the insured." *Ante*, at 215. Because provider agreements neither themselves spread risk, nor involve transactions between insurers and insureds, the Court excludes them from the "business of insurance."

The argument fails in light of this Court's [\*\*\*\*62] prior decisions and the legislative history of the Act. The Court has held, for example, *FTC v. National Casualty Co.*, 357 U.S. 560 (1958), that the advertising of insurance, a unilateral act which does not involve underwriting, is within the scope of the McCarran-Ferguson [\*\*1090] Act. And the legislative history makes it abundantly clear that numerous horizontal agreements between insurance companies which do not technically involve the underwriting of risk were regarded by Congress as within the scope of the Act's exemption for the "business of insurance." For example, rate agreements among insurers, a conspicuous congressional illustration, see, e. g., 91 Cong. Rec. 1481, 1484 (1945) (remarks of Sens. Pepper and Ferguson), and the subject of the *South-Eastern Underwriters* case, see *SEC v. National Securities, Inc.*, 393 U.S. at 460, do not themselves spread risk. Indeed, the Court apparently concedes that arrangements among insurance companies respecting premiums and benefits would constitute the "business of insurance," despite their failure to fit within its formula. *Ante*, at 221 and 224-225, n. 32.

But the Court's [\*\*\*63] attempt to limit its concession to horizontal transactions still conflicts with the legislative history. Compelling evidence is the fact that Congress actually rejected a proposed bill to limit the exemption to agreements between [\*245] insurance companies. S. 12, 79th Cong., 1st Sess. (1945). See n. 3, *supra*. Moreover, vertical relationships between insurance companies and independent sales agencies were a subject of the indictment in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 535 (1944), were the object of discussion in the House, 90 Cong. Rec. 6538 (1944) (remarks of Cong. Celler), and were expressly included as part of the "business of insurance" in an early draft of the Act, *id.*, at A4406 (NAIC bill, § 4 (b)(5)). Again, the Court concedes that such transactions, between insurers and agents, might fall within the "business of insurance," despite the inconsistency with the Court's own theory. *Ante*, at 224-225, n. 32. <sup>13</sup>

[\*\*\*\*64] The Court's limitation also ignores the significance of pervasive state insurance regulation -- prevailing when the Act was passed -- of hospitalization-benefits plans whose "distinctive feature," Rorem I, p. 64; Proceedings of the NAIC, 75th Sess., 228 (1944), was the provider contract with the participating hospital to provide service when needed. The year prior to adoption of the Act the [\*\*\*289] NAIC emphasized the relationship between provider agreements and service-benefit policies:

"A hospital service plan is designed to provide service rather than to indemnify and this can only be guaranteed through contractual arrangements between plans and hospitals." *Ibid.*

The Association also proposed, in the year McCarran-Ferguson passed, a model state enabling Act requiring "full approval of . . . contracts with hospitals . . . by the insurance commissioner." Proceedings of the NAIC, 76th Sess., 250 [**\*246**] (1945). That proposal reflected well the actual contents of existing state enabling Acts which armed insurance commissioners with considerable authority to regulate provider agreements.<sup>14</sup> Congress itself authorized the service-benefit plan it incorporated in [**\*\*\*\*65**] the District of Columbia "to enter into contracts with hospitals for

<sup>12</sup> "Underwriting," the Solicitor General argues, means "[spreading] risk more widely or [reducing] the role of chance events." Brief for United States as *Amicus Curiae* 17 (hereinafter Government Brief). For purposes of argument I will assume that this is a correct definition of "underwriting." But see R. Holtom, *Underwriting Principles and Practices* 11 (1973).

<sup>13</sup> The effort to distinguish insurer/agent transactions from provider agreements on the ground that the former are "wholly intra-industry" while the latter are not, *ante*, at 225 n. 32, constitutes argument by tautology. The former are "intra-industry" and the latter not, only because the Court so holds today.

<sup>14</sup> See, e. g., 1935 Cal. Stats., ch. 386; 1939 Iowa Acts, ch. 222; 1937 Md. Laws, ch. 224; 1939 Me. Acts, ch. 149; 1939 N. H. Laws, ch. 80; 1939 S. C. Acts No. 296. See also Rorem I, pp. 67-68; Sinai 48-49. Such provisions were often quite extensive, e. g., requiring approval by the insurance commissioner of contracts between hospitals and the corporation, including rates of payment, *ibid.*; requiring that the contracts contain guarantees of services by the hospitals to policyholders despite financial difficulties of the insurer. Rorem I, p. 67; or even limiting the kind of hospitals with which contracts could be made. *id. at 68.*

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the care and treatment of [its subscribers]." H. R. 6266, 76th Cong., 1st Sess. (1939). In light of Congress' objective through the McCarran-Ferguson Act to insure the continuation of existing state regulation, the conclusion [\*\*1091] that at least some provider agreements were intended to be within the "business of insurance" is inescapable.

[\*\*\*\*66] Logic compels the same conclusion. Some kind of provider agreement becomes a necessity if a service-benefits insurer is to meet its obligations to the insureds. The policy before us in this case, for example, promises payment of benefits in drugs. Thus, some arrangement must be made to provide those drugs for subscribers.<sup>15</sup> Such an arrangement obtains [\*247] the very benefits promised in the policy; it does not simply relate to the general operation of the company. A provider contract in a service-benefit plan, therefore, is critical to "the type of policy which could be issued" as well as to its "reliability" and "enforcement." It thus comes within the terms of SEC v. National Securities, Inc., 393 U.S., at 460. That case explained that the "business of insurance" involves not only [\*\*\*290] the "relationship between insurer and insured," but also "other activities of insurance companies [that] relate so closely to their status as reliable insurers that they too must be placed in the same class." Thus, "[statutes] aimed at protecting or regulating . . . [the insurer/insured] relationship, directly or indirectly, are laws regulating [\*\*\*67] the 'business of insurance.'" *Ibid.* (emphasis added).

[\*\*\*\*68] The Congress that passed McCarran-Ferguson was composed of neither insurance experts nor dictionary editors. Rather than use the technical term "underwriting" to express its meaning, Congress chose "the business of insurance," a common-sense term connoting not only risk underwriting, but contracts closely related thereto.<sup>16</sup> Since Congress knew of service-benefit policies, and viewed them as insurance, it would strain common sense to suppose Congress viewed contracts [\*248] necessary to effectuate those policies' commitments as being outside the business it sought to exempt from the antitrust laws.

#### [\*\*\*\*69] IV

The remaining question is whether the provider agreement in *this* case constitutes the "business of insurance." Respondents contend that even if some contract between Blue Shield and the pharmacies is necessary, this one is not. Under the contract at issue, the druggist agrees to dispense drugs to Blue Shield's insureds for a \$ 2 payment, and Blue Shield agrees to reimburse the druggist for the acquisition cost of each drug so dispensed. The pharmacy is thus limited to a \$ 2 "markup." With support from the Court of Appeals, respondents argue that only the first half of the bargain is necessary for Blue Shield to fulfill its policy obligations. Those are fulfilled when Blue Shield binds the pharmacy to dispense the requested drug for \$ 2. The second half of [\*\*1092] the agreement, the amount Blue Shield reimburses the druggist, is assertedly irrelevant to the policyholder. As an alternative to the existing plan, the respondents and the Court of Appeals suggest that Blue Shield could simply pay the pharmacist his usual charge (minus the \$ 2 paid by the policyholder). The present plan, which limits reimbursement to acquisition cost

<sup>15</sup> Indeed, unions negotiating for drug-coverage plans have requested that the plans include contractual arrangements with pharmacies, in order to guarantee that the policy's promises are kept. See Brief for Motor Vehicle Manufacturers Assn. as *Amicus Curiae* 10-11.

It might be argued that the drug-benefits policy could operate successfully without any agreement between Blue Shield and the pharmacies. The consumer could simply pay the pharmacist his full price, whereupon he would normally receive the drugs without hesitation. Blue Shield could then reimburse the policyholder for the full price minus the \$ 2 deductible. This would not, however, be the policy bargained for in this case. That policy guarantees provision of drugs upon a minimal \$ 2 payment, without requiring the policyholder to advance the full price when the contingency of illness occurs -- a time when he may not be able to afford the out-of-pocket payment. Moreover, such cash-reimbursement plans almost inevitably include payment ceilings, again distinguishing them from the full-coverage service plan bargained for in this case. See discussion, *infra*, at 252, and n. 20.

<sup>16</sup> The Court errs in its reading of SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65 (1959). There a "variable annuity" plan was held not to be "the business of insurance" because all risk remained on the policyholder and no underwriting of risk occurred. The key to *Variable Annuity* is that neither the agreement at issue nor any with which it was involved effectuated a transference of risk. *Id., at 71*. That is not the case here, where the policyholder has successfully transferred his risk by trading his premium for the certainty of benefits in the event of illness.

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and freezes the markup at \$ 2, is said [\*\*\*\*70] to set a "fixed" price. From this premise respondents argue that such fixed-price plans are "anticompetitive," and therefore not the "business of insurance."

Respondents' argument is directly contradicted by history. The service-benefit plans available when the McCarran-Ferguson Act was passed actually "fixed" more of the payment to their participating providers than does the plan here, which "fixes" only the markup. Those early plans [\*\*\*291] usually paid established and equal amounts to their participating hospitals, rather than paying whatever each hospital charged. Rorem I, p. 64. Moreover, under the typical state enabling Act, those [\*249] payments were subject to the approval of the state department of insurance.<sup>17</sup> The 1937 Pennsylvania statute, for example, provided that "all rates of payments to hospitals made by such [service-benefit plan] corporations . . . and any and all contracts entered into by any such corporation with any hospital, shall, at all times, be subject to the prior approval of the Insurance Department." 1937 Pa. Laws No. 378. Therefore, as insurer/provider fee agreements were part of the system of state regulation which the McCarran-Ferguson [\*\*\*\*71] Act sought to preserve, there is no historical reason to exclude Blue Shield's Pharmacy Agreements from the ambit of the exemption; there is instead a good historical reason for including them.

Nor does respondents' claim that the Pharmacy Agreements are "anticompetitive" exclude them from constituting the "business of insurance." The determination of whether Blue Shield's Pharmacy Agreements actually involve antitrust violations or are otherwise anticompetitive has been held in abeyance, pending final decision as to whether the agreements fall within the scope of the McCarran-Ferguson Act. But even if the agreements were anticompetitive, that alone could not be the basis for excluding them from the "business of insurance." An antitrust exemption by its very nature must protect some [\*\*\*\*72] transactions that are anticompetitive; an exemption that is extinguished by a finding that challenged activity violates the antitrust laws is no exemption at all.

While this reason for excluding the Pharmacy Agreements from the circle of exempt provider agreements is unconvincing, there are substantial reasons, in addition to history, for including them within that circle. First, it is clear that the contractual arrangement utilized by Blue Shield affects its [\*250] costs, and thus affects both the setting of rates and the insurer's reliability. This is definitely a factor relevant to the determination of whether a transaction is within the "business of insurance." See *SEC v. National Securities, Inc.*, 393 U.S., at 460. See also *Proctor v. State Farm Mutual Automobile Ins. Co.*, 182 U. S. App. D. C. 264, 561 F.2d 262 (1977). True, that factor alone is not determinative, for as argued by the Court, innumerable agreements, including the lease on the insurance company's offices, affect cost. This contract, however, has more than a mere incidental connection to the policy and premium. It is a direct arrangement to provide the very goods [\*\*\*\*73] and services whose purchase is the risk assumed in the insurance policy. It is therefore integral to the insurer's rate-setting process, as the correlation between rates and drug prices in a drug-benefits policy is necessarily high. Moreover, the ability of state insurance commissioners to regulate rates, an important concern of the Act, is measurably enhanced by their ability [\*\*1093] to control the formulas by which insurers reimburse [\*\*\*292] providers.<sup>18</sup> The same is true of state efforts to ensure that plans are financially reliable. See *Travelers Ins. Co. v. Blue Cross of Western Pennsylvania*, 481 F.2d 80, 83 n. 9 (CA3 1973) (quoting the Pennsylvania Insurance Commissioner). This close nexus between the Pharmacy Agreements and both the rates and fiscal reliability of Blue Shield's plan speaks strongly for their inclusion within the "business of insurance." See generally *Proctor v. State* [\*251] *Farm Mutual Automobile Ins. Co.*, *supra*, at 271-272, 561 F.2d, at 269-270.

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<sup>17</sup> Sinai 49. See, e. g., 1937 Ga. Laws, p. 690; 1939 Iowa Acts, ch. 222; 1939 Mich. Pub. Acts No. 109; 1939 N. M. Laws, ch. 66; 1939 Tex. Gen. Laws, p. 123. The same is true of the modern state statutes. See Eilers 106-107.

<sup>18</sup> Indeed, some state insurance commissioners have made aggressive use of their authority over provider contracts as a means of controlling premium rates. See *Frankford Hospital v. Blue Cross of Greater Philadelphia*, 417 F.Supp. 1104, 1106 (ED Pa. 1976), aff'd, 554 F.2d 1253 (CA3), cert. denied, 434 U.S. 860 (1977); State of Michigan, Commissioner of Ins., No. 77-R-101 (Mar. 3, 1977); State of Illinois, Dept. of Ins., Hearing No. 1607 (Apr. 8, 1977). This may also explain why the Federal Government, in programs in which it functions as a health insurer, requires that its provider agreements include specified fee formulas. See, e. g., 42 U. S. C. §§ 1395u, 1395x (v) (Medicare).

[\*\*\*\*74] Another reason, in addition to this nexus to basic insurance elements, also supports the conclusion that fixed-price provider agreements are the "business of insurance." Such agreements themselves perform an important insurance function. It may be true, as the Court contends, that conventional notions of insurance focus on the underwriting of risk. But they also include efforts to reduce the unpredictable aspects of the risks assumed. Traditional plans achieve this end by setting ceilings on cash payments or utilizing large deductibles. R. Mehr & E. Cammack, *Principles of Insurance* 222 (6th ed. 1976). Even if the insurer cannot know how often a policyholder might become ill, it can know the extent of its exposure in the event of illness. The actuarial uncertainty, therefore, is greatly reduced. A fixed-price provider agreement attempts to reach the same result by contracting in advance for a price, rather than agreeing to pay as the market fluctuates. The agreement on price at least minimizes the variance of the "payoff" variable, even if the probability of its occurrence remains an unknown. Indeed, if examined carefully, this function comes within the latter half of the [\*\*\*\*75] definition of "underwriting" offered by the Solicitor General: "[spreading] risk more widely or [reducing] the role of chance events." See n. 12, *supra*. Of course, the Pharmacy Agreements in this case do not totally control "the role of chance" in drug prices since acquisition costs may fluctuate even if "markup" is fixed, but they are at least an attempt to reduce the role of chance to manageable proportions.<sup>19</sup>

Moreover, a service-benefit plan which "[pays] the cost . . . whatever it might be," as hypothesized by the Court of [\*252] Appeals, 556 F.2d, at 1381, would run grave risks of bankruptcy. Since it would expose the insurer to unknown liability, it would measurably increase the probability that an incorrect assessment of exposure would occur. This could lead to a failure to cover actual losses [\*\*\*\*76] with premiums. Respondents argue that this fiscal-reliability problem could be solved by placing a dollar limit on benefits. But such a [\*\*\*293] plan would be almost indistinguishable from a cash-indemnity policy. It would not be the full-service-regardless-of-price plan for which the policyholders bargained.<sup>20</sup> The Pharmacy Agreements are thus "other activities of insurance companies [related] so closely to their status as reliable insurers that they too must be placed in the same class." [SEC v. National Securities, Inc., supra, at 460.](#)

[\*\*1094] V

The process of deciding what is and is not the "business of insurance" is inherently a case-by-case problem. It is true that the conclusion advocated here carries with it line-drawing problems. That [\*\*\*\*77] is necessarily so once the provider-agreement line is crossed by holding some to be within the "business." But that is a line which history and logic compel me to cross. I would hold that the *concept* of a provider agreement for benefits promised in the policy is within the "business of insurance" because some form of provider agreement is necessary to fulfill the obligations of a service-benefit policy. I would hold that *these* provider agreements, Blue Shield's Pharmacy Agreements, are protected because they (1) directly obtain the very benefits promised in the policy<sup>21</sup> [\*\*\*\*78] and therefore [\*253] directly affect rates, cost, and insurer reliability, and (2) themselves constitute a critical element of risk "prediction."<sup>22</sup> The conclusion that these kinds of agreements are the "business of insurance" is that reached by every Court of Appeals except the Court of Appeals in this case.<sup>23</sup>

<sup>19</sup> The pharmacist respondents would not be better off if Blue Shield set acquisition cost as well as markup. In that event they might not even meet the cost of their own outlays.

<sup>20</sup> The plan here was "bargained for" in the literal sense. It had its origins in a 1967 collective-bargaining agreement between the United Auto Workers and the three largest domestic automobile manufacturers. Brief for Petitioners 6.

<sup>21</sup> The Solicitor General suggests that this test could be subverted by an insurer's decision to list all kinds of incidental and even unrelated transactions in its policy. As with other forms of antitrust immunity, I have no difficulty concluding that "sham" arrangements should not be honored. Cf. [Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 \(1961\)](#); [California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 \(1972\)](#).

<sup>22</sup> These factors together are sufficient to decide this case. I need not decide whether either would independently suffice, nor whether in the absence of these factors others might also be capable of bringing a provider agreement within the exemption.

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[\*\*\*\*79] I would not suggest, however, that *all* provider agreements come within the McCarran-Ferguson Act proviso. Given the facts found by the District Court upon summary judgment, this is not a case where the petitioner pharmacies themselves conspired to exclude others from the market, and either pressured Blue Shield to go along, or were voluntarily joined by the insurer. See also Government Brief 13 n. 6. Such an agreement among pharmacies, itself neither necessary nor related to the insurer's [\*\*\*294] effort to satisfy its obligations to its policyholders, would be outside the "business of insurance." An insurance company cannot immunize an illegal conspiracy by joining it. Cf. *Parker v. Brown*, 317 U.S. 341, 351-352 [\*254] (1943). Moreover, since in this case the Blue Shield plan was offered to all San Antonio pharmacies and was in fact agreed to by at least 12, I am not called upon to decide whether an exclusive arrangement with a single provider would be so tenuously related to providing policyholder benefits as to be beyond the exemption's protection. See generally *Proctor v. State Farm Mutual Automobile Ins. Co.*, 182 U. S. App. D. C., at 270 n. 10, 561 F.2d, at 268 n. 10. [\*\*\*\*80] <sup>24</sup>

Finally, the conclusion that Blue Shield's Pharmacy Agreements should be held within the "business of insurance" <sup>25</sup> [\*\*\*\*82] [\*255] does not alone establish [\*\*\*295] whether the agreements enjoy [\*\*1095] an exemption from

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<sup>23</sup> See *Proctor v. State Farm Mutual Automobile Ins. Co.*, 182 U. S. App. D. C. 264, 561 F.2d 262 (1977), aff'g 406 F.Supp. 27 (DC 1975), cert. pending, No. 77-580; *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 557 F.2d 1001 (CA3 1976), aff'g 431 F.Supp. 5 (ED Pa. 1975); *Frankford Hospital v. Blue Cross of Greater Philadelphia*, 554 F.2d 1253 (CA3 1976), aff'g 417 F.Supp. 1104 (ED Pa.), cert. denied, 434 U.S. 860 (1977); *Anderson v. Medical Service of District of Columbia*, 551 F.2d 304 (CA4 1977), aff'g 1976-1 Trade Cases para. 60,884 (ED Va); *Travelers Ins. Co. v. Blue Cross of Western Pennsylvania*, 481 F.2d 80 (CA3), aff'g 361 F.Supp. 774 (WD Pa. 1972), cert. denied, 414 U.S. 1093 (1973).

<sup>24</sup> Such an arrangement could not be suspect simply because it would be anticompetitive, see discussion, *supra*, at 249. Rather, that means of providing policy benefits might be regarded as so unnecessary, and so likely to have its principal impact on pharmacies rather than policyholders, as to cross the boundary line of what constitutes the "business of insurance." I intimate no view upon the question.

<sup>25</sup> The analogies to other antitrust exemptions referred to by the Court, *ante*, at 231-232, are inapt. It is true that as a general rule an "exempt" party loses its immunity when it makes an agreement that is outside the scope of the exemption. But that general rule has no application here unless one assumes what the respondents need to prove -- that the Pharmacy Agreements are outside the scope of the McCarran-Ferguson Act. Reference to the cases under the Capper-Volstead Act is not helpful on the matter, as that Act limits its exemption to those who are "engaged in the production of agricultural products as *farmers, planters, ranchmen, dairymen, nut or fruit growers.*" 42 Stat. 388, 7 U.S.C. § 291 (emphasis added). As a result, this Court has held that agreements involving nonfarmers are not exempt. *National Broiler Marketing Assn. v. United States*, 436 U.S. 816 (1978). As the Court emphasizes, however, the McCarran-Ferguson Act exemption was not written in terms of "insurance companies," but extends instead to the "business of insurance." Hence, the participation of pharmacies does not automatically vitiate the exemption, as does the participation of nonfarmers in the Capper-Volstead "analogy."

Nor is reference to the labor exemption helpful to the Court. The quotation from *Mine Workers v. Pennington*, 381 U.S. 657, 665-666 (1965), cited by the Court, *ante*, at 232 n. 39, is in complete accord with what I would conclude here: "[A] union [read 'insurer'] may make wage [pharmacy] agreements with a multi-employer bargaining unit [a group of pharmacies] . . . . But . . . [one] group of employers [pharmacies] may not conspire to eliminate competitors from the industry and the union [insurer] is liable with the employers [pharmacies] if it becomes a party to the conspiracy." The labor exemption is a particularly poor analogy for the Court to stress because in yet another footnote, *Pennington* expressly approved a set of transactions virtually identical to those complained of in this case. Here, respondents contend that Blue Shield adopted a uniform fee policy, even though it may have suspected that some pharmacies would not be able to compete if required to limit their markup to that demanded by Blue Shield. There was, however, no additional evidence of a conspiracy among the participating pharmacies to drive out their less able brethren, which Blue Shield then joined. This was precisely the set of circumstances held by the *Pennington* Court to be *within* the scope of the exemption:

"Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy." *381 U.S.*, at 665 n. 2.

the antitrust laws. To be entitled to an exemption, petitioners still would have to demonstrate that the transactions are in fact truly regulated by the State, [15 U. S. C. § 1012 \(b\)](#), and that they do not fall within the "boycott" exception of [15 U. S. C. § 1013 \(b\)](#). The District Court held for petitioners on both issues. Neither [\*\*\*\*81] issue was reached by the Court of Appeals, however, in light of its holding that the contracts were not the "business of insurance." Accordingly, [\*256] I would reverse the judgment of the Court of Appeals and remand the case for further proceedings.<sup>26</sup>

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## References

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[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 225](#)

24 Am Jur Trials 1, Defending Antitrust Lawsuits

### [15 USCS 1012](#)

US L Ed Digest, Restraints of Trade and Monopolies 29

L Ed Index to Annos, Insurance; Restraints of Trade and Monopolies

ALR Quick Index, Insurance; Restraints of Trade and Monopolies

Federal Quick Index, Insurance; McCarran-Ferguson Act; Monopolies and Restraints of Trade

#### Annotation References:

Validity, construction, and application of McCarran-Ferguson Act (15 USCS 1011-1015), dealing with regulations of insurance business by state or federal law. [21 L Ed 2d 938](#).

Union activities violating the federal antitrust laws. [9 L Ed 2d 998, 20 L Ed 2d 1528](#).

Employer activities, beneficial or detrimental to organized labor, as violating federal antitrust laws. [93 L Ed 811](#).

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Thus, the approach taken by the Court today does not merely "narrowly" construe "insurance" in accordance with our general practice. Rather, that approach actively discriminates between kinds of insurance, effectively confining "insurance" to traditional forms and effectively excluding forms that provide full-service coverage via provider agreements. It thereby places a significant obstacle in the path of the latter.

<sup>26</sup> The Court argues, *ante*, at 232 n. 40, that provider agreements may have anticompetitive consequences which could lead to escalation of health-care costs. The argument is not without force, but I must note that the very purpose of an antitrust exemption is to protect anticompetitive conduct. The argument, therefore, is better directed to the legislature, which has the power to modify or repeal McCarran-Ferguson, rather than to this Court. Referral to the legislators is particularly appropriate in this case, as the policy aspects may not be as one-sided as those painted by the Court. There is authority for the proposition that provider agreements, far from increasing costs, constitute an effective means for reduction in health-care prices and premiums. Council on Wage and Price Stability, Employee Health Care Benefits: Labor and Management Sponsored Innovations in Controlling Cost, [41 Fed. Reg. 40298, 40305 \(1976\)](#). And the argument that "there is little incentive on the part of Blue Shield to minimize costs, since it is in the interest of the providers to set fee schedules at the highest possible level" overlooks the vital consideration that many if not most of these plans originate in collective-bargaining agreements where "the consumer power and negotiating expertise of organized labor" combine to "reduce the unit price of health services." *Ibid.* Control over provider agreements by state insurance commissioners constitutes a second "incentive" operating in the same direction. See n. 18, *supra*. Whether or not the potential anticompetitive impact of McCarran-Ferguson outweighs these positive effects on health-care costs is a judgment properly to be made by Congress.



## **Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.**

Supreme Court of the United States

January 15, 1979, Argued ; April 17, 1979, Decided \*

No. 77-1578

### **Reporter**

441 U.S. 1 \*; 99 S. Ct. 1551 \*\*; 60 L. Ed. 2d 1 \*\*\*; 1979 U.S. LEXIS 84 \*\*\*\*; 201 U.S.P.Q. (BNA) 497; Copy. L. Rep. (CCH) P25,064; 1979-1 Trade Cas. (CCH) P62,558

BROADCAST MUSIC, INC., ET AL. v. COLUMBIA BROADCASTING SYSTEM, INC., ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

**Disposition:** [562 F.2d 130](#), reversed and remanded.

### **Core Terms**

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license, blanket, music, compositions, rights, Sherman Act, users, composers, price fixing, antitrust, negotiate, copyright owner, network, television, cases, decree, practices, television network, anti trust law, per se rule, per se violation, competitors, costs, restraint of trade, consent decree, monopoly, holders, musical composition, broadcasters, publishers

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

**[HN1](#)[] Regulated Industries, Higher Education & Professional Associations**

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\* Together with No. 77-1583, American Society of Composers, Authors and Publishers et al. v. Columbia Broadcasting System, Inc., et al., also on certiorari to the same court.

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█ JÍ

In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, certain agreements or practices are so plainly anticompetitive, and so often lack any redeeming virtue, that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases. This per se rule is a valid and useful tool of antitrust policy and enforcement. And agreements among competitors to fix prices on their individual goods or services are among those concerted activities held to be within the per se category.

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

## Governments > Legislation > Overbreadth

Antitrust & Trade Law > Sherman Act > General Overview

**HN2** Per Se Rule & Rule of Reason, Per Se Violations

When two partners set the price of their goods or services they are literally price fixing, but they are not per se in violation of the Sherman Act.

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

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

**HN3**  Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act.

# Lawyers' Edition Display

## Decision

Blanket licensing for use of copyrighted musical compositions, held not to be per se illegal price fixing under Sherman Act ([15 USCS 1 et seq.](#)).

## Summary

Two organizations serving as "clearinghouses" for copyright owners and users were sued in the United States District Court for the Southern District of New York for violation of the Sherman Act ([15 USCS 1 et seq.](#)) and copyright laws with respect to a system of blanket licensing whereby the organizations give licensees the right to perform any and all of the musical compositions owned by the organizations' members or affiliates as often as the licensees desire, for a stated term, in return for the licensees' payment of fees which do not directly depend on the amount or type of music used, but ordinarily reflect a percentage of total revenues or a flat dollar amount. The plaintiff, the operator of a national commercial television network holding blanket licenses from both organizations, alleged that the two organizations were unlawful monopolies and that the blanket licenses constituted illegal price fixing, unlawful tying arrangements, concerted refusals to deal, and misuse of copyrights. The District Court ultimately dismissed the complaint, rejecting a claim that the blanket licenses constituted price fixing that was a per

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ÍÍ JÍ

se violation of the Sherman Act, and holding that since direct negotiation with individual copyright owners was available and feasible there was no undue restraint of trade, illegal tying, misuse of copyrights, or monopolization ([400 F Supp 737](#)). On appeal, the United States Court of Appeals for the Second Circuit reversed and remanded for consideration of an appropriate remedy, holding that the blanket licenses issued to television networks constituted a form of price fixing illegal per se under the Sherman Act, the determination as to price fixing settling the issue of liability under the Act and establishing copyright misuse ([562 F2d 130](#)).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by White, J., joined by Burger, Ch. J., and Brennan, Stewart, Marshall, Blackmun, Powell, and Rehnquist, JJ., it was held that the system of blanket licensing for the use of copyrighted musical compositions did not constitute a type of price fixing per se violative of the Sherman Act, and that in determining whether the system of blanket licensing violated the Sherman Act, the appropriate standard of examination was that of the rule of reason generally applied in Sherman Act cases, such standard of analysis being one for the Court of Appeals to utilize on remand if the issue of blanket licenses as employed in the television industry had been preserved in the Court of Appeals.

Stevens, J., dissenting, agreed with the Court's holding that the blanket licenses did not constitute a species of price fixing categorically forbidden by the Sherman Act, but would not have remanded the case, and instead would have affirmed the judgment of the Court of Appeals on the ground that the question whether the blanket licenses were unlawful under a rule of reason inquiry was properly before the court and should be answered affirmatively.

## Headnotes

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MONOPOLIES §16 > blanket licensing -- copyrighted musical compositions -- price fixing -- per se illegality -- rule of reason --> Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C]

The system of blanket licensing whereby organizations operating as clearinghouses for copyright owners and users issue blanket licenses for the use of copyrighted musical compositions--which licenses give the licensees the right to perform any and all of the compositions owned by the organizations' members or affiliates as often as the licensees desire, for a stated term, in return for a fee which does not directly depend on the amount or type of music used, but ordinarily is based upon a percentage of total revenues or a flat dollar amount--does not constitute a type of price fixing that is illegal per se under the Sherman Act ([15 USCS 1 et seq.](#)), but rather, when such a system of blanket licensing is attacked as constituting price fixing under the Act, it should be subjected to examination under the federal antitrust law's rule of reason standard of analysis.

MONOPOLIES §9 > per se rule -- rule of reason --> Headnote:

[LEdHN\[2\]](#) [2]

Under the per se rule used in construing and applying the ban of the Sherman Act ([15 USCS 1 et seq.](#)) against contracts, conspiracies, and combinations in restraint of trade, certain agreements or practices are so plainly anticompetitive and so often lack any redeeming virtue that they will be conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases.

MONOPOLIES §62 > price fixing -- blanket license -- copyrighted musical compositions -- per se illegality -- > Headnote:  
[LEdHN\[3\]](#) [3]

Although a system for the blanket licensing of copyrighted musical compositions through the joining together of the composers of musical compositions and publishing houses into an organization that sets a price for the blanket licenses sold by the organization might be "price fixing" in the literal sense, such does not alone establish that the licensing practice is one so plainly anticompetitive and so often lacking any redeeming virtue as to be conclusively presumed illegal under the Sherman Act ([15 USCS 1 et seq.](#)) without further examination under the rule of reason generally applied in Sherman Act cases.

COPYRIGHT §11 > MONOPOLIES §62 > blanket license -- musical composition -- > Headnote:  
[LEdHN\[4A\]](#) [4A] [LEdHN\[4B\]](#) [4B]

The mere fact that a broadcaster of television programs, as the licensee under a blanket license for the use of copyrighted musical compositions, pays a flat fee regardless of the amount of use it makes of copyrighted compositions under the agreement, and even though many of its programs contain little or no music, does not alone make out a violation of federal antitrust law or misuse of copyrights.

MONOPOLIES §37 > price fixing -- per se violation -- Sherman Act -- > Headnote:  
[LEdHN\[5\]](#) [5]

When two partners set the price of their goods or services they are literally "price fixing," but they are not per se in violation of the Sherman Act ([15 USCS 1 et seq.](#)).

MONOPOLIES §9 > federal antitrust laws -- per se violation -- > Headnote:  
[LEdHN\[6\]](#) [6]

It is only after considerable experience with a certain business relationship that such relationship will be classified as a per se violation of federal antitrust laws.

COPYRIGHT §15 > prior consent -- performance of copyrighted music -- > Headnote:  
[LEdHN\[7A\]](#) [7A] [LEdHN\[7B\]](#) [7B]

Under the copyright laws, those who publicly perform copyrighted music have the burden of obtaining prior consent.

MONOPOLIES §19 > per se rule -- effect and purpose of practice -- competition -- > Headnote:  
[LEdHN\[8\]](#) [8]

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In characterizing conduct for purposes of the rule whereby certain agreements or practices that are so plainly anticompetitive and so often lacking any redeeming virtue are conclusively presumed illegal under federal **antitrust law** without further examination under the rule of reason generally applied in cases arising under the Sherman Act ([15 USCS 1 et seq.](#)), the inquiry must focus on whether the effect and, where the conduct tends to show effect, the purpose of the practice is to threaten the proper operation of the predominately free market economy--that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead is one designed to increase economic efficiency and render markets more, rather than less, competitive.

MONOPOLIES §37 > agreements among competitors -- impact on price -- per se violation of Sherman Act -- > Headnote: [LEdHN\[9\]!\[\]\(a62ca53ca8a080b5dd0895438b960293\_img.jpg\)](#) [9]

Not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act ([15 USCS 1 et seq.](#)) or even unreasonable restraints; mergers among competitors eliminate competition, including price competition, but they are not per se illegal and many of them withstand attack under any existing antitrust standard; joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.

ERROR §1537 > Court of Appeals' judgment -- reversal and remand by Supreme Court -- > Headnote: [LEdHN\[10\]!\[\]\(369f19138a7ccd2f216b46bf55aab9c3\_img.jpg\)](#) [10]

On certiorari to review the decision of a Federal Court of Appeals, which reversed and remanded as to a Federal District Court's dismissal of a complaint in an action brought by the operator of a television network alleging that blanket licenses under which the operator was licensed to use copyrighted musical compositions violated the Sherman Act ([15 USCS 1 et seq.](#)) and copyright laws because they constituted illegal price fixing, unlawful tying arrangements, concerted refusals to deal, and misuse of copyrights, the United States Supreme Court will--upon holding that the blanket licenses do not constitute a type of price fixing that is per se illegal under the Sherman Act but must be examined under the rule of reason--reverse the Court of Appeals' judgment that the blanket licenses constitute price fixing per se violative of the Sherman Act and also its judgment, dependent upon its holding regarding price fixing, that the blanket licenses constitute copyright misuse, and the Supreme Court will remand the case for further proceedings to consider any unresolved issues that the network operator might have properly brought to the Court of Appeals, including an assessment under the rule of reason of blanket licenses as employed in the television industry, if such issue had been preserved by the network operator in the Court of Appeals. (Stevens, J., dissented from this holding.)

ERROR §1087.5(2) > Court of Appeals' judgment -- affirmance despite error -- failure to raise point in petition for certiorari -- > Headnote:

[LEdHN\[11A\]!\[\]\(07629363eba05b885474682c0ebe34f5\_img.jpg\)](#) [11A] [LEdHN\[11B\]!\[\]\(495aef4a752a2ced9659bdeb25678a27\_img.jpg\)](#) [11B]

On certiorari to review the decision of a Federal Court of Appeals, which reversed and remanded as to a Federal District Court's dismissal of a complaint in an action brought by the operator of a television network alleging that blanket licenses under which the network was licensed to use copyrighted musical compositions violated the Sherman Act ([15 USCS 1 et seq.](#)) and copyright laws as constituting illegal price fixing, unlawful tying arrangements, concerted refusals to deal, and misuse of copyrights, the United States Supreme Court--upon

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holding that the Court of Appeals had erred in ruling that the blanket licenses constituted a type of price fixing that is per se illegal under the Sherman Act--will not affirm the Court of Appeals' judgment on the ground that the blanket licenses constitute tying arrangements violative of the Sherman Act or on the ground that the licensors monopolized the relevant market contrary to the Sherman Act; the Supreme Court will leave undisturbed the Court of Appeals' judgment in respect to its rejection of the tying and monopolization arguments, particularly since the network operator did not file its own petition for certiorari challenging the Court of Appeals' failure to sustain the tying and monopolization claims.

## Syllabus

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**[498]** Respondent Columbia Broadcasting System, Inc. (CBS), brought this action against petitioners, American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), and their members and affiliates, alleging, *inter alia*, that the issuance by ASCAP and BMI to CBS of blanket licenses to copyrighted musical compositions at fees negotiated by them is illegal price fixing under the antitrust laws. Blanket licenses give the licensees the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term. Fees for blanket licenses are ordinarily a percentage of total revenues or a flat dollar amount, and do not directly depend on the amount or type of music [\*\*\*2] used. After a trial limited to the issue of liability, the District Court dismissed the complaint, holding, *inter alia*, that the blanket license was not price fixing and a *per se* violation of the Sherman Act. The Court of Appeals reversed and remanded for consideration of the appropriate remedy, holding that the blanket license issued to television networks was a form of price fixing illegal *per se* under the Sherman Act and established copyright misuse.

*Held:* The issuance by ASCAP and BMI of blanket licenses does not constitute price fixing *per se* unlawful under the antitrust laws. Pp. 7-25.

(a) "It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." [United States v. Topco Associates, Inc., 405 U.S. 596, 607-608](#). And though there has been rather intensive antitrust scrutiny of ASCAP and BMI and their blanket licenses, that experience hardly counsels that this Court should outlaw the blanket license as a *per se* restraint of trade. Furthermore, the United States, by its *amicus* brief in the present case, urges that the blanket licenses, which [\*\*\*3] consent decrees in earlier actions by the Government authorize ASCAP and BMI to issue to television networks, are not *per se* violations of the Sherman Act. And Congress, in the Copyright Act of 1976, has itself chosen to employ the blanket license and similar practices. Thus, there is no nearly universal view that the blanket licenses are a form of price fixing subject to automatic condemnation under the Sherman Act, rather than to a careful assessment under the rule of reason generally applied in Sherman Act cases. Pp. 7-16.

(b) In characterizing the conduct of issuing blanket licenses under the *per se* rule, this Court's inquiry must focus on whether the effect and, here because it tends to show effect, the purpose of the practice are to threaten the proper operation of a predominantly free-market economy. The blanket license is not a "naked [restraint] of trade with no purpose except stifling of competition," [White Motor Co. v. United States, 372 U.S. 253, 263](#), but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use, which would be difficult and expensive problems if left to individual users [\*\*\*4] and copyright owners. Although the blanket license fee is set by ASCAP and BMI rather than by competition among individual copyright owners, and although it is a fee for the use of any of the compositions covered by the license, the license cannot be wholly equated with a simple horizontal arrangement among competitors and is quite different from anything any individual owner could issue. In light of the background, which plainly indicates that over the years, and in the face of available alternatives including direct negotiation with individual copyright owners, the blanket license has provided an acceptable mechanism for at least a large part of the market for the performing rights to copyrighted musical compositions, it cannot automatically be declared illegal in all of its many manifestations. Rather, it should be subjected to a more discriminating examination under the rule of reason. Pp. 16-24.

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(c) The Court of Appeals' judgment holding that the licensing practices of ASCAP and BMI are *per se* violations of the Sherman Act, and the copyright misuse judgment dependent thereon, are reversed, and the case is remanded for further proceedings to consider any unresolved issues [\*\*\*\*5] that CBS may have properly brought to the Court of Appeals, including an assessment under the rule of reason of the blanket license as employed in the television industry. Pp. 24-25.

**Counsel:** Amalya L. Kearse argued the cause for petitioners in No. 77-1578. With her on the briefs were George A. Davidson and Conley E. Brian, Jr. Jay Topkis argued the cause for petitioners in No. 77-1583. With him on the briefs were Bernard Korman, Simon H. Rifkind, Herman Finkelstein, and Allan Blumstein.

Alan J. Hruska argued the cause for respondents in both cases. With him on the briefs were John D. Appel and Robert M. Sondak.

Deputy Solicitor General Easterbrook argued the cause for the United States as amicus curiae urging reversal. With him on the briefs were Solicitor General McCree, Assistant Attorney General Shenefield, William Alsup, John J. Powers III, and Andrea Limmer. +

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**Judges:** WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, post, p. 25.

**Opinion by:** WHITE

## Opinion

[\*4]   [\*6]   [\*\*1554] MR. JUSTICE WHITE delivered the opinion of the Court.

**LEdHN[1A]** [1A]This case involves an action under the antitrust and copyright laws brought by respondent Columbia Broadcasting System, Inc. (CBS), against petitioners, American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, **[499]** Inc. (BMI), and their members and affiliates.<sup>1</sup> The basic question presented is whether the issuance by ASCAP and BMI to CBS of blanket licenses to copyrighted musical compositions at fees negotiated by them is price fixing *per se* unlawful under the antitrust laws.

[\*\*\*\*\*7] 1

CBS operates one of three national commercial television networks, supplying programs to approximately 200 affiliated stations and telecasting approximately 7,500 network programs per year. Many, but not all, of these

<sup>+</sup> Briefs of amici curiae urging reversal were filed by Irwin Karp for the Authors League of America, Inc.; by Philip Elman and Robert M. Lichtman for the Performing Right Society, Ltd., et al.; and by Robert H. Bork for Aaron Copland et al.

Briefs of amici curiae urging affirmance were filed by Ira M. Millstein for the All-Industry Television Music License Committee; by Clarence Fried for American Broadcasting Companies, Inc.; by David R. Hyde for National Broadcasting Company, Inc.; by John H. Midlen, Jr., for National Religious Broadcasters, Inc.; and by John L. Hill, Attorney General of Texas, David M. Kendall, First Assistant Attorney General, and Robert S. Bickerstaff and Susan Dasher, Assistant Attorneys General, for the Universities of the State of Texas et al.

Irving Moskovitz filed a brief for the All-Industry Radio Music License Committee as amicus curiae.

<sup>1</sup> The District Court certified the case as a defendant class action. *400 F.Supp. 737, 741 n. 2 (SDNY 1975)*.

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programs make use of copyrighted music recorded on the soundtrack. CBS also owns television and radio stations in various cities. It is "the giant of the world in the use of [\*\*7] music rights," the "No. 1 outlet in the history of entertainment."<sup>2</sup>

Since 1897, the copyright laws have vested in the owner of a copyrighted musical composition the exclusive right to perform the work publicly for profit,<sup>3</sup> but the legal right is not self-enforcing. In 1914, Victor Herbert and a handful of other composers organized ASCAP because those who performed [\*\*\*8] [\*5] copyrighted music for profit were so numerous and widespread, and [\*\*1555] most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses. "ASCAP was organized as a 'clearing-house' for copyright owners and users to solve these problems" associated with the licensing of music. [400 F.Supp. 737, 741 \(SDNY 1975\)](#). As ASCAP operates today, its 22,000 members grant it nonexclusive rights to license nondramatic performances of their works, and ASCAP issues licenses and distributes royalties to copyright owners in accordance with a schedule reflecting the nature and amount of the use of their music and other factors.

BMI, a nonprofit corporation owned by members of the broadcasting industry,<sup>4</sup> was organized in 1939, is affiliated with or represents some 10,000 publishing companies and 20,000 authors and composers, and operates [\*\*\*9] in much the same manner as ASCAP. Almost every domestic copyrighted composition is in the repertory either of ASCAP, with a total of three million compositions, or of BMI, with one million.

Both organizations operate primarily through blanket licenses, which give the licensees the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term. Fees for blanket licenses are ordinarily a percentage of total revenues or a flat dollar amount, and do not directly depend on the amount or type of music used. Radio and television broadcasters are the largest users of music, and almost all of them hold blanket licenses from both ASCAP and BMI. Until this litigation, CBS held blanket licenses from both organizations for its television network on a continuous basis since the late 1940's and [\*\*\*10] had never attempted to secure any other form of [\*6] license from either ASCAP<sup>5</sup> or any of its members. [Id., at 752-754](#).

The complaint filed by CBS charged various violations of the Sherman Act<sup>6</sup> and the copyright laws.<sup>7</sup> CBS argued that ASCAP and BMI are unlawful monopolies and that the blanket license is illegal price fixing, an unlawful tying arrangement, [\*\*\*8] a concerted refusal to deal, and a misuse of copyrights. The District Court, though denying summary judgment to certain defendants, ruled that the practice did not fall within the *per se* rule. [337 F.Supp. 394, 398 \(SDNY 1972\)](#). After an 8-week trial, limited to the issue of liability, the court dismissed the complaint, rejecting again the claim that the blanket license was price fixing and a *per se* violation of § 1 of the Sherman Act, and holding that since direct [\*\*\*11] negotiation with individual copyright owners is available and feasible there is no undue restraint of trade, illegal tying, misuse of copyrights, or monopolization. [400 F.Supp., at 781-783](#).

<sup>2</sup> [Id., at 771](#), quoting a CBS witness. CBS is also a leading music publisher, with publishing subsidiaries affiliated with both ASCAP and BMI, and is the world's largest manufacturer and seller of records and tapes. *Ibid.*

<sup>3</sup> Act of Jan. 6, 1897, 29 Stat. 481.

<sup>4</sup> CBS was a leader of the broadcasters who formed BMI, but it disposed of all of its interest in the corporation in 1959. [400 F.Supp., at 742](#).

<sup>5</sup> Unless the context indicates otherwise, references to ASCAP alone in this opinion usually apply to BMI as well. See n. 20, *infra*.

<sup>6</sup> [15 U. S. C. §§ 1 and 2](#).

<sup>7</sup> CBS seeks injunctive relief for the antitrust violations and a declaration of copyright misuse. [400 F.Supp., at 741](#).

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[500] Though agreeing with the District Court's factfinding and not disturbing its legal conclusions on the other antitrust theories of liability,<sup>8</sup> [\*\*\*\*12] the Court of Appeals held that the blanket license issued to television networks was a form of price fixing illegal *per se* under the Sherman Act. [562 F.2d 130, 140 \(CA2 1977\)](#). This conclusion, without more, settled the issue of liability under the Sherman Act, established copyright misuse,<sup>9</sup> and required reversal of the District [\*\*1556] Court's [\*7] judgment, as well as a remand to consider the appropriate remedy.<sup>10</sup>

[\*\*\*\*13] ASCAP and BMI petitioned for certiorari, presenting the questions of the applicability of the *per se* rule and of whether this constitutes misuse of copyrights. CBS did not cross petition to challenge the failure to sustain its other antitrust claims. We granted certiorari because of the importance of the issues to the antitrust and copyright laws. [439 U.S. 817 \(1978\)](#). Because we disagree with the Court of Appeals' conclusions with respect to the *per se* illegality of the blanket license, we reverse its judgment and remand the cause for further appropriate proceedings.

[\*\*\*9] II

[LEdHN\[2\]↑](#) [2][HN1\[↑\]](#) In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, [\*8] the Court has held that certain agreements or practices are so "plainly anticompetitive," [National Society of Professional Engineers v. United States, 435 U.S. 679, 692 \(1978\)](#); [Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 \(1977\)](#), [\*\*\*\*14] and so often "lack . . . any redeeming virtue," [Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 \(1958\)](#), that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases. This *per se* rule is a valid and useful tool of antitrust policy and enforcement.<sup>11</sup> [\*\*\*\*15] And agreements among competitors to fix prices on their

<sup>8</sup> The Court of Appeals affirmed the District Court's rejection of CBS's monopolization and tying contentions but did not rule on the District Court's conclusion that the blanket license was not an unreasonable restraint of trade. See [562 F.2d 130, 132, 135, 141 n. 29 \(CA2 1977\)](#).

<sup>9</sup> At CBS's suggestion, the Court of Appeals held that the challenged conduct constituted misuse of copyrights solely on the basis of its finding of unlawful price fixing. [Id., at 141 n. 29](#).

<sup>10</sup> The Court of Appeals went on to suggest some guidelines as to remedy, indicating that despite its conclusion on liability the blanket license was not totally forbidden. The Court of Appeals said:

"Normally, after a finding of price-fixing, the remedy is an injunction against the price-fixing -- in this case, the blanket license. We think, however, that if on remand a remedy can be fashioned which will ensure that the blanket license will not affect the price or negotiations for direct licenses, the blanket license need not be prohibited in all circumstances. The blanket license is not simply a 'naked restraint' ineluctably doomed to extinction. There is not enough evidence in the present record to compel a finding that the blanket license does not serve a market need for those who wish full protection against infringement suits or who, for some other business reason, deem the blanket license desirable. The blanket license includes a practical covenant not to sue for infringement of any ASCAP copyright as well as an indemnification against suits by others."

"Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete. We think that these objections may be removed if ASCAP itself is required to provide some form of per use licensing which will ensure competition among the individual members with respect to those networks which wish to engage in per use licensing." [Id., at 140](#) (footnotes omitted).

<sup>11</sup> "This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken." [Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 \(1958\)](#).

See [Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n. 16 \(1977\)](#); [United States v. Topco Associates, Inc., 405 U.S. 596, 609 n. 10 \(1972\)](#).

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individual goods or services are among those concerted activities that the Court has held to be within the *per se* category.<sup>12</sup> But easy labels do not always supply ready answers.

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[LEdHN\[3\]](#) [↑] [3][LEdHN\[4A\]](#) [↑] [4A][LEdHN\[5\]](#) [↑] [5] To the Court of Appeals and CBS, the blanket license involves "price fixing" in the literal sense: the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells.<sup>13</sup> [\*\*\*17] But this [\*9] is not a [\*\*1557] [501] question simply of determining whether two or more potential competitors have literally "fixed" a "price." As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." Literalness is overly simplistic and often overbroad. [HN2](#) [↑] [\*\*\*\*16] When two partners set the price of their goods or services [\*\*\*10] they are literally "price fixing," but they are not *per se* in violation of the Sherman Act. See [United States v. Addyston Pipe & Steel Co., 85 F. 271, 280 \(CA6 1898\)](#), aff'd, [175 U.S. 211 \(1899\)](#). Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "*per se* price fixing." That will often, but not always, be a simple matter.<sup>14</sup>

[LEdHN\[4B\]](#) [↑] [4B]

[LEdHN\[6\]](#) [↑] [6] Consequently, as we recognized in [United States v. Topco Associates, Inc., 405 U.S. 596, 607-608 \(1972\)](#), [HN3](#) [↑] "[it] is only after considerable experience with certain business relationships that courts classify them as *per se* violations . . ." See [\*10] [White \[\\*\\*\\*\\*18\] Motor Co. v. United States, 372 U.S. 253, 263 \(1963\)](#). We have never examined a practice like this one before; indeed, the Court of Appeals recognized that "[in] dealing with performing rights in the music industry we confront conditions both in copyright law and in **antitrust law** which are *sui generis*." [562 F.2d, at 132](#). And though there has been rather intensive antitrust scrutiny of ASCAP and its blanket licenses, that experience hardly counsels that we should outlaw the blanket license as a *per se* restraint of trade.

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<sup>12</sup> See cases discussed in n. 14, *infra*.

<sup>13</sup> CBS also complains that it pays a flat fee regardless of the amount of use it makes of ASCAP compositions and even though many of its programs contain little or no music. We are unable to see how that alone could make out an antitrust violation or misuse of copyrights:

"Sound business judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement. . . . Petitioner cannot complain because it must pay royalties whether it uses Hazeltine patents or not. What it acquired by the agreement into which it entered was the privilege to use any or all of the patents and developments as it desired to use them." [Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827, 834 \(1950\)](#).

See also [Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 \(1969\)](#).

<sup>14</sup> Cf., e. g., [United States v. McKesson & Robbins, Inc., 351 U.S. 305 \(1956\)](#) (manufacturer/wholesaler agreed with independent wholesalers on prices to be charged on products it manufactured); [United States v. Socony-Vacuum Oil Co., 310 U.S. 150 \(1940\)](#) (firms controlling a substantial part of an industry agreed to purchase "surplus" gasoline with the intent and necessary effect of increasing the price); [United States v. Trenton Potteries Co., 273 U.S. 392 \(1927\)](#) (manufacturers and distributors of 82% of certain vitreous pottery fixtures agreed to sell at uniform prices).

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This litigation and other cases involving ASCAP and its licensing practices have arisen out of the efforts of the creators of copyrighted musical compositions to collect for the public performance of their works, as they are entitled to do under the Copyright Act. As already indicated, ASCAP and BMI originated to make possible and to facilitate dealings between copyright owners and those who desire to use their music. Both organizations plainly involve concerted action in a large and active line of commerce, and it is not surprising that, as the District Court found, "[neither] ASCAP nor BMI is a stranger to antitrust [\*\*\*\*19] litigation." [400 F.Supp., at 743](#).

The Department of Justice first investigated allegations of anticompetitive conduct by ASCAP over 50 years ago.<sup>15</sup> [\*\*\*\*20] A criminal complaint was filed in 1934, but the Government was granted a midtrial continuance and never returned to the courtroom. In separate complaints in 1941, the United States charged that the blanket license, which was then the only license [\*\*1558] offered by ASCAP and BMI, was an illegal restraint of trade and that arbitrary prices were being charged as the result of an illegal copyright pool.<sup>16</sup> The Government sought [\*11] to enjoin ASCAP's exclusive licensing powers and to require [\*\*\*11] a different form of licensing by that organization. The case was settled by a consent decree that imposed tight restrictions on ASCAP's operations.<sup>17</sup> Following complaints relating to the television industry, successful private litigation against ASCAP by movie theaters,<sup>18</sup> and a [502] Government challenge to ASCAP's arrangements with similar foreign organizations, the 1941 decree was reopened and extensively amended in 1950.<sup>19</sup>

Under the amended decree, which still substantially controls the activities of ASCAP, members may grant ASCAP only nonexclusive rights to license their works for public performance. Members, therefore, retain the rights individually to license public performances, along with the rights to license the use of their compositions for other purposes. ASCAP itself is forbidden to grant any license to perform one or more specified compositions in the ASCAP repertory unless both the user and the owner have requested [\*\*\*\*21] it in writing to do so. ASCAP is required to grant to any user making written application a nonexclusive license to perform all ASCAP compositions, either for a period of time or on a per-program basis. ASCAP may not insist on the blanket license, and the fee for the per-program license, which is to be based on the revenues for the program on which ASCAP music is played, must offer the applicant a genuine economic choice between the per-program license and the more common blanket license. If ASCAP and a putative licensee are unable to agree on a fee within 60 days, the applicant may apply to the District Court [\*12] for a determination of a reasonable fee, with ASCAP having the burden of proving reasonableness.<sup>20</sup>

[\*\*\*\*22] The 1950 decree, as amended from time to time, continues in effect, and the blanket license continues to be the primary instrument through which ASCAP conducts its business under the decree. The courts have twice construed the decree not to require ASCAP to issue licenses for selected portions of its repertory.<sup>21</sup> [\*\*\*\*23] It also

<sup>15</sup> Cohn, Music, Radio Broadcasters and the Sherman Act, 29 Geo. L. J. 407, 424 n. 91 (1941).

<sup>16</sup> E. g., complaint in *United States v. ASCAP*, Civ. No. 13-95 (SDNY 1941), pp. 3-4.

<sup>17</sup> *United States v. ASCAP*, 1940-1943 Trade Cases para. 56,104 (SDNY 1941).

<sup>18</sup> See [Alden-Rochelle, Inc. v. ASCAP](#), 80 F.Supp. 888 (SDNY 1948); [M. Witmark & Sons v. Jenson](#), 80 F.Supp. 843 (Minn. 1948), appeal dismissed *sub nom. M. Witmark & Sons v. Berger Amusement Co.*, 177 F.2d 515 (CA8 1949).

<sup>19</sup> *United States v. ASCAP*, 1950-1951 Trade Cases para. 62,595 (SDNY 1950).

<sup>20</sup> BMI is in a similar situation. The original decree against BMI is reported as *United States v. BMI*, 1940-1943 Trade Cases para. 56,096 (ED Wis. 1941). A new consent judgment was entered in 1966 following a monopolization complaint filed in 1964. [United States v. BMI](#), 1966 Trade Cases para. 71,941 (SDNY). The ASCAP and BMI decrees do vary in some respects. The BMI decree does not specify that BMI may only obtain nonexclusive rights from its affiliates or that the District Court may set the fee if the parties are unable to agree. Nonetheless, the parties stipulated, and the courts below accepted, that "CBS could secure direct licenses from BMI affiliates with the same ease or difficulty, as the case may be, as from ASCAP members." [400 F.Supp., at 745](#).

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remains true that the decree guarantees the legal availability of direct licensing of performance [\*\*\*12] rights by ASCAP members; and the District Court found, and in this respect the Court of Appeals agreed, that there are no practical impediments preventing direct dealing by the television networks if they so desire. Historically, they have not done so. Since 1946, CBS and other television networks have taken blanket licenses from ASCAP and BMI. It was not until this suit [\*\*1559] arose that the CBS network demanded any other kind of license.<sup>22</sup>

[\*13] Of course, a consent judgment, even one entered at the behest of the Antitrust Division, does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of nonparties. See *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 690 (1961), which involved this same decree. But it cannot be ignored that the Federal Executive and Judiciary have carefully scrutinized ASCAP and the challenged conduct, have imposed restrictions on various of ASCAP's practices, and, by the terms of the decree, stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices. [\*\*\*\*24] <sup>23</sup> In these circumstances, we have a unique indicator that the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to be in vain.<sup>24</sup> Thus, although CBS is not bound by the Antitrust Division's actions, the decree is a fact of economic and legal life in this industry, and the Court of Appeals should not have ignored it completely in analyzing the practice. See *id., at 694-695*. That fact alone might not remove a naked price-fixing [503] scheme from the ambit of the *per se* rule, but, as discussed *infra*, Part III, here we are uncertain whether the practice on its face has the effect, or could have been spurred by the purpose, of restraining competition among the individual composers.

[\*\*\*\*25] After the consent decrees, the legality of the blanket license was challenged in suits brought by certain ASCAP members against individual radio stations for copyright infringement. The stations raised as a defense that the blanket license was a form of price fixing illegal under the Sherman Act. The parties [\*14] stipulated that it would be nearly impossible for each radio station to negotiate with each copyright holder separate licenses for the performance of his works on radio. Against this background, and relying heavily on the 1950 consent judgment, the Court of Appeals for the Ninth Circuit rejected claims that ASCAP was a combination in restraint of trade and that the blanket license constituted illegal price fixing. *K-91, Inc. v. Gershwin Publishing Corp.*, 372 F.2d 1 (1967), [\*\*\*13] cert. denied, 389 U.S. 1045 (1968).

The Department of Justice, with the principal responsibility for enforcing the Sherman Act and administering the consent decrees relevant to this case, agreed with the result reached by the Ninth Circuit. In a submission *amicus curiae* opposing one station's petition for certiorari in this Court, the Department [\*\*\*\*26] stated that there must be "some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them." Memorandum for United States as *Amicus Curiae* on Pet. for Cert. in *K-91, Inc. v. Gershwin Publishing Corp.*, O. T. 1967, No. 147, pp. 10-11. And the Department elaborated on what it thought that fact meant for the proper application of the antitrust laws in this area:

"The Sherman Act has always been discriminately applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict

<sup>21</sup> *United States v. ASCAP (Application of Shenandoah Valley Broadcasting, Inc.)*, 208 F.Supp. 896 (SDNY 1962), aff'd, 331 F.2d 117 (CA2), cert. denied, 377 U.S. 997 (1964); *United States v. ASCAP (Application of National Broadcasting Co.)*, 1971 Trade Cases para. 73,491 (SDNY 1970). See also *United States v. ASCAP (Motion of Metromedia, Inc.)*, 341 F.2d 1003 (CA2 1965).

<sup>22</sup> National Broadcasting Co. did, in 1971, request an annual blanket license for 2,217 specific ASCAP compositions most frequently used on its variety shows. It intended to acquire the remaining rights to background and theme music through direct transactions by it and its program packagers. See *United States v. ASCAP (Application of National Broadcasting Co.)*, *supra*.

<sup>23</sup> *1950-1951 Trade Cases para. 62,595, p. 63,756*.

<sup>24</sup> Cf. *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S., at 50 n. 16. Moreover, unthinking application of the *per se* rule might upset the balancing of economic power and of procompetitive and anticompetitive effects presumably worked out in the decree.

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limitations [\*\*1560] under the antitrust laws to guarantee against abuse of the collective power thus created. Associated Press v. United States, 326 U.S. 1; United States v. St. Louis Terminal, 224 U.S. 383; Appalachian Coals, Inc. v. United States, 288 U.S. 344; Chicago Board of Trade v. United States, 246 U.S. 231. This case appears to us to involve such a situation. The extraordinary number of users spread across the land, [\*\*\*\*27] the ease with which a performance may be broadcast, the sheer volume [\*15] of copyrighted compositions, the enormous quantity of separate performances each year, the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music." Id., at 10 (footnote omitted).

The Department concluded that, in the circumstances of that case, the blanket licenses issued by ASCAP to individual radio stations were neither a *per se* violation of the Sherman Act nor an unreasonable restraint of trade.

As evidenced by its *amicus* brief in the present case, the Department remains of that view. Furthermore, the United States disagrees with the Court of Appeals in this case and urges that the blanket licenses, which the consent decree authorizes ASCAP to issue to television networks, are not *per se* violations of the Sherman Act. It takes no position, however, on whether the practice is an unreasonable restraint of trade in the context of the network television industry.

Finally, we note that Congress itself, in the new Copyright Act, has [\*\*\*\*28] chosen to employ the blanket license and similar practices. Congress created a compulsory blanket license for secondary transmissions by cable television systems and provided that "[notwithstanding] any provisions of the antitrust laws, . . . any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, [\*\*\*14] may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf." 17 U. S. C. App. § 111 (d)(5)(A). And the newly created compulsory license for the use of copyrighted compositions in jukeboxes is also a blanket license, which is payable to the performing-rights societies such as ASCAP unless an individual copyright holder can prove his entitlement to a share. § 116 (c)(4). Moreover, in requiring noncommercial broadcasters to pay for their use of copyrighted music, Congress again provided that "[notwithstanding] [\*16] any provision of the antitrust laws" copyright owners "may designate common agents to negotiate, agree to, pay, or receive payments." § 118(b). Though these provisions are not directly controlling, [\*\*\*\*29] they do reflect an opinion that the blanket license, and ASCAP, are economically beneficial in at least some circumstances.

[504] There have been District Court cases holding various ASCAP practices, including its licensing practices, to be violative of the Sherman Act,<sup>25</sup> but even so, there is no nearly universal view that either the blanket or the per-program licenses issued by ASCAP at prices negotiated by it are a form of price fixing subject to automatic condemnation under the Sherman Act, rather than to a careful assessment under the rule of reason.

### III

LEdHN/1B [↑] [1B] [\*\*\*\*30] Of course, we are no more bound than is CBS by the views of the Department of Justice, the results in the prior lower court [\*\*1561] cases, or the opinions of various experts about the merits of the blanket license. But while we must independently examine this practice, all those factors should caution us against too easily finding blanket licensing subject to *per se* invalidation.

### A

As a preliminary matter, we are mindful that the Court of Appeals' holding would appear to be quite difficult to contain. If, as the court held, there is a *per se* antitrust violation whenever ASCAP issues a blanket license to a television network for a single fee, why would it not also be automatically illegal for ASCAP to negotiate and issue

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<sup>25</sup> See cases cited n. 18, *supra*. Those cases involved licenses sold to individual movie theaters to "perform" compositions already on the motion pictures' soundtracks. ASCAP had barred its members from assigning performing rights to movie producers at the same time recording rights were licensed, and the theaters were effectively unable to engage in direct transactions for performing rights with individual copyright owners.

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blanket licenses to [\*17] individual radio or television stations or to other users who perform copyrighted music for profit?<sup>26</sup> Likewise, if the present network licenses issued through ASCAP on behalf of its members are *per se* violations, why would it not be equally illegal for the members to authorize ASCAP to issue licenses establishing various categories of uses that a network might have for [\*15] copyrighted music and setting a standard [\*31] fee for each described use?

Although the Court of Appeals apparently thought the blanket license could be saved in some or even many applications, it seems to us that the *per se* rule does not accommodate itself to such flexibility and that the observations of the Court of Appeals with respect to remedy tend to impeach the *per se* basis for the holding of liability.<sup>27</sup>

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[\*18] [LEdHN\[7A\]](#) [7A] CBS would prefer that ASCAP be authorized, indeed directed, to make all its compositions available at standard per-use rates within negotiated categories of use. [400 F.Supp., at 747 n. 7.](#)<sup>28</sup> [\*33] But if this in itself or in conjunction with blanket licensing constitutes illegal price fixing by copyright owners, CBS urges that an injunction issue forbidding ASCAP to issue any blanket license or to negotiate any fee except on behalf of an individual member for the use of his own copyrighted work or works.<sup>29</sup> Thus, we are called upon to determine that blanket licensing is unlawful across the board. We are [505] quite sure, however, that the *per se* rule does not require any such holding.

[LEdHN\[7B\]](#) [7B]

B

[\*\*1562] In the first place, the line of commerce allegedly being restrained, the performing rights to copyrighted music, exists at all only because of the copyright laws. Those who would use copyrighted music in public

<sup>26</sup> Certain individual television and radio stations, appearing here as *amici curiae*, argue that the *per se* rule should extend to ASCAP's blanket licenses with them as well. The television stations have filed an antitrust suit to that effect. *Buffalo Broadcasting Co. v. ASCAP*, 78 Civ. 5670 (SDNY, filed Nov. 27, 1978).

<sup>27</sup> See n. 10, *supra*. The Court of Appeals would apparently not outlaw the blanket license across the board but would permit it in various circumstances where it is deemed necessary or sufficiently desirable. It did not even enjoin blanket licensing with the television networks, the relief it realized would normally follow a finding of *per se* illegality of the license in that context. Instead, as requested by CBS, it remanded to the District Court to require ASCAP to offer in addition to blanket licensing some competitive form of per-use licensing. But per-use licensing by ASCAP, as recognized in the consent decrees, might be even more susceptible to the *per se* rule than blanket licensing.

The rationale for this unusual relief in a *per se* case was that "[the] blanket license is not simply a 'naked restraint' ineluctably doomed to extinction." [562 F.2d, at 140.](#) To the contrary, the Court of Appeals found that the blanket license might well "serve a market need" for some. *Ibid.* This, it seems to us, is not the *per se* approach, which does not yield so readily to circumstances, but in effect is a rather bobtailed application of the rule of reason, bobtailed in the sense that it is unaccompanied by the necessary analysis demonstrating why the particular licensing system is an undue competitive restraint.

<sup>28</sup> Surely, if ASCAP abandoned the issuance of all licenses and confined its activities to policing the market and suing infringers, it could hardly be said that member copyright owners would be in violation of the antitrust laws by not having a common agent issue per-use licenses. Under the copyright laws, those who publicly perform copyrighted music have the burden of obtaining prior consent. Cf. [Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S., at 139-140.](#)

<sup>29</sup> In its complaint, CBS alleged that it would be "wholly impracticable" for it to obtain individual licenses directly from the composers and publishing houses, but it now says that it would be willing to do exactly that if ASCAP were enjoined from granting blanket licenses to CBS or its competitors in the network television business.

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performances must secure consent from the copyright owner or be liable at least for the statutory damages for each infringement and, if the conduct is willful and for the purpose of financial gain, to criminal penalties.<sup>30</sup> Furthermore, nothing in the Copyright Act of 1976 indicates in the slightest that Congress intended [\*\*\*16] to weaken the rights of copyright owners to control the public [\*19] performance of musical compositions. Quite the contrary is true.<sup>31</sup> Although the copyright laws confer no rights on copyright owners [\*\*\*34] to fix prices among themselves or otherwise to violate the antitrust laws, we would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted would be deemed a *per se* violation of the Sherman Act. Otherwise, the commerce anticipated by the Copyright Act and protected against restraint by the Sherman Act would not exist at all or would exist only as a pale reminder of what Congress envisioned.<sup>32</sup>

[\*\*\*35] C

LEdHN[8] [8]More generally, in characterizing this conduct under the *per se* rule,<sup>33</sup> our inquiry must focus on whether the effect and, here because it tends to show effect, see United States v. United States Gypsum Co., 438 U.S. 422, 436 n. 13 (1978), the purpose of the practice are to threaten the proper operation of our predominantly free-market economy -- that is, whether the practice facially appears to be one that would always or [\*20] almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive." *Id.*, at 441 n. 16; see National Society of Professional Engineers v. United States, 435 U.S., at 688; Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S., at 50 n. 16; Northern Pac. R. Co. v. United States, 356 U.S., at 4.

[\*\*\*36] The blanket license, as we see it, is not a "naked [restraint] of trade with no purpose except stifling of competition," White Motor Co. v. United States, 372 U.S. 253, 263 (1963), but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use. See L. Sullivan, Handbook of the Law of Antitrust § 59, p. 154 (1977). As we have already indicated, ASCAP and the blanket license developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, [\*\*\*17] rapid, and indemnified access to any and all of the repertory of compositions, [\*\*1563] and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed, as both the Court of Appeals and CBS recognize, the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants, 562 F.2d, at 140 n. 26, and it was [\*\*\*37] in that milieu that the blanket license arose.

A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided. Also, individual fees for the use of individual compositions would presuppose an intricate schedule of fees and uses, as well as a difficult and expensive reporting problem for the user and policing

<sup>30</sup> 17 U. S. C. App. § 506.

<sup>31</sup> See Koenigsberg, The 1976 Copyright Act: Advances for the Creator, 26 Cleve. St. L. Rev. 515, 524, 528 (1977).

<sup>32</sup> Cf. Silver v. New York Stock Exchange, 373 U.S. 341 (1963).

Because a musical composition can be "consumed" by many different people at the same time and without the creator's knowledge, the "owner" has no real way to demand reimbursement for the use of his property except through the copyright laws and an effective way to enforce those legal rights. See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 162 (1975). It takes an organization of rather large size to monitor most or all uses and to deal with users on behalf of the composers. Moreover, it is inefficient to have too many such organizations duplicating each other's monitoring of use.

<sup>33</sup> The scrutiny occasionally required must not merely subsume the burdensome analysis required under the rule of reason, see National Society of Professional Engineers v. United States, 435 U.S. 679, 690-692 (1978), or else we should apply the rule of reason from the start. That is why the *per se* rule is not employed until after considerable experience with the type of challenged restraint.

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task for the copyright owner. Historically, the market for public-performance rights organized itself largely around the single-fee blanket [\*21] license, which gave unlimited access to the repertory and reliable protection against infringement. When ASCAP's major and user-created competitor, BMI, came [506] on the scene, it also turned to the blanket license.

With the advent of radio and television networks, market conditions changed, and the necessity for and advantages of a blanket license for those users may be far less obvious than is the case when the potential users are individual television or radio stations, or the thousands of other individuals and organizations performing copyrighted compositions in public.<sup>34</sup> But even for television network licenses, ASCAP reduces costs absolutely [\*\*\*\*38] by creating a blanket license that is sold only a few, instead of thousands,<sup>35</sup> of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for.<sup>36</sup> ASCAP also provides the necessary resources for blanket sales and enforcement, resources unavailable to the vast majority of composers and publishing houses. Moreover, a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established.

#### [\*\*\*\*39] D

This substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses. The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the [\*22] sum of its parts; it is, to some extent, a different product. The blanket license has certain unique characteristics: It allows the licensee immediate use of covered compositions, without the delay of [\*\*\*18] prior individual negotiations,<sup>37</sup> and great flexibility in the choice of musical material. Many consumers clearly prefer the characteristics and cost advantages of this marketable [\*\*1564] package,<sup>38</sup> and even small performing-rights societies that have occasionally arisen to compete with ASCAP and BMI have offered blanket licenses.<sup>39</sup> [\*\*\*\*41] Thus, to the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material.<sup>40</sup> ASCAP, [\*23] in short, made a market in which individual [\*\*\*\*40] composers are inherently unable to compete fully effectively.<sup>41</sup>

<sup>34</sup> And of course changes brought about by new technology or new marketing techniques might also undercut the justification for the practice.

<sup>35</sup> The District Court found that CBS would require between 4,000 and 8,000 individual license transactions per year. [400 F.Supp., at 762](#).

<sup>36</sup> To operate its system for distributing the license revenues to its members, ASCAP relies primarily on the networks' records of which compositions are used.

<sup>37</sup> See Timberg, The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950, 19 Law & Contemp. Prob. 294, 297 (1954) ("The disk-jockey's itchy fingers and the bandleader's restive baton, it is said, cannot wait for contracts to be drawn with ASCAP's individual publisher members, much less for the formal acquiescence of a characteristically unavailable composer or author"). Significantly, ASCAP deals only with nondramatic performance rights. Because of their nature, dramatic rights, such as for musicals, can be negotiated individually and well in advance of the time of performance. The same is true of various other rights, such as sheet music, recording, and synchronization, which are licensed on an individual basis.

<sup>38</sup> Cf. [United States v. Grinnell Corp., 384 U.S. 563, 572-573 \(1966\)](#); [United States v. Philadelphia Nat. Bank, 374 U.S. 321, 356-357 \(1963\)](#).

<sup>39</sup> Comment, Music Copyright Associations and the Antitrust Laws, 25 Ind. L. J. 168, 170 (1950). See also Garner, [United States v. ASCAP: The Licensing Provisions of the Amended Final Judgment of 1950](#), 23 Bull. Copyright Soc. 119, 149 (1975) ("no performing rights are licensed on other than a blanket basis in any nation in the world").

<sup>40</sup> Moreover, because of the nature of the product -- a composition can be simultaneously "consumed" by many users -- composers have numerous markets and numerous incentives to produce, so the blanket license is unlikely to cause decreased

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LEdHN[9] [9]Finally, we have some doubt [\*\*\*\*42] -- enough to counsel against application of the *per se* rule -- about the extent to which this practice threatens the "central nervous system of the economy," *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n. 59 (1940)*, that is, competitive pricing as the free [507] market's means of allocating resources. Not all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints. Mergers among competitors eliminate competition, including price competition, but they are not *per se* illegal, and many of them withstand attack under any existing antitrust standard. Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to [\*\*\*19] market the product at all.

Here, the blanket-license fee is not set by competition among individual copyright owners, and it is a fee for the use of any of the compositions covered by the license. But the blanket license cannot be wholly equated with a simple horizontal arrangement among competitors. ASCAP does set the price for [\*\*\*\*43] its blanket license, but that license is quite different from anything any individual owner could issue. The individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket [\*24] license to mask price fixing in such other markets.<sup>42</sup> Moreover, the substantial restraints placed on ASCAP and its members by the consent decree must not be ignored. The District Court found that there was no legal, practical, or conspiratorial impediment to CBS's obtaining individual licenses; CBS, in short, had a real choice.

LEdHN[1C] [1C]With this background in mind, which plainly enough indicates that over the years, and in the face of available [\*\*\*\*44] alternatives, the blanket license has provided an acceptable mechanism for at least a large [\*1565] part of the market for the performing rights to copyrighted musical compositions, we cannot agree that it should automatically be declared illegal in all of its many manifestations. Rather, when attacked, it should be subjected to a more discriminating examination under the rule of reason. It may not ultimately survive that attack, but that is not the issue before us today.

IV

LEdHN[10] [10] LEdHN[11A] [11A]As we have noted, n. 27, *supra*, the enigmatic remarks of the Court of Appeals with respect to remedy appear to have departed from the court's strict, *per se* approach and to have invited a more careful analysis. But this left the general import of its judgment that the licensing practices of ASCAP and BMI under the consent decree are *per se* violations of the Sherman Act. We reverse that judgment, and the copyright misuse judgment dependent upon it, see n. 9, *supra*, and remand for further proceedings to consider any unresolved [\*\*\*\*45] issues that CBS may have properly brought to the Court of Appeals.<sup>43</sup> Of course, this will

output, one of the normal undesirable effects of a cartel. And since popular songs get an increased share of ASCAP's revenue distributions, composers compete even within the blanket license in terms of productivity and consumer satisfaction.

<sup>41</sup> Cf. *United States v. Socony-Vacuum Oil Co., 310 U.S., at 217* (distinguishing *Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918)*, on the ground that among the effects of the challenged rule there "was the creation of a public market"); *United States v. Trenton Potteries Co., 273 U.S., at 401* (distinguishing *Chicago Bd. of Trade* on the ground that it did not involve "a price agreement among competitors in an open market").

<sup>42</sup> "CBS does not claim that the individual members and affiliates ('sellers') of ASCAP and BMI have agreed among themselves as to the prices to be charged for the particular 'products' (compositions) offered by each of them." *400 F.Supp., at 748*.

<sup>43</sup> It is argued that the judgment of the Court of Appeals should nevertheless be affirmed on the ground that the blanket license is a tying arrangement in violation of § 1 of the Sherman Act or on the ground that ASCAP and BMI have monopolized the relevant market contrary to § 2. The District Court and the Court of Appeals rejected both submissions, and we do not disturb the latter's judgment in these respects, particularly since CBS did not file its own petition for certiorari challenging the Court of Appeals' failure to sustain its tying and monopolization claims.

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include an assessment under [\*25] the rule of reason of the blanket license as employed in the television industry, if that issue was preserved by CBS in the Court of Appeals.<sup>44</sup>

### LEDHN[11B] [↑] [11B]

[\*\*\*46] The [\*\*20] judgment of the Court of Appeals is reversed, and the cases are remanded to that court for further proceedings consistent with this opinion.

*It is so ordered.*

**Dissent by:** STEVENS

## Dissent

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MR. JUSTICE STEVENS, dissenting.

The Court holds that ASCAP's blanket license is not a species of price fixing categorically forbidden by the Sherman Act. I agree with that holding. The Court remands the cases to the Court of Appeals, leaving open the question whether the blanket license as employed by ASCAP and BMI is unlawful under a rule-of-reason inquiry. I think that question is properly before us now and should be answered affirmatively.

There is ample precedent for affirmance of the judgment of the Court of Appeals on a ground that differs from its rationale, provided of course that we do not modify its judgment.<sup>1</sup> In this litigation, the judgment of the [508] Court of Appeals was [\*26] not that blanket licenses may never be offered by ASCAP and BMI. Rather, its judgment directed the District Court to fashion relief requiring them to offer additional forms of license as well.<sup>2</sup> Even though that judgment may not be consistent with its stated conclusion that the blanket [\*\*\*47] license is "illegal per se" as a kind of price fixing, it is entirely consistent with a conclusion that petitioners' exclusive all-or-nothing blanket-license policy violates the rule of reason.<sup>3</sup>

The [\*\*1566] Court of Appeals may well so decide on remand. In my judgment, however, a remand is not necessary.<sup>4</sup> The record before this Court is a full one, reflecting extensive discovery and [\*\*\*48] eight weeks of trial. The District Court's findings of fact are thorough and well supported. They clearly reveal that the challenged

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<sup>44</sup> The Court of Appeals did not address the rule-of-reason issue, and BMI insists that CBS did not preserve the question in that court. In any event, if the issue is open in the Court of Appeals, we prefer that that court first address the matter. Because of the United States' interest in the enforcement of the consent decree, we assume it will continue to play a role in this litigation on remand.

<sup>1</sup> See *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n. 8; *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419; *Massachusetts Mutual Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480-481; *United States v. American Railway Express Co.*, 265 U.S. 425, 435.

<sup>2</sup> [562 F.2d 130, 140-141 \(CA2 1977\)](#).

<sup>3</sup> See *ante*, at 17 n. 27 (describing relief ordered by Court of Appeals as "unusual" for a *per se* case, and suggesting that that court's decision appears more consistent with a rule-of-reason approach).

<sup>4</sup> That the rule-of-reason issues have been raised and preserved throughout seems to me clear. See [562 F.2d, at 134](#). ("CBS contends that the blanket licensing method is not only an illegal tie-in or blockbooking which in practical terms is coercive in effect, but is also an illegal price-fixing device, a *per se* violation . . . "); *id., at 141 n. 29* ("As noted, CBS also claims violation of § 2 of the Sherman Act. We need not go into the legal arguments on this point because they are grounded on its factual claim that there are barriers to direct licensing and 'bypass' of the ASCAP blanket license. The District Court, as noted, rejected this contention and its findings are not clearly erroneous. The § 2 claim must therefore fail at this time and on this record"); Brief for Respondents 41.

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policy does have a significant adverse impact on competition. I would therefore affirm the judgment of the Court of Appeals.

[\*\*\*\*49] I

In December 1969, the president [\*\*\*21] of the CBS television network wrote to ASCAP and BMI requesting that each "promptly . . . grant a new performance rights license which [\*27] will provide, effective January 1, 1970, for payments measured by the actual use of your music."<sup>5</sup> ASCAP and BMI each responded by stating that it considered CBS's request to be an application for a license in accordance with the provisions of its consent decree and would treat it as such,<sup>6</sup> [\*\*\*50] even though neither decree provides for licensing on a per-composition or per-use basis.<sup>7</sup> Rather than pursuing further discussion, CBS instituted this suit.

Whether or not the CBS letter is considered a proper demand for per-use licensing is relevant, if at all, only on the question of relief. For the fact is, and it cannot seriously be questioned, that ASCAP and BMI have steadfastly adhered to the policy of only offering overall blanket or per-program licenses,<sup>8</sup> notwithstanding requests for more limited authorizations. Thus, ASCAP rejected a 1971 request by NBC for licenses for 2,217 specific compositions,<sup>9</sup> as well as an earlier request by a group of television stations for more limited authority than the blanket licenses which they were then [\*28] purchasing.<sup>10</sup> Neither ASCAP nor BMI has ever offered to license anything less than its entire portfolio, even on an experimental basis. Moreover, if the response to the CBS letter were not sufficient to characterize their consistent policy, the defense of this lawsuit surely is. It is the refusal to license anything less than the entire repertoire -- rather than the decision to offer blanket licenses themselves -- that raises the serious antitrust questions [\*\*\*51] in this case.

II

[\*\*1567] Under our prior cases, there would be no question about the illegality of the [\*\*\*52] blanket-only [509] licensing policy if ASCAP and BMI were the exclusive sources of all licenses. A copyright, like a patent, is a statutory grant of monopoly privileges. The rules which prohibit a patentee from enlarging his statutory monopoly by conditioning a license on the purchase [\*\*\*22] of unpatented goods,<sup>11</sup> or by refusing to grant a license under one patent unless the licensee also takes a license under another, are equally applicable to copyrights.<sup>12</sup>

<sup>5</sup> [400 F.Supp. 737, 753 \(SDNY 1975\)](#).

<sup>6</sup> ASCAP responded in a letter from its general counsel, stating that it would consider the request at its next board of directors meeting, and that it regarded it as an application for a license consistent with the decree. The letter from BMI's president stated: "The BMI Consent Decree provides for several alternative licenses and we are ready to explore any of these with you." [\*Id.\* at 753-754.](#)

<sup>7</sup> See *ante*, at 12, and n. 21.

<sup>8</sup> The 1941 decree requires ASCAP to offer per-program licenses as an alternative to the blanket license. [United States v. ASCAP, 1940-1943 Trade Cases para. 56,104, p. 404 \(SDNY\)](#). Analytically, however, there is little difference between the two. A per-program license also covers the entire ASCAP repertoire; it is therefore simply a miniblanket license. As is true of a long-term blanket license, the fees set are in no way dependent on the quantity or quality of the music used. See *infra*, at 30-33.

<sup>9</sup> See [United States v. ASCAP \(Application of National Broadcasting Co.\), 1971 Trade Cases para. 73,491 \(SDNY 1970\)](#).

<sup>10</sup> See [United States v. ASCAP \(Application of Shenandoah Valley Broadcasting, Inc.\), 208 F.Supp. 896 \(SDNY 1962\)](#), aff'd, [331 F.2d 117 \(CA2 1964\)](#), cert. denied, [377 U.S. 997](#).

<sup>11</sup> [Mercoind Corp. v. Mid-Continent Investment Co., 320 U.S. 661](#); [Ethyl Gasoline Corp. v. United States, 309 U.S. 436](#); [International Business Machines Corp. v. United States, 298 U.S. 131](#); [United Shoe Machinery Corp. v. United States, 258 U.S. 451](#).

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[\*\*\*\*53] It is clear, however, that the mere fact that the holder of several patents has granted a single package license covering them all does not establish any illegality. This point was settled by *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827, 834, and reconfirmed in *Zenith Radio Corp. [\*291] v. Hazeltine Research, Inc.*, 395 U.S. 100, 137-138. The Court is therefore unquestionably correct in its conclusion that ASCAP's issuance of blanket licenses covering its entire inventory is not, standing alone, automatically unlawful. But both of those cases identify an important limitation on this rule. In the former, the Court was careful to point out that the record did not present the question whether the package license would have been unlawful if Hazeltine had refused to license on any other basis. *339 U.S., at 831*. And in the latter case, the Court held that the package license was illegal because of such a refusal. *395 U.S., at 140-141*.

Since ASCAP offers only blanket licenses, its licensing practices fall on the illegal side of the line drawn by the two *Hazeltine* cases. But there [\*\*\*\*54] is a significant distinction: unlike Hazeltine, ASCAP does not have exclusive control of the copyrights in its portfolio, and it is perfectly possible -- at least as a legal matter -- for a user of music to negotiate directly with composers and publishers for whatever rights he may desire. The availability of a practical alternative alters the competitive effect of a blockbooking or blanket-licensing policy. ASCAP is therefore quite correct in its insistence that its blanket license cannot be categorically condemned on the authority of the blockbooking and package-licensing cases. While these cases are instructive, they do not directly answer the question whether the ASCAP practice is unlawful.

The answer to that question depends on an evaluation of the effect of the practice on competition in the relevant market. And, of course, it is well settled that a sales practice that is permissible for a small vendor, at least when no coercion is present, may be unreasonable when employed by a company that dominates the market.<sup>13</sup> We [\*\*1568] therefore must consider [\*30] what the record tells [\*\*\*23] us about the competitive character of this market.

### [\*\*\*\*55] III

The market for music at issue here is wholly dominated by ASCAP-issued blanket licenses.<sup>14</sup> Virtually every domestic copyrighted composition is in the repertoire of either ASCAP or BMI. And again, virtually without exception, the only means that has been used to secure authority to perform such compositions is the blanket license.

<sup>12</sup>Indeed, the leading cases condemning the practice of "blockbooking" involved copyrighted motion pictures, rather than patents. See *United States v. Paramount Pictures*, 334 U.S. 131; *United States v. Loew's Inc.*, 371 U.S. 38.

<sup>13</sup>See *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 334 (upholding requirements contract on the ground that "[there] is here neither a seller with a dominant position in the market as in *Standard Fashion [Co. v. Magrane-Houston Co.]*, 258 U.S. 346; nor myriad outlets with substantial sales volume, coupled with an industry-wide practice of relying upon exclusive contracts, as in *Standard Oil [Co. v. United States]*, 337 U.S. 293; nor a plainly restrictive tying arrangement as in *International Salt [Co. v. United States]*, 332 U.S. 392"); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 610-612 (upholding challenged advertising practice because, while the volume of commerce affected was not "insignificant or insubstantial," seller was found not to occupy a "dominant position" in the relevant market). While our cases make clear that a violation of the Sherman Act requires both that the volume of commerce affected be substantial and that the seller enjoy a dominant position, see *id.*, at 608-609, proof of actual compulsion has not been required, but cf. *Royster Drive-In Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc.*, 268 F.2d 246, 251 (CA2 1959), cert. denied, 361 U.S. 885; *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561 (CA7 1951), cert. denied, 342 U.S. 909. The critical question is one of the likely practical effect of the arrangement: whether the "court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected." *Tampa Electric Co. v. Nashville Coal Co.*, *supra*, at 327.

<sup>14</sup>As in the majority opinion, my references to ASCAP generally encompass BMI as well.

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**[510]** The blanket all-or-nothing license is patently discriminatory.<sup>15</sup> The user purchases full access to ASCAP's entire **[\*31]** repertoire, even though his needs could be satisfied by a far more limited selection. The price he pays for this access is unrelated either to the quantity or the quality of the music he actually uses, or, indeed, to what he would probably use in a competitive system. Rather, in this unique all-or-nothing system, the price is based on a percentage of the user's advertising revenues,<sup>16</sup> **[\*\*\*\*57]** a measure that reflects the customer's ability to pay<sup>17</sup> but is totally unrelated **[\*\*\*\*56]** to factors -- such as the cost, quality, or quantity of the product -- that normally affect price in a competitive market. The ASCAP system requires users to buy more music than they want at a price which, while not beyond their ability to pay and perhaps not even beyond what **[\*\*\*24]** is "reasonable" for the access they are getting,<sup>18</sup> may well be far higher than what they would choose to spend for music in **[\*32]** a competitive system. It is a classic example of economic discrimination.

The record plainly establishes **[\*\*\*\*58]** that there is no price competition between separate musical compositions.<sup>19</sup> Under a blanket license, it is no more expensive for a network **[\*\*1569]** to play the most popular current hit in prime time than it is to use an unknown composition as background music in a soap opera. Because the cost to the user is unaffected by the amount used on any program or on all programs, the user has no incentive to economize by, for example, substituting what would otherwise be less expensive songs for established favorites or by reducing the quantity of music used on a program. The blanket license thereby tends to encourage the use of more music, and also of a larger share of what is really more valuable music, than would be expected in a competitive system characterized by separate licenses. And since revenues are passed on to composers on a basis reflecting the character and frequency of the use of their music,<sup>20</sup> the tendency is to increase the rewards of the established composers at the expense of those less well known. Perhaps the prospect is in any event unlikely, but the blanket license does not present a new songwriter with any opportunity to try to **[\*33]** break into the market **[\*\*\*\*59]** by

<sup>15</sup> See Cirace, *CBS v. ASCAP: An Economic Analysis of A Political Problem*, 47 Ford. L. Rev. 277, 286 (1978) ("the all-or-nothing bargain allows the monopolist to reap the benefits of perfect price discrimination without confronting the problems posed by dealing with different buyers on different terms").

<sup>16</sup> For many years prior to the commencement of this action, the BMI blanket-license fee amounted to 1.09% of net receipts from sponsors after certain specified deductions. [400 F.Supp., at 743](#). The fee for access to ASCAP's larger repertoire was set at 2.5% of net receipts; in recent years, however, CBS has paid a flat negotiated fee, rather than a percentage, to ASCAP. 23 Jt. App. in CA2 No. 75-7600, pp. E1051-E1052, E1135.

<sup>17</sup> See Cirace, *supra*, at 288:

"This history indicates that, from its inception, ASCAP exhibited a tendency to discriminate in price. A license fee based upon a percentage of gross revenue is discriminatory in that it grants the same number of rights to different licensees for different total dollar amounts, depending upon their ability to pay. The effectiveness of price discrimination is significantly enhanced by the all-or-nothing blanket license."

<sup>18</sup> Under the ASCAP consent decree, on receipt of an application, ASCAP is required to "advise the applicant in writing of the fee which it deems reasonable for the license requested." If the parties are unable to agree on the fee within 60 days of the application, the applicant may apply to the United States District Court for the Southern District of New York for the determination of a "reasonable fee." [United States v. ASCAP, 1950-1951 Trade Cases para. 62,595, p. 63,754 \(SDNY 1950\)](#). The BMI decree contains no similar provision for judicial determination of a reasonable fee.

<sup>19</sup> ASCAP's economic expert, Robert Nathan, was unequivocal on this point:

"Q. Is there price competition under this system between separate musical compositions?

"A. No sir." Tr. 3983.

<sup>20</sup> See [562 F.2d, at 136 n. 15](#). In determining royalties ASCAP distinguishes between feature, theme, and background uses of music. The 1950 amended decree requires ASCAP to distribute royalties on "a basis which gives primary consideration to the performance of the compositions." The 1960 decree provided for the additional option of receiving royalties under a deferred plan which provides additional compensation based on length of membership and the recognized status of the individual's works. See [United States v. ASCAP, 1960 Trade Cases para. 69,612, pp. 76,469-76,470 \(SDNY 1960\)](#).

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offering his product for sale at an unusually low price. The absence of that opportunity, however unlikely it may be, is characteristic of a cartelized rather than a competitive market.<sup>21</sup>

[\*\*\*\*60] The current state of the market cannot be explained on the ground that it could not operate competitively, or that issuance of more limited -- and thus less restrictive -- licenses by ASCAP is not feasible. The District Court's findings disclose no reason [511] why music-performing rights could not be negotiated on a per-composition or per-use basis, either with the composer or publisher directly or with an agent such as ASCAP. In fact, ASCAP now compensates composers and publishers on precisely those bases.<sup>22</sup> [\*\*\*\*61] If distributions of royalties can be calculated [\*\*\*25] on a per-use and per-composition basis, it is difficult to see why royalties could not also be collected in the same way. Moreover, the record also shows that where ASCAP's blanket-license scheme does not govern, competitive markets do. A competitive market for "synch" rights exists,<sup>23</sup> and after the use of blanket licenses in the motion picture industry was discontinued,<sup>24</sup> such a market promptly developed in that industry.<sup>25</sup> In sum, the record demonstrates that the market at issue here is one that could be highly competitive, but is not competitive at all.

#### [\*34] IV

Since the record describes a market that could be competitive and is not, and since that market is dominated by two firms engaged in a single, blanket method of dealing, it surely seems logical to conclude that trade has been restrained unreasonably. ASCAP argues, however, that at least as to CBS, there has been no restraint at all since the network is free to deal [\*\*\*\*62] directly with copyright holders.

[\*\*1570] The District Court found that CBS had failed to establish that it was compelled to take a blanket license from ASCAP. While CBS introduced evidence suggesting that a significant number of composers and publishers, satisfied as they are with the ASCAP system, would be "disinclined" to deal directly with the network, the court found such evidence unpersuasive in light of CBS's substantial market power in the music industry and the importance to copyright holders of network television exposure.<sup>26</sup> Moreover, it is arguable that CBS could go further and, along with the other television networks, use its economic resources to exploit destructive competition among purveyors of music by driving the price of performance rights down to a far lower level. But none of this demonstrates that ASCAP's practices are lawful, or that ASCAP cannot be held liable for injunctive relief at CBS's request.

The fact that CBS has substantial [\*\*\*\*63] market power does not deprive it of the right to complain when trade is restrained. Large buyers, as well as small, are protected by the antitrust laws. Indeed, even if the victim of a conspiracy is himself a wrongdoer, he has not forfeited the protection of the law.<sup>27</sup> Moreover, a conclusion that

<sup>21</sup> See generally 2 P. Areeda & D. Turner, *Antitrust Law* 280-281, 342-345 (1978); Cirace, *supra* n. 15, at 286-292.

<sup>22</sup> See n. 20, *supra*.

<sup>23</sup> The "synch" right is the right to record a copyrighted song in synchronization with the film or videotape, and is obtained separately from the right to perform the music. It is the latter which is controlled by ASCAP and BMI. See [CBS, Inc. v. ASCAP, 400 F.Supp., at 743](#).

<sup>24</sup> See [Alden-Rochelle, Inc. v. ASCAP, 80 F.Supp. 888 \(SDNY 1948\)](#).

<sup>25</sup> See [400 F.Supp., at 759-763](#); 5 Jt. App. in CA2 No. 75-7600, pp. 775-777 (testimony of Albert Berman, managing director of the Harry Fox Agency, Inc.). Television synch rights and movie performance and synch rights are handled by the Fox Agency, which serves as the broker for thousands of music publishers.

<sup>26</sup> See [400 F.Supp., at 767-771](#).

<sup>27</sup> See [Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138-140](#); [Simpson v. Union Oil Co., 377 U.S. 13, 16-17](#); [Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 214](#).

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excessive competition would cause one side of the market more harm than good may justify a legislative exemption from the antitrust laws, but does not [\*35] constitute a defense to a violation of the Sherman [\*\*\*26] Act.<sup>28</sup> Even though characterizing CBS as an oligopolist may be relevant to the question of remedy, and even though free competition might adversely affect the income of a good many composers and publishers, these considerations do not affect the legality of ASCAP's conduct.

[\*\*\*64] More basically, ASCAP's underlying argument that CBS must be viewed as having acted with complete freedom in choosing the blanket license is not supported by the District Court's findings. The District Court did not find that CBS could cancel its blanket license "tomorrow" and continue to use music in its programming and compete with the other networks. Nor did the District Court find that such a course was without any risk or expense. Rather, the District Court's finding was that within a year, during which it would continue to pay some millions of dollars for its annual blanket license, CBS would be able to develop the needed machinery and enter into the necessary contracts.<sup>29</sup> In other words, although the barriers to direct dealing by CBS as an alternative to paying for a [512] blanket license are real and significant, they are not insurmountable.

Far from establishing ASCAP's immunity from liability, these District Court findings, in my judgment, confirm the illegality [\*\*\*65] of its conduct. Neither CBS nor any other user has been willing to assume the costs and risks associated with an attempt to purchase music on a competitive basis. The fact that an attempt by CBS to break down the ASCAP monopoly might well succeed does not preclude the conclusion that smaller and less powerful buyers are totally foreclosed from a competitive market.<sup>30</sup> Despite its size, CBS itself [\*36] may not obtain [\*\*1571] music on a competitive basis without incurring unprecedented costs and risks. The fear of unpredictable consequences, coupled with the certain and predictable costs and delays associated with a change in its method of purchasing music, unquestionably inhibits any CBS management decision to embark on a competitive crusade. Even if ASCAP offered CBS a special bargain to forestall any such crusade, that special arrangement would not cure the marketwide restraint.

[\*\*\*66] Whatever management decision CBS should or might have made, it is perfectly clear that the question whether competition in the market has been unduly restrained is not one that any single company's management is authorized to answer. It is often the case that an arrangement among competitors will not serve to eliminate competition forever, but only to delay its appearance or to increase the costs of new entry. That may well be the state of [\*\*\*27] this market. Even without judicial intervention, the ASCAP monopoly might eventually be broken by CBS, if the benefits of doing so outweigh the significant costs and risks involved in commencing direct dealing.<sup>31</sup> But that hardly means that the blanket-licensing [\*37] policy at issue here is lawful. An arrangement that

<sup>28</sup> See [National Society of Professional Engineers v. United States, 435 U.S. 679, 689-690](#).

<sup>29</sup> See [400 F.Supp., at 762-765](#).

<sup>30</sup> For an individual user, the transaction costs involved in direct dealing with individual copyright holders may well be prohibitively high, at least in the absence of any broker or agency routinely handling such requests. Moreover, the District Court found that writers and publishers support and prefer the ASCAP system to direct dealing. [Id., at 767](#). While their apprehension at direct dealing with CBS could be overcome, the District Court found, by CBS's market power and the importance of television exposure, a similar conclusion is far less likely with respect to other users.

<sup>31</sup> The risks involved in such a venture appear to be substantial. One significant risk, which may be traced directly to ASCAP and its members, relates to music "in the can" -- music which has been performed on shows and movies already in the network's inventory, but for which the network must still secure performing rights. The networks accumulate substantial inventories of shows "in the can." And, as the Government has pointed out as *amicus curiae*:

"If they [the networks and television stations] were to discontinue the blanket license, they then would be required to obtain performance rights for these already-produced shows. This attempt would create an opportunity for the copyright owners, as a condition of granting performing rights, to attempt to obtain the entire value of the shows 'in the can.' It would produce, in other words, a case of bilateral monopoly. Because pricing is indeterminate in a bilateral monopoly, television networks would not terminate their blanket licenses until they had concluded an agreement with every owner of copyrighted music 'in the can' to

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produces marketwide price discrimination and significant barriers to entry unreasonably restrains trade even if the discrimination and the barriers have only a limited life expectancy. History suggests, however, that these restraints have an enduring character.

[\*\*\*\*67] Antitrust policy requires that great aggregations of economic power be closely scrutinized. That duty is especially important when the aggregation is composed of statutory monopoly privileges. Our cases have repeatedly stressed the need to limit the privileges conferred by patent and copyright strictly to the scope of the statutory grant. The record in this case plainly discloses that the limits have been exceeded and that ASCAP and BMI exercise monopoly powers that far exceed the sum of the privileges of the individual copyright holders. [\*38] Indeed, ASCAP itself argues that its blanket license constitutes a [513] product that is significantly different from the sum of its component parts. I agree with that premise, but I conclude that the aggregate is a monopolistic restraint of trade proscribed by the Sherman Act.

## References

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[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 45 et seq.](#)

24 Am Jur Trials 1, Defending Antitrust Lawsuits

[15 USCS 1 et seq.](#)

US L Ed Digest, Restraints of Trade and Monopolies 16, 62

L Ed Index to Annos, Restraints of Trade and Monopolies

ALR [\*\*\*\*68] Quick Index, Restraints of Trade and Monopolies

Federal Quick Index, Monopolies and Restraints of Trade

Annotation References:

Literary and artistic rights for purposes of, and their infringement by or in connection with, motion pictures, radio, and television. 23 ALR2d 244.

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allow future performance for an identified price; the networks then would determine whether that price was sufficiently low that termination of the blanket license would be profitable. But the prospect of such negotiations offers the copyrights owners an ability to misuse their rights in a way that ensures the continuation of blanket licensing despite a change in market conditions that may make other forms of licensing preferable." Brief for United States as *Amicus Curiae* 24-25.

This analysis is in no sense inconsistent with the findings of the District Court. The District Court did reject CBS's coercion argument as to music "in the can." But as the Government again points out, the District Court's findings were addressed essentially to a tie-in claim; "the court did not consider the possibility that the copyright owners' self-interested, non-coercive demands for compensation might nevertheless make the cost of CBS' dropping the blanket license sufficiently high that ASCAP and BMI could take this 'termination penalty' into account in setting fees for the blanket license." *Id.*, at 25 n. 23.

## **Reiter v. Sonotone Corp.**

Supreme Court of the United States

April 25, 1979, Argued ; June 11, 1979, Decided

No. 78-690

**Reporter**

442 U.S. 330 \*; 99 S. Ct. 2326 \*\*; 60 L. Ed. 2d 931 \*\*\*; 1979 U.S. LEXIS 108 \*\*\*\*; 1979-1 Trade Cas. (CCH) P62,688; 27 Fed. R. Serv. 2d (Callaghan) 653

REITER v. SONOTONE CORP. ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

**Disposition:** 579 F.2d 1077, reversed and remanded.

## **Core Terms**

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consumers, retail, Clayton Act, district court, enterprise, damages, commercial interest, legislative history, antitrust violation, antitrust, terms, court of appeals, federal court, class action, anticompetitive, treble-damages, settlements, purchaser

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Clayton Act > General Overview

### [HN1](#) [] Antitrust & Trade Law, Clayton Act

See § 4 of the Clayton Act, [15 U.S.C.S. § 15.](#)

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > General Overview

### [HN2](#) [] Antitrust & Trade Law, Clayton Act

The Clayton Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

Antitrust & Trade Law > Clayton Act > General Overview

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### [\*\*HN3\*\*](#) [down] Antitrust & Trade Law, Clayton Act

The word "property" has a naturally broad and inclusive meaning. In its dictionary definitions and in common usage "property" comprehends anything of material value owned or possessed. Money, of course, is a form of property.

Governments > Legislation > Interpretation

### [\*\*HN4\*\*](#) [down] Legislation, Interpretation

In construing a statute the court is obliged to give effect, if possible, to every word Congress used. Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise.

Antitrust & Trade Law > Clayton Act > General Overview

### [\*\*HN5\*\*](#) [down] Antitrust & Trade Law, Clayton Act

Congress' use of the word "or" in § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), makes plain that "business" was not intended to modify "property," nor was "property" intended to modify "business."

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

Antitrust & Trade Law > Clayton Act > General Overview

### [\*\*HN6\*\*](#) [down] Private Actions, Remedies

A consumer whose money has been diminished by reason of an antitrust violation has been injured in his "property" within the meaning of § 4 of the Clayton Act, [15 U.S.C.S. § 15](#).

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

### [\*\*HN7\*\*](#) [down] Clayton Act, Claims

Monetary injury, standing alone, may be injury in one's "property" within the meaning of § 4 of the Clayton Act, [15 U.S.C.S. § 15](#).

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

Antitrust & Trade Law > Clayton Act > General Overview

### [\*\*HN8\*\*](#) [down] Private Actions, Standing

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Consumers of retail goods and services have standing to sue under § 4 of the Clayton Act, [15 U.S.C.S. § 15](#).

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

Governments > Legislation > Interpretation

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

Antitrust & Trade Law > Public Enforcement > US Department of Justice Actions > General Overview

## **[HN9](#) [down] US Department of Justice Actions, Civil Actions**

The court must take a statute as it finds it.

## **Lawyers' Edition Display**

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### **Decision**

Consumers paying higher price for goods because of **antitrust law** violations, held to sustain injury to "property" and to be entitled to sue for treble damages under Clayton Act ([15 USCS 15](#)).

### **Summary**

On behalf of herself and all other persons in the United States who purchased hearing aids manufactured by five corporations, a woman brought a class action in the United States District Court for the District of Minnesota, seeking treble damages under 4 of the Clayton Act ([15 USCS 15](#))--which authorizes such treble damage actions by "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws"--on the ground that because of the corporations' violation of federal antitrust laws, including vertical and horizontal price fixing, she and all other members of the class she represented were forced to pay illegally fixed higher prices for hearing aids and related services they purchased from the corporations' retail dealers. The corporations moved for dismissal of the complaint or summary judgment, arguing, among other things, that a retail purchaser of goods for personal use lacks standing to sue for treble damages under 4 of the Act because such a consumer has not been injured in his "business or property" within the meaning of the Act. The District Court held that under 4 a retail purchaser is injured in "property" if the purchaser can show that antitrust violations caused an increase in the price paid for the article purchased, but determining that the defendants had raised a controlling question of law as to which there was substantial ground for difference of opinion, the District Court stayed further proceedings in the case and certified the question of consumer treble damage suits to the [United States Court of Appeals for the Eighth Circuit \(435 F Supp 933\)](#). The Court of Appeals reversed, ruling that retail purchasers of consumer goods and services who allege no injury of a commercial or business nature are not injured in their "business or property" for purposes of 4 ([579 F2d 1077](#)).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Burger, Ch. J., expressing the unanimous view of the eight participating members of the Court, it was held that consumers who pay a higher price for goods purchased for personal use as a result of antitrust violations, thus having their money diminished, sustain an injury in their "property" within the meaning of 4 of the Clayton Act, and thus may bring an action under 4 to recover treble damages.

Rehnquist, J. concurring, expressed the view that although the interpretation of 4 of the Act as authorizing consumer suits might add a substantial volume of litigation to the strained dockets of the federal courts, and might be used to exact unfair settlements from retail businesses, any such problems were for Congress and not for the courts.

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Brennan, J., did not participate.

## Headnotes

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MONOPOLIES §67 > treble damages -- consumer suits -- injury to "business or property" -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C]

Consumers who, as a result of violations of federal antitrust laws, pay a higher price for goods purchased for personal use, thus having their money diminished, sustain an injury in their "property" within the meaning of 4 of the Clayton Act ([15 USCS 15](#)) and may bring an action to recover treble damages under 4, which authorizes treble damage actions by "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."

STATUTES §163 > federal law -- construction -- language -- > Headnote:

[LEdHN\[2\]](#) [2]

In every case involving the construction of a federal statute, the starting point must be the language employed in the statute by Congress.

MONEY §1 > nature -- > Headnote:

[LEdHN\[3\]](#) [3]

Money is a form of property.

STATUTES §110 > construction -- giving effect to all language -- > Headnote:

[LEdHN\[4\]](#) [4]

In construing a federal statute a court is obliged to give effect, if possible, to every word Congress used.

STATUTES §179 > construction -- use of disjunctive -- > Headnote:

[LEdHN\[5\]](#) [5]

Under canons of construction, terms connected by a disjunctive ordinarily should be given separate meanings, unless the context dictates otherwise.

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STATUTES §154 > Clayton Act -- interpretation -- belief of Congress after enactment -- > Headnote:

[LEdHN\[6A\]](#) [  ] [6A] [LEdHN\[6B\]](#) [  ] [6B]

The fact that Congress, as evidenced by the text and legislative history of a federal statute enacted subsequent to the enactment of 4 of the Clayton Act ([15 USCS 15](#)), believed that consumers have a cause of action to recover treble damages for violations of federal antitrust laws under 4 of the Clayton Act will not be viewed as a controlling consideration by the United States Supreme Court in determining whether consumers who pay a higher price for goods purchased for personal use as a result of federal antitrust violations sustain an injury in their "business or property" within the meaning of 4 so as to be entitled to bring treble damage actions.

COURTS §105 > interpretation of statute -- adverse effects -- considerations for legislature -- > Headnote:

LEdHN[7] [  ] [7]

For purposes of the United States Supreme Court's determining whether consumers who pay a higher price for goods purchased for personal use as a result of federal antitrust violations sustain an injury in their "business or property" within the meaning of 4 of the Clayton Act ([15 USCS 15](#)), so as to be entitled to bring an action for treble damages under 4, the argument that the cost of defending consumer actions brought as class actions will have a potentially ruinous effect on small businesses and will ultimately be paid by consumers relates to policy considerations more properly addressed to Congress than to the court, and such considerations cannot govern the court's interpretation of the language of 4.

## **Syllabus**

Petitioner brought a class action on behalf of herself and all persons in the United States who purchased hearing aids manufactured by respondents, alleging that, because of antitrust violations committed by respondents, she and the class she seeks to represent have been forced to pay illegally fixed higher prices for the hearing aids and related services they purchased from respondents' retail dealers. Treble damages were sought under § 4 of the Clayton Act, which provides that "[any] person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may bring suit and recover treble damages. Respondents moved to dismiss the damages claim on the ground [\*\*\*\*2] that petitioner had not been injured in her "business or property" within the meaning of § 4. The District Court held that under § 4 a retail purchaser is injured in "property" if it can be shown that antitrust violations caused an increase in the price paid for the article purchased; however, it certified the question to the Court of Appeals. The Court of Appeals reversed, holding that retail purchasers of consumer goods and services who allege no injury of a commercial or business nature are not injured in their "business or property" within the meaning of § 4, and that the phrase "business or property" was intended to limit standing to those engaged in commercial ventures.

*Held:* Consumers who pay a higher price for goods purchased for personal use as a result of antitrust violations sustain an injury in their "property" within the meaning of § 4. Pp. 337-345.

(a) Statutory construction must begin with the language employed by Congress. The word "property" has a naturally broad and inclusive meaning comprehending, in common usage, anything of material value owned or possessed. Congress' use of the disjunctive "or" in the phrase "business or property" indicates "business" [\*\*\*\*3] was not intended to modify "property," nor was "property" intended to modify "business." Giving the word "property" the independent significance to which it is entitled in this context does not destroy the restrictive significance of the phrase "business or property" as a whole. Pp. 337-339.

- (b) Monetary injury, standing alone, may be injury in one's "property" within the meaning of § 4. *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390. Thus, the fact that petitioner was deprived of only money is no reason to conclude that she did not sustain a "property" injury. Pp. 339-340.
- (c) Nor does petitioner's status as a "consumer" who purchased goods at retail for personal use change the nature of the injury she suffered or the intrinsic meaning of "property" in § 4. Pp. 340-342.
- (d) The legislative history reflects that the treble-damages remedy was designed to protect consumers, and that no one questioned the right of consumers to sue under § 4. Thus, to the extent that § 4's legislative history is relevant, it also supports the conclusion that a consumer deprived of money by reason of anticompetitive conduct is injured in "property" within the [\*\*\*\*4] meaning of § 4. Pp. 342-344.
- (e) The fact that allowing class actions such as this may add a significant burden to the federal courts' already overcrowded dockets is an important but not a controlling consideration, since Congress created the § 4 treble-damages remedy precisely for the purpose of encouraging *private* challenges to antitrust violations. P. 344.
- (f) Respondents' arguments that the cost of defending consumer class actions will have a potentially ruinous effect on small businesses in particular and will ultimately be paid by consumers, are policy considerations more properly addressed to Congress than to this Court; in any event they cannot govern the reading of the plain language of § 4. Pp. 344-345.
- Counsel:** John E. Thomas argued the cause and filed a brief for petitioner. Julian R. Wilheim and Elliot S. Kaplan argued the cause for respondents. With them on the brief were Fred L. Woodworth, Joseph C. Basta, and Deborah J. Palmer. Assistant Attorney General Shenefield argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Solicitor General McCree, Deputy Solicitor General Easterbrook, Stephen M. Shapiro, Barry [\*\*\*\*5] Grossman, and Bruce E. Fein. Warren Spannaus, Attorney General of Minnesota, argued the cause for the States of Alabama et al. as amici curiae urging reversal. With him on the brief were Richard B. Allyn, Solicitor General of Minnesota, Alan H. Maclin, Stephen P. Kilgruff, and Thomas Kenyon, Special Assistant Attorneys General; and John Ashcroft, Attorney General of Missouri, Walter O. Theiss, Assistant Attorney General, and Robert Bern; joined by other officials for their respective States as follows: Charles A. Graddick, Attorney General, for Alabama; Avrum M. Gross, Attorney General, and Mark E. Ashburn, Assistant Attorney General, for Alaska; Robert K. Corbin, Attorney General, and Kenneth R. Reed for Arizona; Steve Clark, Attorney General, and Royce O. Griffin, Jr., Deputy Attorney General, for Arkansas; George Deukmejian, Attorney General, Warren J. Abbott, Assistant Attorney General, and Linda L. Tedeschi, Deputy Attorney General, for California; J. D. MacFarlane, Attorney General, B. Lawrence Theis, First Assistant Attorney General, and William E. Walters, Assistant Attorney General, for Colorado; Carl R. Ajello, Attorney General, Gerard J. Dowling and Larry H. Evans, Assistant [\*\*\*\*6] Attorneys General, for Connecticut; Richard S. Gebelein, Attorney General, and William E. Kirk III, Assistant Attorney General, for Delaware; Jim Smith, Attorney General, Charles R. Ranson, Special Assistant Attorney General, and Douglas C. Kearney, Assistant Attorney General, for Florida; Wayne Minami, Attorney General, and Thomas T. Wood, Deputy Attorney General, for Hawaii; David H. Leroy, Attorney General, and Mike Brassey, Deputy Attorney General, for Idaho; William J. Scott, Attorney General, for Illinois; Theodore L. Sendak, Attorney General, for Indiana; Thomas J. Miller, Attorney General, and Gary H. Swanson, Assistant Attorney General, for Iowa; Robert T. Stephan, Attorney General, and Wayne E. Hundley, Deputy Attorney General, for Kansas; Robert F. Stephens, Attorney General, and James M. Ringo, Assistant Attorney General, for Kentucky; William J. Guste, Jr., Attorney General, and John R. Flowers, Jr., Assistant Attorney General, for Louisiana; Richard S. Cohen, Attorney General, and Cheryl Harrington, Assistant Attorney General, for Maine; Stephen H. Sachs, Attorney General, and Charles O. Monk II, Assistant Attorney General, for Maryland; Francis X. Bellotti, Attorney [\*\*\*\*7] General, Paula W. Gold, Assistant Attorney General, and Steven J. Greenfogel for Massachusetts; Frank J. Kelley, Attorney General, and Edwin M. Bladen, Assistant Attorney General, for Michigan; A. F. Summer, Attorney General, and Marshall G. Bennett, Assistant Attorney General, for Mississippi; Mike T. Greely, Attorney General, and Jerome J. Cate, Assistant Attorney General, for Montana; Paul L. Douglas, Attorney General, and Robert F. Bartle and Paul E. Hofmeister, Assistant Attorneys General, for Nebraska; Richard H. Bryan, Attorney

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General, for Nevada; Thomas D. Rath, Attorney General, for New Hampshire; John J. Degnan, Attorney General, and Alfred J. Luciani for New Jersey; Jeff Bingham, Attorney General, and James J. Wechsler, Assistant Attorney General, for New Mexico; Robert Abrams, Attorney General, and John M. Desiderio, Assistant Attorney General, for New York; Rufus L. Edmisten, Attorney General, Howard A. Kramer, Deputy Attorney General, and David S. Crump, Special Deputy Attorney General, for North Carolina; Allen I. Olson, Attorney General, and Dale V. Sandstrom and Terry L. Adkins, Assistant Attorneys General, for North Dakota; William J. Brown, Attorney General, and [\*\*\*8] Eugene F. McShane and Richard M. Firestone, Assistant Attorneys General, for Ohio; Jan Eric Cartwright, Attorney General, and Manville J. Buford, Assistant Attorney General, for Oklahoma; James A. Redden, Attorney General, and James Kirkham Johns for Oregon; Edward G. Biester, Jr., Attorney General, and Norman J. Watkins and John L. Shearburn, Deputy Attorneys General, for Pennsylvania; Dennis J. Roberts II, Attorney General, and Patrick J. Quinlan, Special Assistant Attorney General, for Rhode Island; Daniel R. McLeod, Attorney General, for South Carolina; Mark V. Meierhenry, Attorney General, and James E. McMahon, Assistant Attorney General, for South Dakota; William M. Leech, Jr., Attorney General, and William J. Haynes, Jr., Deputy Attorney General, for Tennessee; Mark White, Attorney General, for Texas; Robert B. Hansen, Attorney General, and Andrew W. Buffmire, Assistant Attorney General, for Utah; M. Jerome Diamond, Attorney General, and Jay I. Ashman, Assistant Attorney General, for Vermont; Marshall Coleman, Attorney General, and Joseph W. Kaestner, Assistant Attorney General, for Virginia; Slade Gorton, Attorney General, Thomas L. Boeder, Senior Assistant Attorney General, [\*\*\*9] and Earle J. Hereford, Jr., Assistant Attorney General, for Washington; Chauncey H. Browning, Jr., Attorney General, and Charles G. Brown, Deputy Attorney General, for West Virginia; Bronson C. La Follette, Attorney General, and Michael L. Zaleski, Assistant Attorney General, for Wisconsin; and John D. Troughton, Attorney General, Peter J. Mulvaney, Deputy Attorney General, and James W. Gusea, Assistant Attorney General, for Wyoming. \*

**Judges:** BURGER, C. J., delivered the opinion of the Court, in which all other Members joined, except BRENNAN, J., who took no part in the decision of the case. REHNQUIST, J., filed a concurring opinion, post, p. 345.

**Opinion by:** BURGER

## Opinion

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[\*334] [\*\*\*934] [\*\*2328] MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

LEdHN[1A] [1A]We granted certiorari to decide whether consumers who pay [\*\*\*10] a [\*\*\*935] higher price for goods purchased for personal use as a result of antitrust violations sustain an injury in their "business or property" within the meaning of § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15.

[\*335] [\*\*2329] I

Petitioner brought a class action on behalf of herself and all persons in the United States who purchased hearing aids manufactured by five corporations, respondents here. Her complaint alleges that respondents have committed a variety of antitrust violations, including vertical and horizontal price fixing.<sup>1</sup> Because of these violations, the complaint alleges, petitioner and the class of persons she seeks to represent have been forced to pay illegally fixed

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\* David Berger, H. Laddie Montague, Jr., Merrill G. Davidoff, Stanley J. Friedman, Frederick P. Furth, Thomas R. Fahrner, Aaron M. Fine, and Josef D. Cooper filed a brief for the plaintiffs in Kennedy Smith v. Toyota Motor Sales U.S.A. et al. as amici curiae urging reversal.

<sup>1</sup> Specifically, Reiter alleges that respondents violated §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1 and 2, and § 3 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 14. She claims respondents restricted the territories, customers, and brands of hearing aids offered by their retail dealers, used the customer lists of their retail dealers for their own purposes, prohibited unauthorized retailers from dealing in or repairing their hearing aids, and conspired among themselves and with their retail dealers to fix the retail prices of the hearing aids.

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higher prices for the hearing aids and related services they purchased from respondents' retail dealers. Treble damages and injunctive relief are sought under §§ 4 and 16 of the Clayton Act, 38 Stat. 731, 737, as amended, [15 U. S. C. §§ 15](#) and [26](#).

[\*\*\*\*11] Respondents moved for dismissal of the complaint or summary judgment in the District Court. Among other things, respondents argued that Reiter, as a retail purchaser of hearing aids for personal use, lacked standing to sue for treble damages under § 4 of the Clayton Act because she had not been injured in her "business or property" within the meaning of the Act.

The District Court held that under § 4 a retail purchaser is injured in "property" if the purchaser can show that antitrust violations caused an increase in the price paid for the article purchased. The District Court relied on [Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390, 396 \(1906\)](#), and the legislative history of the Clayton Act set forth in [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 1\\*3361 486 n. 10 \(1977\)](#), indicating that Congress intended to give a § 4 remedy to consumers. [435 F.Supp. 933, 935-938 \(Minn. 1977\)](#).

The District Court determined, however, that the respondents had raised a "controlling question of law as to which there is substantial ground for difference of opinion," [id., at 938](#), and accordingly [\*\*\*\*12] certified the question for interlocutory review under [28 U. S. C. § 1292 \(b\)](#). It then stayed further proceedings in the case and declined to express any opinion on the merits of the other issues raised by respondents' motions or on the certifiability of the class.

The Court of Appeals reversed, holding that retail purchasers of consumer goods and services who allege no injury of a commercial or business nature are not injured in their "business or property" within the meaning of § 4. [579 F.2d 1077 \(CA8 1978\)](#). Noting the absence of any holdings on this precise issue by this Court or other courts of [\*\*\*\*936] appeals, the court reasoned that the phrase "business or property" was intended to limit standing to those engaged in commercial ventures. It relied on the legislative history and this Court's statement in [Hawaii v. Standard Oil Co., 405 U.S. 251, 264 \(1972\)](#), that "business or property" referred to "commercial interests or enterprises." A contrary holding, the Court of Appeals observed, would add a substantial volume of litigation to the already strained dockets of the federal courts and could be used to exact unfair [\*\*\*\*13] settlements from retail businesses. Small and medium-sized retailers would be especially hard hit by "gigantic consumer class actions," and granting standing to retail consumers might actually have an anticompetitive impact as a consequence. Accordingly, the Court of Appeals thought "it sensible as a matter of policy and compelled as a matter of law that consumers alleging no injury of a commercial or competitive nature are not injured in their property under section 4 of the Clayton Act." [579 F.2d, at 1087](#).

[\*337] [\*\*2330] We granted certiorari, [439 U.S. 1065 \(1979\)](#).<sup>2</sup> [\*\*\*\*14] We reverse.<sup>3</sup>

II

[LEdHN\[1B\]](#) [1B] [LEdHN\[2\]](#) [2] As is true in every case involving the construction of a statute, our starting point must be the language employed by Congress. [HN1](#) Section 4 of the Clayton Act, 38 Stat. 731, provides:

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<sup>2</sup> Differing views on this issue have been expressed by various courts. See, e. g., [Reiter v. Sonotone Corp., 579 F.2d 1077 \(CA8 1978\)](#) (case below); [Bravman v. Bassett Furniture Industries, 552 F.2d 90, 98-99](#), and n. 23 (CA3), cert. denied, [434 U.S. 823 \(1977\)](#); [Cleary v. Chalk, 159 U. S. App. D. C. 415, 419 n. 17, 488 F.2d 1315, 1319 n. 17 \(1973\)](#), cert. denied, [416 U.S. 938 \(1974\)](#); [Theophil v. Sheller-Globe Corp., 446 F.Supp. 131 \(EDNY 1978\)](#); [Gutierrez v. E. & J. Gallo Winery Co., 425 F.Supp. 1221 \(ND Cal. 1977\)](#), appeal docketed, No. 77-1725 (CA9).

<sup>3</sup> The Court of Appeals expressly noted that Reiter's claim for injunctive relief under § 16 of the Clayton Act was not before it on interlocutory appeal. [579 F.2d, at 1087 n. 19](#). The court therefore expressed no view as to Reiter's standing to raise this claim. It also expressly refused to decide whether Reiter's claim for treble damages under § 4 was barred by the direct-purchaser rule of [Illinois Brick Co. v. Illinois, 431 U.S. 720 \(1977\)](#). [579 F.2d, at 1079 n. 3](#). Accordingly, these issues are not before us.

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"Any person who shall be injured in his business or property by reason of anything forbidden [\*\*\*\*15] in the antitrust laws may sue therefor in any district court of the United States . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." [15 U. S. C. § 15](#) (emphasis added).

On its face, § 4 contains little in the way of restrictive language. In *Pfizer Inc. v. Government of India*, [434 U.S. 308 \(1978\)](#), we remarked:

[HN2\[↑\]](#) 'The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices [\*338] by whomever they may be perpetrated.' *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, [334 U.S. 219, 236](#); cf. *Perma Life Mufflers, Inc. v. International Parts Corp.*, [392 U.S. 134, 138-139](#). [\*\*\*937] And the legislative history of the Sherman Act demonstrates that Congress used the phrase 'any person' intending it to have its naturally broad and inclusive meaning. There was no mention in the floor debates of any more restrictive definition. [\*\*\*\*16] " [Id. at 312](#).

[LEdHN\[3\]\[↑\]](#) [3]Similarly here, [HN3\[↑\]](#) the word "property" has a naturally broad and inclusive meaning. In its dictionary definitions and in common usage "property" comprehends anything of material value owned or possessed. See, e. g., Webster's Third New International Dictionary 1818 (1961). Money, of course, is a form of property.

Respondents protest that, if the reference to "property" in § 4 means "money," the term "business" then becomes superfluous, for every injury in one's business necessarily involves a pecuniary injury. They argue that if Congress wished to permit one who lost only money to bring suit under § 4, it would not have used the restrictive phrase "business or property"; rather, it would have employed more generic language akin to that of § 16, for example, which provides for injunctive relief against any "threatened loss or damage." [15 U. S. C. § 26](#). Congress plainly intended to exclude some category of injury in choosing the phrase "business or property" [\*\*\*\*17] for § 4. Only a "commercial interest" gloss, they argue, both gives the phrase the restrictive significance intended for it and at the same time gives independent significance to the word "business" and the word "property." The argument of respondents is straightforward: the phrase "business or property" means "business activity or property related to one's business." Brief for Respondents 11 n. 7.

[\*\*2331] [LEdHN\[4\]\[↑\]](#) [4][LEdHN\[5\]\[↑\]](#) [5]That strained construction would have us ignore the disjunctive "or" and rob the term "property" of its independent [\*339] and ordinary significance; moreover, it would convert the noun "business" into an adjective. [HN4\[↑\]](#) In construing a statute we are obliged to give effect, if possible, to every word Congress used. *United States v. Menasche*, [348 U.S. 528, 538-539 \(1955\)](#). Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates [\*\*\*\*18] otherwise; here it does not. See *FCC v. Pacifica Foundation*, [438 U.S. 726, 739-740 \(1978\)](#).[HN5\[↑\]](#) Congress' use of the word "or" makes plain that "business" was not intended to modify "property," nor was "property" intended to modify "business."

[LEdHN\[1C\]\[↑\]](#) [1C]When a commercial enterprise suffers a loss of money it suffers an injury in both its "business" and its "property." But neither term is rendered redundant by recognizing that a consumer not engaged in a "business" enterprise, but rather acquiring goods or services for personal use, is injured in "property" when the price of those goods or services is artificially inflated by reason of the anticompetitive conduct complained of. The phrase "business or property" also retains restrictive significance. It would, for example, exclude personal injuries suffered. E. g., *Hamman v. United States*, [267 F.Supp. 420, 432 \(Mont. 1967\)](#). Congress must have intended to exclude some class of injuries by the phrase "business or property." But it [\*\*\*\*19] taxes the ordinary meaning of common

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[\*\*\*938] terms to argue, as respondents do, that a consumer's monetary injury arising directly out of a retail purchase is not comprehended by the natural and usual meaning of the phrase "business or property." We simply give the word "property" the independent significance to which it is entitled in this context. [HN6](#)<sup>↑</sup> A consumer whose money has been diminished by reason of an antitrust violation has been injured "in his . . . property" within the meaning of § 4.

Indeed, this Court indicated as much in [\*Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 \(1960\)\*](#). There the city alleged that the anticompetitive conduct of the defendants [\*340] had caused the city to pay more for water pipes purchased for use in the city's water system. The defendants answered that the pecuniary injury resulting from the alleged overcharges did not injure the city in its "business or property" within the meaning of § 4. This Court, without relying on the fact that the city was engaged in a business enterprise, stated:

"The city was [\*\*\*20] . . . injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property." [203 U.S., at 396](#).

The holding of *Chattanooga Foundry* could well have been grounded on the undisputed fact that the city was engaged in the commercial enterprise of supplying water for a charge and, therefore, engaged in a business. It was not uncommon for both municipalities and private companies to own and operate competing waterworks at the turn of the century. In operating a municipal public utility, the city was in a real sense engaged in the "business of furnishing water" when it purchased the pipe to carry water from the city's reservoirs to its customers. *Ibid.*

Yet, the Court's holding in *Chattanooga Foundry* was deliberately grounded on the premise that the city had been injured in its "property" -- independent of any injury it had sustained in its "business of furnishing water" -- because the defendants' antitrust violation caused it to pay a higher price for the pipe than it otherwise would have paid. [\*\*\*21] *Ibid.* *Chattanooga Foundry* therefore establishes that [HN7](#)<sup>↑</sup> monetary injury, standing alone, may be injury in one's "property" within the meaning of § 4. Thus, the fact that petitioner Reiter was deprived of only money, albeit a modest [\*2332] amount, is no reason to conclude that she did not sustain a "property" injury.

Nor does her status as a "consumer" change the nature of [\*341] the injury she suffered or the intrinsic meaning of "property" in § 4. [HN8](#)<sup>↑</sup> That consumers of retail goods and services have standing to sue under § 4 is implicit in our decision in [\*Goldfarb v. Virginia State Bar, 421 U.S. 773, 780, 782 \(1975\)\*](#). There we held that a bar association was subject to a treble-damages suit brought under § 4 by persons who sought legal services in connection with the purchase of a residence. Furthermore, we have often referred to "consumers" as parties entitled to seek damages under § 4 without intimating that consumers [\*\*\*939] of goods and services purchased [\*22] for personal rather than commercial use were in any way foreclosed by the statutory language from asserting an injury in their "property." E. g., *Pfizer Inc. v. Government of India, 434 U.S., at 313-315*; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S., at 486 n. 10*; *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494 (1968)*; *Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948)*.

[\*Hawaii v. Standard Oil Co., 405 U.S. 251 \(1972\)\*](#), is not to the contrary. There we held that injury to a state's total economy, for which the state sought redress in its *parens patriae* capacity, was not cognizable under § 4. It is true we noted that the words "business or property" refer to "commercial interests or enterprises," and reasoned that Hawaii could not recover on its claim for damage done to its "general economy" because such injury did not harm Hawaii's "commercial interests." [405 U.S., at 264](#).

However, the language of an opinion is not always to be parsed as though we were dealing with language of a statute. Use of [\*\*\*23] the phrase "commercial interests or enterprises," read in context, in no sense suggests that only injuries to a business entity are within the ambit of § 4. Respondents ignore the Court's careful use of the disjunctive and the naturally broad meaning of the term "interests" in [\*Hawaii v. Standard Oil Co., supra\*](#). The phrase

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"commercial interests" was used there as a generic reference to the interests of the [\*342] State of Hawaii as a party to a commercial transaction. This is apparent from *Hawaii's* explicit reaffirmance of the rule of *Chattanooga Foundry* and statement that, where injury to a state "occurs in its capacity as a consumer in the marketplace" through a "payment of money wrongfully induced," treble damages are recoverable by a state under the Clayton Act. *Hawaii v. Standard Oil Co., supra, at 263 n. 14*. A central premise of our holding in *Hawaii* was concern over duplicative recoveries. We noted that a "large and ultimately indeterminable part of the injury to the 'general economy'" for which the State sued was "no more than a reflection of injuries to the 'business or property' of consumers" for which, on a [\*\*\*\*24] proper showing, they could recover in their own right. *405 U.S., at 263-264*.

Consumers in the United States purchase at retail more than \$ 1.2 trillion in goods and services annually. 1978 Economic Report of the President 257 (Table B-1). It is in the sound commercial interests of the retail purchasers of goods and services to obtain the lowest price possible within the framework of our competitive private enterprise system. The essence of the antitrust laws is to ensure fair price competition in an open market. Here, where petitioner alleges a wrongful deprivation of her money because the price of the hearing aid she bought was artificially inflated by reason of respondents' anticompetitive conduct, she has alleged an injury in her "property" under § 4.

Nothing in the legislative history of § 4 conflicts with our holding today. [\*\*\*940] Many courts and commentators have observed that the respective legislative histories of § 4 of the Clayton Act and § 7 of the [\*\*2333] Sherman Act, its predecessor, shed no light on Congress' original understanding of the terms "business or property."

<sup>4</sup> [\*\*\*\*26] Nowhere in the legislative record [\*343] is specific reference [\*\*\*\*25] made to the intended scope of those terms. Respondents engage in speculation in arguing that the substitution of the terms "business or property" for the broader language originally proposed by Senator Sherman <sup>5</sup> was clearly intended to exclude pecuniary injuries suffered by those who purchase goods and services at retail for personal use. None of the subsequent floor debates reflect any such intent. On the contrary, they suggest that Congress designed the Sherman Act as a "consumer welfare prescription." R. Bork, *The Antitrust Paradox* 66 (1978). Certainly the leading proponents of the legislation perceived the treble-damages remedy of what is now § 4 as a means of protecting consumers from overcharges resulting from price fixing. *E. g.*, 21 Cong. Rec. 2457, 2460, 2558 (1890). Because Congress in 1890 rejected a proposal to allow a group of consumers to bring a collective action as a class, some legislators questioned whether individual consumers would be willing to bring actions for relatively small amounts. See, *e. g.*, *id.*, at 1767-1768, 2569, 2612, 3147-3148, 3150. At no time, however, was the *right* of a consumer to bring an action for damages questioned.<sup>6</sup>

**LEdHN[6A]** [↑] [6A] In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra*, after examining the legislative history of § 4, we described the Sherman Act as "conceived of primarily as a remedy for '[the] people of the United States as individuals,' especially consumers," and the treble-damages provision of the Clayton Act as "conceived primarily as [opening] the door of justice [\*344] to every man . . . and [giving] the injured party ample damages for the wrong suffered."<sup>7</sup> *429 U.S., at 486 n. 10*. Thus, to the extent that the legislative history is relevant, [\*\*\*\*27] it supports our

<sup>4</sup> See, *e. g.*, *Hawaii v. Standard Oil Co., 405 U.S. 251, 261 (1972)*; *Weinberg v. Federated Department Stores, Inc., 426 F.Supp. 880, 882-883 (ND Cal. 1977)*, appeal docketed, No. 77-1547 (CA9); M. Forkosch, *Antitrust and the Consumer* 2-3 (1956); Comment, *Closing the Door on Consumer Antitrust Standing*, 54 N. Y. U. L. Rev. 237, 242-243, 249-252 (1979). See also 1 P. Areeda & D. Turner, *Antitrust Law* para. 106, pp. 14-16 (1978).

<sup>5</sup> As originally introduced, the bill that ultimately became the Sherman Act authorized "any person or corporation injured or damaged by [an unlawful] arrangement, contract, agreement, trust, or combination" to sue for damages thereby sustained. S. 1, 51st Cong., 1st Sess., § 2 (1889).

<sup>6</sup> Of course, the treble-damages remedy of § 4 took on new practical significance for consumers with the advent of *Fed. Rule Civ. Proc. 23*.

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holding that a consumer deprived of money by reason of allegedly anticompetitive conduct is injured in "property" within the meaning of § 4.<sup>7</sup>

### LEdHN[6B] [↑] [6B]

Respondents [\*\*\*941] also argue that allowing class actions [\*\*\*28] to be brought by retail consumers like the petitioner here will add a significant burden to the already crowded dockets of the federal courts. That may well be true but cannot be a controlling consideration here. HN9 [↑] We must take the statute as we find it. Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations. Indeed, nearly 20 times as many private antitrust actions are currently pending in the federal courts as actions filed by the Department of Justice. Administrative Office [\*\*2334] of the United States Courts Ann. Rep. 101, Table 28 (1978). To be sure, these private suits impose a heavy litigation burden on the federal courts; it is the clear responsibility of Congress to provide the judicial resources necessary to execute its mandates.

LEdHN[7] [↑] [7]Finally, [\*\*\*29] respondents argue that the cost of defending consumer class actions will have a potentially ruinous effect on small businesses in particular and will ultimately be paid by [\*345] consumers in any event. These are not unimportant considerations, but they are policy considerations more properly addressed to Congress than to this Court. However accurate respondents' arguments may prove to be -- and they are not without substance -- they cannot govern our reading of the plain language in § 4.

District courts must be especially alert to identify frivolous claims brought to extort nuisance settlements; they have broad power and discretion vested in them by Fed. Rule Civ. Proc. 23 with respect to matters involving the certification and management of potentially cumbersome or frivolous class actions. See generally Durham & Dibble, Certification: A Practical Device for Early Screening of Spurious Antitrust Litigation, 1978 B.Y.U.L. Rev. 299. Recognition of the plain meaning of the statutory language "business or property" need not result in administrative chaos, class-action harassment, or "windfall" settlements if the district courts exercise sound discretion and use [\*\*\*30] the tools available.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*Reversed and remanded.*

MR. JUSTICE BRENNAN took no part in the decision of this case.

**Concur by:** REHNQUIST

### **Concur**

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MR. JUSTICE REHNQUIST, concurring.

I join the Court's opinion and write separately only to point out that the concern expressed by the Court of Appeals that an interpretation of "business or property" in the manner in which the Court interprets it today would "add a substantial [\*\*\*942] volume of litigation to the already strained dockets of the federal courts and could be used to

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<sup>7</sup> Although in no sense a controlling consideration, we note that our holding is consistent with the assumption on which Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394, 15 U. S. C. § 15c et seq. The text and legislative history of this statute make clear that in 1976 Congress believed that consumers have a cause of action under § 4, which the statute authorizes the states to assert in a *parens patriae* capacity. See, e. g., 15 U. S. C. §§ 15c (a)(1), 15c (a)(1)(B)(ii), 15c (b)(2); H. R. Rep. No. 94-499, pp. 6, 9 (1975). See also Illinois Brick Co. v. Illinois, 431 U.S., at 734 n. 14.

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exact unfair settlements from retail businesses," *ante*, at 336, is by no means an unfounded one. And pronouncements from this Court exhorting district courts to be "especially alert to identify frivolous [\*346] claims brought to extort nuisance settlements" will not be a complete solution for those courts which are actually on the firing line in this type of litigation. *Ante*, at 345. But I fully agree that we must take the statute as Congress wrote it, and I also fully agree with the Court's construction of the phrase "business [\*\*\*31] or property." I think that the Court's observation, *ante*, at 343 n. 6, that "the treble-damages remedy of § 4 took on new practical significance for consumers with the advent of Fed. Rule Civ. Proc. 23" is a miracle of understatement; and in the absence of any jurisdictional limit, there is considerable doubt in my mind whether this type of action is indeed ultimately of primary benefit to consumers themselves, who may recover virtually no monetary damages, as opposed to the attorneys for the class, who stand to obtain handsome rewards for their services. Be that as it may, the problem, if there is one, is for Congress and not for the courts.

## References

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[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 360](#)

24 Am Jur Trials 1, Defending Antitrust Lawsuits

[15 USCS 15](#)

US L Ed Digest, Restraints of Trade and Monopolies 67

L Ed Index to Annos, Damages; Restraints of Trade and Monopolies

ALR Quick Index, Double or Treble Damages

Federal Quick Index, Monopolies and Restraints of Trade

Annotation References:

Supreme [\*\*\*32] Court's views on weight to be accorded to pronouncements of legislature, or members of legislature, respecting meaning or intent of previously enacted statute. [56 L Ed 2d 918](#).

Authority of state to sue as parens patriae to recover treble damages under 4 of Clayton Act ([15 USCS 15](#)). 23 ALR Fed 878.

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## J. Truett Payne Co. v. Chrysler Motors Corp.

Supreme Court of the United States

January 21, 1981, Argued ; May 18, 1981, Decided

No. 79-1944

### **Reporter**

451 U.S. 557 \*; 101 S. Ct. 1923 \*\*; 68 L. Ed. 2d 442 \*\*\*; 1981 U.S. LEXIS 49 \*\*\*\*; 49 U.S.L.W. 4516; 1981-1 Trade Cas. (CCH) P64,013

J. TRUETT PAYNE CO., INC. v. CHRYSLER MOTORS CORP.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

**Disposition:** [607 F.2d 1133](#), vacated and remanded.

## **Core Terms**

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damages, sales, competitors, antitrust, profits, price discrimination, cases, retail, Robinson-Patman Act, programs, substantial evidence, Clayton Act, wrongdoer, dealer, prices, bonus, infer

## **LexisNexis® Headnotes**

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

[\*\*HN1\*\* \[\] Antitrust & Trade Law, Robinson-Patman Act](#)

See [15 U.S.C.S. § 13\(a\)](#).

Antitrust & Trade Law > Clayton Act > General Overview

[\*\*HN2\*\* \[\] Antitrust & Trade Law, Clayton Act](#)

See [15 U.S.C.S. § 15](#).

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

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Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

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

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

**HN3** [] Remedies, Damages

By its terms [15 U.S.C.S. § 13\(a\)](#) is a prophylactic statute which is violated merely upon a showing that the effect of such discrimination may be substantially to lessen competition. As cases have recognized, the statute does not require that the discriminations must in fact have harmed competition. [15 U.S.C.S. § 15](#), in contrast, is essentially a remedial statute. It provides treble damages to any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. To recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent.

Antitrust & Trade Law > Clayton Act > General Overview

[HN4](#) [] Antitrust & Trade Law, Clayton Act

Proof of a violation does not mean that a disfavored purchaser has been actually injured within the meaning of [15 U.S.C.S. § 15](#).

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

**HN5** [] Private Actions, Remedies

Damages issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The court has repeatedly held that in the absence of more precise proof, the factfinder may conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

**HN6** [down arrow] Robinson-Patman Act, Claims

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Even if there is a violation of the Robinson-Patman Act, a petitioner is not excused from its burden of proving antitrust injury and damages. It is simply that once a violation has been established, that burden is to some extent lightened.

## **Lawyers' Edition Display**

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### **Decision**

Recovery of treble damages in price discrimination case under 4 of Clayton Act ([15 USCS 15](#)), held dependent upon showing of actual injury resulting from price discrimination.

### **Summary**

A former automobile dealer brought suit in the United States District Court for the Northern District of Alabama under 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), alleging that an automobile manufacturer's sales incentive program violated the price discrimination prohibition of 2(a). The dealer argued that since the manufacturer's program, which assigned him a sales objective and paid him a bonus for each car sold in excess of his objective, was set higher than those of his competitors, he received fewer bonuses to the extent that he failed to meet his objectives while his competitors met theirs, resulting in price discrimination whereby he paid more for his automobiles than his competitors. The jury returned a verdict against the manufacturer and awarded the dealer damages which the District Court trebled pursuant to 4 of the Clayton Act ([15 USCS 15](#)). The United States Court of Appeals for the Fifth Circuit reversed, finding that in order to recover treble damages under 4, the dealer must prove (1) a violation of the **antitrust law**, (2) cognizable injury attributable to the violation, and (3) at least the approximate amount of damage. Further, it found it unnecessary to consider whether the manufacturer's incentive program violated 2(a), since the dealer failed to introduce substantial evidence of injury attributable to the program ([607 F2d 1133](#)).

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by Rehnquist, J., joined by Burger, Ch. J., and Stewart, White, and Stevens, JJ., it was held (1) that the dealer must prove actual injury resulting from a price discrimination prohibited by 2(a) if it is to recover treble damages under 4, and (2) that the case would be remanded so that the Court of Appeals could pass upon the manufacturer's contention that the evidence adduced at trial was insufficient to support a finding of violation of 2(a), where it was a close question whether the dealer's evidence would be sufficient to support a jury award, and where the Court of Appeals had bypassed the issue of whether the manufacturer in fact violated 2(a) and had gone directly to the issue of damages.

Powell, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting in part, expressed the view that the judgment of the Court of Appeals should have been affirmed, rather than being vacated and remanded, since, even if there were some reason for the Supreme Court to review the evidence in this case, the Court of Appeals was correct in finding the dealer's evidence insufficient to show a competitive injury of the kind that antitrust laws were enacted to prevent.

## **Headnotes**

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PRACTICES §36 > price discrimination -- treble damages -- proof of injury -- > Headnote:

[LEdHN\[1\]](#) [1]

In a suit brought by a former automobile dealer under 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), alleging that an automobile manufacturer's sales incentive programs violated the price discrimination prohibition of 2(a), the dealer is not entitled to automatic damages in the amount of the price

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discrimination upon a showing of a violation of 2(a), and must prove more than a violation of 2(a) if he is to recover treble damages under 4 of the Clayton Act ([15 USCS 15](#)), since 2(a) is a prophylactic statute which is violated merely upon a showing that injury may result from the price discrimination prohibited under 2(a), whereas 4 is a remedial statute which provides treble damages upon some showing of actual injury attributable to something the antitrust laws were designed to prevent, and since proof of a violation of 2(a) does not mean that a disfavored purchaser has been actually injured within the meaning of 4.

ERROR §1692.1 > remand -- issue not passed on by court below -- > Headnote:

[LEdHN\[2\]](#) [2]

The United States Supreme Court, in a case in which a former automobile dealer seeks treble damages under 4 of the Clayton Act ([15 USCS 15](#)), by alleging that an automobile manufacturer's sales incentive programs, which assigned the dealer a sales objective and paid it a bonus for each car sold in excess of its objective, violated the price discrimination prohibition of 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), by setting the dealer's sales objectives higher than those of its competitors, thereby causing the dealer to receive fewer bonuses and causing it to pay more for its automobiles, will remand the case so that the Federal Court of Appeals may pass upon the manufacturer's contention that the evidence adduced at trial was insufficient to support a finding of violation of 2(a), where, while it is a close question whether the dealer's evidence, consisting of testimony that it lost sales to its competitors, was undersold by them, suffered a reduced market share of retail sales, had to force business so that it could meet its assigned quota, and had to overallow on trade-ins, as a result of the manufacturer's sales incentive programs, would be sufficient to support a jury award, the Court of Appeals bypassed the issue of whether the manufacturer in fact violated 2(a), and went directly to the issue of damages. (Powell, Brennan, Marshall, and Blackmun, JJ., dissented in part from this holding.)

ERROR §1750 > remand -- what may be considered -- > Headnote:

[LEdHN\[3\]](#) [3]

On remand after the United States Supreme Court vacated the Federal Court of Appeals judgment, the Supreme Court having remanded the case so that the Court of Appeals may pass upon the manufacturer's contention that the evidence adduced at trial was insufficient to support a finding that it violated 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), as alleged by a former automobile dealer, where the Court of Appeals bypassed the issue, at trial, of whether the manufacturer in fact violated 2(a), if the Court of Appeals determines that the manufacturer did violate 2(a), it should then consider the sufficiency of the dealer's evidence of injury.

## Syllabus

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Petitioner, a former automobile dealer, brought suit against respondent automobile manufacturer in Federal District Court, alleging that respondent's "sales incentive" programs over a certain period violated the price-discrimination prohibition of § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act. Under its programs, respondent paid a bonus to its dealers if they exceeded their quotas -- set by respondent for each dealer -- of cars to be sold at retail or purchased from respondent. Petitioner alleged that respondent set petitioner's quotas higher than those of its competitors; that to the extent it failed to meet its quotas, and to the extent its competitors met their lower quotas, petitioner [\*\*\*\*2] received fewer bonuses; and that the net effect was that it paid more for its automobiles than did its competitors. Petitioner contended that the amount of the price discrimination -- the amount of the price difference

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multiplied by the number of petitioner's purchases -- was \$ 81,248, and that when petitioner went out of business, the going-concern value of the business ranged between \$ 50,000 and \$ 170,000. Respondent maintained that the sales incentive programs were nondiscriminatory, and that they did not injure petitioner or adversely affect competition. The jury returned a verdict awarding petitioner \$ 111,247.48 in damages, which the District Court trebled. The Court of Appeals reversed, holding that it was unnecessary to consider whether a violation of § 2 (a) had been proved, since petitioner had failed to introduce substantial evidence of injury attributable to the programs, much less substantial evidence of the amount of such injury, as was required in order to recover treble damages under § 4 of the Clayton Act.

### *Held:*

1. Petitioner's contention that once it has proved a price discrimination in violation of § 2 (a) it is entitled at a minimum to so-called "automatic [\*\*\*\*3] damages" in the amount of the price discrimination is without merit. Section 2 (a), a prophylactic statute which is violated merely upon a showing that "the effect of such discrimination *may be* substantially to lessen competition," does not require, for purposes of injunctive actions, that the discrimination must in fact have harmed competition. *Corn Products Co. v. FTC*, 324 U.S. 726; *FTC v. Morton Salt Co.*, 334 U.S. 37. However, under § 4 of the Clayton Act, which is essentially a remedial statute providing treble damages to any person "who *shall be injured* in his business or property by reason of anything forbidden in the antitrust laws," a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent. Thus it must prove more than a violation of § 2 (a), since such proof establishes only that injury *may* result. Cf. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477. Pp. 561-563.

2. The rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury, see, e. g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, [\*\*\*\*4] will not be applied here to determine whether petitioner, though not entitled to "automatic damages," has produced enough evidence of actual injury to sustain recovery. While it is a close question whether petitioner's evidence would be sufficient to support a jury award even under such rule, a more fundamental difficulty is that the cases relied upon by petitioner all depend in greater or lesser part on the inequity of a wrongdoer defeating the recovery of damages against him by insisting upon a rigorous standard of proof. In this case, it cannot be said with assurance that respondent is a "wrongdoer" since the Court of Appeals went directly to the issue of damages after bypassing the question whether respondent in fact violated § 2 (a). The proper course is to remand the case so that the Court of Appeals may pass upon respondent's contention that the evidence was insufficient to support a finding of such violation. If the court determines that respondent did violate the Act, it should then consider the sufficiency of petitioner's evidence of injury. Pp. 563-568.

**Counsel:** C. Lee Reeves argued the cause and filed briefs for petitioner.

J. Ross Forman III argued the cause and [\*\*\*\*5] filed a brief for respondent.\*

**Judges:** REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and STEVENS, JJ., joined. POWELL, J., filed an opinion dissenting in part, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, post, p. 569.

**Opinion by: REHNQUIST**

## Opinion

[\*559] [\*\*\*446] [\*\*1925] JUSTICE REHNQUIST delivered the opinion of the Court.

\* Robert H. Whaley filed a brief for Ricky Hasbrouck et al. as amici curiae urging reversal.

Briefs of amici curiae were filed by Thomas E. Deacy, Jr., E. Houston Harsha, and Alan I. Becker, for Cessna Aircraft Co.; and by John T. Cusack and Gordon B. Nash, Jr., for Vanco Beverage, Inc.

The question presented in this case is the appropriate measure of damages in a suit brought under § 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act.<sup>1</sup>

[\*\*\*6] [\*\*1926] Petitioner, for several decades a Chrysler-Plymouth dealer in Birmingham, Ala., went out of business in 1974. It subsequently brought suit against respondent in the United States District Court for the Northern District of Alabama, alleging that from January 1970 to May 1974 respondent's various "sales incentive" programs violated § 2 (a). Under one type of program, respondent assigned to each participating dealer a sales objective and paid to the dealer a bonus on each car sold in excess of that objective. Under another type of program, respondent required each dealer to purchase from it a certain quota of automobiles before it would pay a bonus on the sale of automobiles sold at retail. The amount of the [\*560] bonus depended on the number of retail sales (or wholesale purchases) made in excess of the dealer's objective, and could amount to several hundred dollars. Respondent set petitioner's objectives higher than those of its competitors, requiring it to sell (or purchase) more automobiles to obtain a bonus than its competitors. To the extent petitioner failed to meet those objectives and to the extent its competitors met their lower objectives, petitioner [\*\*\*7] received fewer bonuses. The net effect of all this, according to petitioner, was that it paid more money for its automobiles than did its competitors. It contended that the amount of the price discrimination -- the amount of the price difference multiplied by the number of [\*\*\*447] petitioner's purchases -- was \$ 81,248. It also claimed that the going-concern value of the business as of May 1974 ranged between \$ 50,000 and \$ 170,000.

Respondent maintained that the sales incentive programs were nondiscriminatory, and that they did not injure petitioner or adversely affect competition. The District Court denied respondent's motion for a directed verdict. The jury returned a verdict against respondent and awarded petitioner \$ 111,247.48 in damages, which the District Court trebled.

The Court of Appeals for the Fifth Circuit reversed with instructions to dismiss the complaint. [607 F.2d 1133 \(1979\)](#). It found that in order to recover treble damages under § 4 of the Clayton Act, a plaintiff must prove (1) a violation of the antitrust laws, (2) cognizable injury attributable to the violation, and (3) at least the approximate amount of damage. It found it unnecessary [\*\*\*\*8] to consider whether petitioner proved that respondent's incentive programs violated § 2 (a) because, in its view, petitioner had "failed to introduce substantial evidence of injury attributable to the programs, much less substantial evidence of the amount of such injury." [Id., at 1135](#). Rejecting petitioner's theory of "automatic damages," under which mere proof of discrimination establishes the fact and amount of injury, the court held that injury must be proved by more than mere "[conclusory] statements [\*561] by the plaintiff, without evidentiary support." [Id., at 1136-1137](#). The court concluded that the District Court erred in refusing respondent's motion for a directed verdict and in denying its motion for judgment notwithstanding the verdict. We granted certiorari, [449 U.S. 819 \(1980\)](#), to review the decision of the Court of Appeals.

<sup>1</sup> Section 2 (a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, [15 U. S. C. § 13 \(a\)](#), provides in pertinent part:

**HN1**[] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them . . . ."

Section 4 of the Clayton Act, 38 Stat. 731, [15 U. S. C. § 15](#), provides:

**HN2**[] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

LEDHN[1] [1] Petitioner first contends that once it has proved a price discrimination in violation of § 2 (a) it is entitled at a minimum to so-called "automatic damages" in the amount of the price discrimination. Petitioner [\*\*\*\*9] concedes [\*\*1927] that in order to recover damages it must establish cognizable injury attributable to an antitrust violation and some approximation of damage. Brief for Petitioner 9. It insists, however, that the jury should be permitted to infer the requisite injury and damage from a showing of a substantial price discrimination. Petitioner notes that this Court has consistently permitted such injury to be inferred in injunctive actions brought to enforce § 2 (a), e. g., *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), and argues that private suits for damages under § 4 should be treated no differently. We disagree.<sup>2</sup>

[\*\*\*\*10] **HN3** By [\*\*\*448] its terms § 2 (a) is a prophylactic statute which is violated merely upon a showing that "the effect of such discrimination *may be* substantially to lessen competition." [\*562] (Emphasis supplied.) As our cases have recognized, the statute does not "require that the discriminations must in fact have harmed competition." *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 742 (1945); *FTC v. Morton Salt Co.*, *supra*, at 46 ("the statute does not require the Commission to find that injury has actually resulted"). Section 4 of the Clayton Act, in contrast, is essentially a remedial statute. It provides treble damages to "[any] person who *shall be injured* in his business or property by reason of anything forbidden in the antitrust laws . . ." (Emphasis supplied.) To recover treble damages, then, a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent. *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969) (plaintiff "must, of course, be [\*\*\*\*11] able to show a causal connection between the price discrimination in violation of the Act and the injury suffered"). It must prove more than a violation of § 2 (a), since such proof establishes only that injury *may result*.

Our decision here is virtually governed by our reasoning in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). There we rejected the contention that the mere violation of § 7 of the Clayton Act, which prohibits mergers which *may* substantially lessen competition, gives rise to a damages claim under § 4. We explained that "to recover damages [under § 4] respondents must prove more than that the petitioner violated § 7, since such proof establishes only that injury may result." *Id.*, at 486. Likewise in this case, HN4 [↑] proof of a violation does not mean that a disfavored purchaser has been actually "injured" within the meaning of § 4.

The legislative history buttresses this view. Both the Patman bill, H. R. 8442, § 2 (d), 74th Cong., 1st Sess. (1935), as introduced in the House, and the Robinson bill, S. 3154, [\*\*\*\*12] § 2 (d), 74th Cong., 2d Sess. (1935), as introduced in the Senate, provided that a plaintiff's damages for a violation of § 2 (a) shall be presumed to be the amount of the price discrimination. The provision, however, encountered such [\*\*563] strong opposition in both Houses that the House Committee eliminated it from its bill, H. R. Rep. No. 2287, 74th Cong., 2d Sess., 16 (1936), and the Senate Committee modified the provision to authorize presumptive damages in the amount of the discrimination only when plaintiff shows the "fact of damage." S. Rep. No. 1502, 74th Cong., 2d Sess., 8 (1936). The Conference Committee eliminated even that compromise, and § 2 (a) was passed in its present form. Congress thus [\*\*1928] has rejected the very concept which petitioner seeks to have the Court judicially legislate. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199-201 (1974).<sup>3</sup>

<sup>2</sup> The automatic-damages theory has split the lower courts. The leading case approving the theory is *Fowler Manufacturing Co. v. Gorlick*, 415 F.2d 1248 (CA9 1969), cert. denied, 396 U.S. 1012 (1970). See also *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (CA8) (involving §§ 2 (d) and 2 (e) of the Act), cert. denied, 326 U.S. 773 (1945); *Grace v. E. J. Kozin Co.*, 538 F.2d 170 (CA7 1976) (involving § 2 (c) of the Act). The leading case rejecting the theory is *Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457 (CA2), cert. denied, 353 U.S. 965 (1957). Accord, *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (CA3 1980); *McCaskill v. Texaco, Inc.*, 351 F.Supp. 1332 (SD Ala. 1972), affirmance order, 486 F.2d 1400 (CA5 1973); *Kidd v. Esso Standard Oil Co.*, 295 F.2d 497 (CA6 1961).

<sup>3</sup> Relying on *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 757 (1947), petitioner argues that this Court has previously accepted the automatic-damages theory. In that case, the Court stated that if petitioner can show an illegal price discrimination under the Act, "it would establish its right to recover three times the discriminatory difference without proving more than the illegality of the prices." *Ibid.* But that statement is merely dictum, since the only issue before the Court was whether a violation of § 2 (a) could be used as an affirmative defense to void a contract.

[\*\*\*\*13] II

[\*\*\*449] [LEdHN\[2\]](#) [2]Petitioner next contends that even though it may not be entitled to "automatic damages" upon a showing of a violation of § 2 (a), it produced enough evidence of actual injury to survive a motion for a directed verdict. That evidence consisted primarily of the testimony of petitioner's owner, Mr. Payne, and an expert witness, a professor of economics. Payne testified that the price discrimination was one of the causes of the dealership going out of business. In support of that contention, he testified that his salesmen told him that the dealership lost sales to its competitors, and that its market share of retail Chrysler-Plymouth sales in the Birmingham area was 24% in 1970, 27% in 1971, 23% in 1972, and 25% in 1973. Payne contended that it was proper to infer that the 4% drop in 1972 was a result of the incentive programs. [\*564] He also testified that the discrimination caused him to "force" business so that he could meet his assigned quotas. That is, his desire to make a sale induced him to "overallow" on trade-ins, thus reducing his profits on his used car operation. App. [\*\*\*\*14] 51-52. Payne adduced evidence showing that his average gross profit on used car sales was below that of his competitors, though that same evidence revealed that his average gross profit on new sales was higher. [Id.](#) at 269.

Neither Payne nor petitioner's expert witness offered documentary evidence as to the effect of the discrimination on retail prices. Although Payne asserted that his salesmen and customers told him that the dealership was being undersold, *id.*, at 35-37, 92, 95, he admitted he did not know if his competitors did in fact pass on their lower costs to their customers. [Id.](#) at 44, 57. Petitioner's expert witness took a somewhat different position. He believed that the discrimination would ultimately cause retail prices to be held at an artificially high level since petitioner's competitors would not reduce their retail prices as much as they would have done if petitioner received an equal bonus from respondent. [Id.](#) at 103, 135. He also testified that petitioner was harmed by the discrimination even if the favored purchasers did not lower their retail prices, since petitioner in that case would make less money per car.

<sup>4</sup> [Id.](#) at 139.

[\*\*\*\*15] [\*565] [\*\*\*450] [\*\*1929] Even construed most favorably to petitioner, the evidence of injury is weak. Petitioner nevertheless asks us to consider the sufficiency of its evidence in light of our traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-124 (1969), for example, the Court discussed at some length the fixing of damages in a case involving market exclusion. We accepted the proposition that damages could be awarded on the basis of plaintiff's estimate of sales it could have made absent the violation:

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<sup>4</sup> Respondent suggests that petitioner's inability to show that his favored competitors lowered their retail sales price should defeat recovery. That argument assumes that evidence of a lower retail price is the *sine qua non* of antitrust injury, that the disfavored purchaser is simply not "injured" unless the favored purchaser has lowered his price. If the favored purchaser has lowered his retail price, for example, the disfavored purchaser will lose sales to the extent it does not match that lower price. Similarly, if the disfavored purchaser matches the lower price, it will lose profits. Because petitioner has not shown that the favored purchasers have lowered their retail price, petitioner is arguably foreclosed from showing that it lost either sales or profits. Justice Cardozo seemingly adopted this position in [ICC v. United States](#), 289 U.S. 385, 390-391 (1933), a case involving rate discrimination under the Interstate Commerce Act:

"If by reason of the discrimination, the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered price . . . damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more."

Petitioner argues that is an overly narrow view of antitrust injury. To the extent a disfavored purchaser must pay more for its goods than its competitors, it is less able to compete. It has fewer funds available with which to advertise, make capital expenditures, and the like. Although the inability of petitioner to show that the favored retailers lowered their retail price makes petitioner's argument particularly weak, we find it unnecessary to decide in this case whether such failure as a matter of law demonstrates no competitive injury.

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**HN5** "[Damage] issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline [\*\*\*\*16] in prices, profits and values, not shown to be attributable to other causes, [\*566] that defendants' wrongful acts had caused damage to the plaintiffs.' *Bigelow v. RKO Pictures, Inc.*, *supra*, at 264. See also *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 377-379 (1927); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 561-566 (1931)." *Ibid.*

In *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), relied on in *Zenith*, film distributors had conspired to deny the plaintiff theater access to first-run films. The jury awarded damages based on a comparison of plaintiff's actual profits with the contemporaneous profits of a competing theater with access to first-run films. Plaintiff had also adduced evidence comparing his actual profits during the conspiracy with his profits when he had been able to obtain first-runs. The lower court thought the evidence too imprecise to support the award, but we reversed because the evidence was sufficient to support a "just and reasonable inference" of damage. We explained:

"[Any] other rule would enable [\*\*\*\*17] the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. \*\*\*451 Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery." *327 U.S., at 264-265*.

Our willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land. The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation. But our willingness also rests on the principle articulated in cases such as *Bigelow*, that it does not "come with very good grace" for [\*567] the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted. *Hetzell v. Baltimore & Ohio R. Co.*, 169 U.S. 26, 39 (1898) (quoting *United States Trust Co. v. O'Brien*, 143 N. Y. 284, 289, 38 N. E. 266, 267 (1894). [\*\*\*\*18] Accord, *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) ("Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his [\*\*1930] acts"); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927).

Applying the foregoing principles to this case is not without difficulty. In the first place, it is a close question whether petitioner's evidence would be sufficient to support a jury award even under our relaxed damages rules. In those cases where we have found sufficient evidence to permit a jury to infer antitrust injury and approximate the amount of damages, the evidence was more substantial than the evidence presented here. In *Zenith*, for example, plaintiff compared its sales in Canada, where it was subject to a violation, with its sales in the United States, where it was not. And in *Bigelow*, plaintiff adduced evidence not only comparing its profits with [\*\*\*\*19] a competitor not subject to the violation but also comparing its profits during the time of the violation with the period immediately preceding the violation.<sup>5</sup>

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<sup>5</sup> *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), is similarly distinguishable. In upholding a jury verdict against respondents for a violation of § 2 of the Sherman Act, the Court observed:

"It is true that there was uncertainty as to the extent of damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the

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[\*\*\*\*20] [\*568] But a more fundamental difficulty confronts us in this case. The cases relied upon by petitioner all depend in greater or lesser part on the inequity of a wrongdoer defeating the recovery of damages against him by insisting upon a rigorous standard of [\*\*\*452] proof. In this case, however, we cannot say with assurance that respondent is a "wrongdoer." Because the court below bypassed the issue of liability and went directly to the issue of damages, we simply do not have the benefit of its views as to whether respondent in fact violated § 2 (a). Absent such a finding, we decline to apply to this case the lenient damages rules of our previous cases. Had the court below found a violation, we could more confidently consider the adequacy of petitioner's evidence.

LEdHN[3] [3]Accordingly, we think the proper course is to remand the case so that the Court of Appeals may pass upon respondent's contention that the evidence adduced at trial was insufficient to support a finding of violation of the Robinson-Patman Act. We do not ordinarily address for the first time in this Court an issue which the Court [\*\*\*\*21] of Appeals has not addressed, and we think this would be a poor case in which to depart from that practice. If the court determines on remand that respondent did violate the Act, the court should then consider the sufficiency of petitioner's evidence of injury in light of the cases discussed above. We, of course, intimate no views as to how that issue should be decided. We emphasize that HN6 even if there has been a violation of the Robinson-Patman Act, petitioner is not excused from its burden of proving antitrust injury and damages. It is simply that once a violation has been established, that burden is to some extent lightened.

[\*569] For the foregoing reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for proceedings consistent with this opinion.

*It is so ordered.*

**Dissent by:** POWELL (In Part)

## Dissent

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JUSTICE POWELL, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting in part.

I concur in Part I of the Court's opinion, but simply would affirm the judgment of the Court of Appeals.

The Court of Appeals concluded that petitioner "failed to introduce substantial evidence of injury attributable to [respondent's program], [\*\*\*\*22] much less substantial evidence [\*\*1931] of the amount of such injury." 607 F.2d 1133, 1135. In Part II of its opinion, the Court today reviews the evidence, vacates the judgment of the Court of Appeals, and remands the case for a resifting of the evidence and determination of whether respondent violated the Clayton Act as amended by the Robinson-Patman Act. The Court identifies no error of fact or law in the judgment of the Court of Appeals, but vacates that judgment only because the Court finds it "unclear" whether there is sufficient evidence. I find no basis for this Court undertaking to second-guess the Court of Appeals as to the sufficiency of evidence.

Even if there were some satisfactory reason for us to review the evidence in this relatively uncomplicated case, I think the Court of Appeals was plainly correct in finding petitioner's evidence insufficient to show a competitive injury of the kind that the antitrust laws were enacted to prevent. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,

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measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. . . ." Id., at 562.

"If the damage is certain, the fact that its extent is uncertain does not prevent a recovery." Id., at 566.

In this case, by contrast, the issue is not so much the amount of damages as whether petitioner has in fact been injured by an antitrust violation.

429 U.S. 477, 488-489 (1977). Section 2 (a) [\*\*\*453] is a prophylactic statute that makes unlawful price discrimination that "may . . . lessen [\*\*\*\*23] competition." Thus, a court cannot infer from the fact of a violation that defendant's behavior has caused plaintiff any injury. A plaintiff must show, to recover damages for violation of § 2 (a), that unlawful discrimination in price allowed a favored competitor to draw sales or profits [\*570] from him, the unfavored competitor. See *Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457, 458 (CA2), cert. denied, 353 U.S. 965 (1957). Petitioner's evidence, which the Court concedes to be "weak," *ante*, at 565, amounts to nothing more than a showing that its market share declined temporarily 4% in 1972. Petitioner presented no substantial evidence that respondent's incentive program caused its market share to shrink. Indeed, over the 4-year period of the challenged programs its market share increased 1%. Rather, petitioner relied on its president's conclusory testimony, which consisted in major part of hearsay statements from petitioner's automobile salesmen. Hypothetical analysis of the "predicted effects" of respondent's program by an economics professor also was relied upon by petitioner to prove the actual cause of injury. One hardly [\*\*\*\*24] would expect this Court to reject a Court of Appeals judgment that evidence as flimsy as this was insufficient to go to the jury.

My concern with the Court's opinion, however, goes beyond its reviewing the evidence. I have understood that in a Robinson-Patman Act case the plaintiff has the burden of proving the fact of antitrust injury by a preponderance of the evidence. See Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969). Only when this fact has been proved may a court properly be lenient in the evidence it requires to prove the amount of damages. See *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931). It is not at all apparent that the Court adequately recognizes this distinction.

It seems to me that today's remand measurably increases the uncertainty inherent in the generalities of the Robinson-Patman Act. Accordingly, I dissent.

## References

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54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 140, 141, 153, 154, 186, 189, 362, 363

12 Federal Procedural Forms L Ed, Monopolies and Restraints of Trade 48:61-48:147

18 Am Jur PI [\*\*\*\*25] & Pr Forms (Rev), Monopolies, Restraints of Trade and Unfair Trade Practices, Forms 11-30

15 USCS 13, 15

US L Ed Digest, Appeal and Error 1692.1; Restraints of Trade, Monopolies, and Unfair Trade Practices 36, 67

L Ed Index to Annos, Damages; Restraints of Trade and Monopolies

ALR Quick Index, Double or Treble Damages; Restraints of Trade and Monopolies

Federal Quick Index, Double and Treble Damages; Monopolies and Restraints of Trade; Robinson-Patman Act

Annotation References:

Robinson-Patman Act as construed by the Supreme Court. 2 L Ed 2d 1737.

Measure and elements of damages under 15 USCS 15 entitling person injured in his business or property by reason of anything forbidden in federal antitrust laws to recover treble damages. 16 ALR Fed 14.

Measure and elements of damages for violation of Robinson-Patman Act (15 USC 13). 9 ALR Fed 279.



## **H. A. Artists & Assocs. v. Actors' Equity Ass'n**

Supreme Court of the United States

March 23, 1981, Argued ; May 26, 1981, Decided

No. 80-348

### **Reporter**

451 U.S. 704 \*; 101 S. Ct. 2102 \*\*; 68 L. Ed. 2d 558 \*\*\*; 1981 U.S. LEXIS 104 \*\*\*\*; 49 U.S.L.W. 4557; 91 Lab. Cas. (CCH) P12,742; 1981-1 Trade Cas. (CCH) P64,021; 107 L.R.R.M. 2394

H. A. ARTISTS & ASSOCIATES, INC., ET AL. v. ACTORS' EQUITY ASSN. ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

**Disposition:** [622 F.2d 647](#), affirmed in part, reversed in part, and remanded.

### **Core Terms**

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regulations, franchising, exemption, theatrical, producers, actresses, antitrust, nonlabor, labor dispute, wages, Sherman Act, negotiated, licensed, immune, employment condition, franchise fee, Clayton Act, restrictions, commissions, terms, anti trust law, union member, Norris-LaGuardia Act, self-interest, injunctions, combines, exaction

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Clayton Act

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption > Primacy of Labor Policy

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

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[HN1](#) [blue icon] Collectives & Cooperatives, Clayton Act

Section 6 of the Clayton Act, [15 U.S.C.S. § 17](#), declares that human labor is not a commodity or article of commerce, and immunizes from antitrust liability labor organizations and their members lawfully carrying out their legitimate objectives. Section 20 of the Clayton Act, [29 U.S.C.S. § 52](#), prohibits injunctions against specified employee activities, such as strikes and boycotts, that are undertaken in the employees' self-interest and that occur in the course of disputes concerning terms or conditions of employment, and states that none of the specified acts can be held to be a violation of any law of the United States.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

## HN2 [] Scope, Exemptions

Labor unions acting in their self-interest and not in combination with nonlabor groups enjoy a statutory exemption from Sherman Act liability.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

**HN3** Exemptions & Immunities, Labor

So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under the Clayton Act § 20, [29 U.S.C.S. § 52](#), are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

**HN4** Exemptions & Immunities, Labor

No federal injunction may issue over a labor dispute, and the Clayton Act § 20, [29 U.S.C.S. § 52](#), removes all such allowable conduct from the taint of being a violation of any law of the United States, including the Sherman Act.

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

## **[HN5](#) [+] Antitrust & Trade Law, Clayton Act**

The statutory exemption does not apply when a union combines with a non-labor group. Accordingly, antitrust immunity is forfeited when a union combines with one or more employers in an effort to restrain trade.

## **Lawyers' Edition Display**

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### **Decision**

Theatrical union's system of regulating theatrical agents, held, with exception of union's exaction of franchise fees, within statutory labor exemption from Sherman Act ([15 USCS 1 et seq.](#))

### **Summary**

A union representing most stage actors and actresses in the United States unilaterally established in 1928 a licensing system for the regulation of theatrical agents. The essential elements of the regulations have remained unchanged, requiring, among other things, that a licensed agent renounce any right to take a commission on an employment contract under which an actor or actress receives so-called "scale" wages. Agents are also required to pay franchise fees to the unions which are deposited in the general treasury and not segregated from other union funds. The union has also entered into collective bargaining agreements with theatrical producers specifying minimum wages and other terms and conditions of employment. Eventually, a group of agents who refused to accept the regulations or apply for franchises brought suit in the United States District Court for the Southern District of New York contending that the union's regulation of theatrical agents violated the antitrust provisions of 1 and 2 of the Sherman Act ([15 USCS 1, 2](#)). The District Court dismissed the complaint, finding that the union's creation and maintenance of the agency franchise system was fully protected by the antitrust exemption for unions and their members arising under 6 and 20 of the Clayton Act ([15 USCS 17, 29 USCS 52](#)) and 4, 5, and 13 of the Norris-LaGuardia Act ([29 USCS 104, 105, 113](#)) ([478 F Supp 496](#)). The United States Court of Appeals for the Second Circuit affirmed, deciding that the central feature of the union's franchising system--the union's exaction of an agreement by agents not to charge commissions on certain types of work--was immune from antitrust challenge. Furthermore, the Court of Appeals suggested that if the exaction of franchise fees by the union exceeded its expenses in administering the franchise system, the fees could not legally be collected. However, the Court of Appeals concluded that the fees were sufficiently low that a remand on this point would not have served any useful purpose ([622 F2d 647](#)).

On certiorari, the United States Supreme Court affirmed in part, reversed in part, and remanded. In an opinion by Stewart, J., joined by White, Blackmun, Powell, Rehnquist, and Stevens, JJ., and joined in part (all but holding 2 below) by Burger, Ch. J., and Brennan and Marshall, JJ., it was held that the system of regulation imposed by the union upon the theatrical agents, with the exception of the exaction of franchise fees, came within the statutory labor exemption from the federal antitrust laws available to labor unions acting in their self-interest and not in combination with "nonlabor groups", or in combination with parties to a "labor dispute," since (a) a finding that there was no combination between the union and the theatrical producers to create or maintain the system was amply supported by the record, (b) the agents had to be considered a "labor group" and their controversy with the union a "labor dispute" as defined in 13 of the Norris-LaGuardia Act ([29 USCS 113](#)) insofar as the regulations embodied a direct frontal attack upon a problem though to threaten the maintenance of the union's basic wage structure, and (c) the union's regulations are clearly designed to promote the union's self-interest, and (2) the franchise fees levied upon theatrical agents, by the union were not a permissible component of the exempt regulatory system, since (a) the union was able to suggest only in the most general terms that the fees were related to the basic purposes of the regulations and (b) if the union did not impose the franchise fees upon the agents, there was no reason to believe

that any of its legitimate interests would be affected given their option of raising members' dues to offset the loss of a general revenue source.

Brennan, J., joined by Burger, Ch. J., and Marshall, J., concurring in part and dissenting in part, expressed the view that the union's exaction of a franchise fee was not incommensurate with its expenses in maintaining a full-time employee to administer the system, and therefore was a permissible component of the exempt regulatory system.

## **Headnotes**

LABOR §137 > PRACTICES §46 > theatrical union -- regulation of theatrical agents -- labor exemption from antitrust laws --

> Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C]

A system of regulation imposed upon theatrical agents by a union representing stage actors and actresses, under which union members cannot deal with any agents who have not obtained a union "franchise" by agreeing to meet certain prescribed regulations imposing conditions of representation, comes within the statutory labor exemption from the federal antitrust laws, and is accordingly not violative of the Sherman Act ([15 USCS 1 et seq.](#))--such exemption being derived from 6 and 20 of the Clayton Act ([15 USCS 17](#), [29 USCS 52](#)) and 4, 5 and 13 of the Norris-LaGuardia Act ([29 USCS 104](#), [105](#), and [113](#)) and being available to labor unions acting in their self-interest and not in combination with "nonlabor groups" or persons who are not "parties to a labor dispute" within the meaning of the Norris-LaGuardia Act--where (1) a finding that there is no combination between the union and certain theatrical producers with whom the union has entered into collective bargaining agreements to create or maintain the system of regulation is amply supported by the record, (2) the agents must be considered a "labor group" for purposes of the exemption and their controversy with the union a "labor dispute" as defined in the Norris-LaGuardia Act in view of the fact that the regulations embody a direct frontal attack upon a problem thought to threaten the maintenance of the union's basic wage structure, and (3) the union's regulations are clearly designed to promote the union's self-interest.

PRACTICES §46 > theatrical union -- theatrical agents -- franchise fees -- statutory labor exemption from antitrust laws --

> Headnote:

LEdHN[2A] [ ] [2A] LEdHN[2B] [ ] [2B]

Franchise fees levied upon theatrical agents by a union representing stage actors and actresses as a part of a system of licensing which is generally exempt from federal antitrust laws under the statutory labor exemption from those laws derived from 6 and 20 of the Clayton Act ([15 USCS 17](#), [29 USCS 52](#)) and 4, 5, and 13 of the Norris-LaGuardia Act ([29 USCS 104](#), [105](#), and [113](#)) are not a permissible component of the exempt system, where (1) the union is able to suggest only in the most general terms that the fees, which are not segregated in any manner but merely deposited in the union's general fund, are somehow related to the basic purposes of the regulation, and (2) if the union did not impose the franchise fees, there is no reason to believe that any of its legitimate interests would be affected insofar as an increase in members' dues could offset the loss of the fees. (Brennan, J., Burger, Ch. J., and Marshall, J., dissented from this holding.)

LABOR §137 > PRACTICES §46 > federal antitrust laws -- statutory labor exemption -- scope -- > Headnote:

LEdHN [3]  [3]

No federal injunction may issue over a "labor dispute" as defined in 13 of the Norris-LaGuardia Act ([29 USCS 113](#)), and 20 of the Clayton Act ([29 USCS 52](#)) removes all such allowable conduct from the taint of being a violation of any law of the United States, including the Sherman Act ([15 USCS 1 et seq.](#)); however, the statutory exemption does not apply when a union combines with a "nonlabor group," and therefore antitrust immunity is forfeited when a union combines with one or more employers in an effort to restrain trade, a business monopoly being no less so because the union participates and such participation being a violation of the Sherman Act.

PRACTICES §46 > federal antitrust laws -- statutory labor exemption -- covered parties -- > Headnote:

LEdHN[4A] [↓] [4A] LEdHN[4B] [↓] [4B]

A party seeking refuge in the statutory labor exemption from the federal antitrust laws derived from 6 and 20 of the Clayton Act ([15 USCS 17](#), [29 USCS 52](#)) and 4, 5, and 13 of the Norris-LaGuardia Act ([29 USCS 104](#), [105](#), [113](#)) must be a bona fide labor organization, and not an independent contractor or entrepreneur.

PRACTICES §46 > federal antitrust laws -- statutory labor exemption -- "nonlabor group" -- theatrical producers -- > Headnote:

**LEdHN[5A]** [  ] [5A] **LEdHN[5B]** [  ] [5B]

With regard to the statutory labor exemption from the federal antitrust laws which derives from 6 and 20 of the Clayton Act ([15 USCS 17](#), [29 USCS 52](#)) and 4, 5, and 13 of the Norris-LaGuardia Act ([29 USCS 104](#), [105](#), [113](#)) which immunizes labor unions acting in their self-interest and not in combination with "nonlabor groups" from liability under the Sherman Act ([15 USCS 1 et seq.](#)), theatrical producers who employ members of a union representing stage actors and actresses are plainly a "nonlabor group".

LABOR §137 > PRACTICES §46 > federal antitrust laws -- statutory labor exemption -- combination with "nonlabor group" --

> Headnote:

LEdHN[6] [  ] [6]

With regard to the application to a union of the statutory labor exemption from the federal antitrust laws derived from 6 and 20 of the Clayton Act ([15 USCS 17](#), [29 USCS 52](#)) and 4, 5, and 13 of the Norris-LaGuardia Act ([29 USCS 104](#), [105](#), [113](#)) under which labor unions acting in their self-interest and not in combination with "nonlabor groups", and also not in combination with persons who are not "parties to a labor dispute" within the meaning of the Norris-LaGuardia Act, enjoy exemptions from liability under the Sherman Act ([15 USCS 1 et seq.](#)), the issue of whether a union which seeks to regulate a particular group is acting in combination with a "nonlabor group" is resolved, in a case where there is no direct wage or job competition between the union and the regulated group, by determining whether there is "some" economic interrelationship affecting legitimate union interests.

## Syllabus

Respondent union, which represents most of the stage actors and actresses in the United States, has entered into collective-bargaining agreements with virtually all major theatrical producers throughout the country, fixing minimum (scale) wages and other conditions of employment for those represented by the union. Because of abuses by theatrical agents who, as independent contractors, negotiated employment contracts for actors and actresses with

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producers, particularly abuses as to the extraction of high commissions tending to undermine collectively bargained rates of compensation, the union in 1928 unilaterally established a licensing system for the regulation of agents, [\*\*\*\*2] prohibiting union members from using an agent who has not obtained a license from the union. The essential elements of the licensing system have remained unchanged. To obtain a license, an agent must agree to comply with union regulations which, *inter alia*, prohibit agent commissions on scale portions of wages received by an actor or an actress from a producer, limit commissions on wages in excess of scale pay, and require payment to the union of franchise fees. Petitioners, agents who refused to obtain union licenses, instituted this action, contending that the union's regulations violated §§ 1 and 2 of the Sherman Act. After trial, the District Court dismissed the complaint, finding that the union's agency franchise system was protected from liability by the antitrust exemptions of unions and their members arising under the Clayton Act and the Norris-LaGuardia Act. The Court of Appeals affirmed, determining that the central feature of the union's franchising system -- the exaction of an agreement by agents as to their commissions -- was immune from antitrust challenge. The court suggested that if the exactions of franchise fees exceeded the union's costs in administering [\*\*\*\*3] its license system, they could not legally be collected; but despite the lack of any cost evidence at trial, the court concluded that the fees were sufficiently low that a remand on the point would not serve any useful purpose.

*Held:*

1. Labor unions acting in their self-interest and not in combination with nonlabor groups enjoy statutory exemption from Sherman Act liability, but the exemption does not apply when a union combines with a "nonlabor group," or persons who are not "parties to a labor dispute" within the meaning of the Norris-LaGuardia Act. [United States v. Hutcheson, 312 U.S. 219](#). Here, the union's franchising of agents did not involve any combination between the union and any "nonlabor groups." The record amply supports the conclusion that there was no combination between the union and the theatrical producers, and the determination of whether the combination between the union and those agents who agreed to become franchised was a combination with a "nonlabor group" depends on whether there was "job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent [\*\*\*\*4] contractors." [Musicians v. Carroll, 391 U.S. 99, 106](#). Because of the peculiar structure of the legitimate theater industry, where it is customary if not essential for union members to secure employment through agents whose fees are calculated as a percentage of the member's wage -- thus making it impossible for the union to defend even the integrity of the minimum wages it has negotiated with producers without regulation of agency fees -- the union's regulations are within the labor exemption. Agents must, therefore, be considered a "labor group" and their controversy with the union is plainly a "labor dispute" as defined in the Norris-LaGuardia Act. The union's regulations are also clearly designed to promote its legitimate self-interest. Pp. 713-722.
2. However, the union's justification for the franchise fees -- based only on the suggestion in the most general terms that they are related to the basic purposes of its regulations -- is inadequate to warrant the conclusion that the fees are a permissible component of the exempt regulatory system. P. 722.

**Counsel:** Howard Breindel argued the cause for petitioners. With him on the briefs was Charles Donelan.

[\*\*\*\*5] Jerome B. Lurie argued the cause for respondents. With him on the brief were Sidney E. Cohn, Mary K. O'Melveny, Nan Bases, and Samuel Estreicher.

Laurence Gold argued the cause for the American Federation of Labor and Congress of Industrial Organizations as amicus curiae urging affirmance. With him on the brief were J. Albert Woll and George Kaufmann. \*

**Judges:** STEWART, J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined, and in all but Part II-D of which BURGER, C. J., and BRENNAN and MARSHALL, JJ.,

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\*David Alter, Joseph Ferraro, Mortimer Becker, Henry Kaiser, Ronald Rosenberg, and Paul P. Selvin filed a brief for the American Federation of Television and Radio Artists et al. as amici curiae urging affirmance.

joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and MARSHALL, J., joined, post, p. 723.

**Opinion by:** STEWART

## Opinion

[\*706] [\*\*\*563] [\*\*2104] JUSTICE STEWART delivered the opinion of the Court.

**LEdHN[1A]** [↑] [1A] **LEdHN[2A]** [↑] [2A] [\*\*\*\*6] The respondent Actors' Equity Association (Equity) is a union representing the vast majority of stage actors and actresses in the United States. It enters into collective-bargaining agreements with theatrical producers that specify minimum wages and other terms and conditions of employment for those whom it represents. The petitioners are independent theatrical agents who place actors and actresses in jobs with producers. The Court of Appeals for the Second Circuit held that the respondents'<sup>1</sup> system of regulation of theatrical agents is immune from antitrust liability by reason of the statutory labor exemption from the antitrust laws, 622 F.2d 647.<sup>2</sup> We granted certiorari to consider the availability of that exemption in the circumstances presented by this case. *449 U.S. 991*.

[\*\*\*\*7] [\*\*2105] |

Equity is a national union that has represented stage actors and actresses since early in this century. Currently representing approximately 23,000 actors and actresses, it has collective-bargaining agreements with virtually all major theatrical [\*\*\*564] producers in New York City, on and off Broadway, [\*707] and with most other theatrical producers throughout the United States. The terms negotiated with producers are the minimum conditions of employment (called "scale"); an actor or actress is free to negotiate wages or terms more favorable than the collectively bargained minima.

Theatrical agents are independent contractors who negotiate contracts and solicit employment for their clients. The agents do not participate in the negotiation of collective-bargaining agreements between Equity and the theatrical producers. If an agent succeeds in obtaining employment for a client, he receives a commission based on a percentage of the client's earnings. Agents who operate in New York City must be licensed as employment agencies and are regulated by the New York City Department of Consumer Affairs pursuant to New York law, which provides that the maximum commission [\*\*\*\*8] a theatrical agent may charge his client is 10% of the client's compensation.

In 1928, concerned with the high unemployment rates in the legitimate theater and the vulnerability of actors and actresses to abuses by theatrical agents,<sup>3</sup> including the extraction of high commissions that tended to undermine collectively bargained rates of compensation, Equity unilaterally established a licensing system for the regulation of agents. The regulations permitted Equity members to deal only with those agents who obtained Equity licenses and thereby agreed to meet the conditions of representation prescribed by Equity. Those members who dealt with nonlicensed agents were subject to union discipline.

<sup>1</sup> The respondent Donald Grody is the executive secretary of Equity.

<sup>2</sup> The basic sources of organized labor's exemption from federal antitrust laws are §§ 6 and 20 of the Clayton Act, 38 Stat. 731 and 738, 15 U. S. C. § 17 and 29 U. S. C. § 52, and §§ 4, 5, and 13 of the Norris-LaGuardia Act, 47 Stat. 70, 71, and 73, 29 U. S. C. §§ 104, 105, and 113.

<sup>3</sup> Such vulnerability was, and still remains, particularly acute for actors and actresses without established professional reputations, who have always constituted the overwhelming majority of Equity's members.

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The system established by the Equity regulations was immediately challenged.<sup>4</sup> In *Edelstein v. Gillmore*, 35 F.2d 723, [\*\*\*\*9] [\*708] the Court of Appeals for the Second Circuit concluded that the regulations were a lawful effort to improve the employment conditions of Equity members. In an opinion written by Judge Swan and joined by Judge Augustus N. Hand,<sup>5</sup> the court said:

"The evils of unregulated employment agencies (using this term broadly to include also the personal representative) are set forth in the defendants' affidavits and are corroborated by common knowledge. . . . Hence the requirement that, as a condition to writing new business with Equity's members, old contracts with its members must be made to conform to the new standards, does not seem to us to justify an inference that the primary purpose of the requirement is infliction of injury upon plaintiff, and other personal representatives in a similar situation, rather than the protection of the supposed interests of Equity's members. *The terms they insist upon are calculated to secure* [\*\*\*565] *from personal representatives better and more impartial service, at uniform and cheaper rates, and to improve conditions of employment of actors by theater managers.* Undoubtedly the defendants intend to compel the plaintiff [\*\*\*\*10] to give up rights under existing contracts which do not conform to the new standards set up by Equity, but, as already indicated, *their motive in so doing is to benefit themselves and their fellow actors in the economic struggle.* The financial loss to plaintiff is incidental [\*\*2106] to this purpose." *Id.*, at 726 (emphasis added).<sup>6</sup>

[\*\*\*11] [\*709] The essential elements of Equity's regulation of theatrical agents have remained unchanged since 1928.<sup>7</sup> [\*\*\*13] A member of Equity is prohibited, on pain of union discipline, from using an agent who has not, through the mechanism of obtaining an Equity license (called a "franchise"), agreed to comply with the regulations. The most important of the regulations requires that a licensed agent must renounce any right to take a commission on an employment contract under which an actor or actress receives scale wages.<sup>8</sup> To the extent a contract includes provisions under which an actor or actress will sometimes receive scale pay -- for rehearsals or "chorus" [\*710] employment, for example -- and sometimes more, the regulations deny the agent any commission on the scale portions of the contract. Licensed agents are also precluded from taking commissions on out-of-town expense money paid to their clients. Moreover, commissions are limited on wages within [\*\*\*566] 10% of scale pay,<sup>9</sup> [\*\*\*14] and an agent must allow his client to terminate a representation contract if the agent is not

<sup>4</sup> The challenge was grounded on allegations of common-law tortious interference with business relationships.

<sup>5</sup> Judge Manton dissented without opinion.

<sup>6</sup> For contemporary descriptions of agent abuses of actors and actresses, see generally A. Harding, *The Revolt of the Actors* (1929). See also *New Rules for Actors*, N. Y. Times, Sept. 24, 1928, p. 20, col. 3; *The New Republic*, Oct. 24, 1928, p. 263. Cf. *Ribnik v. McBride*, 277 U.S. 350, 359-375 (Stone, J., joined by Holmes and Brandeis, JJ., dissenting) (general abuses by employment agencies, particularly at times of widespread unemployment). The Court's decision in *Ribnik v. McBride* was overruled unanimously in *Olsen v. Nebraska*, 313 U.S. 236.

<sup>7</sup> The petitioners do not dispute this. The regulations have undergone revision in some details, largely as a result of negotiations between Equity and Theatrical Artists Representatives Associates (TARA), which until shortly before this litigation began was the only association voicing the concerns of agents with regard to their representation of Equity members. Until their voluntary resignation in late 1977, most of the petitioners were members of TARA. The petitioners are now members of the National Association of Talent Representatives (NATR). Unlike TARA, which functions only in the legitimate theater field, NATR also functions in the fields of motion pictures and television. In those fields, agents operate under closely analogous agent regulations maintained by the Screen Actors' Guild and the American Federation of Television and Radio Artists.

The history of the negotiations and disputes between Equity and TARA are described in the opinion of the District Court in the present case. [478 F.Supp. 496, 498](#) (SDNY).

<sup>8</sup> The minimum, or "scale," wage varies. In August 1977, for example, the minimum weekly salary was \$ 335 for Broadway performances, and \$ 175 for performances off Broadway. Scale wages are set by a collective-bargaining agreement between Equity and the producers, to which the agents are not parties. When an agent represents an actor or actress whose professional reputation is not sufficient to demand a salary higher than scale, the agent hopes to develop a relationship that will become continually more remunerative as the performer's professional reputation grows, and with it the power to demand an ever higher salary. No agent is required to represent an actor or actress whom he does not wish to represent.

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successful in procuring employment within a specified period.<sup>10</sup> Finally, agents are required to [\*\*\*\*12] pay franchise fees to Equity. The fee is \$ 200 for the initial franchise, \$ 60 a year thereafter for each agent, and \$ 40 for any subagent working in the office of another. These fees are deposited by Equity in its general treasury and are not segregated from other union funds.

[\*\*2107] In 1977, after a dispute between Equity and Theatrical Artists Representatives Associates (TARA) -- a trade association representing theatrical agents, see n. 7, *supra* -- a group of agents, including the petitioners, resigned from TARA because of TARA's decision to abide by Equity's regulations. These agents also informed Equity that they would not accept Equity's regulations, or apply for franchises. The petitioners instituted this lawsuit in May 1978, contending that Equity's regulations of theatrical agents violated [§§ 1](#) and [2](#) of the Sherman Act, 26 Stat. 209, as amended, [15 U. S. C. §§ 1](#) and [2](#).

#### [\*711] B

The District Court found, after a bench trial, that Equity's creation [\*\*\*\*15] and maintenance of the agency franchise system were fully protected by the statutory labor exemptions from the antitrust laws, and accordingly dismissed the petitioners' complaint. [478 F.Supp. 496](#) (SDNY). Among its factual conclusions, the trial court found that in the theatrical industry, agents play a critical role in securing employment for actors and actresses:

"As a matter of general industry practice, producers seek actors and actresses for their productions through agents. Testimony in this case convincingly established that an actor without an agent does not have the same access to producers or the same opportunity to be seriously considered for a part as does an actor who has an agent. Even principal interviews, in which producers are required to interview all actors who want to be considered for principal roles, do not eliminate the need for an agent, who may have a greater chance of gaining an audition for his client.

....

"Testimony confirmed that agents play an integral role in the industry; without an agent, an actor would have significantly lesser chances of gaining employment." [Id., at 497, 502](#).

[\*\*567] The court [\*\*\*\*16] also found "no evidence to suggest the existence of any conspiracy or illegal combination between Actors' Equity and TARA or between Actors' Equity and producers," and concluded that "[the] Actors Equity franchising system was employed by Actors' Equity for the purpose of protecting the wages and working conditions of its members." [Id., at 499](#).

The Court of Appeals unanimously affirmed the judgment of the District Court. It determined that the threshold issue was, under [United States v. Hutcheson, 312 U.S. 219, 232](#), whether Equity's franchising system involved any combination [\*712] between Equity and any "non-labor groups" or persons who are not "parties to a labor dispute." [622 F.2d, at 648-649](#). If it did, the court reasoned, the protection of the statutory labor exemption would not apply.

First, the Court of Appeals held that the District Court had not been clearly erroneous in finding no agreement, explicit or tacit, between Equity and the producers to establish or police the franchising system. *Ibid.* Next, the court

<sup>9</sup> It is Equity's view that commissions in the industry are not necessarily related to efforts by the agents, and that an agent often functions as little more than an "order taker," who is able to collect a percentage of a client's wages for the duration of a show for doing little more than answering a producer's telephone call. Indeed, an agent may collect a commission on the salary of an actor or actress he represents even if the client obtains the job without the agent.

<sup>10</sup> Equity argues that this restriction is necessary because there is an incentive for agents to represent as many actors and actresses as possible -- and not necessarily to serve them all well -- because an agent receives a commission whenever his client is employed at a salary higher than scale, regardless of the extent of his involvement in obtaining employment for the client.

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turned to the relationship between the union and those agents who had agreed to become franchised, [\*\*\*\*17] in order to determine whether those agreements would divest Equity's system of agency regulation of the statutory exemption. Relying on *Musicians v. Carroll*, 391 U.S. 99, the court concluded that the agents were themselves a "labor group," because of their substantial "economic inter-relationship" with Equity, under which "the union [could] not eliminate wage competition among its members without regulation of the fees of the agents." *622 F.2d, at 650, 651*. Accordingly, since the elimination of wage competition is plainly within the area of a union's legitimate self-interest, the court concluded that the exemption was applicable.<sup>11</sup>

[\*\*\*\*18] [\*\*2108] After deciding that the central feature of Equity's franchising system -- the union's exaction of an agreement by agents not to charge commissions on certain types of work -- was immune from antitrust challenge, the Court of Appeals turned to the petitioners' challenge of the franchise fees exacted from agents. Equity had argued that the fees were necessary to meet its expenses in administering the franchise system, but no evidence was presented at trial to show that the costs justified the fees actually levied. The Court of Appeals suggested that if the exactions exceeded the true [\*713] costs, they could not legally be collected, as such exactions would be unconnected with any of the goals of national labor policy that justify the labor antitrust exemption. Despite the lack of any cost evidence at trial, however, the appellate court reasoned that the fees were sufficiently low that a remand to the District Court on this point "would not serve any useful purpose." *Id., at 651*.

[\*\*\*568] II

A

Labor unions are lawful combinations that serve the collective interests of workers, but they also possess the power to control the character of competition [\*\*\*\*19] in an industry. Accordingly, there is an inherent tension between national antitrust policy, which seeks to maximize competition, and national labor policy, which encourages cooperation among workers to improve the conditions of employment.<sup>12</sup> [\*\*\*\*20] In the years immediately following passage of the Sherman Act, courts enjoined strikes as unlawful restraints of trade when a union's conduct or objectives were deemed "socially or economically harmful." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 485 (Brandeis, J., dissenting).<sup>13</sup> In response to these practices, Congress acted, first in the Clayton Act, 38 Stat. 731, and later in the Norris-LaGuardia Act, 47 Stat. 70, to immunize labor unions and labor disputes from challenge under the Sherman Act.

Section 6 of the Clayton Act, *15 U. S. C. § 17, HN1*<sup>14</sup> declares that human labor "is not a commodity or article of commerce," and immunizes from antitrust liability labor organizations [\*714] and their members "lawfully carrying out" their "legitimate [objectives]." Section 20 of the Act prohibits injunctions against specified employee activities, such as strikes and boycotts, that are undertaken in the employees' self-interest and that occur in the course of disputes "concerning terms or conditions of employment," and states that none of the specified acts can be "held to be [a] [violation] of any law of the United States." *29 U. S. C. § 52*. This protection is re-emphasized and expanded in the Norris-LaGuardia Act, which prohibits federal-court injunctions against single or organized employees engaged in enumerated activities,<sup>14</sup> and specifically forbids such injunctions notwithstanding the claim of an

<sup>11</sup> The Court of Appeals recognized that even if there had been an agreement between Equity and a "non-labor group," the agreement might still have been protected from the antitrust laws under the "non-statutory" exemption. *622 F.2d, at 649, n. 1*. See *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 622. See n. 19, *infra*.

<sup>12</sup> See generally Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659 (1965); Winter, Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 Yale L. J. 14 (1963). See also Leslie, Principles of Labor Antitrust, 66 Va. L. Rev. 1183 (1980).

<sup>13</sup> See Winter, *supra* n. 12, at 30-38.

<sup>14</sup> As is true under the Clayton Act, the specified activities are protected only in the context of a labor dispute. The Norris-LaGuardia Act defines a labor dispute to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or

unlawful [\*\*\*\*21] combination or conspiracy. While the Norris-LaGuardia Act's bar of federal-court labor injunctions is not explicitly phrased as an exemption from the antitrust laws, it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust [\*\*2109] laws as a vehicle to interfere in labor disputes.<sup>15</sup>

[\*\*\*\*22] [LEdHN\[3\]](#) [3]In [\*\*\*569] [\*United States v. Hutcheson, 312 U.S. 219\*](#), the Court held that [HN2](#) labor unions acting in their self-interest and not in combination with nonlabor groups enjoy a statutory exemption from Sherman Act liability. After describing the [\*715] congressional responses to judicial interference in union activity, *id.*, at 229-230, the Court declared that

**HN3** [↑] "[so] long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." *Id.*, at 232 (footnote omitted).

The Court explained that this exemption derives not only from the Clayton Act, but also from the Norris-LaGuardia [\*\*\*\*23] Act, particularly its definition of a "labor dispute," see n. 14, *supra*, in which Congress "reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act." [312 U.S., at 236](#). Thus under *Hutchesson*, HN4[] no federal injunction may issue over a "labor dispute," and "§ 20 [of the Clayton Act] removes all such allowable conduct from the taint of being a 'violation of any law of the United States,' including the Sherman [Act]." *Ibid.*<sup>16</sup>

[\*\*\*\*24] [HN5](#)<sup>↑</sup> The statutory exemption does not apply when a union combines with a "non-labor group." Hutcheson, supra, at 232. Accordingly, antitrust immunity is forfeited when a union combines with one or more employers in an effort to restrain trade. In *Allen Bradley Co. v. Electrical Workers*, 325 U.S. 797, for example, the Court held that a union had violated the Sherman Act when it combined with manufacturers and contractors to erect a sheltered local business market in [\*716] order "to bar all other business men from [the market], and to charge the public prices above a competitive level." Id., at 809.<sup>17</sup> [\*\*\*\*25] The Court indicated that the union efforts would, standing alone, be exempt from antitrust liability, *ibid.*, but because the union had not acted unilaterally, the

conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." [29 U. S. C. § 113\(c\)](#).

<sup>15</sup> In *Milk Wagon Drivers v. Lake Valley Farm Products, Inc.*, 311 U.S. 91, 103, the Court stated: "For us to hold, in the face of [the Norris-LaGuardia Act], that the federal courts have jurisdiction to grant injunctions in cases growing out of labor disputes, merely because alleged violations of the Sherman Act are involved, would run counter to the plain mandate of the Act and would reverse the declared purpose of Congress."

<sup>16</sup> See also *Apex Hosiery Co. v. Leader*, 310 U.S. 469. There, in the Term preceding that in which the *Hutcheson* case was decided, the Court reasoned that the Sherman Act prohibits only restraints on "commercial competition," 310 U.S., at 497, 499, 510-511 -- or those market restraints designed to monopolize supply, control prices, or allocate product distribution -- and that unions are not liable where they merely further their own goals in the labor market.

<sup>17</sup> In *Hunt v. Crumboch*, 325 U.S. 821, decided the same day as *Allen Bradley*, the Court ruled that the labor exemption protected a union's boycott of a truck hauler through successful secondary pressure on purchasers of the hauler's services with whom the union had contracts, because of the absence of union participation in a conspiracy with the hauler's competitors. See 325 U.S., at 824; Meltzer, *supra* n. 12, at 677, and n. 74.

exemption was denied.<sup>18</sup> Congress "intended to outlaw business monopolies. A business [\*\*\*570] monopoly is no less such because a union participates, and such participation is a violation of the Act." *Id.* at 811.<sup>19</sup>

[\*\*\*\*26] [\*717] [\*\*2110] B

[LEdHN\[1B\]](#) [↑] [1B] [LEdHN\[4A\]](#) [↑] [4A] [LEdHN\[5A\]](#) [↑] [5A] The Court of Appeals properly recognized that the threshold issue was to determine whether or not Equity's franchising of agents involved any combination between Equity and any "non-labor groups," or persons who are not "parties to a labor dispute." [622 F.2d, at 649](#) (quoting [Hutcheson, 312 U.S., at 232](#)).<sup>20</sup> And the court's conclusion that the trial court had not been clearly erroneous in its finding that there was no combination between Equity and the theatrical producers<sup>21</sup> to create or maintain the franchise system is amply supported by the record.

The more difficult problem is whether the combination between Equity and the agents who agreed to become franchised was a combination with a "nonlabor group." The answer to this question is best understood in light of *Musicians v. Carroll, 391 U.S. 99*. There, four orchestra leaders, members of the American Federation of Musicians, brought an action based on the Sherman Act challenging the union's unilateral system of regulating "club dates," or one-time musical engagements. These regulations, *inter alia*, enforced a [\*\*\*718] closed shop; required orchestra leaders to engage a [\*\*\*571] minimum number [\*\*\*28] of "sidemen," or instrumentalists; prescribed minimum

<sup>18</sup> *Mine Workers v. Pennington*, 381 U.S. 657, also dealt with a union combination with employers, but the grounds of decision were unrelated to the antitrust exemption.

<sup>19</sup> Even where there are union agreements with nonlabor groups that may have the effect of sheltering the nonlabor groups from competition in product markets, the Court has recognized a "nonstatutory" exemption to shield such agreements if they are intimately related to the union's vital concerns of wages, hours, and working conditions. See, e. g., *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676. This nonstatutory exemption was described as follows in *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S., at 622:

"The Court has recognized . . . that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions. . . .

"The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions."

Neither the District Court nor the Court of Appeals in this case decided whether the nonstatutory exemption would independently shield the respondents from the petitioners' antitrust claims. See n. 11, *supra*.

20  [4B]

Of course, a party seeking refuge in the statutory exemption must be a bona fide labor organization, and not an independent contractor or entrepreneur. See *Meat Drivers v. United States*, 371 U.S. 94; *Columbia River Packers Assn. v. Clinton*, 315 U.S. 143. See generally 1 P. Areeda & D. Turner, *Antitrust Law* § 229c, pp. 195-198 (1978). There is no dispute about Equity's status as a bona fide labor organization.

21 [\*\*\*\*27] LEdHN[5B] [↑] [5B]

As the employers of Equity's members, producers are plainly a "nonlabor group." Employers almost always will be a "nonlabor group," although an exception has been recognized, for example, when the employer himself is in job competition with his employees. See *Musicians v. Carroll*, 391 U.S. 99 (orchestra leaders who both lead an orchestra and play an instrument).

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prices for local engagements;<sup>22</sup> prescribed higher minimum prices for traveling orchestras; and permitted leaders to deal only with booking agents licensed by the union.

Without disturbing the finding of the Court of Appeals that the orchestra leaders were employers and independent contractors, the Court concluded that they were nonetheless a "labor group" and parties to a "labor dispute" within the meaning of the Norris-LaGuardia Act, and thus that their involvement in the union regulatory scheme was not an unlawful combination between [\*\*\*29] "labor" and "nonlabor" groups. The Court [\*\*2111] agreed with the trial court that the applicable test was whether there was "job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors." *Id., at 106.*

The Court also upheld the restrictions on booking agents, who were *not* involved in job or wage competition with union members. Accordingly, these restrictions had to meet the "other economic interrelationship" branch of the disjunctive test quoted above. And the test was met because those restrictions were "'at least as intimately bound up with the subject of wages' . . . as the price floors." *Id., at 113* (quoting *Teamsters v. Oliver*, 362 U.S. 605, 606). The Court noted that the booking agent restrictions had been adopted, in part, because agents had "charged exorbitant fees, and booked engagements for musicians at wages . . . below union scale."<sup>23</sup>

[\*\*\*30] [\*719] C

The restrictions challenged by the petitioners in this case are very similar to the agent restrictions upheld in the *Carroll* case.<sup>24</sup> [\*\*\*31] The essential [\*\*\*572] features of the regulatory scheme are identical: members are permitted to deal only with agents who have agreed (1) to honor their fiduciary obligations by avoiding conflicts of interest, (2) not to charge excessive commissions, and (3) not to book members for jobs paying less than the union minimum.<sup>25</sup> And as in *Carroll*, Equity's [\*720] regulation of agents developed in response to abuses by

<sup>22</sup> These consisted of a minimum scale for sidemen, a "leader's fee," which was twice the sidemen's scale in orchestras of at least four, and an additional 8% for social security, unemployment insurance, and other expenses. In addition, if a leader did not appear but designated a subleader, and four or more musicians performed, the leader was required to pay from his leader's fee 1.5 times the sidemen's scale to the subleader.

<sup>23</sup> The Court did not explicitly determine whether the second prong of the *Hutcheson* test for the statutory exemption had been met, *i. e.*, whether the union had acted in its "self-interest." But given its various findings that the challenged restrictions were designed to cope with job competition and to protect wage scales and working conditions, *391 U.S., at 108, 109, 110, 113*, it clearly did so *sub silentio*.

<sup>24</sup> Several cases before *Carroll* also upheld union regulation of the practices of independent entrepreneurs affecting the wages or working conditions of union members. See *Milk Wagon Drivers v. Lake Valley Farm Products, Inc.*, 311 U.S. 91; *Teamsters v. Oliver*, 358 U.S. 283 (*Oliver I*); *Teamsters v. Oliver*, 362 U.S. 605 (*Oliver II*). In *Milk Wagon Drivers*, the Court held that the union had engaged in a "labor dispute" within the meaning of the Norris-LaGuardia Act when it attempted to organize independent "vendors" who supplied milk to retail stores. There the union feared that the "vendor system" was designed to escape the payment of union wages and the assumption of union-imposed working conditions. In *Oliver I*, the *Milk Wagon Drivers* decision was invoked to protect from state antitrust challenge a union's successful efforts to prescribe through collective-bargaining agreements a wage scale for truck-drivers, and minimum rental fees for drivers who owned their own trucks. The union feared that driver-owners, whose fees included not only an entrepreneurial component but also a "wage" for the labor of driving, might undercut the union scale by charging a fee that effectively included a subscale wage component. The Court stated that "[the] regulations [embodied] . . . a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract." *358 U.S., at 294*. See also *Oliver II, supra, at 606* (after remand to the state court).

<sup>25</sup> Indeed, the District Court in *Carroll*, whose judgment was affirmed by this Court "in its entirety," *391 U.S., at 114*, drew parallels with the restrictions at issue in the present case. The court noted that "[apparently], similar abuses by booking agents existed in other fields too. *Edelstein v. Gillmore*, 35 F.2d 723, 726 (2d Cir. 1929) (actors)." *Carroll v. AFM*, 241 F.Supp. 865, 892 (SDNY).

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employment agents who occupy a critical role in the relevant labor market.<sup>26</sup> The agent stands **[\*\*2112]** directly between union members and jobs, and is in a powerful position to evade the union's negotiated wage structure.

**[\*\*\*\*32]** [LEdHN\[1C\]](#) [1C]The peculiar structure of the legitimate theater industry, where work is intermittent, where it is customary if not essential for union members to secure employment through agents, and where agents' fees are calculated as a percentage of a member's wage, makes it impossible for the union to defend even the integrity of the minimum wages it has negotiated without regulation of agency fees.<sup>27</sup> The regulations are "brought within the labor exemption [because they are] necessary to assure that scale wages will be paid . . . ." [Carroll, 391 U.S., at 112](#). They "embody . . . a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure." [Teamsters v. Oliver, 358 U.S. 283, 294](#). **[\*721]** Agents must, therefore, be considered a "labor group," and their controversy with Equity is plainly a "labor dispute" as defined in the Norris-LaGuardia Act: "representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand **[\*\*\*573]** **[\*\*\*\*33]** in the proximate relation of employer and employee." [29 U. S. C. § 113\(c\)](#).

Agents perform a function -- the representation of union members in the sale of their labor -- that in most nonentertainment industries is performed exclusively by unions. In effect, Equity's franchise system operates as a substitute for maintaining a hiring hall as the representative of its members seeking employment.<sup>28</sup>

**[\*\*\*\*34]** [LEdHN\[6\]](#) [6]Finally, Equity's regulations are clearly designed to promote the union's legitimate self-interest. [Hutcheson, 312 U.S., at 232](#). In a case such as this, where there is no direct wage or job competition between the union and the group it regulates, the *Carroll* formulation to determine the **[\*722]** presence of a nonlabor group -- whether there is "some . . . economic interrelationship affecting legitimate union interests . . . ,"[391 U.S., at 106](#) (quoting District Court opinion) -- necessarily resolves this issue.

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[LEdHN\[2B\]](#) [2B]The question remains whether the fees that Equity levies upon the agents who apply for franchises are a permissible component of the exempt regulatory system. We have concluded that Equity's

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The petitioners argue that theatrical agents are indistinguishable from "numerous [other] groups of persons who merely supply products and services to union members" such as landlords, grocers, accountants, and lawyers. But it is clear that agents differ from these groups in two critical respects: the agents control access to jobs and negotiation of the terms of employment. For the actor or actress, therefore, agent commissions are not merely a discretionary expenditure of disposable income, but a virtually inevitable concomitant of obtaining employment.

<sup>26</sup> See [Carroll v. AFM, 241 F.Supp., at 881-882](#); Harding, *supra* n. 6, at 319-325.

<sup>27</sup> The Court of Appeals found that "the union *cannot* eliminate wage competition among its members without regulation of the fees of the agents." [622 F.2d, at 651](#) (emphasis added). Wage competition is prevented not only by the rule precluding commissions on scale jobs. Actors and actresses could also compete over the percentage of their wages they were willing to cede to an agent, subject only to the restrictions imposed by state law.

<sup>28</sup> In many industries, unions maintain hiring halls and other job referral systems, particularly where work is typically temporary and performed on separate project sites rather than fixed locations. By maintaining halls, unions attempt to eliminate abuses such as kickbacks, and to insure fairness and regularity in the system of access to employment. In a 1947 Senate Report, Senator Taft explained: "The employer should be able to make a contract with the union as an employment agency. The union frequently is the best employment agency. The employer should be able to give notice of vacancies, and in the normal course of events to accept men sent to him by the hiring hall." S. Rep. No. 1827, 81st Cong., 2d Sess., 13 (1947), quoted in [Teamsters v. NLRB, 365 U.S. 667, 673-674](#).

The National Labor Relations Board and the courts have ruled that union demands for hiring halls are a mandatory subject of collective bargaining, and that strikes to obtain such provisions are protected activity. See, e. g., [Houston Chapter, Associated General Contractors, 143 N. L. R. B. 409](#), enf'd, [349 F.2d 449](#) (CA5); [NLRB v. Tom Joyce Floors, Inc., 353 F.2d 768, 771](#) (CA9). Cf. [Teamsters v. NLRB, supra, at 672-673, 676](#).

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justification for these fees is inadequate. Conceding that *Carroll* did not sanction union extraction of franchise fees from agents,<sup>29</sup> [\*\*2113] Equity suggests, only in the most general terms, that the fees are somehow related to the basic purposes of its regulations: elimination [\*\*\*\*35] of wage competition, upholding of the union wage scale, and promotion of fair access to jobs. But even assuming that the fees no more than cover the costs of administering the regulatory system, this is simply another way of saying that without the fees, the union's regulatory efforts would not be subsidized -- and that the dues of Equity's members would perhaps have to be increased to offset the loss of a general revenue source.<sup>30</sup> If Equity did not impose these franchise fees upon the agents, there is no reason to believe that any of its legitimate interests [\*\*\*574] would be affected.<sup>31</sup>

[\*\*\*36] [\*723] III

For the reasons stated, the judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for proceedings consistent with this opinion.

*It is so ordered.*

**Concur by:** BRENNAN (In Part)

**Dissent by:** BRENNAN (In Part)

## Dissent

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JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and JUSTICE MARSHALL join, concurring in part and dissenting in part.

I join all but Part II-D of the Court's opinion. That part holds that respondents' exaction of a franchise fee is not a "permissible component of the exempt regulatory system." *Ante*, at 722. Rather, I agree with the Court of Appeals that the approximately \$ 12,000 collected annually in fees is not "incommensurate with Equity's expenses in maintaining a full-time employee to administer the system," [622 F.2d 647, 651 \(CA2 1980\)](#), and thus is not "unconnected with any of the goals of national labor policy which justify the antitrust exemption for labor," *ibid.*

The Court justifies its conclusion by suggesting that, since the union could increase its dues to offset the revenue lost from invalidation of the fee system, "there is no reason to believe that any of [the union's] legitimate [\*\*\*37] interests would be affected," if the fee system were found to violate the antitrust laws. *Ante*, at 722. The union could of course raise its dues, but the issue here is whether the conceded antitrust immunity of the franchising system includes the franchise fee.

I find somewhat incongruous the Court's conclusion that an incident of the overall system constitutes impermissible regulation, but that agents in general may be significantly [\*724] regulated because they are not a "nonlabor

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<sup>29</sup> See [Carroll, 241 F.Supp., at 881](#). We have, in fact, found no case holding that a union may extract such fees from independent agents who represent union members.

<sup>30</sup> As already indicated, the franchise fees are not segregated in any manner but merely deposited in the union's general fund.

<sup>31</sup> The respondents offer union hiring hall fees as an analogy in support of Equity's collection of franchise fees. In that context, the respondents argue, without citation, that a union may impose reasonable fees upon employers to meet the costs of maintaining a union-run hiring hall. But even if the respondents' statement of labor law is correct, the analogy would not be persuasive. Assuming that hiring hall fees are so imposed, the fees are borne by parties who directly benefit from the employment services of the hiring halls and are collected by the entities that provide them. That is not true in the present case.

The view expressed in the separate opinion filed today as to who are the beneficiaries of the franchising system will undoubtedly surprise the agents who brought this lawsuit. *Post*, at 724.

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group." This incongruity is highlighted by the similarity between union hiring halls and the franchising system, a similarity which the Court itself acknowledges: "Equity's franchise system operates as a substitute for maintaining a hiring hall as the representative of its members seeking employment." *Ante*, at 721. The Court disregards this similarity in concluding that the franchising system does not "directly benefit" the agents who are required to pay the fees. *Ante*, at 722, n. 31. It reaches this conclusion by incorrectly assuming that the only parties who directly benefit from the hiring hall and the franchising system [\*\*\*575] are employers and employees and producers and [\*\*\*38] actors, as the case may be. But surely the agents also benefit from the franchising system, which provides an orderly and protective [\*\*2114] mechanism for pairing actors who seek jobs with producers who seek actors. The system is thus the means by which the agents ultimately receive their commissions; it is as much the source of their livelihood as it is that of the actors.

Because the fee is an incident of a legitimate scheme of regulation and because it is commensurate in amount with the purpose for which it is sought, I would also affirm this holding of the Court of Appeals.

## **References**

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[48 Am Jur 2d, Labor and Labor Relations 425 et seq.](#)

24 Am Jur Trials 1, Defending Antitrust Lawsuits

[15 USCS 1 et seq., 17; 29 USCS 52, 104, 105, 113](#)

FRES, Regulation of Labor Unions 20:1-20:3, 20:11

US L Ed Digest, Labor 137; Restraints of Trade, Monopolies, and Unfair Trade Practices 46

L Ed Index to Annos, Labor and Employment; Restraints of Trade and Monopolies

ALR Quick Index, Labor and Labor Unions; Norris-LaGuardia Act; Restraints of Trade and Monopolies

Federal [\*\*\*\*39] Quick Index, Labor and Employment; Monopolies and Restraints of Trade

Annotation References:

Propriety and scope of injunctive relief in federal antitrust case. [55 L Ed 2d 892](#).

Applicability of federal antitrust laws as affected by other federal statutes or by [Federal Constitution . 45 L Ed 2d 841](#).

Union activities violating the federal antitrust laws. [9 L Ed 2d 998, 20 L Ed 2d 1528](#).

## *Tex. Indus. v. Radcliff Materials*

Supreme Court of the United States

March 3, 1981, Argued ; May 26, 1981, Decided

No. 79-1144

**Reporter**

451 U.S. 630 \*; 101 S. Ct. 2061 \*\*; 68 L. Ed. 2d 500 \*\*\*; 1981 U.S. LEXIS 26 \*\*\*\*; 49 U.S.L.W. 4537; 1981-1 Trade Cas. (CCH) P64,020; 1980-81 Trade Cas. (CCH) P64,020

TEXAS INDUSTRIES, INC. v. RADCLIFF MATERIALS, INC., ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

**Disposition:** [604 F.2d 897](#), affirmed.

## **Core Terms**

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courts, right to contribution, damages, anti trust law, federal common law, common-law, antitrust, Sherman Act, violations, federal court, co-conspirators, conspiracy, wrongdoers, amici, common law, treble-damages, formulate, parties, legislative history, Clayton Act, tortfeasors, concrete, cases

## **LexisNexis® Headnotes**

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

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Torts > ... > Multiple Defendants > Contribution > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

### **[HN1](#)[] Private Actions, Remedies**

A right to contribution may arise in either of two ways: first, through the affirmative creation of a right of action by Congress, either expressly or by clear implication; or, second, through the power of federal courts to fashion a federal common law of contribution.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

451 U.S. 630, \*630; 101 S. Ct. 2061, \*\*2061; 68 L. Ed. 2d 500, \*\*\*500; 1981 U.S. LEXIS 26, \*\*\*\*1

[Antitrust & Trade Law > Clayton Act > General Overview](#)

[Antitrust & Trade Law > Clayton Act > Penalties](#)

[Antitrust & Trade Law > Clayton Act > Remedies > General Overview](#)

## **HN2** **Remedies, Damages**

The very idea of treble damages available under the Clayton Act reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers.

[Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview](#)

[Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview](#)

[Torts > ... > Multiple Defendants > Contribution > General Overview](#)

[Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview](#)

## **HN3** **Private Actions, Remedies**

Congress neither expressly nor implicitly intended to create a right to contribution. If any right to contribution exists, its source must be federal common law.

[Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview](#)

[Governments > Courts > Common Law](#)

[Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview](#)

## **HN4** **Federal & State Interrelationships, Federal Common Law**

There is no federal general common law. Nevertheless, the Court has recognized the need and authority in some limited areas to formulate what has come to be known as "federal common law." These instances are "few and restricted," and fall into essentially two categories: those in which a federal rule of decision is necessary to protect uniquely federal interests, and those in which Congress has given the courts the power to develop substantive law.

[Governments > Courts > Common Law](#)

[International Trade Law > Dispute Resolution > General Overview](#)

[Transportation Law > Interstate Commerce > Federal Powers](#)

[Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview](#)

[Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview](#)

[Governments > Federal Government > US Congress](#)

[International Law > Dispute Resolution > General Overview](#)

**HN5** Courts, Common Law

Absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Torts > ... > Multiple Defendants > Contribution > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

**HN6** Federal & State Interrelationships, Federal Common Law

Contribution does not implicate "uniquely federal interests" of the kind that oblige courts to formulate federal common law.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

**HN7** Antitrust & Trade Law, Sherman Act

Neither the Sherman Act, [15 U.S.C.S. § 1](#) nor the Clayton Act, [15 U.S.C.S. § 15](#), confers on federal courts the broad power to formulate the right to contribution.

## **Lawyers' Edition Display**

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### Decision

Antitrust defendants against whom civil damages, costs, and attorney's fees have been assessed, held to have no federal statutory or common law right to contribution from alleged co-conspirators.

### Summary

A construction company, which had purchased concrete from a company which manufactured and sold ready-mixed concrete, filed a civil action in the United States District Court for the Eastern District of Louisiana against the cement manufacturer, alleging that the manufacturer and certain unnamed concrete firms had conspired to raise prices in violation of 1 of the Sherman Act ([15 USCS 1](#)) and seeking treble damages, plus attorney's fees, under 4 of the Clayton Act ([15 USCS 15](#)). Through discovery, the defendant manufacturer learned that certain other companies were the concrete producers that had participated in the alleged price-fixing scheme and filed a third-party complaint against the other manufacturers seeking contribution from them should it be held liable in the action filed by the construction company. The District Court dismissed the third-party complaint for failure to state a claim upon which relief could be granted, holding that federal law did not allow an antitrust defendant to recover in contribution from co-conspirators. On appeal, the United States Court of Appeals for the Fifth Circuit affirmed, concluding that no common law rule of contribution should be fashioned by the courts ([604 F2d 897](#)).

On certiorari, the United States Supreme Court affirmed. In an opinion by Burger, Ch. J., expressing the unanimous view of the court, it was held that in a federal **antitrust law** action a defendant, against whom civil damages, costs,

and attorney's fees have been assessed, has no right to contribution, under federal statutory or common law, from other participants in the unlawful conspiracy on which recovery was based, Congress neither expressly nor implicitly intending to create a right to contribution in the antitrust statutes ([15 USCS 1 et seq.](#)), contribution not implicating uniquely federal interests of the kind that oblige courts to formulate federal common law, and nothing in the Sherman Act, its legislative history, or in the overall regulatory scheme suggesting that Congress intended courts to have the power to alter or supplement the remedies enacted in 1 and 2 of the Act ([15 USCS 1](#) and [2](#)), and the issue of such a right to contribution being a matter for Congress, not the courts, to decide.

## Headnotes

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CONTRIBUTION §2 > COURTS §141 > antitrust action -- defendant's right to contribution from co-conspirators --> Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D]

In a federal **antitrust law** action, a defendant, against whom civil damages, costs, and attorney's fees have been assessed, has no right to contribution, under federal statutory or common law, from other participants in the unlawful conspiracy on which recovery was based, Congress neither expressly nor implicitly intending to create a right to contribution in the antitrust statutes ([15 USCS 1 et seq.](#)), contribution not implicating uniquely federal interests of the kind that oblige courts to formulate common law, and nothing in the Sherman Act ([15 USCS 1 et seq.](#)), its legislative history, or in the overall regulatory scheme suggesting that Congress intended courts to have the power to alter or supplement the remedies enacted in 1 and 2 of the Act ([15 USCS 1](#) and [2](#)); the issue of such a right to contribution is a matter for Congress, not the courts, to decide.

SUIT §4 > statute -- implication of right of action for contribution -- intent of Congress -- > Headnote:  
[LEdHN\[2\]](#) [2]

In determining whether a right to contribution exists by implication under a federal statute, the focus of the United States Supreme Court, as it is in any case involving the implication of a right of action, is on the intent of Congress; congressional intent may be discerned by looking to the legislative history and other factors, such as the identity of the class for whose benefits the statute was enacted, the overall legislative scheme, and the traditional role of the states in providing relief.

LAW §2 > COURTS §792 > federal common law -- development by courts -- > Headnote:  
[LEdHN\[3\]](#) [3]

There is no general federal common law; however, there exists the need and authority in limited areas to formulate what has come to be known as "federal common law," these instances being few and restricted and falling essentially into two categories--those in which a federal rule of decision is necessary to protect uniquely federal interests, and those in which Congress has given the courts the power to develop substantive law.

451 U.S. 630, \*630; 101 S. Ct. 2061, \*\*2061; 68 L. Ed. 2d 500, \*\*\*500; 1981 U.S. LEXIS 26, \*\*\*\*1

COURTS §792 > jurisdiction in federal courts -- authority to formulate common law -- > Headnote:

[LEdHN\[4\]](#) [4]

The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law, and the existence of congressional authority under Article I of the United States Constitution does not mean that federal courts are free to develop a common law to govern those areas until Congress acts; absent some congressional authorization to formulate substantive rules of decision, federal common law exist only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of states or relations with foreign nations, and admiralty cases, the federal system not permitting the controversy in these instances to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

COURTS §93 > legislative scheme -- creation of remedies -- > Headnote:

[LEdHN\[5\]](#) [5]

The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.

COURTS §93 > authority -- providing new rule or remedy -- > Headnote:

[LEdHN\[6\]](#) [6]

The authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has not decided to adopt.

## Syllabus

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Petitioner and respondents manufacture and sell ready-mix concrete. A purchaser of concrete from petitioner filed a civil action against petitioner in Federal District Court, alleging that petitioner and certain unnamed firms had conspired to raise concrete prices in violation of [§ 1](#) of the Sherman Act, and seeking treble damages under [§ 4](#) of the Clayton Act. After learning through discovery that respondents were the alleged co-conspirators, petitioner filed a third-party complaint against them, seeking contribution should it be held liable in the original action. The District Court dismissed the third-party complaint for failure to state a claim upon which relief could be granted, holding that federal law does not allow an antitrust defendant to recover [\\*\\*\\*\\*2](#) in contribution from alleged co-conspirators. The Court of Appeals affirmed.

*Held:* There is no basis in federal statutory or common law for allowing federal courts to fashion the right to contribution urged by petitioner. Pp. 634-647.

(a) Congress neither expressly nor implicitly intended to create such a right to contribution. Nothing in the Sherman and Clayton Acts or in their legislative history refers to contribution, and there is nothing to indicate any congressional concern with softening the blow on joint wrongdoers. Rather, the very idea of treble damages reveals an intent to punish past, and deter future, unlawful conduct, not to ameliorate the liability of joint wrongdoers. Pp. 639-640.

451 U.S. 630, \*630; 101 S. Ct. 2061, \*\*2061; 68 L. Ed. 2d 500, \*\*\*500; 1981 U.S. LEXIS 26, \*\*\*\*2

(b) The federal courts are not empowered to fashion a federal common-law rule of contribution among antitrust wrongdoers. Contribution does not implicate "uniquely federal interests" of the kind that oblige courts to formulate federal common law. Moreover, even though Congress may have intended to allow federal courts to develop governing principles of law in the common-law tradition with regard to substantive violations of the Sherman Act, it does not follow that Congress intended [\*\*\*\*3] to give courts as wide discretion in formulating remedies to enforce the Act or the kind of relief sought through contribution. There is nothing in the Act itself, in its legislative history, or in the overall legislative scheme to suggest that Congress intended courts to have the power to alter or supplement the remedies enacted. Pp. 640-646.

(c) Regardless of the merits of the conflicting arguments on the complex policy questions presented by petitioner's claimed right to contribution, this is a matter for Congress, not the courts to resolve. Pp. 646-647.

**Counsel:** Benjamin R. Slater, Jr., argued the cause for petitioner. With him on the briefs was William J. Hamlin.

Dando B. Cellini argued the cause for respondents. With him on the brief were James A. Babst, Ewell P. Walther, Jr., and Stephen H. Kupperman.

Solicitor General McCree argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Assistant Attorney General Litvack, Deputy Solicitor General Wallace, Stephen M. Shapiro, Barry Grossman, and Bruce E. Fein.\*

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**Judges:** BURGER, C. J., delivered the opinion for a unanimous Court.

**Opinion by:** BURGER

## Opinion

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[\*632] [\*\*\*503] [\*\*2062] CHIEF JUSTICE BURGER delivered the opinion of the Court.

[LEdHN\[1A\]](#) [↑] [1A]This case presents the question whether the federal antitrust laws allow a defendant, against whom civil damages, costs, and attorney's fees have been assessed, a right to contribution from other participants in the unlawful conspiracy on which recovery was based. We granted certiorari to resolve a conflict in the *Circuits*. 449 U.S. 949 (1980).<sup>1</sup> We affirm.

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\* Briefs of amici curiae urging reversal were filed by Eugene Driker for Borman's Inc.; by Denis McInerney, William T. Lifland, and Allen S. Joslyn for CPC International Inc.; by Cloyd R. Mellott, J. Gary Kosinski, Ray C. Stoner, Michael R. Borasky, James M. Nicholson, and William E. Craig for Georgia-Pacific Corp. et al.; by Harold F. Baker, Alan M. Wiseman, and Gaspare J. Bono for Mead Corp.; and by Leslie H. Arps, Kenneth A. Plevan, John M. Nannes, Richard M. Schwartz, and Thomas R. Long for Westvaco Corp.

Briefs of amici curiae urging affirmance were filed by R. Clifford Potter for Boise Cascade Corp.; by Lowell E. Sachnoff and Stephen D. Susman for the Corrugated Container Class in M. D. L. 310; by David L. Foster and John W. Malley for Duplan Corp.; and by Robert M. Johnson for River Cement Co.

Briefs of amici curiae were filed by James W. Witherspoon for A. L. Black et al.; by Harold G. Christensen, Michael R. Carlston, and Craig S. Cook for Olson Farms, Inc.; by Earl E. Pollock for Owens-Illinois, Inc., et al.; by Richard W. Odgers and C. Douglas Floyd for Safeway Stores, Inc.; and by Donald G. Kempf, Jr., and Hammond E. Chaffetz for Weyerhaeuser Co. et al.

<sup>1</sup> Compare *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d 897 (CA5 1979) (this case), and *Olson Farms, Inc. v. Safeway Stores, Inc.*, 1979-2 Trade Cases para. 62,995 (CA10), rehearing en banc granted (Dec. 27, 1979), with *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*, 594 F.2d 1179 (CA8 1979).

[\*\*\*\*5] I

Petitioner and the three respondents manufacture and sell ready-mix concrete in the New Orleans, La., area. In 1975, the Wilson P. Abraham Construction Corp., which had purchased concrete from petitioner, filed a civil action in the United States District Court for the Eastern District of Louisiana naming petitioner as defendant;<sup>2</sup> the [\*\*\*504] complaint alleged that petitioner and certain unnamed concrete firms had conspired to raise prices in violation of § 1 of the Sherman Act, 26 Stat. 209, as [\*\*2063] amended, 15 U. S. C. § 1, which provides in relevant part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

The complaint sought treble damages plus attorney's fees under § 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, which provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust [\*633] laws may sue therefor in any district court of the United States in the district in which the defendant resides [\*\*\*6] or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."<sup>3</sup>

Through discovery, petitioner learned that Abraham believed respondents were the other concrete producers that had participated in the alleged price-fixing scheme.<sup>4</sup> Petitioner then filed a third-party complaint against respondents seeking contribution from them should it be held liable in the action filed by Abraham. The District Court dismissed the third-party complaint for failure to state a claim upon which relief could be granted, holding that federal law does not allow an antitrust defendant to recover in contribution from co-conspirators. The District Court also [\*\*\*7] determined there was no just reason for delay with respect to that aspect of the case and entered final judgment under Federal Rule of Civil Procedure 54 (b).

On appeal, the Court of Appeals for the Fifth Circuit affirmed, holding that, although the Sherman and the Clayton Acts do not expressly afford a right to contribution, the issue should be resolved as a matter of federal common law. *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d 897 (1979). The court then examined what it perceived to be the benefits and the difficulties of contribution and concluded that no common-law rule of contribution should be fashioned by the courts.

[\*634] II

The common law provided no [\*\*\*8] right to contribution among joint tortfeasors. *Union Stock Yards Co. v. Chicago, B. & Q. R. Co.*, 196 U.S. 217 (1905); W. Prosser, *Law of Torts* § 50, pp. 305-307 (4th ed. 1971). See *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K. B. 1799). See also *Northwest Airlines, Inc. v. Transport Workers*, *ante*, at 86-87, n. 16. In part, at least, this common-law rule rested on the idea that when several [\*\*\*505] tortfeasors have caused damage, the law should not lend its aid to have one tortfeasor compel others to share in the sanctions imposed by way of damages intended to compensate the victim. *E. g., Atkins v. Johnson*, 43 Vt. 78, 81-82 (1870). See Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. Pa. L. Rev. 130, 130-134 (1932). Since the turn of the century, however, 39 states and the District of Columbia have fashioned rules of contribution in one form or another, 10 initially through judicial action and the remainder through legislation. See *Northwest Airlines, Inc. v. Transport Workers*, *ante*, at 86-87, and n. 16. Because courts generally have

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<sup>2</sup> The complaint also named one of petitioner's former employees as a codefendant; this employee has never been served.

<sup>3</sup> The phrase "antitrust laws" includes the Sherman Act and the Clayton Act. 15 U. S. C. § 12 (a).

<sup>4</sup> In 1973, a federal grand jury in Louisiana issued indictments against petitioner, respondents (or their corporate predecessors), and certain employees charging a price-fixing conspiracy in violation of § 1 of the Sherman Act. Each defendant ultimately entered a plea of *nolo contendere*.

acknowledged that [\*\*\*\*9] treble-damages actions under the antitrust laws are analogous to common-law actions sounding in tort,<sup>5</sup> we are urged to follow [\*\*2064] this trend and adopt contribution for antitrust violators.

[\*\*\*\*10] The parties and *amici* representing a variety of business [\*635] interests -- as well as a legion of commentators<sup>6</sup> -- have thoroughly addressed the policy concerns implicated in the creation of a right to contribution in antitrust cases. With potentially large sums at stake, it is not surprising that the numerous and articulate *amici* disagree strongly over the basic issue raised: whether sharing of damages liability will advance or impair the objectives of the antitrust laws.

[\*\*\*\*11] Proponents of a right to contribution advance concepts of fairness and equity in urging that the often massive judgments in antitrust actions be shared by all the wrongdoers. In the abstract, this position has a certain appeal: collective fault, collective responsibility. But the efforts of petitioner and supporting *amici* to invoke principles of equity presuppose a legislative intent to allow parties violating the law to draw upon equitable principles to mitigate the consequences of their wrongdoing. Moreover, traditional equitable standards have something to say about the septic state of the hands of such a suitor in the courts, and, in the context of one wrongdoer suing a co-conspirator, these standards similarly [\*\*\*506] suggest that parties generally *in pari delicto* should be left where they are found. See *supra, at 634.*<sup>7</sup>

[\*\*\*\*12] [\*636] The proponents of contribution also contend that, by allowing one violator to recover from co-conspirators, there is a greater likelihood that most or all wrongdoers will be held liable and thus share the consequences of the wrongdoing. It is argued that contribution would thus promote more vigorous private enforcement of the antitrust laws and thereby deter violations, one of the important purposes of the treble-damages action under § 4 of the Clayton Act. See, e. g., *Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485 (1977); Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).* Independent of this effect, a right to contribution may increase the incentive of a single defendant to provide evidence against co-conspirators so as to avoid bearing the full weight of the judgment. Realization of this possibility [\*\*2065] may also deter one from joining an antitrust conspiracy.

Respondents and *amici* opposing contribution point out [\*\*\*\*13] that an even stronger deterrent may exist in the possibility, even if more remote, that a single participant could be held fully liable for the total amount of the judgment. In this view, each prospective co-conspirator would ponder long and hard before engaging in what may be called a game of "Russian roulette."<sup>8</sup> Moreover, any discussion of this problem [\*637] must consider the

<sup>5</sup> See, e. g., *Solomon v. Houston Corrugated Box Co., 526 F.2d 389, 392, n. 4 (CA5 1976); Simpson v. Union Oil Co., 311 F.2d 764, 768 (CA9 1963); Northwestern Oil Co. v. Socony-Vacuum Oil Co., 138 F.2d 967, 970 (CA7), cert. denied, 321 U.S. 792 (1943); Williamson v. Columbia Gas & Elec. Corp., 110 F.2d 15, 18 (CA3 1939), cert. denied, 310 U.S. 639 (1940).* Cf. *Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 552 (1902).* Although not expressly characterizing antitrust violations as tortious, our opinion in *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 342-348 (1971),* repeatedly referred to common-law rules and trends regarding release of joint tortfeasors in determining the validity of a release of an alleged antitrust violator.

<sup>6</sup> See, e. g., Cirace, A Game Theoretic Analysis of Contribution and Claim Reduction in Antitrust Treble Damage Suits, 55 St. John's L. Rev. 42 (1980); Corbett, Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions, 31 Ford. L. Rev. 111 (1962); Easterbrook, Landes, & Posner, Contribution Among Antitrust Defendants: A Legal and Economic Analysis, 23 J. Law & Econ. 331 (1980); Floyd, Contribution Among Antitrust Violators: A Question of Legal Process, 1980 B. Y. U. L. Rev. 183; Polinsky & Shavell, Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis, 33 Stan. L. Rev. 447 (1981); Note, 63 Cornell L. Rev. 682 (1978); Note, 48 Geo. Wash. L. Rev. 749 (1980); Note, 93 Harv. L. Rev. 1540 (1980); Note, 78 Mich. L. Rev. 892 (1980); Note, 58 Texas L. Rev. 961 (1980); Recent Developments, 33 Vand. L. Rev. 979 (1980); Note, 66 Va. L. Rev. 797 (1980).

<sup>7</sup> Of course, not all equitable principles apply in antitrust cases. For example, in *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)*, the Court held that traditional notions of *in pari delicto* would not bar a franchisee from recovering from its franchisor even though the franchisee had sought a franchise and thus, to some degree, acquiesced in the scheme alleged to be illegal.

problem of "overdeterrence," *i. e.*, the possibility that severe antitrust penalties will chill wholly legitimate business agreements. See [United States v. United States Gypsum Co., 438 U.S. 422, 441-442 \(1978\)](#).

[\*\*\*\*14] The parties and *amici* also discuss at length how a right to contribution should be structured and, in particular, how to treat problems that may arise with the allocation of damages among the wrongdoers and the effect of settlements. Dividing or apportioning damages among a cluster of co-conspirators presents difficult issues, for the participation of each in the conspiracy may have varied. Some may have profited more than others; some may have caused more damage to the injured plaintiff. Some may have been "leaders" and others "followers"; one may be a [\*\*\*507] "giant," others "pygmies."<sup>9</sup> Various formulae are suggested: damages may be allocated according to market shares, relative profits, sales to the particular plaintiff, the role in the organization and operation of the conspiracy, or simply pro rata, assessing an equal amount against each participant on the theory that each one is equally liable for the injury caused by collective action. In addition to the question of allocation, a right to contribution may have a serious impact on the incentive of defendants to settle. Some *amici* and commentators have suggested that the total amount of the plaintiff's claim [\*\*\*\*15] should be reduced by the amount of any settlement with any one co-conspirator; others [\*638] strongly disagree. Similarly, vigorous arguments can be made for and against allowing a losing defendant to seek contribution from co-conspirators who settled with the plaintiff before trial. Regardless of the particular rule adopted for allocating damages or enforcing settlements, the complexity of the issues involved may result in additional trial and pretrial proceedings, thus adding new complications to what already is complex litigation. See, e. g., [Illinois Brick Co. v. Illinois, 431 U.S. 720, 737-747 \(1977\)](#).

#### [\*\*\*\*16] III

The contentions advanced indicate how views diverge as to the "unfairness" of not providing contribution, the risks and trade-offs perceived by decisionmakers in business, and the various patterns for contribution that could be devised. In this vigorous debate over the advantages and disadvantages of contribution and various contribution schemes, the parties, *amici*, and commentators [\*\*2066] have paid less attention to a very significant and perhaps dispositive threshold question: whether courts have the power to create such a cause of action absent legislation and, if so, whether that authority should be exercised in this context.

Earlier this Term, in *Northwest Airlines, Inc. v. Transport Workers*, *ante*, p. 77, we addressed the similar question of a right to contribution under the Equal Pay Act of 1963, [29 U. S. C. § 206 \(d\)](#), and Title VII of the Civil Rights Act of 1964, [42 U. S. C. § 2000e et seq.](#) We concluded that HN1[] a right to contribution may arise in either of two ways: first, through the affirmative creation [\*\*\*\*17] of a right of action by Congress, either expressly or by clear implication; or, second, through the power of federal courts to fashion a federal common law of contribution. *Ante*, at 90-91.<sup>10</sup>

<sup>8</sup> Economists disagree over whether business decisionmakers, be they the high-level or the middle-level management, are "risk averse"; *i. e.*, they would prefer a greater certainty of a small loss to a less certain chance of a greater loss. Compare K. Elzinga & W. Breit, *The Antitrust Penalties* 126-129 (1976), with Easterbrook, Landes, & Posner, *supra* n. 6, at 352, n. 50. See also Polinsky & Shavell, *supra* n. 6, at 452-455; Shavell, *Risk Sharing and Incentives in the Principal and Agent Relationship*, 10 Bell J. Econ. 55 (1979).

<sup>9</sup> A small business that mimics the practices of larger companies may be participating directly in the conspiracy or simply "tagging along" with larger companies. See, e. g., Markham, *The Nature and Significance of Price Leadership*, 41 Amer. Econ. Rev. 891 (1951); Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan. L. Rev. 1562, 1582 (1969); Washburn, *Price Leadership*, 64 Va. L. Rev. 691, 693-697, 708-712 (1978). Although following industry leaders may help support an inference of agreement, "this Court has never held that proof of parallel business behavior [by itself] conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense." *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, [346 U.S. 537, 541 \(1954\)](#).

<sup>10</sup> In *Northwest Airlines*, we decided that no such right exists under the Equal Pay Act or Title VII, and we declined to fashion such a right from federal common law.

## [\*639] A

[\*\*\*508] [LEdHN\[1B\]](#) [1B] [LEdHN\[2\]](#) [2] There is no allegation that the antitrust laws expressly establish a right of action for contribution. Nothing in these statutes refers to contribution, and if such a right exists it must be by implication. Our focus, as it is in any case involving the implication of a right of action, is on the intent of Congress. *E. g., California v. Sierra Club, ante*, p. 287; *Universities Research Assn. v. Coutu*, [450 U.S. 754 \(1981\)](#); *Transamerica* [\*\*\*\*18] *Mortgage Advisors, Inc. v. Lewis*, [444 U.S. 11 \(1979\)](#); *Touche Ross & Co. v. Redington*, [442 U.S. 560 \(1979\)](#). Congressional intent may be discerned by looking to the legislative history and other factors: e. g., the identity of the class for whose benefit the statute was enacted, the overall legislative scheme, and the traditional role of the states in providing relief. See *California v. Sierra Club, supra*; *Cort v. Ash*, [422 U.S. 66 \(1975\)](#).

Petitioner readily concedes that "there is nothing in the legislative history of the Sherman Act or the Clayton Act to indicate that Congress considered whether contribution was available to defendants in antitrust actions." Brief for Petitioner 10. Moreover, it is equally clear that the Sherman Act and the provision for treble-damages actions under the Clayton Act were not adopted for the benefit of the participants in a conspiracy to restrain trade. On the contrary, petitioner "is a member of the class whose activities Congress intended to regulate for the protection and benefit of an entirely distinct class," *Piper v. Chris-Craft Industries, Inc.*, [430 U.S. 1, 37 \(1977\)](#) [\*\*\*\*19] (emphasis added). [HN2](#) The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers. The absence of any reference to contribution in the legislative history or of any possibility that Congress was concerned with softening the blow on joint wrongdoers in this setting makes examination of other factors unnecessary. *California v. Sierra Club, ante*, at 298; *Touche Ross & Co. v. Redington, supra, at 574-576*. We therefore conclude that [HN3](#) Congress neither expressly nor implicitly intended to create a right to contribution.<sup>11</sup> If any right to contribution [\*\*2067] exists, its source must be federal common law.

## [\*\*\*\*20] B

[\*\*\*509] [LEdHN\[1C\]](#) [1C] [LEdHN\[3\]](#) [3] [HN4](#) There is, of course, "no federal general common law." *Erie R. Co. v. Tompkins*, [304 U.S. 64, 78 \(1938\)](#). Nevertheless, the Court has recognized the need and authority in some limited areas to formulate what has come to be known as "federal common law." See *United States v. Standard Oil Co.*, [332 U.S. 301, 308 \(1947\)](#). These instances are "few and restricted," *Wheeldin v. Wheeler*, [373 U.S. 647, 651 \(1963\)](#), and fall into essentially two categories: those in which a federal rule of decision is "necessary to protect uniquely federal interests," *Banco Nacional de Cuba v. Sabbatino*, [376 U.S. 398, 426 \(1964\)](#), and those in which Congress has given the courts the power to develop substantive law, *Wheeldin v. Wheeler, supra, at 652*.

(1)

[LEdHN\[4\]](#) [4] The [\*\*\*\*21] vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal [\*641] common law, *United States v. Little Lake Misere Land Co.*, [412 U.S. 580, 591](#)

<sup>11</sup> That Congress knows how to define a right to contribution is shown by the express actions for contribution under § 11 (f) of the Securities Act of 1933, [15 U. S. C. § 77k \(f\)](#), and [§§ 9 \(e\)](#) and [18 \(b\)](#) of the Securities Exchange Act of 1934, [15 U. S. C. §§ 78i \(e\)](#) and [78r \(b\)](#). Some courts have extrapolated from these provisions that when an implied right of action exists under the securities laws, there also is an implied right to contribution. See, e. g., *Heizer Corp. v. Ross*, [601 F.2d 330 \(CA7 1979\)](#); *Globus, Inc. v. Law Research Service, Inc.*, [318 F.Supp. 955](#) (SDNY), aff'd, [442 F.2d 1346](#) (CA2), cert. denied, [404 U.S. 941](#) (1971); *De Haas v. Empire Petroleum Co.*, [286 F.Supp. 809](#) (Colo. 1968), aff'd in part, rev'd in part, [435 F.2d 1223](#) (CA10 1970). We intimate no view as to the correctness of these decisions; in any event, they do not support implication of a right to contribution when a statute expressly creates a damages action but does not provide for contribution. See *Northwest Airlines, Inc. v. Transport Workers, ante*, at 91-92, n. 24.

(1973), nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts. Rather, [HN5](#) absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States,<sup>12</sup> [\[\\*\\*\\*\\*22\]](#) interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations,<sup>13</sup> and admiralty cases.<sup>14</sup> In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

In areas where federal common law [\[\\*\\*\\*\\*23\]](#) applies, the creation of a right to contribution may fall within the power of the federal courts. For example, in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, [417 U.S. 106](#) [\[\\*5101\]](#) (1974), we held that contribution [\[\\*642\]](#) is available among joint tortfeasors for injury to a longshoreman. But that claim arose within admiralty jurisdiction, one of the areas long recognized as subject to federal common law, see *Edmonds v. Compagnie Generale Transatlantique*, [443 U.S. 256](#), [259](#) (1979); our decision there [\[\\*\\*2068\]](#) was based, at least in part, on the traditional division of damages in admiralty not recognized at common law, see [417 U.S., at 110](#). *Cooper Stevedoring* thus does not stand for a general federal common-law right to contribution. See *Northwest Airlines, Inc. v. Transport Workers*, *ante*, at 96-97.

The antitrust laws were enacted pursuant to the power of Congress under the *Commerce Clause*, Art. I, § 8, cl. 3, to regulate interstate and foreign trade, and the case law construing the Sherman Act now spans nearly a century. Nevertheless, a treble-damages action remains a private suit involving the rights [\[\\*\\*\\*\\*24\]](#) and obligations of private parties. Admittedly, there is a federal interest in the sense that vindication of rights arising out of these congressional enactments supplements federal enforcement and fulfills the objects of the statutory scheme. Notwithstanding that nexus, contribution among antitrust wrongdoers does not involve the duties of the Federal Government, the distribution of powers in our federal system, or matters necessarily subject to federal control even in the absence of statutory authority. Cf. *Bank of America v. Parnell*, [352 U.S. 29](#), [33](#) (1956). In short, [HN6](#) contribution does not implicate "uniquely federal interests" of the kind that oblige courts to formulate federal common law.

(2)

Federal common law also may come into play when Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law. See *Wheeldin v. Wheeler*, *supra*, at 652. In this vein, this Court has read § 301 (a) of the Labor Management Relations Act, [29 U. S. C. § 185](#) (a), not only as granting jurisdiction [\[\\*\\*\\*\\*25\]](#) over defined [\[\\*643\]](#) areas of labor law but also as vesting in the courts the power to develop a common law of labor-management relations within that jurisdiction. *Textile Workers v. Lincoln Mills*, [353 U.S. 448](#) ([1957](#)). A similar situation arises with regard to the first two sections of the Sherman Act, which in sweeping language forbid "[every] contract, combination . . . , or conspiracy, in restraint of trade" and "[monopolizing], or

<sup>12</sup> See, e. g., *United States v. Little Lake Misere Land Co.*, [412 U.S. 580](#) (1973); *Clearfield Trust Co. v. United States*, [318 U.S. 363](#) (1943).

<sup>13</sup> See, e. g., *Illinois v. Milwaukee*, [406 U.S. 91](#) (1972); *Banco Nacional de Cuba v. Sabbatino*, [376 U.S. 398](#) (1964); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, [304 U.S. 92](#) (1938). Many of these cases arise from interstate water disputes. Such cases do not directly involve state boundaries, disputes over which more often come to this Court under our original jurisdiction; they nonetheless involve especial federal concerns to which federal common law applies. In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, *supra*, at 110, decided the same day as *Erie*, the Court observed:

"Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions."

<sup>14</sup> See, e. g., *Edmonds v. Compagnie Generale Transatlantique*, [443 U.S. 256](#) (1979); *Fitzgerald v. United States Lines Co.*, [374 U.S. 16](#) (1963).

451 U.S. 630, \*643; 101 S. Ct. 2061, \*\*2068; 68 L. Ed. 2d 500, \*\*\*510; 1981 U.S. LEXIS 26, \*\*\*\*25

[attempting] to monopolize, . . . any part of the trade or commerce . . ." [15 U. S. C. §§ 1, 2](#). We noted in [National Society of Professional Engineers v. United States, 435 U.S. 679, 688 \(1978\)](#):

"Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."

[\*\*\*511] Accord, [United States v. United States Gypsum Co., 438 U.S., at 438](#), and n. 14; 2 P. Areeda & D. Turner, [Antitrust Law](#) para. 302 (1978). [\*\*\*\*26] See 21 Cong. Rec. 2456, 2460, 3149, 3152 (1890).<sup>15</sup>

It does not necessarily follow, however, that Congress intended to give courts as wide discretion in formulating remedies to enforce the provisions of the Sherman Act or the kind of relief sought through contribution. The intent to allow courts to develop governing principles of law, so unmistakably clear with regard to substantive violations, does not appear in debates on the treble-damages action created [[\\*644](#)] in § 7 of the original Act, 26 Stat. 210.<sup>16</sup> [\*\*\*\*28] Floyd, *supra* n. [\*\*2069] 6, at 228. [\*\*\*\*27] In the Senate debates of 1890, Senator Morgan described the type of authority given the courts:

"Now, whoever recovers upon this statute, in whatever court he may go to, will recover upon the statute. It is very true that we use common-law terms here and common-law definitions in order to define an offense which is in itself comparatively new, *but it is not a common-law jurisdiction that we are conferring upon the circuit courts of the United States.*" 21 Cong. Rec. 3149 (1890) (emphasis added).

The Senator added that common-law actions in state courts might still exist, but recovery of treble damages would not be available, for its source is federal, not state, law. *Ibid.* This description of the power of federal courts under the Act suggests a sharp distinction between the lawmaking powers conferred in defining violations and the ability to fashion the relief available to parties claiming injury.<sup>17</sup>

[LEdHN\[5\]](#) [5]In contrast to the sweeping language of [§§ 1](#) and [2](#) of the Sherman Act, the remedial provisions defined in the antitrust laws are detailed and specific: (1) violations of [§§ 1](#) [[\\*645](#)] and [2](#) are crimes; (2) Congress has expressly authorized a private right of action for treble damages, costs, and reasonable attorney's fees;<sup>18</sup> [\*\*\*\*30] (3) other remedial sections also provide for suits by the United [\[\\*\\*\\*512\]](#) States to enjoin violations<sup>19</sup> or for injury to its "business [[\\*\\*\\*\\*29](#)] or property,"<sup>20</sup> and *parens patriae* suits by state attorneys general;<sup>21</sup> (4)

<sup>15</sup> Congress assumed the courts would refer to the existing law of monopolies and restraints on trade. See, e. g., *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (K. B. 1711); *Darcy v. Allein*, 11 Co. Rep. 84, 77 Eng. Rep. 1260 (K. B. 1603). See generally P. Areeda, *Antitrust Analysis* 44-46 (3d ed. 1981); Letwin, *The English Common Law Concerning Monopolies*, 21 U. Chi. L. Rev. 355 (1954).

<sup>16</sup> [Section 4](#) of the Clayton Act, [15 U. S. C. § 15](#), which provides the private treble-damages action, derives from § 7 of the Sherman Act as originally enacted. See H. R. Rep. No. 627, 63d Cong., 2d Sess., pt. 1, p. 14 (1914). Congress repealed the original § 7 in 1955, Act of July 7, 1955, ch. 283, 69 Stat. 282, as being redundant of Clayton Act [§ 4](#), H. R. Rep. No. 422, 84th Cong., 1st Sess., 2 (1955); S. Rep. No. 619, 84th Cong., 1st Sess., 2 (1955).

<sup>17</sup> Courts, of course, should be wary of relying on the remarks of a single legislator, and Senator Morgan's comments are not unambiguous. Yet it is clear that when the Sherman Act was adopted the common law did not provide a right to contribution among tortfeasors participating in proscribed conduct. One permissible, though not mandatory, inference is that Congress relied on courts' continuing to apply principles in effect at the time of enactment. See, e. g., [Edmonds v. Compagnie Generale Transatlantique, 443 U.S., at 273](#).

<sup>18</sup> Clayton Act [§ 4](#) (original version at Sherman Act § 7).

<sup>19</sup> Sherman Act [§ 4](#), [15 U. S. C. § 4](#).

Congress has provided that a final judgment or decree of an antitrust violation in one proceeding will serve as prima facie evidence in any subsequent action or proceeding;<sup>22</sup> and (5) the remedial provisions in the antimerger field, not at issue here, are also quite detailed.<sup>23</sup>

"The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines, Inc. v. Transport Workers, ante*, at 97.

That presumption is strong indeed in the context of antitrust violations; the continuing existence of this statutory scheme for 90 years without amendments authorizing contribution is not without significance. There is nothing in the statute itself, in its legislative history, or in the overall regulatory scheme to suggest that Congress intended courts to have the power to alter or supplement the remedies enacted.

[LEdHN\[6\]](#)<sup>24</sup> [6]Our cases interpreting the treble-damages action, see, e. g., *Hawaii v. Standard Oil Co., 405 U.S. 251 (1972)*; *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971)*; *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)*, do not suggest that, in the past, [\*646] we have invoked some broad-ranging common-law source for creating a cause of action. Nor does the judicial determination that defendants should be jointly and severally liable suggest that courts also may order contribution, since joint and several liability simply ensures that the plaintiffs will [\*\*\*\*31] be [\*\*2070] able to recover the full amount of damages from some, if not all, participants. See *Atlanta v. Chattanooga Foundry & Pipeworks, 127 F. 2d, 26 (CA6 1903)*, aff'd, *203 U.S. 390 (1906)*. These cases do no more than identify the scope of the remedy Congress itself has provided. See Floyd, *supra* n. 6, at 227-231.

"In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." *Northwest Airlines, Inc. v. Transport Workers, ante*, at 97.

We are satisfied that [HN7](#)<sup>25</sup> neither the Sherman Act nor the Clayton Act confers on federal courts the broad power to formulate the right to contribution sought here.

[\*\*\*513] IV

[LEdHN\[1D\]](#)<sup>26</sup> [1D]The policy questions presented by petitioner's claimed right to contribution are far-reaching. In declining [\*\*\*\*32] to provide a right to contribution, we neither reject the validity of those arguments nor adopt the views of those opposing contribution. Rather, we recognize that, regardless of the merits of the conflicting arguments, this is a matter for Congress, not the courts, to resolve.

The range of factors to be weighed in deciding whether a right to contribution should exist demonstrates the inappropriateness of judicial resolution of this complex issue. Ascertaining what is "fair" in this setting calls for inquiry into the entire spectrum of [antitrust law](#), not simply the elements [\*647] of a particular case or category of cases. Similarly, whether contribution would strengthen or weaken enforcement of the antitrust laws, or what form a right to contribution should take, cannot be resolved without going beyond the record of a single lawsuit. As in *Diamond v. Chakrabarty, 447 U.S. 303, 317 (1980)*:

<sup>20</sup> Clayton Act § 4A, [15 U. S. C. § 15a](#).

<sup>21</sup> Clayton Act §§ 4C-4H, [15 U. S. C. §§ 15c-15h](#).

<sup>22</sup> Clayton Act § 5 (a), [15 U. S. C. § 16 \(a\)](#).

<sup>23</sup> Clayton Act §§ 7-11, [15 U. S. C. §§ 18-21](#).

"The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing [\*\*\*\*33] values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts."

Accord, *United States v. Topco Associates*, 405 U.S. 596, 611-612 (1972).

Because we are unable to discern any basis in federal statutory or common law that allows federal courts to fashion the relief urged by petitioner, the judgment of the Court of Appeals is

*Affirmed.*

## References

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[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 360](#)

[15 USCS 1 et seq.](#)

US L Ed Digest, Contribution 2

L Ed Index to Annos, Contribution; Restraints of Trade and Monopolies

ALR Quick Index, Contribution; Restraints of Trade and Monopolies

Federal Quick Index, Contribution; Monopolies and Restraints of Trade

Annotation References:

Implication of private right of action from provision of federal statute not expressly providing for one. [61 L Ed 2d 910](#).

[\*\*\*\*34] The Supreme Court and the post-Erie federal common law. [31 L Ed 2d 1006](#).

Right to contribution in federal antitrust case. 47 ALR Fed 712.

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## Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross

Supreme Court of the United States

April 29, 1981, Argued ; June 15, 1981, Decided

No. 80-802

### **Reporter**

452 U.S. 378 \*; 101 S. Ct. 2415 \*\*; 69 L. Ed. 2d 89 \*\*\*; 1981 U.S. LEXIS 122 \*\*\*\*; 49 U.S.L.W. 4672; 1981-1 Trade Cas. (CCH) P64,125

NATIONAL GERIMEDICAL HOSPITAL AND GERONTOLOGY CENTER v. BLUE CROSS OF KANSAS CITY ET AL.

**Prior History:** [\*\*\*\*1] CERTIROARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

**Disposition:** [628 F.2d 1050](#), reversed and remanded.

## **Core Terms**

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planning, anti trust law, antitrust, repeal, participating, health-care, health planning, health services, immunity, facilities, Resources, providers, statutory scheme, health system

## **LexisNexis® Headnotes**

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Healthcare Law > Business Administration & Organization > General Overview

### [\*\*HN1\*\*](#) **Healthcare Law, Business Administration & Organization**

The National Health Planning and Resources Development Act of 1974, [42 U.S.C.S. § 300k et seq](#), created federal, state, and local bodies that coordinate their activities in the area of health planning and policy.

Banking Law > Regulators > General Overview

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

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

### [\*\*HN2\*\*](#) **Banking Law, Regulators**

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The antitrust laws represent a "fundamental national economic policy." Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. Repeal is to be regarded as implied only if necessary to make the subsequent law work, and even then only to the minimum extent necessary.

Governments > Legislation > Expiration, Repeal & Suspension

Securities Law > Regulators > Self-Regulating Entities > National Association of Securities Dealers

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

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

### **HN3** Legislation, Expiration, Repeal & Suspension

Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry. Intent to repeal the antitrust laws is much clearer when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge.

Governments > Legislation > Expiration, Repeal & Suspension

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

### **HN4** Legislation, Expiration, Repeal & Suspension

Antitrust repeals are especially disfavored where the antitrust implications of a business decision have not been considered by a governmental entity.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

### **HN5** Antitrust & Trade Law, Exemptions & Immunities

The National Health Planning and Resources Development Act, [42 U.S.C.S. § 300k et seq.](#), is not so incompatible with antitrust concerns as to create a "pervasive" repeal of the antitrust laws as applied to every action taken in response to the health-care planning process.

## **Lawyers' Edition Display**

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### **Decision**

Health insurer's refusal to accept hospital as member of insurance plan, held not immune from antitrust laws, even if insurer's intent was to aid implementation of HSA's policy under NHRDA ([42 USCS 300k et seq.](#))

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## Summary

The Kansas City area's health system agency (HSA), a private, non-profit corporation, federally funded under the National Health Planning and Resources Development Act (NHRDA; [42 USCS 300k et seq.](#)), determined that there was a surplus of hospital beds in the Kansas City area and announced that it would not approve any addition of acute-care beds in area hospitals. As a result of this announced policy, the petitioner, a private, acute-care community hospital in the Kansas City area, did not seek the HSA's approval of its construction. However, prior to the completion of construction, the petitioner sought to become a participating member of the respondent insurers' health insurance plan. The respondents refused to accept the petitioner as a participating member, because of the respondents' policy barring participation in their insurance plan by any new hospital which could not show that it was meeting a clearly evident need for health-care services in the Kansas City area. In determining that the petitioner had not satisfied this requirement, the respondents relied on the petitioner's failure to obtain the HSA's approval for construction. Claiming that the respondents' refusal to accept the petitioner as a participating member put the petitioner at a competitive disadvantage, the petitioner filed suit against the respondents in the United States District Court for the Western District of Missouri. The petitioner claimed that the respondents had violated 1 and 2 of the Sherman Act ([15 USCS 1, 2](#)) by refusing to deal with the petitioner and by conspiring with the HSA. Holding that Congress intended that actions taken by private parties with the intention of aiding implementation of the NHRDA would be immune from the antitrust laws, the District Court granted judgment for the respondents ([479 F Supp 1012](#)). The United States Court of Appeals for the Eighth Circuit affirmed ([628 F2d 1050](#)).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Powell, J., expressing the unanimous view of the court, it was held that the respondents' refusal to accept the petitioner as a participating member of the respondents' health insurance plan was not immune from the federal antitrust laws, even if such refusal was intended to aid implementation of the HSA's plans under the NHRDA, since (1) such refusal was neither compelled nor approved by any governmental, regulatory body, but was a spontaneous response to the finding of an advisory planning body, the local HSA, that there was a surplus of acute-care hospital beds in the area, (2) application of the antitrust laws to such refusal would neither frustrate a particular provision of the NHRDA nor create a conflict with the orders of any regulatory body, (3) nothing in the NHRDA required the respondents to take an action which, in essence, sought to enforce the advisory decision of the HSA, (4) there was no reason to believe that Congress specifically contemplated such enforcement of the NHRDA by private insurance providers, and (5) the NHRDA was not so incompatible with antitrust concerns as to create a pervasive repeal of the antitrust laws as applied to every action taken in response to health-care planning recommendations under the NHRDA.

## Headnotes

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PRACTICES §20 > STATUTES §248.5 > relation of antitrust laws to other legislation -- repeal -- refusal to accept hospital in health insurance plan -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D]

The refusal of a health insurer to accept a private, acute-care community hospital as a participating member of the insurer's health insurance plan is not immune from the federal antitrust laws ([15 USCS 1, 2](#)), even if such refusal is intended to aid implementation of the plans of a local health systems agency (HSA) under the National Health Planning and Resources Development Act (NHRDA; [42 USCS 300k et seq.](#)), where (1) such refusal was neither compelled nor approved by any governmental, regulatory body, but was a spontaneous response to the finding of an advisory planning body, the local HSA, that there was a surplus of acute-care hospital beds in the area, (2) application of the antitrust laws to such refusal would neither frustrate a particular provision of the NHRDA nor create a conflict with the orders of any regulatory body, (3) nothing in the NHRDA required the insurer to take an action which, in essence, sought to enforce the advisory decision of the HSA, (4) there is no reason to believe that Congress specifically contemplated such enforcement of the NHRDA by private insurance providers, and (5) the

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NHPRDA is not so incompatible with antitrust concerns as to create a pervasive repeal of the antitrust laws as applied to every action taken in response to health-care planning recommendations under the NHPRDA.

PRACTICES §7 > implied antitrust immunity -- > Headnote:

[LEdHN\[2\]](#) [2]

Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.

PRACTICES §20 > STATUTES §248.5 > implied repeal of antitrust law -- > Headnote:

[LEdHN\[3\]](#) [3]

Repeal of an antitrust law by a subsequent federal law is to be regarded as implied only if necessary to make the subsequent law work, and even then only to the minimum extent necessary.

STATUTES §248.5 > repeal of antitrust law -- > Headnote:

[LEdHN\[4\]](#) [4]

Where Congress intends to repeal the antitrust laws, such intent governs, but such intent must be clear, and even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry; intent to repeal the antitrust laws is much clearer when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge.

STATUTES §248.5 > repeal of antitrust laws -- > Headnote:

[LEdHN\[5\]](#) [5]

Repeals of antitrust laws are especially disfavored where the antitrust implications of a business decision have not been considered by a governmental entity; when relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws.

PRACTICES §20 > relation of antitrust laws to other legislation -- > Headnote:

[LEdHN\[6\]](#) [6]

Where possible, the proper approach for determining whether subsequent federal legislation has granted immunity from the antitrust laws is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted.

## Syllabus

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Prior to the completion of its construction, petitioner, a private, acute-care community hospital in the Kansas City, Mo., metropolitan area, sought to enter into a participating hospital agreement with respondent Blue Cross of Kansas City (Blue Cross), a nonprofit provider of individual and group health-care reimbursement plans in the area. Blue Cross refused on the basis of its policy barring participation by any new hospital that could not show that it was meeting a clearly evident need for health-care services in its service area. Blue Cross relied on petitioner's failure to obtain approval for construction from the Mid-America Health Systems Agency (MAHSA), a private, [\*\*\*\*2] nonprofit, federally funded corporation which was the local "health system agency" (HSA) designated for the area under the National Health Planning and Resources Development Act of 1974 (NHPDRA). MAHSA's major function is health planning for the Kansas City metropolitan area. Petitioner had not sought approval of its construction from MAHSA because of the latter's announced policy that it would not approve any addition of acute-care beds in view of its determination that there was a surplus of hospital beds in the area. Alleging a wrongful refusal to deal and a conspiracy between Blue Cross and MAHSA, which resulted in a competitive disadvantage to it, petitioner filed suit against respondents Blue Cross and the National Blue Cross Association for violation of the Sherman Act. Respondents contended that the NHPDRA had impliedly repealed the antitrust laws as applied to the conduct in question. The District Court granted judgment for respondents, finding a clear repugnancy between the NHPDRA and the antitrust laws, and congressional intent to repeal the antitrust laws in this context. The Court of Appeals affirmed.

*Held:* Although respondents may have acted with only the highest [\*\*\*\*3] motives in seeking to implement the plans of the local HSA, they cannot defeat petitioner's antitrust claim by the assertion of immunity from the requirements of the Sherman Act. Pp. 388-393.

(a) Implied antitrust immunity can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry. And intent to repeal the antitrust laws is much clearer when a regulatory agency has been empowered to regulate the type of conduct under antitrust challenge. Pp. 388-389.

(b) The action challenged here was neither compelled nor approved by any governmental regulatory body. Instead, it was a spontaneous response to the finding of only an advisory planning body, the local HSA which, under the NHPDRA, has no regulatory authority over health-care providers. And the application of the antitrust laws to the Blue Cross' conduct would not frustrate a particular provision of the NHPDRA or create a conflict with the orders of any regulatory body. Nor does the NHPDRA require [\*\*\*\*4] Blue Cross to take an action that, in essence, sought to enforce the advisory decision of MAHSA. There is no reason to believe that Congress specifically contemplated "enforcement" of advisory decisions of an HSA by private insurance providers, let alone relied on such actions to put "teeth" into the noncompulsory local planning process. Pp. 389-391.

(c) And NHPDRA is not so incompatible with antitrust concerns as to create a "pervasive" repeal of the antitrust laws as applied to every action taken in response to the health-care planning process. Respondents have failed to make the showing necessary for an exemption of all such actions. Pp. 391-393.

**Counsel:** Erwin N. Griswold argued the cause for petitioner. With him on the briefs were Joe Sims and James M. Beck.

Joshua F. Greenberg argued the cause for respondents. With him on the brief were Abraham Ribicoff, Richard M. Steuer, Harry P. Thomson, Jr., Jennifer A. Gille, John C. Noonan, and Max O. Bagley.

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Solicitor General McCree argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Acting Assistant Attorney General Favretto, Deputy Solicitor General Wallace, Stephen M. Shapiro, [\*\*\*\*5] Barry Grossman, and Andrea Limmer. \*

**Judges:** POWELL, J., delivered the opinion for a unanimous Court.

**Opinion by:** POWELL

## Opinion

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[\*380] [\*\*\*93] [\*\*2417] JUSTICE POWELL delivered the opinion of the Court.

LEdHN[1A] [↑] [1A]The petitioner in this case, National Gerimedical Hospital and Gerontology Center (National Gerimedical) filed an antitrust suit against respondents, Blue Cross of Kansas City (Blue Cross) and the national Blue Cross Association, challenging the refusal of Blue Cross to accept petitioner as a participating member provider under its health insurance plan. The issue presented here is whether this refusal by Blue Cross is immunized from antitrust scrutiny because it was intended to aid implementation of the plans of the "health systems agency" designated for the Kansas City area under the National Health Planning and Resources Development Act of 1974.

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Petitioner National Gerimedical is a private, acute-care community hospital opened in 1978 in the Kansas [\*\*\*94] [\*\*\*\*6] City, Mo., metropolitan area.<sup>1</sup> Prior to the completion of construction, petitioner sought to enter into a participating hospital agreement with Blue Cross, a nonprofit provider of individual and group health-care reimbursement plans in Missouri and Kansas. Under such an agreement, participating hospitals receive direct reimbursement of the full costs of [\*\*2418] covered services rendered to individual Blue Cross subscribers.<sup>2</sup> When subscribers receive care in hospitals that are not participating members, Blue Cross pays only 80% of the cost, and these payments are made to the subscriber, rather than directly to the hospital.

[\*381] Blue Cross refused to enter into a participating hospital agreement [\*\*\*\*7] with petitioner on the basis of its official policy barring participation by any new hospital that could not show that it was meeting "a clearly evident need for health care services in its defined service area."<sup>3</sup> [\*\*\*\*8] In determining that petitioner had not satisfied

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<sup>1</sup> Carl Weissburg and J. Mark Waxman filed a brief for the Federation of American Hospitals as amicus curiae urging reversal.

<sup>2</sup> As a Missouri hospital, petitioner has been licensed by the Missouri Division of Health since September 1977. It also has been certified as a Medicare provider by the Department of Health and Human Services.

<sup>3</sup> All other acute-care hospitals in the Blue Cross service area are participating members.

<sup>3</sup> On January 1, 1976, Blue Cross issued a summary of "Prerequisites" by which it would be guided in deciding whether to accept new participating hospitals. App. 141a. These included the following:

"The hospital must meet a clearly evident need for health care services in its defined service area. Health care institutions and institutional services shall be approved, and/or if required by law, certified as necessary, by the designated planning agency or areawide health planning agency respectively; or, when effective, by the designated State Agency as provided for in Public Law 93-641, the 'National Health Planning and Resources Development Act of 1974.'" *Id.* at 146a.

Blue Cross added that it retained the final discretion in deciding whether to accept a new hospital, and then included a warning to those contemplating new construction:

"Because lack of knowledge by any applicant of this requirement shall not be considered sufficient reason for waiving it, community groups contemplating construction of new hospitals are urged to consult with Blue Cross, if they expect to apply for participation in the hospital service plan, at some time well in advance of actual construction." *Ibid.*

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this requirement, Blue Cross relied on petitioner's failure to obtain approval for construction from the local "health systems agency" or "HSA" -- the Mid-America Health Systems Agency (MAHSA).<sup>4</sup> This agency is a private, nonprofit corporation, federally funded under the National Health Planning and Resources Development Act of 1974 (NHRDA), 88 Stat. 2229, as amended, [42 U. S. C. § 300l](#) (1976 ed. and Supp. IV). Its major function is health planning for the Kansas City metropolitan area.

In conducting its planning functions, MAHSA had determined that there was a surplus of hospital beds in the area [~~\*382~~] and had announced that it would not approve any addition of acute-care beds in area hospitals. As a result of this announced policy, petitioner did not seek MAHSA approval of its construction, leading to the refusal of participating hospital status by Blue Cross.

Claiming that this refusal by Blue Cross put it at a competitive disadvantage, petitioner filed suit in the United States District Court for the Western District of Missouri against [~~\*\*\*95~~] Blue Cross and the national Blue Cross Association. It claimed violations of [§§ 1](#) and [2](#) of the Sherman Act, [15 U. S. C. §§ 1, 2](#), alleging a wrongful refusal to deal and a conspiracy between Blue Cross and MAHSA.<sup>5</sup> As relief, petitioner sought treble damages and an [~~\*\*\*9~~] injunction to prevent future violations.

Respondents moved to dismiss the complaint on the ground that the NHRDA had impliedly repealed the antitrust laws as applied to the conduct in question.<sup>6</sup> The District Court treated this motion as one for summary judgment, and granted judgment for respondents. [479 F.Supp. 1012 \(1979\)](#). It reasoned that if private parties seeking to effectuate the planning objectives of an HSA could be subjected to antitrust liability, accomplishment of the goals [~~\*\*2419~~] of the NHRDA would be frustrated. [Id. at 1021](#). Having found a "clear repugnancy," [id. at 1024](#), between this Act and the antitrust laws, the court relied largely on legislative history for the view that "Congress intended that action taken pursuant to the Act and clearly within the scope of the Act would be exempt from application of the antitrust laws," [~~\*\*\*10~~] *ibid.*

[~~\*383~~] The United States Court of Appeals for the Eighth Circuit affirmed, essentially adopting the reasoning of the District Court. [628 F.2d 1050 \(1980\)](#). The Court of Appeals agreed with the District Court's "finding of clear repugnancy between the Act and the antitrust laws, as the Act and regulatory scheme clearly call for the action which has now become the basis of an antitrust claim." [Id., at 1055-1056](#). It then quoted in full the District Court's argument for the view that Congress intended repeal of the antitrust laws in this context.

We granted a writ of certiorari to [~~\*\*\*11~~] review this important question. [449 U.S. 1123 \(1981\)](#).

## II

Our decision in this case requires careful attention to the structure and goals of the NHRDA, as well as a review of this Court's decisions in the area of implied repeals of the antitrust laws. We begin with a description of the complex scheme of regulatory and planning agencies established by the NHRDA in order to assess the legal significance of that Act with respect to the antitrust claim brought here.

MAHSA, the health systems agency whose refusal to approve new hospital construction in the Kansas City area prompted Blue Cross not to accept petitioner as a participating hospital, is but one part of a larger statutory scheme. The NHRDA, [42 U. S. C. § 300k et seq.](#), [HN1](#)[] created federal, state, and local bodies that coordinate their activities in the area of health planning and policy. Building on existing planning and development [~~\*\*\*96~~] statutes,

<sup>4</sup> See n. 3, *supra*. In a newsletter issued on July 21, 1976, Blue Cross announced that "[all] projects not reviewed and approved by these Health Systems Agencies will not be reimbursable by Blue Cross of Kansas City." App. 147a.

<sup>5</sup> MAHSA was not named as a defendant. Petitioner also included claims under Missouri's antitrust laws.

<sup>6</sup> Respondents also argued, unsuccessfully, that their conduct was immune from antitrust attack under the McCarran-Ferguson Act, [15 U. S. C. § 1011 et seq.](#), that their prepaid medical plans are not part of "trade or commerce" within the meaning of the Sherman Act, and that the allegations of conspiracy were insufficient. These claims are not before this Court.

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<sup>7</sup> Congress sought in 1974 [**\*384**] to create a statutory scheme that would assist in preventing overinvestment in and maldistribution [**\*\*\*\*12**] of health facilities. See 1974 Senate Report, at 39.

HSA's such as MAHSA are concerned with health planning in a particular metropolitan area. See generally H. R. Rep. No. 93-1382, pp. 40-41 (1974). [**\*\*\*\*13**] Each is a nonprofit private corporation, public regional planning body, or single unit of local government, serving a particular "health service area." [42 U. S. C. § 300l-1](#) (b)(1). The statute requires that a majority of HSA board members be consumers of health care and that at least 40% be health-care "providers." [§ 300l-1](#) (b)(3)(C). The "primary responsibility" of each HSA is "effective health planning for its health service area and the promotion of the development within the area of health services, manpower, and facilities which meet identified needs, reduce documented inefficiencies, and implement the health plans of the agency." [§ 300l-2](#) (a). As originally enacted, the Act established four general goals: "improving the health of residents," "increasing the accessibility . . . , acceptability, continuity, and quality of . . . health services," "restraining increases in the cost of . . . health services," and "preventing unnecessary duplication of health resources." [§ 300l-2](#) (a).<sup>8</sup> To accomplish these goals, [**\*\*2420**] the Act requires each HSA to formulate a "detailed statement of goals" called a "health systems plan," [§ 300l-2](#) (b)(2), an "annual implementation plan" describing the objectives that will achieve the goals of the general plan, [§ 300l-2](#) (b)(3), [**\*385**] and "specific plans and projects for achieving the objectives established in the" annual implementation plan, [§ 300l-2](#) (b)(4). Each HSA is instructed to "seek, to the extent practicable, to implement [its plans] with the assistance of individuals and public and private entities in its health service area." [§ 300l-2](#) (c)(1). In addition, it may provide "technical assistance" to individuals and public and private entities for the development of necessary projects and programs, [§ 300l-2](#) (c)(2), and should use grants and contracts to encourage these projects and programs, [§ 300l-2](#) (c)(3). The agencies do not possess regulatory authority over healthcare providers.

[**\*\*\*\*15**] At the state level, the Act created two separate bodies. The first, a State Health Planning and Development Agency, is a state agency created by agreement between a Governor [**\*\*\*97**] and the Federal Government. See [§ 300m](#). It is intended to perform certain crucial functions that cannot be undertaken by local HSA's:

"Specifically, the integration and synthesis of areawide health plans into a Statewide health plan, the establishment of priorities within the State, and the performance of regulatory functions are most appropriately carried out at the State level. The latter function can appropriately be carried out only by an agency of State government." 1974 Senate Report, at 52.

Each state agency must be governed by a "State Program," which the Secretary of Health and Human Services may approve only if it meets guidelines set out in [42 U. S. C. §§ 300m-1](#), 300m-2. Included in these guidelines is the requirement that each State establish a "certificate of need" program under which all new institutional health facilities must seek state approval prior to construction. § 300m-2 (a)(4)(A).<sup>9</sup> This procedure is "the basic

<sup>7</sup> See generally S. Rep. No. 93-1285, pp. 4-39 (1974) (hereinafter 1974 Senate Report). In 1972, for example, Congress passed § 1122 of the Social Security Act, [42 U. S. C. § 1320a-1](#), which authorizes the Secretary of Health and Human Services to enter into agreements with willing States, under which a state agency would be designated as the appropriate body for approving capital expenditures in the health-care area. Under § 1122, federal reimbursements under programs including Medicare and Medicaid do not include the capital expenses of hospitals that have not received agency approval.

In 1976, Missouri chose not to renew its agreement with the Federal Government under § 1122, thus eliminating the previous state program for approval of hospital construction. Brief for Respondents 6, n. 6.

<sup>8</sup> The Health Planning and Resources Development Amendments of 1979 (1979 Amendments), Pub. L. 96-79, § 103 (c), 93 Stat. 595, added another goal, "preserving and improving . . . competition in the health service area." [42 U. S. C. § 300l-2](#) (a)(5) (1976 ed., Supp. IV).

<sup>9</sup> The Act provides for reductions in various federal grants to States that do not participate in the planning process. [42 U. S. C. § 300m \(d\)](#).

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component in an **[\*386] [\*\*\*\*16]** overall effort to control the unnecessary capital expenditures which contribute so greatly to the total national health bill." S. Rep. No. 96-96, p. 5 (1979) (hereinafter 1979 Senate Report).

The State Health Planning and Development Agency is advised by a Statewide Health Coordinating Council, composed in part of representatives of local HSA's. This council is empowered to review the plans of HSA's, review and revise state plans, and make recommendations with respect to applications for federal funds from HSA's and States. 42 U. S. C. § 300m-3 (c).

In addition to various review functions, the Federal Government plays a separate role in this statutory scheme. The NHRDA requires the Secretary of Health and Human Services to issue guidelines concerning the appropriate supply, distribution, and organization of health **[\*\*\*\*17]** resources. § 300k-1; see [42 CFR § 121.1 et seq. \(1980\)](#). Finally, the Act created a National Council on Health Planning and Development to advise the Secretary on these guidelines and on the general administration of the Act. 42 U. S. C. § 300k-3.

This elaborate planning structure was intended by Congress to remedy perceived deficiencies in the performance of the health-care industry as it existed prior to 1974. The problems addressed fall into two categories. First, there was concern that marketplace forces in this industry failed to produce efficient investment in facilities and to minimize the costs of health care.<sup>10</sup> **[\*\*\*\*18] [\*\*2421]** In addition, **[\*\*\*98]** Congress sought to reduce the maldistribution of health-care facilities.<sup>11</sup>

**[\*387]** In 1979, Congress amended the NHRDA substantially in the Health Planning and Resources Development Amendments of 1979, Pub. L. 96-79, 93 Stat. 592. A purpose of these Amendments was to "[direct] that special consideration be given throughout the planning process to the importance of maintaining and improving competition in the health industry." 1979 Senate Report, at 3.<sup>12</sup> Toward this end, Congress added a number of provisions requiring promotion of competition at the local, state, and federal levels. [42 U. S. C. §§ 300k-2 \(b\), 300l-2 \(a\)\(5\) \(1976 ed., Supp. IV\); 42 U. S. C. §§ 300n-1 \[\\*\\*\\*\\*19\] \(c\)\(11\), \(12\) \(1976 ed., Supp. IV\)](#). See generally H. R. Conf. Rep. No. 96-420, p. 58 (1979). In so doing, however, Congress recognized a distinction between areas

<sup>10</sup> As the 1974 Senate Report put it:

"The need for strengthened and coordinated planning for personal health services is growing more apparent each day. In the view of the Committee the health care industry does not respond to classic marketplace forces. The highly technical nature of medical services together with the growth of third party reimbursement mechanisms act to attenuate the usual forces influencing the behavior of consumers with respect to personal health services. . . .

"Investment in costly health care resources, such as hospital beds, coronary care units or radio-isotope treatment centers is frequently made without regard to the existence of similar facilities or equipment already operating in an area. Investment in costly facilities and equipment not only results in capital accumulation, but establishes an ongoing demand for payment to support those services. . . .

"A recently published study indicates that by 1975, over 67,000 unneeded hospital beds will be in operation throughout the United States.

"Hospital beds, though unused, contribute substantial additional costs to the health care industry." 1974 Senate Report, at 39.

<sup>11</sup> The 1974 Senate Report stated:

"Widespread access and distribution problems exist with respect to medical facilities and services. In many urban areas, hospitals, clinics and other medical care institutions and services are crowded into relatively tiny sectors, while large areas go poorly served or completely unserved. Many rural communities are completely without a physician or any other type of health care service, while adjacent urban areas are oversupplied." *Ibid.*

<sup>12</sup> The Committee also sought to reduce the threat of domination of HSA decisionmaking by providers with a personal stake in the existing health-care system. 1979 Senate Report, at 57-59. See also Rosenblatt, *Health Care Reform and Administrative Law: A Structural Approach*, 88 Yale L. J. 243, 304-330 (1978) (describing problems of establishing consumer representation in HSA's).

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where competition could serve a useful purpose and [\*388] those where some other allocation of resources remained necessary.<sup>13</sup>

[\*\*\*\*20] III

National Gerimedical contends that the denial by Blue Cross of participating hospital status violated the antitrust laws. Blue Cross defends on the ground that it acted pursuant to the local HSA plan and only intended to further the purposes of the NHRDA. It argues that, despite the absence of any reference to the antitrust laws in the NHRDA, the creation of the planning structure summarized above implied a repeal of those laws, as applied to this conduct.

LEdHN[2] [1] [2]LEdHN[3] [3]On a number of occasions, this Court has faced similar claims of antitrust immunity in the context of various regulated industries. The general principles applicable to such [\*\*\*99] claims are well established. HN2 [1] The antitrust laws represent a "fundamental national economic policy." *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966); see *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-399 [\*2422] (1978). [\*\*\*\*21] "Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719-720 (1975); see *Gordon v. New York Stock Exchange*, 422 U.S. 659, 682 (1975); *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-351 [\*389] (1963). "Repeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

LEdHN[4] [1] [4]To be sure, where Congress did intend to repeal the antitrust laws, that intent governs, *United States v. National Association of Securities Dealers*, *supra*; *Gordon v. New York Stock Exchange*, *supra*, but this intent must be clear. HN3 [1] [\*\*\*\*22] Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry. *E. g.*, *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372-375 (1973); *United States v. Radio Corp. of America*, 358 U.S. 334, 346 (1959). Intent to repeal the antitrust laws is much clearer when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge. *E. g.*, *United States v. National Association of Securities Dealers*, *supra*, at 730-734; *Gordon v. New York Stock Exchange*, *supra*, at 689-690.

LEdHN[1B] [1] [1B]In the present case, we must apply these precedents to an industry with a regulatory structure quite different from those considered previously. The action challenged here was neither compelled nor approved by any governmental, regulatory body. Instead, it was a spontaneous response to the finding of an advisory planning body, the local HSA, that there was a surplus of acute-care hospital beds in the Kansas [\*\*\*\*23] City area.

<sup>14</sup> [\*\*\*\*24] Indeed, when respondents refused to enter into [\*390] the agreement with petitioner, the regulatory aspects of the NHRDA -- controlled by the state health planning agencies -- were not in place in Missouri. There

<sup>13</sup> In a new subsection, 42 U. S. C. § 300k-2 (b)(1) (1976 ed., Supp. IV), Congress made the finding that "the effect of competition on decisions of providers respecting the supply of health services and facilities is diminished," causing "duplication and excess supply of certain health services and facilities." It added that where "competition appropriately allocates supply consistent with health systems plans and State health plans," planning agencies should "give priority . . . to actions which would strengthen the effect of competition on the supply of such services." § 300k-2 (b)(3). But, for "health services, such as inpatient health services and other institutional health services, for which competition does not or will not appropriately allocate supply," agencies should "take actions . . . to allocate the supply of such services." § 300k-3 (b)(2).

<sup>14</sup> Significantly, the MAHSA health systems plan only called on insurers to create incentives to hold down the costs of care in existing institutions, and made no mention of a role for insurers in restraining unneeded hospital construction. The plan calls on the "reimbursement system [to] promote appropriate utilization of hospital services, provide positive incentives for efficient institutions, actively encourage utilization of less costly but equal quality alternatives to inpatient care, and develop uniform reimbursement programs." App. 67a. But it then asserts that "[capital] investment in institutions [shall] be controlled by an appropriate review agency." *Ibid.*

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simply was no regulation of this hospital construction, as Missouri had not established any [\*\*100] state regulatory agency with authority to review hospital construction.<sup>15</sup>

LEdHN[5] [5]As a result, the claim of implied antitrust immunity in this case is weaker than in previous cases. It cannot be argued that application of the antitrust laws to the conduct of Blue Cross would frustrate a particular provision of the NHRDA or create a conflict with the orders of any regulatory body. The record discloses no formal request from MAHSA to Blue Cross to refrain from accepting petitioner as a new [\*\*2423] participating hospital. Even if [\*\*\*\*25] such a request had been made, it could not have been more than the advice of a private planning body -- albeit a planning body created and funded by the Federal Government. This fact is crucial, because HN4[<sup>16</sup>] antitrust repeals are especially disfavored where the antitrust implications of a business decision have not been considered by a governmental entity. United States v. Radio Corp. of America, supra, at 339, 346; cf. *Otter Tail, supra*, at 374 ("When . . . relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws").

[\*391] Respondents rely on the fact that a major function of an HSA is planning in order to eliminate unnecessary duplication of hospital services, 42 U. S. C. § 300l-2 (a)(4) (1976 ed., Supp. IV), and point to statutory language requiring each HSA to "seek, to the extent practicable, to implement its [health plans] with the assistance [\*\*\*\*26] of individuals and public and private entities in its health service area," § 300l-2 (c)(1). Here, respondents argue, the HSA found that petitioner was duplicating hospital facilities unnecessarily, and Blue Cross merely sought to aid in the "implementation" of that finding.

LEdHN[1C] [1C]We are unpersuaded, however, that the provisions cited by respondents are sufficient to create a "clear repugnancy" between the NHRDA and the antitrust laws, at least on the facts of this case. See n. 18, *infra*. Nothing in the NHRDA requires Blue Cross to take an action that, in essence, sought to enforce the advisory decision of MAHSA. HSA's themselves are required to seek private cooperation only "to the extent practicable." 42 U. S. C. § 300l-2 (c)(1). And there is no reason to believe that Congress specifically contemplated such "enforcement" by private insurance providers, let alone relied on such actions to put "teeth" into the noncompulsory local planning process. Congress expected HSA planning to be implemented mainly through persuasion and cooperation. If an HSA recommendation [\*\*\*\*27] could be used to justify antitrust immunity for such an act of private enforcement, this effectively would give that [\*\*\*101] recommendation greater force than Congress intended.<sup>16</sup>

As there is no direct conflict between the requirements of the NHRDA and the Sherman Act with respect to the conduct at issue here, respondents' only remaining argument must be that the NHRDA immunizes all private conduct [\*392] undertaken in response to the health planning process. Arguably, the fundamental assumption of Congress, particularly in 1974 when it passed the original Act,<sup>17</sup> was that competition was not a relevant consideration in the health-care industry. If so, although that industry is not regulated in any comprehensive fashion, it might [\*\*\*\*28] be concluded that Congress intended "pervasive" cooperation and planning without the interference of antitrust suits.

<sup>15</sup> See n. 7, *supra*. If it had done so, this case probably would not have arisen. The state agency would have conditioned all hospital construction on issuance of a "certificate of need." See *supra, at 385-386*. Parties pursuing hospital construction without a certificate of need would now be subject to legal penalties. 42 U. S. C. § 300m-2 (a)(4)(A) (1976 ed., Supp. IV).

Missouri subsequently has established a state agency and enacted "certificate of need" legislation. Mo. Rev. Stat. § 197.300 et seq. (Supp. 1980).

<sup>16</sup> Congress knew how to give an HSA policy greater legal effect. Under 42 U. S. C. § 300l-2 (e) (1976 ed., Supp. IV), HSA approval -- subject to review by the Secretary -- is required for expenditures of funds under certain federal programs.

<sup>17</sup> As noted supra, at 387-388, in 1979 competition was given a more prominent place in the thinking of Congress.

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LEdHN[6] [6] This argument has some force, in light of the prominence Congress gave to the view that "the health care industry does not respond to classic marketplace forces." 1974 Senate Report, at 39. Perhaps it makes little sense in such a context to entertain antitrust suits intended to promote or protect free competition. It is clear, however, that respondents have failed to make the showing necessary for an exemption of all actions of health-care providers taken in response to planning recommendations. In other industrial contexts, we have refused such a blanket exemption, despite a clear congressional finding that some substitution of regulation for competition was necessary. **[\*\*2424]** *Carnation Co* **[\*\*\*\*29]** . v. *Pacific Westbound Conference*, **383 U.S., at 217-219** (maritime industry); *Otter Tail*, 410 U.S., at 373-374 (electric power industry). These holdings are based on the guiding principle that, where possible, "the proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver*, **373 U.S., at 357**. There is no indication that Congress intended a different result with respect to the health-care industry. One manifestation of this is the fact that in the 1979 Amendments Congress did not alter the basic planning structure, even as it made plain its intent that "competition and consumer choice" are to be favored wherever they "can constructively serve . . . to advance the purposes of quality **[\*393]** assurance, cost effectiveness, and access." 42 U. S. C. § 300k-2 (a)(17) (1976 ed., Supp. IV).<sup>18</sup>

**[\*\*\*\*30]** LEdHN[1D] [1D] We **[\*\*\*102]** hold, therefore, that HN5 [5] the NHRDA is not so incompatible with antitrust concerns as to create a "pervasive" repeal of the antitrust laws as applied to every action taken in response to the health-care planning process. Moreover, as discussed above, there was no specific conflict between the Act and the antitrust laws in this case. Although respondents may well have acted here with only the highest of motives in seeking to implement the plans of the local HSA, they cannot defeat petitioner's antitrust claim by the assertion of immunity from the requirements of the Sherman Act.<sup>19</sup> As a result, the judgment below must be reversed and the case remanded.

**[\*\*\*\*31]** *It is so ordered.*

## References

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[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 190](#); 73 Am Jur 2d, Statutes 392-396

[15 USCS 1, 2; 42 USCS 300k et seq.](#)

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 20; Statutes 248.5

L Ed Index to Annos, Restraints of Trade and Monopolies; Statutes

ALR Quick Index, Restraints of Trade and Monopolies; Statutes

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<sup>18</sup> Nevertheless, because Congress has remained convinced that competition does not operate effectively in some parts of the health-care industry, e. g., 42 U. S. C. § 300k-2 (b) (1976 ed., Supp. IV), we emphasize that our holding does not foreclose future claims of antitrust immunity in other factual contexts. Although favoring a reversal in this case, the United States as *amicus curiae* asserts that "there are some activities that must, by implication, be immune from antitrust attack if HSAs and State Agencies are to exercise their authorized powers." Brief for United States as *Amicus Curiae* 16, n. 11. Where, for example, an HSA has expressly advocated a form of cost-saving cooperation among providers, it may be that antitrust immunity is "necessary to make the [NHRDA] work." *Silver v. New York Stock Exchange*, **373 U.S. 341, 357 (1963)**. See 124 Cong. Rec. 34932 (1978) (Rep. Rogers) ("The intent of Congress was that HSA's and providers who voluntarily work with them in carrying out the HSA's statutory mandate should not be subject to the antitrust laws. If they were, Public Law 93-641 simply could not be implemented"). Such a case would differ substantially from the present one, where the conduct at issue is not cooperation among providers, but an insurer's refusal to deal with a provider that failed to heed the advice of an HSA.

<sup>19</sup> This holding does not, of course, suggest anything about the merits of the antitrust claim in this case. These matters remain to be litigated on remand, where the court should give attention to the particular economic context in which the alleged conspiracy and "refusal to deal" took place.

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Federal Quick Index, Monopolies and Restraints of Trade; Repeal

Annotation References:

Applicability of federal antitrust laws as affected by other federal statutes or by Federal Constitution. 45 L Ed 2d 841.

Refusals to deal as violations of the federal antitrust laws (15 USCS 1, 2, 23). 41 ALR Fed 175.

Valid governmental action [\*\*\*\*32] as conferring immunity or exemption from private liability under the federal antitrust laws. 12 ALR Fed 329.

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## Am. Soc'y of Mech. Eng'Rs v. Hydrolevel Corp.

Supreme Court of the United States

January 13, 1982, Argued ; May 17, 1982, Decided

No. 80-1765

### **Reporter**

456 U.S. 556 \*; 102 S. Ct. 1935 \*\*; 72 L. Ed. 2d 330 \*\*\*; 1982 U.S. LEXIS 3 \*\*\*\*; 50 U.S.L.W. 4512; 1982-2 Trade Cas. (CCH) P64,730

AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. v. HYDROLEVEL CORP.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

**Disposition:** [635 F.2d 118](#), affirmed.

## **Core Terms**

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apparent authority, anti trust law, Boiler, antitrust, subcommittee, fuel, cutoff, codes, antitrust violation, treble damages, nonprofit, Sherman Act, low-water, non profit organization, commercial enterprise, organizations, agency law, standard-setting, anticompetitive, reputation, purposes, antitrust liability, treble-damages, associations, effective, ratified, intent of congress, time delay, tax-exempt, customer

## **LexisNexis® Headnotes**

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Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

Torts > Vicarious Liability > Agency Relationships > General Overview

Business & Corporate Law > Agency Relationships > General Overview

Business & Corporate Law > Agency Relationships > Authority to Act > General Overview

Business & Corporate Law > Agency Relationships > Duties & Liabilities > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Negligent Acts of Agents > Liability of Principals

Business & Corporate Law > ... > Duties & Liabilities > Unlawful Acts of Agents > General Overview

**[HN1](#)[ Authority to Act, Apparent Authority**

Under general rules of agency law, principals are liable when their agents act with apparent authority and commit torts.

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

## [\*\*HN2\*\*](#) Authority to Act, Apparent Authority

Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons.

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

Torts > Vicarious Liability > Agency Relationships > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Unlawful Acts of Agents > General Overview

## [\*\*HN3\*\*](#) Authority to Act, Apparent Authority

Under an apparent authority theory, liability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person, the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

## [\*\*HN4\*\*](#) Authority to Act, Apparent Authority

The apparent authority theory is the settled rule in the federal system.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Business & Corporate Law > Agency Relationships > Types > General Agents

Governments > Courts > Common Law

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

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

## [\*\*HN5\*\*](#) Regulated Industries, Higher Education & Professional Associations

Victorian common law does not define the limits of the antitrust private action. The court looks to the general principles of the common law for guidance in deciding the scope of the antitrust cause of action, but the court's decisions are determined by the congressional intent that led to the enactment of the antitrust laws, a desire to enhance competition.

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

## **HN6** [down] **Private Actions, Remedies**

The antitrust private cause of action is at least as broad as a plaintiff's right to sue for analogous torts, absent indications that the antitrust laws are not intended to reach so far.

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

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

## **HN7** [down] **Private Actions, Remedies**

The apparent authority theory is consistent with the congressional intent, expressed in the antitrust laws, to encourage competition.

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

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

Torts > ... > Punitive Damages > Availability > Employers

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

## **HN8** [down] **Regulated Practices, Private Actions**

Antitrust treble damages are designed in part to punish past violations of the antitrust laws. But treble damages are also designed to deter future antitrust violations. Moreover, the antitrust private action serves primarily as a remedy for the victims of antitrust violations.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

## **HN9** [down] **Regulated Industries, Higher Education & Professional Associations**

Nonprofit organizations can be held liable under the antitrust laws.

## **Lawyers' Edition Display**

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### **Decision**

Nonprofit association of mechanical engineers responsible for promulgation of industry codes, held civilly liable under antitrust laws for antitrust violations of its agents committed with apparent authority.

### **Summary**

Shortly after the manufacturer of a low-water fuel cutoff, a safety device for heating boilers, secured an important customer, the company which had dominated the market for low-water fuel cutoffs became concerned. The vice-president of the dominant manufacturer, who was also vice-chairman of the subcommittee of the association of mechanical engineers which, among other things, promulgated and published codes and standards for areas of engineering and industry, including the code applicable to cutoffs, and several company officials met with the chairman of that subcommittee. They decided to send an inquiry to the association's committee concerned with boilers asking whether a fuel cutoff with a time delay--which was employed by the new manufacturer, but not employed in the dominant manufacturer's product--satisfied the requirements of the applicable association-promulgated code. The two individuals, as vice-chairman and chairman, respectively, of the relevant subcommittee cooperated in drafting a letter, one they thought would elicit a negative response. Following the association's standard routine, the chairman prepared a response which, in effect, declared the competitor's product unsafe. Salesmen of the dominant manufacturer used the response to discourage customers from buying the competitor's product, so that the manufacturer successfully used his position within the association in an effort to thwart the competitor's challenge. The competitor subsequently sought a correction from the association of the response, but continued to suffer marked resistance after the pertinent committee replied. After the vice-chairman's part in drafting the original letter of inquiry became public, the competitor filed an action in the United States District Court for the Eastern District of New York against the association, and other parties, alleging that their actions had violated 1 and 2 of the Sherman Act ([15 USCS 1, 2](#)). After the other parties settled, the lawsuit proceeded to trial against the association, as the remaining defendant. The competitor requested that the trial court instruct the jury that the association could be held liable under the antitrust laws for its agents' conduct if the agents acted within the scope of their apparent authority. The District Court rejected this approach and instead, at the association's suggestion, charged the jury that the association could be held liable only if it had ratified its agents' actions or the agents had acted in pursuit of the association's interests. The jury, nonetheless, returned a verdict for the competitor. The United States Court of Appeals for the Second Circuit concluded that the association could be held liable if its agents had acted within the scope of their apparent authority, and since the District Court had delivered a charge that was more favorable to the defendant than the law requires, affirmed the jury's finding that the association was liable under 1 of the Sherman Act for its agents' actions ([635 F2d 118](#)).

On certiorari, the United States Supreme Court affirmed. In an opinion by Blackmun, J., joined by Brennan, Marshall, Stevens, and O'Connor, JJ., it was held that the association was civilly liable under the antitrust laws for the antitrust violations of its agents committed with apparent authority, this being consistent with the congressional intent to encourage competition, the imposition of treble damages not being inconsistent with the purposes of the antitrust laws and principles of agency law on the grounds that such damages are punitive and that under traditional agency law the courts do not employ apparent authority to impose punitive damages upon a principal for the acts of its agents, and the fact that the association was a nonprofit organization not weakening the force of the antitrust and agency principles that indicate that the association should be held liable for the competitor's antitrust injuries.

Burger, Ch. J., concurred in the judgment, agreeing that the judgment against the association should be affirmed since the association permitted itself to be used to further the scheme which caused injury to the competitor and at no time disavowed the challenged conduct of its members who misused their position in the association, and that under the instructions approved by the association and given by the District Court, the jury found that the association had ratified or adopted the conduct in question.

Powell, J., joined by White and Rehnquist, JJ., dissenting, expressed the view that the holding that standard-setting organizations may be held liable for the acts of their agents even though the organization never ratified, authorized, or derived any benefit whatsoever from the fraudulent activity of the agent and even though the agent acted solely for his private employer's gain, and the imposition of the potentially crippling burden of treble damages, was, at least as applied to nonprofit organizations, inconsistent with the weight of precedent and the intent of Congress, unsupported by the rules of agency law, and irrelevant to the achievement of the goals of the antitrust laws.

## Headnotes

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PRACTICES §12 > safety standards for low-water fuel cutoffs -- liability of nonprofit association of engineers -- agents acting with apparent authority -- imposition of treble damages -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D]

A nonprofit membership association of mechanical engineers engaged in, among other things, the promulgation and publication of codes and standards for areas of engineering and industry is civilly liable under the antitrust laws for the antitrust violations of its agents committed with apparent authority--which violations arose when the chairman of one of the association's subcommittees helped a manufacturer of low-water fuel cutoffs for heating boilers request a ruling on the satisfaction of pertinent code requirements of a competitor's cutoffs and then prepared the association's response which in effect declared the competitor's product unsafe and which was used by the manufacturer's salesmen to discourage customers from buying the competitor's product--this being consistent with the congressional intent to encourage competition, the imposition of treble damages not being inconsistent with the purposes of the antitrust laws and principles of agency law on the grounds that such damages are punitive and that under traditional agency law the courts did not employ apparent authority to impose punitive damages upon a principal for the acts of its agents, and the fact that the association is a non-profit organization not weakening the force of the antitrust and agency principles that indicate that the association should be held liable for the competitor's antitrust injuries. (Powell, White and Rehnquist, JJ., dissented from this holding.)

AGENT §22 > principal's liability for agent's acting with apparent authority -- tortious actions of agent -- > Headnote:

[LEdHN\[2\]](#) [2]

Under general rules of agency law, principals are liable when their agents act with apparent authority and commit torts analogous to antitrust violations; a principal is liable for an agent's fraud though the agent acts solely to benefit himself, if the agent acts with apparent authority; a principal is liable for an agent's misrepresentations that cause pecuniary loss to a third party, when the agent acts within the scope of the apparent authority; if an agent is guilty of defamation, the principal is liable so long as the agent was apparently authorized to make the defamatory statement; and a principal is responsible if an agent acting with apparent authority tortiously injures the business relations of a third person.

PRACTICES §7 > antitrust laws -- construction -- common law -- > Headnote:

[LEdHN\[3A\]](#) [3A] [LEdHN\[3B\]](#) [3B]

Victorian common law does not define the limits of the antitrust private action; the United States Supreme Court will look to the general principles of the common law for guidance in deciding the scope of the antitrust cause of action, but its decisions are determined by the congressional intent that led to the enactment of the antitrust laws.

PRACTICES §9 > antitrust private cause of action -- breadth -- analogous torts -- > Headnote:

[LEdHN\[4\]](#) [4]

The antitrust private cause of action is at least as broad as a plaintiff's right to sue for analogous torts, absent indications that the antitrust laws are not intended to reach so far.

PRACTICES §12 > antitrust laws -- liability of nonprofit organizations -- > Headnote:

LEdHN[5] [5]

Nonprofit organizations can be held liable under the antitrust laws.

## Syllabus

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Petitioner, a nonprofit membership corporation with over 90,000 members drawn from all fields of mechanical engineering, promulgates codes for areas of engineering and industry. Much of its work is done through volunteers from industry and government. The codes, while only advisory, have a powerful economic influence, many of them being incorporated by reference in federal regulations and state and local laws. Respondent marketed a safety device for use in water boilers and secured a customer that previously had purchased the competing product of McDonnell & Miller, Inc. (M&M). One of M&M's officials, a vice president (James), was vice chairman of petitioner's subcommittee that drafted, revised, and interpreted the segment of petitioner's [\*\*\*2] code governing the safety device in question. Subsequently he and other M&M officials met with the subcommittee's chairman (Hardin). As a result, M&M sent a letter to petitioner asking whether a safety device with a feature such as one contained in respondent's device satisfied the pertinent code requirements. The letter was referred to Hardin, as chairman of the subcommittee, and ultimately an "unofficial response" was issued, prepared by Hardin but mailed on petitioner's stationery over the signature of one of petitioner's full-time employees. The response in effect declared respondent's product unsafe. Thereafter, M&M's salesmen used the subcommittee's response to discourage customers from buying respondent's product. Respondent subsequently sought a correction from petitioner of the unofficial response; respondent continued to suffer market resistance after the pertinent committee replied. After James' part in the drafting of the original letter of inquiry became public, respondent filed suit in Federal District Court against petitioner (and others who settled), alleging violation of the Sherman Act. The trial court rejected respondent's request for jury instructions that [\*\*\*3] petitioner could be held liable for its agents' conduct if they acted within the scope of their apparent authority. Instead, the jury was instructed that petitioner could be held liable only if it had ratified its agents' actions or if the agents had acted in pursuit of petitioner's interests. The jury, nonetheless, returned a verdict for respondent. The Court of Appeals affirmed, concluding that petitioner could be held liable if its agents had acted within the scope of their apparent authority, and that thus the charge was more favorable to petitioner than the law required.

*Held:* Petitioner is civilly liable under the antitrust laws for the antitrust violations of its agents committed with apparent authority. Pp. 565-576.

(a) Under general rules of agency law, principals are liable when their agents act with apparent authority and commit torts analogous to the antitrust violation presented here. An agent who appears to have authority to make statements for his principal gives to his statements the weight of the principal's reputation -- in this case, the weight of petitioner's acknowledged expertise in boiler safety. Pp. 565-570.

(b) Petitioner's liability under a theory [\*\*\*4] of apparent authority is consistent with the congressional intent behind the antitrust laws to encourage competition. Petitioner wields great power in the Nation's economy, and when it cloaks its subcommittee officials with the authority of its reputation, it permits those agents to affect the destinies of businesses and thus gives them the power -- as illustrated by the facts of this case -- to frustrate competition in the marketplace. A rule that imposes liability on the standard-setting organization -- which is best situated to prevent antitrust violations through the abuse of its reputation -- is most faithful to the congressional intent that the private right of action deter antitrust violations. On the other hand, a ratification rule would have anticompetitive effects, encouraging petitioner to do as little as possible to oversee its agents since it could avoid liability by ensuring that it remained ignorant of its agents' conduct. And a rule whereby petitioner would not be liable unless its agents acted with an intent to benefit petitioner would be irrelevant to the antitrust laws' purposes. The anticompetitive practices

of petitioner's agents are repugnant to the antitrust [\*\*\*\*5] laws even if the agents act without any intent to aid petitioner, and petitioner should be encouraged to eliminate the anticompetitive practices of all its agents acting with apparent authority, especially those who use their positions in petitioner solely for their own benefit or the benefit of their employers. Pp. 570-574.

(c) Application of the theory of apparent authority is not improper on the asserted ground that treble damages for antitrust violations are punitive and that under traditional agency law the courts do not employ apparent authority to impose punitive damages upon a principal for the acts of its agents. Since treble damages also serve as a means of deterring antitrust violations and of compensating victims, it is in accord with both the purposes of the antitrust laws and principles of agency law to hold petitioner liable for the acts of agents committed with apparent authority. Nor does the fact that petitioner is a nonprofit organization weaken the force of the antitrust and agency principles that indicate that it should be liable for respondent's antitrust injuries. Pp. 574-576.

**Counsel:** Harold R. Tyler, Jr., argued the cause for petitioner. With him on the [\*\*\*\*6] briefs were Richard D. Parsons, Frederick T. Davis, and Steven C. Charen.

Carl W. Schwarz argued the cause for respondent. With him on the brief were Stephen P. Murphy and William H. Barrett.

Deputy Solicitor General Shapiro argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Solicitor General Lee, Assistant Attorney General Baxter, Barry Grossman, and Ernest J. Isenstadt. \*

**Judges:** BLACKMUN, J., delivered the opinion of the Court, in which [\*\*\*\*7] BRENNAN, MARSHALL, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, post, p. 578. POWELL, J., filed a dissenting opinion, in which WHITE and REHNQUIST, JJ., joined, post, p. 578.

**Opinion by:** BLACKMUN

## Opinion

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[\*558] [\*\*\*335] [\*\*1938] JUSTICE BLACKMUN delivered the opinion of the Court.

LEdHN[1A] [1A]Petitioner, the American Society of Mechanical Engineers, Inc. (ASME), is a nonprofit membership corporation organized in 1880 under the laws of the State of New York. This case presents the important issue of the Society's civil liability under the antitrust laws for acts of its agents performed [\*559] with apparent authority. Because the judgment of the Court of Appeals upholding civil liability is consistent with the central purposes of the antitrust laws, we affirm that judgment.

[\*\*1939] I

ASME has over 90,000 members drawn from all fields of mechanical engineering. It has an annual operating budget of over \$ 12 million. It employs a full-time staff, but much of its work is done through volunteers from

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\* Briefs of amici curiae urging reversal were filed by Michael D. Brown for the American Association of Engineering Societies, Inc.; by Lewis H. Van Dusen, Jr., for the American Society for Testing and Materials; by Robert J. Siverd for the Institute of Electrical and Electronics Engineers, Inc.; by David Crump for the Legal Foundation of America; and by Daniel J. Piliero II for the National Fire Protection Association.

Merle L. Royce and James P. Chapman filed a brief for ECOS Electronic Corp. as amicus curiae urging affirmance.

Briefs of amici curiae were filed by Henry A. Field, Jr., for Adolph J. Ackerman; and by Kim Zeitlin for the National Commission for Health Certifying Agencies.

industry and government. The Society engages [\*\*\*\*8] in a number of activities, such as publishing a mechanical engineering magazine and conducting educational and research programs.

In addition, ASME promulgates and publishes over 400 separate codes and standards for areas of engineering and industry. These codes, while only advisory, have a powerful influence: federal regulations have incorporated many of them by reference, as have the laws of most States, the ordinances of major cities, and the laws of all the Provinces of Canada. See Brief for Petitioner 2. Obviously, if a manufacturer's product cannot satisfy the applicable ASME code, it is at a great disadvantage in the marketplace.

Among ASME's many sets of standards is its Boiler and Pressure Vessel Code. This set, like ASME's other codes, is very important in the affected industry; it has been adopted by 46 States and all but one of the Canadian Provinces. See *id.*, at 5. Section IV of the code sets forth standards for components of heating boilers, including "low-water fuel cutoffs." If the water in a boiler drops below a level sufficient to moderate the boiler's temperature, the boiler can "dry fire" or even explode. A low-water fuel cutoff does what its name [\*\*\*\*9] implies: when the water in the boiler falls below a certain level, the device blocks the flow of fuel to the boiler before the water level reaches a dangerously low point. To prevent dry firing and boiler explosions, para. HG-605 of Section IV provides that each boiler "shall have an automatic low-water fuel cutoff so located as to automatically cut [\*560] off the fuel supply when the surface of the water falls to the lowest visible part of the water gage glass." Plaintiff's Exhibit 30A. See [635 F.2d 118, 121 \(CA2 1980\)](#).

For some decades, McDonnell & Miller, Inc. (M&M), has dominated the market for low-water fuel cutoffs. [\*\*\*336] But in the mid-1960's, respondent Hydrolevel Corporation entered the low-water fuel cutoff market with a different version of this device. The relevant distinction, for the purposes of this case, was that Hydrolevel's fuel cutoff, unlike M&M's, included a time delay.<sup>1</sup>

[\*\*\*\*10] In early 1971, Hydrolevel secured an important customer. Brooklyn Union Gas Company, which had purchased M&M's product for several years, decided to switch to Hydrolevel's probe. Not surprisingly, M&M was concerned.

Because of its involvement in ASME, M&M was in an advantageous position to react to Hydrolevel's challenge. ASME's governing body had delegated the interpretation, formulation, and revision of the Boiler and Pressure Vessel Code to a Boiler and Pressure Vessel Committee. See App. 120. That committee in turn had authorized subcommittees to respond to public inquiries about the interpretation of the code. An M&M vice president, John W. James, was vice chairman of the subcommittee which drafted, revised, and interpreted Section IV, the segment of the Boiler and Pressure Vessel Code governing low-water fuel cutoffs.

After Hydrolevel obtained the Brooklyn Union Gas account, James and other M&M officials met with T. R. Hardin, [\*561] the chairman [\*\*1940] of the Section IV subcommittee.<sup>2</sup> The participants at the meeting planned a course of action. They decided to send an inquiry to ASME's Boiler and Pressure Vessel Committee asking whether a fuel cutoff with [\*\*\*\*11] a time delay would satisfy the requirements of para. HG-605 of Section IV. James and Hardin, as vice chairman and chairman, respectively, of the relevant subcommittee, cooperated in drafting a letter, one they thought would elicit a negative response.

<sup>1</sup> M&M's fuel cutoff is a floating bulb that falls with the boiler's water level. When the level reaches the critical point, the bulb causes a switch to cut off the boiler's fuel supply. Hydrolevel's product, in contrast, was an immovable probe inserted in the side of the boiler; when the water level dropped below the probe, the fuel supply was interrupted. Because water in a boiler surges and bubbles, the level intermittently would seem to fall slightly below the probe even though the overall level remained safe. To prevent premature fuel cutoff because of these intermittent fluctuations, Hydrolevel's probe included a time delay that allowed the boiler to operate for a brief period after the water level dropped beneath the probe.

<sup>2</sup> Hardin was an executive vice president of Hartford Steam Boiler Inspection and Insurance Company. A controlling interest in Hartford was owned by International Telephone and Telegraph Corporation, which acquired M&M within the year. See [635 F.2d 118, 122, n. 2 \(CA2 1980\)](#).

The letter was mailed over the name of Eugene Mitchell, an M&M vice president, to W. Bradford Hoyt, secretary of the Boiler and Pressure Vessel Committee and a full-time ASME employee. App. 62. Following ASME's standard routine, Hoyt referred the letter to Hardin, as chairman of the subcommittee. Under the procedures of the Boiler and Pressure Vessel Committee, the subcommittee chairman -- Hardin -- could draft a response to a public inquiry without referring it to the entire [\*\*\*\*12] subcommittee if he treated it as an "unofficial communication."

As a result, Hardin, one of the very authors of the inquiry, prepared the response. *Id.*, at 63. Although he retained control over the [\*\*\*337] inquiry by treating the response as "unofficial," the response was signed by Hoyt, secretary of the Boiler and Pressure Vessel Committee, and it was sent out on April 29, 1971, on ASME stationery. *Id.*, at 64. Predictably, Hardin's prepared answer, utilized verbatim in the Hoyt letter, condemned fuel cutoffs that incorporated a time delay:

"A low-water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gage glass is located in accordance with the requirements of Par. HG-602(b), it is the intent of Par. HG-605(a) that the low-water fuel [\*562] cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gage glass."

"There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low-water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous [\*\*\*13] point during a time delay period." *Ibid.*

As the Court of Appeals in this case observed, the second paragraph of the response does not follow from the first: "If the cut-off is positioned sufficiently above the lowest permissible water level, a cut-off with a time-delay could assure, even allowing for the delay, that the fuel supply would stop by the time the water fell to the lowest visible part of the water-gauge glass." [635 F.2d, at 122-123](#). Hoyt signed and mailed the response without checking its accuracy. See App. 124-126.

As anticipated, M&M seized upon this interpretation of Section IV to discourage customers from buying Hydrolevel's product. It instructed its salesmen to tell potential customers that Hydrolevel's fuel cutoff failed to satisfy ASME's code. See [635 F.2d, at 123](#). And M&M's employees did in fact carry the message of the subcommittee's response to customers interested in buying fuel cutoffs. Thus, M&M successfully used its position within ASME in an effort to thwart Hydrolevel's competitive challenge.

Several months later, Hydrolevel learned of the subcommittee interpretation from a former customer. Hydrolevel wrote ASME for [\*\*\*\*14] a copy of the April 29 response. On February 8, 1972, over the signature of the assistant secretary of the Boiler and Pressure Vessel Committee, ASME sent Hydrolevel a letter quoting the two paragraphs of the April 29 interpretation of Section IV. App. 66-67.

[\*\*1941] On March 23, Hydrolevel's president wrote Hoyt and demanded that ASME cure the effect of the April 29 letter by sending a correction to whomever might have received it. [\*563] *Id.*, at 68-73. Hoyt placed Hydrolevel's complaint on the agenda for the meetings of the Boiler and Pressure Vessel Committee and Subcommittee to be held on May 4 and 5.

On May 4, the subcommittee voted to confirm the intent of the first quoted paragraph of the April 29 letter. James, by then the chairman of the subcommittee, reported this recommendation to the committee on May 5. *Id.*, at 82. Thereafter, the committee designated two persons to propose a response to Hydrolevel. *Id.*, at 83. In the end, on June 9 the committee mailed Hydrolevel a reply that "confirmed the intent" of [\*\*\*338] the April 29 letter. *Id.*, at 84.

<sup>3</sup> The committee's letter further advised that there was

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<sup>3</sup> Actually, the committee "confirmed the intent" of ASME's February 8, 1972, letter to Hydrolevel. That letter, however, simply quoted the original April 29, 1971, response. See App. 66-67.

"no intent in Section IV [\*\*\*\*15] to prohibit the use of low water fuel cutoffs having time delays in order to meet the requirements of Par. HG-605(a). This paragraph relates itself to Par. HG-602(b) which specifically delineates the location of the lowest visible part of the water gage glass." *Ibid.*

The committee concluded the letter with a warning paragraph suggested by James, see *id.*, at 111-112:

"If a means for retarding control action is incorporated in a low-water fuel cutoff, the termination of the retard function must operate to cutoff the fuel supply before the boiler water level falls below the visible part of the water gage glass." *Id.*, at 84.

After this response to its complaint, Hydrolevel continued to suffer from market resistance. Two years later, the Wall Street Journal published an article describing Hydrolevel's predicament [\*\*\*\*16] in trying to sell a fuel cutoff that many in the industry thought to be in violation of ASME's code. Wall Street Journal, July 9, 1974, p. 44, col. 1; App. 94-98. Reacting [\*564] to this story, ASME's Professional Practice Committee opened an investigation. It never discovered that James had been involved with the original inquiry. In a resolution reporting the results of its investigation, the committee decided that all ASME officials had acted properly. Further, the Professional Practice Committee "[commended] [James] for conducting himself in a forthright manner." *Id.*, at 104.

Subsequently, James' part in drafting the original letter of inquiry became public because of his testimony in March 1975 before a Senate Subcommittee. See Voluntary Industrial Standards: Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 186-199 (1975) (testimony of John W. James of M&M (ITT)); see also *id.*, at 171-185 (testimony of Eugene Mitchell, Manager of Original Equipment Sales, ITT Fluid Handling Division). Within a few months, Hydrolevel filed suit against ITT, ASME, and Hartford in the United States [\*\*\*\*17] District Court for the Eastern District of New York. Hydrolevel alleged that the defendants' actions had violated §§ 1 and 2 of the Sherman Act, *15 U. S. C. §§ 1 and 2*. App. 11. Prior to trial, Hydrolevel sold all its assets, except this suit, for salvage value. Ultimately, ITT and Hartford settled.

The lawsuit proceeded to trial against ASME, as the remaining defendant. Hydrolevel requested the trial court to instruct the jury that ASME could be held liable under the antitrust laws for its agents' conduct if the agents acted within the scope of their apparent authority. See *id.*, at 59. The District Court, however, rejected this approach and, instead, at ASME's suggestion, charged the jury that ASME could be held liable only if it had ratified its agents' actions or if the agents had acted in [\*\*\*339] pursuit of ASME's interests. The District Court explained to the jury:

"[\*\*1942] If the officers or agents act on behalf of interests adverse to the corporation or acted for their own economic benefit or the benefit of another person or corporation, [\*565] and this action was not ratified or adopted by the defendant [ASME], their misconduct [\*\*\*\*18] cannot be considered that of the corporation with which they are associated." *Id.*, at 49.

The jury, nonetheless, returned a verdict for Hydrolevel.

Before the Court of Appeals, the parties disputed the sufficiency of the evidence to support a verdict based on the District Court's instruction. See *635 F.2d, at 125*. But the Court of Appeals chose not to decide whether the evidence was sufficient to demonstrate that ASME had ratified its agents' actions or that the agents had acted to advance ASME's interests. Instead, after surveying the law of agency and the policies underlying the antitrust laws, the Court of Appeals concluded that ASME could be held liable if its agents had acted within the scope of their apparent authority. *Id., at 124-127*. Since, therefore, the District Court had delivered "a charge that was more favorable to the defendant than the law requires," *id., at 127*, the Court of Appeals affirmed the judgment on liability, that is, the jury's finding that ASME was liable under § 1 of the Sherman Act for its agents' actions.<sup>4</sup>

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<sup>4</sup>The Court of Appeals remanded the case to the District Court after finding that the damages awarded Hydrolevel were excessive and that the District Court had made errors in its calculation of damages. *635 F.2d, at 128-131*. The damages issue is the subject of a pending cross-petition for certiorari, No. 80-1771, filed April 22, 1981. Hydrolevel's damages arguments are not now before us, and we express no opinion on that aspect of the Court of Appeals' decision.

[\*\*\*\*19] Because the Court of Appeals' decision presents an important issue concerning the interpretation of the antitrust laws, we granted certiorari. 452 U.S. 937 (1981).

II

A

LEdHN[2] [2]As the Court of Appeals observed, HN1 under general rules of agency law, principals are liable when their agents act with [\*566] apparent authority<sup>5</sup> and commit torts analogous to the antitrust violation presented by this case. See generally 10 W. Fletcher, Cyclopedic of the Law of Private Corporations para. 4886, pp. 400-401 (rev. ed. 1978); W. Seavey, Law of Agency § 92 (1964). For instance, a principal is liable for an agent's fraud though the agent acts solely to benefit himself, if the agent acts with apparent authority. See, e. g., *Standard Surety & Casualty Co. v. Plantsville Nat. Bank*, 158 F.2d 422 (CA2 1946), cert. denied, 331 U.S. 812 (1947). Similarly, a principal is liable for an agent's misrepresentations that cause pecuniary loss to a third party, when the agent acts within [\*\*\*\*20] the scope of his apparent authority. *Restatement (Second) of Agency* [\*\*\*340] §§ 249, 262 (1957) (Restatement); see *Rutherford v. Rideout Bank*, 11 Cal. 2d 479, 80 P. 2d 978 (1938). Also, if an agent is guilty of defamation, the principal is liable so long as the agent was apparently authorized to make the defamatory statement. Restatement §§ 247, 254. Finally, a principal is responsible if an agent acting with apparent authority tortiously injures the business relations of a third person. *Id.*, § 248 and Comment b, p. 548.

[\*\*\*\*21] HN3 Under an apparent authority theory, "[liability] is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him." *Id.*, § 261, Comment a, p. 571. See *Record v. Wagner*, 100 N. H. 419, 128 A. 2d 921 (1957). As with the April 29 letter issued by the [\*\*1943] Boiler and Pressure Vessel Subcommittee, the injurious statements are "effective, in part at least, because of the personality of the one [\*567] publishing it." Restatement § 247, Comment c, p. 545. In other words, "one who appears to have authority to make statements for the [principal] gives to his statements the weight of the [principal's] reputation," *ibid.* -- in this case, the weight of ASME's acknowledged expertise in boiler safety. See generally W. Prosser, Law of Torts 467 (4th ed. 1971).

ASME's system of codes and interpretative advice would not be effective if the statements of its agents did not carry with them the assurance that persons in the affected industries [\*\*\*\*22] could reasonably rely upon their apparent trustworthiness. Behind the principal's liability under an apparent authority theory, then, is "business expediency -- the desire that third persons should be given reasonable protection in dealing with agents." *Restatement* § 262, *Comment a*, p. 572. See *Ricketts v. Pennsylvania R. Co.*, 153 F.2d 757 (CA2 1946). The apparent authority theory thus benefits both ASME and the public whom ASME attempts to serve through its codes: "It is . . . for the ultimate interest of persons employing agents, as well as for the benefit of the public, that persons dealing with agents should be able to rely upon apparently true statements by agents who are purporting to act and are apparently acting in the interests of the principal." *Restatement* § 262, *Comment a*, p. 572.

HN4 The apparent authority theory has long been the settled rule in the federal system. See *Ricketts v. Pennsylvania R. Co.*, 153 F.2d, at 759. In *Friedlander v. Texas & Pacific R. Co.*, 130 U.S. 416 (1889), the Court held that an [\*\*\*\*23] employer was not liable for the fraud of his agent, when the employer could derive no benefit from the agent's fraud. But *Gleason v. Seaboard Air Line R. Co.*, 278 U.S. 349 (1929), discarded that rule. In *Gleason*, a railroad's employee sought to enrich himself by defrauding a customer of the railroad through a forged bill of lading. The Court of Appeals had absolved the railroad from liability because the employee perpetrated the fraud solely for his own benefit. But this Court reversed, [\*568] overruling *Friedlander*. 278 U.S., at 357. Noting that "there was . . . no want of authority in the agent," *id.*, at 355, the Court held the railroad [\*\*\*341] liable despite

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<sup>5</sup> HN2 "Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." *Restatement (Second) of Agency* § 8 (1957).

456 U.S. 556, \*568; 102 S. Ct. 1935, \*\*1943; 72 L. Ed. 2d 330, \*\*\*341; 1982 U.S. LEXIS 3, \*\*\*\*23

the agent's desire to benefit only himself. It explained that "few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own." *Id., at 356.*

**LEdHN/3A**[<sup>↑</sup>] [3A]In a wide variety of areas, the federal courts, like this Court in *Gleason*, have imposed [\*\*\*\*24] liability upon principals for the misdeeds of agents acting with apparent authority. See, e. g., *Dark v. United States*, 641 F.2d 805 (CA9 1981) (federal tax liability); *National Acceptance Co. v. Coal Producers Assn.*, 604 F.2d 540 (CA7 1979) (common-law fraud); *Holloway v. Howerdd*, 536 F.2d 690 (CA6 1976) (federal securities fraud); *United States v. Sanchez*, 521 F.2d 244 (CA5 1975) (bail bond fraud), cert. denied, 429 U.S. 817 (1976); *Kerbs v. Fall River Industries, Inc.*, 502 F.2d 731 (CA10 1974) (federal securities fraud); *Gilmore v. Constitution Life Ins. Co.*, 502 F.2d 1344 (CA10 1974) (common-law fraud).<sup>6</sup>

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[\*569] [\*\*1944] **LEdHN/4**[<sup>↑</sup>] [4]In the past, the Court has refused to permit broad common-law barriers to relief to constrict the antitrust private right of action. *Perma Life Mufflers, Inc. v. International Parts* [\*\*\*342] *Corp.*, 392 U.S. 134 (1968). It stated there that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat" to deter antitrust violations. *Id., at 139*. In *Perma Life Mufflers*, the Court honored that purpose by denying defendants the right to invoke a common-law defense (the doctrine of *in pari delicto*) that was inconsistent with the antitrust laws. In this case, we can honor the statutory purpose best by interpreting **HN6**[<sup>↑</sup>] the antitrust private cause of action to be at least as broad as a plaintiff's right to sue for analogous torts, absent indications that the antitrust laws are not intended to reach so far. See *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981); [\*\*\*\*26] *Perma Life Mufflers*, [**\*570**] 392 U.S., at 138.

<sup>6</sup>The dissent delves into the agency law of the late 19th century and concludes that "it was far from clear" that a principal could be held liable for the deliberate torts of his agent. *Post*, at 587. But in fact, while there was a division of authority, many courts had made it very clear that principals could be held liable for torts analogous to the antitrust violations committed by ASME's agents.

For instance, a treatise of that era noted that a "considerable number of American courts" had held the principal liable for the agent's fraud, though the agent acted solely for his own benefit, and praised a leading opinion for its "singular ability and lucidity." E. Huffcut, Elements of the Law of Agency § 155, p. 168 (1895). Indeed, the author commented that the cases holding a principal liable when his agent acted with apparent authority and for the agent's sole benefit were "too various to be referred to in detail." *Id.*, § 157.

In holding a telegraph company liable for the fraud of its agent committed solely for his personal benefit, one court summarized the reasoning that became widespread during the last half of the 19th century: "Persons receiving dispatches in the usual course of business, when there is nothing to excite suspicion, are entitled to rely upon the presumption that the agents intrusted with the performance of the business of the company have faithfully and honestly discharged the duty owed by it to its patrons, and that they would not knowingly send a false or forged message." *McCord v. Western Union Tel. Co.*, 39 Minn. 181, 185, 39 N. W. 315, 317 (1888). See, e. g., *Bank of Batavia v. New York, L.E. & W.R. Co.*, 106 N. Y. 195, 12 N. E. 433 (1887).

**LEdHN/3B**[<sup>↑</sup>] [3B]Thus, based on the agency law of the late 19th century, there is ample support for holding ASME liable, particularly since Congress intended that the antitrust laws be given broad, remedial effect. See, e. g., *Pfizer Inc. v. Government of India*, 434 U.S. 308, 312-313 (1978). But, as we have made clear before, **HN5**[<sup>↑</sup>] Victorian common law does not define the limits of the antitrust private action. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968) (refusing to apply the ancient defense of *in pari delicto* in antitrust cases). We look to the general principles of the common law for guidance in deciding the scope of the antitrust cause of action, see *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978), but our decisions are determined by the congressional intent that led to the enactment of the antitrust laws, a desire to enhance competition, see *id., at 688, 691*. Here, general agency principles would lead to a finding of liability if the violation in this case were a mere tort; and imposing liability on ASME in accord with those common-law principles honors the congressional intent behind the antitrust statutes.

Our remaining inquiry, then, is whether ASME's liability under a theory of apparent authority is consistent with the intent behind the antitrust laws.<sup>7</sup>

[\*\*\*\*27] B

LEdHN[1B] [1B] We hold that HN7 the apparent authority theory is consistent with the congressional intent to encourage competition. ASME wields great power in the Nation's economy. [\*\*1945] Its codes and standards influence the policies of numerous States and cities, and, as has been said about "so-called voluntary standards" generally, its interpretations of its guidelines "may result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country," as well as entire segments of an industry. H. R. Rep. No. 1981, 90th Cong., 2d Sess., 75 (1968). ASME can be said to be "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce." *Fashion Originators' Guild of America, Inc.* v. FTC, 312 U.S. 457, 465 (1941). When it cloaks its subcommittee officials with the authority of its reputation, [\*571] ASME permits those agents to affect the destinies of businesses and thus gives them the power to frustrate [\*\*\*\*28] competition in the marketplace.

The facts of this case dramatically illustrate the power of ASME's agents to restrain competition. M&M instigated the submission of a [\*\*\*343] single inquiry to an ASME subcommittee. For its efforts, M&M secured a mere "unofficial" response authored by a single ASME subcommittee chairman. Yet the force of ASME's reputation is so great that M&M was able to use that one "unofficial" response to injure seriously the business of a competitor.

Furthermore, a standard-setting organization like ASME can be rife with opportunities for anticompetitive activity. Many of ASME's officials are associated with members of the industries regulated by ASME's codes. Although, undoubtedly, most serve ASME without concern for the interests of their corporate employers, some may well view their positions with ASME, at least in part, as an opportunity to benefit their employers. When the great influence of ASME's reputation is placed at their disposal, the less altruistic of ASME's agents have an opportunity to harm their employers' competitors through manipulation of ASME's codes.<sup>8</sup>

[\*\*\*\*29] Again, the facts of this case are illustrative. Hardin was able to issue an interpretation of ASME's Boiler and Pressure Vessel Code which in effect declared Hydrolevel's product unsafe. Hardin's interpretation of the code was sent out [\*572] under Hoyt's name as secretary of the committee, though Hoyt exercised only ministerial duties and played no role in confirming the substance of the April 29, 1971, letter. See App. 125-126. Thus,

<sup>7</sup> Evidently, in recent years no Court of Appeals other than the Second Circuit has directly decided whether a principal can be held liable for antitrust damages based on an apparent authority theory. But cf. Truck Drivers' Local No. 421 v. United States, 128 F.2d 227 (CA8 1942). The dissent cites several cases, stating that they appear to reject antitrust liability based on apparent authority. See *post*, at 581-582, and n. 6. United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1090 (CA5), cert. denied, 437 U.S. 903 (1978); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004-1007 (CA9 1972), cert. denied *sub nom.* Western International Hotels Co. v. United States, 409 U.S. 1125 (1973); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204 (CA3 1970), cert. denied, 401 U.S. 948 (1971). A fair reading of those cases, however, reveals that they did not discuss the merits of an apparent authority theory of antitrust liability. The dissent then dismisses other cases that also do not directly discuss the validity of the apparent authority theory, but that contain language approving apparent authority instructions, see *post*, at 583-584, n. 8. United States v. Continental Group, Inc., 603 F.2d 444, 468, n. 5 (CA3 1979), cert. denied, 444 U.S. 1032 (1980); Continental Baking Co. v. United States, 281 F.2d 137, 150-151 (CA6 1960).

<sup>8</sup> For example, James' employer did not overlook his usefulness as an ASME official. In November 1973, even after the Hydrolevel events had taken place, an M&M executive recommended that James be retained by M&M. The recommendation stated:

"A major reason for the continued success at M&M is a result of [James'] efforts and skill in influencing the various code making bodies to 'legislate' in favor of M&M products. This has been a planned strategy for the business under E. N. McDonnell and carried out with considerable success as evidenced by the M&M market penetration of 70 plus %." App. 86.

The writer emphasized a number of James' ASME activities, including: "Member of main boiler and pressure code committee" and "Chairman of the heating boiler sub-committee (section 4)." *Ibid.*

without any meaningful safeguards,<sup>9</sup> ASME entrusted the interpretation of one of its codes to Hardin. As a result, M&M was able to use ASME's reputation to hinder Hydrolevel's competitive threat.

[\*\*\*\*30] A principal purpose of the antitrust private cause of action, see [15 U. S. C. § 15](#), is, of course, to deter anticompetitive practices. *Pfizer Inc. v. Government of India*, [434 U.S. 308, 314 \(1978\)](#); *Perma Life Mufflers, Inc. v. International Parts Corp.*, [392 U.S., at 139](#); see *Reiter v. Sonotone Corp.*, [442 U.S. 330, 342-344 \[\\*\\*1946\] \(1979\)](#). It is true that imposing liability on ASME's agents themselves will have some deterrent effect, because they will know that if they violate the antitrust laws through their participation in ASME, they risk the consequences of personal civil liability. But if, in addition, ASME is civilly liable for the antitrust violations of its agents acting with apparent authority, it is much more likely that [\*\*\*344] similar antitrust violations will not occur in the future. "[Pressure] [will be] brought on [the organization] to see to it that [its] agents abide by the law." *United States v. A & P Trucking Co.*, [358 U.S. 121, 126 \(1958\)](#). Only ASME can take systematic steps to make improper conduct on the part of all its agents unlikely, [\*\*\*\*31] and the possibility of civil liability will inevitably be a powerful incentive for ASME to take those steps.<sup>10</sup> Thus, a rule that imposes liability on the [\*573] standard-setting organization -- which is best situated to prevent antitrust violations through the abuse of its reputation -- is most faithful to the congressional intent that the private right of action deter antitrust violations.<sup>11</sup>

[\*\*\*\*32] The wisdom of the apparent authority rule becomes evident when it is compared to the alternative approaches advanced by the District Court's instructions to the jury, see [supra, at 564-565](#), and advocated by ASME.<sup>12</sup> First, ASME insists that it should not be held liable unless it ratified the actions of its agents. But a ratification rule would have anticompetitive effects, directly contrary to the purposes of the antitrust laws. ASME could avoid liability by ensuring that it remained ignorant of its agents' conduct, and the antitrust laws would therefore encourage ASME to do as little as possible to oversee its agents. Thus, ASME's ratification theory would actually enhance the likelihood that the Society's reputation would be used for anticompetitive ends.

[\*\*\*\*33] Second, ASME contends that it should not be held liable unless its agents act with an intent to benefit the Society. This proposed rule falls short, though, because it is simply irrelevant to the purposes of the antitrust laws. Whether [\*574] they intend to benefit ASME or not, ASME's agents exercise economic power because they act with the force of the Society's reputation behind them. And, whether they act in part to benefit ASME or solely to benefit themselves or their employers, ASME's agents can have the same [\*\*\*345] anticompetitive effects on the marketplace. The anticompetitive practices of ASME's agents are repugnant to the antitrust laws even if the agents

<sup>9</sup> ASME suggests that Hardin's response did undergo a form of committee review, because he sent copies to the chairman and vice chairman of the full committee. Brief for Petitioner 8. But there is no indication that those officers carefully scrutinized Hardin's response. And certainly they will be encouraged to give responses a closer look in the future if ASME is subject to antitrust liability under an apparent authority theory.

<sup>10</sup> Permitting private plaintiffs to sue defendants like ASME will make that incentive especially powerful, because private suits are an important element of the Nation's antitrust enforcement effort:

"Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." *Reiter v. Sonotone Corp.*, [442 U.S. 330, 344 \(1979\)](#) (emphasis in original).

<sup>11</sup> The apparent authority rule is also consistent with the congressional desire that the antitrust laws sweep broadly. Congress extended antitrust liability to "every person," [15 U. S. C. §§ 1, 2](#), and defined "person" to include corporations and associations, [15 U. S. C. § 7](#).

<sup>12</sup> ASME insists that the Court foreclosed imposition of civil antitrust liability based on apparent authority in *Mine Workers v. Coronado Coal Co.*, [259 U.S. 344 \(1922\)](#), and *Coronado Coal Co. v. Mine Workers*, [268 U.S. 295 \(1925\)](#). Those cases, however, are not controlling here. The Court expressly pointed out: "Here it is not a question . . . of holding out an appearance of authority on which some third person acts." [259 U.S., at 395; 268 U.S., at 304-305](#). In fact, it noted: "A corporation is responsible for the wrongs committed by its agents in the course of its business, and this principle is enforced against the contention that torts are *ultra vires* of the corporation." [259 U.S., at 395; 268 U.S., at 304](#).

456 U.S. 556, \*574; 102 S. Ct. 1935, \*\*1946; 72 L. Ed. 2d 330, \*\*\*345; 1982 U.S. LEXIS 3, \*\*\*\*33

act without any intent to aid ASME, and ASME should be encouraged to eliminate the anticompetitive practices of all its agents acting with apparent authority, especially those who use their positions in [\*\*1947] ASME solely for their own benefit or the benefit of their employers.<sup>13</sup>

[\*\*\*\*34] C

LEdHN[1C] [↑] [1C]Finally, ASME makes two additional arguments in an attempt to avoid antitrust liability. It characterizes treble damages for antitrust violations as punitive, and urges that [\*575] under traditional agency law the courts do not employ apparent authority to impose punitive damages upon a principal for the acts of its agents. See *Lake Shore & M.S.R. Co. v. Prentice*, 147 U.S. 101 (1893); *United States v. Ridglea State Bank*, 357 F.2d 495 (CA5 1966); see also Restatement § 217C.<sup>14</sup> It is true that HN8 [↑] antitrust treble damages were designed in part to punish past violations of the antitrust laws. See *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S., at 639. But treble damages were also designed to deter future antitrust [\*\*\*346] violations. *Ibid.* Moreover, the antitrust private action was created primarily as a remedy for the victims of antitrust violations. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-486 (1977); [\*\*\*\*35] see *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746-747 (1977). Treble damages "make the remedy meaningful by counterbalancing 'the difficulty of maintaining a private suit'" under the antitrust laws. *Brunswick Corp.*, *supra*, at 486, n. 10, quoting 21 Cong. Rec. 2456 (1890) (remarks of Sen. Sherman). Since treble damages serve as a means of deterring [\*576] antitrust violations and of compensating victims, it is in accord with both the purposes of the antitrust laws and principles of agency law to hold ASME liable for the acts of agents committed with apparent authority. See Restatement § 217C, Comment c, p. 474 (rule limiting principal's liability for punitive damages does not apply to special statutes giving triple damages).

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<sup>13</sup> The dissent argues, unconvincingly to us, that imposing antitrust liability on ASME will not advance enforcement of the antitrust laws.

The dissent claims that the apparent authority rule will "[encourage] plaintiffs to seek recovery from nonprofit organizations, rather than from the commercial enterprises that benefited from the violation." *Post*, at 591. Here, the dissent engages in "curious reasoning," see *ibid.*, because today's decision does not encourage a plaintiff to sue any particular defendant to the exclusion of others; it merely lists organizations like ASME among the possible defendants in cases similar to this one. Indeed, although the litigation in this case ended with ASME as the only remaining defendant, it seems likely that, in general, a plaintiff will prefer to bring a corporate defendant like M&M (ITT) before a jury, rather than a nonprofit organization that understandably may appeal to a jury's sympathies and that may not provide so deep a pocket as a commercial enterprise.

In addition, the dissent insists that ASME and other such organizations cannot take steps to reduce the likelihood that antitrust violations like the one that occurred in this case will take place in the future. *Post*, at 591-592, n. 17. Evidently ASME does not agree, because it has instituted new procedures specifically in response to this suit. See n. 15, *infra*. The dissent simply refuses to accept that ASME and other such organizations can react to potential antitrust liability by making their associations less subject to fraudulent manipulation.

<sup>14</sup> A majority of courts, however, have held corporations liable for punitive damages imposed because of the acts of their agents, in the absence of approval or ratification. See W. Prosser, *Law of Torts* 12 (4th ed. 1971). *E. g.*, *Kelite Products, Inc. v. Binzel*, 224 F.2d 131, 144 (CA5 1955) ("[The] jury may in its discretion assess punitive damages against a corporate defendant for oppressive acts of its agent done in the course of his employment, regardless of actual authority or ratification"); *Mayo Hotel Co. v. Danciger*, 143 Okla. 196, 200, 288 P. 309, 313 (1930) (holding corporate principal liable for punitive damages, noting that "the legal malice of the servant is the legal malice of the corporation"). In fact, the Court may have departed from the trend of late 19th-century decisions when it issued *Lake Shore & M.S.R. Co. v. Prentice*, 147 U.S. 101 (1893), requiring the principal's participation, approval, or ratification. See *Singer Manufacturing Co. v. Holdfoot*, 86 Ill. 455, 459 (1877) ("if the wrongful act of the agent is perpetrated while ostensibly discharging duties within the scope of the corporate purposes, the corporation may be liable to vindictive damages"); see also *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 803-805, 22 So. 53, 57-59 (1897); *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 223-224 (1869).

[\*\*1948] [LEDHN\[5\]](#) [5]In addition, ASME contends it should not bear the risk of loss for antitrust violations committed by its agents acting with apparent authority because it is a nonprofit organization, not a business seeking profit. But it is beyond debate that [HN9](#) nonprofit organizations can be held liable under the antitrust laws. See, e. g., *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Associated Press v. United States*, 326 U.S. 1 (1945). Although ASME may not operate for profit, it does derive benefits from its codes, including the fees the Society receives for its code-related publications and services, the prestige the codes bring to the Society, the influence they permit ASME to wield, and the aid the standards provide the profession of mechanical engineering. Since the antitrust violation in this case could not have occurred without ASME's codes and ASME's method of administering them, it is not unfitting that ASME be liable for the damages [\*\*\*37] arising from that violation. See W. Prosser, Law of Torts 459 (4th ed. 1971); W. Seavey, Law of Agency § 83 (1964). Furthermore, as shown above, ASME is in the best position to take precautions that will prevent future antitrust violations.<sup>15</sup> Thus, the fact that ASME is a nonprofit organization does not weaken the force of the antitrust and agency principles that [\*\*\*347] indicate that ASME should be liable for Hydrolevel's antitrust injuries.

[\*\*\*38] [\*577] III

[LEDHN\[1D\]](#) [1D]We need not delineate today the outer boundaries of the antitrust liability of standard-setting organizations for the actions of their agents committed with apparent authority. There is no doubt here that Hardin acted within his apparent authority when he answered an inquiry about ASME's Boiler and Pressure Vessel Code as the chairman of the relevant ASME subcommittee. And in this case, we do not face a challenge to a good-faith interpretation of an ASME code reasonably supported by health or safety considerations. See *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). We have no difficulty in finding that this set of facts falls well within the scope of ASME's liability on an apparent authority theory.

When ASME's agents act in its name, they are able to affect the lives of large numbers of people and the competitive fortunes of businesses throughout the country. By holding ASME liable under the antitrust laws for the antitrust violations of its agents committed with apparent authority, we recognize the important role of ASME and its agents in the economy, [\*\*\*39] and we help to ensure that standard-setting organizations will act with care when they permit their agents to [\*578] speak for them. We thus make it less likely that competitive challengers like Hydrolevel will be hindered by agents of organizations like ASME in the future.

[\*\*1949] The judgment of the Court of Appeals is affirmed.

So ordered.

**Concur by:** BURGER

## Concur

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<sup>15</sup>Indeed, ASME has initiated procedures to protect against similar misadventures in the future. After its experience with the Hydrolevel affair, ASME began issuing a publication containing all written technical inquiries pertaining to codes and their interpretations, a publication available through subscription. See ASME Court of Appeals Exhibit Volume, p. 110; App. in Nos. 79-7254, 79-7260 (CA2), pp. 784 and 804. Apparently, ASME now gives its interpretations close scrutiny through the publication process. According to the publication's foreword, "[in] some few instances, a review of the interpretation revealed a need for corrections of a technical nature." In those cases, ASME published "a corrected interpretation . . . immediately after the original reply." See Interpretations, ASME Boiler and Pressure Vessel Code, Foreword (No. 7: Replies to Technical Inquiries January 1, 1980, through June 30, 1980). In addition, the readers are advised that ASME may reconsider its interpretation "when or if additional information is available which the inquirer believes might affect the interpretation." *Ibid.*

ASME's new procedure illustrates that the standard-setting organization itself is in the best position to prevent antitrust violations committed by its agents acting with apparent authority, and therefore that the policies of antitrust and agency law call for imposition of liability upon ASME.

CHIEF JUSTICE BURGER, concurring in the judgment.

I concur in the judgment. However, I do not agree with the reasoning that leads the Court to its conclusion. I agree with the result reached since petitioner permitted itself to be used to further the scheme which caused injury to respondent. At no time did petitioner disavow the challenged conduct of its members who misused their positions in the Society. Under the instructions approved by petitioner and given by the District Court, the jury found that petitioner had "ratified or adopted" the conduct in question. \* On that basis the judgment against petitioner should be affirmed but no general rule can appropriately be drawn from the Court's holding.

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**Dissent by: POWELL**

## Dissent

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[\*\*\*348] JUSTICE POWELL, with whom JUSTICE WHITE and JUSTICE REHNQUIST join, dissenting.

The Court today adopts an unprecedented theory of antitrust liability, one applied specifically to a nonprofit, standard-setting association but a theory with undefined boundaries that could encompass a broad spectrum of our country's nonprofit associations. The theory, based on the agency concept of "apparent authority," would impose the potentially [\*579] crippling burden of treble damages. In this case, the Court specifically holds that standard-setting organizations may be held liable for the acts of their agents even though the organization never ratified, authorized, or derived any benefit whatsoever from the fraudulent activity of the agent and even though the agent acted solely for his private employer's gain. In my view such an expansive rule of strict liability, at least as applied to nonprofit organizations, is inconsistent with the weight of precedent and the intent of Congress, unsupported by the rules of agency law that the Court purports to apply, and irrelevant to the achievement of the goals of the antitrust laws. Accordingly, I dissent.

I

The [\*\*\*\*41] American Society of Mechanical Engineers (ASME) is a nonprofit, tax-exempt, membership corporation with over 90,000 members. Among its many activities, ASME drafts over 400 codes and standards. These codes have been developed through the voluntary efforts of ASME's members, and are a valuable public service. The Boiler and Pressure Vessel Code, relevant in this case, is some 18,000 pages in length. In addition to preparing codes and standards, ASME members -- through committees -- perform the further service of responding to public inquiries concerning interpretation of the codes. Some measure of the extent of this service can be gathered from the 20,000-30,000 inquiries a year received by the organization concerning just the Boiler and Pressure Vessel Code alone. As a result of a fraudulent answer given by an ASME subcommittee chairman to one of these thousands of inquiries, the entire organization has been exposed to potentially crippling liability.<sup>1</sup>

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\* The District Court instructed the jury that it could find petitioner liable for the acts of its members only if they acted on behalf of the corporation within the scope of their actual authority or if the corporation thereafter ratified or adopted their acts. Judge Weinstein refused to give the apparent authority instruction proposed by respondent. Nevertheless, the Court of Appeals did not rest on the narrow ratification theory underlying the District Court judgment, but instead reached out to decide that petitioner is liable for the acts of its members if those acts are found to be within their apparent authority: the jury never found liability on that theory and the Court of Appeals went "out of bounds." I regard that aspect of the Court of Appeals' opinion and that part of the Court's opinion today as dictum not essential to support the result reached.

<sup>1</sup> The District Court entered a judgment against ASME in an amount in excess of \$ 7 million -- a sum that would destroy many such organizations. By contrast McDonnell & Miller, Inc., and Hartford Steam Boiler Inspection and Insurance Co., commercial enterprises owned by International Telephone and Telegraph Corp., and the beneficiaries of the fraudulent conduct in this case, have settled for \$ 725,000 and \$ 75,000 respectively. Curiously, the Court speaks of the "wisdom" of a rule that encourages such an inequitable result. *Ante*, at 573. The Court correctly notes that the Court of Appeals reversed the damages award

[\*\*\*\*42] [\*580] [\*\*1950] Of course, nonprofit associations are subject to the antitrust laws. The Court has so held on several occasions. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).<sup>2</sup> [\*\*\*\*43] Yet the Court also has noted that the antitrust [\*\*\*349] laws need not be applied to professional organizations in precisely the same manner as they are applied to commercial enterprises. In *Goldfarb, supra*, for example, the Court recognized that "[it] would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts that originated in other areas."<sup>3</sup> *Id., at 788, n. 17*. In view of this recognition, one would not have expected the Court to take [\*581] the occasion of this case to promulgate an expansive rule of antitrust liability not heretofore applied by it to a commercial enterprise much less to a nonprofit organization.

Indeed, the Court points to no case in which any court has held the apparent authority theory of liability applicable in an antitrust case. Nor does the Court cite a single decision in which the apparent authority theory of liability has been applied in a case involving treble or punitive damages and an agent who acts without any intention of benefiting the principal.<sup>4</sup> In a word, the Court makes new law, largely ignoring existing precedent.

[\*\*\*\*44] In *Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922), and *Coronado Coal Co. v. Mine Workers*, 268 U.S. 295 (1925), the Court held that the national union was not liable as principal for the antitrust violations of the local union. The Court was hesitant to impose treble-damages liability on a membership organization in the absence of clear evidence showing ratification or authorization.<sup>5</sup> [\*\*\*\*45] Even in the context [\*582] of

against ASME and remanded for a new estimation. Perhaps the final award against ASME will be substantially less than the \$ 7.5 million judgment originally entered. Yet there is no assurance of this.

<sup>2</sup> Although associations now are viewed as being within the scope of the antitrust laws, to my knowledge this is the first case in which the Court has held explicitly that a nonprofit, tax-exempt association is subject to treble-damages liability. Cf. Areeda, Antitrust Immunity for "State Action" After *Lafayette*, 95 Harv. L. Rev. 435, 455 (1981) (footnote omitted) ("[Antitrust] liability does not necessarily call for a damage remedy. . . . The Supreme Court may come to agree that antitrust liability may vary according to the remedies sought").

ASME refers to itself as a "society." I use the words "organization" and "association" interchangeably to describe a broad range of nonprofit, membership entities and tax-exempt organizations.

<sup>3</sup> *Goldfarb* "properly left to the Court some flexibility in considering how to apply traditional Sherman Act concepts to professions long consigned to self-regulation." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 699 (1978) (BLACKMUN, J., concurring in part and concurring in judgment). See *id., at 701* (stressing the need for "elbow-room for realistic application of the Sherman Act" to other than commercial enterprises).

<sup>4</sup> The Court cites to several decisions, *ante*, at 575, n. 14, in which courts have levied punitive damages upon the principal for the "unauthorized" acts of an agent. It is not clear that any of these decisions holds the principal liable upon the apparent authority of an agent acting without intent to benefit the principal. None of them concerns the antitrust laws. None involves a nonprofit entity.

<sup>5</sup> "[A] trades-union . . . might be held liable . . . but certainly it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association." *Coronado Coal Co.*, 268 U.S., at 304. The Court refused to impose liability on the national union simply because it had the authority to discipline the local. See *Mine Workers*, 259 U.S., at 395. Moreover, the Court indicated that this was not a case in which a theory of apparent authority might be applied -- despite the national union's power over the local and despite the support of the strike by the president of the national union: "Here it is not a question of contract or of holding out an appearance of authority on which some third person acts." *Ibid.* The majority quotes this language, see *ante*, at 573, n. 12, but misses its point. The *Mine Workers* Court well could have characterized the case before it as involving an exercise of apparent authority by the local union or the national president; it refused to do so. See *Truck Drivers' Local No. 421 v. United States*, 128 F.2d 227, 235 (CA8 1942) (viewing the holding in *Mine Workers* as rejecting an apparent authority theory of antitrust liability).

commercial [\*\*\*350] [\*\*1951] enterprises, the Courts of Appeals that have considered the matter appear to reject antitrust liability upon mere apparent authority.<sup>6</sup>

[\*\*\*\*46] Moreover, the Court as much as concedes that an apparent authority rule of liability has rarely, if ever, been used to impose punitive damages upon the principal. See *ante*, at 570, n. 7.<sup>7</sup> Rather than contest this well-established rule of [\*583] agency law, the Court argues that treble damages are not punitive or, even if they are, the purposes of the antitrust laws override this basic rule of the law of agency. In fact the Court often has characterized treble-damages liability as punitive: "The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981). See P. Areeda & D. Turner, *Antitrust Law* para. 311b (1978) ("whether or not compensatory damages ever punish, treble damages are indisputably punishment"). In the context of a nonprofit, tax-exempt organization it would seem even [\*\*\*351] clearer that treble damages primarily punish and are intended to do so. There is no element of restitution here; ASME has derived no ill-gotten gain from the misdeeds of its disloyal agent.

[\*\*\*\*47] In short, the Court launches on an uncharted course. I know of no antitrust decision that has imposed treble-damages liability upon a commercial enterprise, let alone a nonprofit organization, solely on an [\*\*1952] apparent authority theory of liability.<sup>8</sup> The antitrust laws have been effectively enforced for over 90 years without

<sup>6</sup> See *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204 (CA3 1970); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (CA5 1978); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (CA9 1972). Accord *Truck Drivers' Local No. 421 v. United States*, *supra*, at 235 (union not liable for the antitrust violations of a local division: "To bind the union in a situation such as this, actual and authorized agency was necessary; mere apparent authority would not be sufficient").

In *United States v. Hilton Hotels Corp.*, *supra*, for example, the Court of Appeals for the Ninth Circuit ruled out liability on apparent authority by requiring that the agent hold a "purpose to benefit the corporation." *Id.*, at 1006, n. 4. In light of the rule adopted by the Court today, it is ironic that the Court of Appeals in *Hilton Hotels* considered that its rule of liability was actually a broad one. Although implicitly rejecting a rule of apparent authority, the court held that a corporation could be liable for the acts of its agents "even when done against company orders." *Id.*, at 1004. The court argued that such an expansive rule of liability was justified in the case before it, involving a commercial enterprise, because the Sherman Act was "primarily concerned with the activities of business entities." *Ibid.* A rule promoting corporate liability was supported further by the consideration that antitrust violations "are usually motivated by a desire to enhance profits," "involve basic policy decisions, and must be implemented over an extended period of time," and "if a violation of the Sherman Act occurs, the corporation, and not the individual agents, will have realized the profits from the illegal activity." *Id.*, at 1006. None of these considerations in support of a broad rule of liability applies to the fraudulent, self-interested conduct of ASME members in this case. Yet the Court adopts a rule of liability far broader than that stated by the Ninth Circuit with such care.

<sup>7</sup> In *Lake Shore & M.S.R. Co. v. Prentice*, 147 U.S. 101, 107 (1893), the Court held that "[a] principal . . . cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent." In a generally similar context, the Court of Appeals for the Fifth Circuit held that a principal was not subject to double damages under the False Claims Act, 31 U. S. C. § 231, for the fraud of an agent acting without intent to benefit the principal. See *United States v. Ridglea State Bank*, 357 F.2d 495, 500 (1966) ("[The] present action is not primarily one for the recovery of a loss caused by an employee, but is one which, if successful, must result in a recovery wholly out of proportion to actual loss. . . . [The] case calls for the application of the rule . . . that the knowledge or guilty intent of an agent not acting with a purpose to benefit his employer, will not be imputed to the employer").

<sup>8</sup> Hydrolevel argues that *Continental Baking Co. v. United States*, 281 F.2d 137, 150-151 (CA6 1960), and *United States v. Continental Group, Inc.*, 603 F.2d 444, 468, n. 5 (CA3 1979), support an apparent authority theory of liability in antitrust cases. Yet in *Continental Baking* the court endorsed an instruction that included an "apparent" authority component on the theory that a corporation must "answer for [an agent's] violations of law which inure to the corporation's benefit." There was no such benefit in this case. Moreover, in *Continental Group* the court simply affirmed an apparent authority instruction without comment, in a footnote, in a case presenting many other issues. The agents in that case were clearly acting for the benefit of their corporations, and the court may have considered that the apparent authority instruction, if error, was harmless.

the need for such a theory of liability. Indeed, the very facts of this case belie the necessity [\*584] of simply *creating* a new theory of liability; the jury found ASME liable not upon a theory of apparent authority but upon the traditional basis of ratification or authorization. The apparent authority rationale was not even argued to the Second Circuit on appeal. The Second Circuit, and now this Court, reach out unnecessarily to embrace a dubious new doctrine. That the Court chooses the case of a nonprofit, tax-exempt organization to announce its new rule is particularly inappropriate. Nor can the Court's decision be squared with the intent of Congress in enacting the Sherman Act.

[\*\*\*\*48] II

This case comes before us as an antitrust suit under the Sherman Act. Our focus should be on the intent of Congress.<sup>9</sup> See *Texas Industries, Inc. v. Radcliff Materials, Inc., supra, at 639*. And that intent emerges clearly from the legislative history:

[\*585] "[The Sherman Act] was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The [\*\*\*352] end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services . . ." *Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-493 (1940)*.

[\*\*\*\*49] Senator Sherman twice explained that his bill was directed at anticompetitive *business* activity and not at voluntary associations. In response to a request that the legislation be more clearly tailored to "these great trusts, these great corporations, these large moneyed institutions," Senator Sherman answered as follows:

"The bill as reported contains three or four simple propositions which relate only to contracts, combinations, agreements made with a view and designed to carry out a certain purpose . . . It does not interfere in the slightest degree with voluntary associations . . . to advance the interests of a particular trade or occupation. . . . [\*\*1953] They are not business combinations. They do not deal with contracts, agreements, etc. They have no connection with them." 21 Cong. Rec. 2562 (1890).

When Senator Hoar expressed the concern that the bill would prohibit temperance organizations, and proposed an amendment to exclude them from the bill, Senator Sherman spoke reassuringly:

"I have no objection to [this] amendment, but I do not see any reason for putting in temperance societies any more than churches or school-houses or any other [\*\*\*\*50] kind of [\*586] moral or educational associations that may be organized. Such an association is not in any sense a combination or arrangement made to interfere with interstate commerce." *Id.*, at 2658.

In any event, the comparative paucity of authority on the question of apparent authority liability in antitrust cases simply underscores that the Court today is making new law. It also is doing so needlessly as ASME was neither tried nor found liable on the basis of apparent authority.

<sup>9</sup> Relying on a novel public policy as to nonprofit associations, the Court makes little effort to ascertain the intent of Congress either through examining the legislative history or the common law then existing. Indeed, the Court implies that the agency law of the 19th century and "Victorian" common law are irrelevant. See *ante*, at 568-569, n. 6. In seeking to understand the Sherman Act, this Court frequently has found it necessary to "delve" into the history of the common law both "Victorian" and from earlier eras. See *Standard Oil Co. v. United States, 221 U.S. 1, 51-62 (1911)*. The Civil Rights Acts of the 19th century were also the work of a "Victorian" Congress, yet we have looked both to the legislative history and to the common law when interpreting those Acts. See, e.g., *Pierson v. Ray, 386 U.S. 547 (1967)*.

456 U.S. 556, \*586; 102 S. Ct. 1935, \*\*1953; 72 L. Ed. 2d 330, \*\*\*352; 1982 U.S. LEXIS 3, \*\*\*\*50

This legislative history does not indicate that nonprofit associations are exempt from the antitrust laws. See [Goldfarb v. Virginia State Bar, 421 U.S. 773 \(1975\)](#). But it does counsel against adopting a new rule of agency law that extends the exposure of such organizations to potentially destructive treble-damages liability.

In addition to the legislative history, it is particularly relevant -- in view of the Court's reliance on the modern law of agency -- to consider the accepted law of agency as it existed at the time the Sherman Act was passed.<sup>10</sup> [\*\*\*\*51] It was clear under basic principles then established that [\*\*\*353] charitable organizations were not liable for the torts of their agents.<sup>11</sup> [\*587] Whether a nonprofit, tax-exempt, public service association would have been considered a "charity" is not clear, but one would think that it well might have been.<sup>12</sup>

Moreover, under the laws of agency as known to the Congress that passed the Sherman Act it was far from clear -- even in cases involving commercial enterprises -- that a principal could be held liable for the deliberate torts of his agent. According to one treatise of the time, "[while] . . . it is well settled that the [\*\*\*\*52] principal is liable for the negligent act of his agent, committed in the course of his employment, it has been held in many cases, that he is not liable for the agent's willful or malicious act." F. Mechem, Law of Agency § 740 (1889) (hereafter Mechem).<sup>13</sup> [\*\*\*\*53] [\*\*\*354] Indeed, the Court [\*\*1954] acknowledges [\*588] this much when it notes that in [Friedlander](#)

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<sup>10</sup> In [Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 644, n. 17 \(1981\)](#), the Court stated that the rules of common law in effect at the time the Act was passed were relevant to an inquiry into congressional intent: "[It] is clear that when the Sherman Act was adopted the common law did not provide a right to contribution among tortfeasors participating in proscribed conduct. One permissible, though not mandatory, inference is that Congress relied on courts' continuing to apply principles in effect at the time of enactment." The contemporary case law is relevant precisely because "Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." [National Society of Professional Engineers v. United States, 435 U.S., at 688](#).

<sup>11</sup> "Where a corporation or trustees are conducting a charity with funds devoted to that purpose, the charitable organization is not liable for the torts of its agents or servants, as 'it would be against all law and all equity to take those trust funds, so contributed for a special, charitable purpose, to compensate injuries inflicted or occasioned by the negligence of the agents or servants.'" E. Huffcut, Elements of the Law of Agency § 161, pp. 176-177 (1895).

<sup>12</sup> In describing the liability of the principal for the torts of the agent, the First Restatement of Agency, published in 1933, cautioned that it did not address "any limitations upon liability because of . . . rules applicable to special classes, such as charitable organizations." **Restatement of Agency 458**.

<sup>13</sup> The complete statement of the rule by Mechem is as follows:

"While . . . it is well settled that the principal is liable for the negligent act of his agent, committed in the course of his employment, it has been held in many cases, that he is not liable for the agent's willful or malicious act. . . .

"The tendency of modern cases, however, is to attach less importance to the intention of the agent and more to the question whether the act was done within the scope of the agent's employment; and it is believed that the true rule may be said to be that the principal is responsible for the wilful or malicious acts of his agent, if they are done in the course of his employment and within the scope of his authority; *but that the principal is not liable for such acts, unless previously expressly authorized, or subsequently ratified, when they are done outside of the course of the agent's employment, and beyond the scope of his authority, as where the agent steps aside from his employment to gratify some personal animosity, or to give vent to some private feeling of his own*" (emphasis added, footnotes omitted).

Although the concept of within "scope of authority" is not always easy to apply, it is beyond rational doubt that in this case the fraudulent activity of Hardin and James, on behalf of McDonnell & Miller, Inc., was not within the scope of any authority of ASME. In addition, some courts have found that "[a] purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." See [United States v. Hilton Hotels Corp., 467 F.2d, at 1006, n. 4](#). It is just such a purpose that was lacking in this case. Indeed, the "agents" in this case were not acting simply for their own malicious purposes, they were acting on behalf of another principal with interests inimical to those of ASME. It is far from clear under principles of agency law that Hardin and James are properly described as the "agents" of ASME when they act to serve a different principal and without any intention of benefiting ASME. See Mechem § 67 ("A person may act as agent of two or more principals . . . if his duties to each are not such as to require . . . incompatible things").

456 U.S. 556, \*588; 102 S. Ct. 1935, \*\*1954; 72 L. Ed. 2d 330, \*\*\*354; 1982 U.S. LEXIS 3, \*\*\*\*53

v. Texas & Pacific R. Co., 130 U.S. 416 (1889) -- decided the year before the Sherman Act was passed -- "the Court held that an employer was not liable for the fraud of his agent, when the employer could derive no benefit from the agent's fraud." *Ante*, at 567.<sup>14</sup>

Finally, no principle of agency law was more firmly established in 1890 -- or now for that matter -- than that *punitive* damages are not awarded against a principal for the acts of an agent acting only with apparent authority and without any [\*\*\*\*54] intention of benefiting the principal. Indeed, this Court [\*589] went further, holding more generally that "punitive or vindictive damages, or smart money, [are] not to be allowed as against the principal, unless the principal participated in the wrongful act of the agent." *Lake Shore & M.S.R. Co. v. Prentice*, 147 U.S., at 114, quoting Hagan v. Providence & Worcester R. Co., 3 R.I. 88, 91 (1854).<sup>15</sup>

[\*\*\*\*55] [\*\*1955] Although an inquiry into the legislative history and the law of agency is not conclusive, it does cast serious doubt on the Court's choice of this case to promulgate a new rule of antitrust liability. Whatever the merits of an apparent authority rule of liability for commercial enterprises, in the case of a treble-damages action against a nonprofit organization, such a rule is inconsistent with what appears to have been the intent of Congress in enacting the Sherman Act.

[\*590] [\*\*\*355] III

The underlying theme of the Court's opinion seems to be that any rule of agency law that widens the net of antitrust enforcement and liability should be adopted. Yet the Court has never used such a single-minded approach in the past. In United States v. United States Gypsum Co., 438 U.S. 422 (1978), for example, the Court held that intent is a necessary element of a criminal antitrust offense. The Court was unwilling to assume that Congress had intended to create a strict liability crime despite the potential increase in deterrence. Similarly, in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), the Court held that indirect [\*\*\*\*56] purchasers could not use a "pass-on" theory to recover

The Court suggests that there was a division among the state courts on the question of the principal's liability for the malicious acts of an agent. See *ante*, at 568-569, n. 6. But there was no division in the federal courts, the courts charged with enforcement of the Sherman Act. In any event, surely the point is not whether every state court recognized the rule stated by this Court in Friedlander v. Texas & Pacific R. Co., 130 U.S. 416 (1889). Rather, if there was any uncertainty as to the liability of a commercial principal for the torts of an agent acting in the course of employment, how much clearer must it be that a nonprofit, voluntary association would not have been held liable in treble damages for the acts of an agent acting with apparent authority only.

<sup>14</sup> The Court notes that *Friedlander* was later overruled by Gleason v. Seaboard Air Line R. Co., 278 U.S. 349 (1929). The relevance of this fact to Congress' intentions is not clear to me. There is "no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). There is no federal general law of agency. Rather we are engaged here in an exercise in statutory construction. Cf. 21 Cong. Rec. 3149 (1890) (remarks of Sen. Morgan) ("It is very true that we use common-law terms here and common-law definitions in order to define an offense which is in itself comparatively new, but it is not a common-law jurisdiction that we are conferring upon the circuit courts of the United States," quoted in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S., at 644).

<sup>15</sup> The Court responds by citing to several state law decisions indicating that in some States a principal might have been held liable in punitive damages for the acts of an agent. See *ante*, at 575, n. 14. I believe the Court overstates the extent to which 19th-century state courts imposed punitive damages on the principal for the deliberate torts of an agent. See Mechem § 751; cf. *Mayo Hotel Co. v. Danciger*, 143 Okla. 196, 200, 288 P. 309, 312 (1930) ("There are . . . respectable authorities, some of them recent ones, definitely holding that a corporation cannot be subjected to exemplary damages because of the malicious . . . acts of its agents and servants where such acts are not authorized or afterwards ratified . . . . Many of the state courts, and a majority of the federal courts, expressly adhere to that doctrine") (emphasis added). More significantly, the Court does not make clear which, if any, of the state decisions it relies upon held the principal liable for punitive damages upon the apparent authority of an agent acting without any intention of benefiting the principal. I had thought that this was the question before us. And again the Court misses the basic point: If the rule of liability adopted by the Court today would have seemed questionable in 1890 even as applied to a commercial enterprise, can there be any basis for believing that Congress intended such an extreme rule of liability to be applied to voluntary, nonprofit associations?

treble damages from an antitrust violator. The Court rejected the argument that the antitrust laws would be more effective were the class of potential plaintiffs widened. On the contrary, "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue." *Id.*, at 735. Nor would the Court accept a rule that might permit both indirect and direct purchasers to sue for the same overcharge. Such a rule "would create a serious risk of multiple liability for defendants." *Id.*, at 730. Thus, the Court has adopted a more discerning approach to questions of antitrust liability in the past -- an approach that considers the fairness and appropriateness of a rule in addition to its perceived potential for deterrence.

The Court argues that its expanded rule of liability furthers effective antitrust enforcement. One may question whether a rule of liability developed so late in the day and with so little support in precedent can be described as necessary [\*\*\*\*57] to antitrust enforcement. When one considers further that the jury found ASME liable under traditional principles, the need for an expanded rule becomes even less credible. Nor does the Court explain how its rule of apparent authority serves the purpose of effective antitrust enforcement. The [\*591] primary beneficiary in this case was McDonnell & Miller, the manufacturing company that arranged for the fraudulent ruling by the ASME subcommittee chairman. The sole purpose of the fraud was to disadvantage McDonnell & Miller's competitor. The focus of Hydrolevel's attack, however, has been on ASME.<sup>16</sup> [\*\*\*\*58] It is curious reasoning to argue, as the Court does, that a rule that encourages plaintiffs to seek recovery from nonprofit organizations, rather than from the commercial enterprises that benefited [\*\*1956] from the violation, will facilitate proper antitrust enforcement.<sup>17</sup>

[\*\*\*\*59] [\*592] In [\*\*356] a more fundamental sense, the Court's assignment of liability to ASME on a theory of apparent authority simply has no relevance to the furtherance of the purposes of the antitrust laws. ASME is not a competitor. The competition here was between McDonnell & Miller, Inc., and Hydrolevel. Of course, if ASME ratifies the fraudulent act of its agent, as the jury found, liability should attach. But the Court has devised what amounts to a rule of strict liability for voluntary associations in antitrust cases. Under the Court's rule ASME would be liable if an ASME building employee pilfered ASME stationery and supplied it to McDonnell & Miller. Similarly, if a private pharmaceutical school -- a tax-exempt corporation like ASME -- released a study condemning a particular

<sup>16</sup> Damages were awarded against ASME in an amount of \$ 7.5 million. By contrast, McDonnell & Miller settled the suit for less than a million dollars. See n. 1, *supra*. The majority's contention that "a plaintiff will prefer to bring a corporate defendant like M&M (ITT) before a jury," *ante*, at 574, n. 13, is not borne out by this case. If the Court has some other case in mind, it does not cite to it.

<sup>17</sup> The Court's argument that the imposition of treble damages will advance antitrust enforcement has a hollow ring in the context of a membership, nonprofit organization. Organizations of this kind normally function through committees composed -- as in this case -- of volunteers who are not employees, serve only at infrequent intervals, and are virtually uncontrollable by what usually is a small headquarters staff.

The Court suggests that voluntary organizations can "take steps to reduce the likelihood that antitrust violations like the one that occurred in this case will take place in the future." *Ibid.* The Court then refers to "new procedures" adopted by ASME, and criticizes my dissent for refusing "to accept that ASME and other such organizations can react to potential antitrust liability by making their associations less subject to fraudulent manipulation." *Ibid.*

It would be enlightening if the Court would explain how such an association can protect itself even from "mere tort" liability, see *ante*, at 569, n. 6, much less the treble-damages liability imposed in this case, in light of the Court's adoption of the apparent authority theory of liability. Review procedures well may be helpful to prevent mistakes made in good faith on behalf of an association. But no set of rules and regulations, and no procedures however elaborate, can protect adequately against fraud and disloyalty. In this case, for example, if ASME had required approval by a review committee or even by its governing body before the release of each of the thousands of ruling letters, a member bent on fraud could forge evidence or otherwise circumvent most safeguards. In practice, a rule of apparent authority can be a rule of strict liability as the Court today holds in this case. In the context of a loosely structured, voluntary nonprofit association it may be wholly impractical to adopt any measures that will lessen substantially the likelihood of liability, and if there is liability the Court also would impose punitive damages.

drug, because a competing drug company had suborned the professor who wrote the report, the Court's rule would subject the school to the full brunt of treble damages.

Section 1 of the Sherman Act requires a contract, combination, or conspiracy in restraint of trade. The Court attaches liability in this case on the dubious notion that ASME somehow has "conspired" with McDonnell & Miller. Yet [\*\*\*\*60] it stretches the concept of vicarious liability beyond its rational limits to conceive of Hardin and James as conspiring on behalf of ASME when they acted solely for the benefit of McDonnell & Miller and against the interests of ASME.<sup>18</sup> The Court simply opens [\*\*\*357] new vistas in the law of conspiracy and vicarious liability, as well as in the imposition of the harsh penalty of treble damages.

[\*\*\*\*61] [\*593] Whatever the application of agency law in its traditional setting, application of the most expansive rules of liability in the context of antitrust treble damages and nonprofit, [\*\*1957] tax-exempt associations threatens serious injustice and over deterrence. There is no way in which an association adequately can protect itself from this sort of liability. There is no chain of delegated authority, from stockholders through directors and officers, in the typical voluntary association. The members of these associations exercise a far less structured control than the stockholders and directors of a commercial enterprise. Perhaps ASME will attempt to protect itself by ceasing to respond to inquiries concerning its codes. That hardly would contribute either to antitrust enforcement or to the public welfare. And whereas a commercial enterprise may have the resources to bear a treble-damages award, the same cannot be said of most nonprofit organizations.<sup>19</sup>

[\*\*\*\*62] The Court is so zealous to impose treble-damages liability that it ignores a basic purpose of the Sherman Act: the preservation of *private* action contributing to the public welfare. See *United States v. United States Gypsum Co.*, 438 U.S., at 438-443. [\*594] ASME industry standard-setting can have a significant potential for consumer benefit: for example, its boiler safety information can be expensive if consumers are forced to gain it only by their own experience or by the creation of another bureaucracy. The Court's policy discussion takes no account of this potential cost. Rather, it appears to be so concerned with imposing liability that it puts at risk much of the beneficial private activity of the voluntary associations of our country.

How far the Court's holding extends is unclear. The Court emphasizes that ASME is a standard-setting organization. Yet it does not limit its rationale to these particular organizations. One must be concerned whether the new doctrine and the sweep of the Court's language will be read as exposing the array of nonprofit associations -- professional, charitable, educational, and even religious -- to a new theory [\*\*\*\*63] of strict liability in treble damages.

## References

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[3 Am Jur 2d, Agency 261; 54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 107](#), 108.5, 251

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<sup>18</sup> The intersection of the law of agency and vicarious liability with the law of conspiracy makes this a complex case. Yet the Court does not recognize this complexity. It so expands the concept of vicarious liability as to leave little content, in this case, to the requirement in § 1 of the Sherman Act that antitrust plaintiffs demonstrate a contract, combination, or conspiracy. Indeed, the Court never identifies who conspired with whom. Did James -- acting for ASME -- conspire with Hardin -- acting for McDonnell & Miller, Inc., and Hartford Steam Boiler Inspection and Insurance Co.? Or was it the other way around? Could it be said, under the Court's theory, that James had conspired with himself -- as a double agent -- thereby committing both of his "principals" to an antitrust conspiracy? In my view, it makes more sense to view the matter as a conspiracy between the agents of McDonnell & Miller, Inc., and Hartford Steam Boiler Inspection and Insurance Co. The Court's theory makes possible ratification by ASME irrelevant. In this light, ASME was as much a victim of this conspiracy as Hydrolevel.

<sup>19</sup> It is relevant to note that a nonprofit organization cannot reduce the burden of a treble-damages award by deducting the award as a business expense. See P. Areeda & D. Turner, *Antitrust Law* § 311a (1978) ("treble damages are generally a deductible business expense for federal income tax purposes").

456 U.S. 556, \*594; 102 S. Ct. 1935, \*\*1957; 72 L. Ed. 2d 330, \*\*\*357; 1982 U.S. LEXIS 3, \*\*\*\*63

12 Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade 48:21 et seq.

18 Am Jur PI & Pr Forms (Rev), Monopolies, Restraints of Trade, and Unfair Trade Practices, Form 11 et seq.

24 Am Jur Trials 1, Defending Antitrust Actions

[15 USCS 1, 2](#)

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 12, 43, 67

L Ed Index to Annos, Principal and Agent; Restraints of Trade and Monopolies

ALR Quick Index, Corporate Officers, Directors, and Agents; Principal and Agent; Restraints of Trade [\*\*\*\*64] and Monopolies

Federal Quick Index, Agency; Monopolies and Restraints of Trade

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## Ariz. v. Maricopa County Medical Soc.

Supreme Court of the United States

November 4, 1981, Argued ; June 18, 1982, Decided

No. 80-419

### **Reporter**

457 U.S. 332 \*; 102 S. Ct. 2466 \*\*; 73 L. Ed. 2d 48 \*\*\*; 1982 U.S. LEXIS 5 \*\*\*\*; 50 U.S.L.W. 4687; 1982-2 Trade Cas. (CCH) P64,792

ARIZONA v. MARICOPA COUNTY MEDICAL SOCIETY ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

**Disposition:** [643 F.2d 553](#), reversed.

## **Core Terms**

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insurers, price-fixing, per se rule, prices, consumers, price fixing, Sherman Act, respondents', condemned, patients, fee schedule, maximum price, procompetitive, literal, maximum-fee, coverage, insurance plan, antitrust, schedules, maximum, medical services, medical care, license, summary judgment, rule of reason, competitors, composed, blanket, charges, parties

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN1\*\*](#) **[ Antitrust & Trade Law, Sherman Act**

[Section 1](#) of the Sherman Act of 1890, [15 U.S.C.S. § 1](#), literally prohibits every agreement in restraint of trade.

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

### [\*\*HN2\*\*](#) **[ Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The United States Supreme Court analyzes most restraints of trade under the so-called "rule of reason." As its name suggests, the rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.

Antitrust & Trade Law > Sherman Act > General Overview

**HN3** [down] **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 1](#).

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

**HN4** [down] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The true test of legality is whether the restraint of trade imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

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

**HN5** [down] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements.

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

**HN6** [down] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Inquiry under its rule of reason ends once a price-fixing agreement is proved, for there is a conclusive presumption which brings such agreements within the statute.

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

**HN7** [down] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Any combination which tampers with price structures is engaged in an unlawful activity.

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

**HN8** [down] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Under the Sherman Act, [15 U.S.C.S. § 1](#), a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.

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

### [\*\*HN9\*\*](#) **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The elimination of so-called competitive evils in an industry is no legal justification for price-fixing agreements.

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

### [\*\*HN10\*\*](#) **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A new per se rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged.

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

### [\*\*HN11\*\*](#) **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness.

## **Lawyers' Edition Display**

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### **Decision**

Agreement among competing physicians setting, by majority vote, maximum fees for payment from participants in specified insurance plans, held per se unlawful under 1 of Sherman Act ([15 USCS 1](#)).

### **Summary**

Two Arizona county medical societies formed two "foundations for medical care" organized for the purpose of promoting fee-for-service medicine and to provide the community with a competitive alternative to existing health insurance plans. The foundations performed three primary activities including establishing the schedule of maximum fees that participating doctors agreed to accept as payment in full for services performed for patients insured under plans approved by the foundations. The state of Arizona filed a civil complaint in the United States District Court for the District of Arizona against the two county medical societies and foundations alleging that they were engaged in illegal price-fixing conspiracies in violation of 1 of the Sherman Act ([15 USCS 1](#)). The state moved for partial summary judgment after conducting a limited amount of pretrial discovery, and the District Court denied the motion but certified for interlocutory appeal the question of whether the foundations' membership agreements, which contained the promise to abide by maximum fee schedules, are illegal per se under 1 of the Sherman Act. The United States Court of Appeals for the Ninth Circuit affirmed the District Court's order refusing to enter partial

summary judgment, holding that the question could not be answered without evaluating the actual purpose and effect of the agreement at a full trial ([643 F2d 553](#)).

On certiorari, the United States Supreme Court reversed. In an opinion by Stevens, J., joined by Brennan, White, and Marshall, JJ., it was held that the maximum fee agreements, as price-fixing agreements, are per se unlawful under 1 of the Sherman Act, (1) the agreements not escaping per se condemnation because they were horizontal and fix maximum prices since horizontal agreements to fix maximum prices are placed on the same legal footing as agreements to fix minimum or uniform prices, (2) the fact that doctors--rather than nonprofessionals--were the parties to the price-fixing agreement not precluding application of the per se rule as the price-fixing agreements are not premised on public service or ethical norms, (3) the fact that the judiciary has had little antitrust experience in the health care industry being insufficient reason for not applying the per se rule, (4) the per se rule not being inapplicable because the agreements were alleged to have procompetitive justifications as the anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some, and (5) the maximum-fee schedules not involving price-fixing in only a literal sense since as agreements among independent competing entrepreneurs, the agreements fit squarely into the horizontal price-fixing mold.

Powell, J., joined by Burger, Ch. J., and Rehnquist, J., dissented, expressing the view that a decision on an incomplete record was not consistent with proper judicial resolution of an issue of this complexity, novelty, and importance to the public.

Blackmun and O'Connor, JJ., did not participate.

## **Headnotes**

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PRACTICES §42 > competing physicians -- maximum fee setting -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B]

An agreement among competing physicians setting, by majority vote, the maximum fees that they may claim in full payment for health services provided to policyholders of specified insurance plans is per se unlawful under 1 of the Sherman Act ([15 USCS 1](#)).

ERROR §1283 > partial summary judgment -- disputed issue of fact -- view of defendants -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

On the issue of whether a partial summary judgment should have been entered by a Federal District Court in favor of the plaintiffs in a case, the United States Supreme Court must assume that the defendants' version of any disputed issue of fact is correct.

ERROR §1662 > moot question -- change in practices -- > Headnote:

[LEdHN\[3A\]](#) [3A] [LEdHN\[3B\]](#) [3B]

A challenge to activities of "foundations for medical care" in the use of "relative values"--providing a numerical weight for each different medical service--and "conversion factors"--the dollar amount used to determine fees for

particular medical speciality--to determine maximum fees and submitting new few schedules to the vote of the entire physician membership is not mooted when, after the Federal District Court and the Federal Court of Appeals have rendered judgment, both foundations apparently discontinue the use of relative values and conversion factors in formulating the fee schedules and one foundation amends its bylaws to provide that the fee schedule would be adopted by majority vote of its board of trustees and not by the vote of its members.

PRACTICE §16 > rule of reason -- > Headnote:

[LEdHN\[4\]](#) [4]

The rule of reason used to determine whether an agreement is in restraint of trade in violation of 1 of the Sherman Act ([15 USCS 1](#)) requires the factfinder to decide whether under all of the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.

PRACTICES §42 > horizontal agreements -- maximum prices -- > Headnote:

[LEdHN\[5\]](#) [5]

Agreements among competing physicians setting, by majority vote, the maximum fees that they may claim in full payment for health services provided to policyholders of specified insurance plans do not escape per se condemnation under the Sherman Act ([15 USCS 1](#)) because they are horizontal and fix maximum prices since horizontal agreements to fix maximum prices are placed on the same legal footing as agreements to fix minimum or uniform prices.

PRACTICES §42 > doctors' services -- public service -- > Headnote:

[LEdHN\[6\]](#) [6]

The fact that doctors--rather than nonprofessionals--are the parties to a price-fixing agreement among competing physicians setting, by majority vote, the maximum fees that they may claim in full payment for health services provided the policyholders of specified insurance plan does not support the physicians' position that the agreements are not in violation of 1 of the Sherman Act ([15 USCS 1](#)) since the price-fixing agreements are not promised on public service or ethical norms and the physicians' claim for relief from the application of the per se rule of a violation of the Act is simply that the doctors' agreement not to charge certain insureds more than a fixed price facilitates the successful marketing of an attractive insurance plan; but the claim that the price restraint will make it easier for customers to pay does not distinguish the medical profession from any other provider of goods or services.

PRACTICES §16 > judicial experience -- per se rule -- > Headnote:

[LEdHN\[7\]](#) [7]

The fact that the judiciary has had little antitrust experience in health care industry is insufficient reason for not applying the per se rule, that price-fixing agreements are unlawful per se under the Sherman Act ([15 USCS 1 et](#)

[seq.](#)), since the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.

PRACTICES §16 > per se rule -- rule of reason -- > Headnote:

[LEdHN\[8A\]](#) [8A] [LEdHN\[8B\]](#) [8B]

A new per se rule to determine whether a particular type of restraint is a per se violation of the Sherman Act ([15 USCS 1 et seq.](#)) is not justified until the judiciary obtains considerable rule of reason experience with the particular type of restraint challenged.

PRACTICES §36 > price-fixing -- procompetitive justifications -- > Headnote:

[LEdHN\[9A\]](#) [9A] [LEdHN\[9B\]](#) [9B]

The per se rule, that price-fixing agreements are unlawful per se under the Sherman Act ([15 USCS 1 et seq.](#)), is not inapplicable to agreements alleged to have procompetitive justifications since the anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some and those claims of enhanced competition are so unlikely to prove significant in any particular case that the United States Supreme Court adheres to the rule of law that is justified in its general application.

PRACTICES §16 > COURTS §141 > per se rule -- Congress -- > Headnote:

[LEdHN\[10A\]](#) [10A] [LEdHN\[10B\]](#) [10B]

Adherence to the per se rule, that price-fixing agreements are unlawful per se under the Sherman Act ([15 USCS 1 et seq.](#)), is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the judiciary and the Congress in regulating the economy since Congress may consider the exception that the judiciary is not free to read into the statute and Congress can make per se rules inapplicable in some or all cases.

PRACTICES §42 > price-fixing agreements -- horizontal agreements -- > Headnote:

[LEdHN\[11\]](#) [11]

Maximum-fee schedule of physicians of competing physicians set by majority vote do not involve price-fixing in only a literal sense since the physicians' combination in the form of a foundation does not permit them to sell any different product and has merely permitted them to sell their services to certain customers at fixed prices; the maximum fee agreements are among independent competing entrepreneurs fitting squarely into the horizontal price-fixing mold.

## Syllabus

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Respondent foundations for medical care were organized by respondent Maricopa County Medical Society and another medical society to promote fee-for-service medicine and to provide the community with a competitive alternative to existing health insurance plans. The foundations, by agreement of their member doctors, established the maximum fees the doctors may claim in full payment for health services provided to policyholders of specified insurance plans. Petitioner State of Arizona filed a complaint against respondents in Federal District Court, alleging that they were engaged in an illegal price-fixing conspiracy in violation of § 1 of the Sherman Act. The District Court denied the State's motion for partial [\*\*\*\*2] summary judgment, but certified for interlocutory appeal the question whether the maximum-fee agreements were illegal *per se* under § 1 of the Sherman Act. The Court of Appeals affirmed the denial of the motion for partial summary judgment and held that the certified question could not be answered without evaluating the purpose and effect of the agreements at a full trial.

*Held:* The maximum-fee agreements, as price-fixing agreements, are *per se* unlawful under § 1 of the Sherman Act. Pp. 342-357.

(a) The agreements do not escape condemnation under the *per se* rule against price-fixing agreements because they are horizontal and fix maximum prices. Horizontal agreements to fix maximum prices are on the same legal -- even if not economic -- footing as agreements to fix minimum or uniform prices. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211; *Albrecht v. Herald Co.*, 390 U.S. 145. The *per se* rule is violated here by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, experience, training, or willingness to employ innovative and difficult procedures [\*\*\*\*3] in individual cases. Such a restraint may also discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs. P. 348.

(b) Nor does the fact that doctors rather than nonprofessionals are the parties to the price-fixing agreements preclude application of the *per se* rule. Respondents do not claim that the quality of the professional services their members provide is enhanced by the price restraint, *Goldfarb v. Virginia State Bar*, 421 U.S. 773, and *National Society of Professional Engineers v. United States*, 435 U.S. 679, distinguished, and their claim that the price restraint will make it easier for customers to pay does not distinguish the medical profession from any other provider of goods or services. Pp. 348-349.

(c) That the judiciary has had little antitrust experience in the health care industry is insufficient reason for not applying the *per se* rule here. "[The] Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222. Pp. [\*\*\*\*4] 349-351.

(d) The *per se* rule is not rendered inapplicable in this case for the alleged reason that the agreements in issue have procompetitive justification. The anticompetitive potential in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Even when respondents are given every benefit of doubt, the record in this case is not inconsistent with the presumption that respondents' agreements will not significantly enhance competition. The most that can be said for having doctors fix the maximum prices is that doctors may be able to do it more efficiently than insurers, but there is no reason to believe any savings that might accrue from this arrangement would be sufficiently great to affect the competitiveness of these kinds of insurance plans. Pp. 351-354.

(e) Respondents' maximum-fee schedules do not involve price-fixing in only a literal sense. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, distinguished. As agreements among independent competing entrepreneurs, they fit squarely into the horizontal price-fixing mold. Pp. 355-357.

**Counsel:** Kenneth R. Reed, [\*\*\*\*5] Special Assistant Attorney General of Arizona, argued the cause for petitioner. With him on the briefs were Robert K. Corbin, Attorney General, Charles L. Eger, Assistant Attorney General, Alison B. Swan, and Patricia A. Metzger.

Philip P. Berelson argued the cause for respondents. With him on the brief were Robert O. Lesher and Daniel J. McAuliffe.

Deputy Solicitor General Shapiro argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Solicitor General McCree, Assistant Attorney General Baxter, Deputy Solicitor General Wallace, Barry Grossman, Robert B. Nicholson, and Nancy C. Garrison.\*

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**Judges:** STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, and MARSHALL, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, post, p. 357. BLACKMUN and O'CONNOR, JJ., took no part in the consideration or decision of the case.

**Opinion by:** STEVENS

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\*Briefs of amici curiae urging reversal were filed for the State of Alabama et al. by Charles A. Graddick, Attorney General of Alabama, and Susan Beth Farmer, Sarah M. Spratling, and James Drury Flowers, Assistant Attorneys General; Wilson L. Condon, Attorney General of Alaska, and Louise E. Ma, Assistant Attorney General; Steve Clark, Attorney General of Arkansas, and David L. Williams, Deputy Attorney General; J. D. MacFarlane, Attorney General of Colorado, and B. Lawrence Theis, First Assistant Attorney General; Carl R. Ajello, Attorney General of Connecticut, and Robert M. Langer, John R. Lacey, John M. Looney, Jr., and Steven M. Rutstein, Assistant Attorneys General; Richard S. Gebelein, Attorney General of Delaware, and Robert P. Lobue, Deputy Attorney General; Jim Smith, Attorney General of Florida, and Bill L. Bryant, Jr., Assistant Attorney General; Tany S. Hong, Attorney General of Hawaii, and Sonia Faust, Deputy Attorney General; Tyrone C. Fahner, Attorney General of Illinois, and Thomas M. Genovese, Assistant Attorney General; Linley E. Pearson, Attorney General of Indiana, and Frank A. Baldwin, Assistant Attorney General; Thomas J. Miller, Attorney General of Iowa, and John R. Perkins, Assistant Attorney General; Robert T. Stephan, Attorney General of Kansas, and Carl M. Anderson, Assistant Attorney General; Steven L. Beshear, Attorney General of Kentucky, and James M. Ringo, Assistant Attorney General; William J. Guste, Jr., Attorney General of Louisiana, and John R. Flowers, Jr., Assistant Attorney General; James E. Tierney, Attorney General of Maine; Stephen H. Sachs, Attorney General of Maryland, and Charles O. Monk II, Assistant Attorney General; Frank J. Kelley, Attorney General of Michigan, and Edwin M. Bladen, Assistant Attorney General; Warren R. Spannaus, Attorney General of Minnesota, and Stephen P. Kilgriff, Special Assistant Attorney General; Bill Allain, Attorney General of Mississippi, and Robert E. Sanders, Special Assistant Attorney General; John Ashcroft, Attorney General of Missouri, and William L. Newcomb, Jr., Assistant Attorney General; Michael T. Greely, Attorney General of Montana, and Jerome J. Cate, Assistant Attorney General; Paul L. Douglas, Attorney General of Nebraska, and Dale A. Comer, Assistant Attorney General; Gregory H. Smith, Attorney General of New Hampshire; James R. Zazzali, Attorney General of New Jersey, and Laurel A. Price, Deputy Attorney General; Jeff Bingaman, Attorney General of New Mexico, and James J. Wechsler and Richard H. Levin, Assistant Attorneys General; Robert Abrams, Attorney General of New York, and Lloyd Constantine, Assistant Attorney General; Rufus L. Edmisten, Attorney General of North Carolina, H. A. Cole, Jr., Special Deputy Attorney General, and R. Darrell Hancock, Associate Attorney General; Robert O. Wefald, Attorney General of North Dakota, and Gary H. Lee, Assistant Attorney General; Jan Eric Cartwright, Attorney General of Oklahoma, and Gary W. Gardenshire, Assistant Attorney General; Dennis J. Roberts II, Attorney General of Rhode Island, and Patrick J. Quinlan, Special Assistant Attorney General; Daniel R. McLeod, Attorney General of South Carolina, and John M. Cox, Assistant Attorney General; Mark V. Meierhenry, Attorney General of South Dakota, and James E. McMahon, Assistant Attorney General; William M. Leech, Jr., Attorney General of Tennessee, and William J. Haynes, Deputy Attorney General; Mark White, Attorney General of Texas, and Linda A. Aaker, Assistant Attorney General; David L. Wilkinson, Attorney General of Utah, and Peter C. Collins, Assistant Attorney General; John J. Easton, Jr., Attorney General of Vermont, and Jay I. Ashman, Assistant Attorney General; Kenneth O. Eikenberry, Attorney General of Washington, and John R. Ellis, Assistant Attorney General; Chauncey H. Browning, Attorney General of West Virginia, and Charles G. Brown, Deputy Attorney General; Bronson C. La Follette, Attorney General of Wisconsin, and Michael L. Zaleski, Assistant Attorney General; and John D. Troughton, Attorney General of Wyoming, and Gay R. Venderpoel, Assistant Attorney General; for the State of Ohio by William J. Brown, Attorney General, and Charles D. Weller, Doreen C. Johnson, and Eugene F. McShane, Assistant Attorneys General; for Chalmette General Hospital, Inc., et al. by John A. Stassi II; and for Hospital Building Co. by John K. Train III and John R. Jordan, Jr.

Briefs of amici curiae urging affirmance were filed by William G. Kopit and Robert J. Moses for the American Association of Foundations for Medical Care; by Richard L. Epstein and Jay H. Hedgepeth for the American Hospital Association; and by M. Laurence Popofsky and Peter F. Sloss for California Dental Service.

Alfred Miller filed a brief for the American Association of Retired Persons et al. as amici curiae.

## Opinion

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[\*335] [\*\*\*53] [\*\*2468] JUSTICE STEVENS delivered the opinion of the Court.

LEdHN[1A] [1A]The question presented is whether § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, has been violated by agreements among competing physicians setting, by majority vote, the maximum fees that they may claim in full [\*336] payment for health services provided to policyholders of specified insurance plans. The United States Court of Appeals for the Ninth Circuit held that the question could not be answered without evaluating the actual purpose and effect of the agreements at a full trial. 643 F.2d 553 (1980). Because the undisputed facts disclose a violation of the statute, [\*\*\*2469] we granted certiorari, 450 U.S. 979 (1981), [\*\*\*\*7] and now reverse.

I

In October 1978 the State of Arizona filed a civil complaint against two county medical societies and two "foundations for medical care" that the medical societies had organized. The complaint alleged that the defendants were engaged in illegal price-fixing conspiracies.<sup>1</sup> [\*\*\*\*8] After the defendants filed their answers, one [\*\*\*54] of the medical societies was dismissed by consent, the parties conducted a limited amount of pretrial discovery, and the State moved for partial summary judgment on the issue of liability. The District Court denied the motion,<sup>2</sup> [\*\*\*\*9] but entered an order pursuant to 28 U. S. C. § 1292(b), [\*337] certifying for interlocutory appeal the question "whether the FMC membership agreements, which contain the promise to abide by maximum fee schedules, are illegal per se under section 1 of the Sherman Act."<sup>3</sup>

<sup>1</sup> The complaint alleged a violation of § 1 of the Sherman Act as well as of the Arizona antitrust statute. The state statute is interpreted in conformity with the federal statute. 643 F.2d 553, 554, n. 1 (CA9 1980). The State of Arizona prayed for an injunction but did not ask for damages.

<sup>2</sup> The District Court offered three reasons for its decision. First, citing Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), the court stated that "a recent antitrust trend appears to be emerging where the Rule of Reason is the preferred method of determining whether a particular practice is in violation of the antitrust law." App. to Pet. for Cert. 43. Second, "the two Supreme Court cases invalidating maximum price-fixing, [Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951), and Albrecht v. Herald Co., 390 U.S. 145 (1968)], need not be read as establishing a per se rule." Id., at 44. Third, "a profession is involved here." Id., at 45. Under the rule-of-reason approach, the plaintiff's motion for partial summary judgment on the issue of liability could not be granted "because there is insufficient evidence as to the [purpose and effect of the allegedly unlawful practices and the power of the defendants]." Id., at 47.

The District Court also denied the defendants' motion to dismiss based on the ground that they were engaged in the business of insurance within the meaning of the McCarran-Ferguson Act, 15 U. S. C. § 1011 et seq. See App. to Pet. for Cert. 39-41. The defendants did not appeal that portion of the District Court order. 643 F.2d, at 559, and n. 7.

<sup>3</sup> The quoted language is the Court of Appeals' phrasing of the question. Id., at 554. The District Court had entered an order on June 5, 1979, providing, in relevant part:

"The plaintiff's motion for partial summary judgment on the issue of liability is denied with leave to file a similar motion based on additional evidence if appropriate." App. to Pet. for Cert. 48.

On August 8, 1979, the District Court entered a further order providing:

"The Order of this Court entered June 5, 1979 is amended by addition of the following: This Court's determination that the Rule of Reason approach should be used in analyzing the challenged conduct in the instant case to determine whether a violation of Section 1 of the Sherman Act has occurred involves a question of law as to which there is substantial ground for difference of opinion and an immediate appeal from the Order denying plaintiff's motion for partial summary judgment on the issue of liability may materially advance the ultimate determination of the litigation. Therefore, the foregoing Order and determination of the Court is certified for interlocutory appeal pursuant to 28 U. S. C. § 1292(b)." Id., at 50-51.

[\*\*\*\*10] The Court of Appeals, by a divided vote, affirmed the District Court's order refusing to enter partial summary judgment, but each of the three judges on the panel had a different view of the case. Judge Sneed was persuaded that "the challenged practice is not a per se violation." [643 F.2d, at 1\\*338](#) 560.<sup>4</sup> [\*\*\*\*11] Judge Kennedy, [\*\*\*55] although concurring, cautioned that he had not [\*\*2470] found "these reimbursement schedules to be per se proper, [or] that an examination of these practices under the rule of reason at trial will not reveal the proscribed adverse effect on competition, or that this court is foreclosed at some later date, when it has more evidence, from concluding that such schedules do constitute per se violations." *Ibid.*<sup>5</sup> Judge Larson dissented, expressing the view that a *per se* rule should apply and, alternatively, that a rule-of-reason analysis should condemn the arrangement even if a *per se* approach was not warranted. [Id., at 563-569.](#)<sup>6</sup>

[\*339] [LEdHN/2A1↑](#) [2A] [\*\*\*\*12] Because the ultimate question presented by the certiorari petition is whether a partial summary judgment should have been entered by the District Court, we must assume that the respondents' version of any disputed issue of fact is correct. We therefore first review the relevant undisputed facts and then identify the factual basis for the respondents' contention that their agreements on fee schedules are not unlawful.

## II

The Maricopa Foundation for Medical Care is a nonprofit Arizona corporation composed of licensed doctors of medicine, osteopathy, and podiatry engaged in private practice. Approximately 1,750 doctors, representing about 70% of the practitioners in Maricopa County, are members.

The Maricopa Foundation was organized in 1969 for the purpose of promoting fee-for-service medicine and to provide the community with a competitive alternative to existing health insurance plans.<sup>7</sup> The foundation performs

<sup>4</sup> Judge Sneed explained his reluctance to apply the *per se* rule substantially as follows: The record did not indicate the actual purpose of the maximum-fee arrangements or their effect on competition in the health care industry. It was not clear whether the assumptions made about typical price restraints could be carried over to that industry. Only recently had this Court applied the antitrust laws to the professions. Moreover, there already were such significant obstacles to pure competition in the industry that a court must compare the prices that obtain under the maximum-fee arrangements with those that would otherwise prevail rather than with those that would prevail under ideal competitive conditions. Furthermore, the Ninth Circuit had not applied [Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.](#), 340 U.S. 211 (1951), and [Albrecht v. Herald Co.](#), 390 U.S. 145 (1968), to horizontal agreements that establish maximum prices; some of the economic assumptions underlying the rule against maximum price fixing were not sound.

<sup>5</sup> Judge Kennedy's concurring opinion concluded as follows:

"There does not now appear to be a controlling or definitive analysis of the market impact caused by the arrangements under scrutiny in this case, but trial may reveal that the arrangements are, at least in their essentials, not peculiar to the medical industry and that they should be condemned." [643 F.2d, at 560.](#)

<sup>6</sup> Judge Larson stated, in part:

"Defendants formulated and dispersed relative value guides and conversion factor lists which together were used to set an upper limit on fees received from third-party payors. It is clear that these activities constituted maximum price-fixing by competitors. Disregarding any 'special industry' facts, this conduct is *per se* illegal. Precedent alone would mandate application of the *per se* standard."

"I find nothing in the nature of either the medical profession or the health care industry that would warrant their exemption from *per se* rules for price-fixing." [Id., at 563-564](#) (citations omitted).

<sup>7</sup> Most health insurance plans are of the fee-for-service type. Under the typical insurance plan, the insurer agrees with the insured to reimburse the insured for "usual, customary, and reasonable" medical charges. The third-party insurer, and the insured to the extent of any excess charges, bears the economic risk that the insured will require medical treatment. An alternative to the fee-for-service type of insurance plan is illustrated by the health maintenance organizations authorized under the Health Maintenance Organization Act of 1973, [42 U. S. C. § 300e et seq.](#) Under this form of prepaid health plan, the

three primary activities. It establishes the schedule of maximum fees that participating doctors agree to accept as payment in full for services performed for patients insured under plans approved by the foundation. It reviews the medical necessity and appropriateness [\*\*\*13] of treatment provided by its members to such insured persons. It is authorized to draw checks on insurance [\*\*\*56] company accounts to pay doctors for [\*340] services performed for covered patients. In performing these functions, the foundation is considered an "insurance administrator" by the Director of the Arizona Department of Insurance. Its participating doctors, however, have no financial interest in the operation of the foundation.

[\*\*\*14] [\*\*2471] The Pima Foundation for Medical Care, which includes about 400 member doctors,<sup>8</sup> performs similar functions. For the purposes of this litigation, the parties seem to regard the activities of the two foundations as essentially the same. No challenge is made to their peer review or claim administration functions. Nor do the foundations allege that these two activities make it necessary for them to engage in the practice of establishing maximum-fee schedules.

LEdHN[3A][] [3A]At the time this lawsuit was filed,<sup>9</sup> [\*\*\*16] each foundation made use of "relative values" and "conversion factors" in compiling its fee schedule. The conversion factor is the dollar amount used to determine fees for a particular [\*\*\*15] medical specialty. Thus, for example, the conversion factors for "medicine" and "laboratory" were \$ 8 and \$ 5.50, respectively, in 1972, and \$ 10 and \$ 6.50 in 1974. The relative value schedule provides a numerical weight for each different medical service -- thus, an office consultation has a lesser value than a home visit. The relative value was multiplied by the conversion factor to determine the maximum fee. The fee schedule has been revised periodically. The foundation board of trustees would solicit advice from various medical societies about the need [\*341] for change in either relative values or conversion factors in their respective specialties. The board would then formulate the new fee schedule and submit it to the vote of the entire membership.<sup>10</sup>

#### LEdHN[3B][] [3B]

The fee schedules limit the amount that the member doctors may recover for services performed for patients insured under plans approved by the foundations. To obtain this approval the insurers -- including self-insured employers as well as insurance companies<sup>11</sup> -- agree to pay [\*\*\*57] the doctors' charges up to the scheduled amounts, and in exchange the doctors agree to accept those amounts as payment in full for their services. The doctors are free to charge higher fees to uninsured patients, and they also may charge any patient less than the scheduled maxima. A patient who is insured by a foundation-endorsed plan is guaranteed complete coverage for the full amount of his medical bills only if he is treated by a foundation member. He [\*\*\*17] is free to go to a

consumer pays a fixed periodic fee to a functionally integrated group of doctors in exchange for the group's agreement to provide any medical treatment that the subscriber might need. The economic risk is thus borne by the doctors.

<sup>8</sup>The record contains divergent figures on the percentage of Pima County doctors that belong to the foundation. A 1975 publication of the foundation reported 80%; a 1978 affidavit by the executive director of the foundation reported 30%.

<sup>9</sup>In 1980, after the District Court and the Court of Appeals had rendered judgment, both foundations apparently discontinued the use of relative values and conversion factors in formulating the fee schedules. Moreover, the Maricopa Foundation that year amended its bylaws to provide that the fee schedule would be adopted by majority vote of its board of trustees and not by vote of its members. The challenge to the foundation activities as we have described them in the text, however, is not mooted by these changes. See United States v. W.T. Grant Co., 345 U.S. 629 (1953).

<sup>10</sup>The parties disagree over whether the increases in the fee schedules are the cause or the result of the increases in the prevailing rate for medical services in the relevant markets. There appears to be agreement, however, that 85-95% of physicians in Maricopa County bill at or above the maximum reimbursement levels set by the Maricopa Foundation.

<sup>11</sup>Seven different insurance companies underwrite health insurance plans that have been approved by the Maricopa Foundation, and three companies underwrite the plans approved by the Pima Foundation. The record contains no firm data on the portion of the health care market that is covered by these plans. The State relies upon a 1974 analysis indicating that the insurance plans endorsed by the Maricopa Foundation had about 63% of the prepaid health care market, but the respondents contest the accuracy of this analysis.

nonmember physician and is still covered for charges that do not exceed the maximum-fee schedule, but he must pay any excess that the nonmember physician may charge.

LEdHN[2B] [2B] The impact of the foundation fee schedules on medical fees and on insurance premiums is a matter of dispute. The State of Arizona contends that the periodic upward revisions of the maximum-fee schedules have the effect of stabilizing [\*\*\*18] and enhancing the level of actual charges by physicians, [\*\*2472] and [\*342] that the increasing level of their fees in turn increases insurance premiums. The foundations, on the other hand, argue that the schedules impose a meaningful limit on physicians' charges, and that the advance agreement by the doctors to accept the maxima enables the insurance carriers to limit and to calculate more efficiently the risks they underwrite and therefore serves as an effective cost-containment mechanism that has saved patients and insurers millions of dollars. Although the Attorneys General of 40 different States, as well as the Solicitor General of the United States and certain organizations representing consumers of medical services, have filed *amicus curiae* briefs supporting the State of Arizona's position on the merits, we must assume that the respondents' view of the genuine issues of fact is correct.

This assumption presents, but does not answer, the question whether the Sherman Act prohibits the competing doctors from adopting, revising, and agreeing to use a maximum-fee schedule in implementation of the insurance plans.

### III

The respondents recognize that our decisions [\*\*\*19] establish that price-fixing agreements are unlawful on their face. But they argue that the *per se* rule does not govern this case because the agreements at issue are horizontal and fix maximum prices, are among members of a profession, are in an industry with which the judiciary has little antitrust experience, and are alleged to have procompetitive justifications. Before we examine each of these arguments, we pause to consider the history and the meaning of the *per se* rule against price-fixing agreements.

#### A

LEdHN[4] [4] Section 1 of the Sherman Act of 1890 HN1 literally prohibits every agreement "in restraint of trade." <sup>12</sup> In United States v. Joint Traffic Assn., 171 U.S. 505 [\*\*581] (1898), we recognized that Congress could not have intended a literal interpretation of the word "every"; since Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911), [\*\*\*20] HN2 we have analyzed most restraints under the so-called "rule of reason." As its name suggests, the rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.<sup>13</sup>

[\*\*\*21] The elaborate inquiry into the reasonableness of a challenged business practice entails significant costs. Litigation of the effect or purpose of a practice often is extensive and complex. Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958). Judges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition. United States v. Topco Associates,

<sup>12</sup> HN3 "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ." 15 U. S. C. § 1.

<sup>13</sup> Justice Brandeis provided the classic statement of the rule of reason in Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918):

HN4 "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

Inc., 405 U.S. 596, 609-610 (1972). And the result of the process in any given case may provide little certainty or guidance about the legality of **[\*\*2473]** a practice in another context. Id. at 609, n. 10; Northern Pacific R. Co. v. United States, supra, at 5.

The costs of judging business practices under the rule of reason, however, have been reduced by the recognition of *per se* rules.<sup>14</sup> Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable.<sup>15</sup> **[\*\*\*23]** As in every rule of general application, the **[\*\*\*22]** match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.<sup>16</sup>

Thus **[\*\*\*59]** the Court in *Standard Oil* recognized that **[\*\*\*24]** HN6<sup>17</sup> inquiry under its rule of reason ended once a price-fixing agreement was proved, for there was "a conclusive presumption which **[\*345]** brought [such agreements] within the statute." 221 U.S., at 65. By 1927, the Court was able to state that "it has . . . often been decided and always assumed that uniform price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law." United States v. Trenton Potteries Co., 273 U.S. 392, 398.

"The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves **[\*\*\*25]** unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions." Id. at 397-398.

Thirteen years later, the Court could report that "for over forty years this Court has consistently and without deviation adhered **[\*\*2474]** to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940). In that case a glut in the spot market for gasoline had prompted the major oil refiners to engage in a concerted effort to

<sup>14</sup> For a thoughtful and brief discussion of the costs and benefits of rule-of-reason versus *per se* rule analysis of price-fixing agreements, see F. Scherer, Industrial Market Structure and Economic Performance 438-443 (1970). Professor Scherer's "opinion, shared by a majority of American economists concerned with antitrust policy, is that in the present legal framework the costs of implementing a rule of reason would exceed the benefits derived from considering each restrictive agreement on its merits and prohibiting only those which appear unreasonable." Id. at 440.

<sup>15</sup> HN5<sup>18</sup> "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements." Northern Pacific R. Co. v. United States, 356 U.S., at 5 (citations omitted). See United States v. Columbia Steel Co., 334 U.S. 495, 522-523 (1948).

<sup>16</sup> Thus, in applying the *per se* rule to invalidate the restrictive practice in United States v. Topco Associates, Inc., 405 U.S. 596 (1972), we stated that "[w]hether or not we would decide this case the same way under the rule of reason used by the District Court is irrelevant to the issue before us." Id. at 609. The Court made the same point in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S., at 50, n. 16:

"*Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them."

purchase and store surplus gasoline in order to maintain stable prices. Absent the agreement, the [\*346] companies argued, competition was cutthroat and self-defeating. The argument did not carry the day:

[\*\*\*\*26] [HN7](#) "Any combination which tampers with price structures is engaged in an unlawful activity. Even though [\*\*\*60] the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress. Certainly Congress has not left us with any such choice. Nor has the Act created or authorized the creation of any special exception in favor of the oil industry. Whatever may be its [\*\*\*\*27] peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." [\*Id.\* at 221-222](#).

The application of the *per se* rule to maximum-price-fixing agreements in [\*Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 \(1951\)\*](#), followed ineluctably from *Socony-Vacuum*:

"For such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment. We reaffirm what we said in [\*United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223: HN8\*](#) Under [\*347] the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." [\*340 U.S., at 213\*](#).

Over the objection that maximum-price-fixing agreements were not the "economic equivalent" of minimum-price-fixing agreements, [\*\*\*\*28] <sup>17</sup> *Kiefer-Stewart* was reaffirmed in [\*Albrecht v. Herald Co., 390 U.S. 145 \(1968\)\*](#):

"Maximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. Competition, even in a single product, is not cast in a single mold. Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise [\*\*\*61] would be subject to significant nonprice competition. Moreover, if the actual price [\*\*2475] charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum [\*\*\*\*29] prices." [\*Id., at 152-153\*](#) (footnote omitted).

We have not wavered in our enforcement of the *per se* rule against price fixing. Indeed, in our most recent price-fixing case we summarily reversed the decision of another Ninth [\*348] Circuit panel that a horizontal agreement among competitors to fix credit terms does not necessarily contravene the antitrust laws. [\*Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 \(1980\)\*](#).

B

[\*LEdHN\*](#) [5] Our decisions foreclose the argument that the agreements at issue escape *per se* condemnation because they are horizontal and fix maximum prices. *Kiefer-Stewart* and *Albrecht* place horizontal agreements to

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<sup>17</sup> [\*Albrecht v. Herald Co., 390 U.S., at 156\*](#) (Harlan, J., dissenting).

fix maximum prices on the same legal -- even if not economic -- footing as agreements to fix minimum or uniform prices.<sup>18</sup> The *per se* rule "is grounded on [\*\*\*\*30] faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition." Rahl, Price Competition and the Price Fixing Rule -- Preface and Perspective, 57 Nw. U. L. Rev. 137, 142 (1962). In this case the rule is violated by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases. Such a restraint also may discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs. It may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character.

[\*\*\*\*31] [LEdHN\[6\]](#)<sup>↑</sup> [6]Nor does the fact that doctors -- rather than nonprofessionals -- are the parties to the price-fixing agreements support the respondents' position. In [Goldfarb v. Virginia State Bar, 421 U.S. 773, 788, n. 17 \(1975\)](#), we stated that the "public service aspect, and other features of the professions, may [\*349] require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." See [National Society of Professional Engineers v. United States, 435 U.S. 679, 696 \(1978\)](#). The price-fixing agreements in this case, however, are not premised on public service or ethical norms. The respondents do not argue, as did the defendants in *Goldfarb* and *Professional Engineers*, that the quality of the professional service that their members [\*\*\*62] provide is enhanced by the price restraint. The respondents' claim for relief from the *per se* rule is simply that the doctors' agreement not to charge certain insureds more than a fixed price facilitates the successful marketing of an attractive [\*\*\*\*32] insurance plan. But the claim that the price restraint will make it easier for customers to pay does not distinguish the medical profession from any other provider of goods or services.

[LEdHN\[7\]](#)<sup>↑</sup> [7] [LEdHN\[8A\]](#)<sup>↑</sup> [8A]We are equally unpersuaded by the argument that we should not apply the *per se* rule in this case because the judiciary has little antitrust experience in the health care industry.<sup>19</sup> [\*\*\*\*34] The argument quite obviously [\*\*2476] is inconsistent with *Socony-Vacuum*. In unequivocal terms, we stated that, "[whatever] may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." [310 U.S., at 222](#). We also stated that [HN9](#)<sup>↑</sup> "[the] elimination of so-called competitive evils [in an industry] is no legal justification" for price-fixing agreements, *id., at 220*, yet the Court of Appeals refused to apply the [\*\*\*\*33] *per se* rule in [\*350] this case in part because the health care industry was so far removed from the competitive model.<sup>20</sup> Consistent with our prediction in [Socony-Vacuum, 310 U.S., at 221](#), the result of this reasoning was the adoption by the Court of

<sup>18</sup> It is true that in *Kiefer-Stewart*, as in *Albrecht*, the agreement involved a vertical arrangement in which maximum resale prices were fixed. But the case also involved an agreement among competitors to impose the resale price restraint. In any event, horizontal restraints are generally less defensible than vertical restraints. See [Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 \(1977\)](#); Easterbrook, Maximum Price Fixing, 48 U. Chi. L. Rev. 886, 890, n. 20 (1981).

<sup>19</sup> The argument should not be confused with the established position that [HN10](#)<sup>↑</sup> a new *per se* rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged. See [White Motor Co. v. United States, 372 U.S. 253 \(1963\)](#). Nor is our unwillingness to examine the economic justification of this particular application of the *per se* rule against price fixing inconsistent with our reexamination of the general validity of the *per se* rule rejected in [Continental T.V., Inc. v. GTE Sylvania Inc., supra](#).

<sup>20</sup> "The health care industry, moreover, presents a particularly difficult area. The first step to understanding is to recognize that not only is access to the medical profession very time consuming and expensive both for the applicant and society generally, but also that numerous government subventions of the costs of medical care have created both a demand and supply function for medical services that is artificially high. The present supply and demand functions of medical services in no way approximate those which would exist in a purely private competitive order. An accurate description of those functions moreover is not available. Thus, we lack baselines by which could be measured the distance between the present supply and demand functions and those which would exist under ideal competitive conditions." [643 F.2d, at 556](#).

Appeals of a legal standard based on the reasonableness of the fixed prices,<sup>21</sup> [\*\*\*\*35] an inquiry we have so often condemned.<sup>22</sup> Finally, [\*351] the argument [\*\*\*63] that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules, which in part is to avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable -- an inquiry so often wholly fruitless when undertaken." *Northern Pacific R. Co. v. United States*, 356 U.S., at 5.

LEdHN[8B] [↑] [8B]

LEdHN[9A] [↑] [9A] [\*\*\*\*36] The respondents' principal argument is that the *per se* rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered [\*\*2477] for some.<sup>23</sup> Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application. Even when the respondents are given every benefit of the doubt, the limited record in this case is not inconsistent with the presumption that the respondents' agreements will not significantly enhance competition.

LEdHN[9B] [↑] [9B]

[\*\*\*\*37] The respondents contend that their fee schedules are procompetitive because they make it possible to provide consumers of health care with a uniquely desirable form of insurance coverage that could not otherwise exist. The features of the foundation-endorsed insurance plans that they stress are a choice of doctors, complete insurance coverage, and lower premiums. The first two characteristics, however, are hardly unique to these plans. Since only about 70% of [\*352] the doctors in the relevant market are members of either foundation, the guarantee of complete coverage only applies when an insured chooses a physician in that 70%. If he elects to go to a nonfoundation doctor, he may be required to pay a portion of the doctor's fee. It is fair to presume, however, that at least 70% of the doctors in other markets charge no more than the "usual, customary, and reasonable" fee that typical insurers are willing to reimburse in full.<sup>24</sup> Thus, in Maricopa and Pima Counties as well as in most parts of

<sup>21</sup> "Perforce we must take industry as it exists, absent the challenged feature, as our baseline for measuring anticompetitive impact. The relevant inquiry becomes whether fees paid to doctors under that system would be less than those payable under the FMC maximum fee agreement. Put differently, confronted with an industry widely deviant from a reasonably free competitive model, such as agriculture, the proper inquiry is whether the practice enhances the prices charged for the services. In simplified economic terms, the issue is whether the maximum fee arrangement better permits the attainment of the monopolist's goal, viz., the matching of marginal cost to marginal revenue, or in fact obstructs that end." *Ibid.*

<sup>22</sup> In the first price-fixing case arising under the Sherman Act, the Court was required to pass on the sufficiency of the defendants' plea that they had established rates that were actually beneficial to consumers. Assuming the factual validity of the plea, the Court rejected the defense as a matter of law. *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897). In *National Society of Professional Engineers v. United States*, 435 U.S. 679, 689 (1978), we referred to Judge Taft's "classic rejection of the argument that competitors may lawfully agree to sell their goods at the same price as long as the agreed-upon price is reasonable." See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (CA6 1898), aff'd, 175 U.S. 211 (1899). In our latest price-fixing case, we reiterated the point: "It is no excuse that the prices fixed are themselves reasonable." *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980).

<sup>23</sup> HN11 [↑] "Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226, n. 59 (1940).

<sup>24</sup> According to the respondents' figures, this presumption is well founded. See Brief for Respondents 42, n. 120.

the country, if an insured asks his [\*\*\*64] doctor if the insurance coverage is complete, presumably in about 70% of the cases the doctor will say "Yes" and in about 30% of the [\*\*\*38] cases he will say "No."

It is true that a binding assurance of complete insurance coverage -- as well as most of the respondents' potential for lower insurance premiums <sup>25</sup> [\*\*\*40] -- can be obtained only if the insurer and the doctor agree in advance on the maximum fee that the doctor will accept as full payment for a particular service. Even if a fee schedule is therefore desirable, it is not necessary that the doctors do the price fixing.<sup>26</sup> [\*\*\*41] The [\*353] [\*\*2478] record indicates that the Arizona Comprehensive Medical/Dental Program for Foster Children is administered by the Maricopa Foundation pursuant to a contract under which the maximum-fee schedule is prescribed by a state agency rather than by the doctors.<sup>27</sup> This program and the Blue Shield plan challenged in [Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205 \(1979\)](#), indicate that insurers are capable [\*\*\*39] not only of fixing maximum reimbursable prices but also of obtaining binding agreements with providers guaranteeing the insured full reimbursement of a participating provider's fee. In light of these examples, it is not surprising that nothing in the record even arguably supports the conclusion that this type of insurance program could not function if the fee schedules were set in a different way.

The most that can be said for having doctors fix the maximum prices is that doctors may be able to do it more efficiently than insurers. The validity of that assumption is [\*\*\*65] far from obvious,<sup>28</sup> [\*\*\*42] but in any event there is no reason to believe [\*354] that any savings that might accrue from this arrangement would be sufficiently great to affect the competitiveness of these kinds of insurance plans. It is entirely possible that the potential or

<sup>25</sup> We do not perceive the respondents' claim of procompetitive justification for their fee schedules to rest on the premise that the fee schedules actually reduce medical fees and accordingly reduce insurance premiums, thereby enhancing competition in the health insurance industry. Such an argument would merely restate the long-rejected position that fixed prices are reasonable if they are lower than free competition would yield. It is arguable, however, that the existence of a fee schedule, whether fixed by the doctors or by the insurers, makes it easier -- and to that extent less expensive -- for insurers to calculate the risks that they underwrite and to arrive at the appropriate reimbursement on insured claims.

<sup>26</sup> According to a Federal Trade Commission staff report: "Until the mid-1960's, most Blue Shield plans determined in advance how much to pay for particular procedures and prepared fee schedules reflecting their determinations. Fee schedules are still used in approximately 25 percent of Blue Shield contracts." Bureau of Competition, Federal Trade Commission, Medical Participation in Control of Blue Shield and Certain Other Open-Panel Medical Prepayment Plans 128 (1979). We do not suggest that Blue Shield plans are not actually controlled by doctors. Indeed, as the same report discusses at length, the belief that they are has given rise to considerable antitrust litigation. See also D. Kass & P. Pautler, Bureau of Economics, Federal Trade Commission, Staff Report on Physician Control of Blue Shield Plans (1979). Nor does this case present the question whether an insurer may, consistent with the Sherman Act, fix the fee schedule and enter into bilateral contracts with individual doctors. That question was not reached in [Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205 \(1979\)](#). See *id.*, at 210, n. 5. In an *amicus curiae* brief, the United States expressed its opinion that such an arrangement would be legal unless the plaintiffs could establish that a conspiracy among providers was at work. Brief for United States as *Amicus Curiae*, O. T. 1978, No. 77-952, pp. 10-11. Our point is simply that the record provides no factual basis for the respondents' claim that the doctors must fix the fee schedule.

<sup>27</sup> In that program the foundation performs the peer review function as well as the administrative function of paying the doctors' claims.

<sup>28</sup> In order to create an insurance plan under which the doctor would agree to accept as full payment a fee prescribed in a fixed schedule, someone must canvass the doctors to determine what maximum prices would be high enough to attract sufficient numbers of individual doctors to sign up but low enough to make the insurance plan competitive. In this case that canvassing function is performed by the foundation; the foundation then deals with the insurer. It would seem that an insurer could simply bypass the foundation by performing the canvassing function and dealing with the doctors itself. Under the foundation plan, each doctor must look at the maximum-fee schedule fixed by his competitors and vote for or against approval of the plan (and, if the plan is approved by majority vote, he must continue or revoke his foundation membership). A similar, if to some extent more protracted, process would occur if it were each insurer that offered the maximum-fee schedule to each doctor.

actual power of the foundations to dictate the terms of such insurance plans may more than offset the theoretical efficiencies upon which the respondents' defense ultimately rests.<sup>29</sup>

C

LEdHN[10A]<sup>[↑]</sup> [10A] Our adherence to the *per se* rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy. United States v. Topco Associates, Inc., 405 U.S., at 611-612. Given its generality, our enforcement of the Sherman Act has required the Court to provide much of its substantive content. By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the legislative prerogative [\*\*\*\*43] to amend the law. The respondents' arguments against application of the *per se* rule in this case therefore are [\*355] better directed to the Legislature. Congress may consider the exception that we are not free to read into the statute.<sup>30</sup>

LEdHN[10B]<sup>[↑]</sup> [10B]

[\*\*\*44] [\*\*2479] IV

LEdHN[1B]<sup>[↑]</sup> [1B] LEdHN[11]<sup>[↑]</sup> [11] Having declined the respondents' invitation to cut back on the *per se* rule against price fixing, we are left with the respondents' argument that their fee schedules involve price fixing in only a literal sense. For this argument, the respondents rely upon Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

[\*\*\*66] In *Broadcast Music* we were confronted with an antitrust challenge to the marketing of the right to use copyrighted compositions derived from the entire membership of the American Society of Composers, Authors and Publishers (ASCAP). The so-called "blanket license" was entirely different from the product that any one composer was able to sell by himself.<sup>31</sup> Although there was little competition among individual composers for their separate compositions, the blanket-license arrangement did not place any restraint on the right of any individual copyright owner to sell his own compositions separately to any buyer at any price.<sup>32</sup> But [\*\*\*45] a [\*356] "necessary consequence" of the creation of the blanket license was that its price had to be established. Id., at 21. We held that the delegation by the composers to ASCAP of the power to fix the price for the blanket license was not a species of the price-fixing agreements categorically forbidden by the Sherman Act. The record disclosed price fixing only in a "literal sense." Id., at 8.

<sup>29</sup> In this case it appears that the fees are set by a group with substantial power in the market for medical services, and that there is competition among insurance companies in the sale of medical insurance. Under these circumstances the insurance companies are not likely to have significantly greater bargaining power against a monopoly of doctors than would individual consumers of medical services.

<sup>30</sup> "[Congress] can, of course, make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach." United States v. Topco Associates, Inc., 405 U.S., at 610, n. 10. Indeed, it has exempted certain industries from the full reach of the Sherman Act. See, e. g., 7 U. S. C. §§ 291, 292 (Capper-Volstead Act, agricultural cooperatives); 15 U. S. C. §§ 1011-1013 (McCarran-Ferguson Act, insurance); 49 U. S. C. § 5b (Reed-Bulwinkle Act, rail and motor carrier rate-fixing bureaus); 15 U. S. C. § 1801 (newspaper joint operating agreements).

<sup>31</sup> "Thus, to the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material." 441 U.S., at 22 (footnote omitted).

<sup>32</sup> "Here, the blanket-license fee is not set by competition among individual copyright owners, and it is a fee for the use of any of the compositions covered by the license. But the blanket license cannot be wholly equated with a simple horizontal arrangement among competitors. ASCAP does set the price for its blanket license, but that license is quite different from anything any individual owner could issue. The individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket license to mask price fixing in such other markets." Id., at 23-24 (footnote omitted).

[\*\*\*\*46] This case is fundamentally different. Each of the foundations is composed of individual practitioners who compete with one another for patients. Neither the foundations nor the doctors sell insurance, and they derive no profits from the sale of health insurance policies. The members of the foundations sell medical services. Their combination in the form of the foundation does not permit them to sell any different product.<sup>33</sup> Their combination has merely permitted them to sell their services to certain customers at fixed prices and arguably to affect the prevailing market price of medical care.

[\*\*\*\*47] The foundations are not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market. The agreement under attack is [\*357] an agreement among hundreds of competing doctors concerning the price at which each will offer his own services to a substantial number of consumers. It is true that [\*\*\*67] some are surgeons, some anesthesiologists, and some psychiatrists, but the doctors do not sell a package of three kinds of services. If a clinic offered complete medical coverage for a flat fee, the cooperating doctors would have the type of partnership arrangement in which a price-fixing agreement [\*\*2480] among the doctors would be perfectly proper. But the fee agreements disclosed by the record in this case are among independent competing entrepreneurs. They fit squarely into the horizontal price-fixing mold.

The judgment of the Court of Appeals is reversed.

*It is so ordered.*

JUSTICE BLACKMUN and JUSTICE O'CONNOR took no [\*\*\*\*48] part in the consideration or decision of this case.

**Dissent by: POWELL**

## **Dissent**

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JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

The medical care plan condemned by the Court today is a comparatively new method of providing insured medical services at predetermined maximum costs. It involves no coercion. Medical insurance companies, physicians, and patients alike are free to participate or not as they choose. On its face, the plan seems to be in the public interest.

The State of Arizona challenged the plan on a *per se* antitrust theory. The District Court denied the State's summary judgment motion, and -- because of the novelty of the issue -- certified the question of *per se* liability for an interlocutory appeal. On summary judgment, the record and all inferences therefrom must be viewed in the light most favorable to the respondents. Nevertheless, rather than identifying clearly the controlling principles and remanding for decision on a completed record, this Court makes its own *per se* judgment of invalidity. The respondents' contention that [\*358] the "consumers" of medical services are benefited substantially by the plan is given [\*\*\*\*49] short shrift. The Court concedes that "the parties conducted [only] a limited amount of pretrial discovery," *ante*, at 336, leaving undeveloped facts critical to an informed decision of this case. I do not think today's decision on an incomplete record is consistent with proper judicial resolution of an issue of this complexity, novelty, and importance to the public. I therefore dissent.

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<sup>33</sup> It may be true that by becoming a member of the foundation the individual practitioner obtains a competitive advantage in the market for medical services that he could not unilaterally obtain. That competitive advantage is the ability to attract as customers people who value both the guarantee of full health coverage and a choice of doctors. But, as we have indicated, the setting of the price by *doctors* is not a "necessary consequence" of an arrangement with an insurer in which the doctor agrees not to charge certain insured customers more than a fixed price.

I

The Maricopa and Pima Foundations for Medical Care are professional associations of physicians organized by the medical societies in their respective counties.<sup>1</sup> The foundations [\*\*\*68] were established to make available a type of prepaid medical insurance plan, aspects of which are the target of this litigation. Under the plan, the foundations insure no risks themselves. Rather, their key function is to secure agreement among their member physicians to a maximum-price schedule for specific medical services. Once a fee schedule has been agreed upon following a process of consultation and balloting, the foundations invite private insurance companies to participate by offering medical insurance policies based upon the maximum-fee schedule.<sup>2</sup> The insurers agree to offer complete [\*\*\*50] [\*359] reimbursement to their insureds for the full amount of their medical bills -- so long as these bills do not exceed the maximum-fee schedule.

[\*\*\*51] [\*\*2481] An insured under a foundation-sponsored plan is free to go to any physician. The physician then bills the foundation directly for services performed.<sup>3</sup> If the insured has chosen a physician who is *not* a foundation member and the bill exceeds the foundation maximum-fee schedule, the insured is liable for the excess. If the billing physician *is* a foundation member, the foundation disallows the excess pursuant to the agreement each physician executed upon joining the foundation.<sup>4</sup> Thus, the plan offers complete coverage of medical expenses but still permits an insured to choose any physician.

[\*\*\*52] II

This case comes to us on a plaintiff's motion for summary judgment after only limited discovery. Therefore, as noted above, the inferences to be drawn from the record must be viewed in the light most favorable to the respondents. *United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).* [\*360] This requires, as the Court acknowledges, that we consider the foundation arrangement as one that "impose[s] a meaningful limit on physicians' charges," that "enables the insurance carriers to limit and to calculate more efficiently the risks they underwrite," and that "therefore serves as an effective cost containment mechanism that has saved patients and insurers millions of dollars." *Ante*, at 342. The question is whether we [\*\*\*69] should condemn this arrangement forthwith under the Sherman Act, a law designed to *benefit* consumers.

<sup>1</sup> The Pima Foundation is open to any Pima County area physician licensed in Arizona. It has a renewable 5-year membership term. A voluntary resignation provision permits earlier exit on the January 1 following announcement of an intent to resign.

The Maricopa Foundation admits physicians who are members of their county medical society. The Maricopa Foundation has a renewable 1-year term of membership. Initial membership may be for a term of less than a year so that a uniform annual termination date for all members can be maintained.

The medical *societies* are professional associations of physicians practicing in the particular county. The Pima County Medical Society, but not the Pima Foundation, has been dismissed from the case pursuant to a consent decree.

<sup>2</sup> Three private carriers underwrite various Pima Foundation-sponsored plans: Arizona Blue Cross-Blue Shield, Pacific Mutual Life Insurance Co., and Connecticut General Life Insurance Co. The latter two companies also underwrite plans for the Maricopa Foundation, as do five other private insurance companies. Apparently large employers, such as the State of Arizona and Motorola, also act as foundation-approved insurers with respect to their employees' insurance plans.

<sup>3</sup> The foundations act as the insurance companies' claims agents on a contract basis. They administer the claims and, to some extent, review the medical necessity and propriety of the treatment for which a claim is entered. The foundations charge insurers a fee for their various services. In recent years, this fee has been set at 4% of the insurers' premiums.

<sup>4</sup> This agreement provides in part that the physician agrees "to be bound . . . with respect to maximum fees . . . by any fee determination by the [foundation] consistent with the schedule adopted by the [foundation physician] membership . . ." App. 31-32. The agreement also provides that foundation members "understand and agree that participating membership in the [foundation] shall not affect the method of computation or amount of fees billed by me with respect to any medical care for any patient." *Ibid.*

Several other aspects of the record are of key significance but are not stressed by the Court. First, the foundation arrangement forecloses *no* competition. Unlike the classic cartel agreement, the foundation plan does not instruct potential competitors: "Deal with consumers on the following terms and no others. [\*\*\*\*53]" Rather, physicians who participate in the foundation plan are free both to associate with other medical insurance plans -- at any fee level, high or low -- and directly to serve uninsured patients -- at any fee level, high or low. Similarly, insurers that participate in the foundation plan also remain at liberty to do business outside the plan with any physician -- foundation member or not -- at any fee level. Nor are physicians locked into a plan for more than one year's membership. See n. 1, *supra*. Thus freedom to compete, as well as freedom to withdraw, is preserved. The Court cites no case in which a remotely comparable plan or agreement is condemned on a *per se* basis.

Second, on this record we must find that insurers represent consumer interests. Normally consumers search for high quality at low prices. But once a consumer is insured<sup>5</sup> -- *i. e.*, has chosen a medical insurance plan -- he is [\*361] largely indifferent to the amount that his physician charges if the coverage is full, as under the foundation-sponsored plan.

[\*\*\*\*54] The insurer, however, is *not* indifferent. To keep insurance premiums at a competitive level and to remain profitable, insurers -- including those who have contracts with the foundations -- step into the consumer's [\*2482] shoes with his incentive to contain medical costs. Indeed, insurers may be the only parties who have the effective power to restrain medical costs, given the difficulty that patients experience in comparing price and quality for a professional service such as medical care.

On the record before us, there is no evidence of opposition to the foundation plan by insurance companies -- or, for that matter, by members of the public. Rather seven insurers willingly have chosen to contract out to the foundations the task of developing maximum-fee schedules.<sup>6</sup> Again, on the record before us, we must infer that the foundation plan -- open as it is to insurers, physicians, and the public -- has in fact benefited consumers by "[enabling] the insurance carriers to limit and to calculate more efficiently the risks they underwrite." *Ante*, at 342. Nevertheless, even though the case is here on an [\*70] incomplete summary judgment record, the Court conclusively [\*\*\*\*55] draws contrary inferences to support its *per se* judgment.

### III

It is settled law that once an arrangement has been labeled as "price fixing" it is to be condemned *per se*. But it is equally well settled that this characterization is not to be applied [\*362] as a talisman to every arrangement that involves a literal fixing of prices. Many lawful contracts, mergers, and partnerships fix prices. But our cases require a more discerning [\*\*\*\*56] approach. The inquiry in an antitrust case is not simply one of "determining whether two or more potential competitors have literally 'fixed' a 'price.' . . . [Rather], it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label 'per se price fixing.' That will often, but not always, be a simple matter." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979).

Before characterizing an arrangement as a *per se* price-fixing agreement meriting condemnation, a court should determine whether it is a "naked [restraint] of trade with no purpose except stifling of competition." *United States v.*

<sup>5</sup> At least seven insurance companies are competing in the relevant market. See n. 2, *supra*. At this stage of the case we must infer that they are competing vigorously and successfully.

The term "consumer" -- commonly used in antitrust cases and literature -- is used herein to mean persons who need or may need medical services from a physician.

<sup>6</sup> The State introduced no evidence on its summary judgment motion supporting its apparent view that insurers effectively can perform this function themselves, without physician participation. It is clear, however, that price and quality of professional services -- unlike commercial products -- are difficult to compare. Cf. *Bates v. State Bar of Arizona*, 433 U.S. 350, 391-395 (1977) (opinion of POWELL, J.). This is particularly true of medical service. Presumably this is a reason participating insurers wish to utilize the foundations' services.

Topco Associates, Inc., 405 U.S. 596, 608 (1972), quoting White Motor Co. v. United States, 372 U.S. 253, 263 (1963). See also Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-50 (1977). Such a determination is necessary because "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *Id.*, at 58-59. [\*\*\*\*57] As part of this inquiry, a court must determine whether the procompetitive economies that the arrangement purportedly makes possible are substantial and realizable in the absence of such an agreement.

For example, in National Society of Professional Engineers v. United States, 435 U.S. 679 (1978), we held unlawful as a *per se* violation an engineering association's canon of ethics that prohibited competitive bidding by its members. After the parties had "compiled a voluminous discovery and trial record," *id.*, at 685, we carefully considered -- rather than rejected out of hand -- the engineers' "affirmative defense" of their agreement: that competitive bidding would tempt engineers to do inferior work that would threaten public [\*363] health and safety. *Id.*, at 693. We refused to accept this defense because its merits "[confirmed] rather than [refuted] the anticompetitive purpose and [\*\*2483] effect of [the] agreement." *Ibid.* The analysis incident to the "price fixing" characterization found no substantial procompetitive efficiencies. See also Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 646, n. 8, and 649-650 (1980) [\*\*\*\*58] (challenged arrangement condemned because it lacked "a procompetitive justification" and had "no apparent potentially redeeming value").

In Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., *supra*, there was minimum price fixing in the most "literal sense." *Id.*, at 8. [\*\*\*71] We nevertheless agreed, unanimously,<sup>7</sup> [\*\*\*\*59] that an arrangement by which copyright clearinghouses sold performance rights to their entire libraries on a blanket rather than individual basis did not warrant condemnation on a *per se* basis. Individual licensing would have allowed competition between copyright owners. But we reasoned that licensing on a blanket basis yielded substantial efficiencies that otherwise could not be realized. See *id.*, at 20-21. Indeed, the blanket license was itself "to some extent, a different product." *Id.*, at 22.<sup>8</sup>

In sum, the fact that a foundation-sponsored health insurance plan *literally* involves the setting of ceiling prices among competing physicians does not, of itself, justify condemning the plan as *per se* illegal. Only if it is clear from the record that the agreement among physicians is "so plainly [\*364] anticompetitive that no elaborate study of [its effects] is needed to establish [its] illegality" may a court properly make a *per se* judgment. National Society of Professional Engineers v. United States, *supra*, at 692. [\*\*\*\*60] And, as our cases demonstrate, the *per se* label should not be assigned without carefully considering substantial benefits and procompetitive justifications. This is especially true when the agreement under attack is novel, as in this case. See Broadcast Music, *supra*, at 9-10; United States v. Topco Associates, Inc., *supra*, at 607-608 ("It is only after considerable experience with certain business relationships that courts classify them as *per se* violations").

#### IV

The Court acknowledges that the *per se* ban against price fixing is not to be invoked every time potential competitors *literally* fix prices. *Ante*, at 355-357. One also would have expected it to acknowledge that *per se* characterization is inappropriate if the challenged agreement or plan achieves for the public procompetitive benefits that otherwise are not attainable. The Court does not do this. And neither does it provide alternative criteria by which the *per se* characterization is to be determined. It is content simply to brand this type of plan as "price fixing"

<sup>7</sup> See Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S., at 25 (STEVENS, J., dissenting in part) ("The Court holds that ASCAP's blanket license is not a species of price fixing categorically forbidden by the Sherman Act. I agree with that holding").

<sup>8</sup> Cf. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54 (1977) (identifying achievement of efficiencies as "redeeming virtue" in decision sustaining an agreement against *per se* challenge); L. Sullivan, Law of Antitrust § 74, p. 200 (1977) (*per se* characterization inappropriate if price agreement achieves great economies of scale and thereby improves economic performance); *id.*, § 66, p. 180 (higher burden might reasonably be placed on plaintiff where agreement may involve efficiencies).

and describe the agreement in *Broadcast Music* -- which also literally involved the [\*\*\*\*61] fixing of prices -- as "fundamentally different." *Ante*, at 356.

In fact, however, the two agreements are similar in important respects. Each involved competitors [\*\*\*72] and resulted in cooperative pricing.<sup>9</sup> Each arrangement also was [\*\*2484] prompted [\*365] by the need for better service to the consumers.<sup>10</sup> [\*\*\*\*62] And each arrangement apparently makes possible a new product by reaping otherwise unattainable efficiencies.<sup>11</sup> The Court's effort to distinguish *Broadcast Music* thus is unconvincing.<sup>12</sup>

[\*\*\*63] [\*366] The Court, in defending its holding, also suggests that "respondents' arguments against application of the *per se* rule . . . are better directed to the Legislature." *Ante*, at 354-355. This is curious advice. The Sherman Act does not mention *per se* rules. And it was not Congress that decided *Broadcast Music* and the other relevant cases. Since the enactment of the Sherman Act in 1890, it has been the duty of courts to interpret and apply its general mandate -- and to do so for the [\*\*\*73] benefit of consumers.

As in *Broadcast Music*, the plaintiff here has not yet discharged its burden of proving that respondents have entered a plainly anticompetitive combination without a substantial and procompetitive efficiency justification. In my view,

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<sup>9</sup> In this case the physicians in effect vote on foundation maximum-fee schedules. In *Broadcast Music*, the copyright owners aggregated their copyrights into a group package, sold rights to the package at a group price, and distributed the proceeds among themselves according to an agreed-upon formula. See *Columbia Broadcasting System, Inc. v. American Society of Composers, Authors and Publishers*, 562 F.2d 130, 135-136 (CA2 1977).

<sup>10</sup> In this case, the foundations' maximum-fee schedules attempt to rectify the inflationary consequence of patients' indifference to the size of physicians' bills and insurers' commitment to reimburse whatever "usual, customary, and reasonable" charges physicians may submit. In *Broadcast Music*, the market defect inhered in the fact that "those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses." *441 U.S., at 4-5*.

<sup>11</sup> In this case, the record before us indicates that insurers -- those best situated to decide and best motivated to inspire trust in their judgment -- believe that the foundations are the most efficient providers of the maximum-fee scheduling service. In *Broadcast Music*, we found that the blanket copyright clearinghouse system "[reduced] costs absolutely . . ." *Id., at 21*.

<sup>12</sup> The Court states that in *Broadcast Music* "there was little competition among individual composers for their separate compositions." *Ante*, at 355. This is an irrational ground for distinction. Competition could have existed, *441 U.S., at 6*; see also *562 F.2d, at 134-135, 138*, but did not because of the cooperative agreement. That competition yet persists among physicians is not a sensible reason to invalidate their agreement while refusing similarly to condemn the *Broadcast Music* agreements that were completely effective in eliminating competition.

The Court also offers as a distinction that the foundations do not permit the creation of "any different product." *Ante*, at 356. But the foundations provide a "different product" to precisely the same extent as did *Broadcast Music*'s clearinghouses. The clearinghouses provided only what copyright holders offered as individual sellers -- the rights to use individual compositions. The clearinghouses were able to obtain these same rights more efficiently, however, because they eliminated the need to engage in individual bargaining with each individual copyright owner. See *441 U.S., at 21-22*.

In the same manner, the foundations set up an innovative means to deliver a basic service -- insured medical care from a wide range of physicians of one's choice -- in a more economical manner. The foundations' maximum-fee schedules replace the weak cost containment incentives in typical "usual, customary, and reasonable" insurance agreements with a stronger cost control mechanism: an absolute ceiling on maximum fees that can be charged. The conduct of the insurers in this case indicates that they believe that the foundation plan as it presently exists is the most efficient means of developing and administering such schedules. At this stage in the litigation, therefore, we must agree that the foundation plan permits the more economical delivery of the basic insurance service -- "to some extent, a different product." *Broadcast Music, 441 U.S., at 22*.

the District Court therefore correctly refused to grant the State's motion for summary judgment.<sup>13</sup> This critical and disputed issue of fact remains [\*\*2485] unresolved. See [Fed. Rule Civ. Proc. 56\(c\)](#).

[\*\*\*\*64] [\*367] V

I believe the Court's action today loses sight of the basic purposes of the Sherman Act. As we have noted, the anti-trust laws are a "consumer welfare prescription." [Reiter v. Sonotone Corp., 442 U.S. 330, 343 \(1979\)](#). In its rush to condemn a novel plan about which it knows very little, the Court suggests that this end is achieved only by invalidating activities that *may* have some potential for harm. But the little that the record does show about the effect of the plan suggests that it is a means of providing medical services that in fact benefits rather than injures persons who need them.

In a complex economy, complex economic arrangements are commonplace. It is unwise for the Court, in a case as novel and important as this one, to make a final judgment in the absence of a complete record and where mandatory inferences create critical issues of fact.

## **References**

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Annotation References:

Supreme Court's views as to what constitutes per se illegal "price fixing" to under the Sherman Act ([15 USCS 1 et seq.](#)). [64 L Ed 2d 997](#).

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<sup>13</sup> Medical services differ from the typical service or commercial product at issue in an antitrust case. The services of physicians, rendered on a patient-by-patient basis, rarely can be compared by the recipient. A person requiring medical service or advice has no ready way of comparing physicians or of "shopping" for quality medical service at a lesser price. Primarily for this reason, the foundations -- operating the plan at issue -- perform a function that neither physicians nor prospective patients can perform individually. On a collective -- and average -- basis, the physicians themselves express a willingness to render certain identifiable services for not more than specified fees, leaving patients free to choose the physician. We thus have a case in which we derive little guidance from the conventional "perfect market" analysis of antitrust law. I would give greater weight than the Court to the uniqueness of medical services, and certainly would not invalidate on a *per se* basis a plan that may in fact perform a uniquely useful service.

Affirmance of the District Court's holding would not have immunized the medical service plan at issue. Nor would it have foreclosed an eventual conclusion on remand that the arrangement should be deemed *per se* invalid. And if the District Court had found that petitioner had failed to establish a *per se* violation of the Sherman Act, the question would have remained whether the plan comports with the rule of reason. See, e. g., [United States v. United States Gypsum Co., 438 U.S. 422, 441, n. 16 \(1978\)](#).

"Learned profession" exemption in Federal Antitrust Laws ([15 USCS 1 et seq.](#)). 39 ALR Fed 774.

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## Blue Shield of Va. v. McCready

Supreme Court of the United States

March 24, 1982, Argued ; June 21, 1982, Decided

No. 81-225

### **Reporter**

457 U.S. 465 \*; 102 S. Ct. 2540 \*\*; 73 L. Ed. 2d 149 \*\*\*; 1982 U.S. LEXIS 132 \*\*\*\*; 50 U.S.L.W. 4723; 1982-2 Trade Cas. (CCH) P64,791

BLUE SHIELD OF VIRGINIA ET AL. v. McCREADY

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

**Disposition:** [649 F.2d 228](#), affirmed.

## **Core Terms**

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psychologists, reimburse, subscribers, anti trust law, psychiatrists, conspiracy, antitrust, conspirators, damages, anticompetitive, psychotherapy, coverage, clinical psychologist, petitioners', Clayton Act, distributors, competitors, retailers, boycott, concerted refusal, purchasers, violations, antitrust violation, consumer, alleges, billed, remote, economic loss, third party, effecting

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN1\*\*](#) **[ Antitrust & Trade Law, Sherman Act**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

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

### [\*\*HN2\*\*](#) **[ Remedies, Damages**

Section 4 of the Clayton Act provides a treble-damages remedy to any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. [15 U.S.C.S. § 15](#).

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

Antitrust & Trade Law > Clayton Act > Scope

### [HN3](#) [down] **Private Actions, Standing**

The Clayton Act (Act) does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. [15 U.S.C.S. § 15](#).

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Public Enforcement > State Civil Actions

### [HN4](#) [down] **Remedies, Damages**

Section 4 of the Clayton Act does not authorize a state to sue in its parens patriae capacity for damages to its general economy. [15 U.S.C.S. § 15](#).

Antitrust & Trade Law > Clayton Act > Claims

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

### [HN5](#) [down] **Clayton Act, Claims**

In the absence of direct guidance from Congress, and faced with the claim that a particular injury is too remote from the alleged violation to warrant § 4 standing under the Clayton Act, the courts are thus forced to resort to an analysis no less elusive than that employed traditionally by courts at common law with respect to the matter of proximate cause. [15 U.S.C.S. § 15](#).

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

### [HN6](#) [down] **Private Actions, Remedies**

Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely the type of loss that the claimed violations would be likely to cause.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

## **[HN7](#) [L] Clayton Act, Claims**

For a plaintiff to recover treble damages on account of violations of § 7 of the Clayton Act, he must prove more than injury causally linked to an illegal presence in the market. Plaintiff must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of loss that the claimed violations would be likely to cause.

## **Lawyers' Edition Display**

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### **Decision**

Health plan subscriber denied reimbursement for psychologist's fees, held to have standing to sue for conspiracy to exclude psychologists from psychotherapy market.

### **Summary**

A prepaid group health plan subscriber brought a private antitrust class action in the United States District Court for the Eastern District of Virginia against the plan and a psychiatric society, alleging an unlawful conspiracy to exclude and boycott clinical psychologists from receiving compensation under the plan, so as to restrain competition in the psychotherapy market, and further alleging that her claims for psychotherapy by a clinical psychologist were routinely denied because not billed through a physician. The District Court granted the defendants' motion to dismiss, on the grounds that the subscriber lacked standing to sue, and the United States Court of Appeals for the Fourth Circuit reversed ([649 F2d 228](#)).

On certiorari, the United States Supreme Court affirmed. In an opinion by Brennan, J., joined by White, Marshall, Blackmun, and Powell, JJ., it was held that the subscriber had suffered an injury redressable under the antitrust laws because the harm to her was a necessary step in effecting the ends of the illegal conspiracy.

Rehnquist, J., joined by Burger, Ch. J., and O'Connor, J., dissented, stating that the subscriber lacked standing to sue because she did not suffer the type of harm which makes the challenged practice illegal.

Stevens, J., dissented, expressing the view that the subscriber suffered no damages because she received psychological services presumably worth the payment made by her.

## **Headnotes**

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ERROR §1293 > pleadings -- > Headnote:

[LEdHN\[1A\]](#) [L] [1A] [LEdHN\[1B\]](#) [L] [1B]

On certiorari to review a case arising on a motion to dismiss, the United States Supreme Court will assume, as the plaintiff alleged, that but for an alleged conspiracy to deny payment to her, she would have been reimbursed by her health plan insurer for the cost of her psychologist's services.

457 U.S. 465, \*465; 102 S. Ct. 2540, \*\*2540; 73 L. Ed. 2d 149, \*\*\*149; 1982 U.S. LEXIS 132, \*\*\*\*1

PRACTICES §67 > who may recover -- > Headnote:

[LEdHN\[2\]](#) [2]

Section 4 of the Clayton Act ([15 USCS 15](#)), which provides a treble-damages remedy to any person "injured in his business or property by reason of anything forbidden in the antitrust laws," does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers, but protects all who are made victims of the forbidden practices by whomever they may be perpetrated.

PRACTICES §67 > who may recover -- > Headnote:

[LEdHN\[3\]](#) [3]

Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.

SUIT §4 > statutory remedy -- > Headnote:

[LEdHN\[4A\]](#) [4A] [LEdHN\[4B\]](#) [4B]

In identifying the limits of an explicit statutory remedy, legislative intent is the controlling consideration.

PRACTICES §67 > who may recover -- > Headnote:

[LEdHN\[5\]](#) [5]

In determining which persons have sustained injuries too remote from an antitrust violation to give them standing to sue for damages under 4 of the Clayton Act ([15 USCS 15](#)), which provides a treble-damages remedy to any person "injured in his business or property by reason of anything forbidden in the antitrust laws," the court must look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff and (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making the defendant's conduct unlawful and in providing a private remedy under 4 of the Clayton Act.

PRACTICES §67 > who may recover -- > Headnote:

[LEdHN\[6\]](#) [6]

Under 4 of the Clayton Act ([15 USCS 15](#)), which provides a treble-damages remedy to any person "injured in his business or property by reason of anything forbidden in the antitrust laws," the availability of the remedy to some person who claims its benefits is not a question of the specific intent of the conspirators.

457 U.S. 465, \*465; 102 S. Ct. 2540, \*\*2540; 73 L. Ed. 2d 149, \*\*\*149; 1982 U.S. LEXIS 132, \*\*\*\*1

PRACTICES §67 > who may recover -- > Headnote:

[LEdHN\[7\]](#) [7]

An injury is within 4 of the Clayton Act ([15 USCS 15](#)), which provides a treble-damages remedy to any person "injured in his business or property by reason of anything forbidden in the antitrust laws," where the harm to the plaintiff and her class was a necessary step in effecting the ends of the illegal conspiracy. (Rehnquist, J., Burger, Ch. J., and O'Connor, J., dissented from this holding.)

CAUSE §10 > intervening cause -- > Headnote:

[LEdHN\[8A\]](#) [8A] [LEdHN\[8B\]](#) [8B]

In a private antitrust suit by an employee against a prepaid health plan and a psychiatric society for unlawful conspiracy causing the group health plan's refusal to reimburse subscribers for psychotherapy performed by psychologists rather than psychiatrists, the employer's decision to retain the plan notwithstanding such refusal is not an intervening cause of the employee's injury.

PRACTICES §67 > who may recover -- > Headnote:

[LEdHN\[9\]](#) [9]

As a general principle, antitrust treble-damages recoveries under 4 of the Clayton Act ([15 USCS 15](#)) should be linked to the pro-competition policy of the antitrust laws.

PRACTICES §67 > who may recover -- > Headnote:

[LEdHN\[10\]](#) [10]

A plaintiff under 4 of the Clayton Act ([15 USCS 15](#)), which provides a treble-damages remedy to any person "injured in his business or property by reason of anything forbidden in the antitrust laws," need not prove an actual lessening of competition in order to recover; competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened.

PRACTICES §67 > who may recover -- > Headnote:

[LEdHN\[11\]](#) [11]

A prepaid group health plan subscriber whose claims for psychotherapy expenses are denied by the plan because not billed through a physician, in furtherance of an unlawful conspiracy to restrain competition in the psychotherapy market by refusing to reimburse subscribers for psychotherapy performed by psychologists, thereby suffers an injury redressable under 4 of the Clayton Act ([15 USCS 15](#)), which provides a treble-damages remedy to any person "injured in his business or property by reason of anything forbidden in the antitrust laws." (Rehnquist, J., Burger, Ch. J., O'Connor and Stevens, JJ., dissented from this holding.)

PRACTICES §67 > who may recover -- > Headnote:

LEdHN[12A] [12A] LEdHN[12B] [12B]

The relationship between the claimed injury and that which is unlawful in the defendant's conduct is one factor to be considered in determining the redressability of a particular form of injury under 4 of the Clayton Act ([15 USCS 15](#)), which provides a treble-damages remedy to any person "injured in his business or property by reason of anything forbidden in the antitrust laws."

## Syllabus

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Respondent employee was provided coverage under a prepaid group health plan purchased by her employer from petitioner Blue Shield of Virginia (Blue Shield). The plan provided reimbursement for part of the cost incurred by subscribers for outpatient treatment for mental and nervous disorders, including psychotherapy. However, Blue Shield's practice was to reimburse subscribers for services provided by *psychiatrists* but not by *psychologists* unless the treatment was supervised by and billed through a physician. Respondent was treated by a clinical psychologist and submitted claims to Blue Shield for the costs of the treatment. After the claims were routinely denied because they had not been billed through a physician, respondent brought a class action in Federal District Court, [\*\*\*\*2] alleging that Blue Shield and petitioner Neuropsychiatric Society of Virginia, Inc., had engaged in an unlawful conspiracy in violation of [§ 1](#) of the Sherman Act to exclude psychologists from receiving compensation under Blue Shield's plans. She further alleged that Blue Shield's failure to reimburse was in furtherance of the conspiracy and had caused injury to her business or property for which she was entitled to treble damages under § 4 of the Clayton Act, which provides for recovery of such damages by "[any] person" injured "by reason of anything" prohibited in the antitrust laws. The District Court granted petitioners' motion to dismiss, holding that respondent had no standing under § 4 to maintain her suit. The Court of Appeals reversed.

*Held:* Respondent has standing to maintain the action under § 4 of the Clayton Act. Pp. 472-485.

(a) The lack of restrictive language in § 4 reflects Congress' expansive remedial purpose of creating a private enforcement mechanism to deter violators and deprive them of the fruits of their illegal actions, and to provide ample compensation to victims of antitrust violations. In the absence of some articulable consideration of statutory [\*\*\*\*3] policy suggesting a contrary conclusion in a particular factual setting, § 4 is to be applied in accordance with its plain language and its broad remedial and deterrent objectives. Pp. 472-473.

(b) Permitting respondent to proceed does not offer the slightest possibility of a duplicative exaction from petitioners, [Hawaii v. Standard Oil Co., 405 U.S. 251](#), and [Illinois Brick Co. v. Illinois, 431 U.S. 720](#), distinguished, since she had paid her psychologist, who thus was not injured by Blue Shield's refusal to reimburse respondent. And whatever the adverse effect of Blue Shield's actions on respondent's employer, who purchased the plan, it is not the employer as purchaser, but its employees as subscribers, who are out of pocket as a consequence of the plan's failure to pay benefits. Pp. 473-475.

(c) In determining whether a particular injury is too remote from the alleged violation to warrant § 4 standing, consideration is to be given (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2), more particularly, to the relationship of the injury alleged with those forms of injury about [\*\*\*\*4] which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4. Pp. 476-478.

(d) Respondent's injury is not rendered "remote" merely because the alleged goal of petitioners was to halt encroachment by psychologists into a market that physicians and psychiatrists sought to preserve for themselves. Here, the § 4 remedy cannot reasonably be restricted to those competitors whom petitioners hoped to eliminate

from the market. Denying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its alleged illegal ends, and respondent's injury was precisely the type of loss that the claimed violations would be likely to cause. Nor is the § 4 remedy unavailable to respondent on the asserted ground that standing should be limited to participants in the restrained market in group health care plans -- that is, to entities, such as respondent's employer, who were purchasers of group health plans. Respondent did not allege a restraint in the market for group health plans, but instead premised her claim on the concerted refusal to reimburse under a [\*\*\*\*5] plan that would permit reimbursement for psychologists' services. As a consumer of psychotherapy services entitled to financial benefits under the Blue Shield plan, she was within that area of the economy endangered by the breakdown of competitive conditions resulting from Blue Shield's selective refusal to reimburse. Pp. 478-481.

(e) Section 4 standing is not precluded on the asserted ground that respondent's injury does not reflect the "anticompetitive" effect of the alleged boycott. Her injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws. Respondent did not yield to Blue Shield's coercive pressure to induce its subscribers into selecting psychiatrists over psychologists for the services they required, but instead bore Blue Shield's sanction in the form of an increase in the net cost of her psychologist's services. In light of the conspiracy here alleged, respondent's injury "flows from that which makes defendants' acts unlawful," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, and falls squarely within the area of congressional concern. Pp. 481-484.

**Counsel:** Griffin B. Bell [\*\*\*\*6] argued the cause for petitioners. With him on the briefs were James D. Miller, William B. Poff, Ronald M. Ayers, Heman A. Marshall III, Joel I. Klein, and H. Bartow Farr III.

Warwick R. Furr II argued the cause for respondent. With him on the brief were Timothy J. Bloomfield and Thomas M. Brownell. \*

**Judges:** BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and O'CONNOR, J., joined, post, p. 485. STEVENS, J., filed a dissenting opinion, post, p. 492.

**Opinion by:** BRENNAN

## Opinion

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[\*467] [\*\*\*153] [\*\*2542] JUSTICE BRENNAN delivered the opinion of the Court.

The antitrust complaint at issue in this case alleges that a group health plan's practice of refusing to reimburse subscribers for psychotherapy performed by psychologists, while providing reimbursement for comparable treatment by psychiatrists, was in furtherance of an unlawful conspiracy to restrain competition in the psychotherapy market. [\*\*\*\*7] The question presented is whether a subscriber who employed the services of a psychologist has standing to maintain an action under § 4 of the Clayton Act based upon the plan's failure to provide reimbursement for the costs of that treatment.

I

LEdHN[1A] [1A]From September 1975 until January 1978, respondent Carol McCready was an employee of Prince William County, [\*468] Va. As [\*\*\*154] part of her compensation, the county provided her with coverage under a prepaid group health plan purchased from petitioner Blue Shield of Virginia (Blue Shield).<sup>1</sup> The plan

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<sup>\*</sup>Paul R. Friedman, Bruce J. Ennis, and Donald N. Bersoff filed a brief for the American Psychological Association as amicus curiae urging affirmance.

<sup>1</sup>With petitioner Blue Shield of Southwestern Virginia.

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specifically provided reimbursement for a portion of the cost incurred by subscribers with respect to outpatient treatment for mental and nervous disorders, including psychotherapy. Pursuant to this provision, Blue Shield reimbursed subscribers for psychotherapy provided by *psychiatrists*. But Blue Shield did not provide reimbursement for the services of *psychologists* unless the treatment was supervised by and billed through a physician.<sup>2</sup> [\*\*\*\*9] While a subscriber to the plan, McCready was treated by a clinical psychologist. She [\*\*2543] submitted [\*\*\*\*8] claims to Blue Shield for the costs of that treatment, but those claims were routinely denied because they had not been billed through a physician.<sup>3</sup>

#### LEdHN[1B] [1B]

In 1978, McCready brought this class action in the United States District Court for the Eastern District of Virginia, on behalf of all Blue Shield subscribers who had incurred costs [\*469] for psychological services since 1973 but who had not been reimbursed.<sup>4</sup> [\*\*\*\*11] The complaint alleged [\*\*\*155] that Blue Shield and petitioner Neuropsychiatric Society of Virginia, Inc., had engaged in an unlawful conspiracy in violation of § 1 of the [\*470] Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1,<sup>5</sup> "to exclude and boycott clinical psychologists from

<sup>2</sup> Petitioners contend that the contract between the county and Blue Shield must be read to bar payments for the services of nonphysicians. Respondent counters that between 1962 and 1972 Blue Shield routinely reimbursed subscribers for psychotherapy provided by psychologists, and that this practice was revised in 1972 as a result of the alleged conspiracy. In addition, respondent notes that in 1973 the Virginia Legislature passed a "freedom of choice" statute, Va. Code § 38.1-824 (1981), that required Blue Shield to pay for services rendered by licensed psychologists. See Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 624 F.2d 476, 478 (CA4 1980). She argues that Blue Shield's obligations must be read consistently with that statute, at least until that statute was held invalid as applied in Blue Cross of Virginia v. Commonwealth, 221 Va. 349, 269 S. E. 2d 827 (1980). This case arises on a motion to dismiss. We therefore assume, as McCready has alleged, that but for the alleged conspiracy to deny payment, she would have been reimbursed by Blue Shield for the cost of her psychologist's services.

<sup>3</sup> Apparently Blue Shield inadvertently paid one of McCready's claims. After the error was discovered, Blue Shield sought to obtain a refund from McCready for the amount paid. 649 F.2d 228, 230, n. 4 (1981).

<sup>4</sup> A similar complaint was filed by the Virginia Academy of Clinical Psychologists (VACP) and its president against the same defendants. The District Court addressed the motions to dismiss filed in each of the cases in a single opinion. The court dismissed McCready's case -- thus giving rise to the appellate decision at issue in this Court -- but permitted the VACP case to proceed to trial. Following trial, the District Court entered judgment for the defendants, Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 469 F.Supp. 552 (1979), but the Court of Appeals reversed with respect to defendant Blue Shield, 624 F.2d 476 (CA4 1980). The opinion of the Court of Appeals for the Fourth Circuit in the instant case states that the opinion in VACP "should be read in connection with" its own opinion. 649 F.2d, at 230. A brief recitation of the decision in the VACP case is thus helpful in understanding the precise nature of McCready's claim.

In VACP, the Court of Appeals rejected the District Court's treatment of Blue Shield as a distinct entity for purposes of determining whether a conspiracy or agreement had been shown. 624 F.2d, at 479. The court found that "the Blue Shield Plans are combinations of physicians, operating under the direction and control of their physician members." *Ibid.*

"Blue Shield Plans are not insurance companies, though they are, to a degree, insurers. Rather, they are generally characterized as prepaid health care plans, quantity purchasers of health care services. [In] a real and legal sense, the Blue Shield Plans are agents of their member physicians." Id., at 480 (citations and footnote omitted).

With respect to the question whether the alleged Blue Shield combination was "in restraint of trade," the Court of Appeals agreed with the District Court that the rule of reason was applicable, but held that the District Court had erred in finding no liability. The Court of Appeals observed that psychologists and psychiatrists compete in the psychotherapy market, and that the decisions of Blue Shield "necessarily dictate, to some extent," who will be chosen to provide psychotherapy. Id., at 485. Finding that Blue Shield's policy of denying reimbursement for the psychotherapeutic services of psychologists unless billed through physicians, was not merely a cost-containment device or simply "good medical practice," as claimed by Blue Shield, the court held that Blue Shield had violated the Sherman Act. *Ibid.*

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receiving compensation under" the Blue Shield plans. App. 55. McCready further alleged that Blue Shield's failure to reimburse had been in furtherance of the alleged conspiracy, and had caused injury to her business or property for which she was entitled to treble damages and attorney's fees [\*\*\*\*10] under § 4 of the Clayton Act, 38 Stat. 731, [15 U. S. C. § 15](#).<sup>6</sup>

The District Court granted petitioners' motion to dismiss, holding that McCready had no standing under § 4 to maintain her suit.<sup>7</sup> In the District Court's view, [\*\*2544] McCready's standing to maintain a § 4 action turned on whether she had suffered injury "within the sector of the economy competitively endangered by the defendants' alleged violations of the antitrust laws." App. 17. Noting that the goal of the alleged boycott [\*\*\*\*12] was to exclude clinical psychologists from a segment of the psychotherapy market, the court concluded that the "sector of the economy *competitively endangered*" by the charged violation extended "no further than that area occupied by the psychologists." *Id.*, at 18 (emphasis in original). Thus, while McCready clearly had suffered an injury by [\*471] being denied reimbursement, this injury was "too indirect and remote to be considered 'antitrust injury.'" *Ibid.*

[\*\*\*\*13] A divided panel of the United States Court of Appeals for the Fourth Circuit reversed, holding that McCready had alleged an injury within the meaning of § 4 of the Clayton Act and had standing to maintain the suit. [649 F.2d 228 \(1981\)](#). The court recognized that the goal of the alleged conspiracy was the exclusion of clinical psychologists from some segment of the psychotherapy [\*\*\*156] market. But it held that the § 4 remedy was available to any person "whose property loss is directly or proximately caused by" a violation of the antitrust laws, and that McCready's loss was not "too remote or indirect to be covered by the Act." *Id., at 231*.<sup>8</sup> The court thus

<sup>5</sup> [HN1](#) [↑] That section provides, in pertinent part, that "[every] contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

<sup>6</sup> That section provides, in pertinent part:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

<sup>7</sup> Petitioners have argued in this Court that under § 2 of the McCarran-Ferguson Act, [15 U. S. C. § 1012](#), their actions were exempt from the antitrust laws as part of the "business of insurance." In ruling on petitioners' motion to dismiss, the District Court concluded that respondent had adequately pleaded a boycott beyond the protection of the McCarran-Ferguson Act, [15 U. S. C. § 1013\(b\)](#). Respondent points out that on a full factual record the issue was resolved against the petitioners in VACP, 624 F.2d, at 483-484. The Court of Appeals did not address this question in the present case, however, and we do not reach it here.

<sup>8</sup> Addressing the "target area" limitation on antitrust standing recognized in several Courts of Appeals, see n. 14, *infra*, the court concluded that the policies underlying that limitation were not implicated by McCready's claim. [649 F.2d, at 231-232](#). The dissenting judge took a contrary view of the "target area" rule. He emphasized that McCready had not described her injury "as a design or goal of any antitrust violation," but "rather as a consequence thereof." *Id., at 232*. He viewed this as the determinative factor in the proper application of the "target area" test to the facts of this case:

"In determining who has standing to sue, the courts must look at who the illegal act was aimed to injure. A bystander, who is not the intended victim of the antitrust violation but who is injured nonetheless, cannot sue under the antitrust laws. His injury is too remote." *Id., at 233*.

In addition, the dissent argued that McCready was not within the sector of the economy "competitively endangered" by the alleged violation, agreeing with the District Court that "she operated in a market which was unrestrained so far as she was concerned." *Id., at 234*. Finally, the dissent reasoned:

"The price of psychologists' services to her was not increased by any act of the defendants. The fact that her Blue Shield contract . . . would not reimburse her for those services had nothing to do with the price she paid for the services, which . . . were not artificially inflated by an antitrust violation. . . .

". . . There is not even a claim that her psychologists' bills are higher than they would have been had the conspiracy not existed." *Id., at 235-236*.

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[\*472] remanded the case to the District Court for further proceedings. We granted certiorari. 454 U.S. 962 (1981).

[\*\*\*\*14] II

LEdHN[2]<sup>↑</sup> [2]Section 4 of the Clayton Act, 38 Stat. 731, HN2<sup>↑</sup> provides a treble-damages remedy to "[any] person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," 15 U.S.C. § 15 (emphasis added). As we noted in Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979), "[on] its face, § 4 contains little in the way of restrictive language." And the lack of restrictive language reflects Congress' "expansive remedial purpose" in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations. Pfizer Inc. v. India, 434 U.S. 308, 313-314 (1978). See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-486, and n. 10, (1977); Perma Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968); [\*\*\*\*15] American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556, 572-573, and n. 10, \*\*\*\*25451 (1982). HN3<sup>↑</sup> As we have recognized, "[the] statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948).

Consistent with the congressional purpose, we have refused to engrave artificial limitations on the § 4 remedy.<sup>9</sup> [\*\*\*\*17] [\*473] [\*\*\*157] Two recent cases illustrate the point. Pfizer Inc. v. India, supra, afforded the statutory phrase "any person" its "naturally broad and inclusive meaning," id., at 312, and held that it extends even to an action brought by a foreign sovereign. Similarly, Reiter v. Sonotone Corp., supra, rejected the argument that the § 4 remedy is available only to redress [\*\*\*\*16] injury to commercial interests. In that case we afforded the statutory term "property" its "naturally broad and inclusive meaning," and held that a consumer has standing to seek a § 4 remedy reflecting the increase in the purchase price of goods that was attributable to a price-fixing conspiracy. 442 U.S., at 338. In sum, in the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting, we have applied § 4 in accordance with its plain language and its broad remedial and deterrent objectives. But drawing on statutory policy, our cases have acknowledged two types of limitation on the availability of the § 4 remedy to particular classes of persons and for redress of particular forms of injury. We treat these limitations in turn.<sup>10</sup>

A

In Hawaii v. Standard Oil Co., 405 U.S. 251 (1972), we held that § 4 HN4<sup>↑</sup> did not authorize a State to sue in its *parens patriae* capacity for damages to its "general economy." Noting [\*474] [\*\*\*18] that a "large and ultimately indeterminable part of the injury to the 'general economy' . . . is no more than a reflection of injuries to the 'business or property' of consumers, for which they may recover themselves under § 4," we concluded that "[even] the most

<sup>9</sup> In a related context we commented that "[in] the face of [the congressional antitrust] policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress . . ." Radovich v. National Football League, 352 U.S. 445, 454 (1957). See also Radiant Burners, Inc. v. Peoples Gas Co., 364 U.S. 656, 659-660 (1961) (*per curiam*) (To state a claim under § 1 of the Sherman Act, "allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires").

<sup>10</sup> Permitting McCready to maintain this lawsuit will, of course, further certain basic objectives of the private enforcement scheme embodied in § 4. Only by requiring violators to disgorge the "fruits of their illegality" can the deterrent objectives of the antitrust laws be fully served. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494 (1968). See Pfizer Inc. v. India, 434 U.S. 308, 314 (1978); Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977). But in addition to allowing Blue Shield to retain a palpable profit as a result of its unlawful plan, denying standing to McCready and the class she represents would also result in the denial of compensation for injuries resulting from unlawful conduct.

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lengthy and expensive trial could not . . . cope with the problems of double recovery inherent in allowing damages" for injury to the State's quasi-sovereign interests. *Id., at 264*. See *Reiter v. Sonotone Corp., supra, at 342*.

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), similar concerns prevailed. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), had held that an antitrust defendant could not relieve itself of its obligation to pay damages resulting from overcharges to a direct-purchaser plaintiff by showing [\*\*\*158] [\*\*2546] that the plaintiff had passed the amount of the overcharge on to its own customers. *Illinois Brick* was an action by an indirect purchaser claiming damages from the antitrust violator measured by the amount that had been passed on to it. Relying in part on *Hawaii v. Standard Oil Co., supra*, [\*\*\*\*19] the Court found unacceptable the risk of duplicative recovery engendered by allowing both direct and indirect purchasers to claim damages resulting from a single overcharge by the antitrust defendant. *Illinois Brick, supra, at 730-731*. The Court found that the splintered recoveries and litigative burdens that would result from a rule requiring that the impact of an overcharge be apportioned between direct and indirect purchasers could undermine the active enforcement of the antitrust laws by private actions. 431 U.S., 745-747. The Court concluded that direct purchasers rather than indirect purchasers were the injured parties who as a group were most likely to press their claims with the vigor that the § 4 treble-damages remedy was intended to promote. *Id., at 735*.

The policies identified in *Hawaii* and *Illinois Brick* plainly offer no support for petitioners here. Both cases focused on the risk of duplicative recovery engendered by allowing [\*475] every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws. But permitting respondent to proceed in the circumstances [\*\*\*\*20] of this case offers not the slightest possibility of a duplicative exaction from petitioners. McCready has paid her psychologist's bills; her injury consists of Blue Shield's failure to pay her. Her psychologist can link no claim of injury to himself arising from his treatment of McCready; he has been fully paid for his service and has not been injured by Blue Shield's refusal to reimburse her for the cost of his services. And whatever the adverse effect of Blue Shield's actions on McCready's employer, who purchased the plan, it is not the employer as purchaser, but its employees as subscribers, who are out of pocket as a consequence of the plan's failure to pay benefits.<sup>11</sup>

[\*\*\*\*21] [\*476] B

<sup>11</sup> [\*\*\*159] *LEdHN[3][↑]* [3]*LEdHN[4A][↑]* [4A]*LEdHN[5][↑]* [5]Analytically distinct from the restrictions on the § 4 remedy recognized in *Hawaii* and *Illinois Brick*, there is the conceptually more difficult question "of which persons have sustained injuries *too remote* [from an antitrust violation] to give them standing to sue for damages under § 4." *Illinois Brick Co. v. Illinois*, 431 U.S., at 728, n. 7 [\*\*2547] (emphasis added).<sup>12</sup> An antitrust violation may be

<sup>11</sup> If there is a subordinate theme to our opinions in *Hawaii* and *Illinois Brick*, it is that the feasibility and consequences of implementing particular damages theories may, in certain limited circumstances, be considered in determining who is entitled to prosecute an action brought under § 4. Where consistent with the broader remedial purposes of the antitrust laws, we have sought to avoid burdening § 4 actions with damages issues giving rise to the need for "massive evidence and complicated theories," where the consequence would be to discourage vigorous enforcement of the antitrust laws by private suits. *Hanover Shoe, Inc. v. United Shoe Machinery Corp., supra, at 493*. Thus we recognized that the task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972); *Illinois Brick Co. v. Illinois, supra, at 741-742*. In addition, while "[difficulty] of ascertainment [should not be] confused with right of recovery," *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946), § 4 plainly focuses on tangible economic injury. It may therefore be appropriate to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm. See *Hawaii v. Standard Oil Co., supra, at 262-263, n. 14*. But like the policy against duplicative recoveries, our cautious approach to speculative, abstract, or impractical damages theories has no application to McCready's suit. The nature of her injury is easily stated: As the result of an unlawful boycott, Blue Shield failed to pay the cost she incurred for the services of a psychologist. Her damages were fixed by the plan contract and, as the Court of Appeals observed, they could be "ascertained to the penny." *649 F.2d, at 231*.

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expected to cause ripples of [\*477] harm to flow through the Nation's economy; but "despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable." *Id., at 760* (BRENNAN, J., dissenting). It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property. Of course, neither [\*\*\*\*22] the statutory language nor the legislative history of § 4 offers any focused guidance on the question of which injuries are too remote from the violation and the purposes of the antitrust laws to form the predicate for a suit under § 4; indeed, the unrestrictive language of the section, and the avowed breadth of the congressional purpose, cautions us not to cabin § 4 in ways that will defeat its broad remedial objective. But the potency of the remedy implies the need for some care in its application. [HN5↑](#) In the absence of direct guidance from Congress, and faced with the claim that a particular injury is too remote from the alleged violation to warrant § 4 standing, the courts are thus forced to resort to an analysis no less elusive than that employed [\*\*\*160] traditionally by courts at common law with respect to the matter of "proximate cause."<sup>13</sup> See *Perkins v. Standard Oil Co.*, 395 U.S. 642, 649 (1969); *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 363 [[\\*4781](#)] (CA9 1955). In applying that elusive concept to this statutory action, [\*\*\*\*23] we look (1) to the physical and economic nexus between the alleged violation [\*\*2548] and the harm to the plaintiff, and (2), more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4.

[\*\*\*\*24] [LEdHN\[4B\]↑](#) [4B]

[\*\*\*\*25] (1)

<sup>12</sup> We addressed two issues of "remoteness" in *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969). That case involved an alleged violation of § 2 of the Clayton Act, as amended by the Robinson-Patman Act, [15 U. S. C. § 13](#). Focusing on the substantive terms of § 2, we found no warrant in its "language or purpose" to engraft an "artificial" limitation on the reach of the remedy to bar what the court below had termed a "fourth level" injury. [395 U.S., at 648](#). We also rejected the claim that one form of damages claimed by the defendant was not the proximate result of the alleged violation. *Id., at 649*.

The Courts of Appeals have developed a more substantial jurisprudence on the subject of "remoteness," formulating various "tests" as aids in analysis. Among the tests employed by the lower courts are those that focus on the "directness" of the injury, e. g., *Loeb v. Eastman Kodak Co.*, 183 F. 704, 709 (CA3 1910); *Productive Inventions, Inc. v. Trico Products Corp.*, 224 F.2d 678 (CA2 1955); *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (CA6 1962); on its foreseeability, e. g., *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 199 (CA9 1973); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 220 (CA9 1964); or on whether the injury is "arguably . . . within the zone of interests protected by the [antitrust laws]," e. g., *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1152 (CA6 1975). See also n. 14, *infra* ("target area" test). The Third Circuit has concluded that "§ 4 standing analysis is essentially a balancing test comprised of many constant and variable factors and that there is no talismanic test capable of resolving all § 4 standing problems." *Bravman v. Basset Furniture Industries, Inc.*, 552 F.2d 90, 99 (1977). The Third Circuit has thus rejected the definitional approach, opting instead for an analysis of the "factual matrix" presented by each case. *Ibid.* We have no occasion here to evaluate the relative utility of any of these possibly conflicting approaches toward the problem of remote antitrust injury.

<sup>13</sup> The traditional principle of proximate cause suggests the use of words such as "remote," "tenuous," "fortuitous," "incidental," or "consequential" to describe those injuries that will find no remedy at law. See, e. g., *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414, 419 (CA4 1966). And the use of such terms only emphasizes that the principle of proximate cause is hardly a rigorous analytic tool. See, e. g., *Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928); *id., at 351-352*, 162 N. E., at 103 (Andrews, J., dissenting) ("What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations. . . . What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point"). It bears affirming that in identifying the limits of an explicit statutory remedy, legislative intent is the controlling consideration. Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377-378 (1982); *Middlesex County Sewerage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 13 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979).

It is petitioners' position that McCready's injury is too "fortuitous" and too "incidental" to and "remote" from the alleged violation to provide the basis for a § 4 action.<sup>14</sup> At the outset, petitioners argue that because the alleged conspiracy was directed by its protagonists at psychologists, and not at subscribers to group health plans, only psychologists might maintain suit. This argument may be quickly disposed of.

[\*\*\*\*26] [LEdHN\[61\]](#) [6][LEdHN\[7\]](#) [7]We do not think that because the goal of the conspirators was to halt encroachment by psychologists into a market that [\*479] physicians and psychiatrists sought to preserve for themselves, McCready's injury is rendered "remote." The availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators. Here the remedy cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the [\*\*\*161] market.<sup>15</sup> McCready claims that she has been the victim of a concerted refusal to pay on the part of Blue Shield, motivated by a desire to deprive psychologists of the patronage of Blue Shield subscribers. Denying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its illegal ends. The harm to McCready and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged illegal conspiracy. [\*\*\*\*27] [HN6](#) Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely "the type of loss that the claimed violations . . . would be likely to cause." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S., at 489*, quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125 (1969)*.

Petitioners next argue that even if the § 4 remedy might be available to persons other than the competitors of the conspirators, it is not available to McCready because she was not an economic actor [\*\*\*\*28] in the market that had been restrained. In petitioners' view, the proximate range of the violation is limited to the sector of the economy in which a violation of the type alleged would have its most direct anticompetitive effects. Here, petitioners contend that that market, for purposes of the alleged conspiracy, is the market in group health care plans. Thus, in petitioners' view, standing to redress [\*480] the violation alleged in this case is limited to participants in that market -- that is, to entities, such as McCready's employer, who were purchasers of group health plans, but not to [\*\*2549] McCready as a beneficiary of the Blue Shield plan.<sup>16</sup>

<sup>14</sup> In so arguing, petitioners advert to the "target area" test of antitrust standing that prevails in the Courts of Appeals for the First, Second, and Fifth Circuits. See, e. g., *Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 546 (CA5 1980)*; *Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 18-19 (CA1 1979)*; *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (CA2 1971)*. Petitioners place special reliance on the following frequently cited formulation of the "target area" principle:

"[In] order to have 'standing' to sue for treble damages under § 4 of the Clayton Act, a person must be within the 'target area' of the alleged antitrust conspiracy, i. e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with 'targets' or with participants in an alleged antitrust conspiracy, rather than being 'targets' themselves." *Id., at 1295*.

<sup>15</sup> Nor does the "target area" test applied by the Courts of Appeals "imply that it must have been a purpose of the conspirators to injure the particular individual claiming damages." See *Schwimmer v. Sony Corp. of America, 637 F.2d 41, 47-48 (CA2 1980)*, quoting *Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d, at 220*.

<sup>16</sup> Petitioners borrow selectively from *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)*, in arguing that McCready's § 4 claim is "unrelated to any reduction in competition caused by the alleged boycott," because the injury she alleges "is the result of the terms of her insurance contract, and not the result of a reduction in competition." Brief for Petitioners 16. Extracting additional language from *Brunswick*, they argue that "McCready would have suffered the identical 'loss' -- but no compensable 'injury' as long as her employer, which acted independently in an unrestrained market, continued to purchase a group insurance contract that did not cover the services of clinical psychologists." Brief for Petitioners 16-17 (footnote omitted).

[\*\*\*\*29] [LEdHN\[8A\]](#) [8A] Petitioners misconstrue McCready's complaint. McCready does not allege a restraint in the market for group health plans. Her claim of injury is premised on a concerted refusal to reimburse under a plan that was, in fact, purchased and retained by her employer for her benefit, and that as a matter of contract construction and state law permitted reimbursement for the services of psychologists without any significant variation in the structure of the contractual relationship between her employer and Blue Shield.<sup>17</sup> See n. 2, [\*\*\*162] *supra*. As a consumer of psychotherapy services entitled to financial benefits under the Blue Shield plan, we think it clear that McCready was "within that area of the economy . . . endangered by [that] breakdown of competitive conditions" [\*481] resulting from Blue Shield's selective refusal to reimburse. *In re Multidistrict Vehicle Air Pollution M. D. L. No. 31, 481 F.2d 122, 129 (CA9 1973)*.

#### [LEdHN\[8B\]](#) [8B]

[\*\*\*\*30] (2)

We turn finally to the manner in which the injury alleged reflects Congress' core concerns in prohibiting the antitrust defendants' course of conduct. Petitioners phrase their argument on this point in a manner that concedes McCready's participation in the market for psychotherapy services and rests instead on the notion that McCready's injury does not reflect the "anticompetitive" effect of the alleged boycott. They stress that McCready did not visit a psychiatrist whose fees were artificially inflated as a result of the competitive advantage he gained by Blue Shield's refusal to reimburse for the services of psychologists; she did not pay additional sums for the services of a physician to supervise and bill for the psychotherapy provided by her psychologist; and that there is no "claim that her psychologists' bills are higher than they would have been had the conspiracy not existed."<sup>18</sup> In promoting this argument, petitioners rely heavily on language in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra*.

[\*\*\*\*31] In *Brunswick*, respondents were three bowling centers who complained that petitioner's acquisition of several financially troubled bowling centers violated § 7 of the Clayton Act by lessening competition or tending to create a monopoly. In seeking damages, "respondents attempted to show that had petitioner allowed the [acquired] centers to close, respondents' profits would have increased." *Id., at 481*. The Court of Appeals endorsed the legal theory upon which respondents' claim was based, *id., at 483*, holding that "any loss 'causally linked' to 'the mere presence of the violator in the market'" was compensable under § 4, *id., at 487*. We reversed, holding that the injury alleged by respondents was not of "the type that the statute was intended" [\*\*2550] to forestall." [\*482] *Id., at 487-488*, quoting *Wyandotte Transportation Co. v. United States, 389 U.S. 191, 202 (1967)*. Indeed, the Court noted that respondents sought in damages "the profits they would have realized had competition been reduced." *429 U.S., at 488* (emphasis added).

[LEdHN\[9\]](#) [9] [\*\*\*\*32] We can agree with petitioners' view of *Brunswick* as embracing the general principle that treble-damages recoveries should be linked to the procompetition policy of the antitrust laws. But petitioners seek to take *Brunswick* one significant step farther. In a passage upon which [\*\*\*163] petitioners place much reliance, we stated:

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<sup>17</sup> Nor do we think that her employer's decision to retain Blue Shield coverage despite its continued failure to reimburse for the services of a psychologist -- or indeed, her employer's unexercised option to terminate that relationship -- is an intervening cause of McCready's injury. Although her employer's decision to purchase the Blue Shield plan for her benefit was in some sense a factor that contributed independently to McCready's injury, her coverage under the Blue Shield plan may, at this stage of the litigation, properly be accepted as a given, and the proper focus in evaluating her entitlement to raise a § 4 damages claim is on Blue Shield's change in the terms of the plan to link reimbursement to a subscriber's choice of one group of psychotherapists over another.

<sup>18</sup> *649 F.2d, at 236* (Widener, J., dissenting).

[\*\*HN7\*\*](#) "[For] plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.' *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S., at 125." *Id.*, at 489 (emphasis in original; footnote omitted).

Relying on this language, [\*\*\*\*33] petitioners reason that McCready can maintain no action under § 4 because her injury "did not reflect the anticompetitive effect" of the alleged violation.

[\*\*LEdHN\[10\]\*\*](#) [10] [\*\*LEdHN\[11\]\*\*](#) [11]*Brunswick* is not so limiting. Indeed, as we made clear in a footnote to the relied-upon passage, a § 4 plaintiff need not "prove an actual lessening of competition in order to recover. [Competitors] may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened." *Id.*, at 489, n. 14. Thus while an increase in price resulting from a dampening of competitive market forces is assuredly one type of injury for which § 4 potentially [\*483] offers redress, see *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), that is not the only form of injury remediable under § 4. We think it plain that McCready's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws.

[\*\*LEdHN\[12A\]\*\*](#) [12A] [\*\*\*\*34] McCready charges Blue Shield with a purposefully *anticompetitive scheme*. She seeks to recover as damages the sums lost to her as the consequence of Blue Shield's attempt to pursue that scheme.<sup>19</sup> [\*\*\*\*36] She alleges that Blue Shield sought to induce its subscribers into selecting psychiatrists over psychologists for the psychotherapeutic services they required,<sup>20</sup> and that the heart of its scheme was the offer of a Hobson's choice to its subscribers. Those subscribers were compelled to choose between visiting a psychologist and forfeiting reimbursement, or receiving reimbursement by forgoing treatment by the practitioner of their choice. In the latter case, the antitrust injury would have been borne in the first instance by the [\*\*\*164] competitors of the conspirators, and inevitably -- though indirectly -- by the customers of the competitors in the form of suppressed competition in the psychotherapy market; in the former case, as it happened, the injury was borne directly by the customers of the competitors. [\*\*2551] McCready did not yield to Blue Shield's coercive pressure, and bore Blue Shield's sanction in the form of an increase in the net cost of her psychologist's services. [\*\*\*\*35] Although [\*484] McCready was not a competitor of the conspirators, the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market. In light of the conspiracy here alleged we think that McCready's injury "flows from that which makes defendants' acts unlawful" within the meaning of *Brunswick*, and falls squarely within the area of congressional concern.<sup>21</sup>

<sup>19</sup> *Brunswick* held that a claim of injury arising from the preservation or enhancement of competition is a claim "inimical to the purposes of [the antitrust] laws," 429 U.S., at 488. Most obviously, McCready's claim is quite unlike the claim asserted by the plaintiff in *Brunswick* for she does not seek to label increased competition as a harm to her. Nevertheless, we agree with petitioners that the relationship between the claimed injury and that which is unlawful in the defendant's conduct, as analyzed in *Brunswick*, is one factor to be considered in determining the redressability of a particular form of injury under § 4.

<sup>20</sup> Or at the least, Blue Shield sought to compel McCready to employ the services of a physician in addition to those of a psychologist.

<sup>21</sup> JUSTICE REHNQUIST, dissenting, is of course correct in asserting that the "injury suffered by the plaintiff must be of the type the antitrust laws were intended to forestall," *post*, at 486. But JUSTICE REHNQUIST's dissent takes an unrealistically narrow view of those injuries with which the antitrust laws might be concerned, and offers not the slightest hint -- beyond sheer *ipse dixit* -- to help in determining what kinds of injury are not amenable to § 4 redress. For example, the dissent acknowledges that "a distributor who refused to go along with the retailers' conspiracy [to injure a disfavored retailer] and thereby lost the conspiring retailers' business would . . . have an action against those retailers," *post*, at 490. The dissent characterizes this circumstance as a "concerted refusal to deal," and is thus willing to acknowledge the existence of compensable injury. But the dissent's is not the only pattern of concerted refusals to deal. If a group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists, the bank would no doubt be able to recover the injuries suffered as a consequence of the

LEdHN[12B] [↑] [12B]

[\*\*\*\*37] III

Section 4 of the Clayton Act provides a remedy to "[any] person" injured "by reason of" anything prohibited in the [\*485] antitrust laws. We are asked in this case to infer a limitation on the rule of recovery suggested by the plain language of § 4. But having reviewed our precedents and, more importantly, the policies of the antitrust laws, we are unable to identify any persuasive rationale upon which McCready might be denied redress under § 4 for the injury she claims. The judgment of the Court of Appeals is

Affirmed.

Dissent by: REHNQUIST; STEVENS

## Dissent

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JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

Respondent's alleged "antitrust injury" in this case arises from a health insurance coverage dispute with her insurer, petitioner Blue Shield of Virginia. Respondent's \*\*\*165 complaint is that Blue Shield reimburses its subscribers for treatment by psychiatrists, but not by psychologists unless their services are supervised and billed by treating physicians. Respondent was treated by a clinical psychologist, but when she submitted claims to Blue Shield, she was denied reimbursement.

Respondent alleged in her complaint [\*\*\*\*38] that Blue Shield's refusal to reimburse her for the costs she incurred in obtaining the services of a psychologist furthered a conspiracy by petitioners "to exclude and boycott clinical psychologists from receiving compensation under" Blue Shield's plan. App. 55. Blue Shield's refusal-to-reimburse policy is alleged to constitute a form of economic pressure on McCready and other Blue Shield subscribers to obtain the services of psychiatrists rather than psychologists. By employing this economic pressure on Blue Shield subscribers, petitioners are alleged to have placed clinical psychologists at a competitive disadvantage with regard to psychiatrists in the market for \*\*2552 insurance-reimbursed psychological services.

The Court concludes that McCready's inability to obtain reimbursement for the psychological services she actually obtained permits her to maintain an action to enforce the anti-trust [\*486] laws pursuant to § 4 of the Clayton Act. According to the Court, one who suffers economic loss as a necessary step in effecting the end of a conspiracy has "standing" to sue pursuant to § 4. *Ante*, at 479, 483-484. I disagree.

Section 4 of the Clayton Act authorizes [\*\*\*\*39] suits for treble damages by "[any] person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U. S. C. § 15. It is not enough, however, for a plaintiff merely to allege that the defendant violated the antitrust laws and that he was injured. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486-489 (1977)*. See *Hawaii v. Standard Oil Co., 405 U.S. 251, 263, n. 14 (1972)*. The injury suffered by the plaintiff must be of the type the antitrust laws were intended to forestall. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra, at 487-488*.

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psychiatrists' actions. And plainly, in evaluating the reasonableness under the antitrust laws of the psychiatrists' conduct, we would be concerned with its effects not only on the business of banking, but also on the business of the psychologists against whom that secondary boycott was directed.

McCready and the banker and the distributor are in many respects similarly situated. McCready alleges that she has been the victim of a concerted refusal by psychiatrists to reimburse through the Blue Shield plan. Because McCready is a consumer, rather than some other type of market participant, the dissent finds itself unwilling to acknowledge that she might have suffered a form of injury of significance under the antitrust laws. But under the circumstances of this case, McCready's participation in the market for psychotherapeutic services provides precisely that significance.

"Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'" [429 U.S., at 489](#) (citation omitted).

Although McCready [\*\*\*\*40] alleges that she would have been reimbursed had it not been for the conspiracy, I do not think that she has made a sufficient allegation of "antitrust injury" within the meaning of *Brunswick*.

Standing alone, a refusal by an insurer to reimburse its insured does not constitute a violation of the Sherman Act. At most, such an action on the part of an insurer may amount to a breach of a contract or a violation of relevant state law regulating [\*\*\*166] the insurance industry.<sup>1</sup> According to the Court, [\*487] however, what distinguishes this case from the typical insurance coverage dispute is either the *purpose* behind or the *effect* of Blue Shield's refusal to reimburse. If Blue Shield violated the antitrust laws by its nonreimbursement policy, it was only because that policy was used as a *means* of putting psychologists at a competitive disadvantage in relation to psychiatrists.

[\*\*\*\*41] Two conceivable grounds therefore may be divined from the Court's opinion to support its conclusion that McCready has suffered "antitrust injury" when Blue Shield refused to reimburse her costs in obtaining the services of a psychologist. The first theory is that McCready may recover simply because petitioners' nonreimbursement policy was *intended* to put clinical psychologists at a competitive disadvantage. According to the Court, this must be so even if Blue Shield's refusal to reimburse her would be entirely legal under the antitrust laws in the absence of such a purpose to competitively injure third parties. Blue Shield's intent or purpose renders the discriminatory reimbursement policy illegal. Under this theory, it would seem to be irrelevant for the Court's purposes whether McCready obtained the services of a psychologist or a psychiatrist so long as the illegal intent is present and she suffered economic loss as a result.<sup>2</sup>

[\*\*\*\*42] [\*\*2553] The second conceivable rationale is a flat rule that recovery is permitted by those persons who suffer economic loss as a necessary step in effecting a conspiracy to place third parties [\*488] at a competitive disadvantage.<sup>3</sup> Under this theory, McCready may recover merely by demonstrating that she was a "tool" of petitioners' effort to disable psychologists from competing with psychiatrists in the market for insurance-reimbursed psychological services. She may recover because she did not yield to the economic pressure imposed on her.<sup>4</sup>

<sup>1</sup> In addition to the antitrust claim, McCready's complaint asserts a claim for breach of contract under the principles of pendent jurisdiction. App. 57-58. She also alleges that Blue Shield's policy contravened state law. [Id. at 55-56](#).

<sup>2</sup> The Court explains that those subscribers, such as McCready, who did not yield to Blue Shield's coercive pressures suffer from Blue Shield's sanctions by way of increased costs in obtaining the services of a psychologist. Those subscribers who did yield to Blue Shield's pressure suffer antitrust injury indirectly because of suppressed competition in the psychotherapy market. *Ante*, at 483-484. I do not understand the Court to conclude that *Illinois Brick Co. v. Illinois*, [431 U.S. 720 \(1977\)](#), would not bar recovery by a subscriber, as opposed to a psychologist, in the latter situation.

<sup>3</sup> The Court suggests a third theory -- that McCready has standing herself as a target of a concerted refusal to deal. See *ante*, at 484, n. 21; *infra*, at 490-491.

<sup>4</sup> In order to recover under this theory, it would seem that respondent must prove at trial that she actually refused to yield to the economic pressure created by Blue Shield's reimbursement policy. If she decided to obtain the services of a psychologist rather than a psychiatrist without knowing of Blue Shield's policy, it cannot be said that her "injury" was proximately related to petitioners' alleged anticompetitive conduct. If she discovered the policy only after she sought reimbursement, then it cannot be said that Blue Shield's policy had any effect on McCready's conduct as a consumer in the market for psychotherapeutic services. This, of course, is not to say that a person in all circumstances must have knowledge of a defendant's anticompetitive activities before one may challenge that activity. One may not be a victim of economic pressure, however, if one acted oblivious to that pressure.

457 U.S. 465, \*488; 102 S. Ct. 2540, \*\*2553; 73 L. Ed. 2d 149, \*\*\*166; 1982 U.S. LEXIS 132, \*\*\*\*42

The theory is that McCready **[\*\*\*167]** may recover because her loss is linked to petitioners' efforts to enforce a "boycott" of third parties.

**[\*\*\*\*43]** I believe that such reasoning is foreclosed by the Court's decision in *Brunswick*. In order to recover, a plaintiff must demonstrate that the nature of the injury *he suffered* is of the type that makes the challenged practice illegal. In *Brunswick*, the merger may well have violated § 7 of the Clayton Act in the abstract or even as to competitors not before the Court. Yet, we held that the plaintiffs in *Brunswick* could not recover because they did not suffer from the *anticompetitive* effects of the merger. We rejected the contention that it was sufficient to show merely that the defendant's merger violated § 7 and that there existed a causal link between that merger and an economic loss. [429 U.S., at 486-489](#). Instead, **[\*489]** the required showing is that the type of harm suffered by the plaintiff is that which makes the challenged practice illegal. [\*Id., at 489\*](#).

Therefore, McCready may not recover merely by showing that she has suffered an economic loss resulting from a practice the legality of which depends upon its effect on a third party. McCready must show that the challenged practice is illegal with regard to its effect **[\*\*\*44]** upon her. But petitioners' policy is alleged to be illegal not by virtue of its effect upon Blue Shield's subscribers but because of its effect upon psychologists. McCready alleges no anticompetitive effect upon herself. She does not allege that the conspiracy has affected the *availability* of the psychological services she sought and actually obtained. Nor does she allege that the conspiracy affected the *price* of the treatment she received.<sup>5</sup> **[\*\*\*\*45]** She does not allege that her injury was caused by any reduction in competition between psychologists and psychiatrists, nor that it was the result of any success<sup>6</sup> Blue Shield achieved in its "boycott" of psychologists. She seeks recovery solely on the basis that Blue Shield's reimbursement policy *failed* to alter her conduct **[\*\*2554]** in a fashion necessary to foreclose psychologists from obtaining the patronage of Blue Shield's subscribers.

If the important consideration is whether the challenged practice is illegal with regard to its effect on the plaintiff, then it would be irrelevant for the plaintiff's purposes that the conspiracy might also adversely affect competition on another level of the market. For example, a group of retailers **[\*490]** may threaten to refuse to do business with those distributors that continue to do business with a disfavored retailer. If the distributors agreed to cooperate with the conspiring retailers, then the disfavored retailer would have an action against the agreeing distributors and the conspiring retailers. **[\*\*\*168]** See, e. g., [United States v. General Motors Corp., 384 U.S. 127 \(1966\)](#); [Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 \(1959\)](#). I would think that a distributor who refused to go along **[\*\*\*46]** with the retailers' conspiracy and thereby lost the conspiring retailers' business would also have an action against those retailers. Such an action would be based upon the conspirators' concerted refusal to deal with the distributor which *itself* would be unlawful under the antitrust laws. Such an action, unlike the instant case, would not depend upon the anticompetitive effect of the challenged practice upon a third party. The distributor would have an action not on the ground that he was caught in the middle of an attempted boycott of participants on another level of the market, but because *he* was boycotted. The boycott of the distributor puts him at a competitive disadvantage to those distributors who are unaffected by the retailers' conspiracy and to those distributors who agree to participate.

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<sup>5</sup> By excluding psychologists from the market, psychiatrists may well be able to increase their charges for psychotherapeutic services, which in turn, may raise the insurance rates charged by Blue Shield. McCready, however, alleges no such injury to herself on this theory.

<sup>6</sup> Because McCready obtained the services of a psychologist, it cannot be said that the psychologists were injured by the economic pressure Blue Shield placed on McCready and the class of subscribers she represents. See *ante*, at 475.

<sup>7</sup> As pointed out by the Court, a concerted refusal to deal may take many forms. *Ante*, at 484, n. 21. I would agree that the bank could sue in the Court's hypothetical because, as conceded by the Court, the bank's ability to compete with other banks would be adversely affected. By contrast, my disagreement with the Court is that it permits McCready to sue solely because of an injury to a level of the market in which she does not participate. Moreover, McCready does not allege that petitioners' conspiracy adversely affected competition between psychologists and psychiatrists in such a manner as to adversely affect the price or supply of psychotherapeutic services available to her as a consumer. Thus, McCready's case is clearly distinguishable from that of the bank's in the Court's hypothetical.

[\*\*\*\*47] McCready, however, does not allege that petitioners engaged in a concerted refusal to deal with *her*. As the Court is aware, *ante*, at 468-470, McCready has alleged that petitioners [\*491] violated the antitrust laws by conspiring to exclude clinical psychologists from the coverage of Blue Shield plans, and that this conspiracy foreseeably injured her. The Court apparently concludes, however, that McCready has also sufficiently alleged that petitioners have engaged in a concerted refusal to deal with *her*, and that this is the gravamen of her antitrust complaint: "McCready alleges that she has been the victim of a concerted refusal by psychiatrists to reimburse through the Blue Shield plan." *Ante*, at 484, n. 21. It may be that the Court today is merely holding that a boycottee has "standing" to sue under § 4. Were this the issue presented by this case, I have little doubt that the Court merely would have denied certiorari.

But McCready simply does not, and could not, claim standing as the target of a concerted refusal to deal. Neither Blue Shield nor the psychiatrists threatened to cease doing business with McCready if she obtained the services of a psychologist [\*\*\*\*48] rather than a psychiatrist. McCready alleges only that under the Blue Shield policy she could not obtain reimbursement for services rendered by psychologists. If such a claim is sufficient to make out a concerted refusal to deal, then any consumer who could not obtain a product or service on the precise terms he desires could claim to be the victim of a "boycott." Most importantly, McCready alleges that Blue Shield's policy violates the antitrust laws [\*\*\*\*169] only by virtue of its anticompetitive effect on *psychologists*. She does not allege that Blue Shield's policy [\*2555] is illegal in any way because of its effect on *subscribers*.

The Court, however, dismisses such concerns by stating in conclusory terms that "the injury [McCready] suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." *Ante*, at 484. I trust that the Court is not holding that a plaintiff may escape dismissal of the complaint merely by alleging that he suffered an economic loss "inextricably [\*492] intertwined" with an injury the defendants intended, but failed, to inflict upon a third party.<sup>8</sup> Although [\*\*\*\*49] the Court may view itself as successfully deciding this case on its peculiar facts, it has wholly failed to provide any sort of reasoned basis for its decision. Especially in the area of antitrust law, labels do not suffice when analysis is necessary.

I would reverse the judgment of the Court of Appeals because McCready has not alleged that she has suffered antitrust injury, but at best injury attributable to a breach of contract on the part of Blue Shield.

JUSTICE STEVENS, dissenting.

Respondent is a consumer of psychotherapeutic services. The question is whether she has been injured [\*\*\*\*50] in her "business or property by reason of anything forbidden in the antitrust laws."<sup>1</sup> The alleged antitrust violation is an agreement between petitioners Neuropsychiatric Society of Virginia and Blue Shield that Blue Shield would refuse to reimburse subscribers for payments made to clinical psychologists for charges that were not billed through a physician. The objective of the alleged conspiracy was to induce subscribers to patronize psychiatrists instead of psychologists.

For purposes of decision, I assume that the alleged agreement is unlawful. In analyzing [\*\*\*\*51] the sufficiency of respondent's damage claim, it is helpful first to consider the situation [\*493] in which the conspiracy would have its maximum impact on the relevant market. Given their objective, petitioners' conspiracy would be most effective if they made it perfectly clear to subscribers that they would not be reimbursed if they consulted psychologists instead of psychiatrists. For without this information, a subscriber's choice between a psychologist and a psychiatrist would

<sup>8</sup> If McCready's injury were truly "inextricably intertwined" with any injury actually suffered by the psychologists, the risk of duplicative recovery and the practical problems inherent in distinguishing the loss suffered by her from the loss suffered by the psychologists may mean that either subscribers or psychologists, but not both, may recover. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

<sup>1</sup> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." [15 U. S. C. § 15](#).

not be affected by the conspiracy. Thus, I first assume that the Blue Shield insurance policy did not cover services performed by psychologists and that subscribers as a class were fully aware of this exclusion.

[\*\*\*170] On this assumption, a Blue Shield subscriber who is a potential consumer in the relevant market has at least three options. He may: (1) forgo treatment entirely; (2) go to a psychiatrist; or (3) go to a psychologist.

<sup>2</sup> [\*\*\*\*53] If he exercises his first option, his illness may worsen but he will not have [\*\*2556] suffered any economic injury cognizable under the antitrust laws.<sup>3</sup> If he exercises his second option, his property will not be diminished because Blue Shield will reimburse [\*\*\*\*52] him for his payment to the psychiatrist. If he exercises his third option, his property will be diminished to the extent of his unreimbursed payment to the psychologist, but he will have received in exchange psychotherapeutic services that presumably [\*494] were worth the payment.<sup>4</sup> The fact that he voluntarily elected to spend money for services not covered by his insurance policy would have no greater legal significance than a similar voluntary decision by a person who was not a Blue Shield subscriber.<sup>5</sup> It thus seems clear to me that whatever option the fully informed subscriber exercises, he would suffer no injury to his property by reason of the restriction of insurance coverage to psychotherapeutic services performed by psychiatrists.

[\*\*\*\*54] This conclusion is reinforced by the fact that Blue Shield subscribers have the additional option of going to a psychologist while retaining their rights to reimbursement under the policy. According to respondent's complaint, Blue Shield did not refuse to reimburse all payments made by subscribers to psychologists, but only those payments not billed through a physician. Even if a fully informed subscriber's preference for psychologists over psychiatrists were protected by the antitrust laws, that preference was not denied by the antitrust violation alleged in this [\*\*\*171] case.<sup>6</sup> The Hobson's choice described [\*495] by the Court, *ante*, at 483, simply does not fit this case.

The availability of this fourth option would seem to indicate that respondent, in fact, was not fully aware of the scope of her policy's [\*\*\*\*55] coverage. If her lack of understanding was caused by fraud or deception, she should be able to recover in a common-law action. If the misunderstanding was her own fault, that circumstance should not provide a basis for an antitrust recovery that would not be available if she had been fully informed.

Nor is the deficiency in respondent's complaint cured if the assumption about the insurance coverage is reversed. Although her antitrust claim would be more credible if Blue Shield excluded coverage of services performed by

<sup>2</sup> In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, [429 U.S. 477](#), we held that antitrust injury was limited to "the type of loss that the claimed violations . . . would be likely to cause." *Id.*, at 489 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, [395 U.S. 100, 125](#)). I would expect that the alleged violation in this case would be most likely to cause knowledgeable members of the class of potential consumers of psychotherapeutic services to exercise either the first or the second option. It is fair to assume that the third situation -- the one in which respondent finds herself -- would be "unlikely" to result.

<sup>3</sup> The subscriber may have to undergo more extensive treatment later if he forgoes treatment now and his illness worsens. Any consequential economic injury, however, would no more constitute antitrust injury than the economic injury suffered by a consumer who decides to forgo a purchase on the ground that the price of the goods or services was fixed at an artificially high level.

<sup>4</sup> If treatment by a psychiatrist and treatment by a psychologist were fungible, then a subscriber who exercised this third option effectively would be paying twice for the psychotherapeutic service, once to the insurer in premiums and once to the psychologist in an unreimbursable payment. But the subscriber's exercise of this option presumably indicates that treatment by a psychologist is more valuable to him than treatment by a psychiatrist. If that be true, the subscriber is in the same situation as any policyholder who desires a service for which he has not purchased insurance.

<sup>5</sup> If the subscriber would purchase a service that was covered by the Blue Shield policy, such as a surgical operation, then he would be reimbursed by Blue Shield for that payment. If respondent's antitrust claim is that petitioners have engaged in an unlawful boycott, it therefore is manifest that respondent is not the boycottee. For petitioners have not refused to deal with respondent -- they offer her the same coverage as any other subscriber or potential subscriber.

<sup>6</sup> Presumably, the charge (if any) of the referring physician would be reimbursable under the policy. In any event, the complaint does not claim damages based on any such unreimbursed charge.

psychologists, respondent alleged in the second count of her complaint that the insurance policy, properly construed under applicable principles of Virginia law, provided coverage for services performed by psychologists, but that Blue Shield nevertheless refused to reimburse her for the payments she made to her psychologist. If a subscriber does not suffer antitrust injury when the insurance policy excludes coverage of services performed by psychologists, it would be anomalous to conclude that the availability of a [\*\*2557] breach-of-contract claim would in any way enhance his standing. The right to recover under the federal antitrust laws cannot be derived [\*\*\*\*56] from a right to recover under state law.

Because respondent's complaint discloses no basis for concluding that she has suffered an injury to her property by reason of the alleged antitrust violation, I respectfully dissent.

## References

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Standing to sue, under 4 of the Clayton Act ([15 USCS 15](#)) and predecessor statute, to recover treble damages for antitrust violation

[\*54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 289, 293\*](#)

12 Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade 48:89, 48:90

18 Am Jur PI & Pr Forms (Rev), Monopolies, Restraints of Trade, and Unfair Trade Practices, Form 13

### [15 USCS 15](#)

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 67

L Ed Index to Annos, Restraints of Trade and Monopolies

ALR Quick Index, Restraints of Trade and Monopolies

Federal Quick Index, Monopolies and Restraints of Trade

Annotation References:

Standing to sue, under 4 of the Clayton Act ([15 USCS 15](#)) and predecessor statute, to recover treble [\*\*\*\*57] damages for antitrust violation. 73 L Ed 2d 1427.

Measure and elements of damages under [\*15 USCS 15\*](#) entitling person injured in his business or property by reason of anything forbidden in federal antitrust laws to recover treble damages. 16 ALR Fed 14.

Propriety, under [\*Rules 23\(a\)\*](#) and [\*23\(b\) of Federal Rules of Civil Procedure\*](#), of class action for violation of federal antitrust laws. 6 ALR Fed 19.



## **Union Labor Life Ins. Co. v. Pireno**

Supreme Court of the United States

April 27, 1982, Argued ; June 28, 1982, Decided \*

No. 81-389

**Reporter**

458 U.S. 119 \*; 102 S. Ct. 3002 \*\*; 73 L. Ed. 2d 647 \*\*\*; 1982 U.S. LEXIS 144 \*\*\*\*; 50 U.S.L.W. 4911; 1982-2 Trade Cas. (CCH) P64,802

UNION LABOR LIFE INSURANCE CO. v. PIRENO

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

**Disposition:** [650 F.2d 387](#), affirmed.

## **Core Terms**

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insured, insurance business, policyholders, Pharmacy, practices, exempt, peer review committee, insurance company, peer review, McCarran-Ferguson Act, insurance industry, parties, Sherman Act, chiropractors, petitioners', charges, anti trust law, chiropractic, underwriting, regulation, legislative history, claims adjustment, reliability, transferred, spreading, prescription drug, reimbursed, antitrust, insurance policy, omitted footnote

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Industry Practices > Federal Regulations > General Overview

**[HN1](#) [down arrow] Exemptions & Immunities, McCarran-Ferguson Act Exemption**

See [15 U.S.C.S. §§ 1012\(a\), \(b\)](#).

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Industry Practices > Federal Regulations > General Overview

**[HN2](#) [down arrow] Exemptions & Immunities, McCarran-Ferguson Act Exemption**

See [15 U.S.C.S. § 1013\(b\)](#).

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\* Together with No. 81-390, New York State Chiropractic Assn. v. Pireno, also on certiorari to the same court.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Antitrust & Trade Law > Exemptions & Immunities > General Overview

### **HN3** Exemptions & Immunities, McCarran-Ferguson Act Exemption

Exemptions from the antitrust laws must be construed narrowly. This principle applies not only to implicit exemptions, but also to express statutory exemptions.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Insurance Law > Industry Practices > Federal Regulations > General Overview

### **HN4** Exemptions & Immunities, McCarran-Ferguson Act Exemption

Three criteria are relevant in determining whether a particular practice is part of the "business of insurance" exempted from the antitrust laws by § 2(b) of the McCarran-Ferguson Act: first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. None of these criteria is necessarily determinative in itself.

Insurance Law > Contract Formation

### **HN5** Insurance Law, Contract Formation

The transfer of risk from insured to insurer is effected by means of the contract between the parties -- the insurance policy -- and that transfer is complete at the time that the contract is entered. If the policy limits coverage to "necessary" treatments and "reasonable" charges for them, then that limitation is the measure of the risk that has actually been transferred to the insurer.

Insurance Law > Contract Formation

### **HN6** Insurance Law, Contract Formation

The insurance policy defines the scope of risk assumed by the insurer from the insured.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Insurance Law > Industry Practices > Federal Regulations > General Overview

### **HN7** Exemptions & Immunities, McCarran-Ferguson Act Exemption

[15 U.S.C.S. § 1012\(b\)](#) is intended primarily to protect "intra-industry cooperation" in the underwriting of risks. Arrangements between insurance companies and parties outside the insurance industry can hardly be said to lie at

the center of that legislative concern. More importantly, such arrangements may prove contrary to the spirit as well as the letter of [§ 1012\(b\)](#) because they have the potential to restrain competition in noninsurance markets.

## Lawyers' Edition Display

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### Decision

Insurer use of peer review committee to determine reasonableness of chiropractor's fees, held not exempt from antitrust laws as "business of insurance" under McCarran-Ferguson Act ([15 USCS 1012\(b\)](#)).

### Summary

A New York insurance company's health insurance policy covers certain policyholder claims for chiropractic treatment but certain of these policies limit the company's liability to "the reasonable charges" for "necessary medical care and services." Accordingly, when presented with a policyholder claim for reimbursement for chiropractic treatments, the insurance company must determine whether the treatments were necessary and whether the charges for them were reasonable. In making some of these determinations the company arranged with the New York chiropractic association to use the advice of the association's peer review committee. The committee was established by the association primarily to aid insurers in evaluating claims for chiropractic treatments and is composed of ten practicing chiropractors, who serve on a voluntary basis. On a number of occasions a certain chiropractor's treatments of the insurance company's policyholders, and his charges for those treatments, have been referred by the company to the committee, which sometimes concluded that his treatments were unnecessary or that his charges were unreasonable. The dispute over the charges deemed unreasonable resulted in the chiropractor bringing a suit in the United States District Court for the Southern District of New York, alleging that the peer review practices involved violated 1 of the Sherman Act ([15 USCS 1](#)). In particular, he claimed that the insurance company and others had used the peer review committee as the vehicle for a conspiracy to fix the prices that chiropractors would be permitted to charge for their services. After extensive discovery, the District Court dismissed the complaint, concluding that the insurance company's use of the peer review committee was exempted from antitrust scrutiny by the McCarran-Ferguson Act ([15 USCS 1011 et seq.](#)), since the peer review practices constituted the "business of insurance" which was subject to an exemption under that Act. The United States Court of Appeals for the Second Circuit reversed, concluding that the District Court had erred in holding that the insurance company's use of the peer review committee constituted the "business of insurance" ([650 F2d 387](#)).

On certiorari, the United States Supreme Court affirmed. In an opinion by Brennan, J., joined by White, Marshall, Blackmun, Powell, and Stevens, JJ., it was held that the alleged conspiracy was not exempt from federal [antitrust law](#) as part of the "business of insurance," since (1) the insurance company's use of the peer review committee played no part in the spreading and underwriting of a policyholder's risk, (2) the use of the peer review committee was not an integral part of the policy relationship between insurer and insured, and (3) although it could be assumed that the challenged peer review practices need not be denied the exemption under 2(b) of the McCarran-Ferguson Act ([15 USCS 1012\(b\)](#)), which operates so as to render the federal antitrust laws inapplicable to the "business of insurance" to the extent such business is regulated by state law, solely because they involved parties outside the insurance industry--namely the practicing chiropractors on the peer review committee--they could hardly be said to lie at the center of the Act's legislative concern and could prove contrary to the spirit as well as the letter of 2(b), since they have the potential to restrain competition in non-insurance markets.

Rehnquist, J., joined by Burger, Ch. J., and O'Connor, J., dissenting, expressed the view that the claims adjustment function of the peer review committee is at the heart of the relationship between insurance companies and their policyholders and that, accordingly, such committees are clearly within the sphere of insurance activity which the McCarran-Ferguson Act intended to protect from the effect of the antitrust laws.

### Headnotes

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PRACTICES §29 > McCarran-Ferguson Act -- "business of insurance" -- exemption from federal antitrust laws -- peer review committee for insurance claim -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C]

An alleged conspiracy to eliminate price competition among chiropractors by means of a "peer review committee" that advises an insurance company whether particular chiropractors' treatments and fees are "necessary" and "reasonable" is not exempt from federal antitrust law as part of the "business of insurance" within the meaning of the McCarran-Ferguson Act ([15 USCS 1011 et seq.](#)), where (1) the insurance company's use of the peer review committee plays no part in the spreading and underwriting of a policyholder's risk, (2) the use of the peer review committee is not an integral part of the policy relationship between insurer and insured, and (3) although it may be assumed that the challenge peer review practices need not be denied the exemption under 2(b) of the Act ([15 USCS 1012\(b\)](#)), which operates so as to render the federal antitrust laws inapplicable to the "business of insurance" to the extent such business is regulated by state law, solely since they involved parties outside the insurance industry--namely the practicing chiropractors on the peer review committee--they can hardly be said to lie at the center of the Act's legislative concern and may prove contrary to the spirit as well as the letter of 2(b), since they have the potential to restrain competition in noninsurance markets. (Rehnquist, J., Burger, Ch. J., and O'Connor, J., dissented from this holding.)

PRACTICES §7 > federal antitrust laws -- exemption -- construction -- > Headnote:

[LEdHN\[2\]](#) [2]

The Sherman Act ([15 USCS 1 et seq.](#)) expresses a longstanding congressional commitment to the policy of free markets and open competition and, accordingly, exemptions from the antitrust laws must be construed narrowly, this principle applying not only to implicit exemptions but also to express statutory exemptions.

PRACTICES §29 > McCarran-Ferguson Act -- "business of insurance" -- criteria -- > Headnote:

[LEdHN\[3\]](#) [3]

Criteria relevant in determining whether a particular practice is part of the "business of insurance" exempted from federal antitrust law by 2(b) of the McCarran-Ferguson Act ([15 USCS 1012\(b\)](#)) are whether the practice has the effect of transferring or spreading a policyholder's risk, whether the practice is an integral part of the policy relationship between the insurer and the insured, and whether the practice is limited to entities within the insurance industry; however, none of these criteria is necessarily determinative in itself.

INSURANCE §46 > insurance policy -- scope of risk -- > Headnote:

[LEdHN\[4\]](#) [4]

The transfer of risk from insured to insurer is affected by means of a contract between the parties--the insurance policy--and that transfer is complete at the time the contract is entered; the fundamental principle of insurance is that the insurance policy defines the scope of risk assumed by the insurer from the insured.

## Syllabus

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As required by New York law, petitioner Union Labor Life Insurance Co. (ULL) issues health insurance policies covering certain policyholder claims for chiropractic treatments. Some ULL policies limit the company's liability to "reasonable" charges for "necessary" medical care and services. In order to determine whether particular chiropractors' treatments and fees were necessary and reasonable, ULL arranged with petitioner New York State Chiropractic Association (NYSCA), a professional association of chiropractors, to use the advice of its Peer Review Committee, which was established primarily to aid insurers in evaluating claims for chiropractic treatments, and which is composed of 10 practicing [\*\*\*\*2] New York chiropractors. Respondent is a licensed chiropractor practicing in New York. On a number of occasions ULL referred his treatments of ULL policyholders, and his charges for those treatments, to the Committee for review. The Committee sometimes concluded that respondent's treatments were unnecessary or his charges unreasonable. Respondent brought suit in Federal District Court, alleging that petitioners' peer review practices violated § 1 of the Sherman Act because petitioners had used the Committee as the vehicle for their conspiracy to fix the prices that chiropractors would be permitted to charge for their services. The District Court granted petitioners' motion for summary judgment, dismissing respondent's complaint on the ground that ULL's use of NYSCA's Peer Review Committee was exempted from antitrust scrutiny by § 2(b) of the McCarran-Ferguson Act, which applies to the "business of insurance." The Court of Appeals reversed and remanded the action for further proceedings.

*Held:* ULL's use of NYSCA's Peer Review Committee does not constitute the "business of insurance" within the meaning of § 2(b) of the McCarran-Ferguson Act, and thus is not exempt from antitrust [\*\*\*\*3] scrutiny. Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, controlling. Pp. 126-134.

(a) There are three criteria relevant in determining whether a particular practice is part of the "business of insurance" exempted from the antitrust laws by § 2(b): first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. Royal Drug Co., supra. Pp. 126-129.

(b) With regard to the first criterion, petitioners' arrangement plays no part in the spreading and underwriting of a policyholder's risk, because it is logically and temporally unconnected to the contract entered by the policyholder and ULL, which was the actual risk-transferring event. As to the second criterion, ULL's use of NYSCA's Peer Review Committee is distinct from ULL's contracts with its policyholders, and constitutes a separate arrangement between the insurer and third parties not engaged in the business of insurance. Nor does the challenged [\*\*\*\*4] arrangement satisfy this criterion on the asserted ground that it directly involves the "interpretation" and "enforcement" of the insurance contract, because ULL's procedure for deciding whether claims are covered is a matter of indifference to the policyholder, whose only concern is *whether* his claim is paid, not *why* it is paid. As respects the third criterion, it may be assumed that the challenged arrangement need not be denied the § 2(b) exemption *solely* because it involves parties outside the insurance industry -- namely, practicing chiropractors serving on the Peer Review Committee. But such arrangements can hardly be said to lie at the center of the legislative concern underlying § 2(b), which was with the protection of intra-industry cooperation in the underwriting of risks. More importantly, such arrangements may prove contrary to the spirit as well as the letter of § 2(b), because they have the potential to restrain competition in noninsurance markets. Pp. 130-134.

**Counsel:** T. Richard Kennedy argued the cause for petitioners in both cases. With him on the briefs for petitioner in No. 81-389 were Edward Thompson and Philip R. Kastellec. Robert P. Borsody [\*\*\*\*5] filed a brief for petitioner in No. 81-390.

Susan M. Jenkins argued the cause for respondent in both cases. With her on the brief was Ralph C. Wiegandt.

Barry Grossman argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Solicitor General Lee, Assistant Attorney General Baxter, Deputy Solicitor General Shapiro, Jerrold J. Ganzfried, and Nancy C. Garrison. \*

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**Judges:** BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and O'CONNOR, J., joined, post, p. 134.

**Opinion by:** BRENNAN

## Opinion

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[\*122] [\*\*\*651] [\*\*3005] JUSTICE BRENNAN delivered the opinion of the Court.

LEdHN/1A [1A] In these cases we consider an alleged conspiracy to eliminate price competition among chiropractors, by means of a "peer review committee" that advised an insurance company whether particular chiropractors' treatments and fees were "necessary" and "reasonable." The question presented is whether the alleged conspiracy is exempt from federal antitrust laws as part of the "business of insurance" within the meaning of the McCarran-Ferguson Act.<sup>1</sup>

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<sup>+</sup> Briefs of amici curiae urging reversal were filed by Richard A. Whiting for the American Insurance Association et al.; by Sidney S. Rosdeitcher and Richard D. Friedman for the Health Insurance Association of America et al.; and by David Crump for the Legal Foundation of America.

Briefs of amici curiae urging affirmance were filed for the State of Arizona et al. by Robert K. Corbin, Attorney General of Arizona, and Kenneth R. Reed, Special Assistant Attorney General, Steve Clark, Attorney General of Arkansas, and David L. Williams, Deputy Attorney General, J. D. MacFarlane, Attorney General of Colorado, and Thomas P. McMahon, Carl R. Ajello, Attorney General of Connecticut, and Robert M. Langer and John R. Lacey, Assistant Attorneys General, Richard S. Gebelein, Attorney General of Delaware, and Vincent M. Amberly, Deputy Attorney General, Tany S. Hong, Attorney General of Hawaii, and Sonia Faust, Deputy Attorney General, Tyrone C. Fahner, Attorney General of Illinois, and Thomas M. Genovese, Assistant Attorney General, Thomas J. Miller, Attorney General of Iowa, and John R. Perkins, Assistant Attorney General, William J. Guste, Jr., Attorney General of Louisiana, and John R. Flowers, Jr., Assistant Attorney General, Stephen H. Sachs, Attorney General of Maryland, and Charles O. Monk II, Assistant Attorney General, Frank J. Kelley, Attorney General of Michigan, and Edwin M. Bladen, Assistant Attorney General, Bill Allain, Attorney General of Mississippi, and Robert E. Sanders, Special Assistant Attorney General, John Ashcroft, Attorney General of Missouri, and William L. Newcomb, Jr., and Robert E. Dolan, Jr., Assistant Attorneys General, Michael T. Greely, Attorney General of Montana, and Jerome J. Cate, Assistant Attorney General, Paul L. Douglas, Attorney General of Nebraska, and Dale A. Comer, Assistant Attorney General, Jeff Bingaman, Attorney General of New Mexico, and James J. Wechsler and Richard H. Levin, Assistant Attorneys General, Rufus L. Edmisten, Attorney General of North Carolina, H. A. Cole, Jr., Special Deputy Attorney General, and John R. Corne, Associate Attorney General, William J. Brown, Attorney General of Ohio, and Eugene F. McShane, Dennis J. Roberts II, Attorney General of Rhode Island, and Patrick J. Quinlan, Assistant Attorney General, Mark White, Attorney General of Texas, and James V. Sylvester, Assistant Attorney General, David L. Wilkinson, Attorney General of Utah, John J. Easton, Jr., Attorney General of Vermont, and Glenn A. Jarrett, Assistant Attorney General, and Bronson C. La Follette, Attorney General of Wisconsin, and Michael L. Zaleski, Assistant Attorney General; for the Association of American Physicians & Surgeons, Inc., by Kent Masterson Brown; and for Automotive Service Councils, Inc., by Donald A. Randall and Jonathan T. Howe.

David J. Brummond filed a brief for the National Association of Insurance Commissioners as amicus curiae.

<sup>1</sup> 59 Stat. 33, as amended, 15 U. S. C. §§ 1011-1015. The Act provides in relevant part:

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[\*\*\*652] Petitioners are the New York State Chiropractic Association (NYSCA), a professional association of chiropractors, and the Union Labor Life Insurance Co. (ULL), a Maryland insurer doing business in New York. As required by New York law, ULL's health insurance policies cover certain policyholder claims for chiropractic treatments. But certain ULL policies limit the company's liability to "the reasonable charges" for "necessary medical care and services." [\*123] App. 19a, 22a (emphasis added). Accordingly, when presented with a policyholder claim for reimbursement for chiropractic treatments, ULL must determine whether the treatments were necessary and whether the charges for them were reasonable. In making some of these determinations, ULL has arranged with NYSCA to use the advice of NYSCA's Peer Review Committee.

The Committee was established by NYSCA in 1971, primarily to aid insurers in evaluating claims for chiropractic treatments.<sup>2</sup> It is composed of 10 practicing New York chiropractors, who serve on a voluntary basis. At the request of an insurer, the Committee will examine a chiropractor's treatments and charges in a particular case, and will [\*\*\*\*8] render an opinion on the necessity for the treatments and the reasonableness of the charges made for them. The opinion will be based upon such considerations as the treating chiropractor's experience and specialty degrees; the location of his office; the number of visits and time spent with the patient; the patient's age, occupation, general physical condition, and history of previous treatment; and X-ray findings.

Respondent is a chiropractor licensed and practicing in the State of New York. On a [\*\*3006] number of occasions his treatments of ULL policyholders, and his charges for those treatments, have been referred by ULL to the Committee, which has sometimes concluded that his treatments were unnecessary or his charges unreasonable. Petitioners assert that respondent has treated his patients "in a manner calculated [\*\*\*\*9] to maximize the number of treatments for a particular condition, and that his fees for these treatments are unusually high." [650 F.2d 387, 389 \(CA2 1981\)](#). Respondent, for his part, contends that the members of the Committee "practice 'antiquated' techniques that they seek to impose on their more innovative competitors." *Ibid.*

[\*124] This dispute resulted in the present suit, brought by respondent in the United States District Court for the Southern District of New York. Respondent alleged that the peer review practices of petitioners violated [§ 1](#) of the Sherman Act.<sup>3</sup> In [\*\*\*653] particular, he claimed that petitioners and others had used the Committee as the vehicle for a conspiracy to fix the prices that chiropractors, including respondent, would be permitted to charge for their services. He concluded that he had been restrained from providing his chiropractic services to the public freely and fully, and that would-be recipients of chiropractic services had been deprived of the benefits of competition. Respondent requested, *inter alia*, declaratory and injunctive relief against ULL's continued use of NYSCA's Peer Review Committee in evaluating policyholders' [\*\*\*\*10] claims.

After extensive discovery, the District Court granted petitioners' motion for summary judgment dismissing respondent's complaint, concluding that ULL's use of NYSCA's Peer Review Committee was exempted from

**HN1** [↑] "(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance. . . ." § 2, [15 U. S. C. §§ 1012\(a\), \(b\)](#).

**HN2** [↑] "(b) Nothing contained in this Act shall render the . . . Sherman Act in applicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." § 3, [15 U. S. C. § 1013\(b\)](#).

<sup>2</sup> The Committee's advice is also available to patients, governmental agencies, and chiropractors themselves, but insurers are the principal users. [650 F.2d 387, 388 \(CA2 1981\)](#).

<sup>3</sup> [15 U. S. C. § 1](#), which provides in pertinent part that "[every] contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

458 U.S. 119, \*124; 102 S. Ct. 3002, \*\*3006; 73 L. Ed. 2d 647, \*\*\*653; 1982 U.S. LEXIS 144, \*\*\*\*10

antitrust scrutiny by the McCarran-Ferguson Act. App. to Pet. for Cert. in No. 81-389, pp. 20a-37a. The court noted that three requirements must be met in order to obtain the McCarran-Ferguson exemption: The challenged practices (1) must constitute the "business of insurance," (2) must be regulated by state law, and (3) must not amount to a "boycott, coercion, or intimidation." *Id.*, at 27a-28a. In the court's view, all three of these requirements were satisfied in the present case. In particular, the court held [\*\*\*\*11] that petitioners' peer review practices constituted the "business of insurance" because they served "to define the precise extent of ULL's [\*125] contractual obligations . . . under [its] policies." *Id.*, at 29a-30a. Moreover, the court determined that the peer review practices "[involved] the spreading of risk, an indispensable element of the 'business of insurance.'" *Id.*, at 30a.<sup>4</sup> Respondents' Sherman Act claim was accordingly dismissed with prejudice.

[\*\*\*\*12] The Court of Appeals for the Second Circuit reversed. [650 F.2d 387 \(1981\)](#). Relying upon this Court's recent opinion in *Group Life & Health Ins. Co. v. Royal Drug Co.*, [440 U.S. 205 \(1979\)](#), the Court of Appeals concluded that the District Court had erred in holding that ULL's use of NYSCA's [\*\*3007] Peer Review Committee constituted the "business of insurance."<sup>5</sup> Accordingly, the Court of Appeals remanded the action for further proceedings. We granted certiorari to resolve a conflict among the Courts of Appeals on the question presented.<sup>6</sup> [454 U.S. 1052 \(1981\)](#).

[\*\*\*\*13] [\*126] //

[\*\*\*654] [LEdHN1B](#) [↑] [1B][LEdHN2](#) [↑] [2]The only issue before us is whether petitioners' peer review practices are exempt from antitrust scrutiny as part of the "business of insurance." "It is axiomatic that conduct which is not exempt from the antitrust laws may nevertheless be perfectly legal." *Group Life & Health Ins. Co. v. Royal Drug Co., supra, at 210, n. 5*. Thus in deciding these cases we have no occasion to address the merits of respondent's Sherman Act claims. However, the Sherman Act does express a "longstanding congressional commitment to the policy of free markets and open competition." *Community Communications Co. v. Boulder*, [455 U.S. 40, 56 \(1982\)](#); see also *United States v. Topco Associates, Inc.*, [405 U.S. 596, 610 \(1972\)](#). Accordingly, our precedents consistently hold that [HN3](#) [↑] exemptions from the antitrust laws must be construed narrowly. *FMC v. Seatrail Lines, Inc.*, [411 U.S. 726, 733 \(1973\)](#). [\*\*\*\*14] This principle applies not only to implicit exemptions, see *Group Life & Health Ins. Co. v. Royal Drug Co., supra, at 231*, but also to express statutory exemptions, see *United States v. McKesson & Robbins, Inc.*, [351 U.S. 305, 316 \(1956\)](#). In *Royal Drug, supra*, this Court had occasion to reexamine the scope of the express antitrust exemption provided for the "business of insurance" by § 2(b) of the McCarran-Ferguson Act. We hold that decision of the question before us is controlled by *Royal Drug*.

The principal petitioner in *Royal Drug* was a Texas insurance company, Blue Shield, that offered policies entitling insured persons to purchase prescription drugs for \$ 2 each from any pharmacy participating in a "Pharmacy Agreement" with Blue Shield; policyholders were also allowed to purchase prescription drugs from a

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<sup>4</sup> The court then turned to the Act's second requirement, that the challenged practices be "regulated by state law." The court held that that requirement had been met, as well, observing that New York had "enacted a pervasive scheme of regulation and supervision of insurance," had prohibited "the unfair settlement of claims," and had proscribed "the conduct alleged in the complaint" in its state *antitrust law*, the Donnelly Act, which by its terms applied to insurers. App. to Pet. for Cert. in No. 81-389, pp. 31a-32a. Finally, the court determined that respondent had neither alleged a "boycott" on petitioners' part, nor offered evidentiary support for such a claim. *Id.*, at 33a-35a. The court thus concluded that the Act's third requirement was satisfied in the present case, and that petitioners' actions were consequently "exempt from application of the antitrust laws." *Id.*, at 36a.

<sup>5</sup> Since it reached this conclusion, the Court of Appeals did not definitively address the other holdings of the District Court. See n. 4, *supra*. The court did note, however, that petitioner NYSCA did not itself "appear to be regulated by state law in the manner § 2(b) requires." [650 F.2d, at 390, n. 5](#).

<sup>6</sup> As noted by the Court of Appeals, [id. at 395, n. 13](#), the decision below is contrary to that of the Court of Appeals for the Fourth Circuit "in a factually identical case." See *Bartholomew v. Virginia Chiropractors Assn.*, [612 F.2d 812 \(1979\)](#).

nonparticipating pharmacy, but in that event they would have to pay full price for the drugs and would be reimbursed by Blue Shield for only a part of that price. Blue Shield offered Pharmacy Agreements to all licensed pharmacies in Texas, but participating pharmacies were required to sell prescription [\*\*\*\*15] drugs to Blue [\*127] Shield's policyholders for \$ 2 each, and were reimbursed only for their cost in acquiring the drugs thus sold. "Thus, only pharmacies that [could] afford to distribute prescription drugs for less than this \$ 2 markup [could] profitably participate in the plan." [440 U.S., at 209](#) (footnote omitted).

Respondents in *Royal Drug* were the owners of nonparticipating pharmacies. They sued Blue Shield and several participating pharmacies under § 1 of the Sherman Act, alleging that the Pharmacy Agreements were the instrument by which Blue Shield had conspired with participating pharmacies to fix the retail prices of prescription drugs. Respondents also alleged that the Agreements encouraged [\*\*3008] Blue Shield's policyholders to avoid nonparticipating pharmacies, thus constituting an unlawful group boycott. The District Court granted summary judgment to Blue Shield and the other petitioners, holding that the challenged Agreements were exempt under § 2(b) of the McCarran-Ferguson \*\*\*655 Act. But the Court of Appeals disagreed, holding that the Agreements were not the "business of insurance" within the meaning of that Act, and reversed. [\*\*\*\*16] [440 U.S., at 210](#). This Court affirmed. Looking to "the structure of the Act and its legislative history," [id., at 211](#), the Court discussed three characteristics of the business of insurance that Congress had intended to exempt through § 2(b).

First, after noting that one "indispensable characteristic of insurance" is the "spreading and underwriting of a policyholder's risk," [id., at 211-212](#),<sup>7</sup> the Court observed that parts [\*128] of the legislative history of the McCarran-Ferguson Act "strongly suggest that Congress understood the business of insurance to be the underwriting and spreading of risk," [id., at 220-221](#). The Court then dismissed Blue Shield's contention that its Pharmacy Agreements involved such activities.

"The Pharmacy Agreements . . . are merely arrangements for the purchase of goods and services by Blue Shield. By agreeing with pharmacies on the maximum prices it will pay for drugs, Blue Shield effectively reduces the total amount it must pay to its policyholders. The Agreements thus enable Blue Shield to minimize costs and maximize profits. Such cost-savings arrangements may well be [\*\*\*\*17] sound business practice, and may well inure ultimately to the benefit of policyholders in the form of lower premiums, but they are not the 'business of insurance.'" [Id., at 214](#) (footnote omitted).

Second, the Court identified "the contract between the insurer and the insured" as "[another] commonly understood aspect of the business of insurance." [Id., at 215](#). The Court noted that, in [\*\*\*\*18] enacting the McCarran-Ferguson Act, Congress had been concerned with the "relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement -- these were the core of the "business of insurance."'" [Id., at 215-216](#), quoting [SEC v. National Securities, Inc., 393 U.S. 453, 460 \(1969\)](#). The Court then rejected Blue Shield's argument that its Pharmacy Agreements were so closely related to the "reliability, interpretation, and enforcement" of its policies as to fall within the intended scope of § 2(b): "This argument . . . proves too much." [440 U.S., at 216](#).

"At the most, the petitioners have demonstrated that the Pharmacy Agreements result in cost savings to Blue Shield which may be reflected in lower premiums if [\*\*\*\*656] the cost savings are passed on to policyholders. But, in that sense, every business decision made by an insurance company has some impact on its reliability, its ratemaking, [\*129] and its status as a reliable insurer . . . [and thus] could be included in the 'business of insurance.' Such a

<sup>7</sup> As the Court explained:

"It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it.' 1 G. Couch, *Cyclopedia of Insurance Law* § 1:3 (2d ed. 1959). See also R. Keeton, *Insurance Law* § 1.2(a) (1971) ('Insurance is an arrangement for transferring and distributing risk'); 1 G. Richards, *The Law of Insurance* § 2 (W. Freedman 5th ed. 1952)." [440 U.S., at 211](#) (footnote omitted).

458 U.S. 119, \*129; 102 S. Ct. 3002, \*\*3008; 73 L. Ed. 2d 647, \*\*\*656; 1982 U.S. LEXIS 144, \*\*\*\*18

result would be plainly contrary to the statutory [\*\*\*\*19] language, which exempts the 'business of insurance' and not the 'business of insurance companies.'" [\*Id.\*](#) [at 216-217](#).

Finally, the Court noted that in enacting the McCarran-Ferguson Act, "the primary concern of both representatives of the insurance [\*\*3009] industry and the Congress was that cooperative ratemaking efforts be exempt from the antitrust laws." [\*Id.\*](#) [at 221](#). This was so because of "the widespread view that it [was] very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation." *Ibid.* The Court was thus reluctant to extend the § 2(b) exemption to the case before it, "because the Pharmacy Agreements involve parties wholly outside the insurance industry." [\*Id.\*](#) [at 231](#).

"There is not the slightest suggestion in the legislative history that Congress in any way contemplated that arrangements such as the Pharmacy Agreements in this case, which involve the mass purchase of goods and services from entities outside the insurance industry, are the 'business of insurance.'" [\*Id.\*](#) [at 224](#) (footnote omitted).

**[LEdHN\[3\]](#)** [3] [\*\*\*\*20] In sum, *Royal Drug* identified **[HN4](#)** three criteria relevant in determining whether a particular practice is part of the "business of insurance" exempted from the antitrust laws by § 2(b): *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry. None of these criteria is necessarily determinative in itself, but examining the arrangement between petitioners NYSCA and ULL with respect to all three criteria, we do not hesitate to conclude that it is not a part of the "business of insurance."

[\*130] **[LEdHN\[4\]](#)** [4] Plainly, ULL's use of NYSCA's Peer Review Committee plays no part in the "spreading and underwriting of a policyholder's risk." *Group Life & Health Ins. Co. v. Royal Drug Co.*, [440 U.S., at 211](#). Both the "spreading" and the "underwriting" of risk refer [\*\*\*\*21] in this context to the transfer of risk characteristic of insurance. See n. 7, *supra*. And as the Court of Appeals below observed:

"The risk that an insured will require chiropractic treatment has been transferred from the insured to [ULL] by the very purchase of insurance. Peer review takes place only after the risk has been transferred by means of the policy, and then it functions only to determine whether the risk of the entire loss (the insured's cost of treatment) has been transferred to [ULL] -- that is, whether the insured's loss falls within the policy limits." [650 F.2d, at 393](#).

Petitioner ULL argues that the [\*\*\*657] Court of Appeals' analysis is "semantic and unrealistic." Brief for Petitioner ULL 17. Petitioner reasons that "[it] is inconceivable that Congress would have included risk transfer within the 'business of insurance' but excluded a device that helps 'determine whether the risk . . . has been transferred' and acts as 'an aid in determining the scope of the transfer.'" *Ibid.* We find no merit in this argument, because the challenged peer review arrangement is logically and temporally unconnected to the transfer of risk [\*\*\*\*22] accomplished by ULL's insurance policies. **[HN5](#)** The transfer of risk from insured to insurer is effected by means of the contract between the parties -- the insurance policy -- and that transfer is complete at the time that the contract is entered. See 9 G. Couch, *Cyclopedia of Insurance Law* §§ 39:53, 39:63 (2d ed. 1962). If the policy limits coverage to "necessary" treatments and "reasonable" charges for them, then that limitation is the measure of the risk that has actually been transferred to the insurer: To the extent that [\*131] the insured pays unreasonable charges for unnecessary treatments, he will not be reimbursed, because the risk of incurring such treatments and

458 U.S. 119, \*131; 102 S. Ct. 3002, \*\*3009; 73 L. Ed. 2d 647, \*\*\*657; 1982 U.S. LEXIS 144, \*\*\*\*22

charges was never transferred to the insurer, but was instead always retained by the insured. Petitioner's argument contains the unspoken premise that the transfer of risk from an insured to his insurer actually takes place not when the contract between those parties is completed, but rather only when the insured's claim is [\*\*3010] settled. This premise is contrary to the fundamental principle of insurance that [\*\*\*\*23] [HNC](#)<sup>↑</sup> the insurance policy defines the scope of risk assumed by the insurer from the insured. See *id.*, § 39:3; R. Keeton, Insurance Law § 5.1(a) (1971).

Turning to the second *Royal Drug* criterion, it is clear that ULL's use of NYSCA's Peer Review Committee is not an integral part of the policy relationship between insurer and insured. In the first place, the challenged arrangement between ULL and NYSCA is obviously distinct from ULL's contracts with its policyholders. In this sense the challenged arrangement resembles the Pharmacy Agreements in *Royal Drug*. There the Court rejected the proposition that the Agreements were "between insurer and insured." *Group Life & Health Ins. Co. v. Royal Drug Co., supra, at 215*, quoting [SEC v. National Securities, Inc., 393 U.S., at 460](#). Rather, it recognized those Agreements as "separate contractual arrangements between Blue Shield and pharmacies engaged in the sale and distribution of goods and services other than insurance." [440 U.S., at 216](#). Similarly, ULL's use of NYSCA's Peer Review Committee is a separate arrangement between [\*\*\*\*24] the insurer and third parties not engaged in the business of insurance.

Petitioner ULL argues that the challenged peer review practices satisfy this criterion because peer review "directly involves the 'interpretation' and 'enforcement' of the insurance contract." Brief for Petitioner ULL 16. But this argument is essentially identical to one made and rejected in [\*132] *Royal Drug*. Blue Shield there contended that its Pharmacy Agreements "so closely [affected] the 'reliability, interpretation, and enforcement' of the insurance [\*\*\*658] contract . . . as to fall within the exempted area." [440 U.S., at 216](#) (footnote omitted). This Court noted, however:

"The benefit promised to Blue Shield policyholders is that their premiums will cover the cost of prescription drugs except for a \$ 2 charge for each prescription. So long as that promise is kept, policyholders are basically unconcerned with arrangements made between Blue Shield and participating pharmacies." [Id., at 213-214](#) (footnotes omitted).

Similarly, when presented with policyholder claims for reimbursement, ULL must decide whether the claims are covered by its policies. [\*\*\*25] But these decisions are entirely ULL's, and its use of NYSCA's Peer Review Committee as an aid in its decisionmaking process is a matter of indifference to the policyholder, whose only concern is *whether* his claim is paid, not *why* it is paid. As in *Royal Drug*, petitioners have shown, at the most, that the challenged peer review practices result in "cost savings to [ULL] which may be reflected in lower premiums if the cost savings are passed on to policyholders." [Id., at 216](#). To grant the practices a § 2(b) exemption on such a showing "would be plainly contrary to the statutory language, which exempts the 'business of insurance' and not the 'business of insurance companies.'" [Id., at 217](#).

Finally, as respects the third *Royal Drug* criterion, it is plain that the challenged peer review practices are not limited to entities within the insurance industry. On the contrary, ULL's use of NYSCA's Peer Review Committee inevitably involves third parties wholly outside the insurance industry -- namely, practicing chiropractors. Petitioners do not dispute this fact, but instead deprecate its importance. They argue that we should not conclude [\*\*\*\*26] "that ULL's use of the peer review process is outside the scope of the 'business' [\*133] of insurance' simply because NYSCA is not an insurance company." Brief for Petitioner ULL 25. In petitioners' view:

"There is nothing in the McCarran-Ferguson Act that limits the 'business of insurance' to the business of insurance companies. As this Court has stated, '[the Act's] language refers not to the persons or companies who are subject to [\*\*3011] state regulation, but to laws "regulating the *business of insurance*.'" [National Securities, 393 U.S. at 459](#)." *Ibid.* (emphasis in original of quoted opinion).

Asserting that "the [New York] Superintendent of Insurance effectively can regulate the peer review process through his authority over the claims adjustment procedures of ULL," *id.*, at 26, petitioners conclude that the process is part of the "business of insurance" despite the necessary involvement of third parties outside the insurance industry.

We may assume that the challenged peer review practices need not be denied the § 2(b) exemption *solely* because they involve parties outside the insurance industry. But the involvement of such [\*\*\*\*27] parties, even if not dispositive, constitutes part of the inquiry mandated by the *Royal Drug* analysis. As the Court noted there, § 2(b) *HN7* was intended primarily to protect "intra-industry cooperation" in the underwriting of [\*\*\*659] risks. 440 U.S., at 221 (emphasis added). Arrangements between insurance companies and parties outside the insurance industry can hardly be said to lie at the center of that legislative concern. More importantly, such arrangements may prove contrary to the spirit as well as the letter of § 2(b), because they have the potential to restrain competition in noninsurance markets. Indeed, the peer review practices challenged in the present cases assertedly realize precisely this potential: Respondent's claim is that the practices restrain competition in a provider market -- the market for chiropractic services -- rather than in an insurance market. App. 8a. Thus we cannot join petitioners in depreciating the [\*134] fact that parties outside the insurance industry are intimately involved in the peer review practices at issue in these cases. [\*\*\*\*28]<sup>8</sup>

[\*\*\*\*29] III

*LEdHN/1C* [1C] In sum, we conclude that ULL's use of NYSCA's Peer Review Committee does not constitute the "business of insurance" within the meaning of § 2(b) of the McCarran-Ferguson Act.<sup>9</sup> The judgment of the Court of Appeals is accordingly

Affirmed.

**Dissent by:** REHNQUIST

## Dissent

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JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

Purporting to rely upon our recent decision in *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), [\*135] the Court today exposes to antitrust liability an aspect of the business of insurance designed to promote fair and efficient claims settlement. The Court reaches this conclusion by determining [\*\*\*\*30] that the peer review

<sup>8</sup>The premise of the dissent is that NYSCA's Peer Review Committee actually constitutes "the claims adjustor" in these cases. See *post*, at 137. From this premise the dissent reasons that since "claims adjustment is part and parcel of the 'business of insurance' protected by the McCarran-Ferguson Act," *post*, at 138, it necessarily follows that the peer review practices at issue in these cases must enjoy the Act's exemption. The fatal flaw in this syllogism is that NYSCA's Peer Review Committee is *not* the claims adjustor. As the Court of Appeals noted: "Opinions of the committee are not binding unless the parties agree beforehand that they will be." 650 F.2d, at 388. Thus in a case such as the present ones, ULL is perfectly free to disregard the Committee's evaluation. Even if ULL were to act upon the Committee's opinion, the nonbinding nature of the Committee's evaluation means that, at most, peer review is merely ancillary to the claims adjustment process. We see no reason that such ancillary activities must necessarily enjoy the McCarran-Ferguson exemption from the antitrust laws. Unlike activities that occur wholly within the insurance industry -- such as the claims adjustment process itself -- the ancillary peer review practices at issue in these cases "involve parties wholly outside the insurance industry." See *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S., at 231. Thus peer review falls afoul of the third *Royal Drug* criterion in a way in which pure claims adjustment activities cannot.

<sup>9</sup>This conclusion renders it unnecessary for us to address the questions whether the conduct challenged in respondent's complaint was "regulated by state law" or constituted a "boycott, coercion, or intimidation." See n. 5, *supra*.

458 U.S. 119, \*135; 102 S. Ct. 3002, \*\*3011; 73 L. Ed. 2d 647, \*\*\*659; 1982 U.S. LEXIS 144, \*\*\*\*30

process does not spread risk, is not an integral [\*\*3012] part of the insurance relationship, and is not limited to entities within the insurance industry. Because I find the claims adjustment function of the Peer Review Committee [\*\*\*660] to be at the heart of the relationship between insurance companies and their policyholders, I conclude that such committees are clearly within the sphere of insurance activity which the McCarran-Ferguson Act intended to protect from the effect of the antitrust laws.<sup>1</sup> This conclusion finds support in the legislative history of the Act and in *Royal Drug* and its predecessors.

For many years statutes such as the Sherman Act were [\*\*\*31] thought not applicable to the business of insurance, this Court having held in *Paul v. Virginia*, 8 Wall. 168, 183 (1869), that "[issuing] a policy of insurance is not a transaction of commerce." When this Court held in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944), that the business of insurance was a part of interstate commerce subject to the Sherman Act, Congress responded quickly to reestablish the preeminence of States in regulating such business. Congress' response -- the McCarran-Ferguson Act -- sought primarily to protect the contractual relationship between the insurer and the insured:

"Under the regime of *Paul v. Virginia, supra*, States had a free hand in regulating the dealings between insurers and their policyholders. Their negotiations, and the contract which resulted, were not considered commerce and were, therefore, left to state regulation. The [\*136] *South-Eastern Underwriters* decision threatened the continued supremacy of the States in this area. The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies [\*\*\*32] in dealing with their policyholders would remain subject to state regulation." *SEC v. National Securities, Inc.*, 393 U.S. 453, 459 (1969).

We recognized this congressional purpose in *Royal Drug*:

"The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement -- these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was -- it was on the relationship between the insurance company and the policyholder." *Group Life & Health Ins. Co. v. Royal Drug Co., supra, at 215-216* (quoting *SEC v. National Securities, Inc., supra, at 460*).

Thus, whatever else was said in *Royal Drug* about the indispensable characteristic of risk-spreading, the Court found the contractual relationship between the insurer and the insured to be the essence of the "business of insurance."

Central to this contractual relationship [\*\*\*33] is the process of claims adjustment -- [\*\*\*661] the determination of the actual payments to be made to the insured for losses covered by the insurance contract. The key representation of the insurance company and the principal expectation of the policyholder is that prompt payment will be made when the event insured against actually occurs. As one commentator has stated:

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<sup>1</sup> Since the Court declines to reach the question of whether petitioners' Committee is regulated by state law as required by the McCarran-Ferguson Act, I likewise do not discuss it. I note, however, that the District Court found petitioners' Committee to be so regulated. App. to Pet. for Cert. in No. 81-389, pp. 31a-32a.

"Up until the time there is a claim and a payment is made, the only tangible evidence of insurance is a piece of paper. In other words, the real product of insurance [\*137] is the claims proceeds. Selection of the prospect, qualifying him for coverage that suits his needs, delivery of a policy, collecting premiums for perhaps years, making changes in coverage to meet changing situations, all of these are but [\*\*3013] preambles to the one purpose for which the insurance was secured, namely to collect dollars if and when an unforeseen event takes place." J. Wickman, Evaluating the Health Insurance Risk 57 (1965).<sup>2</sup>

[\*\*\*\*34] It is the claims adjustor -- in this case petitioners' Peer Review Committee -- which determines whether and to what extent an insured's losses will be covered. The Court thus plainly errs when it concludes that the role of petitioners' Peer Review Committee "is not an integral part of the policy relationship between insurer and insured," *ante*, at 131, and "is a matter of indifference to the policyholder." *Ante*, at 132. Few insurance matters could be of greater importance to policyholders than whether their claims will be paid, and it is the Peer Review Committee which in effect makes that determination. Being a critical component of the relationship [\*138] between an insurer and an insured, claims adjustment is part and parcel of the "business of insurance" protected by the McCarran-Ferguson Act.<sup>3</sup>

[\*\*\*\*35] This conclusion finds support in a source of guidance completely disregarded [\*\*\*662] by the Court -- the legislative history of McCarran-Ferguson. The passage of the Act was preceded by the introduction in the Senate Committee of a report and a bill prepared by the National Association of Insurance Commissioners. "The views of the NAIC are particularly significant, because the Act ultimately passed was based in large part on the NAIC bill." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S., at 221 (footnote omitted). Included in that bill were seven specific insurance practices to which the Sherman Act was not to apply, and to which the Court in *Royal Drug* looked for guidance as to the meaning of the phrase "business of insurance." See *id.*, at 222. Among those seven protected practices was the process of claims adjustment: "the said Sherman Act shall not apply . . . to any cooperative or joint service, *adjustment, investigation, or inspection agreement* relating to insurance." 90 Cong. Rec. A4406 (1944) (emphasis added). Other statements in the legislative history support the conclusion that claims adjustment was to be [\*\*\*\*36] protected:

[\*139] "[W]e come squarely to the question of whether State regulation is adequate to handle insurance, or whether that business should be subject to the provisions of the antitrust laws. . . . A great number of fire-insurance companies have cooperated in mutual agreement -- and of [\*\*3014] necessity -- through the Southeastern Underwriters Association and rating bureaus, adjusting policy rates to risks, classifying insurable property either in co-insurance or in re-insurance, *making appraisals of losses*, and working out systems of inspection to improve

<sup>2</sup> Other commentators agree with this assessment of the importance of claims settlement:

"The adjustment (including payment) of claims represents the final act in the insurance process. The payment of a claim by an insurance company brings the insurance contract 'to life' in a fashion far more vivid than does any other single act in connection with the purchase, issuance, and maintenance of the contract." Butler, Loss Adjustment in Fire Insurance, in Property and Liability Insurance Handbook 219 (J. Long & D. Gregg eds. 1965).

"Claim administration is the last link in the process of insurance -- a process that begins with actuarial analysis and continues through sales, underwriting, investment, and policy service. . . . [T]he expectation of the policyowner that an insurer is willing to meet its obligations, through claims administration, is an important part in the decision to purchase insurance. Indeed, it is the claim administration function that delivers on the product sold to the policyowner." C. Cissley, Claim Administration: Principles and Practices iii (1980).

<sup>3</sup> Apparently unable to discern the difference between a mere method of paying a claim and the more fundamental process of determining whether a claim is covered by the insurance agreement, the Court finds that petitioners' peer review procedure "resembles the Pharmacy Agreements in *Royal Drug*." *Ante*, at 131. But the Pharmacy Agreement at issue in *Royal Drug* was simply a *method* of reimbursing policyowners for medication expenses. The policyowners could obtain medication from participating pharmacies simply by paying the amount that otherwise would not be covered by the insurance plan. The pharmacies thus constituted nothing more than in-kind dispensers of insurance payments; they played no role whatsoever in the more fundamental process of assessing the validity of a claim and determining the amount to be paid. Peer review committees, which fulfill such a fundamental role, are thus quite unlike the arrangements considered by the Court in *Royal Drug*.

protection against fires. All of this has been done with splendid success. It would be a pity indeed, after all these years, to have the government intervene. The business of insurance involves long contracts. The fidelity of performance of those contracts will not brook intervention." *Id.*, at 6530 (remarks of Rep. Satterfield) (emphasis added).

See also *id.*, at 6543 (remarks of Rep. Jennings); *id.*, at 6550-6551 (remarks of Rep. Ploeser).

The role of claims adjustment in the insurance relationship and the legislative history of the Act thus unmistakably demonstrate that claims [\*\*\*\*37] settlement procedures such as petitioners' Peer Review Committee were to be accorded protection from the antitrust laws as the "business of insurance." Few practices followed by insurance companies today present a fairer or more efficient means of claims resolution than professional peer review committees. Insurance claimants seek reimbursement for virtually every form of medical treatment and care, and determining the reasonableness and necessity of such expenses requires the expertise of a practicing physician. Because the entire spectrum of human ailments are involved, the views of one physician are seldom sufficient; specialists from many fields of medicine must be consulted. Few if any insurance companies can afford to staff their claims settlement departments with such a broad range of physicians. The companies thus must either make less than [\*140] satisfactory claims determinations, or must turn to an outside group of experts such as petitioners' Committee.

Although the Court protests that [\*\*\*663] its decision says nothing about petitioners' antitrust liability, there can be little doubt that today's decision will vastly curtail the peer review process. Few professionals [\*\*\*\*38] or companies will be willing to expose themselves to possible antitrust liability through such activity. The Court thus not only misreads the McCarran-Ferguson Act and our prior precedents, but also eliminates an aspect of the American insurance industry which has long redounded to the benefit of insurance companies and policyholders alike.

## References

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[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 225](#)

12 Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade 48:146

24 Am Jur Trials 1, Defending Antitrust Lawsuits

[15 USCS 1012](#)

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Federal Quick Index, Insurance; McCarran-Ferguson Act; Monopolies and Restraints of Trade

Annotation References:

Validity, construction, and application of McCarran-Ferguson Act (15 USCS 1011-1015), dealing with regulation of insurance business [\*\*\*\*39] by state or federal law. 21 L Ed 2d 938.



## **Associated General Contractors v. Cal. State Council of Carpenters**

Supreme Court of the United States

October 5, 1982, Argued ; February 22, 1983, Decided

No. 81-334

### **Reporter**

459 U.S. 519 \*; 103 S. Ct. 897 \*\*; 74 L. Ed. 2d 723 \*\*\*; 1983 U.S. LEXIS 128 \*\*\*\*; 51 U.S.L.W. 4139; 96 Lab. Cas. (CCH) P14,028; 1983-1 Trade Cas. (CCH) P65,226; 112 L.R.R.M. 2753

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC. v. CALIFORNIA STATE COUNCIL OF CARPENTERS ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

**Disposition:** [648 F.2d 527](#), reversed.

## **Core Terms**

damages, antitrust violation, anti trust law, firms, alleges, contractors, coercion, indirect, defendants', common-law, purchaser, nonunion, wages, restraint of trade, subcontractors, overcharges, injuries, cases, union dues, Clayton Act, Sherman Act, collective-bargaining, Appeals, parties, bargaining, conspiracy, antitrust, employees, violation of antitrust laws, amended complaint

## **LexisNexis® Headnotes**

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

### **HN1** Motions to Dismiss, Failure to State Claim

A court must assume that a party can prove the facts alleged in its amended complaint. It is not, however, proper to assume that a party can prove facts that it has not alleged.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

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

### **HN2** Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

I I JÁNÈJÀ FJÀÀ FJLÀCHÀÒDÀ JÌ ÀÀ JÌ LÀ I ÀSEÒAÈGÀÀ GHÀÀ GHÀJÌ HÀWÈJÈSÓYÓÀGÀ ÀÀ

An agreement to restrain trade may be unlawful even though it does not entirely exclude its victims from a market. Coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect.

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

### **HN3** Motions to Dismiss, Failure to State Claim

A district court retains the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.

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

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

### **HN4** Private Actions, Standing

Even though coercion directed by a defendant at third parties in order to restrain trade may have been unlawful, it does not, of course, necessarily follow that still another party is a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

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

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

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

### **HN5** Standing, Clayton Act

The class of persons who may maintain a private damages action under the antitrust laws is broadly defined in § 4 of the Clayton Act, [15 U.S.C.S. § 15](#).

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

Antitrust & Trade Law > Clayton Act > General Overview

### **HN6** Private Actions, Standing

See [15 U.S.C.S. § 15](#).

[Antitrust & Trade Law > ... > Private Actions > Standing > General Overview](#)

[Antitrust & Trade Law > Clayton Act > General Overview](#)

[Antitrust & Trade Law > Clayton Act > Scope](#)

## [\*\*HN7\*\* \[down\] \*\*Private Actions, Standing\*\*](#)

The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. The Clayton Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

[Antitrust & Trade Law > Sherman Act > Remedies > Damages](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Antitrust & Trade Law > ... > Private Actions > Standing > General Overview](#)

[Antitrust & Trade Law > Sherman Act > Remedies > General Overview](#)

## [\*\*HN8\*\* \[down\] \*\*Remedies, Damages\*\*](#)

Neither a creditor nor a stockholder of a corporation that is injured by a violation of the antitrust laws can recover treble damages under § 7 of the Sherman Act.

[Antitrust & Trade Law > Clayton Act > Claims](#)

[Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview](#)

## [\*\*HN9\*\* \[down\] \*\*Clayton Act, Claims\*\*](#)

An antitrust violation may be expected to cause ripples of harm to flow through the nation's economy; but despite the broad wording of § 4 of the Clayton Act there is a point beyond which a wrongdoer should not be held liable. It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.

[Antitrust & Trade Law > ... > Private Actions > Standing > Requirements](#)

[Civil Procedure > ... > Justiciability > Standing > Injury in Fact](#)

[Antitrust & Trade Law > ... > Private Actions > Standing > General Overview](#)

[Civil Procedure > Preliminary Considerations > Justiciability > General Overview](#)

[Civil Procedure > ... > Justiciability > Standing > General Overview](#)

## [\*\*HN10\*\* \[down\] \*\*Standing, Requirements\*\*](#)

I Í JÁNEĀ FJĀĀ FJLĀ ĀHĀĀDĀ JÍ ĀĀ JÍ LĀ I ĀSEĀĀGĀĀ GĀĀĀ ĀHĀĀJÌ HĀĀĀSÓYÓĀGĀ ĀĀĀ

Harm to an antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but a court must make a further determination whether a plaintiff is a proper party to bring a private antitrust action.

[Antitrust & Trade Law > ... > Private Actions > Standing > General Overview](#)

#### [\*\*HN11\*\*\[\] \*\*Private Actions, Standing\*\*](#)

What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations. What is meant by the word "proximate" is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.

[Antitrust & Trade Law > Clayton Act > Remedies > Damages](#)

[Antitrust & Trade Law > Clayton Act > General Overview](#)

[Antitrust & Trade Law > ... > Private Actions > Standing > General Overview](#)

[Antitrust & Trade Law > Clayton Act > Remedies > General Overview](#)

#### [\*\*HN12\*\*\[\] \*\*Remedies, Damages\*\*](#)

The availability of the § 4 of the Clayton Act remedy to some person who claims its benefit is not a question of the specific intent of the conspirators.

[Antitrust & Trade Law > ... > Private Actions > Standing > General Overview](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview](#)

[Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions](#)

#### [\*\*HN13\*\*\[\] \*\*Private Actions, Standing\*\*](#)

A union, in its capacity as bargaining representative, will frequently not be part of a class the Sherman Act was designed to protect, especially in disputes with an employer with whom it bargains. In each case its alleged injury must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall.

[Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview](#)

[Antitrust & Trade Law > ... > Private Actions > Standing > General Overview](#)

[Antitrust & Trade Law > Public Enforcement > State Civil Actions](#)

[Antitrust & Trade Law > Regulated Practices > Private Actions > Private Attorneys General](#)

#### [\*\*HN14\*\*\[\] \*\*Private Actions, Remedies\*\*](#)

The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party to perform the office of a private attorney general.

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

Antitrust & Trade Law > Clayton Act > General Overview

## **HN15** [+] **Private Actions, Standing**

It is appropriate for purposes of § 4 of the Clayton Act to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

## **HN16** [+] **Remedies, Damages**

The feasibility and consequences of implementing particular damages theories may, in certain limited circumstances, be considered in determining who is entitled to prosecute an action brought under § 4 of the Clayton Act. Thus, the task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system.

## **Lawyers' Edition Display**

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### **Decision**

Union held not injured by violation of antitrust laws, within meaning of 4 of Clayton Act ([15 USCS 15](#)), by employer association's coercion of employers.

### **Summary**

Two unions alleged that, in violation of the antitrust laws, a multiemployer association and its members coerced certain third parties, as well as some of the association's members, to enter into business relationships with nonunion firms. This coercion, according to the complaint, adversely affected the trade of certain unionized firms and thereby restrained the business activities of the unions. The unions sought treble damages under 4 of the Clayton Act ([15 USCS 15](#)), which authorizes the award of damages to those injured in their business or property by antitrust violations. The United States District Court for the Northern District of California dismissed the complaint ([404 F Supp 1067](#)). The United States Court of Appeals for the Ninth Circuit reversed the District Court's dismissal of the antitrust claim, holding that (1) a Sherman Act violation, a group boycott, had been alleged, (2) the defendants' conduct was not within the antitrust exemption for labor activities, and (3) the plaintiffs had standing to recover damages for the injury to their own business activities occasioned by the defendants' boycott ([648 F2d 527](#)).

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On certiorari, the United States Supreme Court reversed. In an opinion by Stevens, J., joined by Burger, Ch. J., and Brennan, White, Blackmun, Powell, Rehnquist, and O'Connor, JJ., it was held that based on the allegations of the complaint, the unions were not persons injured by reason of a violation of the antitrust laws within the meaning of 4 of the Clayton Act.

Marshall, J., dissenting, expressed the view that the court's decision imposes an unwarranted judge-made limitation on the antitrust laws and that the unions fit comfortably within the language of 4.

## Headnotes

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PRACTICES §67 > who may recover -- union -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B]

A union is not a person injured by reason of a violation of the antitrust laws within the meaning of 4 of the Clayton Act ([15 USCS 15](#)), which authorizes the award of damages to those injured in their business or property by antitrust violations, based on the allegations of its complaint that a multiemployer association and its members coerced certain third parties, as well as some of the association's members, to enter into business relationships with nonunion firms, allegedly adversely affecting the trade of certain unionized firms and thereby restraining the business activities of the union. (Marshall, J., dissented from this holding.)

ERROR §1293 > complaint -- assumption that plaintiff can prove facts alleged -- > Headnote:

[LEdHN\[2\]](#) [2]

The reviewing court must assume that the plaintiff can prove the facts alleged in its amended complaint, on appeal considering the sufficiency of a complaint alleging violation of the antitrust laws; however, it is not proper to assume that the plaintiff can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged in the complaint.

PRACTICES §46 > antitrust violations -- multiemployer association and its members -- > Headnote:

[LEdHN\[3\]](#) [3]

The allegations that a multiemployer association and its members have breached their collective bargaining agreements in various ways, and that they have manipulated their corporate names and corporate status in order to divert business to nonunion divisions or firms that they actually control, in the context of the bargaining relationship between them and a union, and the charge that the association and its members advocated, encouraged, induced, and aided nonmembers in refusing to enter into collective bargaining relationships with a union, do not describe antitrust violations.

PRACTICES §9 > coercive activity -- > Headnote:

[LEdHN\[4\]](#) [4]

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An agreement to restrain trade may be unlawful even though it does not entirely exclude its victims from the market; coercive activity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect.

PLEADING §130 > specificity -- > Headnote:

[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B]

A Federal District Court retains the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed in a case of the magnitude of an antitrust suit filed by a union alleging that a multiemployer association and its members coerced certain third parties and some of the association's members to enter into business relationships with nonunion contractors and subcontractors, thereby adversely affecting the trade of certain unionized firms and restraining the union's business activities.

PRACTICES §67 > union -- injured party -- > Headnote:

[LEdHN\[6\]](#) [6]

Even though coercion directed by a multiemployer association and its members at third parties in order to restrain the trade of certain contractors and subcontractors may have been unlawful, it does not necessarily follow that still another party, a union, is a person injured by reason of a violation of the antitrust laws within the meaning of 4 of the Clayton Act ([15 USCS 15](#)), which authorizes the award of damages to those injured in their business or property by antitrust violations.

STATUTES §164 > construction -- language of statute -- > Headnote:

[LEdHN\[7\]](#) [7]

The starting point for interpreting a statute is the language of the statute itself.

PRACTICES §7 > Sherman Act -- common-law background -- > Headnote:

[LEdHN\[8\]](#) [8]

Congress intended the Sherman Act ([15 USCS 1 et seq.](#)) to be construed in the light of its common-law background.

PRACTICES §67 > who may recover -- union -- > Headnote:

[LEdHN\[9A\]](#) [9A] [LEdHN\[9B\]](#) [9B] [LEdHN\[9C\]](#) [9C]

The question of whether a union may recover for the injury allegedly suffered by reason of a multiemployer association and its members' coercion against certain third parties cannot be answered simply by reference to the

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broad language of 4 of the Clayton Act ([15 USCS 15](#)) since, as was required in common-law damages litigation in 1890, the question requires an evaluation of the union's harm, the alleged wrongdoing by the defendants, and the relationship between them.

PRACTICES §67 > who may recover -- common-law limitations -- > Headnote:

[LEdHN\[10A\]](#) [ ] [10A] [LEdHN\[10B\]](#) [ ] [10B]

The limitations on damages recoveries found in common-law actions in 1890 are not intended to serve permanently as limits on recoveries under the Sherman Act ([15 USCS 1 et seq.](#)) since the common law is an evolving body of law.

PARTIES §3 > PRACTICES §67 > antitrust standing -- > Headnote:

[LEdHN\[11A\]](#) [ ] [11A] [LEdHN\[11B\]](#) [ ] [11B]

Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.

PRACTICES §67 > Clayton Act -- sufficiency of complaint -- > Headnote:

[LEdHN\[12A\]](#) [ ] [12A] [LEdHN\[12B\]](#) [ ] [12B]

The mere fact that a claim is literally encompassed by the Clayton Act does not end the inquiry; an allegation of improper motive, although it may support a plaintiff's damages claims under 4 of the Act ([15 USCS 15](#)), which authorizes the award of damages to those injured in their business or property by antitrust violations, is not a panacea that will enable any complaint to withstand a motion to dismiss; a defendant's specific intent may sometimes be relevant to the question of whether a violation of law has been alleged.

PRACTICES §67 > who may recover -- union -- > Headnote:

[LEdHN\[13A\]](#) [ ] [13A] [LEdHN\[13B\]](#) [ ] [13B]

A union's allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the union, are insufficient as a matter of law where other relevant factors--the nature of the union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy--weigh heavily against judicial enforcement of the union's antitrust claim.

## Syllabus

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I I JÁNEĀ FJĀĀ FJLĀ ĀHĀOĀ JI ĀĀ JI LĀ I ĀSEĀGĀ ĀGHĀĀ ĀHĀJĀ HĀEĀSĀYĀFĀ ĀĀĀ

Petitioner multiemployer association and respondents (collectively the Union) are parties to collective-bargaining agreements governing the terms and conditions of employment in construction-related industries in California. The Union filed suit in Federal District Court, alleging that petitioner and its members, in violation of the antitrust laws, coerced certain third parties and some of petitioner's members to enter into business relationships with nonunion contractors and subcontractors, and thus adversely affected the trade of certain unionized firms, thereby restraining the Union's business activities. Treble damages were sought under § 4 of the Clayton Act, which authorizes recovery of such damages by "[any] person who shall be injured [\*\*\*\*2] in his business or property by reason of anything forbidden in the antitrust laws." The District Court dismissed the complaint as insufficient to allege a cause of action for treble damages under § 4. The Court of Appeals reversed.

*Held:* Based on the allegations of the complaint, the Union was not a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act. Pp. 526-546.

(a) Even though coercion allegedly directed by petitioner at third parties in order to restrain the trade of "certain" contractors and subcontractors may have been unlawful, it does not necessarily follow that the Union is a person injured by reason of a violation of the antitrust laws within the meaning of § 4. Pp. 526-529.

(b) The question whether the Union may recover for the alleged injury cannot be answered by literal reference to § 4's broad language. Instead, as was required in common-law damages litigation in 1890 when § 4's predecessor was enacted as § 7 of the Sherman Act, the question requires an evaluation of the Union's harm, the petitioner's alleged wrongdoing, and the relationship between them. Pp. 529-535.

(c) The Union's allegations [\*\*\*\*3] of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the Union, are insufficient as a matter of law. Other relevant factors -- the nature of the alleged injury to the Union, which is neither a consumer nor a competitor in the market in which trade was allegedly restrained, the tenuous and speculative character of the causal relationship between the Union's alleged injury and the alleged restraint, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy -- weigh heavily against judicial enforcement of the Union's antitrust claim. Pp. 535-546.

**Counsel:** James P. Watson argued the cause for petitioner. With him on the briefs was George M. Cox.

Victor J. Van Bourg argued the cause and filed a brief for respondents.\*

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**Judges:** STEVENS, J., delivered the opinion of the Court in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, post, p. 546.

**Opinion by:** STEVENS

## Opinion

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\* Briefs of amici curiae urging reversal were filed by Solicitor General Lee, Assistant Attorney General Baxter, Deputy Solicitor General Wallace, Elinor Hadley Stillman, Robert B. Nicholson, and Robert J. Wiggers for the United States; by Peter G. Nash for the Associated General Contractors of America, Inc.; and by Edward B. Miller and Stephen A. Bokat for the Chamber of Commerce of the United States.

J. Albert Woll, Laurence Gold, and George Kaufmann filed briefs for the American Federation of Labor and Congress of Industrial Organization as amicus curiae urging affirmance.

Kenneth E. Ristau, Jr., and David A. Cathcart filed a brief for the Pacific Maritime Association as amicus curiae.

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[\*520] [\*727] [\*899] JUSTICE STEVENS delivered the opinion of the Court.

LEdHN/1A [1A] This case arises out of a dispute between parties to a multi-employer collective-bargaining agreement. The plaintiff unions allege that, in violation of the antitrust laws, the multi-employer association and its members coerced certain third parties, as well as some of the association's members, to enter into business relationships with nonunion firms. This coercion, according to the complaint, adversely affected the trade of certain unionized firms and thereby restrained the [\*521] business activities of the unions. The question presented is whether the complaint sufficiently alleges that the unions have been "injured in [their] business or property by reason of anything forbidden in the antitrust laws" and may therefore recover treble damages under § 4 of the Clayton Act. [\*\*\*5] 38 Stat. 731, 15 U. S. C. § 15. Unlike the majority of the Court of Appeals for the Ninth Circuit, we agree with the District Court's conclusion that the complaint is insufficient.

I

The two named plaintiffs (the Union) -- the California State Council of Carpenters and the Carpenters 46 Northern Counties [\*\*900] Conference Board -- are affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO. The Union represents more than 50,000 individuals employed by the defendants in the carpentry, drywall, piledriving, and related industries throughout the State of California. The Union's complaint is filed as a class action on behalf of numerous affiliated local unions and district councils. The defendants [\*\*\*728] are Associated General Contractors of California, Inc. (Associated), a membership corporation composed of various building and construction contractors, approximately 250 members of Associated who are identified by name in an exhibit attached to the complaint, and 1,000 unidentified co-conspirators.

The Union and Associated, and their respective predecessors, have been parties to collective-bargaining agreements governing [\*\*\*6] the terms and conditions of employment in construction-related industries in California for over 25 years. The wages and other benefits paid pursuant to these agreements amount to more than \$ 750 million per year. In addition, approximately 3,000 contractors who are not members of Associated have entered into separate "memorandum agreements" with the Union, which bind them to the terms of the master collective-bargaining agreements between the Union and Associated. The amended complaint does not [\*522] state the number of nonsignatory employers or the number of nonunion employees who are active in the relevant market.

In paragraphs 23 and 24 of the amended complaint, the Union alleges the factual basis for five different damages claims.<sup>1</sup> [\*\*\*8] Paragraph 23 alleges generally that the defendants conspired to abrogate and weaken the collective-bargaining relationship between the Union and the signatory employers. In seven subsections, paragraph 24 sets forth activities allegedly committed pursuant to the conspiracy. The most specific allegations relate to the labor relations between the parties.<sup>2</sup> The complaint's description of actions affecting nonparties is both brief and vague. [\*\*\*7] It is alleged that defendants

"(3) Advocated, encouraged, induced, and aided non-members of defendant Associated General Contractors of California, Inc. to refuse to enter into collective bargaining relationships with plaintiffs and each of them;

<sup>1</sup> The facts set forth in paragraphs 23 and 24, initially alleged in support of the Union's federal antitrust claim, are realleged in each of the other claims for relief: breach of collective-bargaining agreements (PMPM 29-31); intentional interference with contractual relations (PMPM 32-35); intentional interference with business relationships (PMPM 36-39); and violation of the California antitrust statute (PMPM 40-43).

<sup>2</sup> For example, it is alleged that defendants breached their collective-bargaining agreements "by failing to pay agreed-upon wages, by failing to use the hiring hall, by failing to pay Trust Fund contributions, by failing to observe other terms and conditions of employment, and by generally weakening the good faith requirement of the collective bargaining agreements"; that defendants improperly changed their names and corporate status and made use of so-called "double breasted operations"; and that they encouraged nonmembers of Associated to refuse to enter into collective-bargaining agreements with the Union.

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"(4) Advocated, encouraged, induced, *coerced*, aided and encouraged owners of land and other letters of construction contracts to hire contractors and subcontractors who are not signatories to collective bargaining agreements with plaintiffs and each of them;

[\*523] "(5) Advocated, induced, *coerced*, encouraged, and aided members of Associated General Contractors of California, Inc., non-members of Associated General Contractors of California, Inc., and 'memorandum contractors' to enter into subcontracting agreements with subcontractors who are not signatories to [\*\*\*729] any collective bargaining agreements with plaintiffs and each of them"; App. E to Pet. for Cert. 17-19 (emphasis added).<sup>3</sup>

[\*\*\*9] [\*\*901] Paragraph 25 describes the alleged "purpose and effect" of these activities: first, "to weaken, destroy, and restrain the trade of certain contractors," who were either members of Associated or memorandum contractors who had signed agreements with the Union; and second, to restrain "the free exercise of the business activities of plaintiffs and each of them."<sup>4</sup> [\*\*\*10] Plaintiffs claim that these alleged antitrust violations [\*524] caused them \$ 25 million in damages.<sup>5</sup> The complaint does not identify any specific component of this damages claim.

After hearing "lengthy oral argument" and after receiving two sets of written briefs, one filed before and the second filed after this Court's decision in *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975), the District Court dismissed the complaint, including the federal antitrust claim. *404 F.Supp. 1067 (ND Cal. 1975)*.<sup>6</sup> [\*\*\*11] The court observed that the complaint alleged "a rather vague, general conspiracy," and that the allegations "appear typical of disputes a union might have with an employer," which in the normal course are resolved by grievance and arbitration or by the NLRB. *Id.*, at 1069.<sup>7</sup> Without seeking to clarify or [\*\*\*730] further amend the first amended complaint, the Union filed its notice of appeal on October 9, 1975.

<sup>3</sup>The word "coerced" did not appear in the complaint as originally filed. Even as amended after the filing of motions to dismiss, the complaint does not allege that the defendants used any coercion to persuade nonmembers of Associated to refuse to enter into collective-bargaining agreements with the Union (PM 24(3)). The complaint alleges neither the identity nor the number of landowners, general contractors, or others who were coerced into making contracts with nonunion firms.

<sup>4</sup>Paragraph 25, which describes the effect of the conspiracy, reads in full as follows:

"The purpose and effect of the above described activities, plan and conspiracy are oppressive, unreasonable, and illegal, and are in restraint of trade and an unlawful interference and restraint of the free exercise of the business activities of plaintiffs and each of them, all in violation of *15 U. S. C. Section 1*. The purpose and effect of the above described activities, plan and conspiracy, in addition, are to weaken, destroy, and restrain the trade of certain contractors, both members of the Associated General Contractors of California, Inc. and non-members, who are 'memorandum contractors,' who have faithfully performed the terms and conditions set out in the master collective bargaining agreements described above. The effect of this restraint on trade is to further weaken and destroy plaintiffs in this matter. These activities are in restraint of the free exercise of plaintiffs' trade and an interference therein, all in violation of *15 U. S. C. Section 1*." App. E to Pet. for Cert. 20-21.

<sup>5</sup>Plaintiffs do not seek injunctive relief under § 16 of the Clayton Act, *15 U. S. C. § 26*, and they do not ask us to consider whether they have standing to request such relief.

<sup>6</sup>An order dismissing the federal antitrust claim and the state-law claims was filed on August 4, 1975, and an amended order dismissing the entire complaint was entered on September 10, 1975. The District Court had initially stayed the breach-of-contract claim for 120 days pending grievance and arbitration procedures. On reconsideration it also dismissed the breach-of-contract claim, deciding that the suit had been prematurely filed.

<sup>7</sup>Addressing the federal antitrust claim, the District Court concluded:

"The essence of plaintiffs' claim seems to be that defendants violated the antitrust laws insofar as they declined to enter into agreements with plaintiffs to deal only with subcontractors which were signatories to contracts with plaintiffs, precisely the type of agreement which subjected the union in *Connell* to antitrust liability." *404 F.Supp., at 1070*.

The District Court reasoned that the employers' refusal to enter into such an agreement could not provide the basis for an antitrust claim.

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Over five years later, on November 20, 1980, the Court of Appeals reversed the District Court's dismissal of the Union's federal antitrust claim. [648 F.2d 527](#).<sup>8</sup> The majority [<sup>\*525</sup>] of the Court of Appeals disagreed with the District Court's characterization of the antitrust claim; it adopted a construction of the amended complaint which is somewhat broader than the allegations in the pleading itself.<sup>9</sup> [\*\*\*\*13] The Court of [\*\*902] Appeals held (1) that a Sherman Act violation -- a group [\*\*\*\*12] boycott -- had been alleged, [\*id.\* at 531-532](#); (2) that the defendants' conduct was not within the antitrust exemption for labor activities, [\*id.\* at 532-536](#); and (3) that the plaintiffs had standing to recover damages for the injury to their own business activities occasioned by the defendants' "industry-wide boycott against all subcontractors with whom the Unions had signed agreements . . ." [\*Id.\* at 537](#). In support of the Union's standing, the majority reasoned that the Union was within the area of the economy endangered by a breakdown of competitive conditions, not only because injury to the Union was a foreseeable consequence of the antitrust violation, but also because that injury was specifically intended by the defendants. The court noted that its conclusion was consistent with other cases holding that union organizational [<sup>\*526</sup>] and representational activities constitute a form of business protected by the antitrust laws.<sup>10</sup>

[\*\*\*\*14] II

[LEdHN\[2\]](#) [2]As the case comes to us, we [\*\*\*731] [HN1](#) must assume that the Union can prove the facts alleged in its amended complaint. It is not, however, proper to assume that the Union can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged.<sup>11</sup>

[LEdHN\[3\]](#) [3]We first note that the Union's most specific claims of injury involve matters that are not subject to review under the antitrust laws. The amended complaint alleges that the defendants have breached their collective-bargaining agreements [\*\*\*\*15] in various ways, and that they have manipulated their corporate names and corporate status in order to divert business to nonunion divisions or firms that they actually control. Such deceptive diversion of business to the nonunion portion of a so-called "double-breasted" operation might constitute a breach

<sup>8</sup>The Court of Appeals affirmed the dismissal of all other claims.

<sup>9</sup>The Court of Appeals majority read subparagraph (4) of paragraph 24, quoted [\*supra, at 522\*](#), as though it alleged that the defendants had coerced landowners and other persons who let construction contracts "to hire *only* construction firms, primarily subcontractors, who had not signed with the Unions." [\*648 F.2d, at 532\*](#) (emphasis added); see also [\*id., at 544\*](#) (denying petition for rehearing). The word "only" does not appear in the amended complaint, and it implies that the defendants' activities gave rise to a broader restraint than was actually alleged.

The majority read subparagraph (5) of paragraph 24 to charge that defendants had "coerced and aided each other to subcontract *only* with subcontractors who had not signed with the Unions." [\*Id., at 531\*](#) (emphasis added). Again using the word "only," which does not appear in the complaint itself, the majority characterized the defendants' alleged activities as "very similar to a concerted refusal to deal, or a group boycott." *Ibid.* It concluded that the allegations "present virtually the obverse of the situation described in *Connell*": the conspiracy, if successful, "would effectively lock union-signatory subcontractors out of a portion of the market for carpentry work." [\*Id., at 532\*](#).

<sup>10</sup>See *Tugboat, Inc. v. Mobile Towing Co.*, [534 F.2d 1172, 1176-1177 \(CA5 1976\)](#); *International Assn. of Heat & Frost Insulators v. United Contractors Assn.*, [483 F.2d 384, 397-398 \(CA3 1973\)](#).

Circuit Judge Sneed dissented. He first rejected the majority's characterization of the complaint, agreeing instead with the District Court. Second, assuming that the complaint alleged a boycott of certain employers, he concluded that neither the employees of a victim of the boycott nor their collective-bargaining representative had standing to assert the antitrust claim. Finally, he concluded that an injury that affected only the Union's organizational and representational activity was remediable under the labor laws rather than the antitrust laws.

The Court of Appeals denied the petition for rehearing and rehearing en banc on May 22, 1981. Accompanying the order was a statement by the majority rebutting the petitioners' assertion that the opinion rendered multiemployer bargaining units unlawful, and a dissent by Circuit Judge Sneed. [\*648 F.2d, at 543, 545\*](#).

<sup>11</sup>The Union had an adequate opportunity to amend its pleading to add factual allegations demonstrating that the District Court's decision to dismiss the complaint was based on a misunderstanding of its antitrust claim.

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of contract, an unfair labor practice, or perhaps even a [\*527] common-law fraud or deceit, but in the context of the bargaining relationship between the parties to this litigation, such activities are plainly not subject to review under the federal antitrust laws.<sup>12</sup> [\*\*\*\*16] Similarly, the charge that the defendants "advocated, encouraged, induced, and aided nonmembers . . . to refuse [\*903] to enter into collective bargaining relationships" with the Union (PM 24(3)) does not describe an antitrust violation.<sup>13</sup>

The Union's antitrust claims arise from alleged restraints caused by defendants in the market for construction contracting and subcontracting.<sup>14</sup> The complaint alleges that defendants "coerced"<sup>15</sup> [\*\*\*\*18] two classes of persons: (1) landowners and [\*528] others who let construction contracts, *i. e.*, the defendants' customers and potential customers; and (2) general contractors, *i. e.*, defendants' competitors and defendants themselves. Coercion against the members of both classes was designed to [\*\*\*\*732] induce them to give some of their business -- but not necessarily all of it -- to nonunion firms.<sup>16</sup> Although the pleading does not allege that the coercive conduct increased the aggregate share of nonunion firms in the market, it does allege that defendants' activities weakened and restrained the trade "of certain contractors." See n. 4, *supra*. Thus, particular victims of coercion may have diverted particular [\*\*\*\*17] contracts to nonunion firms and thereby caused certain unionized subcontractors to lose some business.

LEdHN[4] [4] LEdHN[5A] [5A] We think the Court of Appeals properly assumed that such coercion might violate the antitrust laws.<sup>17</sup> [\*\*\*\*19] HN2 An agreement to restrain trade may be unlawful even though it does not entirely exclude its victims from the market. See *Associated Press v. United States*, 326 U.S. 1, 17 (1945). Coercive activity that prevents its victims from making free choices between market alternatives is inherently

<sup>12</sup> In analyzing the antitrust allegations in the amended complaint, we therefore construe the references to "contractors and subcontractors who are not signatories to collective bargaining agreements" as referring to completely independent nonunion firms rather than to operations covertly controlled by one or more defendants.

<sup>13</sup> The Court of Appeals did not reverse the District Court's dismissal of the complaint with regard to these allegations. 648 F.2d, at 531-532, 537, 540.

<sup>14</sup> See Brief for Respondents 37. There is no allegation of wrongful conduct directed at nonunion subcontracting firms. We therefore assume that, if any nonunion firms refused to bargain with the Union because of the conspiracy, they did so because they were rewarded with business they would not otherwise have obtained. Thus, nonunion firms could not be considered victims of the conspiracy; rather, they appear to have been its indirect beneficiaries. None are named either as defendants or as co-conspirators.

The amended complaint also does not allege any restraint on competition in the market for labor union services. Unlike the two cases involving union plaintiffs cited by the Court of Appeals, see n. 10, *supra*, in this case there is no claim that competition between rival unions has been injured or even that any rival unions exist.

<sup>15</sup> The complaint does not specify the nature of the "coercion." It does not, for example, allege that the defendants refused to deal with all members of either of the two classes of persons against whom coercion was applied. Indeed, it is highly improbable that the defendants -- all of whom are signatories to union contracts -- would refuse to deal with all of their customers and potential customers in an attempt to divert all of their business to nonunion firms.

<sup>16</sup> There is no allegation that any person subjected to coercion was required to deal exclusively with nonunion firms.

<sup>17</sup> LEdHN[5B] [5B]

Had the District Court required the Union to describe the nature of the alleged coercion with particularity before ruling on the motion to dismiss, it might well have been evident that no violation of law had been alleged. In making the contrary assumption for purposes of our decision, we are perhaps stretching the rule of *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957), too far. Certainly in a case of this magnitude, HN3 a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.

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destructive of competitive conditions and may be condemned even without proof of its actual market effect. Cf. *Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 210-214 (1959)*.<sup>18</sup>

[\*529] [LEdHN\[6\]](#) [6][HN4](#) Even though coercion directed by defendants at third parties in order to restrain the trade of "certain" contractors and subcontractors may have been unlawful, it does [\*904] not, of course, necessarily follow that still another party -- the Union -- is a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act.

III

[LEdHN\[7\]](#) [7] [\*\*\*20] We first consider the language in the controlling statute. See *Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)*. [HN5](#) The class of persons who may maintain a private damages action under the antitrust laws is broadly defined in § 4 of the Clayton Act. *15 U. S. C. § 15*. That section provides:

[HN6](#) "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, [\*\*\*733] and the cost of suit, including a reasonable attorney's fee."

A literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation. Some of our prior cases have paraphrased the [\*\*\*21] statute in an equally expansive way.<sup>19</sup> But before we hold that the statute is as broad as its [\*530] words suggest, we must consider whether Congress intended such an open-ended meaning.

[\*\*\*22] The critical statutory language was originally enacted in 1890 as § 7 of the Sherman Act. 26 Stat. 210. The legislative history of the section shows that Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices by the giant trusts and combinations that dominated certain interstate markets.<sup>20</sup> That history supports a broad construction of this remedial provision. A proper interpretation of the section cannot, however, ignore the larger context in which the entire statute was debated.

<sup>18</sup> Although we do not know what kind of coercion defendants allegedly employed, we assume for purposes of decision that it had a predatory "nature or character," *Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S., at 211*, and that it would "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951)*.

<sup>19</sup> In *Mandeville Island Farms, Inc. v. Sugar Co., 334 U.S. 219 (1948)*, the Court held that growers of sugar beets could maintain a treble-damages action against refiners who had allegedly conspired to fix the price that they would pay for the beets. Although previous price-fixing cases had involved agreements among sellers to fix sales prices, the Court readily concluded that the Act applied equally to an agreement among competing buyers to fix purchase prices. The Court stated:

[HN7](#) "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. Cf. *United States v. Socony-Vacuum Oil Co., 310 U.S. 150*; *American Tobacco Co. v. United States, 328 U.S. 781*. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Id., at 236*.

Similarly broad language was used in later cases holding that actions could be maintained by consumers, *Reiter v. Sonotone Corp., 442 U.S. 330, 337-338 (1979)*, by a foreign government, *Pfizer Inc. v. India, 434 U.S. 308, 313-314 (1978)*, and by the direct victim of a boycott. *Blue Shield of Virginia v. McCready, 457 U.S. 465, 472-473 (1982)*. In each of those cases, however, the actual plaintiff was directly harmed by the defendants' unlawful conduct. The paraphrasing of the language of § 4 in those opinions added nothing to the even broader language that the statute itself contains.

<sup>20</sup> See 21 Cong. Rec. 1767-1768, 2455-2456, 2459, 2615, 3147-3148 (1890). The original proposal, which merely allowed recovery of the amount of actual enhancement in price, was successively amended to authorize double-damages and then treble-damages recoveries, in order to provide otherwise remediless small consumers with an adequate incentive to bring suit.

[\*\*\*\*23] [\*531] [LEdHN\[8\]](#) [8] [LEdHN\[9A\]](#) [9A] The repeated references to the common law in the debates that preceded the enactment of the Sherman Act make it clear that Congress intended the Act to be [\*\*905] construed in the light of its common-law background.<sup>21</sup> Senator Sherman stated that the bill "does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal \*\*\*734 Government."<sup>22</sup> Thus our comments on the need for judicial interpretation of § 1 are equally applicable to § 7:

"One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that 'every' contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. . . .

"Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its [\*\*\*\*24] application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." [National Society of J\\*5321 Professional Engineers v. United States, 435 U.S. 679, 687-688 \(1978\)](#) (footnotes omitted).

Just as the substantive content of the Sherman Act draws meaning from its common-law antecedents, so must we consider the contemporary legal context in which Congress acted when we try to ascertain the intended scope of the private remedy created by § 7.

[\*\*\*\*25] [LEdHN\[10A\]](#) [10A] In 1890, notwithstanding general language in many state constitutions providing in substance that "every wrong shall have a remedy,"<sup>23</sup> [\*\*\*\*26] a number of judge-made rules circumscribed the availability of damages recoveries in both tort and contract litigation -- doctrines such as foreseeability and proximate cause,<sup>24</sup> directness of injury,<sup>25</sup> [\*\*\*\*27] certainty \*\*\*735 of damages, [\*533]<sup>26</sup> and privity of

*Id.*, at 1765, 2455, 3145. The same purpose was served by the special venue provisions, the provision for the recovery of attorney's fees, and the elimination of any requirement that the amount in controversy exceed the jurisdictional threshold applicable in other federal litigation. See, e. g., *id.*, at 2612, 3149. Moreover, changes in the description of the remedy extended the section's coverage beyond price fixing.

<sup>21</sup> See, e. g., *id.*, at 2456, 2459, 3151-3152.

<sup>22</sup> *Id.*, at 2456. Senator Sherman added: "The purpose of this bill is to enable the courts of the United States to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several States to protect local interests." *Ibid.*; see also *id.*, at 2459, 3149, 3151-3152. Although Members of Congress referred particularly to common-law definitions of "monopoly" and "restraint of trade," they appear to have been generally aware that the statute would be construed by common-law courts in accordance with traditional canons. For example, at the beginning of the debate on the Sherman Act, one Senator cautioned his colleagues:

"A careful analysis of the terms of the bill is essential. We must know what it means, what its legal effect is, if we give force to it as it is written. . . . We must adopt, therefore, the known methods of the courts in determining what the bill means." *Id.*, at 1765.

<sup>23</sup> For example, the State Constitution of Illinois, adopted in 1870, provided: "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation. . . ." Art. II, § 19. Comparable provisions were found in the State Constitutions of Arkansas, Connecticut, Delaware, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Hampshire, Ohio, and Vermont. See generally F. Hough, *American Constitutions* (1871).

<sup>24</sup> One treatise stated: "Natural, proximate, and legal results are all that damages can be recovered for, even under a statute entitling one 'to recover *any* damage.'" 3 J. Lawson, *Rights, Remedies, and Practice* 1740 (1890). Another leading treatise explained:

"The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety." T. Cooley, *Law of Torts* 73 (2d ed. 1888).

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[\*\*906] contract.<sup>27</sup> Although particular common-law limitations were not debated in Congress, the frequent references to common-law principles imply that Congress simply assumed that antitrust damages litigation would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation.<sup>28</sup>

[\*\*\*\*28] The federal judges who first confronted the task of giving meaning to § 7 so understood the congressional intent. Thus in 1910 the Court of Appeals for the Third Circuit held as a matter of law that [HN8↑](#) neither a creditor nor a stockholder of a corporation that was injured by a violation of the antitrust laws could recover treble damages under § 7. [\*Loeb v. Eastman \[\\*534\] Kodak Co., 183 F. 704.\*](#) The court explained that the plaintiff's injury as a stockholder was "indirect, remote, and consequential." [\*Id., at 709.\*](#)<sup>29</sup> This holding was consistent with Justice Holmes' explanation of a similar construction of the remedial provision of the Interstate Commerce Act a few years later: "The general tendency of the law, in regard to damages at least, is not to go beyond the first step." [\*Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533 \(1918\).\*](#)<sup>30</sup> When [\*\*\*736] Congress enacted § 4 of the Clayton Act in 1914, and when it reenacted that section in 1955, 69 Stat. 282, it adopted the language of § 7 and presumably [\*\*\*\*29] also the judicial gloss that avoided a simple literal interpretation.

<sup>25</sup> In torts, a leading treatise on damages set forth the general principle that, "[where] the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote, if the plaintiff sustains no other than a contract relation to such a third person, or is under contract obligation on his account, and the injury consists only in impairing the ability or inclination of such person to perform his part, or in increasing the plaintiff's expense or labor of fulfilling such contract, unless the wrongful act is willful for that purpose." Thus, A, who had agreed with a town to support all the town paupers for a specific period, in return for a fixed sum, had no cause of action against S for assaulting and beating one of the paupers, thereby putting A to increased expense. Similarly, a purchaser under an output contract with a manufacturer had no right of recovery against a trespasser who stopped the company's machinery, and a creditor could not recover against a person who had forged a note, causing diminution in the dividends from an estate. 1 J. Sutherland, Law of Damages 55-56 (1882) (emphasis in original, footnote omitted).

Similarly, in contract, the common-law courts drew a distinction between direct and consequential damages; the latter had to be specifically included in the contract to be recoverable. See [\*id., at 74-93;\*](#) 1 T. Sedgwick, Measure of Damages 203-244 (8th ed. 1891) (discussing the rule of *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854)).

<sup>26</sup> The common law required the plaintiff to prove, with certainty, both the existence of damages and the causal connection between the wrong and the injury. No damages could be recovered for uncertain, conjectural, or speculative losses. See generally cases cited in F. Bohlen, Cases on the Law of Torts 292-312 (2d ed. 1925) (cases alleging emotional harm to plaintiff). Even if the injury was easily provable, there would be no recovery if the plaintiff could not sufficiently establish the causal connection. See 1 Sutherland, *supra* n. 25, at 94-126; 1 Sedgwick, *supra* n. 25, at 245-294.

<sup>27</sup> See, e. g., *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

<sup>28</sup> [\*LEdHN\[10B\]↑\*](#) [10B]

See n. 22, *supra*. The common law, of course, is an evolving body of law. We do not mean to intimate that the limitations on damages recoveries found in common-law actions in 1890 were intended to serve permanently as limits on Sherman Act recoveries. But legislators familiar with these limits could hardly have intended the language of § 7 to be taken literally.

<sup>29</sup> See also [\*Amex v. American Telephone & Telegraph Co., 166 F. 820 \(CC Mass. 1909\).\*](#) Applying "ordinary principles of law" to the general language of the statute, the court held that a stockholder had no legally cognizable antitrust claim against defendants for illegally acquiring the corporation, thereby rendering plaintiff's stock worthless. Plaintiff's claim was not distinguishable from any injury sustained by the company itself. Therefore, the court stated, a contrary result would "subject the defendant not merely to treble damages, but to sextuple damages, for the same unlawful act." [\*Id., at 823.\*](#)

<sup>30</sup> The Court held in that case that the plaintiff shippers could recover damages from the defendant railroad for charging an excessive freight rate, even though they had been able to pass on the damage to their purchasers. Justice Holmes wrote that the law holds the defendant "liable if proximately the plaintiff has suffered a loss," but "does not attribute remote consequences to a defendant." [\*245 U.S., at 533-534.\*](#)

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[\*\*\*\*30] As this Court has observed, the lower federal courts have been "virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263, n. 14 (1972). Just last Term we stated:

**HN9** [↑] " [\*\*907] An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but 'despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable.' [*Illinois* [\*535] *Brick Co. v. Illinois*, 431 U.S.], at 760 (BRENNAN, J., dissenting). It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476-477 (1982).

**LEDHN[9B]** [↑] [9B] **LEDHN[11A]** [↑] [11A] [\*\*\*\*31] It is plain, therefore, that the question whether the Union may recover for the injury it allegedly suffered by reason of the defendants' coercion against certain third parties cannot be answered simply by reference to the broad language of § 4. Instead, as was required in common-law damages litigation in 1890, the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.<sup>31</sup>

[\*\*\*\*32] IV

There is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of "proximate cause,"<sup>32</sup> [\*\*\*\*33] and [\*\*\*737] the struggle of federal judges to [\*536] articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages.<sup>33</sup> [\*\*\*\*34] It is common

<sup>31</sup> **LEDHN[11B]** [↑] [11B]

The label "antitrust standing" has traditionally been applied to some of the elements of this inquiry. As commentators have observed, the focus of the doctrine of "antitrust standing" is somewhat different from that of standing as a constitutional doctrine.

**HN10** [↑] Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action. See Berger & Bernstein, An Analytical Framework for Antitrust Standing, 86 Yale L. J. 809, 813, n. 11 (1977); Pollock, Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine, 32 A. B. A. Antitrust L. J. 5, 6-7 (1966).

<sup>32</sup> In his comment, *Mahoney v. Beatman*: A Study in Proximate Cause, 39 Yale L. J. 532, 533 (1930), Leon Green noted: "Legal theory is too rich in content not to afford alternative ways, and frequently several of them, for stating an acceptable judgment." Earlier, in his Rationale of Proximate Cause 135-136 (1927) (footnote omitted), Green had written:

"Cause,' although irreducible in its concept, could not escape the ruffles and decorations so generously bestowed: remote, proximate, direct, immediate, adequate, efficient, operative, inducing, moving, active, real, effective, decisive, supervening, primary, original, contributory, ultimate, concurrent, causa causans, legal, responsible, dominating, natural, probable, and others. The difficulty now is in getting any one to believe that so simple a creature could have been so extravagantly garbed."

<sup>33</sup> Some courts have focused on the directness of the injury, e. g., *Loeb v. Eastman Kodak Co.*, 183 F. 704, 709 (CA3 1910); *Productive Inventions, Inc. v. Trico Products Corp.*, 224 F.2d 678, 679 (CA2 1955), cert. denied, 350 U.S. 936 (1956); *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 394-395 (CA6 1962), cert. denied, 372 U.S. 907 (1963). Others have applied the requirement that the plaintiff must be in the "target area" of the antitrust conspiracy, that is, the area of the economy which is endangered by a breakdown of competitive conditions in a particular industry. E. g., *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 546-547 (CA5 1980); *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, 17-18 (CA1 1979); *Calderone Enterprises Corp. v. United Artists Theater Circuit, Inc.*, 454 F.2d 1292, 1292-1295 (CA2 1971). Another Court of Appeals has asked whether the injury is "arguably within the zone of interests protected by the antitrust laws." *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1151-1152 (CA6 1975). See generally Berger & Bernstein, *supra* n. 31.

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ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged [\*\*908] wrongdoing. In both situations the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case.<sup>34</sup> Instead, [\*537] previously decided cases identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.

[LEdHN\[9C\]](#) [↑] [9C] [LEdHN\[12A\]](#) [↑] [12A] The factors that favor judicial recognition of the Union's antitrust claim are easily stated. The complaint does allege a causal connection between an antitrust violation and harm to the Union and further [\*\*\*\*35] alleges that the defendants intended to cause that harm. As we have indicated, however, the mere fact that the claim is literally encompassed by the Clayton Act does not end the inquiry. We are also satisfied that an allegation of improper motive, although it may support a plaintiff's damages claim under § 4, 35 [\*\*\*\*36] is not a panacea that will [\*\*\*738] enable any complaint to withstand a motion to dismiss.<sup>36</sup> Indeed, in *McCready*, we specifically held: "[HN12](#) [↑] The availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators." [457 U.S., at 479.](#)<sup>37</sup>

[\*538] A number of other factors may be controlling. In this case it is appropriate to focus on the nature of the plaintiff's alleged injury. As the legislative history shows, the Sherman Act was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market.<sup>38</sup> [\*\*\*\*38] Last Term in [Blue Shield of Virginia v. McCready, supra](#), we identified the relevance of this central policy to a determination of the plaintiff's right to maintain an action under § 4. McCready alleged that she was a consumer [\*\*\*\*37] of psychotherapeutic services and that she had been

As a number of commentators have observed, these labels may lead to contradictory and inconsistent results. See Berger & Bernstein, *supra* n. 31, at 835, 843; Handler, The Shift From Substantive to Procedural Innovations in Antitrust Suits, 71 Colum. L. Rev. 1, 27-31 (1971); Sherman, Antitrust Standing: From *Loeb* to *Malamud*, 51 N. Y. U. L. Rev. 374, 407 (1976) ("it is simply not possible to fashion an across-the-board and easily applied standing rule which can serve as a tool of decision for every case"). In our view, courts should analyze each situation in light of the factors set forth in the text *infra*.

<sup>34</sup> Cf. [Blue Shield of Virginia v. McCready, 457 U.S., at 477-478, n. 13](#) (discussing elusiveness of test of proximate cause); [Palsgraf v. Long Island R. Co., 248 N. Y. 339, 162 N. E. 99 \(1928\)](#); *id. at 351-352, 162 N. E. at 103* (Andrews, J., dissenting) ("[HN11](#) [↑] What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations . . . . What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point").

<sup>35</sup> [LEdHN\[12B\]](#) [↑] [12B]

It is well settled that a defendant's specific intent may sometimes be relevant to the question whether a violation of law has been alleged. See [United States v. Columbia Steel Co., 334 U.S. 495, 522 \(1948\)](#). Moreover, there no doubt are cases in which such an allegation would adequately support a plaintiff's claim under § 4. Cf. Handler, *supra* n. 33, at 30 (specific intent of defendant to cause injury to a particular class of persons should "ordinarily be dispositive" in creating standing to sue); Lytle & Purdue, Antitrust Target Area Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation, 25 Am. U. L. Rev. 795, 814-816 (1976) (suggesting that standing in a group boycott situation should be based on the purpose of the boycott).

<sup>36</sup> See Sherman, *supra* n. 33, at 389-391, citing *Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 189 (CA2 1970)*, cert. denied, [401 U.S. 923 \(1971\)](#).

<sup>37</sup> In *McCready* we rejected the contention that, because there was no specific intent to harm the plaintiff, her injury was thereby rendered remote. This case presents a different question, but in neither case is the motive allegation of controlling importance.

<sup>38</sup> See [United States v. Topco Associates, Inc., 405 U.S. 596, 610 \(1972\)](#) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the [Bill of Rights](#) is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete -- to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster").

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injured by the defendants' conspiracy to restrain competition in the market for such services.<sup>39</sup> The Court stressed [\*\*909] the fact that "McCready's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws." [457 U.S., at 483](#), citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, [429 U.S. 477, 487-489 \(1977\)](#). After noting that her injury "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market," [457 U.S., at 484](#), the Court concluded that such an injury "falls squarely within the area of congressional concern." *Ibid.*

[\*539] [LEdHN\[13A\]](#) [↑] [13A] In this case, however, the Union was neither a consumer nor a competitor in the market in which trade was restrained.<sup>40</sup> [\*\*\*\*40] It is not clear [\*\*\*739] whether the Union's interests would be served or disserved by enhanced competition in the market. As a general matter, a union's primary goal is to enhance the earnings and improve the working conditions of its membership; that goal is not necessarily served, and indeed may actually be harmed, by uninhibited competition among employers striving to reduce costs in order to obtain a competitive advantage over their rivals.<sup>41</sup> At common law -- as well as in the early [\*\*\*39] days of administration of the federal antitrust laws -- the collective activities of labor unions were regarded as a form of conspiracy in restraint of trade.<sup>42</sup> [\*\*\*\*41] Federal policy has since developed not only a broad labor exemption from the antitrust laws,<sup>43</sup> but also a separate body of [\*540] labor law specifically designed to protect and encourage the organizational and representational activities of labor unions. Set against this background, [HN13](#) [↑] a union, in its capacity as bargaining representative, will frequently not be part of the class the Sherman Act was designed to protect, especially in disputes with employers with whom it bargains. In each case its alleged injury must be analyzed to determine whether it is of the type that the antitrust statute was intended to forestall. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra, at 487-488*. In this case, particularly in light of the longstanding collective-bargaining relationship between the parties, the Union's labor-market interests seem to predominate, and the *Brunswick* test is not satisfied.

An additional factor is the directness or indirectness of the asserted injury. In this case, the chain of causation between the Union's injury and the alleged restraint in the market for construction subcontracts [\*\*910] contains several somewhat vaguely defined links. According to the complaint, defendants applied coercion against certain landowners and other contracting parties in order to cause them to divert business from certain union contractors to nonunion contractors.<sup>44</sup> [\*\*\*\*43] As a result, [\*541] the [\*\*\*740] Union's complaint alleges, the Union suffered

<sup>39</sup> McCready, a Blue Shield subscriber, alleged that Blue Shield and the Neuropsychiatric Society of Virginia, Inc., had unlawfully conspired to restrain competition in the market for psychotherapeutic services by providing insurance coverage only for consumers who patronized psychiatrists, not psychologists. McCready obtained services from a psychologist and was denied reimbursement.

<sup>40</sup> Moreover, it has not even alleged any marketwide restraint of trade. The allegedly unlawful conduct involves predatory behavior directed at "certain" parties, rather than a claim that output has been curtailed or prices enhanced throughout an entire competitive market.

<sup>41</sup> In *Mine Workers v. Pennington*, [381 U.S. 657, 664 \(1965\)](#), the Court recognized that wages lie at the heart of the subjects of mandatory collective bargaining, and that "the elimination of competition based on wages among the employers in the bargaining unit," which directly benefits the union, also has an effect on competition in the product market. See generally Leslie, Principles of Labor Antitrust, 66 Va. L. Rev. 1183, 1185-1188 (1980); Winter, Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 Yale L. J. 14, 17-20, 28-30 (1963).

<sup>42</sup> See, e. g., *Coronado Coal Co. v. Mine Workers*, [268 U.S. 295, 310 \(1925\)](#) (applying Sherman Act to alleged conspiracy by unions involved in labor dispute to restrain interstate trade in coal); *Loewe v. Lawlor*, [208 U.S. 274 \(1908\)](#) (applying Sherman Act to boycott by labor organization seeking to unionize plaintiff's hat factory); Cox, Labor and the Antitrust Laws -- A Preliminary Analysis, 104 U. Pa. L. Rev. 252, 256-262 (1955); Meltzer, Labor Unions, Collective Bargaining, and the Antitrust Laws, 32 U. Chi. L. Rev. 659, 661-666 (1965); Winter, *supra* n. 41, at 30-38.

<sup>43</sup> See [29 U. S. C. § 52](#) (statutory labor exemption); *Mine Workers v. Pennington, supra*; *Meat Cutters v. Jewel Tea Co.*, [381 U.S. 676 \(1965\)](#) (nonstatutory exemption). In this case we need not reach petitioner's contentions that the alleged activities are within the statutory and nonstatutory labor exemptions.

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unspecified injuries in its "business activities."<sup>45</sup> It is obvious that any such injuries were only an indirect result of whatever harm may have been suffered [\*\*\*\*42] by "certain" construction contractors and subcontractors.<sup>46</sup>

[\*\*\*\*44] If either these firms, or the immediate victims of coercion by defendants, have been injured by an antitrust violation, their injuries would be direct and, as we held in *McCready*, they would have a right to maintain their own treble-damages actions against the defendants. An action on their behalf would encounter none of the conceptual difficulties that [\*542] encumber the Union's claim.<sup>47</sup> [\*\*\*\*45] [HN14](#)<sup>↑</sup> The existence of an [\*\*\*741] identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a [\*\*911] more remote party such as the Union to perform the office of a private attorney general.<sup>48</sup> Denying the Union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied.<sup>47</sup>

Partly because it is indirect, and partly because the alleged effects on the Union may have been produced by independent factors, the Union's damages claim is also highly speculative. There is, for example, no allegation that

<sup>44</sup> There is a parallel between these allegations and the claim in *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975). The plaintiff in that case, a general building contractor, was coerced by the defendant union into signing an agreement not to deal with nonunion subcontractors. Similarly, in the *McCready* case, the plaintiff was the direct victim of unlawful coercion. As the Court noted, "McCready did not yield to Blue Shield's coercive pressure, and bore Blue Shield's sanction in the form of an increase in the net cost of her psychologist's services." [457 U.S., at 483](#). Her status was thus comparable to that of a contracting or subcontracting firm that refused to yield to the defendants' coercive practices and therefore suffered whatever sanction that coercion imposed. Like *McCready*, and like *Connell Construction Co.*, such a firm could maintain an action against the defendants. In contrast, the Union is neither a participant in the market for construction contracts or subcontracts nor a direct victim of the defendants' coercive practices. We therefore need not decide whether the direct victim of a boycott, who suffers a type of injury unrelated to antitrust policy, may recover damages when the ultimate purpose of the boycott is to restrain competition in the relevant economic market.

<sup>45</sup> Its brief merely echoes the Court of Appeals' description of its allegations: "the Unions have been injured in their business, i.e., organizing carpentry industry employees, negotiating and policing collective bargaining agreements, and securing jobs for their members." Brief for Respondents 25-26.

<sup>46</sup> Because of the absence of specific allegations, we can only speculate about the specific components of the Union's claim. If the Union asserts that its attempts to organize previously nonunion firms have been frustrated because nonunion firms wish to continue to obtain business from those subjected to coercion by the defendants, its harm stems most directly from the conduct of persons who are not victims of the conspiracy. See n. 14, *supra*. If the Union claims that dues payments were adversely affected because employees had less incentive to join the Union in light of expanding nonunion job opportunities, its damage is more remote than the harm allegedly suffered by unionized subcontractors. The same is true if the Union contends that revenues from dues payments declined because its members lost jobs or wages because their unionized employers lost business. That harm, moreover, is even more indirect than the already indirect injury to its members, yet a number of decisions have denied standing to employees with merely derivative injuries. See, e.g., *Pitchford v. PEPI, Inc.*, 531 F.2d 92, 97 (CA3), cert. denied, 426 U.S. 935 (1976); *Contreras v. Grower Shipper Vegetable Assn.*, 484 F.2d 1346 (CA9 1973), cert. denied, 415 U.S. 932 (1974); *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 (CA10), cert. denied, 411 U.S. 938 (1973). But see *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 334 (CA7 1967).

<sup>47</sup> Indeed, if there is substance to the Union's claim, it is difficult to understand why these direct victims of the conspiracy have not asserted any claim in their own right. The Union's suggested explanations of this fact tend to shed doubt on the proposition that these "victims" were actually harmed at all.

"Many unionized firms will respond to the alleged boycott . . . by setting up double-breasted operations or shifting more of their resources to the non-unionized part of their operations when double-breasted operations already exist. In this manner, unionized subcontractors can avoid losing any business and, as a result, these subcontractors will *not* possess the classic economic incentive to file suit." Alternatively, unionized subcontractors may simply not renew the collective bargaining agreement when it expires." Brief for Respondents 49 (citation omitted).

<sup>48</sup> Cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739-748 (1975) (purchaser-seller limitation on actions under § 10(b) of Securities Exchange Act of 1934).

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any collective-bargaining agreement was terminated as a result of the coercion, no allegation that the aggregate share of the contracting market controlled by union firms has diminished, no allegation that the number of employed union members has declined, and no allegation that the Union's revenues in the form of dues or initiation fees have decreased. Moreover, although coercion against certain firms is alleged, there is no assertion that any such firm was prevented from doing business with any union firms or that any firm or group of firms was subjected to a complete boycott. See nn. 9, 15, and 16, *supra*. [\*\*543] Other than the alleged injuries flowing from breaches of [\*\*\*\*46] the collective-bargaining agreements -- injuries that would be remediable under other laws -- nothing but speculation informs the Union's claim of injury by reason of the alleged unlawful coercion. Yet, as we have recently reiterated, [HN15](#)<sup>49</sup> it is appropriate for § 4 purposes "to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm." *Blue Shield of Virginia v. McCready*, 457 U.S., at 475, n. 11, citing *Hawaii v. Standard Oil Co.*, 405 U.S., at 262-263, n. 14.<sup>49</sup>

[\*\*\*\*47] The indirectness of the alleged injury also implicates the strong interest, identified in our prior cases, in keeping the scope of complex antitrust trials within judicially manageable limits.<sup>50</sup> These cases have [\*\*\*742] stressed the importance of avoiding [\*544] either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other. Thus, in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), we refused to allow the defendants to discount the plaintiffs' damages claim to the extent that overcharges had been passed on to the plaintiffs' customers. We noted that any attempt to ascertain damages with such precision "would often require additional long and complicated proceedings involving massive evidence and complicated theories." *Id.*, at 493. [\*\*912] In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), we held that treble damages could not be recovered by indirect purchasers of concrete blocks who had paid an enhanced price because their suppliers had been victimized by a price-fixing conspiracy. We observed that potential plaintiffs [\*\*\*\*48] at each level in the distribution chain would be in a position to assert conflicting claims to a common fund, the amount of the alleged overcharge, thereby creating the danger of multiple liability for the fund and prejudice to absent plaintiffs.

"Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge -- from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness." *Id.*, at 737-738.

<sup>49</sup> We expressly noted in *McCready*:

"[Our] cautious approach to speculative, abstract, or impractical damages theories has no application to McCready's suit. The nature of her injury is easily stated: As the result of an unlawful boycott, Blue Shield failed to pay the cost she incurred for the services of a psychologist. Her damages were fixed by the plan contract and, as the Court of Appeals observed, they could be 'ascertained to the penny.'" [457 U.S., at 475-476, n. 11](#).

<sup>50</sup> This interest was also identified in the legislative debates preceding the enactment of the Sherman Act. Speaking in opposition to a proposed amendment that might have complicated the procedures in private actions, Senator Edmunds said:

"Therefore I say as to the suggested amendment of my friend from Mississippi -- and I repeat it in all earnestness -- that if I were a lobbyist and wanted to entangle this business, I should provide that everybody might sue everybody else in one common suit and have a regular *pot-pourri* of the affair, as his amendment proposes, and leave it to the lawyers of the trust to have an interminable litigation in respect of the proper parties, whether their interests were common or diverse or how they were affected, and take twenty years in order to get a result as to a single one of them. The Judiciary Committee did not think it wise to do that sort of thing, because we were in earnest about the business, as I know my friend is." 21 Cong. Rec. 3148 (1890).

See also *id.*, at 3149 (remarks of Senator Morgan opposing same amendment: "There is as much harm in trying to do too much as there is in not trying to do anything, and I think we have stopped at about the proper line in this bill, and I shall support it just as it is").

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[\*\*\*\*49] The same concerns should guide us in determining whether the Union is a proper plaintiff under § 4 of the Clayton Act.<sup>51</sup> [\*\*\*\*50] [\*545] As the Court wrote in *Illinois Brick*, massive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble-damages suits. *Id.* at 745. In this case, if the Union's complaint asserts a claim for damages under § 4, the District Court would face problems of identifying damages and apportioning them among directly victimized contractors and subcontractors and indirectly affected employees and union entities. It would be necessary to determine to what extent the coerced firms diverted business away from union subcontractors, and then to what extent those subcontractors [\*\*\*743] absorbed the damage to their businesses or passed it on to employees by reducing the work force or cutting hours or wages. In turn it would be necessary to ascertain the extent to which the affected employees absorbed their losses and continued to pay union dues.<sup>52</sup>

LEdHN[1B] [↑] [1B] LEdHN[13B] [↑] [13B] We conclude, therefore, that the Union's allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the Union, are insufficient as a matter of law. Other relevant factors -- the nature of the Union's injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy -- weigh heavily against [\*\*\*51] judicial enforcement of the Union's antitrust claim. Accordingly, we hold that, based on the allegations of this complaint, the District [\*546] Court was correct in concluding that the Union is not a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act. The judgment of the Court of Appeals is reversed.

*It is so ordered.*

**Dissent by:** MARSHALL

## Dissent

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JUSTICE MARSHALL, dissenting.

Section 4 of the Clayton Act provides that a damages action may be brought under the antitrust laws by "[any] person who [has been] injured in his business or [\*\*913] property by reason of anything forbidden in the antitrust laws." 15 U. S. C. § 15 (emphasis added). Despite the absence of an "articulable consideration of statutory policy" supporting the denial of standing, *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 473 (1982), the Court today holds that the intended victim of a restraint of trade does not constitute a "person who [has been] injured in his business or property by reason of anything forbidden in the antitrust laws." Because I believe that this decision imposes an [\*\*\*52] unwarranted judge-made limitation on the antitrust laws, I respectfully dissent.

Congress' adoption of the broad language of § 4 was not accidental. As this Court observed in *Pfizer Inc. v. India*, 434 U.S. 308, 312 (1978): "Congress used the phrase 'any person' intending it to have its naturally broad and inclusive meaning. There was no mention in the floor debates of any more restrictive definition." Only last Term we emphasized that the all-encompassing language of § 4 "reflects Congress' 'expansive remedial purpose' in enacting

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<sup>51</sup> We pointed out in *McCready*, 457 U.S., at 475, n. 11:

"If there is a subordinate theme to our opinions in *Hawaii* and *Illinois Brick*, it is that HN16 [↑] the feasibility and consequences of implementing particular damages theories may, in certain limited circumstances, be considered in determining who is entitled to prosecute an action brought under § 4. . . . Thus we recognized that the task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system."

<sup>52</sup> Although the policy against duplicative recoveries may not apply to the other type of harm asserted in the Union's brief -- reduction in its ability to persuade nonunion contractors to enter into union agreements -- the remote and obviously speculative character of that harm is plainly sufficient to place it beyond the reach of § 4. See n. 46, *supra*.

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§ 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations." [Blue Shield of Virginia v. McCready, supra, \[\\*\\*\\*744\] at 472](#), quoting [Pfizer Inc. v. India, supra, at 313-314](#).

In keeping with the inclusive language and remedial purposes of § 4, this Court has "refused to engraft artificial limitations [\[\\*547\]](#) on the § 4 remedy." [Blue Shield of Virginia v. McCready, supra, at 472](#) (footnote omitted). [\[\\*\\*\\*\\*53\]](#)<sup>1</sup> Thus, for example, in [Pfizer Inc. v. India](#), the Court held that the statutory phrase "any person" is broad enough to encompass a foreign sovereign. In [Reiter v. Sonotone Corp., 442 U.S. 330 \(1979\)](#), the Court likewise adopted an expansive reading of the statutory term "property," ruling that a consumer who pays a higher price as a result of a price-fixing conspiracy has sustained an injury to his "property" and therefore has standing to sue under § 4.

The plaintiff unions fit comfortably within the language of § 4. The complaint [\[\\*\\*\\*\\*54\]](#) alleges that plaintiffs suffered injury as a result of a restraint of trade that was "designed to weaken and destroy plaintiffs and each of them." Complaint para. 26. The Court does not suggest that a union is not a "person" within the meaning of § 4, or that plaintiffs cannot prove injury to their "business or property." Moreover, it would require a strained reading of § 4 to conclude that a party that an antitrust violation was aimed at cannot prove that it suffered injury "by reason of" an antitrust violation.

Far from supporting the Court's conclusion, *ante*, at 531-533, the common-law background of the antitrust laws highlights the anomaly of denying a remedy to the intended victim of unlawful conduct. Since antitrust violations are essentially "tortious acts," [Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 \(1946\)](#),<sup>2</sup> the most apt analogy is to the common law of torts. Although many legal battles have been fought over the extent of tort liability for remote consequences [\[\\*548\]](#) of *negligent* conduct, it has always been assumed that the victim of an *intentional* tort can recover from the tortfeasor if he proves that the tortious [\[\\*\\*\\*\\*55\]](#) conduct was a cause-in-fact of his injuries. An [\[\\*\\*914\]](#) inquiry into proximate cause has traditionally been deemed unnecessary in suits against intentional tortfeasors.<sup>3</sup> [\[\\*\\*\\*\\*56\]](#) For [\[\\*\\*\\*745\]](#) example, if one party makes false representations to another, intending them to be communicated to a third party and acted upon to his detriment, the third party can bring an action for misrepresentation against the originator of the false information if he suffers injury as a result.<sup>4</sup> Indeed, in many

<sup>1</sup> Cf. [Radovich v. National Football League, 352 U.S. 445, 453-454 \(1957\)](#) (given Congress' determination that the activities prohibited by the antitrust laws are "injurious to the public" and its creation of "sanctions allowing private enforcement of the antitrust laws by an aggrieved party," "this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws").

<sup>2</sup> See [Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 363 \(CA9 1955\)](#) (antitrust action is basically a suit to recover "for a tort").

<sup>3</sup> See [Restatement of Torts § 279](#) (1934) ("If the actor's conduct is intended by him to bring about bodily harm to another which the actor is not privileged to inflict, it is the legal cause of any bodily harm of the type intended by him which it is a substantial factor in bringing about"); *id.*, Comment c ("There are no rules which relieve the actor from liability because of the manner in which his conduct has resulted in the injury such as there are where the liability of a negligent actor is in question. Therefore, the fact that the actor's conduct becomes effective in harm only through the intervention of new and independent forces for which the actor is not responsible is of no importance") (citations omitted); *id.*, § 280 (same rule applies to conduct intended to cause harm other than bodily harm); [Seidel v. Greenberg, 108 N. J. Super. 248, 261-269, 260 A. 2d 863, 871-876 \(1969\)](#); [Derosier v. New England Tel. & Tel. Co., 81 N. H. 451, 464, 130 A. 145, 152 \(1925\)](#) ("For an intended injury the law is astute to discover even very remote causation").

The Court's reliance on Sutherland's treatise on damages is misplaced. *Ante*, at 532-533, n. 25. Although Sutherland stated as a general proposition that a defendant is not liable to a plaintiff for injuries suffered as a result of the defendant's conduct with respect to a third party, he distinguished cases in which "the wrongful act is willful for that purpose," by which he presumably meant cases in which the defendant intended to injure the plaintiff. 1 J. Sutherland, *Law of Damages* 55 (1882) (footnote omitted). In the examples given by Sutherland and cited by the Court, there is no suggestion that the defendants intended to inflict injury upon the plaintiffs.

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situations the common law holds [\*549] an intentional tortfeasor liable even for the unforeseeable consequences of his conduct.<sup>5</sup> I am not aware of any cases exonerating an intentional tortfeasor from responsibility for the intended consequences of his actions merely because he inflicted harm upon his victim indirectly rather than directly.

This case does not implicate the sort of "articulable consideration of statutory policy" which we have deemed necessary to deny standing to a party encompassed by the language of § 4. *Blue Shield of Virginia v. McCready*, 457 U.S., at 473. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), we denied standing to parties that suffered injury because an illegal acquisition prevented them from reaping profits that they would have reaped had the acquired firms been permitted to fail. We reasoned that permitting recovery for "the profits [plaintiffs] [\*\*\*\*57] would have realized had competition been reduced" would be "inimical" to the purposes of the antitrust laws, *id.*, at 488, since plaintiffs' injuries did not "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation," *id.*, at 489. This consideration of statutory policy is not applicable here, for plaintiffs allege that they suffered injury as a result of the defendants' efforts to coerce and induce letters of construction contracts and others to deal with nonunion carpentry firms solely because of their nonunion status. If plaintiffs prove their allegations, they will prove that they suffered harm attributable to the anticompetitive consequences of the defendants' restraint of trade.

Nor does the present case implicate the consideration of statutory policy underlying this Court's decisions in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). Critical to the denial of [\*\*915] standing in those cases was [\*\*\*746] the risk of duplicative recovery that would have been created by affording [\*\*\*\*58] the plaintiffs [\*550] standing.<sup>6</sup> In *Illinois Brick* the Court held that an indirect purchaser has no standing to sue a seller on the theory that overcharges paid to the seller by a direct purchaser were passed on to the indirect purchaser. 431 U.S., at 730-731. If the Court had held in *Illinois Brick* that the indirect purchaser has standing, sellers would have faced the prospect of two treble-damages actions based on the same overcharges. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), had established that a direct purchaser can sue a seller for the entire amount of the seller's overcharges, and that the seller cannot assert as a defense that the direct purchaser passed the overcharges through to its customers (the indirect purchasers). Similarly, in *Hawaii v. Standard Oil Co.*, where the State of Hawaii sought to recover for financial harm allegedly suffered by the general economy of the State, the Court denied standing because "[a] large and ultimately indeterminable part of the injury to the 'general economy,' as it is measured by economists, is no more than a reflection of injuries to the 'business' [\*\*\*59] or property' of consumers, for which they may recover themselves under § 4." 405 U.S., at 264.<sup>7</sup>

[\*\*\*60] There is no risk of double recovery here. The plaintiff unions seek recovery for injuries distinct from those that other parties may have suffered. One such distinct injury [\*551] plaintiffs may have suffered is a decrease in union dues resulting from a reduction in work available to union members. In addition to regular dues, it is not uncommon for employees to pay periodic dues representing a percentage of their wages. See R. Gorman, Basic

<sup>4</sup> See, e. g., *Watson v. Crandall*, 7 Mo. App. 233 (1879), aff'd, 78 Mo. 583 (1883); *Campbell v. Gooch*, 131 Kan. 456, 292 P. 752 (1930). See generally Prosser, Misrepresentation and Third Persons, 19 Vand. L. Rev. 231, 240-242 (1966).

<sup>5</sup> See, e. g., W. Prosser, Law of Torts 32-33 (4th ed. 1971) (doctrine of transferred intent); *id.*, at 67-68 (trespasser is responsible for unforeseeable consequences of his trespass).

<sup>6</sup> See *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 474-475 (1982) (noting that *Illinois Brick* and *Hawaii v. Standard Oil Co.* "focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws").

<sup>7</sup> Significantly, the risk of duplicative recovery that the Court relied on in both *Illinois Brick* and *Hawaii v. Standard Oil Co.* is not simply a judicially invented reason for restricting the broad scope of § 4. Permitting two recoveries based on the very same injuries would be contrary to the basic statutory scheme governing damages actions, for the result would be to subject antitrust defendants to sextuple-damages awards rather than the treble-damages awards that Congress contemplated. See 2 P. Areeda & D. Turner, *Antitrust Law* § 337d (1978).

Text on Labor Law 650 (1976).<sup>8</sup> If union members lost work as a result of the alleged restraint of trade, their wages and thus the dues collected by the plaintiff unions may have been reduced.

Any recovery of lost dues by the plaintiff unions would not duplicate [\*\*\*61] recoveries that might be obtained by either unionized carpentry firms or employees of those firms. A recovery of lost dues by a union would not duplicate a recovery for lost profits that might be obtained by a firm for which union members worked, for union dues are not an element of a [\*\*\*747] firm's profits. Nor would a recovery of lost dues by a union duplicate recoveries of lost wages that employees might obtain. Although periodic union dues are based on a percentage of wages, there would be no double recovery because union dues would be subtracted from lost wages in calculating the employees' damages. The *Hanover Shoe* rule barring the assertion of a "pass-through" defense would not prevent subtraction of union dues from wages in determining the employees' damages. The *Hanover Shoe* rule was designed to avoid the "additional long and complicated proceedings involving massive evidence and complicated theories" that would be required to determine the extent to which price overcharges were passed through to an indirect purchaser. [392 U.S., at 493](#). [\*\*916] In sharp contrast, where union dues are a percentage of wages, there is no difficulty in determining [\*\*\*62] the amount of dues that a union lost as a result of a reduction in the wages earned by union members.

[\*552] I recognize that it may not be easy to ascertain to what extent any reduction in union dues was attributable to the defendants' conduct. But our cases make it clear that "[if] there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what the evidence proves is for the jury." [Perkins v. Standard Oil Co., 395 U.S. 642, 648 \(1969\)](#) (reinstating jury verdict based on injury indirectly caused by price discrimination in violation of the Robinson-Patman Act). Insofar as the amount of damages is concerned, an antitrust plaintiff need only provide a reasonable estimate of the damages stemming from an antitrust violation. See [Bigelow v. RKO Radio Pictures, Inc., 327 U.S., at 266](#). "Difficulty of ascertainment is no longer confused with right of recovery," *id.*, [at 265](#), quoting *Story Parchment Co. v. Paterson Co., 282 U.S. 555, 566 (1931), and "[the] most elementary conceptions of justice and public policy require that the wrongdoer shall [\*\*\*63] bear the risk of the uncertainty which his own wrong has created," [327 U.S., at 265](#).*

Any concern the Court may have that the plaintiffs cannot prove their case does not justify throwing them out of court solely on the basis of the pleadings. If, during discovery, it becomes apparent that plaintiffs cannot establish a reasonable inference of causation or cannot provide evidence supporting a rational estimate of damages, they will be vulnerable to a motion for summary judgment. Dismissal for failure to state a claim is too crude a procedural device to be used to vindicate the "interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits." *Ante*, at 543.

## References

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[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 289](#)

12 Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade 48:61 et seq.

[15 USCS 15](#)

FRES, Labor Disputes 72:53, 72:54

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 67

L Ed Index to Annos, Restraints of Trade and Monopolies

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<sup>8</sup> Since we have only the pleadings before us, we do not know how the plaintiff unions collect their dues. However, plaintiffs are entitled to survive a motion to dismiss under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) if there is any set of facts that, if proved at trial, would entitle them to recover.

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ALR Quick Index, Restraints of Trade [\*\*\***64**] and Monopolies

Federal Quick Index, Monopolies and Restraints of Trade

Annotation References:

Supreme Court's views as to meaning of term "person," as used in statutory or constitutional provision. [56 L Ed 2d 895.](#)

Validity, under the federal antitrust laws ([15 USCS 1 et seq.](#)), of agreements between employers or employer associations imposing restrictions on employment. 2 ALR Fed 839.

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## Ashley v. Jackson

Supreme Court of the United States

October 11, 1983, Decided

No. 82-1390

### **Reporter**

464 U.S. 900 \*; 104 S. Ct. 255 \*\*; 78 L. Ed. 2d 241 \*\*\*; 1983 U.S. LEXIS 1904 \*\*\*\*; 52 U.S.L.W. 3287; 32 Fair Empl. Prac. Cas. (BNA) 1846; 32 Empl. Prac. Dec. (CCH) P33,840

ASHLEY ET AL. v. CITY OF JACKSON, MISSISSIPPI, ET AL.

**Prior History:** [\*\*\*\*1] C. A. 5th Cir.

Reported below: [687 F.2d 66](#).

### **Core Terms**

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consent decree, decree, suits, practices, promoting, bind

### **Opinion**

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[\*900] [\*\*255] [\*\*\*241] Certiorari denied.

**Dissent by:** REHNQUIST

### **Dissent**

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[\*\*256] JUSTICE REHNQUIST, with whom JUSTICE BRENNAN joins, dissenting.

This case presents the question whether a victim of alleged discrimination may have his right to sue totally extinguished by a prior suit to which he was not a party and in which a consent decree was entered before his cause of action even accrued. Because I think the Court of Appeals for the Fifth Circuit erred in holding that a district court cannot entertain a suit challenging practices allegedly mandated or permitted by a prior consent decree, I dissent from the denial of certiorari.

In March 1974, consent decrees were entered in two suits alleging race discrimination in the city of Jackson's hiring and promoting practices in its Police Department. *United States v. City of Jackson*, Civil Action No. J-74-66(N) (SD Miss.); *Corley v. Jackson Police Dept.*, Civil Action No. 73J-4(C) (SD Miss.). As described by the District Court in this case:

"The consent decree entered in *United States of America v. City of Jackson* required, *inter alia*, that the City of Jackson adopt [\*\*\*\*2] and seek to achieve a goal for hiring blacks for one-half of all vacancies in all job classifications, subject to the availability of qualified applicants, until such time as the proportion of blacks to whites in each such classification equalled the proportion of blacks to whites in the working age population [\*\*\*242] of the City of Jackson. The *Corley v. Jackson Police Department* consent decree incorporated by reference the *United*

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*States of America v. City of Jackson* decree and further provided that the Jackson Police Department establish separate promotion eligibility lists for white and black employees and that it make future promotions, subject to the availability of qualified black candidates, alternately from each such list in a one-to-one ratio until the proportion of black persons in supervisory positions and in the ranks above patrolman substantially equalled the proportion of blacks to whites in the working age population of the City of Jackson." App. to Pet. for Cert. 13A.

In 1976 and 1978, petitioners, who are white, filed two suits against the city of Jackson alleging that the city had discriminated [\*901] against them in the Police Department by hiring [\*\*\*3] or promoting less qualified blacks solely on the basis of their race. In substance, the complaints alleged that the "goals" established in the prior consent decrees were being treated as strict quotas by the city, and that blacks were being hired and promoted over whites without regard to relative qualifications. See First Amended and Supplemental Complaint in Civil Action No. J76-70(R) (SD Miss.), pp. 36-38; Complaint in Civil Action No. J78-0218(C) (SD Miss.), pp. 20-22. Petitioners contended that the challenged practices were not required by the consent decrees or, in the alternative, that the consent decrees were themselves illegal. As a third option, assuming respondents' practices under the consent decrees were necessary to remedy the effects of the city's past racial discrimination, petitioners claimed that they themselves were now victims of that prior discrimination and, as such, were entitled to compensation.

Both suits were brought only after timely charges of discrimination had been filed with the Equal Employment Opportunity Commission (EEOC), and statutory notices of the right to sue had been received. Jurisdiction of the District Court was invoked under the *Fifth* [\*\*\*4] and *Fourteenth Amendments to the Constitution*, under Title VII of the Civil Rights Act of 1964, [42 U. S. C. § 2000e-5](#), and under various other provisions [\*\*257] of federal law. The court consolidated the two actions.

Petitioners also filed motions for leave to intervene in the consent decree suits in order to challenge those decrees on their face. The United States opposed the motions on the grounds, among others, that they were untimely and asserted interests already adequately represented by the defendant city. The motions to intervene were denied. No appeal was taken.

Following a hearing, the District Court dismissed the consolidated suits for lack of subject-matter jurisdiction. The court determined that "[the] practices complained of are the result of consent decrees which were entered" in the prior cases, App. to Pet. for Cert. 12a, and, thus, that the suits constitute an impermissible collateral attack on the consent decrees over which a different court has continuing jurisdiction. The dismissal was affirmed on the same grounds by the Fifth Circuit, and this petition followed.

I find myself at a loss to understand the origins of the doctrine of "collateral attack" [\*\*\*5] employed by the lower courts in this case to preclude a suit brought by parties who had no connection with the [\*902] prior litigation. Their cause of action did not even accrue until at least a year after the entry of the consent decrees. And their attempt to intervene in those suits, more than three years after entry of the consent decrees, was denied as untimely.

It is a fundamental premise of preclusion law that nonparties to a prior action are not bound by the judgment. *Sea-Land Services, Inc. v. Gaudet*, [414 U.S. 573, 593 \(1974\)](#); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, [395 U.S. 100, 110 \(1969\)](#). This rule can be traced to an opinion of Chief Justice Marshall in *Davis v. Wood*, [1 Wheat. 6, 8-9 \(1816\)](#); it is part of our "deep-rooted historic tradition that everyone should have his own day in court." 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4449, p. 417 (1981). Only a few Terms ago, we had occasion to stress that "[it] is a violation of due process for a judgment to be binding on a litigant who was not a party nor a privy and therefore has never had an opportunity [\*\*\*6] to be heard." *Parklane Hosiery Co. v. Shore*, [439 U.S. 322, 327, n. 7 \(1979\)](#).

This principle should apply with all the more force to a consent decree, which is little more than a contract between the parties, formalized by the signature of a judge. The central feature of any consent decree is that it is not an adjudication on the merits. The decree may be scrutinized by the judge for [\*\*\*243] fairness prior to his approval, but there is no contest or decision on the merits of the issues underlying the lawsuit. Such a decree binds the

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signatories, but cannot be used as a shield against all future suits by nonparties seeking to challenge conduct that may or may not be governed by the decree.

Nonparties have an independent right to an adjudication of their claim that a defendant's conduct is unlawful. Suppose, for example, that the Government sues a private corporation for alleged violations of the antitrust laws and then enters into a consent decree. Surely, the existence of that decree does not preclude a future suit by another corporation alleging that the defendant company's conduct, even if authorized by the decree, constitutes an antitrust violation. The nonparty [\*\*\*7] has an independent right to bring his own private antitrust action for treble damages or injunctive relief. See 2 P. Areeda & D. Turner, *Antitrust Law* para. 330, p. 143 (1978). Similarly, if an action alleging unconstitutional [\*\*258] prison conditions results in a consent decree, a prisoner subsequently harmed by prison conditions is not precluded from bringing suit on the mere plea that the conditions are in accordance [\*903] with the consent decree. Such compliance might be relevant to a defense of good-faith immunity, see Pet. for Cert. in *Bennett v. Williams*, O. T. 1982, No. 82-1704, but it would not suffice to block the suit altogether.

In litigation under Title VII of the Civil Rights Act of 1964 we have constantly stressed the importance of individual enforcement actions, and have shown great reluctance to find such actions precluded. Thus, in *Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)*, we held that an individual does not forfeit his private cause of action if he first pursues his grievance under the nondiscrimination clause of a collective-bargaining agreement.

"Title VII . . . specifies with precision the jurisdictional [\*\*\*8] prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue . . . . There is no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction." *Id., at 47*.

In this case, petitioners have satisfied the same prerequisites, and "[there] is no suggestion in the statutory scheme that a prior [consent decree to which petitioners were not parties] either forecloses an individual's right to sue or divests federal courts of jurisdiction." *Ibid.*

In *General Telephone Co. v. EEOC, 446 U.S. 318, 332 (1980)*, we held that the EEOC may seek classwide relief under Title VII without being certified as the class representative under *Rule 23 of the Federal Rules of Civil Procedure*, even though we recognized that a judgment so obtained would not "be binding upon all individuals with similar grievances [\*\*\*9] in the class or subclasses that might be certified."

"In light of the 'general intent to accord parallel or overlapping remedies against discrimination,' . . . we are unconvinced that it would be consistent with the remedial purpose of the statutes to bind all 'class' members with discrimination grievances against an employer by the relief obtained under an EEOC judgment or settlement against the employer. This is especially true given the possible differences between the [\*904] public and private interests involved." *Id., at 333* (citing *Alexander, supra, at 47*).

We did acknowledge in that case that "where the EEOC has prevailed in its action, the court may reasonably require any individual *who claims under its judgment* to relinquish his right to bring a separate private action." *446 U.S., at 333* (emphasis added). But we were unwilling to bind a class member to a prior judgment when that class member decides to forgo the available class relief because he thinks he can obtain better relief in a private action.

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It certainly seems to follow that we would not preclude someone who was not a party to the prior action [\*\*\*10] from bringing a private enforcement suit.

Finally, just last Term, in *W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983), we held that a union, which declined to participate in conciliation between the EEOC and a [\*\*259] private corporation, could subsequently challenge layoffs made pursuant to the conciliation agreement as in violation of the seniority provisions of its collective-bargaining agreement [\*\*\*244] with the corporation. The unanimous Court was unmoved by the Company's claim that such suits would subject it to conflicting obligations. "The dilemma," we stressed, "was of the Company's own making." *Id., at 767*. The Company was attempting, by hiding behind the conciliation agreement, "to shift the loss to its male employees, who shared no responsibility for the sex discrimination." *Id., at 770*.

In sum, I see no justification, either in general principles of preclusion or the particular policies implicated in Title VII suits, for the District Court's refusal to take jurisdiction over this case. Accordingly, I would grant certiorari to review the judgment of the Court of Appeals for the Fifth Circuit.

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## **Jefferson Parish Hosp. Dist. No. 2 v. Hyde**

Supreme Court of the United States

November 2, 1983, Argued ; March 27, 1984, Decided

No. 82-1031

### **Reporter**

466 U.S. 2 \*; 104 S. Ct. 1551 \*\*; 80 L. Ed. 2d 2 \*\*\*; 1984 U.S. LEXIS 49 \*\*\*\*; 52 U.S.L.W. 4385; 1984-1 Trade Cas. (CCH) P65,908

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2 ET AL. v. HYDE

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

**Disposition:** [686 F.2d 286](#), reversed and remanded.

## **Core Terms**

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patients, market power, seller, anesthesiologists, tying arrangement, anesthesiological, tying product, tied product, products, flour, buyers, consumers, package, sugar, anesthesia, anticompetitive, tie, tie-in, hospital service, Sherman Act, restrain, forcing, condemnation, purchaser, markets, cases, exclusive-dealing, exclusive contract, rule of reason, merits

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

**[HN1](#)[] Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 15](#).

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

**[HN2](#)[] Price Fixing & Restraints of Trade, Tying Arrangements**

Not every refusal to sell two products separately can be said to restrain competition. If each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market, particularly if competing suppliers are free to sell either the entire package or its several parts.

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

### [\*\*HN3\*\*](#) Price Fixing & Restraints of Trade, Tying Arrangements

The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

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

### [\*\*HN4\*\*](#) Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Per se condemnation -- condemnation without inquiry into actual market conditions -- is only appropriate if the existence of forcing is probable. Thus, application of the per se rule focuses on the probability of anticompetitive consequences.

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

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

### [\*\*HN5\*\*](#) Price Fixing & Restraints of Trade, Tying Arrangements

Any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact.

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

### [\*\*HN6\*\*](#) Price Fixing & Restraints of Trade, Tying Arrangements

A tying arrangement cannot exist unless two separate product markets have been linked.

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

### [\*\*HN7\*\*](#) Price Fixing & Restraints of Trade, Tying Arrangements

Tying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made. A lack of price or quality competition does not create this type of forcing.

## **Lawyers' Edition Display**

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### **Decision**

Hospital's exclusive contract with firm of anesthesiologists held not to violate Sherman Act.

### **Summary**

A board-certified anesthesiologist who was denied admission to a hospital staff, because the hospital had an exclusive services contract with a firm of anesthesiologists, sued for a declaratory judgment that the contract was unlawful and an injunction ordering the hospital to appoint him to the hospital staff. The United States District Court for the Eastern District of Louisiana denied relief, finding that the anticompetitive consequences of the contract were minimal and outweighed by benefits in the form of improved patient care ([513 F Supp 532](#)). The United States Court of Appeals for the Fifth Circuit reversed on the ground that the contract was illegal per se ([686 F2d 286](#)).

On certiorari, the United States Supreme Court reversed. In an opinion by Stevens, J., joined by Brennan, White, Marshall, and Blackmun, JJ., it was held that (1) since 70 percent of the patients residing in the parish entered different hospitals, the hospital lacked sufficient market power to apply a rule of per se illegality to the tying arrangement, and (2) evidence that some surgeons and patients preferred the plaintiff's services to those of the firm, without evidence that any patient sophisticated enough to know the difference between two anesthesiologists was not able to go to a hospital that would provide him with the anesthesiologist of his choice, was insufficient to show that the contract unreasonably restrained competition.

Brennan, J., joined by Marshall, J., joined the court's opinion and judgment but filed a separate opinion stating that the court properly adhered to its long held view that tying arrangements are subject to evaluation for per se illegality.

O'Connor, J., joined by Burger, Ch. J., and by Powell and Rehnquist, JJ., concurred on the ground that the per se doctrine should no longer be applied in tying cases, and that the contract was lawful under the rule of reason.

## Headnotes

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30 > tying arrangements -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B]

An exclusive contract between a hospital and a firm of anesthesiologists, which requires every patient undergoing surgery at the hospital to use the services of that firm of anesthesiologists, does not violate 1 of the Sherman Act ([15 USCS 1](#)) where 70 percent of the patients residing in the parish enter different hospitals so that the hospital lacks sufficient market power to force patients to buy services they would not otherwise purchase, and the contract does not unreasonably restrain competition.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §64 > parties -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

Under 4 of the Clayton Act ([15 USCS 15](#)), allowing an antitrust suit to be brought by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," a board-certified anesthesiologist denied admission to a hospital staff because of the hospital's exclusive services contract with a firm of anesthesiologists has standing to enforce 1 of the Sherman Act ([15 USCS 1](#)) against the hospital.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > per se violations -- > Headnote:

[LEdHN\[3A\]](#) [3A] [LEdHN\[3B\]](#) [3B]

466 U.S. 2, \*2; 104 S. Ct. 1551, \*\*1551; 80 L. Ed. 2d 2, \*\*\*2; 1984 U.S. LEXIS 49, \*\*\*\*1

Where a complaint charges that the defendants have engaged in price fixing, or have concertedly refused to deal with nonmembers of an association, or have licensed a patent device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial because such restraints are illegal per se.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > price fixing -- > Headnote:  
[LEdHN\[4\]](#) [4]

A price-fixing agreement between competitors is such an arrangement as to be considered a sufficient basis for presuming unreasonableness without the necessity of any analysis of the market context in which the arrangement may be found.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30 > package sales -- > Headnote:  
[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B]

If each of two products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market, particularly if competing suppliers are free to sell either the entire package or its several parts.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30 > tying arrangements -- > Headnote:  
[LEdHN\[6\]](#) [6]

The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchaser of a tied product that the buyer did not want at all, or might have preferred to purchase elsewhere on different terms; when such forcing is present, competition on the merits for the tied item is restrained and the Sherman Act is violated.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30 > tying arrangements -- > Headnote:  
[LEdHN\[7\]](#) [7]

Per se condemnation of a tying arrangement--condemnation without inquiry into actual market conditions--is only appropriate if it is probable that the seller has some special ability to force a purchaser to do something that he would not do in a competitive market.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30 > tying arrangement -- competitive impact -  
-> Headnote:  
[LEdHN\[8\]](#) [8]

466 U.S. 2, \*2; 104 S. Ct. 1551, \*\*1551; 80 L. Ed. 2d 2, \*\*\*2; 1984 U.S. LEXIS 49, \*\*\*\*1

To justify per se condemnation of a tying arrangement, as a threshold matter there must be a substantial potential for impact on competition.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30 > tying arrangement -- single purchaser --

> Headnote:

[LEdHN\[9\]](#) [9]

If only a single purchaser is forced with respect to a tied item, the resultant impact on competition is insufficient to warrant the concern of the **antitrust law**.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30 > tying arrangement -- undesired product --

> Headnote:

[LEdHN\[10\]](#) [10]

When a purchaser is forced to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §55 > patents -- tying arrangements --

> Headnote:

[LEdHN\[11\]](#) [11]

The sale or lease of a patented item on condition that the buyer make all his purchases of a separate tied product from the patentee is unlawful.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30 > tying arrangement -- market power --

> Headnote:

[LEdHN\[12\]](#) [12]

When a seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product, an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30 > tying arrangement -- product market --

> Headnote:

[LEdHN\[13\]](#) [13]

466 U.S. 2, \*2; 104 S. Ct. 1551, \*\*1551; 80 L. Ed. 2d 2, \*\*\*2; 1984 U.S. LEXIS 49, \*\*\*\*1

The answer to the question whether one or two products are involved, for the purpose of determining whether an unlawful tying arrangement exists, turns not on the functional relationship between them but rather on the character of the demand for the two items; hence, a tying arrangement cannot exist unless two separate product markets have been linked.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30 > tying arrangement -- market power --

> Headnote:

[LEdHN\[14\]](#) [14]

A hospital lacks the market power sufficient to justify per se condemnation of a tying arrangement where 70 percent of the patients residing in the parish enter different hospitals, even though the prevalence of third-party payment for health care costs reduces price competition and a lack of adequate information renders consumers unable to evaluate the quality of the medical care provided by competing hospitals.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30 > tying arrangement -- per se illegality --

> Headnote:

[LEdHN\[15\]](#) [15]

A hospital's exclusive-services contract with a firm of anesthesiologists, so that every patient undergoing surgery at the hospital must use the services of that firm, is not per se illegal under the Sherman Act where 70 percent of the patients residing in the parish enter different hospitals, because the hospital lacks the market power sufficient to justify per se condemnation of the tying arrangement.

EVIDENCE §343.5 > Sherman Act -- burden of proof -- > Headnote:

[LEdHN\[16\]](#) [16]

In order to prevail in the absence of per se liability, a Sherman Act plaintiff has the burden of proving that the conduct in question violated the Sherman Act because it unreasonably restrained competition.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §50 > exclusive requirements contract --

> Headnote:

[LEdHN\[17A\]](#) [17A] [LEdHN\[17B\]](#) [17B]

An exclusive requirements contract is unlawful under the Sherman Act if it forecloses so much of the market from penetration by competitors of the person who contracts to furnish exclusively all the other party's requirements, as to unreasonably restrain competition in the affected market.

EVIDENCE §979 > sufficiency -- anticompetitive effect -- > Headnote:

[LEdHN\[18\]](#) [ ] [18]

There is insufficient evidence to show an actual adverse effect on competition by a hospital's exclusive contract with a firm of anesthesiologists, under which no anesthesiologist outside the firm can provide anesthesiology services at the hospital, where the evidence indicates that some surgeons and patients prefer an outside anesthesiologist's services to those of the firm, but there is no evidence that any patient sophisticated enough to know the difference between two anesthesiologists is unable to go to a hospital that will provide him with the anesthesiologist of his choice.

## Syllabus

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A hospital governed by petitioners has a contract with a firm of anesthesiologists requiring all anesthesiological services for the hospital's patients to be performed by that firm. Because of this contract, respondent anesthesiologist's application for admission to the hospital's medical staff was denied. Respondent then commenced an action in Federal District Court, claiming that the exclusive contract violated [§ 1](#) of the Sherman Act, and seeking declaratory and injunctive relief. The District Court denied relief, finding that the anticompetitive consequences of the contract were minimal and outweighed by benefits in the form of improved patient care. The Court of Appeals reversed, finding the contract illegal "per se." The court held that the case involved a "tying arrangement" because the users of the hospital's operating rooms [\*\*\*\*2] (the tying product) were compelled to purchase the hospital's chosen anesthesiological services (the tied product), that the hospital possessed sufficient market power in the tying market to coerce purchasers of the tied product, and that since the purchase of the tied product constituted a "not insubstantial amount of interstate commerce," the tying arrangement was therefore illegal "per se."

*Held:* The exclusive contract in question does not violate [§ 1](#) of the Sherman Act. Pp. 9-32.

(a) Any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact. Thus, in this case the analysis of the tying issue must focus on the hospital's sale of services to its patients, rather than its contractual arrangements with the providers of anesthesiological services. In making that analysis, consideration must be given to whether petitioners are selling two separate products that may be tied together, and, if so, whether they have used their market power to force their patients to accept the tying arrangement. Pp. 9-18.

(b) No tying arrangement can exist here unless [\*\*\*\*3] there is a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services. The fact that the exclusive contract requires purchase of two services that would otherwise be purchased separately does not make the contract illegal. Only if patients are forced to purchase the contracting firm's services as a result of the hospital's market power would the arrangement have anticompetitive consequences. If no forcing is present, patients are free to enter a competing hospital and to use another anesthesiologist instead of the firm. Pp. 18-25.

(c) The record does not provide a basis for applying the *per se* rule against tying to the arrangement in question. While such factors as the Court of Appeals relied on in rendering its decision -- the prevalence of health insurance as eliminating a patient's incentive to compare costs, and patients' lack of sufficient information to compare the quality of the medical care provided by competing hospitals -- may generate "market power" in some abstract sense, they do not generate [\*\*\*\*4] the kind of market power that justifies condemnation of tying. Tying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made. The fact that patients of the hospital lack price consciousness will not force them to take an anesthesiologist whose services they do not want. Similarly, if the patients cannot evaluate the quality of anesthesiological services, it follows that they are indifferent between certified anesthesiologists even in the absence of a tying arrangement. Pp. 26-29.

(d) In order to prevail in the absence of *per se* liability, respondent has the burden of showing that the challenged contract violated the Sherman Act because it unreasonably restrained competition, and no such showing has been made. The evidence is insufficient to provide a basis for finding that the contract, as it actually operates in the market, has unreasonably restrained competition. All the record establishes is that the choice of anesthesiologists at the hospital has been limited to one of the four doctors who are associated with the contracting firm. If respondent were admitted to the hospital's staff, the range [\*\*\*\*5] of choice would be enlarged, but the most significant restraints on the patient's freedom to select a specific anesthesiologist would nevertheless remain. There is no evidence that the price, quality, or supply or demand for either the "tying product" or the "tied product" has been adversely affected by the exclusive contract, and no showing that the market as a whole has been affected at all by the contract. Pp. 29-32.

**Counsel:** Frank H. Easterbrook argued the cause for petitioners. With him on the briefs were Lucas J. Giordano, Thomas J. Reed, and Henry S. Allen, Jr.

Jerrold J. Ganzfried argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Solicitor General Lee, Assistant Attorney General Baxter, Deputy Solicitor General Wallace, Deputy Assistant Attorney General Lipsky, Barry Grossman, and Andrea Limmer.

John M. Landis argued the cause for respondent. With him on the brief was Phillip A. Wittman. \*

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**Judges:** STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined, post, p. 32. O'CONNOR, J., filed an opinion concurring in the judgment, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, post, p. 32.

**Opinion by:** STEVENS

## Opinion

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[\*4] [\*\*8] [\*\*1554] JUSTICE STEVENS delivered the opinion of the Court.

LEdHN[1A] [1A] LEdHN[2A] [2A] At issue in this case is the validity of an exclusive contract between a hospital and a firm of anesthesiologists. We must decide whether the contract gives rise to a *per se* violation of § 1 of the Sherman Act<sup>1</sup> because every patient undergoing [\*5] surgery at the hospital must use the services of one

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\* Briefs of amici curiae urging reversal were filed for the American Hospital Association by Richard L. Epstein, Robert W. McCann, and John J. Miles; for the College of American Pathologists by Jack R. Bierig; and for the National Association of Private Psychiatric Hospitals by Joel I. Klein.

Briefs of amici curiae urging affirmance were filed for the American Society of Anesthesiologists, Inc., by John Landsdale, Jr., and Michael Scott; for the Association of American Physicians & Surgeons, Inc., by Kent Masterson Brown; and for the Louisiana State Medical Society by Henry B. Alsobrook, Jr., Frank M. Adkins, and Richard B. Eason II.

Briefs of amici curiae were filed for the American Association of Nurse Anesthetists by Phil David Fine, Robert F. Sylvia, Richard E. Verville, and Susan M. Jenkins; and for the Louisiana Hospital Association et al. by Ricardo M. Guevara.

<sup>1</sup> LEdHN[2B] [2B]

Section 1 of the Sherman Act states: HN1 "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . ." 26 Stat. 209, as

firm of anesthesiologists, and, if not, whether the contract is nevertheless illegal because it unreasonably restrains competition among anesthesiologists.

[\*\*\*\*7] In July 1977, respondent Edwin G. Hyde, a board-certified anesthesiologist, applied for admission to the medical staff of East Jefferson Hospital. The credentials committee and the medical staff executive committee recommended approval, but the hospital board denied the application because the hospital was a party to a contract providing that all anesthesiological services required by the hospital's patients would be performed by Roux & Associates, a professional medical corporation. Respondent then commenced this action seeking a declaratory judgment that the contract is unlawful and an injunction ordering petitioners to appoint him to the hospital staff.<sup>2</sup> After trial, the District Court denied relief, finding that the anticompetitive consequences of the Roux contract were minimal and outweighed by benefits in the form of improved patient care. [513 F.Supp. 532 \(ED La. 1981\)](#). The Court of Appeals reversed because it was persuaded that the contract was illegal "per se." [686 F.2d 286 \(CA5 1982\)](#). We granted certiorari, *460 U.S. 1021* (1983), and now reverse.

[\*\*\*\*8] I

In February 1971, shortly before East Jefferson Hospital opened, it entered into an "Anesthesiology Agreement" with Roux & Associates (Roux), a firm that had recently [\*\*1555] been organized by Dr. Kermit Roux. The contract provided that any anesthesiologist designated by Roux would be admitted to the hospital's medical staff. The hospital agreed to [\*6] provide the space, equipment, maintenance, and other supporting services [\*\*\*9] necessary to operate the anesthesiology department. It also agreed to purchase all necessary drugs and other supplies. All nursing personnel required by the anesthesia department were to be supplied by the hospital, but Roux had the right to approve their selection and retention.<sup>3</sup> The hospital agreed to "restrict the use of its anesthesia department to Roux & Associates and [that] no other persons, parties or entities shall perform such services within the Hospital for the [term] of this contract." App. 19.<sup>4</sup>

[\*\*\*\*9] The 1971 contract provided for a 1-year term automatically renewable for successive 1-year periods unless either party elected to terminate. In 1976, a second written contract was executed containing most of the provisions of the 1971 agreement. Its term was five years and the clause excluding other anesthesiologists from the hospital was deleted;<sup>5</sup> [\*\*\*\*10] the hospital nevertheless continued to regard itself as committed to a closed anesthesiology department. Only Roux was permitted to practice anesthesiology at the hospital. At the [\*7] time of trial the department included four anesthesiologists. The hospital usually employed 13 or 14 certified registered nurse anesthetists.<sup>6</sup>

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amended, [15 U. S. C. § 1](#). Respondent has standing to enforce [§ 1](#) by virtue of § 4 of the Clayton Act, 38 Stat. 731, as amended, [15 U. S. C. § 15](#).

<sup>2</sup> In addition to seeking relief under the Sherman Act, respondent's complaint alleged violations of [42 U. S. C. § 1983](#) and state law. The District Court rejected these claims. The Court of Appeals passed only on the Sherman Act claim.

<sup>3</sup> The contract required all of the physicians employed by Roux to confine their practice of anesthesiology to East Jefferson.

<sup>4</sup> Originally Roux agreed to provide at least two full-time anesthesiologists acceptable to the hospital's credentials committee. Roux agreed to furnish additional anesthesiologists as necessary. The contract also provided that Roux would designate one of its qualified anesthesiologists to serve as the head of the hospital's department of anesthesia.

The fees for anesthesiological services are billed separately to the patients by the hospital. They cover the hospital's costs and the professional services provided by Roux. After a deduction of eight percent to provide a reserve for uncollectible accounts, the fees are divided equally between Roux and the hospital.

<sup>5</sup> "Roux testified that he requested the omission of the exclusive language in his 1976 contract because he believes a surgeon or patient is entitled to the services of the anesthesiologist of his choice. He admitted that he and others in his group did work outside East Jefferson following the 1976 contract but felt he was not in violation of the contract in light of the changes made in it." [513 F.Supp. 532, 537 \(ED La. 1981\)](#).

<sup>6</sup> Approximately 875 operations are performed at the hospital each month; as many as 12 or 13 operating rooms may be in use at one time.

The exclusive contract had an impact on two different segments of the economy: consumers of medical services, and providers of anesthesiological services. Any consumer of medical services who elects to have an operation performed at East Jefferson Hospital may not employ any anesthesiologist not associated with Roux. No anesthesiologists except those employed by Roux may practice at East Jefferson.

There are at least 20 hospitals in the New Orleans metropolitan area and about 70 percent of the patients living in Jefferson Parish go to hospitals other than East Jefferson. Because it regarded the entire New Orleans metropolitan area as the relevant geographic market in which hospitals compete, this evidence convinced the District Court that East Jefferson does not possess any significant "market power"; therefore it concluded that petitioners could not use the Roux contract to anticompetitive [\*\*\*10] ends.<sup>7</sup> [\*\*\*12] The same evidence led the Court of Appeals [\*\*\*11] to draw a different conclusion. [\*\*1556] Noting that 30 percent of the residents of the parish go to East Jefferson Hospital, and that in fact "patients tend to choose hospitals by location rather than price or quality," the Court of [\*8] Appeals concluded that the relevant geographic market was the East Bank of Jefferson Parish. [686 F.2d, at 290](#). The conclusion that East Jefferson Hospital possessed market power in that area was buttressed by the facts that the prevalence of health insurance eliminates a patient's incentive to compare costs, that the patient is not sufficiently informed to compare quality, and that family convenience tends to magnify the importance of location.<sup>8</sup>

The Court of Appeals held that the case involves a "tying arrangement" because the "users of the hospital's operating rooms (the tying product) are also compelled to purchase the hospital's chosen anesthesia service (the tied product)." [Id., at \[\\*\\*\\*13\] 289](#). Having defined the relevant geographic market for the tying product as the East Bank of Jefferson Parish, the court held that the hospital possessed "sufficient market power in the tying market to coerce purchasers of the tied product." [Id., at 291](#). Since the purchase of the tied product constituted a "not insubstantial amount of interstate commerce," under the Court of Appeals' reading of our decision in *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 11 (1958), the tying arrangement was therefore illegal "per se."<sup>9</sup>

[\*9] //

[LEdHN\[3A\]](#) [↑] [3A][LEdHN\[4\]](#) [↑] [4]Certain types of contractual arrangements are deemed unreasonable as a matter of law.<sup>10</sup> The [\*\*\*14] character [\*\*\*11] of the restraint produced by such an arrangement is considered a

<sup>7</sup> The District Court found:

"The impact on commerce resulting from the East Jefferson contract is minimal. The contract is restricted in effect to one hospital in an area containing at least twenty others providing the same surgical services. It would be a different situation if Dr. Roux had exclusive contracts in several hospitals in the relevant market. As pointed out by plaintiff, the majority of surgeons have privileges at more than one hospital in the area. They have the option of admitting their patients to another hospital where they can select the anesthesiologist of their choice. Similarly a patient can go to another hospital if he is not satisfied with the physicians available at East Jefferson." [Id., at 541](#).

<sup>8</sup> While the Court of Appeals did discuss the impact of the contract upon patients, it did not discuss its impact upon anesthesiologists. The District Court had referred to evidence that in the entire State of Louisiana there are 156 anesthesiologists and 345 hospitals with operating rooms. The record does not tell us how many of the hospitals in the New Orleans metropolitan area have "open" anesthesiology departments and how many have closed departments. Respondent, for example, practices with two other anesthesiologists at a hospital which has an open department; he previously practiced for several years in a different New Orleans hospital and, prior to that, had practiced in Florida. The record does not tell us whether there is a shortage or a surplus of anesthesiologists in any part of the country, or whether they are thriving or starving.

<sup>9</sup> The Court of Appeals rejected as "clearly erroneous" the District Court's finding that the exclusive contract was justified by quality considerations. See [686 F.2d, at 292](#).

<sup>10</sup> [LEdHN\[3B\]](#) [↑] [3B]

sufficient basis for presuming unreasonableness without the necessity of any analysis of the market context in which the arrangement may be found.<sup>11</sup> A price-fixing agreement between competitors is the classic example of such an arrangement. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 343-348 (1982). It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable "per se."<sup>12</sup> [\*\*\*\*16] The rule was first enunciated in *International Salt Co. v. United States*, 332 U.S. 392, 396 [\*\*1557] (1947),<sup>13</sup> and has been endorsed [\*10] by this Court many times since.<sup>14</sup> [\*\*\*\*17] The rule also reflects congressional policies underlying the antitrust laws. In enacting § 3 of the Clayton Act, 38 Stat. 731, *15 U. S. C. § 14*, Congress expressed great concern about the anticompetitive character of tying arrangements. See H. R. Rep. No. 627, 63d Cong., 2d Sess., 10-13 (1914); S. Rep. No. 698, 63d [\*\*\*\*15] Cong., 2d Sess., 6-9 (1914).<sup>15</sup> [\*\*\*\*18] [\*\*\*12] [\*\*1558] While this

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"For example, where a complaint charges that the defendants have engaged in price fixing, or have concertedly refused to deal with non-members of an association, or have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial because such restraints are illegal *per se*." *United States v. Columbia Steel Co.*, 334 U.S. 495, 522-523 (1948) (footnotes omitted).

<sup>11</sup> See, e. g., *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977).

<sup>12</sup> The District Court intimated that the principles of *per se* liability might not apply to cases involving the medical profession. *513 F.Supp., at 543-544*. The Court of Appeals rejected this approach. *686 F.2d, at 292-294*. In this Court, petitioners "assume" that the same principles apply to the provision of professional services as apply to other trades or businesses. Brief for Petitioners 4, n. 2. See generally *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

<sup>13</sup> The roots of the doctrine date at least to *Motion Picture Patents Co. v. Universal Film Co.*, 243 U.S. 502 (1917), a case holding that the sale of a patented film projector could not be conditioned on its use only with the patentee's films, since this would have the effect of extending the scope of the patent monopoly. See also *Henry v. Dick Co.*, 224 U.S. 1, 70-73 (1912) (White, C. J., dissenting).

<sup>14</sup> See *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 619-621 (1977); *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 498-499 (1969); *White Motor Co. v. United States*, 372 U.S. 253, 262 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 330 (1962); *United States v. Loew's Inc.*, 371 U.S. 38 (1962); *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958); *Black v. Magnolia Liquor Co.*, 355 U.S. 24, 25 (1957); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 608-609 (1953); *Standard Oil Co. of California v. United States*, 337 U.S. 293, 305-306 (1949).

<sup>15</sup> See also 51 Cong. Rec. 9072 (1914) (remarks of Rep. Webb); *id.*, at 9084 (remarks of Rep. Madden); *id.*, at 9090 (remarks of Rep. Mitchell); *id.*, at 9160-9164 (remarks of Rep. Floyd); *id.*, at 9184-9185 (remarks of Rep. Helvering); *id.*, at 9409 (remarks of Rep. Gardner); *id.*, at 9410 (remarks of Rep. Mitchell); *id.*, at 9553-9554 (remarks of Rep. Barkley); *id.*, at 14091-14097 (remarks of Sen. Reed); *id.*, at 14094 (remarks of Sen. Walsh); *id.*, at 14209 (remarks of Sen. Shields); *id.*, at 14226 (remarks of Sen. Reed); *id.*, at 14268 (remarks of Sen. Reed); *id.*, at 14599 (remarks of Sen. White); *id.*, at 15991 (remarks of Sen. Martine); *id.*, at 16146 (remarks of Sen. Walsh); Spivack, The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response, 52 Antitrust L. J. 651, 664-665 (1983). For example, the House Report on the Clayton Act stated:

"The public is compelled to pay a higher price and local customers are put to the inconvenience of securing many commodities in other communities or through mail-order houses that can not be procured at their local stores. The price is raised as an inducement. This is the local effect. Where the concern making these contracts is already great and powerful, such as the United Shoe Machinery Co., the American Tobacco Co., and the General Film Co., the exclusive or 'tying' contract made with local dealers becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors, not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful combinations are operating under this system and practice. By this method and practice the Shoe Machinery Co. has built up a monopoly that owns and controls the entire machinery now being used by all great shoe-manufacturing houses of the United States. No independent manufacturer of shoe machines has the slightest opportunity to build up any considerable trade in this country while this condition obtains. If a manufacturer who is using machines of the Shoe Machinery Co. were to purchase and place a machine manufactured by any independent company in his establishment, the Shoe Machinery Co. could under its contracts withdraw all their machinery from the establishment of the shoe manufacturer and thereby wreck the business of the manufacturer. The General Film Co., by the

466 U.S. 2, \*10; 104 S. Ct. 1551, \*\*1558; 80 L. Ed. 2d 2, \*\*\*12; 1984 U.S. LEXIS 49, \*\*\*\*18

case [\*11] does not arise under the Clayton Act, the congressional finding made therein concerning the competitive consequences of tying is illuminating, and must be respected.<sup>16</sup>

**[LEdHN[5A]]** [5A]It is clear, however, that **HN2** not every refusal to sell two products separately can be said to restrain competition. If each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market, particularly [\*12] if competing suppliers are free to sell either the entire package or its several parts.<sup>17</sup> For example, we have written that "if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself." *Northern Pacific R. Co. v. [\*\*\*\*19] United States, 356 U.S., at 7.*<sup>18</sup> Buyers often find package sales attractive; [\*13] a seller's decision to offer such packages can merely be an attempt to compete effectively -- conduct that is entirely consistent with the Sherman Act. See *Fortner Enterprises v. United States Steel Corp., 394 U.S. 495, 517-518 (1969)*(*Fortner I*) (WHITE, J., dissenting); *id., at 524-525* (Fortas, J., dissenting).

**[\*\*\*\*20]** **[LEdHN[61]]** [6]Our cases have concluded that **HN3** the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

"Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the Nation's resources and thus direct the course its economic development will take. . . . By conditioning his sale of one commodity on

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same method practiced by the Shoe Machinery Co. under the lease system, has practically destroyed all competition and acquired a virtual monopoly of all films manufactured and sold in the United States. When we consider contracts of sales made under this system, the result to the consumer, the general public, and the local dealer and his business is even worse than under the lease system." H. R. Rep. No. 627, 63d Cong., 2d Sess., 12-13 (1914).

Similarly, Representative Mitchell said: "[Monopoly] has been built up by these 'tying' contracts so that in order to get one machine one must take all of the essential machines, or practically all. Independent companies who have sought to enter the field have found that the markets have been preempted. . . . The manufacturers do not want to break their contracts with these giant monopolies, because, if they should attempt to install machinery, their business might be jeopardized and all of the machinery now leased by these giant monopolies would be removed from their places of business. No situation cries more urgently for relief than does this situation, and this bill seeks to prevent exclusive 'tying' contracts that have brought about a monopoly, alike injurious to the small dealers, to the manufacturers, and grossly unfair to those who seek to enter the field of competition and to the millions of consumers." 51 Cong. Rec. 9090 (1914).

<sup>16</sup> See generally, e. g., *Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U.S. 264, 276-277 (1981)*; *New Orleans v. Dukes, 427 U.S. 297, 303-304 (1976)* (per curiam).

<sup>17</sup> **[LEdHN[5B]]** [5B]

"Of course where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price." *Northern Pacific R. Co. v. United States, 356 U.S., at 6, n. 4.*

<sup>18</sup> Thus, we have held that a seller who ties the sale of houses to the provision of credit simply as a way of effectively competing in a competitive market does not violate the antitrust laws. "The unusual credit bargain offered to Fortner proves nothing more than a willingness to provide cheap financing in order to sell expensive houses." *United States Steel Corp. v. Fortner Enterprises, 429 U.S., at 622* (footnote omitted).

466 U.S. 2, \*12; 104 S. Ct. 1551, \*\*1558; 80 L. Ed. 2d 2, \*\*\*13; 1984 U.S. LEXIS 49, \*\*\*\*20

[\*13] the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market. But any [\*\*\*21] intrinsic superiority of the 'tied' product would convince freely choosing buyers to select it over others anyway." *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 605 (1953).<sup>19</sup>

[\*\*\*22] [\*\*1559] Accordingly, [\*\*\*14] we have condemned tying arrangements when the seller has some special ability -- usually called "market [\*14] power" -- to force a purchaser to do something that he would not do in a competitive market. See *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 620 (1977) (*Fortner II*); *Fortner I*, 394 U.S., at 503-504; *United States v. Loew's Inc.*, 371 U.S. 38, 45, 48, n. 5 (1962); *Northern Pacific R. Co. v. United States*, 356 U.S., at 6-7.<sup>20</sup> When "forcing" occurs, our cases have found the tying arrangement to be unlawful.

[\*\*\*23] Thus, the law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other. When the seller's power is just used to maximize its return in the tying product market, where presumably its product enjoys some justifiable advantage over its competitors, the competitive ideal of the Sherman Act is not necessarily compromised. But if that power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures.<sup>21</sup> This impairment could either harm existing competitors or create barriers to entry of new competitors in the market for the tied product, *Fortner I*, 394 U.S., at 509,<sup>22</sup> [\*\*\*25] and can increase [\*15] the social costs of market power by facilitating price discrimination, thereby increasing monopoly profits over what they would be absent the tie, *Fortner II*, 429 U.S., at

<sup>19</sup> Accord, *Fortner I*, 394 U.S., at 508-509; *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 369-371 (1965); *United States v. Loew's Inc.*, 371 U.S., at 44-45; *Northern Pacific R. Co. v. United States*, 356 U.S., at 6. For example, JUSTICE WHITE has written:

"There is general agreement in the cases and among commentators that the fundamental restraint against which the tying proscription is meant to guard is the use of power over one product to attain power over another, or otherwise to distort freedom of trade and competition in the second product. This distortion injures the buyers of the second product, who because of their preference for the seller's brand of the first are artificially forced to make a less than optimal choice in the second. And even if the customer is indifferent among brands of the second product and therefore loses nothing by agreeing to use the seller's brand of the second in order to get his brand of the first, such tying agreements may work significant restraints on competition in the tied product. The tying seller may be working toward a monopoly position in the tied product and, even if he is not, the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market. They must be prepared not only to match existing sellers of the tied product in price and quality, but to offset the attraction of the tying product itself. Even if this is possible through simultaneous entry into production of the tying product, entry into both markets is significantly more expensive than simple entry into the tied market, and shifting buying habits in the tied product is considerably more cumbersome and less responsive to variations in competitive offers. In addition to these anticompetitive effects in the tied product, tying arrangements may be used to evade price control in the tying product through clandestine transfer of the profit to the tied product; they may be used as a counting device to effect price discrimination; and they may be used to force a full line of products on the customer so as to extract more easily from him a monopoly return on one unique product in the line." *Fortner I*, 394 U.S., at 512-514 (dissenting opinion) (footnotes omitted).

<sup>20</sup> This type of market power has sometimes been referred to as "leverage." Professors Areeda and Turner provide a definition that suits present purposes. "'Leverage' is loosely defined here as a supplier's power to induce his customer for one product to buy a second product from him that would not otherwise be purchased solely on the merit of that second product." 5 P. Areeda & D. Turner, *Antitrust Law* para. 1134a, p. 202 (1980).

<sup>21</sup> See Report of the Attorney General's National Committee to Study the Antitrust Laws 145 (1955); Craswell, Tying Requirements in Competitive Markets: The Consumer Protection Issues, 62 B. U. L. Rev. 661, 666-668 (1982); Slawson, A Stronger, Simpler Tie-In Doctrine, 25 Antitrust Bull. 671, 676-684 (1980); Turner, The Validity of Tying Arrangements under the Antitrust Laws, 72 Harv. L. Rev. 50, 60-62 (1958).

<sup>22</sup> See 3 Areeda & Turner, *supra* n. 20, para. 733e (1978); C. Kaysen & D. Turner, Antitrust Policy 157 (1959); L. Sullivan, Law of Antitrust § 156 (1977); O. Williamson, Markets and Hierarchies: Analysis and Antitrust Implications 111 (1975); Pearson, Tying Arrangements and Antitrust Policy, 60 Nw. U. L. Rev. 626, 637-638 (1965).

617.<sup>23</sup> And from the **[\*\*\*15]** standpoint **[\*\*1560]** of the consumer -- whose interests the statute was especially intended to serve **[\*\*\*\*24]** -- the freedom to select the best bargain in the second market is impaired by his need to purchase the tying product, and perhaps by an inability to evaluate the true cost of either product when they are available only as a package.<sup>24</sup> In sum, to permit restraint of competition on the merits through tying arrangements would be, as we observed in *Fortner II*, to condone "the existence of power that a free market would not tolerate."  
[429 U.S., at 617](#) (footnote omitted).

**[\*\*\*\*26]** [LEdHN\[7\]↑](#) [7][LEdHN\[8\]↑](#) [8][LEdHN\[9\]↑](#) [9][LEdHN\[10\]↑](#) [10][HN4↑](#) Per se condemnation -- condemnation without inquiry into actual market conditions -- is only appropriate if the existence of forcing is probable.<sup>25</sup> Thus, application of the *per se* rule **[\*16]** focuses on the probability of anticompetitive consequences. Of course, as a threshold matter there must be a substantial potential for impact on competition in order to justify *per se* condemnation. If only a single purchaser were "forced" with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of **antitrust law**. It is for this reason that we have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby. See [Fortner I, 394 U.S., at 501-502](#); *Northern* **[\*\*\*\*27]** *Pacific R. Co. v. United States, 356 U.S., at 6-7*; *Times-Picayune*, 345 U.S., at 608-610; *International Salt*, 332 U.S., at 396. Similarly, when a purchaser is "forced" to buy a product he would not have otherwise bought even from another seller in the tied-product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.

[LEdHN\[11\]↑](#) [11]Once this threshold is surmounted, *per se* **[\*\*\*28]** prohibition is appropriate if anticompetitive forcing is likely. For example, if the Government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power. [United States v. Loew's Inc., 371 U.S., at 45-47](#). Any effort to enlarge the scope of the patent monopoly by using the market power it confers to restrain competition in the market for a second product will undermine competition on the merits in that second market. Thus, the sale or lease of a patented item on condition that the buyer make all his purchases **[\*\*\*16]** of a separate tied product from the patentee is unlawful. See [United States v. Paramount Pictures, Inc., 334 U.S. 131, 156-159 \(1948\)](#); *International Salt*, 332 U.S., **[\*17]** at 395-396; *International Business Machines Corp. v. United States, 298 U.S. 131 (1936)*.

<sup>23</sup> Sales of the tied item can be used to measure demand for the tying item; purchasers with greater needs for the tied item make larger purchases and in effect must pay a higher price to obtain the tying item. See P. Areeda, *Antitrust Analysis* para. 533 (2d ed. 1974); R. Posner, **Antitrust Law** 173-180 (1976); Sullivan, *supra* n. 22, § 156; Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L. J. 19 (1957); Burstein, *A Theory of Full-Line Forcing*, 55 Nw. U. L. Rev. 62 (1960); Dam, *Fortner Enterprises v. United States Steel: "Neither a Borrower, Nor a Lender Be,"* 1969 S. Ct. Rev. 1, 15-16; Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis*, 30 Law & Contemp. Prob. 552, 554-558 (1965); Markovits, *Tie-Ins, Reciprocity, and the Leverage Theory*, 76 Yale L. J. 1397 (1967); Pearson, *supra* n. 22, at 647-653; Sidak, *Debunking Predatory Innovation*, [83 Colum. L. Rev. 1121, 1127-1131 \(1983\)](#); Stigler, *United States v. Loew's Inc.: A Note on Block-Booking*, 1963 S. Ct. Rev. 152.

<sup>24</sup> Especially where market imperfections exist, purchasers may not be fully sensitive to the price or quality implications of a tying arrangement, and hence it may impede competition on the merits. See Craswell, *supra* n. 21, at 675-679.

<sup>25</sup> The rationale for *per se* rules in part is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct. See, e. g., [Arizona v. Maricopa County Medical Society, 457 U.S. 332, 350-351 \(1982\)](#).

LEdHN[12] [12]The same strict rule is appropriate in other situations in which the existence of market power is probable. When the seller's [\*\*\*\*29] share of the market is high, see *Times-Picayune Publishing Co. v. United States, 345 U.S., at 611-613*, or when the seller offers a unique product that competitors are not able to offer, see *Fortner I, 394 U.S., at 504-506*, and n. 2, the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make *per se* condemnation appropriate. Thus, in *Northern Pacific R. Co. v. United States, 356 U.S. 1 (1958)*, we held that the railroad's control over vast tracts of western real estate, although not itself unlawful, gave the railroad a unique kind of bargaining power that enabled it to tie the sales of that land to exclusive, long-term commitments that fenced out competition in the transportation market over a protracted period.<sup>26</sup> When, however, the [\*18] seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product, an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the [\*\*\*\*30] relevant market. See *Fortner I, 394 U.S., at 499-500*; *Times-Picayune* [\*\*1561] *Publishing Co. v. United States, 345 U.S., at 614-615*.

[\*\*\*\*31] In sum, HN5 [5] any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact. Thus, in this case our analysis of the tying issue must focus on the hospital's sale of services to its patients, rather than its contractual arrangements with [\*\*\*17] the providers of anesthesiological services. In making that analysis, we must consider whether petitioners are selling two separate products that may be tied together, and, if so, whether they have used their market power to force their patients to accept the tying arrangement.

### III

The hospital has provided its patients with a package that includes the range of facilities and services required for a variety of surgical operations.<sup>27</sup> At East Jefferson Hospital the package includes the services of the anesthesiologist.<sup>28</sup> Petitioners argue that the package does not involve a tying arrangement [\*19] at all -- that they are merely providing a functionally [\*\*1562] integrated package of services.<sup>29</sup> Therefore, petitioners [\*\*\*\*32] contend that it is inappropriate to apply principles concerning tying arrangements to this case.

<sup>26</sup> "As pointed out before, the defendant was initially granted large acreages by Congress in the several Northwestern States through which its lines now run. This land was strategically located in checkerboard fashion amid private holdings and within economic distance of transportation facilities. Not only the testimony of various witnesses but common sense makes it evident that this particular land was often prized by those who purchased or leased it and was frequently essential to their business activities. In disposing of its holdings the defendant entered into contracts of sale or lease covering at least several million acres of land which included 'preferential routing' clauses. The very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power, at least where, as here, no other explanation has been offered for the existence of these restraints. The 'preferential routing' clauses conferred no benefit on the purchasers or lessees. While they got the land they wanted by yielding their freedom to deal with competing carriers, the defendant makes no claim that it came any cheaper than if the restrictive clauses had been omitted. In fact any such price reduction in return for rail shipments would have quite plainly constituted an unlawful rebate to the shipper. So far as the Railroad was concerned its purpose obviously was to fence out competitors, to stifle competition." 356 U.S., at 7-8 (footnote omitted).

<sup>27</sup> The physical facilities include the operating room, the recovery room, and the hospital room where the patient stays before and after the operation. The services include those provided by staff physicians, such as radiologists or pathologists, and interns, nurses, dietitians, pharmacists, and laboratory technicians.

<sup>28</sup> It is essential to differentiate between the Roux contract and the legality of the contract between the hospital and its patients. The Roux contract is nothing more than an arrangement whereby Roux supplies all of the hospital's needs for anesthesiological services. That contract raises only an exclusive-dealing question, see n. 51, *infra*. The issue here is whether the hospital's insistence that its patients purchase anesthesiological services from Roux creates a tying arrangement.

<sup>29</sup> See generally Dolan & Ralston, Hospital Admitting Privileges and the Sherman Act, 18 Hous. L. Rev. 707, 756-758 (1981); Kissam, Webber, Bigus, & Holzgraefe, Antitrust and Hospital Privileges: Testing the Conventional Wisdom, 70 Calif. L. Rev. 595, 666-667 (1982).

[\*\*\*\*33] [LEdHN\[13\]](#) [↑] [13]Our cases indicate, however, that the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items.<sup>30</sup> [\*\*\*\*34] In *Times-Picayune Publishing Co. v. United States*, [345 U.S. 594 \(1953\)](#), the Court held that a tying arrangement was not present because the arrangement did not link two distinct markets for products that were distinguishable in the eyes [\*\*\*18] of buyers.<sup>31</sup> [\*\*\*\*35] In [\*20] *Fortner I*, the Court concluded that a sale involving two independent transactions, separately priced and purchased from the buyer's perspective, was a tying arrangement.<sup>32</sup> These [\*21] cases make it clear that [HN6](#) [↑] a tying arrangement cannot [\*\*1563] exist unless two separate product markets have been linked.

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<sup>30</sup> The fact that anesthesiological services are functionally linked to the other services provided by the hospital is not in itself sufficient to remove the Roux contract from the realm of tying arrangements. We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices. See *Mercoid Corp. v. Mid-Continent Co.*, [320 U.S. 661 \(1944\)](#) (heating system and stoker switch); *Morton Salt Co. v. Suppiger Co.*, [314 U.S. 488 \(1942\)](#) (salt machine and salt); *International Salt Co. v. United States*, [332 U.S. 392 \(1947\)](#) (same); *Leitch Mfg. Co. v. Barber Co.*, [302 U.S. 458 \(1938\)](#) (process patent and material used in the patented process); *International Business Machines Corp. v. United States*, [298 U.S. 131 \(1936\)](#) (tabulators and tabulating punch cards); *Carbice Corp. v. American Patents Development Corp.*, [283 U.S. 27 \(1931\)](#) (ice cream transportation package and coolant); *FTC v. Sinclair Refining Co.*, [261 U.S. 463 \(1923\)](#) (gasoline and underground tanks and pumps); *United Shoe Machinery Co. v. United States*, [258 U.S. 451 \(1922\)](#) (shoe machinery and supplies, maintenance, and peripheral machinery); *United States v. Jerrold Electronics Corp.*, [187 F.Supp. 545, 558-560 \(ED Pa. 1960\)](#) (components of television antennas), aff'd, [365 U.S. 567 \(1961\)](#) (per curiam). In fact, in some situations the functional link between the two items may enable the seller to maximize its monopoly return on the tying item as a means of charging a higher rent or purchase price to a larger user of the tying item. See n. 23, *supra*.

<sup>31</sup> "The District Court determined that the Times-Picayune and the States were separate and distinct newspapers, though published under single ownership and control. But that readers consciously distinguished between these two publications does not necessarily imply that advertisers bought separate and distinct products when insertions were placed in the Times-Picayune and the States. So to conclude here would involve speculation that advertisers bought space motivated by considerations other than customer coverage; that their media selections, in effect, rested on generic qualities differentiating morning from evening readers in New Orleans. Although advertising space in the Times-Picayune, as the sole morning daily, was doubtless essential to blanket coverage of the local newspaper readership, nothing in the record suggests that advertisers viewed the city's newspaper readers, morning or evening, as other than fungible customer potential. We must assume, therefore, that the readership 'bought' by advertisers in the Times-Picayune was the selfsame 'product' sold by the States and, for that matter, the Item.

"The factual departure from the 'tying' cases then becomes manifest. The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant 'tying' product, resulting in economic harm to competition in the 'tied' market. Here, however, two newspapers under single ownership at the same place, time, and terms sell indistinguishable products to advertisers; no dominant 'tying' product exists (in fact, since space in neither the Times-Picayune nor the States can be bought alone, one may be viewed as 'tying' as the other); no leverage in one market excludes sellers in the second, because for present purposes the products are identical and the market the same." [345 U.S., at 613-614](#) (footnote omitted).

<sup>32</sup> "There is, at the outset of every tie-in case, including the familiar cases involving physical goods, the problem of determining whether two separate products are in fact involved. In the usual sale on credit the seller, a single individual or corporation, simply makes an agreement determining when and how much he will be paid for his product. In such a sale the credit may constitute such an inseparable part of the purchase price for the item that the entire transaction could be considered to involve only a single product. It will be time enough to pass on the issue of credit sales when a case involving it actually arises. Sales such as that are a far cry from the arrangement involved here, where the credit is provided by one corporation on condition that a product be purchased from a separate corporation, and where the borrower contracts to obtain a large sum of money over and above that needed to pay the seller for the physical products purchased. Whatever the standards for determining exactly when a transaction involves only a 'single product,' we cannot see how an arrangement such as that present in this case could ever be said to involve only a single product." [394 U.S., at 507](#) (footnote omitted).

[\*\*\*\*36] The requirement that two distinguishable product markets be involved follows from the underlying rationale of the rule against tying. The definitional question depends on whether the arrangement may have the type of competitive consequences addressed by the rule.<sup>33</sup> [\*\*\*\*37] The answer to the question whether petitioners [\*\*\*19] have utilized a tying arrangement must be based on whether there is a possibility that the economic effect of the arrangement is that condemned by the rule against tying -- that petitioners have foreclosed competition on the merits in a product market distinct from the market for the tying item.<sup>34</sup> Thus, in this case no tying arrangement can exist unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services [\*22] to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services.<sup>35</sup>

[\*\*\*\*38] Unquestionably, the anesthesiological component of the package offered by the hospital could be provided separately and could be selected either by the individual patient or by one of the patient's doctors if the hospital did not insist on including anesthesiological services in the package it [\*\*1564] offers to its customers. As a matter of actual practice, anesthesiological services are billed separately from the hospital services petitioners provide. There was ample and uncontested testimony that patients or surgeons often request specific anesthesiologists to come to a hospital and provide anesthesia, and that the choice of an individual anesthesiologist separate from the choice of a hospital is particularly frequent in respondent's specialty, obstetric anesthesiology.<sup>36</sup> [\*\*\*\*40] The District [\*23] [\*\*\*20] Court found that "[the] provision of anesthesia services is a medical service

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<sup>33</sup> Professor Dam has pointed out that the *per se* rule against tying can be coherent only if tying is defined by reference to the economic effect of the arrangement.

"[The] definitional question is hard to separate from the question when tie-ins are harmful. Yet the decisions, in adopting the *per se* rule, have attempted to flee from that economic question by ruling that tying arrangements are presumptively harmful, at least whenever certain nominal threshold standards on power and foreclosure are met. The weakness of the *per se* methodology is that it places crucial importance on the definition of the practice. Once an arrangement falls within the defined limits, no justification will be heard. But a *per se* rule gives no economic standards for defining the practice. To treat the definitional question as an abstract inquiry into whether one or two products is involved is thus to compound the weakness of the *per se* approach." Dam, *supra* n. 23, at 19.

<sup>34</sup> Of course, the Sherman Act does not prohibit "tying"; it prohibits "[contracts] . . . in restraint of trade." Thus, in a sense the question whether this case involves "tying" is beside the point. The legality of petitioners' conduct depends on its competitive consequences, not on whether it can be labeled "tying." If the competitive consequences of this arrangement are not those to which the *per se* rule is addressed, then it should not be condemned irrespective of its label.

<sup>35</sup> This approach is consistent with that taken by a number of lower courts. See *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1214-1215 (CA9 1977); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 48-49 (CA9 1971), cert. denied, 405 U.S. 955 (1972); *Washington Gas Light Co. v. Virginia Electric & Power Co.*, 438 F.2d 248, 253 (CA4 1971); *Susser v. Carvel Corp.*, 332 F.2d 505, 514 (CA2 1964), cert. dism'd, 381 U.S. 125 (1965); *United States v. Mercedes-Benz of North America, Inc.*, 517 F.Supp. 1369, 1379-1381 (ND Cal. 1981); *In re Data General Corp. Antitrust Litigation*, 490 F.Supp. 1089, 1104-1110 (ND Cal. 1980); *Jones v. 247 East Chestnut Properties*, 1975-2 Trade Cases para. 60,491, pp. 67,162-67,163 (ND Ill. 1974); *N. W. Controls, Inc. v. Outboard Marine Corp.*, 333 F.Supp. 493, 501-504 (Del. 1971); *Teleflex Industrial Products, Inc. v. Brunswick Corp.*, 293 F.Supp. 107, 109, and n. 6 (ED Pa. 1968). See generally Ross, The Single Product Issue in Antitrust Tying: A Functional Approach, 23 Emory L. J. 963 (1974); Wheeler, Some Observations on Tie-ins, the Single-Product Defense, Exclusive Dealing and Regulated Industries, 60 Calif. L. Rev. 1557, 1558-1567, 1572-1573 (1972); Note, Product Separability: A Workable Standard to Identify Tie-In Arrangements Under the Antitrust Laws, 46 S. Cal. L. Rev. 160 (1972). See also *Fortner I*, 394 U.S., at 525 (Fortas, J., dissenting); Note, Tying Arrangements and the Single Product Issue, 31 Ohio St. L. J. 861 (1970).

<sup>36</sup> Testimony that patients and their physicians frequently do differentiate between hospital services and anesthesiological services, and request specific anesthesiologists, was provided by Dr. Roux, Tr. 17, 20 (May 15, 1980, afternoon session), Dr. Hyde, *id.*, at 68-69, 72-74 (May 16, 1980), and other anesthesiologists as well, see *id., at 64, 87-88 (May 15, 1980, afternoon session)* (testimony of Dr. Charles Eckert); *id.*, at 25-30, 33-34 (May 16, 1980) (testimony of Dr. John Adriani). There was no testimony that patients or their surgeons do not differentiate between anesthesiological services and hospital services when making purchasing decisions. As a statistical matter, only 27 percent of anesthesiologists have financial relationships with hospitals. American Medical Association, Socioeconomic Characteristics of Medical Practice: 1983, p. 12 (1983). In this respect

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separate from the other services provided by the hospital." [513 F.Supp., at 540](#).<sup>37</sup> The Court of Appeals agreed with this finding, and went on to observe: "[An] anesthesiologist is normally selected by the surgeon, rather than the patient, based on familiarity gained through [\*\*\*\*39] a working relationship. Obviously, the surgeons who practice at East Jefferson Hospital do not gain familiarity with any anesthesiologists other than Roux and Associates." [686 F.2d, at 291](#).<sup>38</sup> The record amply supports the conclusion that consumers differentiate between anesthesiological services and the other hospital services provided by petitioners.<sup>39</sup>

[\*\*\*\*41] [\*24] Thus, the hospital's requirement that its patients obtain necessary anesthesiological [\*\*1565] services from Roux [\*\*\*21] combined the purchase of two distinguishable services in a single transaction.<sup>40</sup> [\*\*\*\*42] Nevertheless, the fact that this case involves a required [\*25] purchase of two services that would otherwise be purchased separately does not make the Roux contract illegal. As noted above, there is nothing inherently anticompetitive about packaged sales. Only if patients are forced to purchase Roux's services as a result

anesthesiologists may differ from radiologists, pathologists, and other types of hospital-based physicians (HBPs). "In some respects anesthesiologists are more akin to office-based MDs (particularly surgeons) than other HBPs. Anesthesiologists' outputs are more discrete, and these HBPs are predominantly fee-for-service practitioners who directly provide services to patients." Steinwald, Hospital-Based Physicians: Current Issues and Descriptive Evidence, *Health Care Financing Rev.* 63, 69 (Summer 1980). See also [United States v. American Society of Anesthesiologists, Inc., 473 F.Supp. 147, 150 \(SDNY 1979\)](#) ("By 1957 the salaried anesthesiologist had become the exception. Anesthesiologists began to establish independent practices and were able to obtain hospital privileges upon the same terms and conditions as other clinicians").

<sup>37</sup> Accordingly, in its conclusions of law the District Court treated the case as involving a tying arrangement. [513 F.Supp., at 542](#).

<sup>38</sup> Petitioners do not challenge these findings of the District Court and the Court of Appeals.

<sup>39</sup> One of the most frequently cited statements on this subject was made by Judge Van Dusen in [United States v. Jerrold Electronics Corp., 187 F.Supp. 545 \(ED Pa. 1960\)](#), aff'd, 365 U.S. 567 (1961) (*per curiam*). While this statement was specifically made with respect to § 3 of the Clayton Act, [15 U. S. C. § 14](#), its analysis is also applicable to [§ 1](#) of the Sherman Act, since with respect to the definition of tying the standards used by the two statutes are the same. See *Times-Picayune*, 345 U.S., at 608-609.

"There are several facts presented in this record which tend to show that a community television antenna system cannot properly be characterized as a single product. Others who entered the community antenna field offered all of the equipment necessary for a complete system, but none of them sold their gear exclusively as a single package as did Jerrold. The record also establishes that the number of pieces in each system varied considerably so that hardly any two versions of the alleged product were the same. Furthermore, the customer was charged for each item of equipment and not a lump sum for the total system. Finally, while Jerrold had cable and antennas to sell which were manufactured by other concerns, it only required that the electronic equipment in the system be bought from it." [187 F.Supp., at 559](#).

The record here shows that other hospitals often permit anesthesiological services to be purchased separately, that anesthesiologists are not fungible in that the services provided by each are not precisely the same, that anesthesiological services are billed separately, and that the hospital required purchases from Roux even though other anesthesiologists were available and Roux had no objection to their receiving staff privileges at East Jefferson. Therefore, the *Jerrold* analysis indicates that there was a tying arrangement here. *Jerrold* also indicates that tying may be permissible when necessary to enable a new business to break into the market. See [id., at 555-558](#). Assuming this defense exists, and assuming it justified the 1971 Roux contract in order to give Roux an incentive to go to work at a new hospital with an uncertain future, that justification is inapplicable to the 1976 contract, since by then Roux was willing to continue to service the hospital without a tying arrangement.

<sup>40</sup> This is not to say that [§ 1](#) of the Sherman Act gives a purchaser the right to buy a product that the seller does not wish to offer for sale. A grocer may decide to carry four brands of cookies and no more. If the customer wants a fifth brand, he may go elsewhere but he cannot sue the grocer even if there is no other in town. However, in such a case the customer is free to purchase no cookies at all, while buying other needed food. If the grocer required the customer to buy an unwanted brand of cookies in order to buy other items which the customer needs and cannot readily obtain elsewhere, then a tying question arises. Cf. *Northern Pacific R. Co. v. United States*, [356 U.S., at 7](#) (grocer selling flour can require customers to also buy sugar only "if its competitors were ready and able to sell flour by itself"). Here, the question is whether patients are forced to use an unwanted anesthesiologist in order to obtain needed hospital services.

466 U.S. 2, \*25; 104 S. Ct. 1551, \*\*1565; 80 L. Ed. 2d 2, \*\*\*21; 1984 U.S. LEXIS 49, \*\*\*\*42

of the hospital's market power would the arrangement have anticompetitive consequences. If no forcing is present, patients are free to enter a competing hospital and to use another anesthesiologist instead of Roux.<sup>41</sup> The fact that petitioners' patients are required to purchase two separate items is only the beginning of the appropriate inquiry.<sup>42</sup>

[\*\*\*\*43] [\*26] IV

[\*\*\*22] The question remains whether this arrangement involves the use of market power [\*\*1566] to force patients to buy services they would not otherwise purchase. Respondent's only basis for invoking the *per se* rule against tying and thereby avoiding analysis of actual market conditions is by relying on the preference of persons residing in Jefferson Parish to go to East Jefferson, the closest hospital. A preference of this kind, however, is not necessarily probative of significant market power.

LEdHN[14] [14]Seventy percent of the patients residing in Jefferson Parish enter hospitals other than East Jefferson. [513 F.Supp., at 539](#) Thus East Jefferson's "dominance" over persons residing in Jefferson Parish is far from overwhelming.<sup>43</sup> [\*\*\*45] The [\*27] fact that a substantial majority of the parish's residents elect not to enter East Jefferson means that the geographic data do not establish the kind of dominant market position that obviates the need for further inquiry into actual competitive conditions. The Court of Appeals acknowledged as much; it recognized that East [\*\*\*\*44] Jefferson's market share alone was insufficient as a basis to infer market power, and buttressed its conclusion by relying on "market imperfections"<sup>44</sup> that permit petitioners to charge noncompetitive

<sup>41</sup> An examination of the reason or reasons why petitioners denied respondent staff privileges will not provide the answer to the question whether the package of services they offered to their patients is an illegal tying arrangement. As a matter of antitrust law, petitioners may give their anesthesiology business to Roux because he is the best doctor available, because he is willing to work long hours, or because he is the son-in-law of the hospital administrator without violating the *per se* rule against tying. Without evidence that petitioners are using market power to force Roux upon patients there is no basis to view the arrangement as unreasonably restraining competition whatever the reasons for its creation. Conversely, with such evidence, the *per se* rule against tying may apply. Thus, we reject the view of the District Court that the legality of an arrangement of this kind turns on whether it was adopted for the purpose of improving patient care.

<sup>42</sup> Petitioners argue and the District Court found that the exclusive contract had what it characterized as procompetitive justifications in that an exclusive contract ensures 24-hour anesthesiology coverage, enables flexible scheduling, and facilitates work routine, professional standards, and maintenance of equipment. The Court of Appeals held these findings to be clearly erroneous since the exclusive contract was not necessary to achieve these ends. Roux was willing to provide 24-hour coverage even without an exclusive contract and the credentials committee of the hospital could impose standards for staff privileges that would ensure staff would comply with the demands of scheduling, maintenance, and professional standards. [686 F.2d, at 292](#). In the past, we have refused to tolerate manifestly anticompetitive conduct simply because the health care industry is involved. See [Arizona v. Maricopa Medical Society, 457 U.S., at 348-351](#); [National Gerimedical Hospital v. Blue Cross, 452 U.S. 378 \(1981\)](#); [American Medical Assn. v. United States, 317 U.S. 519, 528-529 \(1943\)](#). Petitioners seek no special solicitude. See n. 12, *supra*. We have also uniformly rejected similar "goodwill" defenses for tying arrangements, finding that the use of contractual quality specifications are generally sufficient to protect quality without the use of a tying arrangement. See [Standard Oil Co. of California v. United States, 337 U.S., at 305-306](#); [International Salt Co. v. United States, 332 U.S., at 397-398](#); [International Business Machines Corp. v. United States, 298 U.S., at 138-140](#). See generally Comment, Tying Arrangements under the Antitrust Laws: The "Integrity of the Product" Defense, 62 Mich. L. Rev. 1413 (1964). Since the District Court made no finding as to why contractual quality specifications would not protect the hospital, there is no basis for departing from our prior cases here.

<sup>43</sup> In fact its position in this market is not dissimilar from the market share at issue in *Times-Picayune*, which the Court found insufficient as a basis for inferring market power. See [345 U.S., at 611-613](#). Moreover, in other antitrust contexts this Court has found that market shares comparable to that present here do not create an unacceptable likelihood of anticompetitive conduct. See [United States v. Connecticut National Bank, 418 U.S. 656 \(1974\)](#); [United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 \(1956\)](#).

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prices for hospital services: the prevalence of third-party payment for health care costs reduces price competition, and a lack of adequate information renders consumers unable to evaluate the quality of the medical care provided by competing hospitals. [686 F.2d, at 290.](#)<sup>45</sup> While these factors may generate "market power" in some abstract sense,<sup>46</sup> they do not generate the kind of market power that justifies condemnation of tying.

**HNT** Tying arrangements need only be condemned if they restrain [\*\*\*\*46] competition on the merits by forcing purchases that would not otherwise be made. A lack of price or quality [\*28] competition does not create this type of forcing. If consumers lack price consciousness, that fact will not [\*\*\*23] force them to take an anesthesiologist whose services they do not want -- their indifference to price will have no impact on their willingness or ability to go to another hospital where they can utilize the services of the anesthesiologist of their choice. Similarly, if consumers cannot evaluate the quality of anesthesiological services, it follows that they are indifferent between certified anesthesiologists even in the absence of a tying arrangement -- such an arrangement cannot be said to have foreclosed a choice that would have otherwise been made "on the merits."

**LEdHN[15]** [15]Thus, neither of the "market imperfections" relied upon by the Court of Appeals forces consumers to take anesthesiological services they would not select in the absence of a tie. It is safe to assume that every patient undergoing a surgical operation needs the services of an anesthesiologist; at least [\*\*\*\*47] this record contains no evidence that the hospital "forced" any [\*\*1567] such services on unwilling patients.<sup>47</sup> The record therefore [\*29] does not provide a basis for applying the *per se* rule against tying to this arrangement.

[\*\*\*\*48] V

**LEdHN[16]** [16]In order to prevail in the absence of *per se* liability, respondent has the burden of proving that the Roux contract violated the Sherman Act because it unreasonably restrained competition. That burden necessarily involves an inquiry into the actual effect of the exclusive contract on competition among

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<sup>44</sup> The Court of Appeals acknowledged that absent these market imperfections, there was no basis for applying the *per se* rule against tying. "The contract at issue here involved only one hospital out of at least twenty in the area. Under the analysis applied to a truly competitive market, appellant has failed to prove an illegal tying arrangement." [686 F.2d, at 290.](#)

<sup>45</sup> Congress has found these market imperfections to exist. See [National Gerimedical Hospital v. Blue Cross, 452 U.S., at 388, n. 13, 391-393](#), and n. 18; [42 U. S. C. §§ 300k](#), 300k-2(b); H. R. Conf. Rep. No. 96-420, pp. 57-58 (1979); S. Rep. No. 96-96, pp. 52-53 (1979).

<sup>46</sup> As an economic matter, market power exists whenever prices can be raised above the levels that would be charged in a competitive market. See [Fortner II, 429 U.S., at 620; Fortner I, 394 U.S., at 503-504.](#)

<sup>47</sup> Nor is there an indication in the record that petitioners' practices have increased the social costs of their market power. Since patients' anesthesiological needs are fixed by medical judgment, respondent does not argue that the tying arrangement facilitates price discrimination. Where variable-quantity purchasing is unavailable as a means to enable price discrimination, commentators have seen less justification for condemning tying. See Dam, *supra* n. 23, at 15-17; Turner, *supra* n. 21, at 67-72. While tying arrangements like the one at issue here are unlikely to be used to facilitate price discrimination, they could have the similar effect of enabling hospitals "to evade price control in the tying product through clandestine transfer of the profit to the tied product. . ." [Fortner I, 394 U.S., at 513](#) (WHITE, J., dissenting). Insurance companies are the principal source of price restraint in the hospital industry; they place some limitations on the ability of hospitals to exploit their market power. Through this arrangement, petitioners may be able to evade that restraint by obtaining a portion of the anesthesiologists' fees and therefore realize a greater return than they could in the absence of the arrangement. This could also have an adverse effect on the anesthesiology market since it is possible that only less able anesthesiologists would be willing to give up part of their fees in return for the security of an exclusive contract. However, there are no findings of either the District Court or the Court of Appeals which indicate that this type of exploitation of market power has occurred here. The Court of Appeals found only that Roux's use of nurse anesthetists increased its and the hospital's profits, but there was no finding that nurse anesthetists might not be used with equal frequency absent the exclusive contract. Indeed, the District Court found that nurse anesthetists are utilized in all hospitals in the area. [513 F.Supp., at 537, 543](#). Moreover, there is nothing in the record which details whether this arrangement has enhanced the value of East Jefferson's market power or harmed quality competition in the anesthesiology market.

anesthesiologists. This competition takes place in a market that has not been defined. The market is not necessarily the same as the market in which hospitals compete in offering services to patients; it may encompass competition among anesthesiologists for exclusive contracts such as the Roux contract and might be statewide [\*\*\*24] or merely local.<sup>48</sup> There is, however, insufficient evidence in this record to provide a basis for finding that the Roux contract, as it actually operates in the market, has unreasonably restrained competition. [\*30] The record sheds little light on how this arrangement affected consumer demand for separate arrangements with a specific anesthesiologist.<sup>49</sup> [\*\*\*\*50] The evidence indicates that some surgeons and patients preferred respondent's services to those of [\*\*\*\*49] Roux, but there is no evidence that any patient who was sophisticated enough to know the difference between two anesthesiologists was not also able to go to a hospital that would provide him with the anesthesiologist of his choice.<sup>50</sup>

[\*\*1568] [LEdHN\[17A\]](#) [↑] [17A] [LEdHN\[18\]](#) [↑] [18] In sum, all that the record establishes is that the choice of anesthesiologists at East Jefferson has been limited to one of the four doctors who are associated with Roux and therefore have staff privileges.<sup>51</sup> Even if Roux did not have an exclusive contract, the range of alternatives open to the patient would be severely limited by the nature of the transaction and the hospital's unquestioned right to exercise some control over the identity and the number of doctors to whom it accords staff privileges. If respondent is admitted to the staff of East Jefferson, the range of choice will be enlarged [\*\*\*\*51] from [\*31] four to five doctors, but the most significant restraints on the patient's freedom to select a specific anesthesiologist will nevertheless remain.<sup>52</sup> Without a showing [\*\*\*25] of actual adverse effect on competition, respondent cannot make out a case under the antitrust laws, and no such showing has been made.

[\*\*\*\*52] VI

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<sup>48</sup> While there was some rather impressionistic testimony that the prevalence of exclusive contracts tended to discourage young doctors from entering the market, the evidence was equivocal and neither the District Court nor the Court of Appeals made any findings concerning the contract's effect on entry barriers. Respondent does not press the point before this Court. It is possible that under some circumstances an exclusive contract could raise entry barriers since anesthesiologists could not compete for the contract without raising the capital necessary to run a hospitalwide operation. However, since the hospital has provided most of the capital for the exclusive contractor in this case, that problem does not appear to be present.

<sup>49</sup> While it is true that purchasers may not be fully sensitive to the price or quality implications of a tying arrangement, so that competition may be impeded, see n. 24, *supra*, this depends on an empirical demonstration concerning the effect of the arrangement on price or quality, and the record reveals little if anything about the effect of this arrangement on the market for anesthesiological services.

<sup>50</sup> If, as is likely, it is the patient's doctor and not the patient who selects an anesthesiologist, the doctor can simply take the patient elsewhere if he is dissatisfied with Roux. The District Court found that most doctors in the area have staff privileges at more than one hospital. [513 F.Supp., at 541](#).

<sup>51</sup> [LEdHN\[17B\]](#) [↑] [17B]

The effect of the contract, of course, has been to remove the East Jefferson Hospital from the market open to Roux's competitors. Like any exclusive-requirements contract, this contract could be unlawful if it foreclosed so much of the market from penetration by Roux's competitors as to unreasonably restrain competition in the affected market, the market for anesthesiological services. See generally *Tampa Electric Co. v. Nashville Coal Co.*, [365 U.S. 320 \(1961\)](#); *Standard Oil Co. of California v. United States*, [337 U.S. 293 \(1949\)](#). However, respondent has not attempted to make this showing.

<sup>52</sup> The record simply tells us little if anything about the effect of this arrangement on price or quality of anesthesiological services. As to price, the arrangement did not lead to an increase in the price charged to the patient. [686 F.2d, at 291](#). As to quality, the record indicates little more than that there have never been any complaints about the quality of Roux's services, and no contention that his services are in any respect inferior to those of respondent. Moreover, the self-interest of the hospital, as well as the ethical and professional norms under which it operates, presumably protect the quality of anesthesiological services. See Joint Commission on Accreditation of Hospitals, Accreditation Manual for Hospitals 3-10, 151-154 (1983).

LEdHN[1B] [1B]Petitioners' closed policy may raise questions of medical ethics,<sup>53</sup> and may have inconvenienced some patients who would prefer to have their anesthesia administered by someone other than a member of Roux & Associates, but it does not have the obviously unreasonable impact on purchasers that has characterized the tying arrangements that this Court has branded unlawful. There is no evidence that the price, the quality, or the supply or demand for either the "tying product" or the "tied product" involved in this case has been adversely affected by the exclusive contract between Roux and the hospital. It may well be true that the contract made it necessary for Dr. Hyde and others to practice elsewhere, rather than at East Jefferson. But there has been no showing that the market as a whole has been affected at all by the contract. Indeed, as we previously noted, the record tells us very little about the market for the services of anesthesiologists. [\*32] Yet that is the market in which the exclusive contract has had its principal impact. There is simply no showing here of the kind of restraint [\*\*\*\*53] on competition that is prohibited by the Sherman Act. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.<sup>54</sup>

*It is so ordered.*

**Concur by:** BRENNAN; O'CONNOR

## Concur

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JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

As the opinion for the Court demonstrates, we have long held that tying arrangements are subject to evaluation for *per se* illegality under § 1 of the Sherman Act. Whatever merit the policy arguments against this longstanding construction of the Act might have, Congress, presumably [\*\*1569] aware of our decisions, has never changed the rule by amending the Act. In such circumstances, our practice usually has been to stand by a settled statutory interpretation [\*\*\*54] and leave the task of modifying the statute's reach to Congress. See *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 769 (1984) (BRENNAN, J., concurring). I see no reason to depart from that principle in this case and therefore join the opinion and judgment of the Court.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, concurring in the judgment.

East Jefferson Hospital, a public hospital governed by petitioners, requires patients to use the anesthesiological services provided by Roux & Associates, as they are the only doctors authorized to administer anesthesia to patients in the hospital. The Court of Appeals found that this [\*\*\*26] arrangement was a tie-in illegal under the Sherman Act. 686 F.2d 286, 1\*331 (CA5 1982). I concur in the Court's decision to reverse but write separately to explain why I believe the hospital-Roux contract, whether treated as effecting a tie between services provided to patients, or as an exclusive dealing arrangement between the hospital and certain anesthesiologists, is properly analyzed under the rule of reason.

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Tying is a form of marketing [\*\*\*55] in which a seller insists on selling two distinct products or services as a package. A supermarket that will sell flour to consumers only if they will also buy sugar is engaged in tying. Flour is referred to as the *tying* product, sugar as the *tied* product. In this case the allegation is that East Jefferson Hospital has unlawfully tied the sale of general hospital services and operating room facilities (the tying service) to the sale of anesthesiologists' services (the tied services). The Court has on occasion applied a *per se* rule of illegality in

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<sup>53</sup> See App. A to Brief for American Society of Anesthesiologists, Inc., as *Amicus Curiae*.

<sup>54</sup> The claims raised by respondent but not passed upon by the Court of Appeals remain open on remand. See n. 2, *supra*.

actions alleging tying in violation of [§ 1](#) of the Sherman Act. *International Salt Co. v. United States*, [332 U.S. 392 \(1947\)](#).

Under the usual logic of the *per se* rule, a restraint on trade that rarely serves any purposes other than to restrain competition is illegal without proof of market power or anticompetitive effect. See, e. g., *Northern Pacific R. Co. v. United States*, [356 U.S. 1, 5 \(1958\)](#). In deciding whether an economic restraint should be declared illegal *per se*, "[the] probability that anticompetitive consequences will result from a practice and the severity of [\*\*\*\*56] those consequences [is] balanced against its procompetitive consequences. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them." *Continental T. V., Inc. v. GTE Sylvania Inc.*, [433 U.S. 36, 50, n. 16 \(1977\)](#). See also *Arizona v. Maricopa County Medical Society*, [457 U.S. 332, 351 \(1982\)](#). Only when there is very little loss to society from banning a restraint [\*34] altogether is an inquiry into its costs in the individual case considered to be unnecessary.

Some of our earlier cases did indeed declare that tying arrangements serve "hardly any purpose beyond the suppression of competition." *Standard Oil Co. of California v. United States*, [337 U.S. 293, 305-306 \(1949\)](#) (dictum). However, this declaration was not taken literally even by the cases that purported to rely upon it. In practice, a tie has been illegal only if the seller is shown to have "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market [\*\*\*\*57] for the tied product. . . ." *Northern Pacific R. Co.*, 356 U.S., at 6. Without "control or dominance over the tying product," the seller could not use the tying product as "an effectual weapon to pressure buyers into taking the tied [\*\*1570] item," so that any restraint of trade would be "insignificant." *Ibid.* The Court has never been willing to say of tying arrangements, as it has of price fixing, division of markets, and other [\*\*\*27] agreements subject to *per se* analysis, that they are always illegal, without proof of market power or anticompetitive effect.

The "*per se*" doctrine in tying cases has thus always required an elaborate inquiry into the economic effects of the tying arrangement.<sup>1</sup> As a result, tying doctrine incurs the costs of a rule-of-reason approach without achieving its benefits: the doctrine calls for the extensive and time-consuming economic analysis characteristic of the rule of reason, but then may be interpreted to prohibit arrangements that economic analysis would show to be beneficial. Moreover, the *per se* label in the tying context has generated more confusion [\*35] than coherent law because it appears to invite [\*\*\*\*58] lower courts to omit the analysis of economic circumstances of the tie that has always been a necessary element of tying analysis.

The time has therefore come to abandon the "*per se*" label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have. The law of tie-ins will thus be brought into accord with the law applicable to all other allegedly anticompetitive economic arrangements, except those few horizontal or quasi-horizontal [\*\*\*\*59] restraints that can be said to have no economic justification whatsoever.<sup>2</sup> This change will rationalize rather than abandon tie-in doctrine as it is already applied.

## II

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<sup>1</sup> This inquiry has been required in analyzing both the *prima facie* case and affirmative defenses. Most notably, *United States v. Jerrold Electronics Corp.*, [187 F.Supp. 545, 559-560 \(ED Pa. 1960\)](#), aff'd *per curiam*, [365 U.S. 567 \(1961\)](#), upheld a requirement that buyers of television systems purchase the complete system, as well as installation and repair service, on the grounds that the tie assured that the systems would operate and thereby protected the seller's business reputation.

<sup>2</sup> Tying law is particularly anomalous in this respect because arrangements largely indistinguishable from tie-ins are generally analyzed under the rule of reason. For example, the "*per se*" analysis of tie-ins subjects restrictions on a franchisee's freedom to purchase supplies to a more searching scrutiny than restrictions on his freedom to sell his products. Compare, e. g., *Siegel v. Chicken Delight, Inc.*, [448 F.2d 43 \(CA9 1971\)](#), cert. denied, [405 U.S. 955 \(1972\)](#), with *Continental T. V., Inc. v. GTE Sylvania Inc.*, [433 U.S. 36 \(1977\)](#). And exclusive contracts that, like tie-ins, require the buyer to purchase a product from one seller are subject only to the rule of reason. See *infra*, at 44-45.

Our prior opinions indicate that the purpose of tying law has been to identify [\*\*\*\*60] and control those tie-ins that have a demonstrable exclusionary impact in the tied-product market, see *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 605 (1953), or that abet the harmful exercise of market power that the seller possesses in the tying product market.<sup>3</sup> Under the rule of reason tying arrangements should be disapproved only in such instances.

Market power in the *tying* product may be acquired legitimately (e. g., through the grant of a patent) or illegitimately (e. g., as a result of unlawful monopolization). In either event, exploitation of consumers in the market for the tying [\*36] product is a possibility that exists and that may be regulated under § 2 of the Sherman Act without reference to any [\*\*\*28] tying arrangements that the seller may have developed. The existence of a tied product normally does not increase the profit that the seller with market power can extract from sales of the *tying* product. [\*\*\*\*61] A seller with a monopoly on flour, for example, cannot increase the profit it can extract from flour consumers simply by forcing them to buy sugar along with their flour. Counterintuitive though that assertion may seem, it is easily demonstrated and widely accepted. See, e. g., R. Bork, *The Antitrust Paradox* 372-374 [\*\*1571] (1978); P. Areeda, *Antitrust Analysis* 735 (3d ed. 1981).

Tying may be economically harmful primarily in the rare cases where power in the market for the tying product is used to create *additional* market power in the market for the *tied* product.<sup>4</sup> [\*\*\*\*62] The antitrust law is properly concerned with [\*37] tying when, for example, the flour monopolist threatens to use its market power to acquire additional power in the sugar market, perhaps by driving out competing sellers of sugar, or by making it more difficult for new sellers to enter the sugar market. But such extension of market power is unlikely, or poses no threat of economic harm, unless the two markets in question and the nature of the two products tied satisfy three threshold criteria.<sup>5</sup>

First, the seller must have power in the tying-product market.<sup>6</sup> [\*\*\*\*64] Absent [\*\*\*29] such power tying cannot conceivably have any adverse impact in the tied-product market, and can be only procompetitive in the tying-

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<sup>3</sup> See n. 4, *infra*.

<sup>4</sup> Tying might be undesirable in two other instances, but the hospital-Roux arrangement involves neither one.

In a regulated industry a firm with market power may be unable to extract a supercompetitive profit because it lacks control over the prices it charges for regulated products or services. Tying may then be used to extract that profit from sale of the unregulated, tied products or services. See *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 513 (1969) (WHITE, J., dissenting).

Tying may also help the seller engage in price discrimination by "metering" the buyer's use of the tying product. Cf. *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936); *International Salt Co. v. United States*, 332 U.S. 392 (1947). Price discrimination may be independently unlawful, see 15 U. S. C. § 13. Price discrimination may, however, decrease rather than increase the economic costs of a seller's market power. See, e. g., R. Bork, *The Antitrust Paradox* 398 (1978); P. Areeda, *Antitrust Analysis* 608-610 (3d ed. 1981); O. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* 11-13 (1975). *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 617 (1977) (*Fortner II*), did not hold that price discrimination in the form of a tie-in is always economically harmful; that case indicated only that price discrimination may indicate market power in the tying-product market. But there is no need in this case to address the problem of price discrimination facilitated by tying. The discussion herein is aimed only at tying arrangements as to which no price discrimination is alleged.

<sup>5</sup> Wholly apart from market characteristics, a prerequisite to application of the Sherman Act is an effect on interstate commerce. See, e. g., *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232, 246 (1980); *Burke v. Ford*, 389 U.S. 320, 322 (1967). It is not disputed that such an impact is present here.

<sup>6</sup> The Court has failed in the past to define how much market power is necessary, but in the context of this case it is inappropriate to attempt to resolve that question. In *International Salt Co. v. United States, supra*, the Court assumed that a patent conferred market power and therefore sufficiently established "the tendency of the arrangement to accomplishment of monopoly." *Id. at 396*. In its next tying case, *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953), the Court distinguished *International Salt* in part by finding that there was no market "dominance," 345 U.S., at 610-613, after a careful

product market.<sup>7</sup> If the [\*38] seller of flour has no [\*\*1572] market power over flour, it will gain none by insisting that its buyers take some sugar as well. See *United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 620 (1977)* (*Fortner II*); *Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 503-504 (1969)* (*Fortner I*); *United States v. Loew's Inc., 371 U.S. 38, 45, 48, n. 5 (1962)*; *Northern Pacific R. Co. v. United States, 356 U.S., at 6-7.* [\*\*\*\*63]

[\*\*\*65] Second, there must be a substantial threat that the tying seller will acquire market power in the tied-product market. No such threat exists if the tied-product market is occupied by many stable sellers who are not likely to be driven out by the tying, or if entry barriers in the tied-product market are low. If, for example, there is an active and vibrant market for sugar -- one with numerous sellers and buyers who do not deal in flour -- the flour monopolist's tying of sugar to flour need not be declared unlawful. Cf. *Fortner II, supra, at 617-618*, and n. 8; *Fortner I, supra, at 498-499*; *Times-Picayune Publishing Co. v. United States, 345 U.S., at 611*; *Standard Oil Co. of California v. United States, 337 U.S., at 305-306*; *International Salt Co. v. United States, 332 U.S., [\*391] at 396*. If, on the other hand, the tying arrangement is likely to erect significant barriers to entry into the tied-product market, the tie remains suspect. *Atlantic Refining Co. v. FTC, 381 U.S. 357, 371 (1965)*.

[\*\*\*30] Third, there must be a coherent economic basis for [\*\*\*66] treating the tying and tied products as distinct. All but the simplest products can be broken down into two or more components that are "tied together" in the final sale. Unless it is to be illegal to sell cars with engines or cameras with lenses, this analysis must be guided by some limiting principle. For products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately *without also purchasing the tying product*.<sup>8</sup> When the tied product has no use other than in conjunction with the tying product, a seller of the tying product can acquire no *additional* market power by selling the two products together. If sugar is useless to consumers except when used with flour, the flour seller's market power is projected into the sugar market whether or not the two products are actually sold together; the flour seller can exploit what market power it has over flour with or without the tie.<sup>9</sup> The flour seller will therefore have [\*\*1573] little incentive to monopolize the sugar market unless it can produce and

consideration of the relevant market. Then, in *Northern Pacific R. Co. v. United States, 356 U.S. 1, 6-8, 11 (1958)*, the Court required only a minimal showing of market power. More recently, in *Fortner II, supra*, the Court conducted a more extensive analysis of whether the tie was actually an exercise of market power, considering such factors as the size and profitability of the firm seeking to impose the tie, the character of the tying product, and the effects of the tie -- the price charged for the products, the number of customers affected, the functional relation between the tied and tying product.

<sup>7</sup> A common misconception has been that a patent or copyright, a high market share, or a unique product that competitors are not able to offer suffices to demonstrate market power. While each of these three factors might help to give market power to a seller, it is also possible that a seller in these situations will have no market power: for example, a patent holder has no market power in any relevant sense if there are close substitutes for the patented product. Similarly, a high market share indicates market power only if the market is properly defined to include all reasonable substitutes for the product. See generally Landes & Posner, Market Power in Antitrust Cases, 94 Harv. L. Rev. 937 (1981).

Nor does any presumption of market power find support in our prior cases. Although *United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948)*, considered the legality of "block-booking" of motion pictures, which ties the purchase of rights to copyrighted motion pictures to purchase of other motion pictures of the same copyright holder, the Court did not analyze the arrangement with the schema of the tying cases. Rather, the Court borrowed the patent law principle of "patent misuse," which prevents the holder of a patent from using the patent to require his customers to purchase unpatented products. *Id., at 156-159*. See, e. g., *Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661, 665 (1944)*. The "patent misuse" doctrine may have influenced the Court's willingness to strike down the arrangement at issue in *International Salt* as well, although the Court did not cite the doctrine in that case.

<sup>8</sup> Whether the tying product is one that consumers might wish to purchase without the tied product should be irrelevant. Once it is conceded that the seller has market power over the tying product it follows that the seller can sell the tying product on noncompetitive terms. The injury to consumers does not depend on whether the seller chooses to charge a supercompetitive price, or charges a competitive price but insists that consumers also buy a product that they do not want.

<sup>9</sup> Cf. Areeda, *supra* n. 4, at 735; Ross, The Single Product Issue in Antitrust Tying: A Functional Approach, 23 Emory L. J. 963, 1010 (1974); Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L. J. 19, 21-23 (1957).

distribute sugar more cheaply than other sugar sellers. And in this unusual case, where flour is monopolized [\*\*\*\*67] and sugar is useful only when [\*40] used with flour, consumers will suffer no further economic injury by the monopolization of the sugar market.

Even when the tied product does have a use separate from the tying product, it makes little sense to label a package as two products [\*\*\*\*68] without also considering the economic justifications for the sale of the package as a unit. When the economic advantages of joint packaging are substantial the package is not appropriately viewed as two products, and that should be the end of the tying inquiry. The lower courts largely have adopted this approach.<sup>10</sup> See, e. g., [\*\*\*31] *Foster v. Maryland State Savings and Loan Assn.*, 191 U. S. App. D. C. 226, 228-231, 590 F.2d 928, 930-933 (1978), cert. denied, 439 U.S. 1071 (1979); *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1330 (CA5 1976); *Kugler v. AAMCO Automatic Transmissions, Inc.*, 460 F.2d 1214 (CA8 1972); *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*, 448 F.Supp. 228, 230 [\*41] (ND Cal. 1978); *United States v. Jerrold Electronics Corp.*, 187 F.Supp. 545, 563 (ED Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961).

[\*\*\*\*69] These three conditions -- market power in the tying product, a substantial threat of market power in the tied product, and a coherent economic basis for treating the products as distinct -- are only threshold requirements. Under the rule of reason a tie-in may prove acceptable even when all three are met. Tie-ins may entail economic benefits as well as economic harms, and if the threshold requirements are met these benefits should enter the rule-of-reason balance.

"[Tie-ins] may facilitate new entry into fields where established sellers have wedded their customers to them by ties of habit and custom. *Brown Shoe Co. v. United States*, 370 U.S. 294, 330 (1962). . . . They may permit clandestine price cutting in products which otherwise would have no price competition at all because of fear of retaliation from the few other producers dealing in the market. They may protect the reputation of the tying product if failure to use the tied product in conjunction with it may cause it to malfunction. . . . [Citing] *Pick Mfg. Co. v. General Motors Corp.*, 80 F.2d 641 (C. A. 7th Cir. 1935), aff'd, 299 U.S. 3 (1936). And, [\*\*\*\*70] if the tied and tying products are functionally related, they may reduce costs through economies of joint production and distribution." *Fortner I*, 394 U.S., at 514, n. 9 (WHITE, J., dissenting).

The ultimate decision whether a tie-in is illegal under the antitrust laws should depend upon the demonstrated economic effects [\*\*1574] of the challenged agreement. It may, for example, be entirely innocuous that the seller exploits its control over the tying product to "force" the buyer to purchase the tied product. For when the seller exerts market power only in the tying-product market, it makes no difference to him or his customers whether he exploits that power by raising [\*42] the price of the tying product or by "forcing" customers to buy a tied product. See Markovits, Tie-Ins, Reciprocity and the Leverage Theory, 76 Yale L. J. 1397, 1397-1398 (1967); Burstein, A Theory of Full-Line Forcing, 55 Nw. U. L. Rev. 62, 62-63 (1960). On the other hand, tying may make the provision

<sup>10</sup> The examination of the economic advantages of tying may properly be conducted as part of the rule-of-reason analysis, rather than at the threshold of the tying inquiry. This approach is consistent with this Court's occasional references to the problem. The Court has not heretofore had occasion to set forth any general criteria for determining when two apparently separate products are components of a single product for tying analysis. In *Times-Picayune Publishing Co.*, the Court held that advertising space in a morning newspaper was the same product as advertising space in the evening newspaper -- access to readership of the respective newspapers -- because the subscribers had no reason to distinguish among the readers of the two papers. *345 U.S.*, at 613-616. In *Fortner I*, the Court, reversing the grant of a motion for summary judgment, rejected the contention that credit could never be separate from the product for whose purchase credit was extended. *394 U.S.*, at 506-507. The Court disclaimed any determination of "the standards for determining exactly when a transaction involves only a single product." *Id.*, at 507. These cases indicate that consideration of whether a buyer might prefer to purchase one component without the other is one of the factors in tying analysis and, more generally, that economic analysis rather than mere conventional separability into different markets should determine whether one or two products are involved in the alleged tie.

of packages of goods and services more efficient. A tie-in should be condemned only when its anticompetitive impact outweighs its contribution to efficiency.

### [\*\*\*\*71] III

Application of these criteria to the case at hand is straightforward.

[\*\*\*32] Although the issue is in doubt, we may assume that the hospital does have market power in the provision of hospital services in its area. The District Court found to the contrary, *513 F.Supp. 532, 541 (ED La. 1981)*, but the Court of Appeals determined that the hospital does possess market power in an appropriately defined market. While appellate courts should normally defer to the district courts' findings on such fact-bound questions,<sup>11</sup> I shall assume for the purposes of this discussion that the Court of Appeals' determination that the hospital does have some power in the provision of hospital services in its local market is accepted.

Second, in light of the hospital's presumed market power, we may also assume that there is a substantial threat that East Jefferson [\*\*\*\*72] will acquire market power over the provision of anesthesiological services in its market. By tying the sale of anesthesia to the sale of other hospital services the hospital can drive out other sellers of those services who might otherwise operate in the local market. The hospital may thus gain local market power in the provision of anesthesiology: anesthesiological services offered in the hospital's market, narrowly defined, will be purchased only from Roux, under the hospital's auspices.

[\*43] But the third threshold condition for giving closer scrutiny to a tying arrangement is not satisfied here: there is no sound economic reason for treating surgery and anesthesia as separate services. Patients are interested in purchasing anesthesia only in conjunction with hospital services,<sup>12</sup> so the hospital can acquire no *additional* market power by selling the two services together. Accordingly, the link between the hospital's services and anesthesia administered by Roux will affect neither the amount of anesthesia provided nor the combined price of anesthesia and surgery for those who choose to become the hospital's patients. In these circumstances, anesthesia and surgical [\*\*\*\*73] services should probably not be characterized as distinct products for tying purposes.

Even if they are, the tying should not be considered a violation of § 1 of the Sherman Act because tying here cannot increase the seller's already absolute power over the volume of production of the tied product, which is an inevitable consequence of the fact that very few patients will choose to undergo surgery without receiving anesthesia. The hospital-Roux contract therefore has little potential to harm the patients. On the other side of the balance, the District Court found, and the Court of Appeals did not dispute, that the tie-in conferred significant benefits upon the hospital and the patients that it served.

The tie-in improves patient care and permits more efficient hospital operation in a number of ways. From the viewpoint of hospital management, [\*\*\*\*74] the tie-in ensures 24-hour [\*\*1575] anesthesiology coverage, aids in standardization of procedures and efficient use of equipment, facilitates flexible scheduling of operations, and permits the hospital more effectively [\*\*\*33] to monitor the quality of anesthesiological services. Further, the tying arrangement is advantageous to patients because, as the District Court found, the closed anesthesiology department [\*44] places upon the hospital, rather than the individual patient, responsibility to select the physician who is to provide anesthesiological services. The hospital also assumes the responsibility that the anesthesiologist will be available, will be acceptable to the surgeon, and will provide suitable care to the patient. In assuming these responsibilities -- responsibilities that a seriously ill patient frequently may be unable to discharge -- the hospital provides a valuable service to its patients. And there is no indication that patients were dissatisfied with the quality of anesthesiology that was provided at the hospital or that patients wished to enjoy the services of anesthesiologists other than those that the hospital employed. Given this evidence of [\*\*\*\*75] the advantages and effectiveness of the closed anesthesiology department, it is not surprising that, as the District Court found, such arrangements are

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<sup>11</sup> See *Fed. Rule Civ. Proc. 52(a); Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 855-858 (1982)*.

<sup>12</sup> While the record appears to be devoid of factual findings on this point the assumption is a safe one, and certainly one that finds no contradiction in the record.

accepted practice in the majority of hospitals of New Orleans and in the health care industry generally. Such an arrangement, which has little anticompetitive effect and achieves substantial benefits in the provision of care to patients, is hardly one that the antitrust law should condemn.<sup>13</sup> This conclusion reaffirms our threshold determination that the joint provision of hospital services and anesthesiology should not be viewed as involving a tie between distinct products, and therefore should require no additional scrutiny under the antitrust law.

#### IV

Whether or not the hospital-Roux contract is characterized [\*\*\*\*76] as a tie between distinct products, the contract unquestionably does constitute exclusive dealing. Exclusive-dealing arrangements are independently subject to scrutiny under §1 of the Sherman Act, and are also analyzed under the rule of [\*45] reason. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 333-335 (1961).

The hospital-Roux arrangement could conceivably have an adverse effect on horizontal competition among anesthesiologists, or among hospitals. Dr. Hyde, who competes with the Roux anesthesiologists, and other hospitals in the area, who compete with East Jefferson, may have grounds to complain that the exclusive contract stifles horizontal competition and therefore has an adverse, albeit indirect, impact on consumer welfare even if it is not a tie.

Exclusive-dealing arrangements may, in some circumstances, create or extend market power of a supplier or the purchaser party to the exclusive-dealing arrangement, and may thus restrain horizontal competition. Exclusive dealing can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods, or by allowing [\*\*\*\*77] one buyer of goods unreasonably to deprive other buyers of a needed source of supply. [\*\*\*34] In determining whether an exclusive-dealing contract is unreasonable, the proper focus is on the structure of the market for the products or services in question -- the number of sellers and buyers in the market, the volume of their business, and the ease with [\*\*1576] which buyers and sellers can redirect their purchases or sales to others. Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal. *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949). When the sellers of services are numerous and mobile, and the number of buyers is large, exclusive-dealing arrangements of narrow scope pose no threat of adverse economic consequences. To the contrary, they may be substantially procompetitive by ensuring stable markets and encouraging long-term, mutually advantageous business relationships.

At issue here is an exclusive-dealing arrangement between a firm of four anesthesiologists and one relatively small hospital. [\*46] There is no suggestion [\*\*\*\*78] that East Jefferson Hospital is likely to create a "bottleneck" in the availability of anesthesiologists that might deprive other hospitals of access to needed anesthesiological services, or that the Roux associates have unreasonably narrowed the range of choices available to other anesthesiologists in search of a hospital or patients that will buy their services. Cf. *Associated Press v. United States*, 326 U.S. 1 (1945). A firm of four anesthesiologists represents only a very small fraction of the total number of anesthesiologists whose services are available for hire by other hospitals, and East Jefferson is one among numerous hospitals buying such services. Even without engaging in a detailed analysis of the size of the relevant markets we may readily conclude that there is no likelihood that the exclusive-dealing arrangement challenged here will either unreasonably enhance the hospital's market position relative to other hospitals, or unreasonably permit Roux to acquire power relative to other anesthesiologists. Accordingly, this exclusive-dealing arrangement must be sustained under the rule of reason.

#### V

For these reasons I conclude that the hospital-Roux [\*\*\*\*79] contract does not violate §1 of the Sherman Act. Since anesthesia is a service useful to consumers only when purchased in conjunction with hospital services, the

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<sup>13</sup> The Court of Appeals disregarded the benefits of the tie because it found that there were less restrictive means of achieving them. In the absence of an adequate basis to expect any harm to competition from the tie-in, this objection is simply irrelevant.

466 U.S. 2, \*46; 104 S. Ct. 1551, \*\*1576; 80 L. Ed. 2d 2, \*\*\*34; 1984 U.S. LEXIS 49, \*\*\*\*79

arrangement is not properly characterized as a tie between distinct products. It threatens no additional economic harm to consumers beyond that already made possible by any market power that the hospital may possess. The fact that anesthesia is used only together with other hospital services is sufficient, standing alone, to insulate from attack the hospital's decision to tie the two types of service.

Whether or not this case involves tying of distinct products, the hospital-Roux contract is subject to scrutiny under the rule of reason as an exclusive-dealing arrangement. Plainly, however, the arrangement forecloses only a small [\*47] fraction of the markets in which anesthesiologists may sell their services, and a still smaller fraction of the market in which hospitals may secure anesthesiological [\*\*\*35] services. The contract therefore survives scrutiny under the rule of reason.

The judgment of the Court of Appeals for the Fifth Circuit should be reversed, and the case should be remanded for any further [\*\*\*80] proceedings on respondent's remaining claims. See *ante*, at 5, n. 2.

## References

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[54 Am Jur 2d, Monopolies, Restraints of Trade and Unfair Trade Practices 59-72](#)

### [15 USCS 1](#)

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 30

L Ed Index to Annos, Restraints of Trade and Monopolies

ALR Quick Index, Restraints of Trade and Monopolies

Federal Quick Index, Tying arrangements

#### Annotation References:

What constitutes sufficient economic power to make tying arrangement unlawful restraint of trade violative of 1 of Sherman Act ([15 USCS 1](#)). [51 L Ed 2d 826](#).

What constitutes separate and distinct products or services for purposes of determining whether tying arrangement violates 1 of the Sherman Act ([15 USCS 1](#)) or 3 of Clayton Act ([15 USCS 14](#)). 46 ALR Fed 516. [\*\*\*81]

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## *Hoover v. Ronwin*

Supreme Court of the United States

January 16, 1984, Argued ; May 14, 1984, Decided

No. 82-1474

### **Reporter**

466 U.S. 558 \*; 104 S. Ct. 1989 \*\*; 80 L. Ed. 2d 590 \*\*\*; 1984 U.S. LEXIS 76 \*\*\*\*; 52 U.S.L.W. 4535; 1984-1 Trade Cas. (CCH) P65,980

HOOVER ET AL. v. RONWIN ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

**Disposition:** [686 F.2d 692](#), reversed.

## **Core Terms**

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Sherman Act, sovereign, grading, anticompetitive, immunity, bar examination, recommend, articulated, lawyers, state-action, anti trust law, formula, state action, state bar, competence, regulation, antitrust, state supreme court, antitrust immunity, practice of law, licensing, state policy, conspiracy, restraint of trade, artificially, challenges, restrain, exempt, guild, delegated

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > State & Territorial Governments > Legislatures

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

### **[HN1](#) [down arrow] Exemptions & Immunities, Parker State Action Doctrine**

Under the court's rationale in [Parker v. Brown, 317 U.S. 341 \(1943\)](#), when a state legislature adopts legislation, its actions constitute those of the state, and ipso facto are exempt from the operation of the antitrust laws.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

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

### **[HN2](#) [down arrow] Scope, Exemptions**

466 U.S. 558, \*558; 104 S. Ct. 1989, \*\*1989; 80 L. Ed. 2d 590, \*\*\*590; 1984 U.S. LEXIS 76, \*\*\*\*1

A state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legislature. Therefore, a decision of a state supreme court, acting legislatively rather than judicially, is exempt from Sherman Act liability as state action. Closer analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization. In such cases, it becomes important to ensure that the anticompetitive conduct of the state's representative is contemplated by the state.

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

### [\*\*HN3\*\*](#) Exemptions & Immunities, Parker State Action Doctrine

If the replacing of entirely free competition with some form of regulation or restraint is not authorized or approved by the state then the rationale of [\*Parker v. Brown, 317 U.S. 341 \(1943\)\*](#), is inapposite. As a result, in cases involving the anticompetitive conduct of a nonsovereign state representative the court requires a showing that the conduct is pursuant to a clearly articulated and affirmatively expressed state policy to replace competition with regulation. The court also has found the degree to which the state legislature or supreme court supervises its representative to be relevant to the inquiry. When the conduct is that of the sovereign itself, on the other hand, the danger of unauthorized restraint of trade does not arise. Where the conduct at issue is in fact that of the state legislature or supreme court, the court need not address the issues of "clear articulation" and "active supervision."

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

Legal Ethics > Practice Qualifications

### [\*\*HN4\*\*](#) Exemptions & Immunities, Parker State Action Doctrine

The regulation of the activities of the bar is at the core of the state's power to protect the public.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN5\*\*](#) Scope, Exemptions

The reason that state action is immune from Sherman Act liability is not that the state has chosen to act in an anticompetitive fashion, but that the state itself has chosen to act. There is no suggestion of a purpose to restrain state action in the Sherman Act's legislative history. The court did not suggest in Parker that a state action is exempt from antitrust liability only if the sovereign acted wisely after full disclosure from its subordinate officers. The only requirement is that the action be that of the state acting as a sovereign.

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

## **HN6[] Exemptions & Immunities, Parker State Action Doctrine**

Where the action complained of is that of the state itself, the action is exempt from antitrust liability regardless of the state's motives in taking the action.

## **Lawyers' Edition Display**

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### **Decision**

State action antitrust immunity held to cover state committee's grading of bar examinations.

### **Summary**

One who failed the Arizona bar examination brought suit in the United States District Court for the District of Arizona against members of the Arizona Supreme Court's Committee on Examinations and Admissions, alleging that the committee members had conspired to restrain trade in violation of 1 of the Sherman Act by artificially reducing the numbers of competing attorneys in the state of Arizona through setting the bar examination grading scale with reference to the number of new attorneys sought desirable rather than with reference to some suitable level of competence. The District Court dismissed the complaint on the grounds that it failed to state a justiciable claim, and that the plaintiff lacked standing. The United States Court of Appeals for the Ninth Circuit reversed, holding that the committee members, in order to secure state action immunity from the federal antitrust laws, must show that they were acting pursuant to a clearly articulated and affirmatively expressed state policy ([686 F2d 692](#)).

On certiorari, the United States Supreme Court reversed. In an opinion by Powell, J., expressing the views of Burger, Ch. J., and Brennan and Marshall, JJ., it was held that the state action doctrine of immunity from antitrust liability applied to the committee's grading of the bar examination because the state constitution vested authority in the court to determine who should be admitted to practice law in the state, the court had established the committee to examine and recommend applicants for admission to the state bar, and the court rules delegated examinations and applicant recommendations to the committee while reserving to the court the ultimate authority to grant or deny admission.

Stevens, J., joined by White and Blackmun, JJ., dissented on the ground that the challenged action was that of the committee rather than that of the Arizona Supreme Court.

Rehnquist and O'Connor, JJ., did not participate.

## **Headnotes**

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > bar examinations -- > Headnote:

[LEdHN\[1A\]!\[\]\(8d1a7a858879e429724662a8297e3c4b\_img.jpg\) \[1A\]](#) [LEdHN\[1B\]!\[\]\(098df655fbb4080743c47e1e8e2f9954\_img.jpg\) \[1B\]](#) [LEdHN\[1C\]!\[\]\(66bacce17587f9ae9c2c8fa84be98d67\_img.jpg\) \[1C\]](#)

The state action doctrine of immunity from Sherman Act liability applies to the grading of bar examinations by a committee selected and appointed by the state supreme court, who are state officers to whom the court has given discretion in compiling and grading the bar examinations, but whose actions remain subject to the court's strict supervisory powers and ultimate full authority, where the supreme court's rules specify the subjects to be tested and the general qualifications required of applicants for the bar, authorize the committee to determine an appropriate grading or scoring system and require the committee to submit the grading formula to the court at least 30 days before the examination, limit the committee's authority after the giving and grading of the examination to making recommendations to the court, and provide a detailed mandatory review procedure by which an aggrieved

466 U.S. 558, \*558; 104 S. Ct. 1989, \*\*1989; 80 L. Ed. 2d 590, \*\*\*590; 1984 U.S. LEXIS 76, \*\*\*\*1

candidate can challenge the committee's grading formula, with the court itself making the final decision to grant or deny admission to practice. (Stevens, White, and Blackmun, JJ., dissented from this holding.)

ATTORNEYS §3 > admission -- regulation -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

A state statute providing that the state's highest court may promulgate rules regulating pleading, practice, and procedure in the state courts, and that such rules shall not become effective until 60 days after distribution, does not limit the court's jurisdiction to establish the terms of admission to practice law in the state.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > state legislation -- > Headnote:

[LEdHN\[3\]](#) [3]

When a state legislature adopts legislation, its actions constitute those of the state, and ipso facto are exempt from the operation of the antitrust laws.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > court rules -- > Headnote:

[LEdHN\[4\]](#) [4]

A decision of a state supreme court, acting legislatively rather than judicially, is exempt from Sherman Act liability as state action.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > state action -- > Headnote:

[LEdHN\[5\]](#) [5]

When the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization, there is no antitrust immunity absent a showing that the conduct is pursuant to a clearly articulated and affirmatively expressed state policy to replace competition with regulation, concerning which the degree to which the state legislature or supreme court supervises its representatives is relevant; when the conduct at issue is in fact that of the state legislature or supreme court, the court need not address the issues of clear articulation and active supervision.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > state action -- > Headnote:

[LEdHN\[6\]](#) [6]

State action is exempt from antitrust liability if the action is that of the state acting as sovereign, regardless of whether the sovereign acted wisely after full disclosure from its subordinate officers.

APPEAL §1104.5 > issue -- petition for rehearing -- > Headnote:

[LEdHN\[7A\]](#) [7A] [LEdHN\[7B\]](#) [7B] [7B]

A contention raised for the first time in a response to a motion for rehearing in the United States Court of Appeals may not be raised before the United States Supreme Court on certiorari to review the Court of Appeals' judgment, because the failure to raise the issue in a timely manner precludes the Supreme Court's consideration of it.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > court actions -- > Headnote:

[LEdHN\[8\]](#) [8]

A state supreme court's denial of a disappointed bar applicant's petition to review the adverse recommendation of the court's committee on examinations and admissions, and its denial of his two petitions for rehearing, constitute state action by the court within the purview of the state action doctrine of antitrust immunity.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > state -- motive -- > Headnote:

[LEdHN\[9\]](#) [9]

Where the action complained of is that of the state itself, the action is exempt from antitrust liability regardless of the state's motives in taking the action.

## Syllabus

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Respondent Ronwin (hereafter respondent) was an unsuccessful candidate for admission to the Arizona Bar in 1974. Pursuant to the Arizona Constitution, the Arizona Supreme Court has plenary authority to determine admissions to the bar. Under the Arizona Supreme Court Rules in effect in 1974, a Committee on Examinations and Admissions (Committee), appointed by the court, was authorized to examine applicants on specified subjects. The Rules required the Committee to submit its grading formula to the court prior to giving the examination. After grading the examination, the Committee was directed to submit its recommendations for the admission of applicants to the court, which then made the final decision to grant or deny admission to practice. Under the Rules, a rejected applicant was entitled to seek individualized review of the Committee's adverse recommendation [\*\*\*\*2] by filing a petition with the court. After the Arizona Supreme Court denied respondent's petition for review, he ultimately filed this action in Federal District Court against the Arizona State Bar, members of the Committee (including petitioners), and others. Respondent alleged that petitioners had conspired to restrain trade in violation of [§ 1](#) of the Sherman Act by "artificially reducing the numbers of competing attorneys in the State." He argued that the Committee had set the grading scale on the examination with reference to the number of new attorneys it thought desirable, rather than with reference to some "suitable" level of competence. Petitioners contended that they were immune from antitrust liability under the state-action doctrine of [Parker v. Brown, 317 U.S. 341](#). The District Court dismissed the complaint on the ground, *inter alia*, of failure to state a justiciable claim. The Court of Appeals reversed, holding that although petitioners ultimately might be able to show that they were entitled to state-action immunity, the District Court should not have decided the issue on a motion to dismiss.

*Held:* The District Court properly dismissed [\*\*\*\*3] the complaint for failure to state a claim on which relief could be granted. Pp. 567-582.

(a) Under *Parker*, when a state legislature adopts legislation, its actions constitute those of the State and *ipso facto* are exempt from the operation of the antitrust laws. A state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legislature for purposes of the state-action doctrine. *Bates v. State Bar of Arizona, 433 U.S. 350*. When the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization, there must be a showing that the challenged conduct is pursuant to a clearly articulated state policy to replace competition with regulation, and the degree to which the state legislature or supreme court supervises its representative may be relevant to the inquiry. However, where the challenged conduct is in fact that of the state legislature or supreme court, the issues of "clear articulation" and "active supervision" need not be addressed. Pp. 567-569.

(b) In this case, the actions of the Committee with regard to the bar examination grading [\*\*\*\*4] formula cannot be divorced from the Arizona Supreme Court's exercise of its sovereign powers. Although the Arizona Supreme Court necessarily delegated the administration of the admissions process to the Committee, under the court's Rules the court itself retained the sole authority to determine who should be admitted to the practice of law in Arizona. Thus, the challenged conduct was in reality that of the Arizona Supreme Court and is therefore exempt from Sherman Act liability under the state-action doctrine. Cf. *Bates v. State Bar of Arizona, supra*. Pp. 569-574.

(c) *Bates* cannot be distinguished on the ground that the Arizona Supreme Court is not a petitioner in this case and was not named as a defendant in the complaint, or on the ground that *Parker* is inapplicable because respondent is not challenging the Arizona Supreme Court's conduct. The same situation existed in *Bates*. As in *Bates*, the real party in interest is the Arizona Supreme Court. The case law, as well as the State Supreme Court's Rules, makes clear that the court made the final decision on each applicant. To allow Sherman Act plaintiffs to look behind the actions of state [\*\*\*\*5] sovereigns and base their claims on perceived illegal conspiracies among the committees, commissions, or others who necessarily must advise the sovereign would emasculate the *Parker v. Brown* doctrine. Pp. 574-582.

**Counsel:** Charles R. Hoover, pro se, argued the cause for petitioners. With him on the briefs were Jefferson L. Lankford and Donn G. Kessler. Philip E. von Ammon filed a brief for the State Bar of Arizona et al. as respondents under this Court's Rule 19.6, in support of petitioners.

Respondent Edward Ronwin argued the cause and filed a brief pro se.

Acting Solicitor General Wallace argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Assistant Attorney General Baxter, John H. Garvey, Barry Grossman and Nancy C. Garrison.  
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**Judges:** POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN and MARSHALL, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE and BLACKMUN, JJ., joined, post, p. 582. REHNQUIST, J., took no part in the decision of the case. O'CONNOR, J., took no part in the consideration or decision of the case.

\* Briefs of amici curiae urging reversal were filed for the National Conference of Bar Examiners by Kurt W. Melchior, Allan Ashman, and Jan T. Chilton; and for the State Bar of California by Henry C. Thumann, Herbert M. Rosenthal, Truitt A. Richey, Jr., and Robert M. Sweet.

A brief of amici curiae was filed for the State of Colorado et al. by Stephen H. Sachs, Attorney General of Maryland, Charles O. Monk II and Linda H. Jones, Assistant Attorneys General, Duane Woodard, Attorney General of Colorado, Thomas P. McMahon, First Assistant Attorney General, Thomas J. Miller, Attorney General of Iowa, John R. Perkins, Assistant Attorney General, Robert Abrams, Attorney General of New York, Lloyd Constantine, Assistant Attorney General, William M. Leech, Jr., Attorney General of Tennessee, William J. Haynes, Jr., Deputy Attorney General, Jim Mattox, Attorney General of Texas, David R. Richards, Executive Assistant Attorney General, Bronson C. La Follette, Attorney General of Wisconsin, and Michael L. Zaleski, Assistant Attorney General.

**Opinion by:** POWELL

## Opinion

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[\*560] [\*\*\*594] [\*\*1991] JUSTICE POWELL delivered the opinion of the Court.

LEdHN[1A] [↑] [1A]This case presents the question whether the state-action doctrine of immunity from actions under the Sherman Act applies to the grading of bar examinations by the Committee appointed by, and according to the Rules of, the Arizona Supreme Court.

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LEdHN[2A] [↑] [2A]Respondent Ronwin was an unsuccessful candidate for admission to the Bar of Arizona in 1974. Petitioners were four members of the [\*\*\*595] Arizona Supreme Court's Committee on Examinations and Admissions (Committee). <sup>1</sup> [\*\*\*\*9] The Arizona [\*561] Constitution vests authority in the court to determine who should be admitted [\*\*\*\*7] to practice law in the State. Hunt v. Maricopa County Employees Merit System Comm'n, 127 Ariz. 259, 261-262, 619 P.2d 1036, 1038-1039 (1980); see also Ariz. Rev. Stat. Ann. § 32-275 (1976). Pursuant to that authority, the Arizona Supreme Court established the Committee to examine and recommend applicants for admission to the Arizona Bar.<sup>2</sup> The Arizona Supreme Court Rules, adopted by the court and in effect in 1974,<sup>3</sup> [\*\*\*\*10] [\*\*1992] delegated certain responsibilities to the Committee while reserving to the court the ultimate authority to grant or deny admission. The [\*562] Rules provided that the Committee "shall examine applicants" on subjects enumerated in the Rules and "recommend to [the] court for admission to practice" applicants found to have the requisite qualifications. Rule 28(a) (1973).<sup>4</sup> They also authorized the Committee to

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<sup>1</sup> Although petitioners represent only four of the seven members of the Committee at the time of the February 1974 bar examination, Ronwin named all seven members in his original complaint. Apparently, three of the original defendants to this action did not join, for reasons not apparent, the petition for certiorari in this Court. There is no claim that these members of the Committee failed to participate in or dissented from the actions of the Committee.

<sup>2</sup> The procedure in Arizona is not unique to that State. In recent years, the burgeoning number of candidates for admission to practice law and the increased complexity of the subjects that must be tested have combined to make grading and administration of bar examinations a burdensome task. As a result, although the highest court in each State retains ultimate authority for granting or denying admission to the bar, each of those courts has delegated to a subordinate committee responsibility for preparing, grading, and administering the examination. See F. Klein, S. Leleiko, & J. Mavity, Bar Admission Rules and Student Practice Rules 30-33 (1978).

<sup>3</sup> The parties disagree on the wording of the Rules at the time Ronwin took the bar examination. The disagreement centers around the effective date of some amendments promulgated in 1974. Petitioners contend that the amendments took effect before Ronwin took the February 1974 bar examination; Ronwin submits that they became effective in March 1974. Ronwin concedes that the Supreme Court order amending the Rules provided that the amendments would become effective in January 1974. Notwithstanding this directive, he argues that Ariz. Rev. Stat. Ann. § 12-109 (1982) provided that amendments to the Supreme Court's Rules may not become effective until 60 days after publication and distribution. Since the Supreme Court released the amendments on January 11, Ronwin submits that the earliest possible effective date was March 12.

LEdHN[2B] [↑] [2B]

Ronwin has misread § 12-109. That section only applied to Rules that regulated pleading, practice, and procedure in judicial proceedings in state courts. By its terms, the statute did not limit the jurisdiction of the Arizona Supreme Court to establish the terms of admission to practice law in the State. See Ariz. Rev. Stat. Ann. § 32-275 (1976).

<sup>4</sup> Rule 28(a) provided:

"Examination and Admission. . . . The examination and admission of applicants for membership in the State Bar of Arizona shall conform to this Rule. For such purpose, a committee on examinations and admissions consisting of seven active members of the state bar shall be appointed by this court. . . . The committee shall examine applicants and recommend to this court for

"utilize such grading or scoring system as the Committee deems appropriate in its discretion,"<sup>5</sup> [\*\*\*\*11] and to use the Multi-State Bar Examination. Rule 28(c) [\*\*\*596] VII A (1973), as amended, 110 Ariz. xxvii, xxxii (1974). Even with respect to "grading or scoring," the court did not delegate final authority to the [\*\*\*\*8] Committee. The Rules directed the Committee to file the formula it intended to use in grading the examination with the court 30 days prior to giving the examination.<sup>6</sup> Also, after grading the examination and compiling the list of those applicants whom it considered [\*563] qualified to practice law in the State, the Committee was directed to submit its recommendations to the court for final action. Rule 28(a). Under the Rules and Arizona case law, only the court had authority to admit or deny admission.<sup>7</sup> Finally, a rejected applicant was entitled to seek individualized review of an adverse recommendation of the Committee by filing a petition directly with the court.<sup>8</sup> [\*\*1993] The [\*564] Rules required the Committee to file a response to such a petition and called for a prompt and fair decision on the applicant's claims by the Arizona Supreme Court.

admission to practice applicants who are found by the committee to have the necessary qualifications and to fulfill the requirements prescribed by the rules of the board of governors as approved by this court respecting examinations and admissions. . . . The court will then consider the recommendations and either grant or deny admission."

<sup>5</sup> According to Ronwin's complaint, the Committee announced before the February examination that the passing grade on the test would be 70, but it assigned grades using a scaled scoring system. Under this system, the examinations were graded first without reference to any grading scale. Thus, each examination was assigned a "raw score" based on the number of correct answers. The Committee then converted the raw score into a score on a scale of zero to 100 by establishing the raw score that would be deemed the equivalent of "seventy." See n. 19, *infra*.

<sup>6</sup> Rule 28(c) VII B provided:

"The Committee on Examinations and Admissions will file with the Supreme Court thirty (30) days before each examination the formula upon which the Multi-State Bar Examination results will be applied with the other portions of the total examination results. In addition the Committee will file with the Court thirty (30) days before each examination the proposed formula for grading the entire examination." 110 Ariz., at xxxii.

<sup>7</sup> See n. 4, *supra*; *Application of Courtney*, 83 Ariz. 231, 233, 319 P. 2d 991, 993 (1957) ("[This] court may in the exercise of its inherent powers, admit to the practice of law with or without favorable action by the Committee"); *Hackin v. Lockwood*, 361 F.2d 499, 501 (CA9) ("[We] find the power to grant or deny admission is vested solely in the Arizona Supreme Court"), cert. denied, 385 U.S. 960 (1966). See also *Application of Burke*, 87 Ariz. 336, 351 P. 2d 169 (1960).

<sup>8</sup> Rule 28(c) XII F provided:

"1. An applicant aggrieved by any decision of the Committee

"(A) Refusing permission to take an examination upon the record;

"(B) Refusing permission to take an examination after hearing;

"(C) For any substantial cause other than with respect to a claimed failure to award a satisfactory grade upon an examination;

"may within 20 days after such occurrence file a verified petition with this Court for a review. . . .

"2. A copy of said petition shall be promptly served upon the chairman or some member of the Committee and the Committee shall within 15 days of such service transmit said applicant's file and a response to the petition fully advising this Court as to the Committee's reasons for its decision and admitting or contesting any assertions made by applicant in said petition. Thereupon this Court shall consider the papers so filed together with the petition and response and make such order, hold such hearings and give such directions as it may in its discretion deem best adapted to a prompt and fair decision as to the rights and obligations of applicant judged in the light of the Committee's and this Court's obligation to the public to see that only qualified applicants are admitted to practice as attorneys at law." 110 Ariz., at xxxv-xxxvi.

Under Rule 28(c) XII G, an applicant who wished to challenge the grading of an answer to a particular question first had to submit his claim to the Committee for review. The applicant was entitled to request Arizona Supreme Court review only if three members of the Committee agreed with the applicant that his answer had not received the grade it deserved. The Rule also provided that the court could grant or deny such a request in its discretion. *Id.*, at xxxvi-xxxvii.

[\*\*\*\*12] Ronwin took the Arizona bar examination [\*\*\*597] in February 1974.<sup>9</sup> He failed to pass, the Committee recommended to the Arizona Supreme Court that it deny him admission to the Bar, and the court accepted the recommendation. Ronwin petitioned the court to review the manner in which the Committee conducted and graded the examination. In particular, he alleged that the Committee had failed to provide him with model answers to the examination, had failed to file its grading formula with the court within the time period specified in the Rules, had applied a "draconian" pass-fail process, had used a grading formula that measured group, rather than individual, performance, had failed to test applicants on an area of the law on which the Rules required testing, and had conducted the examination in a "pressure-cooker atmosphere." He further alleged that the Committee's conduct constituted an abuse of discretion, deprived him of due process and equal protection, and violated the Sherman Act.<sup>10</sup> The court denied his petition and two subsequent petitions for rehearing.<sup>11</sup> Ronwin then sought review of the Arizona [\*565] Supreme Court's action in this Court. We denied his petition [\*\*\*\*13] for certiorari. 419 U.S. 967 (1974).

[\*\*\*\*14] Some four years later, in March 1978, Ronwin filed this action in the United States District Court for the District of Arizona. Petitioners were named as defendants in the suit in their capacity as individual members of the Committee.<sup>12</sup> Ronwin renewed his complaint that petitioners had conspired to restrain trade in violation of § 1 of the Sherman Act, 26 Stat. 209, [15 U. S. C. § 1](#), by "artificially reducing the numbers of competing attorneys in the State of Arizona."<sup>13</sup> [\*\*\*\*16] The gist [\*\*1994] of Ronwin's [\*\*\*598] argument is that the Committee of which petitioners constituted a majority had set the grading scale on the February examination with reference to the number of new attorneys they thought desirable, rather than with reference to some "suitable" level of competence. Petitioners moved to dismiss the complaint under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) for failure to state a claim upon which [\*566] relief could be granted, and under [Federal Rule of Civil Procedure 12\(b\)\(1\)](#) for lack of subject-matter jurisdiction. In particular, petitioners alleged that, acting as a Committee, they were immune from antitrust liability under [Parker v. Brown, 317 U.S. 341 \(1943\)](#). [\*\*\*\*15] Petitioners also argued that Ronwin suffered no damage from the conduct of which he complained and that the Committee's conduct had not affected interstate

<sup>9</sup> The Arizona Supreme Court Rules instructed the Committee to give two examinations each year -- one in July and one in February. *Id.*, at xxxii.

<sup>10</sup> He also alleged that the Committee had violated his constitutional rights by refusing, after the grades had been released, to provide him with the questions and answers to the Multi-State portion of the examination.

<sup>11</sup> Rule 28(c) XII F 2 provides, with respect to the petition of an aggrieved applicant, that the Arizona Supreme Court "shall consider" the petition and response, and "hold such hearings and give such directions as it may in its discretion deem best adapted to a prompt and fair decision." 110 Ariz., at xxxvi. Ronwin makes no claim that the court failed to comply with its Rules, although -- of course -- he disagrees with the court's judgment denying his petition. Thus, the court's denial of his petition must be construed as a consideration and rejection of the arguments made in the petition -- including Ronwin's claim that the Sherman Act was violated.

<sup>12</sup> Also named as defendants were petitioners' spouses and the Arizona State Bar. The District Court dismissed the suit as to these defendants and the Court of Appeals affirmed the dismissal. [Ronwin v. State Bar of Arizona, 686 F.2d 692, 694, n. 1 \(CA9 1981\)](#). Ronwin challenged this aspect of the Court of Appeals' opinion in a conditional cross-petition for certiorari. We denied the cross-petition. [Ronwin v. Hoover, 461 U.S. 938 \(1983\)](#).

<sup>13</sup> The averment of a Sherman Act violation in Ronwin's complaint is as follows:

"The aforesaid conduct [the "scoring system or formula," see n. 4, *supra*], which the Defendants entered into as a conspiracy or combination, was intended to and did result in a restraint of trade and commerce among the Several States by artificially reducing the numbers of competing attorneys in the State of Arizona; and, in further consequence of said conduct, Plaintiff was among those artificially prevented from entering into competition as an attorney in the State of Arizona and thereby further deprived of the right to compete as an attorney for the legal business deriving from or involving the Several States of the United States, including Arizona." App. 10-11.

The adequacy of these conclusory averments of *intent* is far from certain. The Court of Appeals, however, found the complaint sufficient. Accordingly, we address the "state action" issue.

466 U.S. 558, \*566; 104 S. Ct. 1989, \*\*1994; 80 L. Ed. 2d 590, \*\*\*598; 1984 U.S. LEXIS 76, \*\*\*\*15

commerce. The District Court granted petitioners' motion after finding that the complaint failed to state a justiciable claim, that the court had no jurisdiction, and that Ronwin lacked standing.<sup>14</sup>

The Court of Appeals for the Ninth Circuit reversed the dismissal of the complaint. *Ronwin v. State Bar of Arizona*, [686 F.2d 692 \(1982\)](#). The Court of Appeals read the District Court's ruling that Ronwin had failed to state a claim as a holding that bar examination grading procedures are immune from federal antitrust laws under *Parker v. Brown*. It reasoned that, although petitioners ultimately might be able to show that they are entitled to state-action immunity, the District Court should not have decided this issue on a [Rule 12\(b\)\(6\)](#) motion. See [686 F.2d, at 698](#). The court stated that under *Parker* and its progeny, the mere fact that petitioners were state officials appointed by the Arizona Supreme Court was insufficient to confer [\*\*\*\*17] state-action immunity on them. [686 F.2d, at 697](#). Relying on its reading of several recent opinions of this Court,<sup>15</sup> the Court of Appeals noted that the petitioners might be able to invoke the state-action [\*567] doctrine, but reasoned that they first must show that they were acting pursuant to a "clearly articulated and affirmatively expressed . . . state policy." [Id., at 696](#). Therefore, dismissal for failure to state a claim was improper. The court also held that Ronwin had standing to bring this action. The case was remanded to the District Court for further action.<sup>16</sup>

[\*\*\*\*18] We granted certiorari to review the Court of Appeals' application of the state-action doctrine. *461 U.S. 926* (1983). We now reverse.

[\*\*\*599] II

[LEdHN\[3\]](#) [↑] [3]The starting point in any analysis involving the state-action doctrine is the reasoning of *Parker v. Brown*. In *Parker*, [\\*\\*1995](#) the Court considered the antitrust implications of the California Agriculture Prorate Act -- a state statute that restricted competition among food producers in California. Relying on principles of federalism and state sovereignty, the Court declined to construe the Sherman Act as prohibiting the anticompetitive actions of a State acting through its legislature:

"We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and [\*\*\*\*19] agents is not lightly to be attributed to Congress." [317 U.S., at 350-351](#).

Thus, [HN1](#) [↑] under the Court's rationale in *Parker*, when a state legislature adopts legislation, its actions constitute those of [\*568] the State, see [id., at 351](#), and *ipso facto* are exempt from the operation of the antitrust laws.

<sup>14</sup> The District Court also denied Ronwin's motion requesting the trial judge to recuse himself. The Court of Appeals held that the District Court had not abused its discretion in denying the motion. [686 F.2d, at 701](#). We declined to review that finding. *Ronwin v. Hoover, supra*.

<sup>15</sup> *Community Communications Co. v. Boulder*, [455 U.S. 40 \(1982\)](#); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, [445 U.S. 97 \(1980\)](#); *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, [439 U.S. 96 \(1978\)](#); *Lafayette v. Louisiana Power & Light Co.*, [435 U.S. 389 \(1978\)](#).

<sup>16</sup> The Court of Appeals also held that the District Court should give Ronwin the opportunity to show that petitioners' actions sufficiently affected interstate commerce to fall within the jurisdiction of the Sherman Act. Petitioners did not seek review of this holding.

[LEdHN\[4\]](#) [4] [LEdHN\[5\]](#) [5] In the years since the decision in *Parker*, the Court has had occasion in several cases to determine the scope of the state-action doctrine. It has never departed, however, from *Parker*'s basic reasoning. Applying the *Parker* doctrine in [\*Bates v. State Bar of Arizona, 433 U.S. 350, 360 \(1977\)\*](#), the Court held that [HN2](#) [a state supreme Court, when acting in a legislative capacity, occupies the same position as that of a state legislature. Therefore, a decision of a state supreme [\*\*\*\*20] [court, acting legislatively rather than judicially, is exempt from Sherman Act liability as state action. See also \*Goldfarb v. Virginia State Bar, 421 U.S. 773, 790 \(1975\)\*. Closer analysis is required when the activity at issue is not directly that of the legislature or supreme court,](#) <sup>17</sup> [but is carried out by others pursuant to state authorization. See, e. g., \*Community Communications Co. v. Boulder, 455 U.S. 40 \(1982\)\* \(municipal regulation of cable television industry\); \*California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 \(1980\)\* \(private price-fixing arrangement authorized by State\); \*New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96 \(1978\)\* \(new franchises controlled by state administrative board\).](#) In such cases, it becomes important to ensure that the anticompetitive conduct of the State's representative was contemplated by the State. [\*Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413-415 \(1978\)\*](#) (opinion of BRENNAN, J.); see [\*New Mexico v. American Petrofina, Inc., 501 F.2d 363, 369-370 \(CA9 \\*\\*\\*6001 1974\)\*](#). [\*\*\*\*21] [HN3](#) [If the replacing of entirely free competition with some form of regulation or restraint was not authorized or approved by the State then the rationale of *Parker* is inapposite. As a result, in cases [\*569] [involving the anticompetitive conduct of a nonsovereign state representative the Court has required a showing that the conduct is pursuant to a "clearly articulated and affirmatively expressed state policy" to replace competition with regulation. \*Boulder, supra, at 54\*. The Court also has found the degree to which the state legislature or supreme court supervises its representative to be relevant to the inquiry. See \*Midcal Aluminum, supra, at 105\*; \*Goldfarb, supra, at 791\*.](#) When the conduct is that of the sovereign itself, on the other hand, the danger of unauthorized restraint of trade does not arise. Where the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of "clear articulation" and "active supervision."

[\*\*\*\*22] [\*\*1996] Pursuant to the State Constitution, the Arizona Supreme Court has plenary authority to determine admissions to the Bar.<sup>18</sup> Therefore, the first critical step in our analysis must be to determine whether the conduct challenged here is that of the court. If so, the *Parker* doctrine applies and Ronwin has no cause of action under the Sherman Act.

### [\*\*\*\*23] III

At issue here is the Arizona plan of determining admissions to the bar, and petitioners' use thereunder of a grading formula. Ronwin has alleged that petitioners conspired to use [\*570] that formula to restrain competition among lawyers.<sup>19</sup> His argument \*\*\*601 is that, although petitioners qualified as state officials in their capacity as

<sup>17</sup> This case does not present the issue whether the Governor of a State stands in the same position as the state legislature and supreme court for purposes of the state-action doctrine.

<sup>18</sup> Ronwin does not dispute that regulation of the bar is a sovereign function of the Arizona Supreme Court. In [\*Bates v. State Bar of Arizona, 433 U.S. 350, 361 \(1977\)\*](#), the Court noted that [HN4](#) [the regulation of the activities of the bar is at the core of the State's power to protect the public.] Likewise, in [\*Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 \(1975\)\*](#), the Court stated: "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" See also [\*In re Griffiths, 413 U.S. 717, 722-723 \(1973\)\*](#). Few other professions are as close to "the core of the State's power to protect the public." Nor is any trade or other profession as "essential to the primary governmental function of administering justice."

<sup>19</sup> Ronwin's complaint, see [\*supra, at 565\*](#), focuses on the grading formula as the means used to "restrain competition." He describes it as follows:

"The Defendants did not grade on a Zero to One Hundred (0 to 100) scale; rather they used a "raw score" system. After the raw scores were known, the Defendants picked a particular raw score value as equal to the passing grade of Seventy (70). Thereby

members of the Committee, they acted independently of the Arizona Supreme Court. As a result, the argument continues, the Committee's actions are those of a Supreme Court representative, rather than those of the court itself, and therefore are not entitled to immunity.

[\*\*\*\*24] We cannot agree that the actions of the Committee can be divorced from the Supreme Court's exercise of its sovereign powers. The Court's opinion in *Bates v. State Bar of Arizona*, 433 U.S., at 360, is directly pertinent.

<sup>20</sup> [\*\*\*\*26] In *Bates*, two [\*571] attorneys were suspended temporarily from the practice of law in Arizona for violating a disciplinary rule of the American Bar Association (ABA) that prohibited most lawyer advertising. The Arizona Supreme Court had incorporated the ABA's advertising prohibition [\*\*1997] into the local Supreme Court Rules.<sup>21</sup> Those Rules also provided that the Board of Governors of the Arizona State Bar Association, acting on the recommendation of a local Bar disciplinary committee, could recommend the censure or suspension of a member of the Bar for violating the advertising ban. Under the Rules, the Board of Governor's recommendation automatically would become effective if the aggrieved party did not object to the recommendation within 10 days. If the party objected, he was entitled to have the Arizona Supreme Court review the findings and recommendations of the Board of Governors and the local committee. The plaintiffs [\*\*\*\*25] challenged the Rule on Sherman Act and *First Amendment* grounds. This Court ultimately concluded that the ABA Rule violated the *First Amendment*, but it first held that the State Bar Association was immune from Sherman Act liability because its enforcement of the disciplinary Rules was state action. In reaching this conclusion, the Court noted that, although only the State Bar was named as a defendant in the suit, the suspended attorneys' complaint was with the State. The Court stated:

"[The] appellants' claims are against the State. The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. *In* [\*\*\*602] *re Wilson*, 106 [\*572] Ariz. 34, 470 P. 2d 441 (1970). Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the [State Bar] acts as the agent of the court under its continuous supervision." *Id.*, at 361.

The opinion and holding in *Bates* with respect to the state-action doctrine were unanimous.

the number of Bar applicants who would receive a passing grade depended upon the exact raw score value chosen as equal to Seventy (70); rather than achievement by each Bar applicant of a pre-set standard." App. 10.

Apparently Ronwin was trying to describe a "procedure commonly known as test standardization" or "scaled scoring." See Brief for State Bar of California as *Amicus Curiae* 7. This method of scoring, viewed as the fairest by the Educational Testing Service (ETS) for the Multistate Bar Examination (MBE), see S. Duhl, *The Bar Examiners' Handbook* 61-62 (2d ed. 1980), published by The National Conference of Bar Examiners, is described as follows:

"In addition to the 'raw' scores (number of correct answers), ETS reports a 'scaled' score for each applicant. In a series of tests, such as the MBE, which are intended to measure levels of competence, it is important to have a standardized score which represents the same level of competence from test to test. The raw score is not dependable for this purpose since the level of difficulty varies from test to test. It is not possible to draft two tests of exactly the same level of difficulty. Scaled scores are obtained by reusing some questions from earlier tests which have been standardized. A statistical analysis of the scores on the reused questions determines how many points are to be added to or subtracted from the raw score to provide an applicant's scaled score. Thus a particular scaled score represents the same level of competence from examination to examination."

<sup>20</sup> Although the Court of Appeals recognized the similarity between this case and *Bates*, it found the facts in *Goldfarb v. Virginia State Bar, supra*, to be more analogous. The court's reliance on *Goldfarb* was misplaced. As the dissent of Judge Ferguson noted, *Goldfarb* involved procedures that were not approved by the State Supreme Court or the state legislature. In contrast, petitioners here performed functions required by the Supreme Court Rules and that are not effective unless approved by the court itself.

<sup>21</sup> *Rule 29(a) of the Supreme Court* of Arizona provided: "The duties and obligations of members [of the Bar] shall be as prescribed by the Code of Professional Responsibility of the American Bar Association. . . ."

LEdHN[1B] [↑] [1B]The logic of the Court's holding in *Bates* applies with greater force to the Committee and its actions. The petitioners here were each members of an official body selected and appointed by the Arizona Supreme Court. Indeed, it is conceded that they were state officers. The court gave the members of the Committee discretion in compiling and grading the bar examination, but retained strict supervisory powers and ultimate full authority over its actions. The Supreme Court Rules specified the subjects to be tested, and the general qualifications required of applicants for the Bar. With respect to the specific conduct of which Ronwin complained -- establishment of an examination grading formula -- the Rules were explicit. Rule 28(c) VII A authorized the Committee to determine an appropriate "grading [\*\*\*\*27] or scoring system" and Rule 28(c) VII B required the Committee to submit its grading formula to the Supreme Court at least 30 days prior to the examination.<sup>22</sup> After giving and grading the examination, the Committee's authority was limited to [\*573] making recommendations to the Supreme Court. The court itself made the final decision to grant or deny admission to practice. Finally, Rule 28(c) XII F provided for a detailed mandatory review procedure by which an aggrieved candidate could challenge the Committee's grading formula.<sup>23</sup> [\*\*\*\*29] In light of these provisions [\*\*1998] and the Court's holding and reasoning in *Bates*, we conclude that, although the Arizona Supreme Court necessarily delegated the administration of the admissions process to the Committee, the court itself approved the particular grading formula and retained the sole authority to determine who should be admitted to the practice of law in Arizona. Thus, the conduct that Ronwin challenges was in reality that of the Arizona Supreme Court. See Bates, 433 U.S., at 361. It therefore is exempt from Sherman [\*\*\*603] Act liability under the state-action doctrine of Parker v. Brown. [\*\*\*\*28]<sup>24</sup>

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[\*574] LEdHN[6] [↑] [6]LEdHN[7A] [↑] [7A]At oral argument, Ronwin suggested that we should not attribute to the Arizona Supreme Court an intent to approve the anticompetitive activity of petitioners in the absence of proof that the court was aware that petitioners had devised a grading formula the purpose of which was to limit the number of lawyers in the State. This argument misconceives the basis of the state-action doctrine. HN5 [↑] The reason that state action is immune from Sherman Act liability is not that the State has chosen to act in an anticompetitive fashion, but that the State itself has chosen to act. "There is no suggestion of a purpose to restrain

<sup>22</sup> Following petitioners' request for a rehearing in the Court of Appeals, the parties debated whether and to what extent the Committee complied with this Rule. For purposes of determining the application of the state-action doctrine, it is sufficient that the Rules contained an enforceable provision calling for submission of the grading formula. Moreover, the Rules contained a review procedure that allowed an aggrieved applicant to bring to the Supreme Court's attention any failure of the Committee to comply with the filing requirements in Rule 28(c) VII B. The record reveals that Ronwin, in fact, alleged in his petition for review in the Arizona Supreme Court that the Committee had not filed its grading formula within the time provided in the Rule. The court rejected the petition. See supra, at 564.

<sup>23</sup> This procedure allowed a disappointed applicant to challenge "[for] any substantial cause" a Committee decision other than "a claimed failure to award a satisfactory grade." Rule 28(c) XII F 1(C). As we have noted, Ronwin took full advantage of Rule 28(c) XII F 1(C) in his challenge to the action of the Committee and the court. See supra, at 564. He did not, however, challenge the particular grade assigned to any of his answers.

<sup>24</sup> The Solicitor General, on behalf of the United States as *amicus*, contends that our recent opinion in *Community Communications Co. v. Boulder*, 455 U.S. 40 (1982), precludes a finding that the Committee's action was attributable to the Arizona Supreme Court. Contrary to the Solicitor General's suggestion, our reasoning in *Boulder* supports the conclusion we reach today. In *Boulder*, we reiterated the analysis of JUSTICE BRENNAN's opinion in Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978). We noted that the state-action doctrine is grounded in concepts of federalism and state sovereignty. 455 U.S., at 54. We stated that *Parker* did not confer state-action immunity automatically on municipalities, because the actions of a municipality are not those of the State itself. 455 U.S., at 53. Under our holding in *Boulder*, municipalities may be eligible for state-action immunity, but only "to the extent that they [act] pursuant to a clearly articulated and affirmatively expressed state policy." Id., at 54; see also Lafayette, supra, at 411-412 (opinion of BRENNAN, J.). Consistent with our reasoning in *Boulder*, our decision today rests on our conclusion that the conduct Ronwin complains of clearly is the action of the State. *Bates* is explicit authority for this conclusion.

state action in the [Sherman] Act's legislative history." [Parker, 317 U.S., at 351](#). The Court did not suggest in *Parker*, nor has it suggested since, that a state action is exempt from antitrust liability only if the sovereign acted wisely after full disclosure from its subordinate officers. [\*\*\*\*31] The only requirement is that the action be that of "the State acting as a sovereign." [Bates, supra, at 360](#). The action at issue here, whether anticompetitive or not, clearly was that of the Arizona Supreme Court.<sup>25</sup>

[\*\*\*\*32] IV

The dissenting opinion of JUSTICE STEVENS would, if it were adopted, alter dramatically the doctrine of state-action immunity. We therefore reply directly. The dissent concedes, as it must, that "the Arizona Supreme Court exercises sovereign power with respect to admission to the Arizona Bar," and "if the challenged conduct were that of the court, it would be immune under *Parker*." *Post*, at 588. [\*\*\*604] It also is conceded [\*575] that the members of the court's Committee on Examinations and [\*\*1999] Admissions -- petitioners here -- are state officers. These concessions are compelled by the Court's decision in *Bates*, and we think they dispose of Ronwin's contentions.

In its effort to distinguish *Bates*, the dissent notes that the Arizona Supreme Court "is not a petitioner [in this case], nor was it named as a defendant in respondent's complaint," and "because respondent is not challenging the conduct of the Arizona Supreme Court, *Parker* [v. Brown] is simply inapplicable." *Post*, at 588, 589. The dissent fails to recognize that this is precisely the situation that existed in *Bates*. In that case, that case, the Supreme Court of Arizona [\*\*\*\*33] was not a party in this Court, nor was it named as a defendant by the complaining lawyers. Yet, in our unanimous opinion, we concluded that the claims by appellants in *Bates* were "against the State," and that the "Arizona Supreme Court [was] the real party in interest; it adopted the rules, and it [was] the ultimate trier of fact and law in the enforcement process." [Bates v. State Bar of Arizona, supra, at 361](#); see [supra, at 571](#).<sup>26</sup>

The core argument of the dissent is that Ronwin has challenged only the action of the Committee and not that of the Arizona Supreme Court. It states that "there is no claim that the court directed [the [\*\*\*\*34] Committee] to artificially reduce the number of lawyers in Arizona," and therefore the Committee cannot assert the sovereign's antitrust immunity. *Post*, at 592 (emphasis in original). The dissent does not acknowledge that, despite as they might, the Committee could not reduce the *number* of lawyers in Arizona.<sup>27</sup> Only [\*576] the Arizona Supreme Court had the authority to grant or deny admission to practice in the State.<sup>28</sup> As in *Bates* "[t]he Arizona Supreme Court is the real party in interest." [433 U.S., at 361](#).

<sup>25</sup> Our holding that petitioners' conduct is exempt from liability under the Sherman Act precludes the need to address petitioners' contention that they are immune from liability under the *Noerr-Pennington* doctrine. See [Mine Workers v. Pennington, 381 U.S. 657 \(1965\); Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 \(1961\)](#).

[LEdHN\[7B\]](#) [7B]

We also do not address Ronwin's contention that the Arizona method of limiting bar admissions violates the [Fifth](#) and [Fourteenth Amendments](#). As Ronwin concedes, he made this argument for the first time in his response to petitioners' motion for rehearing in the Court of Appeals. His failure to raise this issue in a timely manner precludes our consideration.

<sup>26</sup> The authority of the Arizona Supreme Court to determine who shall be admitted to the Bar, and by what procedure, is even more clearly defined than the role of that court in *Bates*. In that case, State Bar Committee members were not appointed by the court, and the court did not expressly accept or reject each of the Committee's actions.

<sup>27</sup> Under Arizona law, the responsibility is on the court -- and only on it -- to admit or deny admission to the practice of law. This Court certainly cannot assume that the Arizona court, in the exercise of its specifically reserved power under its Rules, invariably agrees with its Committee. Even if it did, however, it would be action of the sovereign.

<sup>28</sup> Even if Committee members had decided to grade more strictly, under the grading formula approved by the court, for the purpose of reducing the total number of lawyers admitted to practice, the court knew and approved the *number* of applicants. This was the definitive action. There is nothing in the state-action doctrine, or in [antitrust law](#), that permits us to question the motives for the sovereign action of the court.

[\*\*\*\*35] The dissent largely ignores the Rules of the Arizona Supreme Court.<sup>29</sup> A summary of the court's commands suggests why the dissent apparently prefers not to address [\*\*\*605] them. The Arizona Supreme Court established the Committee for the sole purpose of examining and recommending applicants for admission to the Bar. Rule 28(a). Its Rules provided: "The examination and admission of applicants . . . shall conform to this Rule. . . . The committee shall examine applicants and recommend [qualified applicants] to this court. . . . Two examinations will be held each year. . . ." *Ibid.*; Rule 28(c) VI (1973), as amended, 110 Ariz. xxxii (1974) (emphasis added). The Rules also specified the subjects to be tested and required the Committee to submit its grading formula to the court in advance of each examination. Rule 28(c) VII (1973), as amended, 110 Ariz. xxxii (1974).

[\*\*\*\*36] [LEdHN/8](#) [8]As a further safeguard, a disappointed applicant was accorded the right to seek individualized review by filing a petition directly with the court -- as Ronwin did unsuccessfully. [\*\*2000] Pursuant to Rule 28(c) XII F, Ronwin filed a complaint with the court that contained a plethora of charges [\*577] including the substance of the complaint in this case. The court denied his petition as well as two petitions for rehearing. See [supra, at 564](#). Thus, again there was *state action* by the court itself explicitly rejecting Ronwin's claim.<sup>30</sup> [\*\*\*\*38] Finally, the [\*\*578] case law, as well as the Rules, makes clear that the Arizona Supreme Court made the final decision [\*\*\*606] on each applicant.<sup>31</sup> [\*\*\*\*39] See n. 6, *supra*. Unlike the actions of the Virginia State

<sup>29</sup> The dissent recites the provisions of the Rules regulating the composition and origin of the Committee and notes that the Rules require the Committee to recommend qualified applicants to the Supreme Court. *Post*, at 586. The dissent does not mention, however, several critical provisions, summarized in the text *infra*, that articulate the Arizona Supreme Court's intent to retain full authority over, and responsibility for, the bar admissions process.

<sup>30</sup> The dissent states, *post*, at 591-592, n. 15, that we "advanced the theory that *the relevant 'state action'*" was the State Supreme Court's denial of Ronwin's postexamination petitions filed with the court. (Emphasis supplied.) The dissent is inaccurate. Our holding is based on the court's direct participation in every stage of the admissions process, including retention of the sole authority to admit or deny. The critical action in this case was the court's decision to deny Ronwin admission to the Bar. The dissent's suggestion that the Arizona Supreme Court never made this decision simply ignores Arizona law. The Arizona Supreme Court has stated on several occasions that it, and not the Committee, makes the decision to admit or deny admission to applicants. In [Application of Burke, 87 Ariz., at 338, 351 P. 2d, at 171-172](#), the court stated:

"[It] is not the function of the committee to grant or deny admission to the bar. That power rests *solely* in the Supreme Court. . . . The committee's bounden duty is to 'put up the red flag' as to those applicants about whom it has some substantial doubt. If such doubt exists, then its recommendation should be withheld. The applicant may feel that any questions raised as to his character or qualifications are without substance. In such case, he may apply directly to this court for admission. In the final analysis -- it *being a judicial function* -- we have the *duty* of resolving those questions, one way or the other. . . ." (Emphasis supplied.)

In a similar vein, the court stated in [Application of Levine, 97 Ariz. 88, 92, 397 P. 2d 205, 207 \(1964\)](#):

"If the committee fails to recommend the admission of an applicant, he may challenge the committee's conclusions by an original application to this Court. . . . This Court will direct the committee to show cause why the applicant has been refused a favorable recommendation and on the applicant's petition and the committee's response, using our independent judgment, *de novo* determine whether the necessary qualifications have been shown."

See also [Application of Kiser, 107 Ariz. 326, 327, 487 P. 2d 393, 394 \(1971\)](#).

Thus, the Arizona Supreme Court repeatedly has affirmed its responsibility as the final decisionmaker on admissions to the Bar. The dissent, relying on the absence in the record before us of a specific order of the court at the time Ronwin was not admitted, nevertheless would have us hold that the Committee rather than the court made the final decisions as to admissions and denials of the applicants who took the examination in February 1974. If the dissent were correct, there would have been *no valid* action with respect to those who took that examination since, under Arizona law, the Committee had no independent power to act. Ronwin's complaint makes no such extreme averment, and certainly this Court will not assume that the Supreme Court of Arizona failed to discharge its responsibility. Moreover, as we have noted, [supra, at 576-577](#), Ronwin's claims were specifically rejected by the court.

466 U.S. 558, \*578; 104 S. Ct. 1989, \*\*2000; 80 L. Ed. 2d 590, \*\*\*606; 1984 U.S. LEXIS 76, \*\*\*\*39

Bar in *Goldfarb*, the actions of the Committee are governed by the court's Rules. Those Rules carefully reserve to the court the authority to make the decision to admit or deny, and that [\*\*2001] decision is the critical state action here.<sup>32</sup> [\*\*\*\*40] See [Bates, 433 U.S., at 359-361](#). Our opinion, therefore, [\*\*\*\*37] also is wholly consistent with the Court's reasoning in [Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 \(1978\)](#) and [Community Communications Co. v. Boulder, 455 U.S. 40 \(1982\)](#).<sup>33</sup>

[\*\*\*\*41] [LEdHN\[9\]](#) [9]Our [\*\*\*607] holding is derived directly from the reasoning of *Parker* and *Bates*. Those cases unmistakably hold that, [HN6](#) where the action complained of -- here the failure to admit [\*580] Ronwin to the Bar -- was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action. Application of that standard to the facts of this case requires that we reverse the judgment of the Court of Appeals.

The reasoning adopted by the dissent would allow Sherman Act plaintiffs to look behind the actions of state sovereigns and base their claims on perceived conspiracies to restrain trade among the committees, commissions, or others who necessarily must advise the sovereign. Such a holding would emasculate the *Parker v. Brown* doctrine. For example, if a state legislature enacted a law based on studies performed, or advice given, by an

<sup>31</sup> It is true, of course, that framing examination questions and particularly the grading of the examinations involved the exercise of judgment and discretion by the examiners. This discretion necessarily was delegated to the Arizona Committee, just as it must be unless state supreme courts themselves undertake the grading. By its Rules, the Arizona Supreme Court gave affirmative directions to the Committee with respect to every nondiscretionary function, reserving the ultimate authority to control the number of lawyers admitted to the Arizona Bar. Ronwin avers a "conspiracy to limit the number" of applicants admitted. He makes no claim of animus or discriminatory intent with respect to himself.

Ronwin apparently would have us believe that grading examinations is an exact science that separates the qualified from the unqualified applicants. Ideally, perhaps, this should be true. But law schools and bar examining committees must identify a grade below which students and applicants fail to pass. No setting of a passing grade or adoption of a grading formula can eliminate -- except on multiple choice exams -- the discretion exercised by the grader. By its very nature, therefore, grading examinations does not necessarily separate the competent from the incompetent or -- except very roughly -- identify those qualified to practice law and those not qualified. At best, a bar examination can identify those applicants who are *more* qualified to practice law than those less qualified.

<sup>32</sup> JUSTICE STEVENS' dissent states that "[any] possible claim that the challenged conduct is that of the State Supreme Court is squarely foreclosed by [Goldfarb v. Virginia State Bar, 421 U.S. 773 \(1975\)](#)." *Post*, at 589. At issue in *Goldfarb* was a Sherman Act challenge to minimum-fee schedules maintained by the Fairfax County Bar Association and enforced by the Virginia State Bar. In *Goldfarb*, state law did not refer to lawyers' fees, the Virginia Supreme Court Rules did not direct the State Bar to supply fee schedules, and the Supreme Court did not approve the fee schedules established by the State Bar. To the contrary, the court "directed lawyers not 'to be controlled' by fee schedules." [421 U.S., at 789](#). Thus, even though the State Bar was a state agency, the Court concluded that "it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent." [Id., at 790](#). As is evident from the provisions in the Arizona Supreme Court Rules, this case arises under totally different circumstances, although the relevant legal principles are the same. The dissent's reliance on *Goldfarb* simply misreads the decision in that case.

<sup>33</sup> The dissent relies on *Boulder*, arguing that the "clearly articulated and affirmatively expressed state policy" does not exist in this case. *Post*, at 594-596. What the dissent overlooks is that the Court in *Boulder* was careful to say that action is not "exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity, see *Parker*, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, see *City of Lafayette*. . ." [455 U.S., at 52](#). Thus, unlike the dissent here, JUSTICE BRENNAN in *Boulder* was careful to distinguish between action by the sovereign itself and action taken by a subordinate body.

The dissent also cites [Cantor v. Detroit Edison Co., 428 U.S. 579 \(1976\)](#), and [California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 \(1980\)](#), as presenting situations analogous to the action of the Arizona Supreme Court. This argument overlooks the fundamental difference between this case and the several cases cited by respondent. In each of those cases, it was necessary for the Court to determine whether there had been a clearly articulated and affirmatively expressed state policy because the challenged conduct was not that of the State "acting as sovereign." Here, as we have noted above, the Arizona Supreme Court, acting in its sovereign capacity, made the final decision to deny admission to Ronwin. See n. 30, *supra*.

advisory committee, the dissent would find the State exempt from Sherman Act liability but not the committee. [\*\*\*\*42] A party dissatisfied with the new law could circumvent the state-action doctrine by alleging that the committee's advice reflected an undisclosed collective desire to restrain trade without the knowledge of the legislature. The plaintiff certainly would survive a motion to dismiss -- or even summary judgment -- despite the fact that the suit falls squarely within the class of cases found exempt from Sherman Act liability in *Parker*.<sup>34</sup>

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[\*581] [\*\*2002] [LEdHN/1C](#) [1C]In [\*\*\*608] summary, this case turns on a narrow and specific issue: who denied Ronwin admission to the Arizona Bar? The dissent argues, in effect, that since there is no court order in the record, the denial must have been the action of the Committee. This argument ignores the incontrovertible fact that under the law of Arizona *only* the State Supreme Court had authority to admit or deny admission to practice law:

"[It] is not the function of the committee to grant or deny admission to the bar. That power rests solely in the Supreme Court. . . ." [Application of Burke, 87 Ariz. 336, 338, 351 P. 2d 169, 171 \(1960\)](#) (see n. 30, *supra*).

Thus, if the dissent's argument were accepted *all* decisions made with respect to admissions and denials of those who took the examination in February 1974 are void. Ronwin did not allege that he alone was a victim: his complaint avers [\*582] that he "was among those artificially prevented from entering into competition as an attorney in the state of Arizona" by the Committee's action with respect [\*\*\*\*44] to the February 1974 examination. We are unwilling to assume that the Arizona Supreme Court failed to comply with state law, and allowed the Committee alone to make the decisions with respect to the February 1974 examination. In any event, the record is explicit that Ronwin's postexamination petition complaining about his denial was rejected by an order of the Arizona Supreme Court. That there was state action at least as to Ronwin could not be clearer.

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<sup>34</sup> The *amicus curiae* brief of the National Conference of Bar Examiners points out that many States have bar admission processes like those at issue in this case. See Brief for National Conference of Bar Examiners as *Amicus Curiae* 1, 2, 8. Typically, the state supreme court is the ultimate decisionmaker and a committee or board conducts the examinations pursuant to court rules. It is customary for lawyers of recognized standing and integrity to serve on these bodies, usually as a public duty and with little or no compensation. See S. Duhl, *The Bar Examiner's Handbook* 95, 99 (2d ed. 1980). In virtually all States, a significant percentage of those who take the bar examination fail to pass. See 1982 Bar Examination Statistics, 52 Bar Examiner 24-26 (1983). Thus, every year, there are thousands of aspirants who, like Ronwin, are disappointed. For example, in 1974 (the year Ronwin first took the Arizona bar examination), of the 43,798 applicants who took bar examinations nationwide, 10,440 failed to pass. 44 Bar Examiner 115 (1975). The National Conference of Bar Examiners, in its *amicus* brief, cautions that affirmance of the Court of Appeals in this case could well invite numerous suits. It is no answer to say that, of course, such suits are likely to be frivolous. Ronwin, who failed the bar in 1974, has been litigating his claim for a decade on the basis of a complaint that basically challenges the *motive* of the Arizona Committee. His claim is that the grading formula was devised for the purpose of limiting competition. If such an allegation is sufficient to survive a motion to dismiss, examining boards and committees would have to bear the substantial "discovery and litigation burdens" attendant particularly upon refuting a charge of improper motive. See Areeda, Antitrust Immunity for "State Action" after *Lafayette*, 95 Harv. L. Rev. 435, 451 (1981). Moreover, Ronwin has brought a suit for damages under the Sherman Act, with the threat of treble damages. There can be no question that the threat of being sued for damages -- particularly where the issue turns on subjective intent or motive -- will deter "able citizens" from performing this essential public service. See [Harlow v. Fitzgerald, 457 U.S. 800, 814 \(1982\)](#). In our view, as the action challenged by Ronwin was that of the State, the motive of the Committee in its recommendations to the court was immaterial. We nevertheless think, particularly in view of the decision below, that the consequences of an affirmance should be understood. The consequences of reversal by the Court today will have only a limited effect. Our attention has not been drawn to any trade or other profession in which the licensing of its members is determined directly by the sovereign itself -- here the State Supreme Court.

We conclude that the District Court properly dismissed Ronwin's complaint for failure to state a claim upon which relief can be granted. Therefore, the judgment of the Court of Appeals is

*Reversed.*

JUSTICE REHNQUIST took no part in the decision of this case. JUSTICE O'CONNOR took no part in the consideration or decision of this case.

**Dissent by: STEVENS**

## Dissent

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JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE BLACKMUN join, dissenting.

In 14th-century London the bakers' guild regulated the economics of the craft and [\*\*2003] the quality of its product. In the year 1316, it was adjudged that one Richard de Lughteburgh "should have the punishment of the hurdle" because he sold certain loaves of bread in London; the [\*\*\*\*45] bread had been baked in Suthwerke, rather than London, and the loaves were not of "the proper [\*\*\*609] weight."<sup>1</sup> Thus Richard had violated [\*583] a guild restriction designed to protect the economic interests of the local bakers<sup>2</sup> as well as a restriction designed to protect the public from the purchase of inferior products.

[\*\*\*\*46] For centuries the common law of restraint of trade has been concerned with restrictions on entry into particular professions and occupations. As the case of the Suthwerke baker illustrates, the restrictions imposed by medieval English guilds served two important but quite different purposes. The guilds limited the number of persons who might engage in a particular craft in order to be sure that there was enough work available to enable guild members to earn an adequate livelihood.<sup>3</sup> [\*\*\*\*47] They also protected the public by ensuring that apprentices, journeymen, and master craftsmen would have the skills that were required for their work. In numerous occupations today, licensing requirements<sup>4</sup> may serve [\*584] either or both of the broad purposes of the medieval guild restrictions.

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<sup>1</sup> H. Riley, *Memorials of London and London Life in the XIIIth, XIVth, and XVth Centuries* 119-120 (1868). The punishment is described in a footnote as "[being] drawn on a hurdle through the principal streets of the City." *Id., at 119, n. 5.*

<sup>2</sup> "The principal reason for the existence of the gild was to preserve to its own members the monopoly of trade. No one not in the gild merchant of the town could buy or sell there except under conditions imposed by the gild. Foreigners coming from other countries or traders from other English towns were prohibited from buying or selling in any way that might interfere with the interest of the gildsmen. They must buy and sell at such times and in such places and only such articles as were provided by the gild regulations." E. Cheyney, *An Introduction to the Industrial and Social History of England* 52-53 (1920).

<sup>3</sup> "The craft gilds existed usually under the authority of the town government, though frequently they obtained authorization or even a charter from the crown. They were formed primarily to regulate and preserve the monopoly of their own occupations in their own town, just as the gild merchant existed to regulate the trade of the town in general. No one could carry on any trade without being subject to the organization which controlled that trade." *Id., at 55.*

<sup>4</sup> Professor Handler has pointed out:

"Entry into various fields of endeavor is guarded by numerous licensing restrictions. Licenses are demanded of physicians and surgeons, dentists, optometrists, pharmacists and druggists, nurses, midwives, chiropodists, veterinarians, certified public accountants, lawyers, architects, engineers and surveyors, shorthand reporters, master plumbers, undertakers and embalmers, real estate brokers, junk dealers, pawnbrokers, ticket agents, liquor dealers, private detectives, auctioneers, milk dealers, peddlers, master pilots and steamship engineers, weighmasters, forest guides, motion picture operators, itinerant retailers on boats, employment agencies, commission merchants of farm produce, and manufacturers of frozen desserts, concentrated feeds, and commercial fertilizers. No factory, cannery, place of public assembly, laundry, cold storage warehouse, shooting gallery, bowling alley and billiard parlor, or place of storage of explosives can be operated nor can industrial house work be

[\*\*\*\*48] The risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of both the development of the common law of restraint of trade and our antitrust jurisprudence. At the same time, the risk that the free market [\*\*\*610] may not adequately protect the public from purveyors of inferior goods and services has provided a legitimate justification for the public regulation of entry into a wide variety of occupations. Private regulation is generally proscribed by the antitrust laws; public regulation is generally consistent with antitrust [\*\*2004] policy. A potential conflict arises, however, whenever government delegates licensing power to private parties whose economic interests may be served by limiting the number of competitors who may engage in a particular trade. In fact private parties have used licensing to advance their own interests in restraining competition at the expense of the public interest. See generally Gellhorn, The Abuse of Occupational Licensing, 44 U. Chi. L. Rev. 6 (1976).

The potential conflict with [\*\*\*\*49] the antitrust laws may be avoided in either of two ways. The State may itself formulate the governing standards and administer the procedures [\*585] that determine whether or not particular applicants are qualified. When the State itself governs entry into a profession, the evils associated with giving power over a market to those who stand to benefit from inhibiting entry into that market are absent. For that reason, state action of that kind, even if it is specifically designed to control output and to regulate prices, does not violate the antitrust laws. *Parker v. Brown*, 317 U.S. 341 (1943). Alternatively, the State may delegate to private parties the authority to formulate the standards and to determine the qualifications of particular applicants. When that authority is delegated to those with a stake in the competitive conditions within the market, there is a risk that public power will be exercised for private benefit. To minimize that risk, state policies displacing competition must be "clearly and affirmatively expressed" and must be appropriately supervised. See *Community Communications Co. v. Boulder*, 455 U.S. 40 (1982); [\*\*\*\*50] *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103-106 (1980).

In this case respondent has been unable to obtain a license to practice law in Arizona. He alleges that this is not because of any doubts about his competence as a lawyer, but because petitioners have engaged in an anticompetitive conspiracy in which they have used the Arizona bar examination to artificially limit the number of persons permitted to practice law in that State. Petitioners claim that the alleged conspiracy is not actionable under § 1 of the Sherman Act, *15 U. S. C. § 1*, because it represents the decision of the State. But petitioners do not identify any state body that has decided that it is in the public interest to limit entry of even fully qualified persons into the Arizona Bar. Indeed, the conspiracy that is alleged is not the product of any regulatory scheme at all; there is no evidence that any criterion except competence has been adopted by Arizona as the basis for granting licenses to practice law. The conspiracy respondent has alleged is private; market participants are allegedly [\*586] attempting to protect their [\*\*\*\*51] competitive position through a misuse of their powers. Yet the Court holds that this conspiracy is cloaked in the [\*\*\*611] State's immunity from the antitrust laws. In my judgment, the competitive ideal of the Sherman Act may not be so easily escaped.

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Petitioners are members of the Arizona Supreme Court's Committee on Examinations and Admissions. The Arizona Supreme Court established the Committee to recommend applicants for admission to the Arizona Bar; it consists of seven members of the State Bar selected from a list of nominees supplied by the Arizona State Bar Association's Board of Governors.<sup>5</sup> Petitioners administered the 1974 bar examination which respondent took and failed. In his complaint, respondent alleged that after the scores of each candidate were known, petitioners selected a particular score which would equal the passing grade. The complaint alleges that the petitioners would adjust the grading formula in order to limit the number of persons who could enter the market and compete with

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carried on without registration or license. Licenses are also required for the sale of minnows, use of fishing nets, and the operation of educational institutions, correspondence schools, filling stations and motor vehicles. Motion pictures cannot be exhibited unless licensed, and canal boats must be registered." M. Handler, Cases and Other Materials on Trade Regulation 3-4 (1937) (footnotes omitted).

<sup>5</sup> Ariz. Sup. Ct. Rule 28(a).

members of the Arizona Bar. [\*\*2005] In this manner, respondent was "artificially prevented from entering into competition as an attorney in the State of Arizona."<sup>6</sup> [\*\*\*\*52]

The Arizona Supreme Court has instructed petitioners to recommend for admission to the Bar "[all] applicants who receive a passing grade in the general examination and who are found to be otherwise qualified. . . ." <sup>7</sup> There is no indication that any criterion other than competence is appropriate under the Supreme Court's Rules for regulating admission to the Bar.<sup>8</sup> Indeed with respect to respondent's application [\*587] for admission, the Arizona Supreme Court wrote: "The practice of law is not a privilege but a right, conditioned solely upon the requirement that a person have the necessary mental, physical and moral qualifications." [Application of Ronwin, 113 Ariz. 357, 358, 555 P.2d 315, 316 \(1976\)](#), cert. denied, 430 U.S. 907 (1977). In short, one looks in vain in Arizona law, petitioners' briefs, or the pronouncements of the Arizona Supreme Court for an articulation of any policy beside that of admitting only competent [\*\*\*\*53] attorneys to practice in Arizona.

Thus, respondent does not challenge any state policy. He contests neither the decision to license those who wish to practice law, nor the decision to require a certain level of competence, as measured in a bar examination, as a precondition to licensing. Instead, he challenges an alleged decision to exclude even competent attorneys from practice in Arizona in order to protect the interests of the Arizona Bar.

As we have often reiterated in cases that involve the sufficiency of a pleading, a federal court may not dismiss a complaint for failure to state a claim unless it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can [\*\*\*\*54] prove no set of facts [\*\*\*612] which would entitle him to relief.<sup>9</sup> The allegations of the complaint must be taken as true for purposes of a decision on the pleadings.<sup>10</sup>

[\*\*\*\*55] A judge reading a complaint of this kind is understandably somewhat skeptical. It seems highly improbable that members of the profession entrusted by the State Supreme Court [\*588] with a public obligation to administer an examination system that will measure applicants' competence would betray that trust, and secretly subvert that system to serve their private ends. Nevertheless, the probability that respondent will not prevail at trial is no justification for dismissing the complaint. "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." [Scheuer v. Rhodes, 416 U.S. 232, 236 \(1974\)](#). The Court does not purport to justify dismissal of this complaint by reference to the low probability that respondent will prevail at trial. Instead, it substantially broadens the doctrine of antitrust immunity, using an elephant gun to kill a flea.

## [\*\*2006] II

If respondent were challenging a restraint of trade imposed by the sovereign itself, this case would be governed by [Parker v. Brown, 317 U.S. 341 \(1943\)](#), which held that the Sherman Act does not apply to the sovereign [\*\*\*\*56] acts of States. See [id., at 350-352](#). As the Court points out, the Arizona Supreme Court exercises sovereign power with respect to admission to the Arizona Bar; hence if the challenged conduct were that of the court, it would be immune under Parker. Ante, at 567-569.<sup>11</sup> [\*\*\*\*57] The majority's conclusion that the challenged action was that

<sup>6</sup> See App. 10-11.

<sup>7</sup> Ariz. Sup. Ct. Rule 28(c) VIII.

<sup>8</sup> Petitioners certainly do not suggest the existence of any other criterion under Arizona law. To the contrary, at oral argument they expressly acknowledged that there is no state policy adopting any criterion but competence for admission to the Bar. Tr. of Oral Arg. 22-24.

<sup>9</sup> See [McClain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 246-247 \(1980\)](#); [Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 397, n. 11 \(1979\)](#); [Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746 \(1976\)](#); [Scheuer v. Rhodes, 416 U.S. 232, 236 \(1974\)](#); [Conley v. Gibson, 355 U.S. 41, 45-46 \(1957\)](#).

<sup>10</sup> See [Hughes v. Rowe, 449 U.S. 5, 10 \(1980\)](#) (per curiam); [Cruz v. Beto, 405 U.S. 319, 322 \(1972\)](#) (per curiam); [California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 515-516 \(1972\)](#); [Jenkins v. McKeithen, 395 U.S. 411, 421 \(1969\)](#) (plurality opinion); [Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 174-175 \(1965\)](#).

of the Arizona Supreme Court is, however, plainly wrong. Respondent alleged that the decision to place an artificial limit on the number of lawyers was made by petitioners -- not by the State Supreme Court. There is no contention that petitioners made that decision at the direction or behest of the Supreme Court. That court is not a petitioner, nor was it named as a defendant in respondent's complaint. Nor, unlike the Court, have petitioners suggested that the Arizona Supreme Court played any part in establishing the grading standards for the bar examination [\*589] or made any independent decision to admit or reject *any* individual applicant for admission [\*\*\*613] to the Bar.<sup>12</sup> Because respondent is not challenging the conduct of the Arizona Supreme Court, *Parker* is simply inapplicable.

Any possible claim that the challenged conduct is that of the State Supreme Court is squarely foreclosed by *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). There an antitrust action was brought challenging minimum-fee schedules published by a county bar association and enforced by the State Bar pursuant to its mandate from the Virginia Supreme Court to regulate the practice of law in that State. After acknowledging that the State Bar was a state agency which had enforced the schedules pursuant to the authority granted it by the State Supreme Court, we stated a simple test for antitrust [\*\*\*58] immunity:

"The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is *required* by the State acting as sovereign. Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules *required* the anticompetitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent [\*590] to supply them, or require the type of price floor which arose from respondents' activities." *Id.*, at 790 (emphasis supplied) (citations omitted).

In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Court applied the *Goldfarb* test to a disciplinary rule restricting advertising by Arizona attorneys that the Supreme Court itself "has imposed and enforces," 433 U.S., at 353: [\*\*\*59]

"In the instant case . . . the challenged restraint is the affirmative command of the Arizona Supreme Court under its Rules 27(a) and 29(a) and its Disciplinary Rule 2-101(B). That court is the ultimate body wielding the State's power [\*\*2007] over the practice of law, see Ariz. Const., Art. 3; *In re Bailey*, 30 Ariz. 407, 248 P. 29 (1926), and, thus, the restraint is 'compelled by direction of the State acting as a sovereign.' 421 U.S., at 791 (footnote omitted)." *Id.*, at 359-360.

The test stated in *Goldfarb* and *Bates* is that the sovereign must *require* the restraint. Indeed, that test is derived from *Parker* itself: " [\*\*\*614] We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities *directed* by its legislature [or supreme court]." 317 U.S., at 350-351 (emphasis supplied). Here, the sovereign is the State Supreme Court, not petitioners, and the court did not require petitioners to grade the bar examination as they did.<sup>13</sup> The fact that petitioners are

<sup>11</sup> See *Bates v. State Bar of Arizona*, 433 U.S. 350, 359-360 (1977).

<sup>12</sup> It should be noted that petitioners do not advance the imaginative argument on which this Court's decision rests -- that the examination procedure is merely advisory and that the Arizona Supreme Court itself "made the final decision on each applicant." *Ante*, at 578 (footnote omitted). Presumably petitioners are more familiar with how their own procedures work than is this Court. The Court shows precious little deference to "administrative expertise" in its analysis of the facts.

<sup>13</sup> It is not surprising that petitioners (who must practice before the Arizona Supreme Court) did not advance the theory on which this Court relies -- that their challenged conduct is actually conduct of the Arizona Supreme Court. They surely understand that they are not the court, but rather its subordinate.

part of a state agency under the direction [\*\*\*\*60] of the sovereign is insufficient to cloak them in the sovereign's immunity; that much was also decided in *Goldfarb*:

[\*591] "The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act." [421 U.S., at 791-792](#) (footnotes and citation omitted).

"*Goldfarb* therefore made it clear that, for purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign." [Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 \(1978\)](#) (plurality opinion). Rather, "anticompetitive actions of a state instrumentality not compelled by the State acting as sovereign are not immune from the antitrust laws." [Id., at 411, n. 41](#). See also [id., at 425](#) (opinion of BURGER, C. J.); [Cantor v. Detroit Edison Co., 428 U.S. 579, 604 \(1976\)](#) [\*\*\*\*61] (opinion of BURGER, C. J.). An antitrust attack falls under *Parker* only when it challenges a decision of the sovereign and not the decision of the state bar which indisputably is not the sovereign. See [California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 104-105 \(1980\)](#).

<sup>14</sup> [\*\*\*\*62] Here no decision of the sovereign, the Arizona Supreme Court, is attacked; <sup>15</sup> only a [\*592] conspiracy [\*\*\*615] of petitioners which was neither compelled nor directed by the sovereign is at stake. Since there is no claim that the court directed petitioners to artificially reduce the number of lawyers in Arizona, petitioners [\*\*2008] cannot utilize the sovereign's antitrust immunity.<sup>16</sup>

[\*\*\*\*63] The majority's confused analysis is illustrated by its difficulty in identifying the sovereign conduct which it thinks is at issue here. To support its conclusion that the challenged action is that of the Arizona Supreme Court, the majority suggests that what respondent challenges is the court's decision to deny respondent's application for admission to the Bar. *Ante*, at 577-578, n. 30. I find nothing in the record to indicate that the court ever made such a decision. Respondent's complaint alleges only that petitioners "announced the results" of the bar examination. App. 9. In their answer, petitioners admitted this and added nothing else of significance. [Id., at 17](#). The Rules of the Supreme Court do not call for the court to deny the application of a person who has failed the bar examination; rather they state only that any "applicant aggrieved by any decision of the Committee . . . may within 20 days after such occurrence file a verified petition [\*593] with this Court for a review." Ariz. Sup. Ct. Rule 28(c) XII. Yet the Court disavows reliance on the Supreme Court's denial of Ronwin's petition, *ante*, at 577-578, n. 30,<sup>17</sup> [\*\*\*\*65] and

<sup>14</sup> See also [New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96, 109 \(1978\)](#); [Cantor v. Detroit Edison Co., 428 U.S., at 593-595](#).

<sup>15</sup> In response to this dissent, the Court has advanced the theory that the relevant "state action" was the State Supreme Court's rejection of an original complaint filed in that court containing a "plethora of charges, including the substance of the complaint in this case." *Ante*, at 576-577. See also *ante*, at 582. Presumably, that complaint was simply deficient as a matter of state law; if the allegations of respondent's current complaint are taken as true then the fact that respondent failed the bar examination would have provided an adequate ground for the dismissal of respondent's complaint without any review of respondent's allegations. Even if it were the case that the Arizona Supreme Court reviewed petitioner's complaint on its merits, all that would indicate is that the court has declined to exercise its power of revision with respect to petitioners' alleged anticompetitive policies. That is far different from having required petitioners to adopt those policies in the first place, which is what *Goldfarb* requires.

<sup>16</sup> The Court argues that "[only] the Arizona Supreme Court had the authority to grant or deny admission to practice in the State," *ante*, at 575-576 (footnote omitted), and therefore concludes that the challenged conduct is that of the court. But there is no allegation that the challenged policy was adopted by the court; at most the court has permitted it by accepting the recommendations of petitioners. Yet as *Bates* and *Goldfarb* make clear, the challenged policy must be required by the sovereign. The fact that the court retained the power to disapprove of the examination procedure adopted by petitioners is no different from the fact that the Virginia Supreme Court retained the power to disapprove of the fee schedules set by the bar association in *Goldfarb*. Similar powers of revision were held insufficient to justify immunity in *Lafayette*, *Cantor*, and *Midcal*.

with good reason, see n. [\*\*\*\*64] 15, *supra*.<sup>18</sup> Thus, if the Supreme Court did not itself deny Ronwin's application, if its denial of Ronwin's petition for review is irrelevant, and if the only criterion it ever required petitioners to employ was competence, it is difficult to see why petitioners should have immunity from the requirements of federal law if, as [\*\*\*616] alleged, they took the initiative in employing a criterion other than competence. "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." *Goldfarb, 421 U.S., at 791*.

### III

It is, of course, true that the Arizona Supreme Court delegated to petitioners the task of administering the bar exam, and retained the authority to review or revise any action taken by petitioners. However, neither of these factors [\*594] is sufficient to accord petitioners immunity under the Sherman Act.

In *Bates*, the Court held that the State Bar's restrictions on attorney advertising qualified for antitrust immunity, [433 U.S., at 359-362](#), because "the state policy requiring the anticompetitive restraint as part of a comprehensive regulatory system, was one [\*\*\*\*66] clearly articulated and affirmatively expressed as state [\*\*2009] policy, and that the State's policy was actively supervised by the State Supreme Court as the policymaker." [Lafayette, 435 U.S., at 410](#) (plurality opinion) (footnote omitted). This Court has since "adopted the principle, expressed in the plurality opinion in *Lafayette*, that anticompetitive restraints engaged in by state municipalities or subdivisions must be 'clearly articulated and affirmatively expressed as state policy' in order to gain an antitrust exemption." *Community Communications Co. v. Boulder*, [455 U.S., at 51, n. 14](#) (quoting [Midcal, 445 U.S., at 105](#)).<sup>19</sup>

Here there is nothing approaching a clearly articulated and affirmatively expressed state policy favoring an artificial [\*\*\*\*67] limit on the number of lawyers licensed to practice in Arizona. Indeed, the majority does not attempt to argue that petitioners satisfy this test. The only articulated policy to be found in Arizona law is that competent lawyers should be admitted to practice; indeed this is the only policy petitioners articulate in this Court. An agreement of the type alleged in respondent's complaint is entirely unrelated to any "clearly articulated and affirmatively expressed" policy of Arizona. While the Arizona Supreme Court may have permitted petitioners to grade and score respondent's bar examination as they did, *Parker* itself indicates that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . ." [317 U.S., at 351](#). The Arizona Supreme Court [\*595] may permit the challenged restraint, but it has hardly required it as a consequence of some affirmatively expressed and clearly articulated policy. What we said of a state home-rule provision that permitted but did not require municipalities to adopt a challenged restraint on competition applies fully here:

<sup>17</sup> While the majority's disavowal in its note 30 is quite unequivocal, at other points in its opinion, see *ante*, at 576-577, and in its ultimate statement of its holding, see *ante*, at 582, it does seem to rely on the denial of respondent's petition for review. If that truly is critical for the majority, then it would follow that an individual in respondent's position who did not file a petition for review would be able to mount an antitrust challenge free from the immunity barrier the majority erects. If it indeed is that easy to escape the majority's holding, then that holding will not protect bar examiners against the parade of horribles discussed by the majority *ante*, at 580, and n. 34.

<sup>18</sup> The cases the Court cites *ante*, at 577, n. 30, 581, all involve instances in which an applicant who had passed the bar examination was nevertheless not recommended for admission. If the applicant seeks judicial review, those cases indicate that the court will decide for itself whether to admit the applicant. However, none of those cases indicates that the court makes an independent decision, or indeed any decision at all, to deny the application of a person who has failed the bar examination.

<sup>19</sup> See also [455 U.S., at 51-52, 54](#); *Midcal, 445 U.S., at 104-105*; *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, [439 U.S., at 109](#).

"[\*\*\*617] [\*\*\*\*68] [Plainly] the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought. . . . Acceptance of such a proposition -- that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances -- would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." *Boulder*, 455 U.S., at 55-56 (emphasis in original).

Unless the Arizona Supreme Court affirmatively directed petitioners to restrain competition by limiting the number of otherwise qualified lawyers admitted to practice in Arizona, it simply cannot be said that its position is anything more than one of neutrality; mere authorization for anticompetitive conduct is wholly insufficient to satisfy the test for antitrust immunity. See *Midcal*, 445 U.S., at 105-106; *Lafayette*, 435 U.S., at 414-415 [\*\*\*\*69] (plurality opinion).

<sup>20</sup> [\*\*\*\*70] [\*\*2010] No [\*596] affirmative decision of the Arizona Supreme Court to restrain competition by limiting the number of qualified persons admitted to the Bar is disclosed on the present record. The alleged conspiracy to introduce a factor other than competence into the bar examination process is not the product of a clearly articulated and affirmatively expressed state policy and hence does not qualify for antitrust immunity.<sup>21</sup>

#### [\*\*\*\*71] IV

[\*\*\*618] The conclusion that enough has been alleged in the complaint to survive a motion to dismiss does not warrant the further conclusion that the respondent is likely to prevail at [\*597] trial, or even that his case is likely to survive a motion for summary judgment. For it is perfectly clear that the admissions policy that is described in the Arizona Supreme Court's Rules does not offend the Sherman Act. Any examination procedure will place a significant barrier to entry into the profession; moreover, a significant measure of discretion must be employed in

<sup>20</sup> See also *Cantor v. Detroit Edison Co.*, 428 U.S., at 604-605 (opinion of BURGER, C. J.). In *Cantor*, the Court wrote:

"Respondent could not maintain the lamp-exchange program without the approval of the Commission, and now may not abandon it without such approval. Nevertheless, there can be no doubt that the option to have, or not to have, such a program is primarily respondent's, not the Commission's. Indeed, respondent initiated the program years before the regulatory agency was even created. There is nothing unjust in a conclusion that respondent's participation in the decision is sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law. Accordingly, even though there may be cases in which the State's participation in a decision is so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it, this record discloses no such unfairness." *Id.*, at 594-595 (footnotes omitted).

<sup>21</sup> In this Court petitioners appear to have abandoned the argument, advanced for the first time in a petition for rehearing in the Court of Appeals, that the examination grading formula was actually approved by the State Supreme Court. Because the majority appears to revive this abandoned contention, *ante*, at 572-573, and n. 22, see also *ante*, at 576, it is necessary to address it, though that requires no more than brief reference to the Court of Appeals' opinion:

"Defendants contend for the first time on rehearing that the Committee's grading formula 'was submitted to the Court, reviewed by the Court, and accepted by the Court.' In response, Ronwin has tendered to this court what purports to be the letter the Committee filed with the Supreme Court on February 8, 1974 pursuant to Rule 28(c) (VII)(B). If, as Ronwin alleges, the Committee scored the examination to admit a pre-determined number of applicants, the letter does not so advise the court. Accordingly, if the letter presented to us constitutes the submission to the Supreme Court, it cannot be the basis for a clearly articulated and affirmatively expressed state policy. Although dismissal might have been proper if the facts were as defendants now argue for the first time on rehearing, those facts were never brought to the district court's attention. Dismissal was therefore improper on the basis of the information before the district court." *Ronwin v. State Bar of Arizona*, 686 F.2d 692, 697 (CA9 1981).

It is, of course, equally improper for this Court to rely on evidence not presented to the District Court as a basis for holding that the complaint was not sufficient to withstand a motion to dismiss. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157-158, n. 16 (1970).

the administration of testing procedures. Yet ensuring that only the competent are licensed to serve the public is entirely consistent with the Sherman Act. See *Goldfarb*, 421 U.S., at 792-793.<sup>22</sup>

[\*\*\*\*72] The Court is concerned about the danger that because thousands of aspirants fail to pass bar examinations every year, "affirmance of the Court of Appeals in this case could well invite numerous suits" questioning bar examiners' motives; the Court fears that the burdens of discovery and trial and "the threat of treble damages" will deter "able citizens" from performing this essential public service." *Ante*, at 580-581, n. 34. The Court is, I submit, unduly alarmed.<sup>23</sup> [\*\*\*\*74] A [\*598] denial of antitrust immunity [\*\*2011] in this case would not necessarily pose any realistic threat of liability, or even of prolonged litigation. Respondent must first produce sufficient evidence that petitioners have indeed abused their public trust to survive summary judgment, a task that no doubt will prove formidable.<sup>24</sup> Moreover, petitioners' motives will not necessarily [\*\*\*619] be relevant to respondent's case. If the proof demonstrates that petitioners have adopted a reasonable means for regulating admission to the Arizona Bar on the basis of competence, respondent will be unable to show the requisite adverse effect on competition even if the subjective motivation of one or more bar [\*\*\*\*73] examiners was tainted by sinister self-interest. Indeed, even if respondent can show that he was "arbitrarily" denied admission to the Bar for reasons unrelated to his qualifications, unless he can also show that this occurred as part of an anticompetitive scheme, his antitrust claim will fail.

In any event, there is true irony in the Court's reliance on these concerns. In essence, the Court is suggesting that a special protective shield should be provided to lawyers because they -- unlike bakers, engineers, or the members of any other craft -- may not have sufficient confidence in the ability of our legal system to identify and reject unmeritorious claims to be willing to assume the ordinary risks of litigation associated with the performance of civic responsibilities. I do not share the Court's fear that the administration of bar [\*599] examinations by court-appointed lawyers cannot survive [\*\*\*\*75] the scrutiny associated with rather ordinary litigation that persons in most other walks of life are expected to endure.

The Court also no doubt believes that lawyers -- or at least those leaders of the bar who are asked to serve as bar examiners -- will always be faithful to their fiduciary responsibilities. Though I would agree that the presumption is indeed a strong one, nothing in the sweeping language of the Sherman Act justifies carving out rules for lawyers inapplicable to any other profession. In *Goldfarb* we specifically rejected such parochialism. Indeed, the argument that it is unwise or unnecessary to require the petitioners to comply with the Sherman Act "is simply an attack upon the wisdom of the longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws." *Boulder*, 455 U.S., at 56. We should not ignore that commitment today.

Denial of antitrust immunity in this case would hardly leave the State helpless to cope with felt exigencies; should it wish to do so, the Arizona Supreme Court remains free to give petitioners an affirmative direction to engage in the precise conduct that respondent [\*\*\*\*76] has alleged. The antitrust laws hardly create any inescapable burdens for

<sup>22</sup> See generally *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348-349 (1982); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978).

<sup>23</sup> The majority makes the rather surprising suggestion that under the well-settled principles I have discussed, those who advise state legislatures on legislation which restrains competition could be sued under the Sherman Act. *Ante*, at 580. Such persons of course would have a complete defense since in such a case they would have been delegated no power which could be used to restrain competition and hence cannot be liable for a restraint they did not impose. Moreover, the Sherman Act protects the right to seek favorable legislation, even if the reason for doing so is to injure competitors. See *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The majority's focus on cases not before the Court surely reflects the weakness of its position with respect to the case that is here.

<sup>24</sup> In order to preserve the secrecy of bar examination questions, the test must vary from year to year; after a test has been given, it may become apparent that the anticipated passing grade should be adjusted in order to provide roughly the same measure of competence as was used in prior years. Thus respondent's burden of proving the conspiracy he has alleged requires far more than evidence that petitioners exercised discretion in setting the passing grade after the results were known.

the State; they simply require that decisions to displace the free market be made overtly by public officials subject to public accountability, rather than secretly in the course of a conspiracy involving representatives of a private guild accountable to the public indirectly if at all. See *id.*, at 56-57; *Lafayette*, 435 U.S., at 416-417 (plurality opinion). "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U.S., at 106.

The practical concerns identified by the Court pale when compared with the principle [\*\*2012] that should govern [\*\*\*620] the decision [\*600] of this case. The rule of law that applies to this case is applicable to countless areas of the economy in which arbitrary restraints on entry may impose the very costs on the consuming public which the antitrust laws were designed to avoid.<sup>25</sup> [\*\*\*\*78] Experience in the administration of the Sherman Act has demonstrated that there is a real risk that private [\*\*\*77] associations that purport merely to regulate professional standards may in fact use their powers to restrain competition which threatens their members.<sup>26</sup> It is little short of irresponsible to tear a gaping hole in the fabric of antitrust law simply because we may be confident that respondent will be unable to prove what he alleges.

[\*601] Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine.<sup>27</sup> Our legal system has developed procedures for speedily disposing of unfounded claims; if they are inadequate to protect petitioners from vexatious litigation, then there is something wrong with those procedures, not with the law of antitrust immunity. That body of law simply does not permit the Sherman Act to be displaced when neither the state legislature nor the state supreme court has expressed [\*\*\*79] any desire to preclude application of the antitrust laws to the conduct of those who stand to benefit from restraints of trade. A healthy respect for state regulatory policy does not require immunizing those who abuse their public trust; such a thin veneer of state involvement is insufficient justification for casting aside the competitive ideal of the Sherman Act. The commitment to free markets and open competition that has evolved over the centuries and is embodied in the Sherman Act [\*\*\*621] should be sturdy enough to withstand petitioners' flimsy claim. That claim might have merited the support of the 14th-century guilds; today it should be accorded the "punishment of the hurdle."

[\*\*\*80] I respectfully dissent.

## References

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<sup>25</sup> The conspiracy respondent has alleged, if proved, would have no procompetitive justification at all; it would be plainly inconsistent with the goals of the Sherman Act. Thus petitioners' claim of antitrust immunity arises in the least defensible context:

"[As] a general proposition . . . state-sanctioned anticompetitive activity must fall like any other if its potential harms outweigh its benefits. This does not mean that state-sanctioned and private activity are to be treated alike. The former is different because the fact of state sanction figures powerfully in the calculus of harm and benefit. If, for example, the justification for the scheme lies in the protection of health or safety, the strength of that justification is forcefully attested to by the existence of a state enactment. . . . A particularly strong justification exists for a state-sanctioned scheme if the State in effect has substituted itself for the forces of competition, and regulates private activity to the same ends sought to be achieved by the Sherman Act. Thus, an anticompetitive scheme which the State institutes on the plausible ground that it will improve the performance of the market in fostering efficient resource allocation and low prices can scarcely be assailed." *Cantor v. Detroit Edison Co.*, 428 U.S., at 610-611 (BLACKMUN, J., concurring in judgment).

<sup>26</sup> See, e. g., *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982); *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *American Medical Assn. v. United States*, 317 U.S. 519 (1943); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 465-466 (1941).

<sup>27</sup> If, as seems likely, respondent's claim proves insubstantial, it should be dealt with in the same manner as other such claims -- by means of summary judgment, perhaps coupled with an award of attorneys' fees should it also develop that this case was "unreasonably and vexatiously" brought. See *28 U. S. C. § 1927*.

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 18

15 USCS 1

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 9

L Ed Index to Annos, Restraints of Trade and Monopolies

ALR Quick Index, Attorneys; Restraints of Trade and Monopolies

Federal Quick Index, Attorneys; Monopolies and Restraints of Trade

Annotation References:

What constitutes "state action" under rule exempting state and local governmental action from antitrust laws. 70 L Ed 2d 973.

Valid governmental action as conferring immunity or exemption from private liability under the federal antitrust laws.  
12 ALR Fed 329.

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## Copperweld Corp. v. Independence Tube Corp.

Supreme Court of the United States

December 5, 1983, Argued ; June 19, 1984, Decided

No. 82-1260

### **Reporter**

467 U.S. 752 \*; 104 S. Ct. 2731 \*\*; 81 L. Ed. 2d 628 \*\*\*; 1984 U.S. LEXIS 115 \*\*\*\*; 52 U.S.L.W. 4821; 1984-2 Trade Cas. (CCH) P66,065

COPPERWELD CORP. ET AL. v. INDEPENDENCE TUBE CORP.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**Disposition:** [691 F.2d 310](#), reversed.

## **Core Terms**

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conspiracy, Sherman Act, wholly owned subsidiary, subsidiary, integration, affiliation, conspiring, intra-enterprise, Cab, affiliated corporation, anticompetitive, concerted, enterprise, unilateral, cases, acquisition, antitrust, effected, entities, tubing, combinations, coordinated, compete, common ownership, competitor, restrain, unreasonable restraint, antitrust liability, restraint of trade, parent corporation

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

[\*\*HN1\*\*](#) [down arrow] **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 1](#).

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

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

[\*\*HN2\*\*](#) [down arrow] **Monopolies & Monopolization, Actual Monopolization**

The Sherman Act contains a basic distinction between concerted and independent action. The conduct of a single firm is governed by [15 U.S.C.S. § 2](#) alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to restrain trade unreasonably, for even a vigorous competitor may leave that impression.

Antitrust & Trade Law > Sherman Act > General Overview

**[HN3](#) [down] Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Mergers & Acquisitions Law > Antitrust > Joint Ventures

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Vertical Acquisitions

**[HN4](#) [down] Price Fixing & Restraints of Trade, Horizontal Market Allocation**

Section 1 of the Sherman Act, [15 U.S.C.S. § 1](#), reaches unreasonable restraints of trade effected by a contract, combination or conspiracy between separate entities. It does not reach conduct that is "wholly unilateral." Concerted activity subject to [§ 1](#) is judged more sternly than unilateral activity under [§ 2](#). Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused. Other combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect. Whatever form the inquiry takes, however, it is not necessary to prove that concerted activity threatens monopolization.

Antitrust & Trade Law > Sherman Act > General Overview

**[HN5](#) [down] Antitrust & Trade Law, Sherman Act**

A [15 U.S.C.S. § 1](#) agreement may be found when the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

Antitrust & Trade Law > Sherman Act > General Overview

## [HN6](#) [+] Antitrust & Trade Law, Sherman Act

A parent corporation and its wholly owned subsidiary are incapable of conspiring with each other for purposes of [§ 1](#) of the Sherman Act. To the extent that prior decisions of the United States Supreme Court are to the contrary, they are disapproved and overruled.

## Lawyers' Edition Display

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### Decision

Parent corporation and its wholly owned subsidiary held incapable of conspiring with each other for purposes of 1 of Sherman Act ([15 USCS 1](#)).

### Summary

A steel tubing company brought an antitrust suit in the United States District Court for the Northern District of Illinois against a competing corporation, that corporation's wholly owned subsidiary, and a supplier of tubing mills. The jury found that the parent corporation and its wholly owned subsidiary had conspired to violate 1 of the Sherman Act ([15 USCS 1](#)), but that the supplier was not part of the conspiracy. The jury also found that the parent company, but not the subsidiary, had interfered with the tubing company's contractual relationship with the supplier, that the subsidiary, but not the parent, had interfered with the tubing company's contractual relationship with a potential customer and had slandered the tubing company, and that the supplier had breached its contract to supply a tubing mill. The United States Court of Appeals for the Seventh Circuit affirmed ([691 F2d 310](#)).

On certiorari, the United States Supreme Court reversed. In an opinion by Burger, Ch. J., joined by Blackmun, Powell, Rehnquist, and O'Connor, JJ., it was held that a parent corporation and its wholly owned subsidiary are legally incapable of conspiring with each other under 1 of the Sherman Act. The court said that the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of 1, and that 1 is limited to concerted conduct and does not prohibit conduct that is wholly unilateral.

Stevens, J., joined by Brennan and Marshall, JJ., dissented, expressing the view that a parent corporation and a wholly owned subsidiary corporation are capable of conspiring in violation of 1 and that the rule announced in the majority opinion was inconsistent with what the Supreme Court has held on at least seven previous occasions.

White, J., did not participate.

## Headnotes

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34 > parent and subsidiary corporation -- conspiracy -- > Headnote:

[LEdHN\[1A\]](#) [+] [1A] [LEdHN\[1B\]](#) [+] [1B] [LEdHN\[1C\]](#) [+] [1C] [LEdHN\[1D\]](#) [+] [1D]

467 U.S. 752, \*752; 104 S. Ct. 2731, \*\*2731; 81 L. Ed. 2d 628, \*\*\*628; 1984 U.S. LEXIS 115, \*\*\*\*1

A parent corporation and its wholly owned subsidiary are legally incapable of conspiring with each other under 1 of the Sherman Act ([15 USCS 1](#)); the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of 1. (Stevens, Brennan, and Marshall, JJ., dissented from this holding.)

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34 > pattern of acquisitions -- illegal combination -- > Headnote:

[LEdHN\[2\]](#) [↓] [2]

A pattern of acquisitions may itself create a combination illegal under 1 of the Sherman Act ([15 USCS 1](#)), especially when an original anticompetitive purpose is evident from the affiliated corporations' subsequent conduct.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > combination between subsidiaries and wholesalers -- resale price -- > Headnote:

[LEdHN\[3A\]](#) [↓] [3A] [LEdHN\[3B\]](#) [↓] [3B]

A combination involving a maximum resale pricing scheme between subsidiaries and wholesalers can violate 1 of the Sherman Act ([15 USCS 1](#)).

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > conduct of single firm -- > Headnote:

[LEdHN\[4\]](#) [↓] [4]

Under the Sherman Act, the conduct of a single firm is governed by 2 of the Act ([15 USCS 2](#)) alone and is unlawful only when it threatens actual monopolization; it is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > concerted and unilateral conduct --

> Headnote:

[LEdHN\[5A\]](#) [↓] [5A] [LEdHN\[5B\]](#) [↓] [5B]

By making a conspiracy to monopolize unlawful, 2 of the Sherman Act ([15 USCS 2](#)) reaches both concerted and unilateral behavior, but purely unilateral conduct is illegal only under 2 and not under 1 of the Act ([15 USCS 1](#)); monopolization without conspiracy is unlawful under 2, but restraint of trade without a conspiracy or combination is not unlawful under 1.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §6 > purpose of antitrust laws -- > Headnote:

[LEdHN\[6A\]](#) [↓] [6A] [LEdHN\[6B\]](#) [↓] [6B]

The antitrust laws were enacted for the protection of competition, not competitors.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > separate entities -- unilateral conduct --> Headnote:

[LEdHN\[7\]](#) [7]

Section 1 of the Sherman Act ([15 USCS 1](#)) reaches unreasonable restraints of trade effected by a contract, combination, or conspiracy between separate entities; it does not reach conduct that is wholly unilateral.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > horizontal price fixing -- market allocation -> Headnote:

[LEdHN\[8\]](#) [8]

Horizontal price-fixing agreements and market allocation agreements are illegal per se under 1 of the Sherman Act ([15 USCS 1](#)) without inquiry into the harm they have actually caused.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > mergers -- joint ventures -- vertical agreements --> Headnote:

[LEdHN\[9\]](#) [9]

For purposes of 1 of the Sherman Act ([15 USCS 1](#)), mergers, joint ventures, and various vertical agreements are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > concerted activity --> Headnote:

[LEdHN\[10\]](#) [10]

It is not necessary to prove that concerted activity threatens monopolization in order for there to be a violation of 1 of the Sherman Act ([15 USCS 1](#)).

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34 > conspiracy -- officers or employees of same firm --> Headnote:

[LEdHN\[11\]](#) [11]

Officers or employees of the same firm do not provide the plurality of actors imperative for a conspiracy under 1 of the Sherman Act ([15 USCS 1](#)); an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that 1 was designed to police.

467 U.S. 752, \*752; 104 S. Ct. 2731, \*\*2731; 81 L. Ed. 2d 628, \*\*\*628; 1984 U.S. LEXIS 115, \*\*\*\*1

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34 > conspiracy -- corporate officers --

> Headnote:

[LEdHN\[12A\]](#) [12A] [LEdHN\[12B\]](#) [12B] [LEdHN\[12C\]](#) [12C] [LEdHN\[12D\]](#) [12D]

Corporations are incapable of conspiring with their own officers or employees for purposes of 1 of the Sherman Act ([15 USCS 1](#)).

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > activities of single firm -- > Headnote:

[LEdHN\[13A\]](#) [13A] [LEdHN\[13B\]](#) [13B]

Section 1 of the Sherman Act ([15 USCS 1](#)) excludes from unlawful combinations or conspiracies the activities of a single firm.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34 > conduct of corporation and unincorporated division -- > Headnote:

[LEdHN\[14\]](#) [14]

Section 1 of the Sherman Act ([15 USCS 1](#)) is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions; the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §10 > conspiracy -- unity of purpose --

> Headnote:

[LEdHN\[15\]](#) [15]

An agreement violating 1 of the Sherman Act ([15 USCS 1](#)) may be found when the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > single firm -- anticompetitive conduct --

> Headnote:

[LEdHN\[16\]](#) [16]

The Sherman Act does not prohibit a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to liability under 1 of the Act ([15 USCS 1](#)).

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > Sherman Act -- concerted conduct --

> Headnote:

[LEdHN\[17\]](#) [17]

[Section 1](#) of the Sherman Act ([15 USCS 1](#)) is limited to concerted conduct.

## Syllabus

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Petitioner Copperweld Corp. purchased petitioner Regal Tube Co., a manufacturer of steel tubing, from Lear Siegler, Inc., which had operated Regal as an unincorporated division, and which under the sale agreement was bound not to compete with Regal for five years. Copperweld then transferred Regal's assets to a newly formed, wholly owned subsidiary. Shortly before Copperweld acquired Regal, David Grohne, who previously had been an officer of Regal, became an officer of Lear Siegler, and, while continuing to work for Lear Siegler, formed respondent corporation to compete with Regal. Respondent then gave Yoder Co. a purchase order for a tubing mill, but Yoder voided the order when it received a letter from Copperweld warning that Copperweld would be greatly [\*\*\*\*2] concerned if Grohne contemplated competing with Regal and promising to take the necessary steps to protect Copperweld's rights under the noncompetition agreement with Lear Siegler. Respondent then arranged to have a mill supplied by another company. Thereafter, respondent filed an action in Federal District Court against petitioners and Yoder. The jury found, *inter alia*, that petitioners had conspired to violate [§ 1](#) of the Sherman Act but that Yoder was not part of the conspiracy, and awarded treble damages against petitioners. The Court of Appeals affirmed. Noting that the exoneration of Yoder from antitrust liability left a parent corporation and its wholly owned subsidiary as the only parties to the [§ 1](#) conspiracy, the court questioned the wisdom of subjecting an "intra-enterprise" conspiracy to antitrust liability, but held that such liability was appropriate "when there is enough separation between the two entities to make treating them as two independent actors sensible," and that there was sufficient evidence for the jury to conclude that Regal was more like a separate corporate entity than a mere service arm of the parent.

*Held:* Petitioner Copperweld and its [\*\*\*\*3] wholly owned subsidiary, petitioner Regal, are incapable of conspiring with each other for purposes of [§ 1](#) of the Sherman Act. Pp. 759-777.

(a) While this Court has previously seemed to acquiesce in the "intra-enterprise conspiracy" doctrine, which provides that [§ 1](#) liability is not foreclosed merely because a parent and its subsidiary are subject to common ownership, the Court has never explored or analyzed in detail the justifications for such a rule. Pp. 759-766.

(b) [Section 1](#) of the Sherman Act, in contrast to [§ 2](#), reaches unreasonable restraints of trade effected by a "contract, combination . . . or conspiracy" between *separate* entities, and does not reach conduct that is "wholly unilateral." Pp. 767-769.

(c) The coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of [§ 1](#) of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate, and their general corporate objectives are guided or determined not by two separate corporate consciousnesses, but one. With or without a formal "agreement," the subsidiary acts for the parent's [\*\*\*\*4] benefit. If the parent and subsidiary "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for [§ 1](#) scrutiny. In reality, the parent and subsidiary *always* have a "unity of purpose or a common design." The "intra-enterprise conspiracy" doctrine relies on artificial distinctions, looking to the form of an enterprise's structure and ignoring the reality. Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary. Here, nothing in the record indicates any meaningful difference between Regal's operations as an unincorporated division of Lear Siegler and its later operations as a wholly owned subsidiary of Copperweld. Pp. 771-774.

(d) The appropriate inquiry in this case is not whether the coordinated conduct of a parent and its wholly owned subsidiary may ever have anticompetitive effects or whether the term "conspiracy" will bear a literal construction that includes a parent and its subsidiaries, but rather whether the logic underlying Congress' decision to exempt unilateral conduct from scrutiny [\*\*\*\*5] under § 1 of the Sherman Act similarly excludes the conduct of a parent and subsidiary. It can only be concluded that the coordinated behavior of a parent and subsidiary falls outside the reach of § 1. Any anticompetitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed adequately without resort to an "intra-enterprise conspiracy" doctrine. A corporation's initial acquisition of control is always subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act, and thereafter the enterprise is subject to § 2 of the Sherman Act and § 5 of the Federal Trade Commission Act. Pp. 774-777.

**Counsel:** Erwin N. Griswold argued the cause for petitioners. With him on the briefs were William R. Jentes, Sidney N. Herman, Robert E. Shapiro, and Donald I. Baker.

Deputy Solicitor General Wallace argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Solicitor General Lee, Assistant Attorney General Baxter, Deputy Assistant Attorney General Collins, Carolyn F. Corwin, Barry Grossman, and Nancy C. Garrison.

Victor E. Grimm argued the cause for respondent. With him on the brief [\*\*\*\*6] were John R. Myers and Scott M. Mendel.<sup>\*</sup>

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\* J. Randolph Wilson, Russell H. Carpenter, Jr., Stephen A. Bokat, Cynthia Wicker, William E. Blasier, and Quentin Riegel filed a brief for the Chamber of Commerce of the United States et al. as amici curiae urging reversal.

A brief of amici curiae urging affirmance was filed for the State of Alabama et al. by Robert K. Corbin, Attorney General of Arizona, and Richard A. Alcorn and Charles L. Eger, Assistant Attorneys General; Charles A. Graddick, Attorney General of Alabama, and Richard Owen, Assistant Attorney General; John Steven Clark, Attorney General of Arkansas, and Jeffrey A. Bell, Assistant Attorney General; Duane Woodard, Attorney General of Colorado, and Thomas P. McMahon, Assistant Attorney General; Neil F. Hartigan, Attorney General of Illinois, and Robert E. Davy, Assistant Attorney General; Thomas J. Miller, Attorney General of Iowa, and John R. Perkins, Assistant Attorney General; Robert T. Stephan, Attorney General of Kansas, and Wayne E. Hundley, Deputy Attorney General; Steven L. Beshear, Attorney General of Kentucky, and James M. Ringo, Assistant Attorney General; Hubert H. Humphrey III, Attorney General of Minnesota, and Stephen P. Kilgriff, Assistant Attorney General; Bill Allain, Attorney General of Mississippi, and Robert Sanders, Special Assistant Attorney General; Mike Greely, Attorney General of Montana, and Joe R. Roberts, Assistant Attorney General; Paul L. Douglas, Attorney General of Nebraska, and Dale A. Comer, Assistant Attorney General; Robert O. Wefald, Attorney General of North Dakota, and Alan C. Hoberg, Assistant Attorney General; Michael C. Turpen, Attorney General of Oklahoma, and James B. Franks, Assistant Attorney General; Dave Frohnmayer, Attorney General of Oregon; John J. Easton, Jr., Attorney General of Vermont, and Glenn R. Jarrett, Assistant Attorney General; Ken Eikenberry, Attorney General of Washington, John R. Ellis, Deputy Attorney General, and Jon P. Ferguson, Assistant Attorney General; Bronson C. La Follette, Attorney General of Wisconsin, and Michael L. Zaleski, Assistant Attorney General; Joseph I. Lieberman, Attorney General of Connecticut, and Robert M. Langer, Assistant Attorney General; Charles M. Oberly, Attorney General of Delaware, and Vincent M. Amberly, Deputy Attorney General; James E. Tierney, Attorney General of Maine, and Stephen L. Wessler, Senior Assistant Attorney General; Stephen H. Sachs, Attorney General of Maryland, and Charles O. Monk II, Assistant Attorney General; Frank J. Kelley, Attorney General of Michigan, and Edwin M. Bladen, Assistant Attorney General; Paul Bardacke, Attorney General of New Mexico; Rufus L. Edmisten, Attorney General of North Carolina, and H. A. Cole, Jr., Special Deputy Attorney General; Dennis J. Roberts II, Attorney General of Rhode Island, and Faith A. LaSalle, Special Assistant Attorney General; Mark V. Meierhenry, Attorney General of South Dakota, and Dennis R. Holmes, Deputy Attorney General; William M. Leech, Jr., Attorney General of Tennessee, and William J. Haynes, Jr., Deputy Attorney General; David L. Wilkinson, Attorney General of Utah, Stephen G. Schwendiman, Chief, Assistant Attorney General, and Suzanne M. Dallimore, Assistant Attorney General; A. G. McClintock, Attorney General of Wyoming, and Gay Vanderpoel, Senior Assistant Attorney General; Inez Smith Reid, Acting Corporation Council for the District of Columbia, and Francis S. Smith, Assistant Corporation Council.

Briefs of amici curiae were filed for the Canadian Manufacturers Association et al. by John DeQ. Briggs III, Scott E. Flick, and Jan Schneider; and for Kaiser Aluminum & Chemical Corporation by Milton Handler and John A. Moore.

**Judges:** BURGER, C. J., delivered the opinion of the Court, in which BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, post, p. 778. WHITE, J., took no part in the consideration or decision of the case.

**Opinion by:** BURGER

## Opinion

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[\*755] [\*\*\*633] [\*\*2733] CHIEF JUSTICE BURGER delivered the opinion of the Court.

LEDHN[1A] [1A] We granted certiorari to determine whether a parent corporation and its wholly owned subsidiary are legally capable of [\*\*2734] conspiring with each other under § 1 of the Sherman Act.

I

A

The predecessor to petitioner Regal Tube Co. was established in Chicago in 1955 to manufacture structural steel [\*756] tubing used in heavy equipment, cargo vehicles, and construction. From 1955 to 1968 it remained a wholly owned subsidiary of C. E. Robinson Co. In 1968 Lear Siegler, Inc., purchased Regal Tube Co. and operated it as an unincorporated division. David Grohne, who had previously served as vice president and general manager of Regal, became president of the division after the acquisition.

[\*\*\*\*8] In 1972 petitioner Copperweld Corp. purchased the Regal division [\*\*\*634] from Lear Siegler; the sale agreement bound Lear Siegler and its subsidiaries not to compete with Regal in the United States for five years. Copperweld then transferred Regal's assets to a newly formed, wholly owned Pennsylvania corporation, petitioner Regal Tube Co. The new subsidiary continued to conduct its manufacturing operations in Chicago but shared Copperweld's corporate headquarters in Pittsburgh.

Shortly before Copperweld acquired Regal, David Grohne accepted a job as a corporate officer of Lear Siegler. After the acquisition, while continuing to work for Lear Siegler, Grohne set out to establish his own steel tubing business to compete in the same market as Regal. In May 1972 he formed respondent Independence Tube Corp., which soon secured an offer from the Yoder Co. to supply a tubing mill. In December 1972 respondent gave Yoder a purchase order to have a mill ready by the end of December 1973.

When executives at Regal and Copperweld learned of Grohne's plans, they initially hoped that Lear Siegler's non-competition agreement would thwart the new competitor. Although their lawyer advised [\*\*\*\*9] them that Grohne was not bound by the agreement, he did suggest that petitioners might obtain an injunction against Grohne's activities if he made use of any technical information or trade secrets belonging to Regal. The legal opinion was given to Regal and Copperweld along with a letter to be sent to anyone with whom Grohne attempted to deal. The letter warned that Copperweld would be "greatly concerned if [Grohne] contemplates [\*757] entering the structural tube market . . . in competition with Regal Tube" and promised to take "any and all steps which are necessary to protect our rights under the terms of our purchase agreement and to protect the know-how, trade secrets, etc., which we purchased from Lear Siegler." Petitioners later asserted that the letter was intended only to prevent third parties from developing reliance interests that might later make a court reluctant to enjoin Grohne's operations.

When Yoder accepted respondent's order for a tubing mill on February 19, 1973, Copperweld sent Yoder one of these letters; two days later Yoder voided its acceptance. After respondent's efforts to resurrect the deal failed, respondent arranged to have a mill supplied by [\*\*\*\*10] another company, which performed its agreement even though it too received a warning letter from Copperweld. Respondent began operations on September 13, 1974, nine months later than it could have if Yoder had supplied the mill when originally agreed.

Although the letter to Yoder was petitioners' most successful effort to discourage those contemplating doing business with respondent, it was not their only one. Copperweld repeatedly contacted banks that were considering financing respondent's operations. One or both petitioners also approached real estate firms that were considering providing plant space to respondent and contacted prospective suppliers and customers of the new company.

## B

In 1976 respondent filed this action in the District Court against [\*\*\*635] petitioners and Yoder.<sup>1</sup> The jury found that [\*758] Copperweld [\*\*2735] and Regal had conspired to violate § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, but that Yoder was not part of the conspiracy. It also found that Copperweld, but not Regal, had interfered with respondent's contractual relationship with Yoder; that Regal, but not Copperweld, had interfered with [\*\*\*\*11] respondent's contractual relationship with a potential customer of respondent, Deere Plow & Planter Works, and had slandered respondent to Deere; and that Yoder had breached its contract to supply a tubing mill.

[\*\*\*12] At a separate damages phase, the judge instructed the jury that the damages for the antitrust violation and for the inducement of the Yoder contract breach should be identical and not double counted. The jury then awarded \$ 2,499,009 against petitioners on the antitrust claim, which was trebled to \$ 7,497,027. It awarded \$ 15,000 against Regal alone on the contractual interference and slander counts pertaining to Deere. The court also awarded attorney's fees and costs after denying petitioners' motions for judgment n.o.v. and for a new trial.

## C

The United States Court of Appeals for the Seventh Circuit affirmed. 691 F.2d 310 (1982). It noted that the exoneration of Yoder from antitrust liability left a parent corporation and its wholly owned subsidiary as the only parties to the § 1 conspiracy. The court questioned the wisdom of subjecting an "intra-enterprise" conspiracy to antitrust liability, when the same conduct by a corporation and an unincorporated [\*759] division would escape liability for lack of the requisite two legal persons. However, relying on its decision in *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (1979), cert. [\*\*\*13] denied, 445 U.S. 917 (1980), the Court of Appeals held that liability was appropriate "when there is enough separation between the two entities to make treating them as two independent actors sensible." 691 F.2d, at 318. It held that the jury instructions took account of the proper factors for determining how much separation Copperweld and Regal in fact maintained in the conduct of their businesses.<sup>2</sup> It also held that there [\*\*\*636] was sufficient evidence for the jury to conclude that Regal was more like a separate corporate entity than a mere service arm of the parent.

[\*\*\*14] We granted certiorari to reexamine the intra-enterprise conspiracy doctrine, 462 U.S. 1131 (1983), and we reverse.

## II

<sup>1</sup>The chairman of the board and chief executive officer of both Copperweld and Regal, Phillip H. Smith, was also named as a defendant. In addition, respondents originally charged petitioners and Smith with an attempt to monopolize the market for structural steel tubing in violation of § 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 2. Before trial respondent dismissed Smith as a defendant and dismissed its § 2 monopolization count.

Petitioners counterclaimed on the ground that respondent and Grohne had used proprietary information belonging to Regal, had competed unfairly by hiring away key Regal personnel, and had interfered with prospective business relationships by filing the lawsuit on the eve of a large Copperweld debenture offering. At the close of the evidence, the court directed a verdict against petitioners on their counterclaims. The disposition of these claims is not at issue before this Court.

<sup>2</sup>The jury was instructed to consider many different factors: for instance, whether Copperweld and Regal had separate management staffs, separate corporate officers, separate clients, separate records and bank accounts, separate corporate offices, autonomy in setting policy, and so on. The jury also was instructed to consider "any other facts that you find are relevant to a determination of whether or not Copperweld and Regal are separate and distinct companies." App. to Pet. for Cert. B-9.

467 U.S. 752, \*759; 104 S. Ct. 2731, \*\*2735; 81 L. Ed. 2d 628, \*\*\*636; 1984 U.S. LEXIS 115, \*\*\*\*14

Review of this case calls directly into question whether the coordinated acts of a parent and its wholly owned subsidiary can, in the legal sense contemplated by § 1 of the Sherman Act, constitute a combination or conspiracy.<sup>3</sup> The so-called "intra-enterprise" [\*\*2736] conspiracy doctrine provides that § 1 liability is not foreclosed merely because a parent and its subsidiary are subject to common ownership. The doctrine derives from declarations in several of this Court's opinions.

[\*\*\*\*15] [\*760] In no case has the Court considered the merits of the intra-enterprise conspiracy doctrine in depth. Indeed, the concept arose from a far narrower rule. Although the Court has expressed approval of the doctrine on a number of occasions, a finding of intra-enterprise conspiracy was in all but perhaps one instance unnecessary to the result.

The problem began with *United States v. Yellow Cab Co., 332 U.S. 218 (1947)*. The controlling shareholder of the Checker Cab Manufacturing Corp., Morris Markin, also controlled numerous companies operating taxicabs in four cities. With few exceptions, the operating companies had once been independent and had come under Markin's control by acquisition or merger. The complaint alleged conspiracies under §§ 1 and 2 of the Sherman Act among Markin, Checker, and five corporations in the operating system. The Court stated that even restraints in a vertically integrated enterprise were not "necessarily" outside of the Sherman Act, observing that an unreasonable restraint

*"may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among [\*\*\*\*16] those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form. See *Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360-361, 376-377*.*

*"And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act. The complaint charges that the restraint of interstate trade was not only [\*\*\*637] effected by the combination of the appellees but was the primary object [\*761] of the combination. The theory of the complaint . . . is that 'dominating power' over the cab operating companies 'was not obtained by normal expansion . . . but by deliberate, calculated purchase for control.' *Id.*, at 227-228 (emphasis added) (quoting *United States v. Reading Co., 253 U.S. 26, 57 (1920)*).*

LEdHN2 [↑] [2] [\*\*\*\*17] It is the underscored language that later breathed life into the intra-enterprise conspiracy doctrine. The passage as a whole, however, more accurately stands for a quite different proposition. It has long been clear that a pattern of acquisitions may itself create a combination illegal under § 1, especially when an original anticompetitive purpose is evident from the affiliated corporations' subsequent conduct.<sup>4</sup> [\*\*\*\*18] The

<sup>3</sup> Section 1 of the Sherman Act provides in pertinent part:

HN1 [↑] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony." 26 Stat. 209, as amended, 15 U. S. C. § 1.

<sup>4</sup> Under the arrangements condemned in *Northern Securities Co. v. United States, 193 U.S. 197, 354 (1904)* (plurality opinion), "all the stock [a railroad holding company] held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose." In *Standard Oil Co. v. United States, 221 U.S. 1 (1911)*, and *United States v. American Tobacco Co., 221 U.S. 106 (1911)*, the trust or holding company device brought together previously independent firms to lessen competition and achieve monopoly power. Although the Court in the latter case suggested that the contracts between affiliated companies, and not merely the original combination, could be

467 U.S. 752, \*761; 104 S. Ct. 2731, \*\*2736; 81 L. Ed. 2d 628, \*\*\*637; 1984 U.S. LEXIS 115, \*\*\*\*18

*Yellow Cab* passage is most fairly read in light of this settled rule. In *Yellow Cab*, the affiliation of the defendants was irrelevant because the original acquisitions were *themselves* illegal.<sup>5</sup> An [\*\*2737] affiliation "flowing from an illegal conspiracy" would not avert sanctions. Common ownership and control were irrelevant because restraint of trade was "the primary object of the combination," which was created in a "deliberate, [\*762] calculated" manner. Other language in the opinion is to the same effect.<sup>6</sup>

[\*\*\*\*19] The [\*\*\*638] Court's opinion relies on *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); however, examination of that case reveals that it gives very little support for the broad doctrine *Yellow Cab* has been thought to announce. On the contrary, the language of Chief Justice Hughes speaking for the Court in *Appalachian Coals* supports a contrary conclusion. After observing that "[the] restrictions the Act imposes are not mechanical or artificial," [288 U.S., at 360](#), he went on to state:

[\*763] "The argument that integration may be considered a normal expansion of business, while a combination of independent producers in a common selling agency should be treated as abnormal -- that one is a legitimate enterprise and the other is not -- makes but an artificial distinction. The Anti-Trust Act aims at substance." [Id. at 377.](#)<sup>7</sup>

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viewed as the conspiracy, [id. at 184](#), the Court left no doubt that "the combination in and of itself" was a restraint of trade and a monopolization, [id. at 187](#).

<sup>5</sup> Contrary to the dissent's suggestion, *post*, at 779, 788, n. 18, our point is not that *Yellow Cab* found only the initial acquisition illegal; our point is that the illegality of the initial acquisition was a predicate for its holding that any postacquisition conduct violated the Act.

<sup>6</sup> When discussing the fact that some of the affiliated Chicago operating companies did not compete to obtain exclusive transportation contracts held by another of the affiliated companies, the Court stated:

"[The] fact that the competition restrained is that between affiliated corporations cannot serve to negative the statutory violation where, as here, *the affiliation is assertedly one of the means of effectuating the illegal conspiracy not to compete.*" [332 U.S., at 229](#) (emphasis added).

The passage quoted in text is soon followed by a cite to *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189 (1944). *Crescent Amusement* found violations of §§ 1 and 2 by film exhibitors affiliated (in most cases) by 50 percent ownership. The exhibitors used the monopoly power they possessed in certain towns to force film distributors to give them favorable terms in other towns. The Court found it unnecessary to view the distributors as part of the conspiracy, [id. at 183](#), so the Court plainly viewed the affiliated entities themselves as the conspirators. The *Crescent Amusement* Court, however, in affirming an order of divestiture, noted that such a remedy was appropriate when "creation of the combination is itself the violation." [Id. at 189](#). This suggests that both *Crescent Amusement* and *Yellow Cab*, which cited the very page on which this passage appears, stand for a narrow rule based on the original illegality of the affiliation.

The dissent misconstrues a later passage in *Crescent Amusement* stating that divestiture need not be limited to those affiliates whose "acquisition was part of the fruits of the conspiracy," [323 U.S., at 189](#). See *post*, at 780-781. This meant only that divestiture could apply to affiliates other than those who were driven out of business by the practices of the original conspirators and who were then acquired illegally to increase the combination's monopoly power. See [323 U.S., at 181](#). It did not mean that affiliates acquired for lawful purposes were subject to divestiture.

<sup>7</sup> *Appalachian Coals* does state that the key question is whether there is an unreasonable restraint of trade or an attempt to monopolize. "If there is, the combination cannot escape because it has chosen corporate form; and, if there is not, it is not to be condemned because of the absence of corporate integration." [288 U.S., at 377](#). *Appalachian Coals*, however, validated a cooperative selling arrangement among independent entities. The statement that intracorporate relationships would be subject to liability under § 1 is thus dictum. The statement may also envision merely the limited rule in *Yellow Cab* pertaining to acquisitions that are *themselves* anticompetitive.

467 U.S. 752, \*763; 104 S. Ct. 2731, \*\*2737; 81 L. Ed. 2d 628, \*\*\*638; 1984 U.S. LEXIS 115, \*\*\*\*19

As we shall see, *infra*, at 771-774, it is the intra-enterprise conspiracy doctrine itself that "makes but an artificial distinction" at the expense of substance.

[\*\*\*\*20] The ambiguity of the *Yellow Cab* holding yielded the one case giving support to the intra-enterprise conspiracy doctrine.<sup>8</sup> In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951)*, the Court held that two wholly owned subsidiaries of a liquor distiller [\*\*2738] were guilty under § 1 of the Sherman Act for jointly refusing to supply a wholesaler who declined to abide by a maximum resale pricing scheme. The Court offhandedly dismissed the defendants' argument [\*764] that "their status as 'mere instrumentalities of a single manufacturing-merchandizing unit' makes [\*\*\*639] it impossible for them to have conspired in a manner forbidden by the Sherman Act." *Id., at 215*. With only a citation to *Yellow Cab* and no further analysis, the Court stated that the

"suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws"

and stated that this rule was "especially applicable" when defendants "hold themselves out as competitors." *340 U.S., at 215*.

[\*\*\*\*21] *LEdHN[3A]*<sup>↑</sup> [3A]Unlike the *Yellow Cab* passage, this language does not pertain to corporations whose initial affiliation was itself unlawful. In straying beyond *Yellow Cab*, the *Kiefer-Stewart* Court failed to confront the anomalies an intra-enterprise doctrine entails. It is relevant nonetheless that, were the case decided today, the same result probably could be justified on the ground that the subsidiaries conspired with wholesalers other than the plaintiff.<sup>9</sup> An intra-enterprise conspiracy doctrine thus would no longer be necessary to a finding of liability on the facts of *Kiefer-Stewart*.

[\*\*\*\*22] Later cases invoking the intra-enterprise conspiracy doctrine do little more than cite *Yellow Cab* or *Kiefer-Stewart*, and in none of the cases was the doctrine necessary to the result reached. *Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951)*, involved restrictive horizontal agreements [\*765] between an American corporation and two foreign corporations in which it owned 30 and 50 percent interests respectively. The *Timken* Court cited *Kiefer-Stewart* to show that "[the] fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws." *341 U.S., at 598*. But the relevance of this statement is unclear. The American defendant in *Timken* did not own a majority interest in either of the foreign corporate conspirators and, as the District Court found, it did not control them.<sup>10</sup> [\*\*\*\*23] Moreover, as in *Yellow*

<sup>8</sup> In two cases decided soon after *Yellow Cab* on facts similar to *Crescent Amusement*, see n. 6, *supra*, affiliated film exhibitors were found to have conspired in violation of § 1. *Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948)*; *United States v. Griffith, 334 U.S. 100 (1948)*. *Griffith* simply assumed that the companies were capable of conspiring with each other; *Schine* cited *Yellow Cab* and *Crescent Amusement* for the proposition, *334 U.S., at 116*. In both cases, however, an intra-enterprise conspiracy holding was unnecessary not only because the Court found a § 2 violation, but also because the affiliated exhibitors had conspired with independent film distributors. See *ibid.*; *Griffith, supra, at 103, n. 6, 109*.

<sup>9</sup> *LEdHN[3B]*<sup>↑</sup> [3B]

Although the plaintiff apparently never acquiesced in the resale price maintenance scheme, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 182 F.2d 228, 231 (CA7 1950)*, rev'd, *340 U.S. 211 (1951)*, one of the subsidiaries did gain the compliance of other wholesalers after once terminating them for refusing to abide by the pricing scheme. See *182 F.2d, at 231*; *340 U.S., at 213*. A theory of combination between the subsidiaries and the wholesalers could now support § 1 relief, whether or not it could have when *Kiefer-Stewart* was decided. See *Albrecht v. Herald Co., 390 U.S. 145, 149-150, and n. 6 (1968)*; *United States v. Parke, Davis & Co., 362 U.S. 29 (1960)*.

467 U.S. 752, \*765; 104 S. Ct. 2731, \*\*2738; 81 L. Ed. 2d 628, \*\*\*639; 1984 U.S. LEXIS 115, \*\*\*\*23

*Cab*, there was evidence that the stock acquisitions were themselves designed to effectuate restrictive practices.<sup>11</sup> The Court's reliance on the intra-enterprise conspiracy [\*\*\*640] doctrine was in no way necessary to the result.

[\*\*2739] The same is true of *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), which involved a conspiracy among a parent corporation and three subsidiaries to impose [\*\*\*\*24] various illegal restrictions on plaintiff franchisees. The Court did suggest that, because the defendants

"availed themselves of the privilege of doing business through separate corporations, the fact of common ownership [\*766] could not save them from any of the obligations that the law imposes on separate entities [citing *Yellow Cab* and *Timken Id., at 141-142.*

But the Court noted immediately thereafter that "[in] any event" each plaintiff could "clearly" charge a combination between itself and the defendants or between the defendants and other franchise dealers. *Ibid.* Thus, for the same reason that a finding of liability in *Kiefer-Stewart* could today be justified without reference to the intra-enterprise conspiracy doctrine, see n. 9, *supra*, the doctrine was at most only an alternative holding in *Perma Life Mufflers*.

In short, while this Court has previously seemed to acquiesce in the intra-enterprise conspiracy doctrine, it has never explored or analyzed in detail the justifications for such a rule; the doctrine has played only a relatively minor role in the Court's Sherman Act holdings.

### III

Petitioners, joined [\*\*\*\*25] by the United States as *amicus curiae*, urge us to repudiate the intra-enterprise conspiracy doctrine.<sup>12</sup> The central criticism is that the doctrine gives undue significance to the fact that a subsidiary is separately incorporated and thereby treats as the concerted activity of two [\*767] entities what is really unilateral behavior flowing from decisions of a single enterprise.

[\*\*\*\*26] We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of [§ 1](#) of the Sherman Act. We do not consider under what

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<sup>10</sup> See *United States v. Timken Roller Bearing Co.*, 83 F.Supp. 284, 311-312 (ND Ohio 1949), aff'd as modified, [341 U.S. 593 \(1951\)](#). The agreement of an individual named Dewar, who owned 24 and 50 percent of the foreign corporations respectively, was apparently required for the American defendant to have its way.

<sup>11</sup> For almost 20 years before they became affiliated by stock ownership, two of the corporations had been party to the sort of restrictive agreements the *Timken* Court condemned. Three Justices upholding antitrust liability were of the view that Timken's "interests in the [foreign] companies were obtained as part of a plan to promote the illegal trade restraints" and that the "intercorporate relationship" was "the core of the conspiracy." *Id., at 600-601*. Because two Justices found no antitrust violation at all, see *id., at 605* (Frankfurter, J., dissenting); *id., at 606* (Jackson, J., dissenting), and two Justices did not take part, apparently only Chief Justice Vinson and Justice Reed were prepared to hold that there was a violation even if the initial acquisition itself was not illegal. See *id., at 601-602* (Reed, J., joined by Vinson, C. J., concurring).

<sup>12</sup> The doctrine has long been criticized. See, e. g., Areeda, Intra-enterprise Conspiracy in Decline, [97 Harv. L. Rev. 451 \(1983\)](#); Handler & Smart, The Present Status of the Intracorporate Conspiracy Doctrine, 3 Cardozo L. Rev. 23 (1981); Kempf, Bathtub Conspiracies: Has Seagram Distilled a More Potent Brew?, 24 Bus. Law. 173 (1968); McQuade, Conspiracy, Multicorporate Enterprises, and [Section 1](#) of the Sherman Act, 41 Va. L. Rev. 183 (1955); Rahl, Conspiracy and the Anti-Trust Laws, 44 Ill. L. Rev. 743 (1950); Sprunk, Intra-Enterprise Conspiracy, 9 ABA Antitrust Section Rep. 20 (1956); Stengel, Intra-Enterprise Conspiracy Under [Section 1](#) of the Sherman Act, 35 Miss. L. J. 5 (1963); Willis & Pitofsky, Antitrust Consequences of Using Corporate Subsidiaries, 43 N. Y. U. L. Rev. 20 (1968); Note, "Conspiring Entities" Under [Section 1](#) of the Sherman Act, 95 Harv. L. Rev. 661 (1982); Note, Intra-Enterprise Conspiracy Under [Section 1](#) of the Sherman Act: A Suggested Standard, 75 Mich. L. Rev. 717 (1977).

circumstances, if any, a [\*\*\*641] parent may be liable for conspiring with an affiliated corporation it does not completely own.

A

[LEdHN\[4\]](#) [↑] [4] [LEdHN\[5A\]](#) [↑] [5A] [LEdHN\[6A\]](#) [↑] [6A] The [HN2](#) [↑] Sherman Act contains a "basic distinction between concerted and independent action." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). The conduct of a single firm is governed by [§ 2](#) alone and is unlawful only when it threatens actual monopolization.<sup>13</sup> [\*\*\*\*28] It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may [\*\*2740] capture unsatisfied customers from an inefficient [\*\*\*\*27] rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster.<sup>14</sup> In part because it is sometimes difficult to [\*768] distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.

[LEdHN\[7\]](#) [↑] [7] [LEdHN\[8\]](#) [↑] [8] [LEdHN\[9\]](#) [↑] [9] [LEdHN\[10\]](#) [↑] [10] [Section 1](#) of the Sherman [\*\*\*\*29] Act, in contrast, [HN4](#) [↑] reaches unreasonable restraints of trade effected by a "contract, combination . . . or conspiracy" between separate entities. It does not reach conduct that is "wholly unilateral." *Albrecht v. Herald Co.*, 390 U.S. 145, 149 (1968); accord, *Monsanto Co. v. Spray-Rite Corp.*, *supra*, at 761. Concerted activity subject to [§ 1](#) is judged more sternly than unilateral activity under [§ 2](#). Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal *per se* without inquiry into the harm it has actually caused. See generally *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958). Other combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry [\*\*\*642] into market power and market structure designed to assess the combination's actual effect. See, e. g., *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); [\*\*\*\*30] [Chicago Board of Trade v. United States](#), 246 U.S. 231 (1918). Whatever form the inquiry takes, however, it is not necessary to prove that concerted activity threatens monopolization.

The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive [\*769] risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit.

<sup>13</sup> [LEdHN\[5B\]](#) [↑] [5B]

[Section 2](#) of the Sherman Act provides in pertinent part:

[HN3](#) [↑] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." 26 Stat. 209, as amended, [15 U. S. C. § 2](#). By making a conspiracy to monopolize unlawful, [§ 2](#) does reach both concerted and unilateral behavior. The point remains, however, that purely unilateral conduct is illegal only under [§ 2](#) and not under [§ 1](#). Monopolization without conspiracy is unlawful under [§ 2](#), but restraint of trade without a conspiracy or combination is not unlawful under [§ 1](#).

<sup>14</sup> [LEdHN\[6B\]](#) [↑] [6B]

For example, the Court has declared that [§ 2](#) does not forbid market power to be acquired "as a consequence of a superior product, [or] business acumen." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). We have also made clear that the "antitrust laws . . . were enacted for 'the protection of competition, not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (damages for violation of Clayton Act [§ 7](#)) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

B

[LEdHN\[11\]](#) [↑] [11] [LEdHN\[12A\]](#) [↑] [12A] [LEdHN\[13A\]](#) [↑] [13A] [\*\*\*\*31] The distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms "contract, combination . . . or conspiracy" in [§ 1](#). Nothing in the literal meaning of those terms excludes coordinated conduct among officers or employees of the same company. But it is perfectly plain that an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that [§ 1](#) was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly [\[\\*\\*2741\]](#) bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a [§ 1](#) conspiracy.<sup>15</sup>

[\*\*\*\*32] [\[\\*770\]](#) [LEdHN\[14\]](#) [↑] [14] There [\[\\*\\*\\*643\]](#) is also general agreement that [§ 1](#) is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions.<sup>16</sup> [\*\*\*\*33] Although this Court has not previously addressed the question,<sup>17</sup> there can be little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor. The existence of an unincorporated division reflects no more than a firm's decision to adopt an organizational division of labor. A division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself; a business enterprise establishes divisions to further its own interests in the most efficient manner. Because coordination between a corporation [\[\\*771\]](#) and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants [§ 1](#) scrutiny.

Indeed, a rule that punished coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits. This

<sup>15</sup> See, e. g., [Schwimmer v. Sony Corp. of America](#), 677 F.2d 946, 953 (CA2), cert. denied, [459 U.S. 1007 \(1982\)](#); [Tose v. First Pennsylvania Bank, N. A.](#), 648 F.2d 879, 893-894 (CA3), cert. denied, [454 U.S. 893 \(1981\)](#); [Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc.](#), 531 F.2d 910, 916-917 (CA8 1976); [Greenville Publishing Co. v. Daily Reflector, Inc.](#), 496 F.2d 391, 399 (CA4 1974) (dictum); [Chapman v. Rudd Paint & Varnish Co.](#), 409 F.2d 635, 643, n. 9 (CA9 1969); [Poller v. Columbia Broadcasting System, Inc.](#), 109 U. S. App. D. C. 170, 174, 284 F.2d 599, 603 (1960), rev'd on other grounds, [368 U.S. 464 \(1962\)](#); [Nelson Radio & Supply Co. v. Motorola, Inc.](#), 200 F.2d 911, 914 (CA5 1952), cert. denied, [345 U.S. 925 \(1953\)](#). Accord, Report of the Attorney General's National Committee to Study the Antitrust Laws 31 (1955). At the same time, many courts have created an exception for corporate officers acting on their own behalf. See, e. g., [H & B Equipment Co. v. International Harvester Co.](#), 577 F.2d 239, 244 (CA5 1978) (dictum); [Greenville Publishing, supra](#); [Johnston v. Baker](#), 445 F.2d 424, 427 (CA3 1971).

[LEdHN\[12B\]](#) [↑] [12B] [LEdHN\[13B\]](#) [↑] [13B] Nothing in the language of the Sherman Act is inconsistent with the view that corporations cannot conspire with their own officers. It is true that a "person" under the Act includes both an individual and a corporation. [15 U. S. C. § 7](#). But [§ 1](#) does not declare every combination between two "persons" to be illegal. Instead it makes liable every "person" engaging in a combination or conspiracy "hereby declared to be illegal." As we note, the principles governing [§ 1](#) liability plainly exclude from unlawful combinations or conspiracies the activities of a single firm.

<sup>16</sup> See [691 F.2d 310, 316 \(CA7 1982\)](#) (decision below); [Cliff Food Stores, Inc. v. Kroger, Inc.](#), 417 F.2d 203, 205-206 (CA5 1969); [Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.](#), 416 F.2d 71, 83-84 (CA9 1969), cert. denied, [396 U.S. 1062 \(1970\)](#); [Poller v. Columbia Broadcasting System, Inc.](#), 109 U. S. App. D. C., at 174, 284 F.2d, at 603.

<sup>17</sup> The Court left this issue unresolved in [Poller v. Columbia Broadcasting System, Inc.](#), 368 U.S., at 469, n. 4.

would serve no useful antitrust purpose but could well deprive consumers of the efficiencies that decentralized management may bring.

C

**LEdHN[1B]** [1B] For similar reasons, the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of **[\*\*2742]** horses drawing a vehicle under the control of a single driver. **[\*\*\*\*34]** With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.

**LEdHN[15]** [15] Indeed, the very notion of an "agreement" in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning. **HN5** A § 1 agreement may be found when "the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American* **[\*\*\*644]** *Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). But in reality a parent and a wholly owned subsidiary always have a "unity of purpose or a common design." They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert **[\*772]** full control at any moment if the subsidiary fails to **[\*\*\*\*35]** act in the parent's best interests.<sup>18</sup>

**[\*\*\*36]** The intra-enterprise conspiracy doctrine looks to the form of an enterprise's structure and ignores the reality. Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary. A corporation has complete power to maintain a wholly owned subsidiary in either form. The economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition.<sup>19</sup> Rather, a corporation may adopt the subsidiary form of organization for valid management and related purposes. Separate incorporation may improve **[\*773]** management, avoid special tax problems arising from multistate operations, or serve other legitimate interests.<sup>20</sup> **[\*\*\*\*38]** Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of

<sup>18</sup> As applied to a wholly owned subsidiary, the so-called "single entity" test is thus inadequate to preserve the Sherman Act's distinction between unilateral and concerted conduct. Followed by the Seventh Circuit below as well as by other Courts of Appeals, this test sets forth various criteria for evaluating whether a given parent and subsidiary are capable of conspiring with each other. See n. 2, *supra*; see generally *Ogilvie v. Fotomat Corp.*, 641 F.2d 581 (CA8 1981); *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614 (CA9 1979), cert. denied, 447 U.S. 906 (1980); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (CA7 1979), cert. denied, 445 U.S. 917 (1980). These criteria measure the "separateness" of the subsidiary: whether it has separate control of its day-to-day operations, separate officers, separate corporate headquarters, and so forth. At least when a subsidiary is wholly owned, however, these factors are not sufficient to describe a separate economic entity for purposes of the Sherman Act. The factors simply describe the manner in which the parent chooses to structure a subunit of itself. They cannot overcome the basic fact that the ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit.

<sup>19</sup> Because an "agreement" between a parent and its wholly owned subsidiary is no more likely to be anticompetitive than an agreement between two divisions of a single corporation, it does not matter that the parent "availed [itself] of the privilege of doing business through separate corporations," *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141 (1968). The purposeful choice of a parent corporation to organize a subunit as a subsidiary is not itself a reason to heighten antitrust scrutiny, because it is not laden with anticompetitive risk.

<sup>20</sup> For example, "[separate] incorporation may reduce federal or state taxes or facilitate compliance with regulatory or reporting laws. Local incorporation may also improve local identification. Investors or lenders may prefer to specialize in a particular aspect of a conglomerate's business. Different parts of the business may require different pension or profitsharing plans or different accounting practices." Areeda, 97 Harv. L. Rev., at 453.

467 U.S. 752, \*773; 104 S. Ct. 2731, \*\*2742; 81 L. Ed. 2d 628, \*\*\*644; 1984 U.S. LEXIS 115, \*\*\*\*38

operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability. Because there is nothing inherently anticompetitive about a corporation's [\*\*\*\*37] decision [\*\*2743] to create a subsidiary, the intra-enterprise conspiracy doctrine "[imposes] [\*\*\*645] grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect." *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29 (1962).<sup>21</sup>

If antitrust liability turned on the garb in which a corporate subunit was clothed, parent corporations would be encouraged to convert subsidiaries into unincorporated divisions. Indeed, this is precisely what the Seagram company did after this Court's decision in *Kiefer-Stewart Co* [\*\*\*\*39] . v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).<sup>22</sup> Such an [\*774] incentive serves no valid antitrust goals but merely deprives consumers and producers of the benefits that the subsidiary form may yield.

The error of treating a corporate division differently from a wholly owned subsidiary is readily seen from the facts of this case. Regal was operated as an unincorporated division of Lear Siegler for four years before it became a wholly owned subsidiary of Copperweld. Nothing in this record indicates any meaningful difference between Regal's operations as a division and its later operations as a separate corporation. Certainly nothing suggests that Regal was a greater threat to competition as a subsidiary of Copperweld than as a division of Lear Siegler. Under either arrangement, Regal might have acted to bar [\*\*\*\*40] a new competitor from entering the market. In one case it could have relied on economic power from other quarters of the Lear Siegler corporation; instead it drew on the strength of its separately incorporated parent, Copperweld. From the standpoint of the antitrust laws, there is no reason to treat one more harshly than the other. As Chief Justice Hughes cautioned, "[realities] must dominate the judgment." *Appalachian Coals, Inc. v. United States*, 288 U.S., at 360.<sup>23</sup>

[\*\*\*\*41] D

LEdHN/16 [↑] [16]Any reading of the Sherman Act that remains true to the Act's distinction between unilateral and concerted conduct will necessarily [\*\*\*646] disappoint those who find that distinction arbitrary. It cannot be denied that § 1's focus on concerted [\*775] behavior leaves a "gap" in the Act's proscription against unreasonable restraints of trade. See *post*, at 789. An unreasonable restraint of trade may be effected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. Because the Sherman Act does not prohibit unreasonable restraints of trade as such -- but only restraints effected by a contract, combination, or conspiracy -- it leaves untouched a single firm's anticompetitive [\*\*2744] conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability.

<sup>21</sup> *Sunkist Growers* provides strong support for the notion that separate incorporation does not necessarily imply a capacity to conspire. The defendants in that case were an agricultural cooperative, its wholly owned subsidiary, and a second cooperative comprising only members of the first. The Court refused to find a § 1 or § 2 conspiracy among them because they were "one 'organization' or 'association' even though they have formally organized themselves into three separate legal entities." *370 U.S., at 29*. Although this holding derived from statutory immunities granted to agricultural organizations, the reasoning of *Sunkist Growers* supports the broader principle that substance, not form, should determine whether a separately incorporated entity is capable of conspiring under § 1.

<sup>22</sup> See *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (CA9 1969), cert. denied, 396 U.S. 1062 (1970).

<sup>23</sup> The dissent argues that references in the legislative history to "trusts" suggest that Congress intended § 1 to govern the conduct of all affiliated corporations. See *post*, at 787-788. But those passages explicitly refer to combinations created for the very purpose of restraining trade. None of the cited debates refers to the postacquisition conduct of corporations whose initial affiliation was lawful. Indeed, Senator Sherman stated:

"It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combination." 21 Cong. Rec. 2457 (1890).

[LEdHN\[12C\]](#) [12C] [LEdHN\[17\]](#) [17] [\*\*\*\*42] We have already noted that Congress left this "gap" for eminently sound reasons. Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote. See *supra*, at 767-769. Moreover, whatever the wisdom of the distinction, the Act's plain language leaves no doubt that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct. Had Congress intended to outlaw unreasonable restraints of trade as such, § 1's requirement of a contract, combination, or conspiracy would be superfluous, as would the entirety of § 2.<sup>24</sup> Indeed, this Court has recognized [\*776] that § 1 is limited to concerted conduct at least since the days of *United States v. Colgate & Co.*, 250 U.S. 300 (1919). Accord, *post*, at 789.

[\*\*\*\*43] [LEdHN\[1C\]](#) [1C] The appropriate inquiry in this case, therefore, is not whether the coordinated conduct of a parent and its wholly owned subsidiary may ever have anticompetitive effects, as the dissent suggests. Nor is it whether the term "conspiracy" will bear a literal construction that includes parent corporations and their wholly owned subsidiaries. For if these were the proper inquiries, a [\*\*\*647] single firm's conduct would be subject to § 1 scrutiny whenever the coordination of two employees was involved. Such a rule would obliterate the Act's distinction between unilateral and concerted conduct, contrary to the clear intent of Congress as interpreted by the weight of judicial authority. See n. 15, *supra*. Rather, the appropriate inquiry requires us to explain the logic underlying Congress' decision to exempt unilateral conduct from § 1 scrutiny, and to assess whether that logic similarly excludes the conduct of a parent and its wholly owned subsidiary. Unless we second-guess the judgment of Congress to limit § 1 to concerted conduct, we can only conclude that the coordinated behavior of a parent [\*\*\*\*44] and its wholly owned subsidiary falls outside the reach of that provision.

Although we recognize that any "gap" the Sherman Act leaves is the sensible result of a purposeful policy decision by Congress, we also note that the size of any such gap is open [\*777] to serious question. Any anticompetitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed adequately without resort to an intra-enterprise conspiracy doctrine. A corporation's initial acquisition of control will always be subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act, 38 Stat. 731, [15 U. S. C. § 18](#). Thereafter, the enterprise is fully subject to § 2 of the Sherman Act and § 5 of the Federal Trade Commission Act, 38 Stat. 719, [15 U. S. C. I\\*\\*27451 § 45](#). That these statutes are adequate to control dangerous anticompetitive conduct is suggested by the fact that not a single holding of antitrust liability by this Court would today be different in the absence of an intra-enterprise conspiracy doctrine. It is further suggested by the fact that the Federal Government, in its administration [\*\*\*\*45] of the antitrust laws, no longer accepts the concept that a corporation and its wholly owned subsidiaries can "combine" or "conspire" under § 1.<sup>25</sup> Elimination of the intra-enterprise conspiracy doctrine with respect to corporations and their wholly owned subsidiaries will therefore not cripple

<sup>24</sup> [LEdHN\[12D\]](#) [12D]

Even if common-law intracorporate conspiracies were firmly established when Congress passed the Sherman Act, the obvious incompatibility of an intracorporate conspiracy with § 1 is sufficient to refute the dissent's suggestion that Congress intended to incorporate such a definition. See *post*, at 784-787. Moreover, it is far from clear that intracorporate conspiracies were recognized at common law in 1890. Even today courts disagree whether corporate employees can conspire with themselves or with the corporation for purposes of certain statutes, such as [42 U. S. C. § 1985\(3\)](#). Compare, e. g., *Novotny v. Great Am. Fed. Sav. & Loan Assn.*, 584 F.2d 1235 (CA3 1978) (en banc), vacated and remanded on other grounds, [442 U.S. 366 \(1979\)](#), with *Dombrowski v. Dowling*, 459 F.2d 190 (CA7 1972). And in 1890 it was disputed whether a corporation could itself be guilty of a crime that required criminal intent, such as conspiracy. Commentators appear to agree that courts began finding corporate liability for such crimes only around the turn of the century. See generally Edgerton, Corporate Criminal Responsibility, 36 Yale L. J. 827, 828, and n. 11 (1927); Miller, Corporate Criminal Liability: A Principle Extended to Its Limits, 38 Fed. Bar J. 49 (1979); Note, 60 Harv. L. Rev. 283, 284, and n. 9 (1946). Of course, Congress changed that common-law rule when it explicitly provided that a corporation could be guilty of a § 1 conspiracy. But the point remains that the Sherman Act did not import a pre-existing common-law tradition recognizing conspiracies between corporations and their own employees.

<sup>25</sup> "[The] [intra-enterprise conspiracy] doctrine has played a relatively minor role in government enforcement actions, and the government has not relied on the doctrine in recent years." Brief for United States as *Amicus Curiae* 26, n. 42.

antitrust enforcement. It will simply eliminate treble damages from private state tort suits masquerading as antitrust actions.

#### IV

**LEDHN[1D]** [1D] We hold that **HN6** Copperweld and its wholly owned subsidiary Regal are incapable of conspiring with each other for purposes of **§ 1** of the Sherman Act. To the extent that prior decisions of this Court are to the contrary, they are disapproved and overruled. Accordingly, **[\*\*\*\*46]** the judgment of the Court of Appeals is reversed.

*It is so ordered.*

**[\*778]** JUSTICE WHITE took no part in the consideration or decision of this case.

**Dissent by:** STEVENS

#### Dissent

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**[\*\*\*648]** JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

It is safe to assume that corporate affiliates do not vigorously compete with one another. A price-fixing or market-allocation agreement between two or more such corporate entities does not, therefore, eliminate any competition that would otherwise exist. It makes no difference whether such an agreement is labeled a "contract," a "conspiracy," or merely a policy decision, because it surely does not unreasonably restrain competition within the meaning of the Sherman Act. The Rule of Reason has always given the courts adequate latitude to examine the substance rather than the form of an arrangement when answering the question whether collective action has restrained competition within the meaning of **§ 1**.

Today the Court announces a new *per se* rule: a wholly owned subsidiary is incapable of conspiring with its parent under **§ 1** of the Sherman Act. Instead of redefining the word "conspiracy," the Court would **[\*\*\*\*47]** be better advised to continue to rely on the Rule of Reason. Precisely because they do not eliminate competition that would otherwise exist but rather enhance the ability to compete, restraints which enable effective integration between a corporate parent and its subsidiary -- the type of arrangement the Court is properly concerned with protecting -- are not prohibited by **§ 1**. Thus, the Court's desire to shield such arrangements from antitrust liability provides no justification for the Court's new rule.

In contrast, the case before us today presents the type of restraint that has precious little to do with effective integration between parent and subsidiary corporations. Rather, the purpose of the challenged conduct was to exclude a potential competitor of the subsidiary from the market. The jury apparently concluded that the two defendant corporations -- **[\*779]** Copperweld and its subsidiary Regal -- had successfully delayed Independence's entry into the steel tubing business by applying a form of economic coercion to potential suppliers of financing and capital equipment, as well as to potential customers. Everyone seems to agree that this conduct was tortious as a matter **[\*\*\*\*48]** of state law. This type of exclusionary conduct is plainly distinguishable from vertical integration designed to achieve competitive efficiencies. If, as seems to be the case, the challenged conduct was manifestly anti-competitive, it should not be immunized from scrutiny under **§ 1** of the Sherman Act.

**[\*\*2746]** I

Repudiation of prior cases is not a step that should be taken lightly. As the Court wrote only days ago: "[Any] departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey, ante*, at 212. It is therefore appropriate to begin with an examination of the precedents.

467 U.S. 752, \*779; 104 S. Ct. 2731, \*\*2746; 81 L. Ed. 2d 628, \*\*\*648; 1984 U.S. LEXIS 115, \*\*\*\*48

In [United States v. Yellow Cab Co., 332 U.S. 218 \(1947\)](#), the Court explicitly stated that a corporate subsidiary could conspire with its parent:

"The fact that these restraints [\*\*\*649] occur in a setting described by the appellees as a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act. The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or [\*\*\*\*49] integrated under common ownership as from a conspiracy among those who are otherwise independent." [\*Id.\*, at 227](#).

The majority attempts to explain *Yellow Cab* by suggesting that it dealt only with unlawful acquisition of subsidiaries. *Ante*, at 761-762. But the Court mentioned acquisitions only as an additional consideration separate from the passage [\*780] quoted above,<sup>1</sup> and more important, the Court explicitly held that restraints imposed by the corporate parent on the affiliates that it *already* owned in themselves violated § 1.<sup>2</sup>

[\*\*\*\*50] At least three cases involving the motion picture industry also recognize that affiliated corporations may combine or conspire within the meaning of § 1. In [United States v. Crescent Amusement Co., 323 U.S. 173 \(1944\)](#), as the Court recognizes, *ante*, at 762, n. 6, the only conspirators were affiliated corporations. The majority's claim that the case involved only unlawful acquisitions because of the Court's comments concerning divestiture of the affiliates cannot be squared with the passage immediately following that cited by the majority, which states that there had been unlawful conduct going beyond the acquisition of subsidiaries:

"That principle is adequate here to justify divestiture of all interest in some of the affiliates since their acquisition was part of the fruits of the conspiracy. *But the relief need not, and under these facts should not, be so restricted* [to divestiture]. The fact that the companies were affiliated induced joint action and agreement. Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, [\*781] [\*\*\*\*51] there will be tempting opportunity for these exhibitors to continue to act in combination against the independents." [\*323 U.S., at 189-190\*](#) (emphasis supplied).

Similarly, in *Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948)*, the Court held that concerted action by parents and subsidiaries [\*\*\*650] constituted an unlawful conspiracy.<sup>3</sup> [\*\*2747] That was also the holding in [United States v. Griffith, 334 U.S. 100, 109 \(1948\)](#). The majority's observation that in these cases there were alternative grounds that could have been used to reach the same result, *ante*, at 763, n. 8, disguises neither the fact that the holding that actually appears in these opinions rests on conspiracy between affiliated entities, nor that today's holding is inconsistent with what was actually held in these cases.

[\*\*\*\*52] In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951)*, the Court's holding was plain and unequivocal:

<sup>1</sup> The language I have quoted, most of which is overlooked by the majority, makes it clear that the Court's adoption of the concept of conspiracy between affiliated corporations was unqualified. As the first word of the sentence indicates, the Court's following statement: "Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed," [\*332 U.S., at 227\*](#), expresses a separate if related point.

<sup>2</sup> "[By] preventing the cab operating companies under their control from purchasing cabs from manufacturers other than CCM, the appellees deny those companies the opportunity to purchase cabs in a free, competitive market. The Sherman Act has never been thought to sanction such a conspiracy to restrain the free purchase of goods in interstate commerce." [\*Id., at 226-227\*](#) (footnote omitted).

<sup>3</sup> "[The] combining of the open and closed towns for the negotiation of films for the circuit was a restraint of trade and the use of monopoly power in violation of § 1 and § 2 of the Act. The concerted action of the parent company, its subsidiaries, and the named officers and directors in that endeavor was a conspiracy which was not immunized by reason of the fact that the members were closely affiliated rather than independent. See [United States v. Yellow Cab Co., 332 U.S. 218, 227](#); [United States v. Crescent Amusement Co., 323 U.S. 173](#)." [\*334 U.S., at 116\*](#).

467 U.S. 752, \*781; 104 S. Ct. 2731, \*\*2747; 81 L. Ed. 2d 628, \*\*\*650; 1984 U.S. LEXIS 115, \*\*\*\*52

"Respondents next suggest that their status as 'mere instrumentalities of a single manufacturing-merchandizing unit' makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. But this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. *E. g.* [United States v. Yellow Cab Co., 332 U.S. 218](#). The rule is especially applicable where, as here, respondents hold themselves out as competitors." *Id.*, at 215.

[\*782] This holding is so clear that even the Court, which is not wanting for inventiveness in its reading of the prior cases, cannot explain it away. The Court suggests only that today *Kiefer-Stewart* might be decided on alternative grounds, *ante*, at 764, ignoring the fact that today's holding is inconsistent with the ground on which the case actually was decided.<sup>4</sup>

[\*\*\*\*53] A construction of the statute that reaches agreements between corporate parents and subsidiaries was again embraced by the Court in *Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951)*,<sup>5</sup> [\*\*\*\*54] and *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)*.<sup>6</sup> [\*\*\*651] The majority only notes that there might have been other grounds for decision available in these cases, *ante*, at 764-766, but again it cannot deny that its new rule is inconsistent with what the Court actually did write in these cases.

[\*783] Thus, the rule announced today is inconsistent with what this Court has held on at least seven previous occasions.<sup>7</sup> [\*\*\*\*56] Perhaps [\*\*2748] most illuminating is the fact that until today, whether they favored the doctrine or not, it had been the universal conclusion of both the lower courts<sup>8</sup> and the commentators<sup>9</sup> that this

<sup>4</sup> In *Kiefer-Stewart*, Seagram unsuccessfully argued that *Yellow Cab* was confined to cases concerning unlawful acquisitions, see Brief for Respondents, O. T. 1950, No. 297, p. 21. Thus the *Kiefer-Stewart* Court considered and rejected exactly the same argument embraced by today's majority.

<sup>5</sup> "The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws. *E. g.*, *Kiefer-Stewart Co. v. Seagram & Sons*, [340 U.S.] at 215. Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled." [341 U.S., at 598](#).

<sup>6</sup> "There remains for consideration only the Court of Appeals' alternative holding that the Sherman Act claim should be dismissed because respondents were all part of a single business entity and were therefore entitled to cooperate without creating an illegal conspiracy. But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities. See *Timken Co. v. United States, 341 U.S. 593, 598 (1951)*; *United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947)*." [392 U.S., at 141-142](#).

<sup>7</sup> Also pertinent is [United States v. Citizens & Southern National Bank, 422 U.S. 86 \(1975\)](#), in which the Court wrote:

"The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion -- that is, by competing successfully rather than by arranging treaties with its competitors. This Court has held that even commonly owned firms must compete against each other, if they hold themselves out as distinct entities. 'The corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act.' [United States v. Yellow Cab Co., 332 U.S. 218, 227](#). See also *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215*; *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598*; *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-142*." *Id.*, at 116-117.

<sup>8</sup> See, e. g., *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1054* (CA9), cert. denied, [459 U.S. 825 \(1982\)](#); [Ogilvie v. Fotomat Corp., 641 F.2d 581, 587-588 \(CA8 1981\)](#); *Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 617-618 (CA9 1979)*, cert. denied, [447 U.S. 906 \(1980\)](#); *Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 726 (CA7 1979)*, cert. denied, [445 U.S. 917 \(1980\)](#); *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20, 33-35*, and n. 49 (CA3), cert. denied, [439 U.S. 876 \(1978\)](#); *H & B Equipment Co. v. International Harvester Co., 577 F.2d 239, 244-245*

Court's cases establish that a parent [\*784] [\*\*\*\*55] and a [\*\*\*652] wholly owned subsidiary corporation are capable of conspiring in violation of [§ 1](#). In this very case the Court of Appeals observed:

"[The] salient factor is that the Supreme Court's decisions, while they need not be read with complete literalism, of course they cannot be ignored. It is no accident that every Court of Appeals to consider the question has concluded that a parent and its subsidiary have the same capacity to conspire, whether or not they can be found to have done so in a particular case." [691 F.2d 310, 317 \(CA7 1982\)](#) (footnotes omitted).

[\*\*\*\*57] Thus, we are not writing on a clean slate. "[We] must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." [Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 \(1977\)](#).<sup>10</sup> There can be no doubt that the Court today changes what has been taken to be the long-settled rule: a rule that Congress did not revise at any point in the last four decades. At a minimum there should be a strong presumption against the approach taken today by the Court. It is to the merits of that approach that I now turn.

## II

The language of [§ 1](#) of the Sherman Act is sweeping in its breadth: "Every contract, combination in the form of trust or [\*785] otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is declared [\*\*\*\*58] to be illegal." [15 U.S.C. § 1](#). This Court has long recognized that Congress intended this language to have a broad sweep, reaching any form of combination:

"[In] view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint." [Standard Oil Co. v. United States, 221 U.S. 1, 59-60 \(1911\)](#).

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[\(CA5 1978\); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 557 \(CA1 1974\)](#), cert. denied, [421 U.S. 1004 \(1975\)](#).

<sup>9</sup> See, e. g., Report of the Attorney General's National Committee to Study the Antitrust Laws 30-36 (1955) (hereinafter cited as Attorney General's Committee Report); L. Sullivan, Law of Antitrust § 114 (1977); Areeda, Intraenterprise Conspiracy in Decline, [97 Harv. L. Rev. 451 \(1983\)](#); Handler, Through the Antitrust Looking Glass -- Twenty-First Annual Antitrust Review, 57 Calif. L. Rev. 182, 182-193 (1969); Handler & Smart, The Present Status of the Intracorporate Conspiracy Doctrine, 3 Cardozo L. Rev. 23, 26-61 (1981); McQuade, Conspiracy, Multicorporate Enterprises, and [Section 1](#) of the Sherman Act, 41 Va. L. Rev. 183, 188-212 (1955); Willis & Pitofsky, Antitrust Consequences of Using Corporate Subsidiaries, 43 N. Y. U. L. Rev. 20, 22-24 (1968); Comment, Intraenterprise Antitrust Conspiracy: A Decisionmaking Approach, [71 Calif. L. Rev. 1732, 1739-1745 \(1983\)](#) (hereinafter cited as Comment, Decisionmaking); Comment, All in the Family: When Will Internal Discussions Be Labeled Intra-Enterprise Conspiracy?, 14 Duquesne L. Rev. 63 (1975); Note, "Conspiring Entities" Under [Section 1](#) of the Sherman Act, 95 Harv. L. Rev. 661 (1982); Note, Intra-Enterprise Conspiracy Under [Section 1](#) of the Sherman Act: A Suggested Standard, 75 Mich. L. Rev. 717, 718-727 (1977) (hereinafter cited as Note, Suggested Standard).

<sup>10</sup> See also [Monsanto Co. v. Spray-Rite Service Co., 465 U.S. 752, 769 \(1984\)](#) (BRENNAN, J., concurring).

467 U.S. 752, \*785; 104 S. Ct. 2731, \*\*2749; 81 L. Ed. 2d 628, \*\*\*652; 1984 U.S. LEXIS 115, \*\*\*\*58

This broad construction is illustrated by the Court's refusal to limit the statute to actual agreements. Even mere acquiescence in an anticompetitive scheme has been held sufficient to [\*\*\*\*59] satisfy the statutory language.<sup>11</sup>

Since the statute was written against the background of the common [\*\*\*653] law,<sup>12</sup> [\*\*\*\*61] reference to the common law is particularly enlightening in construing the statutory requirement of a "contract, combination in the form of trust or otherwise, or conspiracy." Under the common law, the question whether [\*786] affiliated corporations constitute a plurality of actors within the meaning of the statute is easily answered. The well-settled rule is that a corporation is a separate legal entity; the separate corporate form cannot be disregarded.<sup>13</sup> The Congress that passed the Sherman Act was well acquainted with this rule. See 21 Cong. Rec. 2571 (1890) (remarks of Sen. Teller) ("Each corporation is a creature by itself"). [\*\*\*\*60] Thus it has long been the law of criminal conspiracy that the officers of even a single corporation are capable of conspiring with each other or the corporation.<sup>14</sup> [\*\*\*\*62] This Court has held that a corporation can conspire with its employee,<sup>15</sup> and [\*\*2750] that a labor union can "combine" with its business agent within the meaning of § 1.<sup>16</sup> This concept explains the *Timken* Court's statement that the affiliated corporations in that case made [\*787] "agreements between legally separate persons," 341 U.S., at 598. Thus, today's holding that agreements between parent and subsidiary corporations involve merely unilateral conduct is at odds with the way that this Court has traditionally understood the concept of a combination or conspiracy, and also at odds with the way in which the Congress that enacted the Sherman Act surely understood it.

Holding that affiliated corporations cannot constitute a plurality of actors is also inconsistent with the objectives of the Sherman Act. Congress [\*\*\*654] was particularly concerned with "trusts," hence it named them in § 1 as a specific form of "combination" at which the statute was directed. Yet "trusts" consisted of affiliated corporations. As Senator Sherman explained:

"Because these combinations are always in many States and, as the Senator from Missouri says, it will be very easy for them to make a corporation within a State. So they can; but that is only one corporation of the combination. The combination [\*\*\*63] is always of two or more, and in one case of forty-odd corporations, all

<sup>11</sup> See Albrecht v. Herald Co., 390 U.S. 145, 149 (1968); United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960). See also Monsanto Co. v. Spray-Rite Service Co., 465 U.S., at 764, n. 9.

<sup>12</sup> E. g., Associated General Contractors of California, Inc. v. Carpenters, 459 U.S. 519, 531-532 (1983); National Society of Professional Engineers v. United States, 435 U.S. 679, 687-688 (1978); Standard Oil, 221 U.S., at 59.

<sup>13</sup> See, e. g., Schenley Corp. v. United States, 326 U.S. 432, 437 (1946) (per curiam); New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440-442 (1934); Burnet v. Clark, 287 U.S. 410 (1932); Louisville, C. & C. R. Co. v. Letson, 2 How. 497, 558-559 (1844); Bank of the United States v. Deveaux, 5 Cranch 61 (1809).

<sup>14</sup> Attorney General's Committee Report, *supra* n. 9, at 30-31 (citing Barron v. United States, 5 F.2d 799 (CA1 1925); Mininsohn v. United States, 101 F.2d 477 (CA3 1939); Egan v. United States, 137 F.2d 369 (CA8), cert. denied, 320 U.S. 788 (1943)). See also, e. g., United States v. Hartley, 678 F.2d 961, 971-972 (CA11 1982), cert. denied, 459 U.S. 1170 (1983); Alamo Fence Co. of Houston v. United States, 240 F.2d 179 (CA5 1957); Patterson v. United States, 222 F. 599, 618-619 (CA6), cert. denied, 238 U.S. 635 (1915); Union Pacific Coal Co. v. United States, 173 F. 737 (CA8 1909); United States v. Consolidated Coal Co., 424 F.Supp. 577, 579-581 (SD Ohio 1976); United States v. Griffin, 401 F.Supp. 1222, 1224-1225 (SD Ind. 1975), aff'd mem. sub nom. United States v. Metro Management Corp., 541 F.2d 284 (CA7 1976); United States v. Bridell, 180 F.Supp. 268, 273 (ND Ill. 1960); United States v. Kemmel, 160 F.Supp. 718 (MD Pa. 1958); Welling, Intracorporate Plurality in Criminal Conspiracy Law, 33 Hastings L. J. 1155, 1191-1199 (1982).

<sup>15</sup> See Hyde v. United States, 225 U.S. 347, 367-368 (1912). See also United States v. Sampson, 371 U.S. 75 (1962); Fong Foo v. United States, 369 U.S. 141 (1962) (per curiam); Lott v. United States, 367 U.S. 421 (1961); Nye & Nissen v. United States, 336 U.S. 613 (1949).

<sup>16</sup> See Duplex Printing Press Co. v. Deering, 254 U.S. 443, 465 (1921).

bound together by a link which holds them under the name of trustees, who are themselves incorporated under the laws of one of the States." 21 Cong. Rec. 2569 (1890).

The activities of these "combinations" of affiliated corporations were of special concern:

"[Associated] enterprise and capital are not satisfied with partnerships and corporations competing with each other, and have invented a new form of combination commonly called trusts, that seeks to avoid competition by combining the controlling corporations, partnerships, and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman, or a president.

[\*788] "The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the [\*\*\*\*64] profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors. . . . It is this kind of a combination we have to deal with now." *Id.*, at 2457.<sup>17</sup>

Thus, the corporate subsidiary, when used as a device to eliminate competition, was one of the chief evils to which the Sherman Act was addressed.<sup>18</sup> The anomaly [\*\*2751] in today's [\*\*\*655] holding is that the corporate devices most similar to the original "trusts" are now those which free an enterprise from antitrust scrutiny.

### [\*\*\*\*65] [\*789] III

The Court's reason for rejecting the concept of a combination or conspiracy among a parent corporation and its wholly owned subsidiary is that it elevates form over substance -- while in form the two corporations are separate legal entities, in substance they are a single integrated enterprise and hence cannot comprise the plurality of actors necessary to satisfy § 1. *Ante*, at 771-774. In many situations the Court's reasoning is perfectly sensible, for the affiliation of corporate entities often is procompetitive precisely because, as the Court explains, it enhances efficiency. A challenge to conduct that is merely an incident of the desirable integration that accompanies such affiliation should fail. However, the protection of such conduct provides no justification for the Court's new rule, precisely because such conduct cannot be characterized as an unreasonable restraint of trade violative of § 1. Conversely, the problem with the Court's new rule is that it leaves a significant gap in the enforcement of § 1 with respect to anticompetitive conduct that is entirely unrelated to the efficiencies associated with integration.

Since at least *United States v. Colgate & Co.*, 250 U.S. 300 (1919), [\*\*\*\*66] § 1 has been construed to require a plurality of actors. This requirement, however, is a consequence of the plain statutory language, not of any economic principle. As an economic matter, what is critical is the presence of market power, rather than a plurality of actors.<sup>19</sup> [\*\*\*\*67] From a competitive standpoint, a decision of a single firm possessing power to reduce output

<sup>17</sup> See also 21 Cong. Rec. 2562 (1890) (remarks of Sen. Teller); *id.*, at 2570 (remarks of Sen. Sherman); *id.*, at 2609 (remarks of Sen. Morgan).

<sup>18</sup> This legislative history thus demonstrates the error in the majority's conclusion that only acquisitions of corporate affiliates fall within § 1. See *ante*, at 761-762. The conduct of the trusts that Senator Sherman and others objected to went much further than mere acquisitions. Indeed, the irony of the Court's approach is that, had it been adopted in 1890, it would have meant that § 1 would have no application to trust combinations which had already been formed -- the very trusts to which Senator Sherman was referring.

I cannot believe that the Court really intends to express doubt as to whether the Congress that passed the Sherman Act thought conspiracy doctrine could apply to corporations. *Ante*, at 775-776, n. 24. If that were not the case, then the Sherman Act would have no application to corporations. Since, as is clear and as the Court concedes, the Sherman Act does apply to corporations, there can be no doubt that Congress intended to apply the law of conspiracy to agreements between corporations.

467 U.S. 752, \*789; 104 S. Ct. 2731, \*\*2751; 81 L. Ed. 2d 628, \*\*\*655; 1984 U.S. LEXIS 115, \*\*\*\*67

and raise prices above competitive levels has the same consequence as a decision by two firms acting together who have acquired an equivalent amount of market [\*790] power through an agreement not to compete.<sup>20</sup> [\*\*\*\*68] Unilateral conduct by a firm [\*\*\*656] with market power has no less anticompetitive potential than conduct by a plurality of actors which generates or exploits the same power,<sup>21</sup> and probably more, since the [\*\*2752] unilateral actor avoids the policing problems faced by cartels.

The rule of *Yellow Cab* thus has an economic justification. It addresses a gap in antitrust enforcement by reaching anticompetitive agreements between affiliated corporations which [\*791] have sufficient market power to restrain marketwide competition, but [\*\*\*\*69] not sufficient power to be considered monopolists within the ambit of § 2 of the Act.<sup>22</sup> [\*\*\*\*70] The doctrine is also useful when a third party declines to join a conspiracy to restrain trade among affiliated corporations, and is harmed as a result through a boycott or similar tactics designed to penalize the refusal. In such cases, since there has been no agreement with the third party, only an agreement between the affiliated corporations can be the basis for § 1 inquiry.<sup>23</sup> Finally, it must be remembered that not all persons who restrain trade wear grey flannel suits. Businesses controlled by organized crime often attempt to gain control of an industry through violence or intimidation of competitors; in such cases § 1 can be applied to separately incorporated

<sup>19</sup> Market power is the ability to raise prices above those that would be charged in a competitive market. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27, n. 46 (1984); *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 620 (1977); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

<sup>20</sup> Significantly, the Court never suggests that the plurality-of-actors requirement has any intrinsic economic significance. Rather, it suggests that the requirement has evidentiary significance: combinations are more likely to signal anticompetitive conduct than is unilateral activity: "In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction." *Ante*, at 769. That is true, but it is also true of any ordinary commercial contract between separate entities, as can be seen if one substitutes the word "contract" for "conspiracy" in the passage I have quoted. The language of the Sherman Act indicates that it treats "contracts" and "conspiracies" as equivalent concepts -- both satisfy the multiplicity-of-actors requirement -- and yet one of the most fundamental points in antitrust jurisprudence, dating at least to *Standard Oil*, is that there is nothing inherently anticompetitive about a contract. Similarly, an agreement to act "for common benefit" in itself is unremarkable -- all agreements are in some sense a restraint of trade be they contracts or conspiracies. It is only when trade is unreasonably restrained that § 1 is implicated. The Court's evidentiary concern lacks merit.

<sup>21</sup> We made this point in the context of resale price maintenance in *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960):

"The Sherman Act forbids combinations of traders to suppress competition. True, there results the same economic effect as is accomplished by a prohibited combination to suppress price competition if each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices. So long as *Colgate* is not overruled, this result is tolerated but only when it is the consequence of a mere refusal to sell in the exercise of a manufacturer's right 'freely to exercise his own independent discretion as to parties with whom he will deal.'" *Id.*, at 44 (quoting *Colgate*, 250 U.S., at 307).

<sup>22</sup> "[It] is the potential which this conspiracy concept holds for the development of a rational enforcement policy which, if anything, will ultimately attract the courts. If conduct of a single corporation which restrains trade were to violate *Section 1*, a forceful weapon would be available to the government with which to challenge conduct which in oligopolistic industries creates or reinforces entry barriers. Excessive advertising in the cereal, drug, or detergent industries, annual style changes in the auto industry, and other such practices could be reached as soon as they threatened to inhibit competition; there would be no need to wait until a 'dangerous probability' of monopoly had been reached, the requirement under *Section 2* 'attempt' doctrine. Nor would a single firm restraint of trade rule be overbroad. It would in no way threaten single firm activity -- setting a price, deciding what market it would deal in, or the like -- which did not threaten competitive conditions." L. Sullivan, *supra* n. 9, § 114, at 324 (footnotes omitted).

<sup>23</sup> This was the case in *Kiefer-Stewart*, for example. Seagram had refused to sell liquor to Kiefer-Stewart unless it agreed to an illegal resale price maintenance scheme. Kiefer-Stewart refused to agree, and as a result was injured by losing access to Seagram's products. See *340 U.S., at 213*.

businesses which benefit from such tactics, but which may be ultimately controlled by a single criminal enterprise.  
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[\*792] The [\*\*\*657] rule of *Yellow Cab* and its progeny is not one that condemns every parent-subsidiary relationship. A single firm, no matter what its corporate structure may be, is not expected to compete with itself. 25 [\*\*\*\*72] Functional [\*\*\*\*71] integration by its very nature requires unified action; hence in itself it has never been sufficient to establish the [\*\*2753] existence of an unreasonable restraint of trade: "In discussing the charge in the *Yellow Cab* case, we said that the fact that the conspirators were integrated did not insulate them from the act, not that corporate integration violated the act." *United States v. Columbia Steel Co.*, 334 U.S. 495, 522 (1948). Restraints that act only on the parent or its subsidiary as a consequence of an otherwise lawful integration do not violate § 1 of the Sherman Act. 26 But if the behavior at issue is unrelated to any functional integration between the affiliated corporations and [\*793] imposes a restraint on third parties of sufficient magnitude to restrain marketwide competition, as a matter of economic substance, as well as form, it is appropriate to characterize the conduct as a "combination or conspiracy in restraint of trade." 27

[\*\*\*\*73] For example, in *Yellow Cab* the Court read the complaint as alleging that integration had assisted the parent in excluding competing manufacturers from the marketplace, *332 U.S., at 226-227*, leading the Court to conclude that "restraint of interstate [\*\*\*658] trade was not only effected by the combination of the appellees but was the primary object of the combination." *Id., at 227*. Similarly, in *Crescent Amusement* the Court noted that corporate affiliation between exhibitors enhanced their buying power and "was one of the instruments in . . . making the conspiracy effective" in excluding independents from the market. *323 U.S., at 189-190*. Thus, in both cases the Court found that the affiliation enhanced the ability of the parent corporation to exclude the competition of third

<sup>24</sup> See *United States v. Turkette*, 452 U.S. 576, 588-593 (1981) (discussing congressional findings underlying the Organized Crime Control Act of 1970). *Section 1* of the Sherman Act has on occasion been used against various types of racketeering activity. See Hartwell, Criminal RICO and Antitrust, 52 Antitrust L. J. 311, 312-313 (1983); McLaren, Antitrust and Competition -- Review of the Past Year and Suggestions for the Future, in New York State Bar Assn., 1971 *Antitrust Law* Symposium 1, 3 (1971).

<sup>25</sup> See Comment, Decisionmaking, *supra* n. 9, at 1753-1757; Note, Suggested Standard, *supra* n. 9, at 735-738. Professor Sullivan elaborates:

"Picture, at one end of the spectrum, a family business which operates one retail store in each of three or four adjacent communities. All of the stores are managed as a unit by one individual, the founder of the business who sets policy, does all the buying, decides on all the advertising, sets prices, and hires and fires all employees other than family members. The fact that each store is operated by a separate corporation should not convert a family business into a cartel. . . . If there is, as a practical matter, an integrated ownership and management, this small business is a single firm. And a single firm cannot compete with itself. Hence it cannot restrain price competition with itself, or divide markets with itself, or act as a common purchasing agent for itself or otherwise restrain competition with itself, regardless of how many separate corporations the single firm may, for reasons unrelated to the act, be divided into." L. Sullivan, *supra* n. 9, § 114, at 326-327.

<sup>26</sup> Thus, the Court is wrong to suggest, *ante*, at 771-772, 774-776, and n. 24, that *Yellow Cab* could reach truly unilateral conduct involving only the employees of a single firm.

<sup>27</sup> If the rule of *Yellow Cab* and its progeny could be easily circumvented through, for example, use of unincorporated divisions instead of subsidiaries, then there would be reason to question its efficacy as a tool for rational antitrust enforcement. However, the Court is incorrect when it asserts, *ante*, at 770-771, 772-774, that there is no economic substance in a distinction between unincorporated divisions, which cannot provide a plurality of actors, and wholly owned subsidiaries, which under *Yellow Cab* can. If that were the case, incorporated subsidiaries would never be used to achieve integration -- the ready availability of an unincorporated alternative would always be employed in order to avoid antitrust liability. The answer is provided by the Court itself -- the use of subsidiaries often makes possible operating efficiencies that are unavailable through the use of unincorporated divisions. *Ante*, at 772-774. We may confidently assume that any corporate parent whose contingent antitrust liability exceeds the savings it realizes through the use of subsidiaries already utilizes unincorporated divisions instead of corporate subsidiaries. Thus, it is more than merely a question of form when a decision is made to use corporate subsidiaries instead of unincorporated divisions, and the rule is not that easily circumvented.

parties, and hence raised entry [\*794] barriers faced by actual and potential competitors. When conduct restrains trade not merely by integrating affiliated corporations but rather by restraining the ability of others to compete, that conduct has competitive significance drastically different from procompetitive integration.<sup>28</sup> In [\*\*2754] these [\*\*\*\*74] cases, the affiliation assisted exclusionary conduct; it was not the competitive equivalent of unilateral integration but instead generated power to restrain marketwide competition.

[\*\*\*75] There are other ways in which corporate affiliation can operate to restrain competition. A wholly owned subsidiary might market a "fighting brand" or engage in other predatory behavior that would be more effective if its ownership were concealed than if it was known that only one firm was involved. A predator might be willing to accept the risk of bankrupting a subsidiary when it could not afford to let a division incur similar risks. Affiliated corporations might enhance their power over suppliers by agreeing to refuse to deal with those who deal with an actual or potential competitor [\*795] of one of them; such a threat might be more potent coming from both corporations than from only one.<sup>29</sup>

[\*\*\*76] In [\*\*\*659] this case, it may be that notices to potential suppliers of respondent emanating from Copperweld carried more weight than would notices coming only from Regal. There was evidence suggesting that Regal and Copperweld were not integrated, and that the challenged agreement had little to do with achieving procompetitive efficiencies and much to do with protecting Regal's market position. The Court does not even try to explain why their common ownership meant that Copperweld and Regal were merely obtaining benefits associated with the efficiencies of integration. Both the District Court and the Court of Appeals thought that their agreement had a very different result -- that it raised barriers to entry and imposed an appreciable marketwide restraint. The Court's discussion of the justifications for corporate affiliation is therefore entirely abstract -- while it dutifully lists the procompetitive justifications for corporate affiliation, *ante*, at 772-774, it fails to explain how any of them relate to the conduct at issue in this case. What is challenged here is not the fact of integration between Regal and Copperweld, but their specific agreement with respect to [\*\*\*77] Independence. That agreement concerned the exclusion of [\*796] Independence from the market, and not any efficiency resulting from integration. The facts of this very case belie the conclusion that affiliated corporations are incapable of engaging in the kind of conduct that threatens marketwide competition. The Court does not even attempt to assess the competitive significance of the conduct under challenge here -- it never tests its economic assumptions against the concrete facts before it. Use of economic theory without reference to the competitive impact of the particular economic arrangement at issue is

<sup>28</sup> See L. Sullivan, *supra* n. 9, § 114, at 328 ("To have two competitors acting concertedly two separate firms, not just persons, are needed. Thus 'concerted action' by two 'legal persons' which is limited solely to the internal management of a single firm does not restrain competition; but 'concerted action' by two 'legal persons' which erects barriers to entry by another separate firm, a competitor or potential competitor, can be a restraint of trade"); see also Willis & Pitofsky, *supra* n. 9, at 38-41. The Attorney General's National Committee to Study the Antitrust Laws made the same point in 1955:

"The substance of the Supreme Court decisions is that concerted action between a parent and subsidiary or between subsidiaries which has for its purpose or effect coercion or unreasonable restraint on the trade of strangers to those acting in concert is prohibited by [Section 1](#). Nothing in these opinions should be interpreted as justifying the conclusion that concerted action solely between a parent and subsidiary or subsidiaries, the purpose and effect of which is not coercive restraint of the trade of strangers to the corporate family, violates [Section 1](#). Where such concerted action restrains no trade and is designed to restrain no trade other than that of the parent and its subsidiaries, [Section 1](#) is not violated." Attorney General's Committee Report, *supra* n. 9, at 34.

<sup>29</sup> Professor Sullivan provides another example:

"[Picture] a parent corporation and its wholly owned subsidiary (or two corporations wholly owned by the same parent or stockholder group) which operate, respectively, a newspaper and a radio station in the same city. If the radio station, which has no local competitors, were to deny advertising to a local business because the latter advertised in a rival newspaper, the integration between the two corporations, however close in terms of ownership or management or both, would not protect them from a charge of conspiracy to restrain trade. . . . [The] concerted action here involved is not merely carrying on the business of a single integrated firm, it is action which is aimed at restraining trade by utilizing such market power as is possessed by the firm because of its radio station in order to erect a competitive barrier in front of a competitor of the firm's newspaper." L. Sullivan, *supra* n. 9, § 114, at 327 (footnote omitted).

properly criticized when it produces overly broad *per se* rules of antitrust liability;<sup>30</sup> criticism is no less warranted when a *per se* rule of antitrust immunity is adopted in the same way.

In sum, the question that the Court should ask is not why a wholly owned subsidiary should be treated [\*\*\*\*78] differently from a corporate division, since the immunity accorded that type of arrangement is a necessary consequence of *Colgate*. Rather the question should be why two corporations that engage in a predatory course of conduct which produces a marketwide restraint [\*\*2755] on competition and which, as separate legal entities, can be easily fit within the language of § 1, should be immunized from liability because they are controlled by the same godfather. That is a question the Court simply fails to confront. I respectfully dissent.

## References

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Annotation References:

Supreme Court's views as to what constitutes *per se* illegal "price fixing" under the Sherman Act ([15 USCS 1 et seq.](#)). [64 L Ed 2d 997](#).

Business units or persons within single, commonly owned enterprise as conspiring with each other in violation of 1 or 3 of Sherman Act ([15 USCS 1, 3](#)). 20 ALR Fed 682.

Measure and elements of damages under [15 USCS 15](#) entitling person injured in his business or property by reason of anything forbidden in federal antitrust laws to recover treble damages. 16 ALR Fed 14.

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<sup>30</sup> E. g., *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).



## **National Collegiate Athletic Ass'n v. Board of Regents**

Supreme Court of the United States

March 20, 1984, Argued ; June 27, 1984, Decided

No. 83-271

### **Reporter**

468 U.S. 85 \*; 104 S. Ct. 2948 \*\*; 82 L. Ed. 2d 70 \*\*\*; 1984 U.S. LEXIS 130 \*\*\*\*; 52 U.S.L.W. 4928; 1984-2 Trade Cas. (CCH) P66,139

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION v. BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

**Disposition:** [707 F.2d 1147](#), affirmed.

## **Core Terms**

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television, games, athletics, football, college football, broadcasters, networks, output, rights, institutions, telecasts, intercollegiate, schools, amateurism, Sherman Act, sports, teams, regulations, attendance, programs, anticompetitive, compete, enhance, appearances, competitors, attractive, antitrust, procompetitive, audience, consumer

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

**[HN1](#)** [down arrow] **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 1](#).

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

**[HN2](#)** [down arrow] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

A horizontal restraint of trade is created where an agreement among competitors exists on the way in which they will compete with one another. A restraint of this type has often been held to be unreasonable as a matter of law.

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

### **HN3** Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Horizontal price fixing is ordinarily condemned as a matter of law under an "illegal per se" approach because the probability that these practices are anticompetitive is so high. A per se rule is applied when the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output. In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

### **HN4** Higher Education & Professional Associations, Colleges & Universities

There is no doubt that the sweeping language of [15 U.S.C.S. § 1](#) applies to nonprofit entities. Courts impose antitrust liability on nonprofit entities that engage in anticompetitive conduct.

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

### **HN5** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A conclusion that a restraint of trade is unreasonable may be based either on the nature or character of the contracts, or on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

### **HN6** Antitrust & Trade Law, Sherman Act

Under the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), the criterion to be used in judging the validity of a restraint on trade is its impact on competition.

Antitrust & Trade Law > Sherman Act > General Overview

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

## [\*\*HN7\*\*](#) [blue downward arrow] Antitrust & Trade Law, Sherman Act

The Sherman Act, [15 U.S.C.S. § 1 et seq.](#), prohibits every contract, combination, or conspiracy in restraint of trade or commerce among the states.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

## [\*\*HN8\*\*](#) [blue downward arrow] Higher Education & Professional Associations, Colleges & Universities

A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of anti-trust law. Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.

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

## [\*\*HN9\*\*](#) [blue downward arrow] Monopolies & Monopolization, Actual Monopolization

Market power is the ability to raise prices above those that would be charged in a competitive market.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

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

## [\*\*HN10\*\*](#) [blue downward arrow] Regulated Industries, Higher Education & Professional Associations

The absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.

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

Communications Law > ... > Regulated Entities > Broadcasting > General Overview

## [\*\*HN11\*\*](#) [blue downward arrow] Monopolies & Monopolization, Actual Monopolization

When a product is controlled by one interest, without substitutes available in the market, there is monopoly power.

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

## **HN12** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Under the Rule of Reason, hallmarks of anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense, which competitively justifies a deviation from the operations of a free market.

## **Lawyers' Edition Display**

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### **Decision**

NCAA exclusive football telecasting plan held Sherman Act violation.

### **Summary**

The University of Oklahoma and the University of Georgia brought suit in the United States District Court for the Western District of Oklahoma against the National Collegiate Athletic Association (NCAA), challenging the validity under the Sherman Act of the NCAA's restraints in the televising of college football games. The District Court ruled that the NCAA unlawfully restrained trade by fixing the price for particular telecasts, boycotting and threatening to boycott potential broadcasters by its exclusive network football-broadcast contracts, and placing an artificial limit on the production of televised college football ([546 F Supp 1276](#)). The United States Court of Appeals for the Tenth Circuit affirmed but remanded for an appropriate modification of the injunctive decree, holding that the NCAA television plan constituted illegal per se price fixing, and that even if the television plan was not per se illegal, its anticompetitive limitation on price and output was not offset by any procompetitive justification sufficient to save the plan even when the totality of the circumstances was examined ([707 F2d 1147](#)).

On certiorari, the United States Supreme Court affirmed. In an opinion by Stevens, J., expressing the views of Burger, Ch. J., and Brennan, Marshall, Blackmun, Powell, and O'Connor, JJ., it was held that (1) the record supported the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to customer preference, the NCAA restricted rather than enhanced the place of intercollegiate athletics in the nation's life; and (2) the NCAA television plan, which limited the total amount of televised intercollegiate football and the number of games that an NCAA member might televise, and which forbade any member to make any sale of television rights except in accordance with the basic plan, constituted a restraint on the operation of a free market in violation of 1 of the Sherman Act.

White, J., joined by Rehnquist, J., dissented on the ground that the essentially noneconomic nature of the NCAA's program of self-regulation offset any minimal anticompetitive effects of the television plan.

## **Headnotes**

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 > TV contract -- > Headnote:

[LEdHN1A](#) [1A] [LEdHN1B](#) [1B] [LEdHN1C](#) [1C]

A television plan adopted by an association of colleges and universities, which limits the total amount of televised intercollegiate football and the number of games that an association member may televise, and which forbids any member to make any sale of television rights except in accordance with the basic plan, constitutes a restraint on the operation of a free market, in violation of 1 of the Sherman Act ([15 USCS 1](#)), where the record supports the lower court's conclusion that by curtailing output and blunting the ability of member institutions to respond to customer preference, the association restricted rather than enhanced the place of intercollegiate athletics in the nation's life. (White and Rehnquist, JJ., dissented from this holding.)

468 U.S. 85, \*85; 104 S. Ct. 2948, \*\*2948; 82 L. Ed. 2d 70, \*\*\*70; 1984 U.S. LEXIS 130, \*\*\*\*1

APPEAL §1506 > findings -- two-court rule -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

The United States Supreme Court accords great weight to a finding of fact which has been made by a United States District Court and approved by a United States Court of Appeals.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 > reason -- > Headnote:

[LEdHN\[3\]](#) [3]

The Sherman Act ([15 USCS 1 et seq.](#)) is intended to prohibit only unreasonable restraints of trade.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > per se rule -- > Headnote:

[LEdHN\[4\]](#) [4]

A per se rule is applied when a practice facially appears to be one that would always or almost always tend to restrict competition and restrict output, in which event a restraint is presumed unreasonable without inquiring into the particular market context in which it is found.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §11 > nonprofit entities -- > Headnote:

[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B]

[Section 1](#) of the Sherman Act ([15 USCS 1](#)) applies to nonprofit entities.

EVIDENCE §173 > motive -- NCAA -- > Headnote:

[LEdHN\[6A\]](#) [6A] [LEdHN\[6B\]](#) [6B]

As the guardian of an important American tradition, the National Collegiate Athletic Association's motives must be accorded a respectful presumption of validity.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §15 > motive -- > Headnote:

[LEdHN\[7A\]](#) [7A] [LEdHN\[7B\]](#) [7B]

Good motives do not validate an otherwise anticompetitive practice.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 > rule of reason -- > Headnote:  
[LEdHN\[8\]](#) [8]

A conclusion that a restraint of trade is unreasonable may be based either (1) on the nature or character of the contracts or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices; under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > per se rule -- > Headnote:  
[LEdHN\[9\]](#) [9]

Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §19 > anticompetitive impact -- > Headnote:  
[LEdHN\[10\]](#) [10]

Under the Sherman Act ([15 USCS 1 et seq.](#)), the criterion to be used in judging the validity of a restraint on trade is its impact on competition.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §17 > consumer welfare -- > Headnote:  
[LEdHN\[11\]](#) [11]

A restraint that has the affect of reducing the importance of consumer preference in setting price and output is not consistent with the fundamental goal of antitrust law of serving as a consumer welfare prescription.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §19 > market power -- > Headnote:  
[LEdHN\[12\]](#) [12]

The absence of proof of market power does not justify a naked restriction on price or output; rather, a naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > price -- output -- > Headnote:  
[LEdHN\[13\]](#) [13]

When there is an agreement not to compete in terms of price or output, no elaborate industry analysis is required to demonstrate the anticompetitive character of the agreement.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §19 > market -- > Headnote:

[LEdHN\[14\]](#) [down] [14]

The correct test for determining whether college football broadcasts constitute a separate market is whether there are other products that are reasonably substitutable for televised NCAA football games.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §19 > monopolies -- > Headnote:

[LEdHN\[15\]](#) [down] [15]

When a product is controlled by one interest, without substitutes available in the market, there is monopoly power.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > price -- defense -- > Headnote:

[LEdHN\[16\]](#) [down] [16]

Under the rule of reason, a price rise and output reduction place upon the one causing them a heavy burden of establishing an affirmative defense which competitively justifies the apparent deviation from the operations of a free market.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 > defense -- > Headnote:

[LEdHN\[17\]](#) [down] [17]

The rule of reason does not support a defense based on the assumption that competition itself is unreasonable.

## Syllabus

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In 1981, petitioner National Collegiate Athletic Association (NCAA) adopted a plan for the televising of college football games of its member institutions for the 1982-1985 seasons. The plan recites that it is intended to reduce the adverse effect of live television upon football game attendance. The plan limits the total amount of televised intercollegiate football games and the number of games that any one college may televise, and no member of the NCAA is permitted to make any sale of television rights except in accordance with the plan. The NCAA has separate agreements with the two carrying networks, the American Broadcasting Cos. and the Columbia Broadcasting System, granting each network the right to telecast the live "exposures" described in the plan. Each network agreed to pay a specified "minimum aggregate compensation" to the participating NCAA members, and was authorized [\*\*\*\*2] to negotiate directly with the members for the right to televise their games. Respondent Universities, in addition to being NCAA members, are members of the College Football Association (CFA), which was originally organized to promote the interests of major football-playing colleges within the NCAA structure, but

whose members eventually claimed that they should have a greater voice in the formulation of football television policy than they had in the NCAA. The CFA accordingly negotiated a contract with the National Broadcasting Co. that would have allowed a more liberal number of television appearances for each college and would have increased the revenues realized by CFA members. In response, the NCAA announced that it would take disciplinary action against any CFA member that complied with the CFA-NBC contract. Respondents then commenced an action in Federal District Court, which, after an extended trial, held that the controls exercised by the NCAA over the televising of college football games violated § 1 of the Sherman Act, and accordingly granted injunctive relief. The court found that competition in the relevant market -- defined as "live college football television" -- [\*\*\*3] had been restrained in three ways: (1) the NCAA fixed the price for particular telecasts; (2) its exclusive network contracts were tantamount to a group boycott of all other potential broadcasters and its threat of sanctions against its members constituted a threatened boycott of potential competitors; and (3) its plan placed an artificial limit on the production of televised college football. The Court of Appeals agreed that the Sherman Act had been violated, holding that the NCAA's television plan constituted illegal *per se* price fixing and that even if it were not *per se* illegal, its anticompetitive limitation on price and output was not offset by any procompetitive justifications sufficient to save the plan even when the totality of the circumstances was examined.

*Held:* The NCAA's television plan violates § 1 of the Sherman Act. Pp. 98-120.

(a) While the plan constitutes horizontal price fixing and output limitation, restraints that ordinarily would be held "illegal *per se*," it would be inappropriate to apply a *per se* rule in this case where it involves an industry in which horizontal restraints on competition are essential if the product is to be available [\*\*\*4] at all. The NCAA and its members market competition itself -- contests between competing institutions. Thus, despite the fact that restraints on the ability of NCAA members to compete in terms of price and output are involved, a fair evaluation of their competitive character requires consideration, under the Rule of Reason, of the NCAA's justifications for the restraints. But an analysis under the Rule of Reason does not change the ultimate focus of the inquiry, which is whether or not the challenged restraints enhance competition. Pp. 98-104.

(b) The NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the District Court's findings establish that the plan has operated to raise price and reduce output, both of which are unresponsive to consumer preference. Under the Rule of Reason, these hallmarks of anticompetitive behavior place upon the NCAA a heavy burden of establishing an affirmative defense that competitively justifies this apparent deviation from the operations of a free market. The NCAA's argument that its television plan can have no significant anticompetitive effect since it has no market power must be rejected. As a matter [\*\*\*5] of law, the absence of proof of market power does not justify a naked restriction on price or output and, as a factual matter, it is evident from the record that the NCAA does possess market power. Pp. 104-113.

(c) The record does not support the NCAA's proffered justification for its television plan that it constitutes a cooperative "joint venture" which assists in the marketing of broadcast rights and hence is procompetitive. The District Court's contrary findings undermine such a justification. Pp. 113-115.

(d) Nor, contrary to the NCAA's assertion, does the television plan protect live attendance, since, under the plan, games are televised during all hours that college football games are played. Moreover, by seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to draw live attendance when faced with competition from televised games, the NCAA forwards a justification that is inconsistent with the Sherman Act's basic policy. "The Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696. [\*\*\*6] Pp. 115-117.

(e) The interest in maintaining a competitive balance among amateur athletic teams that the NCAA asserts as a further justification for its television plan is not related to any neutral standard or to any readily identifiable group of competitors. The television plan is not even arguably tailored to serve such an interest. It does not regulate the amount of money that any college may spend on its football program or the way the colleges may use their football program revenues, but simply imposes a restriction on one source of revenue that is more important to some colleges than to others. There is no evidence that such restriction produces any greater measure of equality

throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity. Moreover, the District Court's well-supported finding that many more games would be televised in a free market than under the NCAA plan, is a compelling demonstration that the plan's controls do not serve any legitimate procompetitive purpose. Pp. 117-120.

**Counsel:** Frank H. Easterbrook argued the cause for petitioner. With him on the briefs were George H. Gangwere and James D. [\*\*\*7] Fellers.

Andy Coats argued the cause for respondents. With him on the brief were Clyde A. Muchmore, Erwin N. Griswold, J. Ralph Beaird, and James F. Ponsoldt.

Solicitor General Lee argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Assistant Attorney General McGrath, Deputy Solicitor General Wallace, Deputy Assistant Attorney General Ginsberg, Jerrold J. Ganzfried, Barry Grossman, and Andrea Limmer. \*

**Judges:** STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, post, p. 120.

**Opinion by:** STEVENS

## Opinion

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[\*88] [\*\*\*75] [\*\*2953] JUSTICE STEVENS delivered the opinion of the Court.

LEdHN[1A] [↑] [1A] [\*\*\*8] The University of Oklahoma and the University of Georgia contend that the National Collegiate Athletic Association has unreasonably restrained trade in the televising of college football games. After an extended trial, the District Court found that the NCAA had violated § 1 of the Sherman Act<sup>1</sup> and granted [\*\*\*76] injunctive relief. 546 F.Supp. 1276 (WD Okla. 1982). The Court of Appeals agreed that the statute had been violated but modified the remedy in some respects. 707 F.2d 1147 (CA10 1983). We granted certiorari, 464 U.S. 913 (1983), and now affirm.

I

### The NCAA

[\*\*\*9] Since its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports. It has adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs. In some sports, such as baseball, [\*\*2954] swimming, basketball, wrestling, and track, it has sponsored and

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\* Gerald A. Caplan and Alexander Halpern filed a brief for the National Federation of State High School Associations as amicus curiae urging reversal.

Forrest A. Hainline III and J. Laurent Scharff filed a brief for the Association of Independent Television Stations, Inc., as amicus curiae urging affirmance.

<sup>1</sup> Section 1 provides in pertinent part:

HN1 [↑] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." 26 Stat. 209, as amended, 15 U. S. C. § 1.

conducted national tournaments. It has not done so in the sport of football, however. With the [\*89] exception of football, the NCAA has not undertaken any regulation of the televising of athletic events.<sup>2</sup>

The NCAA has approximately 850 voting members. The regular members are classified into separate divisions to reflect differences in size and scope of their athletic programs. Division I includes 276 colleges with major athletic programs; in this group only 187 [\*\*\*10] play intercollegiate football. Divisions II and III include approximately 500 colleges with less extensive athletic programs. Division I has been subdivided into Divisions I-A and I-AA for football.

Some years ago, five major conferences together with major football-playing independent institutions organized the College Football Association (CFA). The original purpose of the CFA was to promote the interests of major football-playing schools within the NCAA structure. The Universities of Oklahoma and Georgia, respondents in this Court, are members of the CFA.

#### *History of the NCAA Television Plan*

In 1938, the University of Pennsylvania televised one of its home games.<sup>3</sup> From 1940 through the 1950 season all of Pennsylvania's home games were televised. App. 303. That was the beginning of the relationship between television and college football.

[\*\*\*11] On January 11, 1951, a three-person "Television Committee," appointed during the preceding year, delivered a report to the NCAA's annual convention in Dallas. Based on preliminary surveys, the committee had concluded that "television does have an adverse effect on college football attendance and unless brought under some control threatens to seriously harm the nation's overall athletic and physical [\*90] system." *Id.*, at 265. The report emphasized that "the television problem is truly a national one and requires collective action by the colleges." *Id.*, [\*\*\*77] at 270. As a result, the NCAA decided to retain the National Opinion Research Center (NORC) to study the impact of television on live attendance, and to declare a moratorium on the televising of football games. A television committee was appointed to implement the decision and to develop an NCAA television plan for 1951. *Id.*, at 277-278.

The committee's 1951 plan provided that only one game a week could be telecast in each area, with a total blackout on 3 of the 10 Saturdays during the season. A team could appear on television only twice during a season. The plan also provided that the NORC would [\*\*\*12] conduct a systematic study of the effects of the program on attendance. *Id.*, at 279. The plan received the virtually unanimous support of the NCAA membership; only the University of Pennsylvania challenged it. Pennsylvania announced that it would televise all its home games. The council of the NCAA thereafter declared Pennsylvania a member in bad standing and the four institutions scheduled to play at Pennsylvania in 1951 refused to do so. Pennsylvania then reconsidered its decision and abided by the NCAA plan. *Id.*, at 280-281.

During each of the succeeding five seasons, studies were made which tended to indicate that television had an adverse effect on attendance at college football games. During those years the NCAA continued to exercise complete control over the number of games that could be televised. *Id.*, at 325-359.

From 1952 through 1977 the NCAA television committee followed essentially the same procedure for developing its television plans. It would first circulate a questionnaire to the membership and then use the responses as a basis for formulating [\*\*2955] a plan for the ensuing season. The plan was then submitted to a vote by means of a mail referendum. [\*\*\*13] Once approved, the plan formed the basis for NCAA's negotiations [\*91] with the networks. Throughout this period the plans retained the essential purposes of the original plan. See 546 F.Supp., at 1283.<sup>4</sup>

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<sup>2</sup> Presumably, however, it sells the television rights to events that the NCAA itself conducts.

<sup>3</sup> According to the NCAA football television committee's 1981 briefing book: "As far as is known, there were [then] six television sets in Philadelphia; and all were tuned to the game." App. 244.

Until 1977 the contracts were all for either 1- or 2-year terms. In 1977 the NCAA adopted "principles of negotiation" for the future and discontinued the practice of submitting each plan for membership approval. Then the NCAA also entered into its first 4-year contract granting exclusive rights to the American Broadcasting Cos. (ABC) for the 1978-1981 seasons. ABC had held the exclusive rights to network telecasts of NCAA football games since 1965. *Id.* at 1283-1284.

#### [\*\*\*\*14] The Current Plan

The plan adopted in 1981 for the 1982-1985 seasons is at issue in this [\*\*\*78] case.<sup>5</sup> [\*\*\*\*15] This plan, like each of its predecessors, recites that it is intended to reduce, insofar as possible, the adverse effects of live television upon football game attendance.<sup>6</sup> It provides that "all forms of television of the football [\*92] games of NCAA member institutions during the Plan control periods shall be in accordance with this Plan." App. 35. The plan recites that the television committee has awarded rights to negotiate and contract for the telecasting of college football games of members of the NCAA to two "carrying networks." *Id.*, at 36. In addition to the principal award of rights to the carrying networks, the plan also describes rights for a "supplementary series" that had been awarded for the 1982 and 1983 seasons,<sup>7</sup> as well as a procedure for permitting specific "exception telecasts."<sup>8</sup>

[\*\*\*\*16] In separate agreements with each of the carrying networks, ABC and the Columbia Broadcasting System (CBS), the NCAA granted each the right to telecast the 14 live "exposures" described in the plan, in accordance with the "ground rules" set [\*\*2956] forth therein.<sup>9</sup> Each of the networks agreed to pay a specified "minimum

<sup>4</sup> The television committee's 1981 briefing book elaborates:

"In 1952, the NCAA Television Committee initiated a plan for controlling the televising of college football games. The plans have remained remarkably similar as to their essential features over the past 30 years. They have had the following primary objectives and purposes:

"1. To reduce, insofar as possible, the adverse effects of live television upon football game attendance and, in turn, upon the athletic and education programs dependent upon that football attendance;  
 "2. To spread television among as many NCAA member colleges as possible; and  
 "3. To provide football television to the public to the extent compatible with the other two objectives." *Ibid.*

<sup>5</sup> Because respondents sought and obtained only injunctive relief against future violations of § 1 in the District Court, we do not consider previous NCAA television plans except to the extent that they shed light on the purpose and effect of the current plan.

<sup>6</sup> "The purposes of this Plan shall be to reduce, insofar as possible, the adverse effects of live television upon football game attendance and, in turn, upon the athletic and related educational programs dependent upon the proceeds therefrom; to spread football television participation among as many colleges as practicable; to reflect properly the image of universities as educational institutions; to promote college football through the use of television, to advance the overall interests of intercollegiate athletics, and to provide college football television to the public to the extent compatible with these other objectives." *Id.*, at 35 (parenthetical omitted).

<sup>7</sup> The supplementary series is described in a separate article of the plan. It is to consist of no more than 36 exposures in each of the first two years and no more than 40 exposures in the third and fourth years of the plan. Those exposures are to be scheduled on Saturday evenings or at other times that do not conflict with the principal football series that is scheduled for Saturday afternoons. *Id.*, at 86-92.

<sup>8</sup> An "exception" telecast is permitted in the home team's market of games that are sold out, and in the visiting team's market of games played more than 400 miles from the visiting team's campus, but in both cases only if the broadcast would not be shown in an area where another college football game is to be played. *Id.*, at 62-72. Also, Division II and Division III institutions are allowed complete freedom to televise their games, except that the games may not appear on a network of more than five stations without the permission of the NCAA. *Id.*, at 73-74.

aggregate compensation [\*93] to the participating NCAA member institutions" during the 4-year period in an amount that totaled \$ 131,750,000. In essence the agreement authorized each network to negotiate directly with member schools for the right to televise their games. The agreement itself does not describe the method of computing the compensation for each game, but the practice that has developed over the years and that the District Court found would be followed under the current agreement involved the setting of a recommended fee by a representative of the NCAA for different types of telecasts, with national telecasts being [\*\*\*79] the most valuable, regional telecasts being less valuable, and Division II or Division III games commanding a still lower price.

<sup>10</sup> [\*\*\*18] The aggregate of all these payments presumably equals the total minimum aggregate compensation [\*\*\*17] set forth in the basic agreement. Except for differences in payment between national and regional telecasts, and with respect to Division II and Division III games, the amount that any team receives does not change with the size of the viewing audience, the number of markets in which the game is telecast, or the particular characteristic of the game or the participating teams. Instead, the "ground rules" provide that the carrying networks make alternate selections of those games they wish to televise, and thereby obtain the exclusive right to submit a bid at an essentially fixed price to the institutions involved. See [546 F.Supp., at 1289-1293](#).<sup>11</sup>

[\*94] The plan also contains "appearance requirements" and "appearance limitations" which pertain to each of the 2-year periods that the [\*\*\*19] plan is in effect. The basic requirement imposed on each of the two networks is that it must schedule appearances for at least 82 different member institutions during each 2-year period. Under the appearance limitations no member institution is eligible to appear on television more than a total of six times and more than four times nationally, with the appearances to be divided equally between the two carrying networks. See [id., at 1293](#). The number of exposures specified in the contracts also sets an absolute maximum on the number of games that can be broadcast.

Thus, although the current plan is more elaborate than any of its predecessors, it retains the essential features of each of them. It limits the total amount of televised intercollegiate football and the number of games that any one team may televise. No member is permitted to make any [\*\*2957] sale of television rights except in accordance with the basic plan.

#### *Background of this Controversy*

Beginning in 1979 CFA members began to advocate that colleges with major football programs should have a greater voice in the formulation of football television policy than they [\*\*\*80] had in the [\*\*\*20] NCAA. CFA therefore investigated the possibility of negotiating a television agreement of its own, developed [\*95] an

<sup>9</sup> In addition to its contracts with the carrying networks, the NCAA has contracted with Turner Broadcasting System, Inc. (TBS), for the exclusive right to cablecast NCAA football games. The minimum aggregate fee for the initial 2-year period of the TBS contract is \$ 17,696,000. [546 F.Supp., at 1291-1292](#).

<sup>10</sup> The football television committee's briefing book for 1981 recites that a fee of \$ 600,000 was paid for each of the 12 national games telecast by ABC during the regular fall season and \$ 426,779 was paid for each of the 46 regional telecasts in 1980. App. 250. The report further recites: "Division I members received \$ 27,842,185 from 1980 football television revenue, 89.8 percent of the total. Division II's share was \$ 625,195 (2.0 percent), while Division III received \$ 385,195 (1.3 percent) and the NCAA \$ 2,147,425 (6.9 percent)." *Id.*, at 251.

<sup>11</sup> The District Court explained how the agreement eliminates competition for broadcasting rights:

"First, the networks have no intention to engage in bidding. Second, once the network holding first choice for any given date has made its choice and agreed to a rights fee for that game with the two teams involved, the other network is then in a monopsony position. The schools cannot threaten to sell the broadcast rights to any other network. They cannot sell to NBC without committing a violation of NCAA rules. They cannot sell to the network which had first choice over that particular date because, again, they would be in violation of NCAA rules, and the network would be in violation of its agreement with NCAA. Thus, NCAA creates a single eligible buyer for the product of all but the two schools selected by the network having first choice. Free market competition is thus destroyed under the new plan." [546 F.Supp., at 1292-1293](#).

independent plan, and obtained a contract offer from the National Broadcasting Co. (NBC). This contract, which it signed in August 1981, would have allowed a more liberal number of appearances for each institution, and would have increased the overall revenues realized by CFA members. See [\*id., at 1286.\*](#)

In response the NCAA publicly announced that it would take disciplinary action against any CFA member that complied with the CFA-NBC contract. The NCAA made it clear that sanctions would not be limited to the football programs of CFA members, but would apply to other sports as well. On September 8, 1981, respondents commenced this action in the United States District Court for the Western District of Oklahoma and obtained a preliminary injunction preventing the NCAA from initiating disciplinary proceedings or otherwise interfering with CFA's efforts to perform its agreement with NBC. Notwithstanding the entry of the injunction, most CFA members were unwilling to commit themselves to the new contractual arrangement with NBC in the face of [\*\*\*\*21] the threatened sanctions and therefore the agreement was never consummated. See [\*id., at 1286-1287.\*](#)

#### *Decision of the District Court*

After a full trial, the District Court held that the controls exercised by the NCAA over the televising of college football games violated the Sherman Act. The District Court defined the relevant market as "live college football television" because it found that alternative programming has a significantly different and lesser audience appeal. [\*Id., at 1297-1300.\*](#)<sup>12</sup> The District Court then concluded that the NCAA [\*96] controls over college football are those of a "classic cartel" with an

"almost absolute control over the supply of college football which is made available to the networks, to television advertisers, and ultimately to the viewing public. Like all other cartels, NCAA members have sought and achieved a price for their product which is, in most instances, artificially high. The NCAA cartel imposes production limits on its members, and maintains mechanisms for punishing cartel members who seek to stray from these production quotas. The cartel has established a uniform price for the [\*\*\*\*22] products of each of the member producers, with no regard for the differing quality of these products or the consumer demand for these various products." [\*Id., at 1300-1301.\*](#)

The District Court found that competition in the relevant market had been restrained in three ways: (1) NCAA fixed the price for particular telecasts; (2) its exclusive network contracts were tantamount to a group boycott of all other potential broadcasters and its threat of sanctions [\*\*\*81] against its own members constituted a threatened boycott of potential competitors; and (3) its plan placed an artificial limit on the production of televised college football. [\*Id., at 1293-1295.\*](#)

In the District Court the NCAA offered two principal [\*\*\*\*23] justifications for its television policies: that they protected the gate attendance of its members and that they tended to preserve a competitive balance among the football programs of the various schools. The District Court rejected the first justification because the evidence did not support the claim that college football television adversely affected gate attendance. [\*Id., at 1295-1296.\*](#) With respect to [\*\*2958] the "competitive balance" argument, the District Court found that the evidence failed to show that the NCAA regulations on matters such as recruitment and the standards for preserving amateurism were not sufficient to maintain an appropriate balance. [\*Id., at 1296.\*](#)

#### [\*97] *Decision of the Court of Appeals*

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<sup>12</sup> The District Court held that the NCAA had monopolized the relevant market in violation of § 2 of the Sherman Act, [\*15 U. S. C. § 2.\*](#) See [\*546 F.Supp., at 1319-1323.\*](#) The Court of Appeals found it unnecessary to reach this issue, as do we.

468 U.S. 85, \*97; 104 S. Ct. 2948, \*\*2958; 82 L. Ed. 2d 70, \*\*\*81; 1984 U.S. LEXIS 130, \*\*\*\*23

The Court of Appeals held that the NCAA television plan constituted illegal *per se* price fixing, [707 F.2d, at 1152](#).<sup>13</sup> It rejected each of the three arguments advanced by NCAA to establish the procompetitive character of its plan.<sup>14</sup> First, the court rejected the argument that the television plan promoted live attendance, noting that since the plan involved a concomitant reduction in viewership the [\*\*\*\*24] plan did not result in a net increase in output and hence was not procompetitive. [Id., at 1153-1154](#). Second, the Court of Appeals rejected as illegitimate the NCAA's purpose of promoting athletically balanced competition. It held that such a consideration amounted to an argument that "competition will destroy the market" -- a position inconsistent with the policy of the Sherman Act. Moreover, assuming *arguendo* that the justification was legitimate, the court agreed with the District Court's finding "that any contribution the plan made to athletic balance could be achieved by less restrictive means." [Id., at 1154](#). Third, the Court of Appeals refused to view the NCAA plan as competitively justified by the need to compete effectively with other types of television programming, since it entirely eliminated competition between producers of football and hence was illegal *per se*. [Id., at 1155-1156](#).

[LEdHN\[2B\]](#)<sup>15</sup> Finally, the Court of Appeals concluded that even if the television plan were not *per se* illegal, its anticompetitive limitation on price and output was not offset by any [\*98] procompetitive justification sufficient to save the plan even when the totality of the circumstances was examined. [\\*\\*\\*82](#) [Id., at 1157-1160](#).<sup>16</sup> [\*\*\*\*26] The case was remanded to the District Court for an appropriate modification in its injunctive decree. [Id., at 1162](#).<sup>17</sup>

II

[LEdHN\[3\]](#)<sup>18</sup> [3]There can be no doubt that the challenged practices of the NCAA [\*\*\*\*27] constitute a "restraint of trade" in the sense that they limit members' freedom to negotiate and [\*2959] enter into their own television contracts. In that sense, however, every contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade.<sup>19</sup>

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<sup>13</sup> [LEdHN\[2A\]](#)<sup>1</sup> [2A]

The Court of Appeals rejected the District Court's boycott holding, since all broadcasters were free to negotiate for a contract as carrying networks and the threat of sanctions against members for violating NCAA rules could not be considered a boycott if the rules were otherwise valid. [707 F.2d, at 1160-1161](#).

<sup>14</sup> In the Court of Appeals as well as the District Court, petitioner argued that respondents had suffered no injury of the type the antitrust laws were designed to prevent, relying on *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Both courts rejected its position, [707 F.2d, at 1150-1152](#); [546 F.Supp., at 1303-1304](#). Petitioner does not seek review on that question in this Court. Brief for Petitioner 5, n. 1.

<sup>15</sup> The Court of Appeals rejected petitioner's position that it should set aside many of the District Court's findings as clearly erroneous. In accord with our usual practice, we must now accord great weight to a finding of fact which has been made by a district court and approved by a court of appeals. See, e. g., *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). In any event, petitioner does not now ask us to set aside any of the findings of the District Court, but rather argues only that both the District Court and the Court of Appeals erred as a matter of law. Brief for Petitioner 6, n. 2, 18-19.

<sup>16</sup> Judge Barrett dissented on the ground that the NCAA television plan's primary purpose was not anticompetitive. "Rather, it is designed to further the purposes and objectives of the NCAA, which are to maintain intercollegiate football as an amateur sport and an adjunct of the academic endeavors of the institutions. One of the key purposes is to insure that the student athlete is fully integrated into academic endeavors." [707 F.2d, at 1163](#). He regarded the television restraints as fully justified "in that they are necessary to maintain intercollegiate football as amateur competition." [Id., at 1165](#). He added: "The restraints upon Oklahoma and Georgia and other colleges and universities with excellent football programs insure that they confine those programs within the principles of amateurism so that intercollegiate athletics supplement, rather than inhibit, academic achievement." [Id., at 1167](#).

<sup>17</sup> See, e. g., *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 342-343 (1982); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-688 (1978); *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

[\*99] It is also undeniable that these practices share characteristics of restraints we have previously held unreasonable. The NCAA is an association of schools which compete against each other to attract television revenues, not to mention fans and athletes. As the District Court found, the policies of the NCAA with respect to television rights are ultimately [\*\*\*\*28] controlled by the vote of member institutions. By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created [HN2](#)<sup>18</sup> a horizontal restraint -- an agreement among competitors on the way in which they will compete with one another.<sup>18</sup> A restraint of this type has often been held to be unreasonable as a matter of law. Because it places a ceiling on the [\*\*\*83] number of games member institutions may televise, the horizontal agreement places an artificial limit on the quantity of televised football that is available to broadcasters and consumers. By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade.<sup>19</sup> Moreover, the District Court found that the minimum aggregate price in fact operates to preclude any price negotiation between broadcasters and institutions, [\*100] thereby [\*\*\*\*29] constituting horizontal price fixing, perhaps the paradigm of an unreasonable restraint of trade.<sup>20</sup>

[\*\*\*\*30] [LEdHN\[4\]](#)<sup>18</sup> [4][LEdHN\[5A\]](#)<sup>18</sup> [5A][LEdHN\[6A\]](#)<sup>18</sup> [6A][LEdHN\[7A\]](#)<sup>18</sup> [7A][HN3](#)<sup>18</sup> Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an "illegal per se" approach because the probability that these practices are anticompetitive is so high; a *per se* rule is applied when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979). In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found. Nevertheless, we have decided that it would be inappropriate to apply a *per se* rule to this case. This decision is not based [\*\*2960] on a lack of judicial experience with this [\*\*\*\*31] type of arrangement,<sup>21</sup> [\*\*\*\*32] on the fact that the NCAA is organized as a nonprofit entity,<sup>22</sup> or [\*\*\*84] on [\*101] our respect for the NCAA's historic role in the preservation

<sup>18</sup> See [Arizona v. Maricopa County Medical Society](#), 457 U.S., at 356-357; [National Society of Professional Engineers v. United States](#), 435 U.S., at 694-696; [United States v. Topco Associates, Inc.](#), 405 U.S. 596, 608-611 (1972). See also [United States v. Sealy, Inc.](#), 388 U.S. 350, 352-354 (1967) (marketing association controlled by competing distributors is a horizontal combination). See generally Blecher & Daniels, Professional Sports and the "Single Entity" Defense Under Section One of the Sherman Act, 4 Whittier L. Rev. 217 (1982).

<sup>19</sup> See, e. g., [United States v. Topco Associates, Inc.](#), 405 U.S., at 608-609; [United States v. Sealy, Inc.](#), *supra*; [United States v. American Linseed Oil Co.](#), 262 U.S. 371, 388-390 (1923); [American Column & Lumber Co. v. United States](#), 257 U.S. 377, 410-412 (1921).

<sup>20</sup> See, e. g., [Arizona v. Maricopa County Medical Society](#), 457 U.S., at 344-348; [Catalano, Inc. v. Target Sales, Inc.](#), 446 U.S. 643, 646-647 (1980) (*per curiam*); [Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.](#), 340 U.S. 211, 213 (1951); [United States v. Socony-Vacuum Oil Co.](#), 310 U.S. 150, 212-214 (1940); [United States v. Trenton Potteries Co.](#), 273 U.S. 392, 396-398 (1927).

<sup>21</sup> While judicial inexperience with a particular arrangement counsels against extending the reach of *per se* rules, see [Broadcast Music](#), 441 U.S., at 9-10; [United States v. Topco Associates, Inc.](#), 405 U.S., at 607-608; [White Motor Co. v. United States](#), 372 U.S. 253, 263 (1963), the likelihood that horizontal price and output restrictions are anticompetitive is generally sufficient to justify application of the *per se* rule without inquiry into the special characteristics of a particular industry. See [Arizona v. Maricopa County Medical Society](#), 457 U.S., at 349-351; [National Society of Professional Engineers v. United States](#), 435 U.S., at 689-690.

<sup>22</sup> [LEdHN\[5B\]](#)<sup>18</sup> [5B][HN4](#)<sup>18</sup> There is no doubt that the sweeping language of § 1 applies to nonprofit entities, [Goldfarb v. Virginia State Bar](#), 421 U.S. 773, 786-787 (1975), and in the past we have imposed antitrust liability on nonprofit entities which have engaged in anticompetitive conduct, [American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.](#), 456 U.S. 556, 576 (1982). Moreover, the economic significance of the NCAA's nonprofit character is questionable at best. Since the District

and encouragement of intercollegiate amateur athletics.<sup>23</sup> Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.

[\*\*\*\*33] As Judge Bork has noted: "[Some] activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams." R. Bork, *The Antitrust Paradox* 278 (1978). What the NCAA and its member institutions market in this case is competition itself -- contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football -- college football. The identification of this "product" with an academic tradition differentiates [\*102] college football from and makes it more popular than professional sports to which it might otherwise be comparable, such [\*\*\*\*34] as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice -- not only the choices available to sports fans but also [\*\*2961] those available to athletes -- and hence can be viewed as procompetitive.<sup>24</sup>

Court found that the NCAA and its member institutions are in fact organized to maximize revenues, see [546 F.Supp., at 1288-1289](#), it is unclear why petitioner is less likely to restrict output in order to raise revenues above those that could be realized in a competitive market than would be a for-profit entity. Petitioner does not rely on its nonprofit character as a basis for reversal. Tr. of Oral Arg. 24.

<sup>23</sup> [LEdHN/6B](#) [↑] [6B] [LEdHN/7B](#) [↑] [7B]

While as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice. See [United States v. Griffith, 334 U.S. 100, 105-106 \(1948\)](#); [Associated Press v. United States, 326 U.S. 1, 16, n. 15 \(1945\)](#); [Chicago Board of Trade v. United States, 246 U.S., at 238](#); [Standard Sanitary Manufacturing Co. v. United States, 226 U.S. 20, 49 \(1912\)](#); [United States v. Trans-Missouri Freight Assn., 166 U.S. 290, 342 \(1897\)](#).

<sup>24</sup> See [Justice v. NCAA, 577 F.Supp. 356, 379-383 \(Ariz. 1983\)](#); [Jones v. NCAA, 392 F.Supp. 295, 304 \(Mass. 1975\)](#); [College Athletic Placement Service, Inc. v. NCAA, 1975-1 Trade Cases para. 60,117 \(NJ\), aff'd mem., 506 F.2d 1050 \(CA3 1974\)](#). See also [Brenner v. World Boxing Council, 675 F.2d 445, 454-455 \(CA2 1982\)](#); [Neeld v. National Hockey League, 594 F.2d 1297, 1299, n. 4 \(CA9 1979\)](#); [Smith v. Pro Football, Inc., 193 U. S. App. D. C. 19, 26-27, 593 F.2d 1173, 1180-1181 \(1978\)](#); [Hatley v. American Quarter Horse Assn., 552 F.2d 646, 652-654 \(CA5 1977\)](#); [Mackey v. National Football League, 543 F.2d 606, 619 \(CA8 1976\)](#), cert. dism'd, [434 U.S. 801 \(1977\)](#); [Bridge Corp. of America v. The American Contract Bridge League, Inc., 428 F.2d 1365, 1370 \(CA9 1970\)](#), cert. denied, [401 U.S. 940 \(1971\)](#); [Gunter Harz Sports, Inc. v. United States Tennis Assn., 511 F.Supp. 1103, 1116 \(Neb.\), aff'd, 665 F.2d 222 \(CA8 1981\)](#); [Cooney v. American Horse Shows Assn., Inc., 495 F.Supp. 424, 430 \(SDNY 1980\)](#); [Los Angeles Memorial Coliseum Comm'n v. National Football League, 468 F.Supp. 154, 165-166 \(CD Cal. 1979\)](#), preliminary injunction entered, [484 F.Supp. 1274 \(1980\)](#), rev'd on other grounds, [634 F.2d 1197 \(CA9 1980\)](#); [Kupec v. Atlantic Coast Conference, 399 F.Supp. 1377, 1380 \(MDNC 1975\)](#); Closius, Not at the Behest of Nonlabor Groups: A Revised Prognosis for a Maturing Sports Industry, 24 Boston College L. Rev. 341, 344-345 (1983); Kurlantzick, Thoughts on Professional Sports and the [Antitrust Law](#); [Los Angeles Memorial Coliseum v. National Football League, 15 Conn. L. Rev. 183, 189-194 \(1983\)](#); Note, Antitrust and Nonprofit Entities, 94 Harv. L. Rev. 802, 817-818 (1981). See generally [Hennessey v. NCAA, 564 F.2d 1136, 1151-1154 \(CA5 1977\)](#); [Association for Intercollegiate Athletics for Women v. NCAA, 558 F.Supp. 487, 494-495 \(DC 1983\)](#); [Warner Amex Cable Communications, Inc. v. American Broadcasting Cos., 499 F.Supp. 537, 545-546 \(SD Ohio 1980\)](#); [Board of Regents v. NCAA, 561 P.2d 499, 506-507 \(Okla. 1977\)](#); Note, Tackling Intercollegiate Athletics: An Antitrust Analysis, 87 Yale L. J. 655, 665-666, 673-675 (1978).

[\*\*\*\*35] [\*103] [\*\*\*85] *Broadcast Music* squarely holds that a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive. See [441 U.S., at 18-23](#). Similarly, as we indicated in *Continental T. V., Inc. v. GTE Sylvania Inc.*, [433 U.S. 36, 51-57 \(1977\)](#), a restraint in a limited aspect of a market may actually enhance marketwide competition. Respondents concede that the great majority of the NCAA's regulations enhance competition among member institutions. Thus, despite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraints.

[LEdHN\[8\]](#) [8] Our analysis of this case under the Rule of Reason, of course, does not change the ultimate focus of our inquiry. Both *per se* rules and the Rule of Reason are employed "to form a judgment about the competitive significance of the restraint." [National Society of Professional Engineers v. United States](#), [435 U.S. 679, 692 \(1978\)](#). [\*\*\*\*36] [HN5](#) [9] A conclusion that a restraint of trade is unreasonable may be

"based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions." [Id., at 690](#) (footnotes omitted).

[LEdHN\[9\]](#) [9] [LEdHN\[10\]](#) [10] *Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to [\*104] render unjustified further examination of the challenged conduct.<sup>25</sup> But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same -- whether or not the challenged restraint enhances [\*\*\*86] competition.<sup>26</sup> [\*\*\*\*37] [HN6](#) [1] Under the Sherman [\\*\\*2962](#) Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition.<sup>27</sup>

### [\*\*\*\*38] III

Because it restrains price and output, the NCAA's television plan has a significant potential for anticompetitive effects.<sup>28</sup> [\*\*\*\*39] The findings of the District Court indicate that this [\*105] potential has been realized. The

<sup>25</sup> See [Jefferson Parish Hospital Dist. No. 2 v. Hyde](#), [466 U.S. 2, 15-16, n. 25 \(1984\)](#); [Arizona v. Maricopa County Medical Society](#), [457 U.S., at 350-351](#); *Continental T. V., Inc. v. GTE Sylvania Inc.*, [433 U.S. 36, 50, n. 16 \(1977\)](#).

<sup>26</sup> Indeed, there is often no bright line separating *per se* from Rule of Reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct. For example, while the Court has spoken of a "*per se*" rule against tying arrangements, it has also recognized that tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis. See *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, [466 U.S., at 11-12](#).

<sup>27</sup> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. [HN7](#) [1] And to this end it prohibits 'Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the Several States.'" *Northern Pacific R. Co. v. United States*, [356 U.S. 1, 4-5 \(1958\)](#).

<sup>28</sup> In this connection, it is not without significance that Congress felt the need to grant professional sports an exemption from the antitrust laws for joint marketing of television rights. See [15 U. S. C. §§ 1291-1295](#). The legislative history of this exemption demonstrates Congress' recognition that agreements among league members to sell television rights in a cooperative fashion

468 U.S. 85, \*105; 104 S. Ct. 2948, \*\*2962; 82 L. Ed. 2d 70, \*\*\*86; 1984 U.S. LEXIS 130, \*\*\*\*39

District Court found that if member institutions were free to sell television rights, many more games would be shown on television, and that the NCAA's output restriction has the effect of raising the price the networks pay for television rights.<sup>29</sup> [\*\*\*\*40] [\*\*\*87] Moreover, the [\*106] court found that by fixing a price for television rights to all games, the NCAA creates a price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market.<sup>30</sup> [\*\*\*\*41] And, of course, [\*\*2963] since as a practical matter all member institutions need NCAA approval, members have no real choice but to adhere to the NCAA's television controls.<sup>31</sup>

could run afoul of the Sherman Act, and in particular reflects its awareness of the decision in *United States v. National Football League*, 116 F.Supp. 319 (ED Pa. 1953), which held that an agreement among the teams of the National Football League that each team would not permit stations to telecast its games within 75 miles of the home city of another team on a day when that team was not playing at home and was televising its game by use of a station within 75 miles of its home city, violated § 1 of the Sherman Act. See S. Rep. No. 1087, 87th Cong., 1st Sess. (1961); H. R. Rep. No. 1178, 87th Cong., 1st Sess., 2-3 (1961); 107 Cong. Rec. 20059-20060 (1961) (remarks of Rep. Cellar); *id.*, at 20061-20062 (remarks of Rep. McCulloch); Telecasting of Professional Sports Contests: Hearings on H. R. 8757 before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., 1-2 (1961) (statement of Chairman Cellar); *id.*, at 3 (statement of Rep. McCulloch); *id.*, at 10-28 (statement of Pete Rozelle); *id.*, at 69-70 (letter from Assistant Attorney General Loewinger).

<sup>29</sup> "It is clear from the evidence that were it not for the NCAA controls, many more college football games would be televised. This is particularly true at the local level. Because of NCAA controls, local stations are often unable to televise games which they would like to, even when the games are not being televised at the network level. The circumstances which would allow so-called exception telecasts arise infrequently for many schools, and the evidence is clear that local broadcasts of college football would occur far more frequently were it not for the NCAA controls. This is not a surprising result. Indeed, this horizontal agreement to limit the availability of games to potential broadcasters is the very essence of NCAA's agreements with the networks. The evidence establishes the fact that the networks are actually paying the large fees because the NCAA agrees to limit production. If the NCAA would not agree to limit production, the networks would not pay so large a fee. Because NCAA limits production, the networks need not fear that their broadcasts will have to compete head-to-head with other college football telecasts, either on the other networks or on various local stations. Therefore, the Court concludes that the membership of NCAA has agreed to limit production to a level far below that which would occur in a free market situation." *546 F.Supp., at 1294*.

<sup>30</sup> "Turning to the price paid for the product, it is clear that the NCAA controls utterly destroy free market competition. NCAA has commandeered the rights of its members and sold those rights for a sum certain. In so doing, it has fixed the minimum, maximum and actual price which will be paid to the schools appearing on ABC, CBS and TBS. NCAA has created the mechanism which produces a uniform price for each national telecast, and a uniform price for each regional telecast. Because of the NCAA controls, the price which is paid for the right to televise any particular game is responsive neither to the relative quality of the teams playing the game nor to viewer preference."

"In a competitive market, each college fielding a football team would be free to sell the right to televise its games for whatever price it could get. The prices would vary for the games, with games between prominent schools drawing a larger price than games between less prominent schools. Games between the more prominent schools would draw a larger audience than other games. Advertisers would pay higher rates for commercial time because of the larger audience. The telecaster would then be willing to pay larger rights fees due to the increased prices paid by the advertisers. Thus, the price which the telecaster would pay for a particular game would be dependent on the expected size of the viewing audience. Clearly, the NCAA controls grossly distort the prices actually paid for an individual game from that to be expected in a free market." *Id., at 1318*.

<sup>31</sup> Since, as the District Court found, NCAA approval is necessary for any institution that wishes to compete in intercollegiate sports, the NCAA has a potent tool at its disposal for restraining institutions which require its approval. See *Silver v. New York Stock Exchange*, 373 U.S. 341, 347-349, and n. 5 (1963); *Associated Press v. United States*, 326 U.S., at 17-18.

LEdHN[11] [11]The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete.<sup>32</sup> [\*107] Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference.<sup>33</sup> [\*\*\*\*43] This latter point is perhaps [\*\*\*88] the most significant, since "Congress designed the Sherman Act as a 'consumer welfare prescription.'" Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979). HN8 [1] A restraint that has the effect of reducing [\*\*\*\*42] the importance of consumer preference in setting price and output is not consistent with this fundamental goal of anti-trust law.<sup>34</sup> Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman [\*108] Act was intended to prohibit. See Standard Oil Co. v. United States, 221 U.S. 52-60 (1911).<sup>35</sup> [\*\*\*\*44] At the same time, the [\*\*2964] television plan eliminates competitors from the market, since only those broadcasters able to bid on

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<sup>32</sup> See Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 465 (1941); Standard Sanitary Manufacturing Co. v. United States, 226 U.S., at 47-49; Montague & Co. v. Lowry, 193 U.S. 38 (1904).

<sup>33</sup> "In this case the rule is violated by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures." Arizona v. Maricopa County Medical Society, 457 U.S., at 348. The District Court provided a vivid example of this system in practice:

"A clear example of the failure of the rights fees paid to respond to market forces occurred in the fall of 1981. On one weekend of that year, Oklahoma was scheduled to play a football game with the University of Southern California. Both Oklahoma and USC have long had outstanding football programs, and indeed, both teams were ranked among the top five teams in the country by the wire service polls. ABC chose to televise the game along with several others on a regional basis. A game between two schools which are not well-known for their football programs, Citadel and Appalachian State, was carried on four of ABC's local affiliated stations. The USC-Oklahoma contest was carried on over 200 stations. Yet, incredibly, all four of these teams received exactly the same amount of money for the right to televise their games." 546 F.Supp., at 1291.

<sup>34</sup> As the District Court observed:

"Perhaps the most pernicious aspect is that under the controls, the market is not responsive to viewer preference. Every witness who testified on the matter confirmed that the consumers, the viewers of college football television, receive absolutely no benefit from the controls. Many games for which there is a large viewer demand are kept from the viewers, and many games for which there is little if any demand are nonetheless televised." Id., at 1319.

<sup>35</sup> Even in the context of professional football, where Congress was willing to pass a limited antitrust exemption, see n. 28, *supra*, it was concerned about ensuring that telecasts not be subject to output limitations:

"Mr. GARY. On yesterday I had the opportunity of watching three different games. There were three different games on three different channels. . . .

"Would this bill prevent them from broadcasting three different games at one time and permit the league to enter into a contract so that only one game would be permitted?

"Mr. CELLER. The bill does not prevent what the gentleman saw yesterday. As a matter of fact the antitrust exemption provided by the bill shall not apply to any package contract which prohibits the person to whom league television rights are sold or transferred from televising any game within any area except the home area of a member club on the day when that club is playing a home game.

....

"Mr. GARY. I am an avid sports fan. I follow football, baseball, basketball, and track, and I am very much interested in all sports. But I am also interested in the people of the United States being able to see on television the games that are played. I am interested in the television audience. I want to know that they are not going to be prohibited from seeing games that might otherwise be telecast.

"Mr. CELLER. I can assure the gentleman from Virginia that he need have no fears on that score." 107 Cong. Rec. 20060 (1961).

television rights covering the entire NCAA can compete.<sup>36</sup> Thus, as the District Court found, many telecasts that would occur in a competitive market are foreclosed by the NCAA's plan.<sup>37</sup>

[\*\*\*\*45] [\*109] [\*\*\*89] Petitioner argues, however, that its television plan can have no significant anticompetitive effect since the record indicates that it has no market power -- no ability to alter the interaction of supply and demand in the market.<sup>38</sup> We must reject this argument for two reasons, one legal, one factual.

[LEdHN\[12\]](#) [↑] [12][LEdHN\[13\]](#) [↑] [13] [\*\*\*\*46] As a matter of law, [HN10](#) [↑] the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Professional Engineers, 435 U.S., at 692*.<sup>39</sup> [\*\*\*\*47] Petitioner does not quarrel with [\*\*2965] the District Court's [\*110] finding that price and output are not responsive to demand. Thus the plan is inconsistent with the Sherman Act's command that price and supply be responsive to consumer preference.

<sup>36</sup> The impact on competitors is thus analogous to the effect of block booking in the motion picture industry that we concluded violated the Sherman Act:

"In the first place, they eliminate the possibility of bidding for films theater by theater. In that way they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit." *United States v. Paramount Pictures, Inc., 334 U.S. 131, 154 (1948)*.

<sup>37</sup> *546 F.Supp., at 1294*. One of respondents' economists illustrated the point:

"[It's] my opinion that if a free market operated in the market for intercollegiate television of football, that there would be substantially more regional and even more local games being televised than there are currently. I can take a specific example from my home state of Indiana.

"I am at Ball State University, which until recently was a division one-A institution, although now is a division one-AA institution in terms of intercollegiate football. When Ball State plays Indiana State, that is a hotly contested game in an intrastate sense. That is a prime example of the type of game that probably would be televised. For example, when Ball State is playing Indiana State at Terre Haute, Indiana, that [would be] a popular game to be televised in the Muncie area, and, vice versa, in Terre Haute when the game happens to be in Muncie." App. 506-507.

See also *id., at 607-608*.

<sup>38</sup> [HN9](#) [↑] Market power is the ability to raise prices above those that would be charged in a competitive market. *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S., at 27, n. 46*; *United States Steel Corp. v. Fortner Enterprises, 429 U.S. 610, 620 (1977)*; *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956)*.

<sup>39</sup> "The fact that a practice is not categorically unlawful in all or most of its manifestations certainly does not mean that it is universally lawful. For example, joint buying or selling arrangements are not unlawful per se, but a court would not hesitate in enjoining a domestic selling arrangement by which, say, Ford and General Motors distributed their automobiles nationally through a single selling agent. Even without a trial, the judge will know that these two large firms are major factors in the automobile market, that such joint selling would eliminate important price competition between them, that they are quite substantial enough to distribute their products independently, and that one can hardly imagine a pro-competitive justification actually probable in fact or strong enough in principle to make this particular joint selling arrangement 'reasonable' under Sherman Act § 1. The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye." P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37-38 (Federal Judicial Center, June 1981) (parenthetical omitted).

<sup>40</sup> We have never required proof of market power in such a case. <sup>41</sup> This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis. <sup>42</sup>

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[\*111] [\*\*\*90] [LEdHN\[14\]](#)[] [14][LEdHN\[15\]](#)[] [15]As a factual matter, it is evident that petitioner does possess market power. The District Court employed the correct test for determining whether college football broadcasts constitute a separate market -- whether there are other products that are reasonably substitutable for televised NCAA football games. <sup>43</sup> Petitioner's argument that it cannot obtain supracompetitive prices from broadcasters since advertisers, and hence broadcasters, can switch from college football to other types of programming simply ignores the findings of the District Court. It found that intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience. <sup>44</sup> These findings amply support its conclusion that the NCAA possesses market power. <sup>45</sup> Indeed, the District Court's subsidiary finding that advertisers will pay a premium price per viewer to reach audiences watching college football because of their demographic [\*\*\*\*49] characteristics <sup>46</sup> [\*\*2966] is vivid evidence of the uniqueness of this product. <sup>47</sup> [\*\*\*51] Moreover, the District Court's market [\*112] analysis is firmly supported by our decision in *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242 (1959), that championship boxing events are uniquely attractive to fans <sup>48</sup> and hence constitute a market separate

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<sup>40</sup> Moreover, because under the plan member institutions may not compete in terms of price and output, it is manifest that significant forms of competition are eliminated. See *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S., at 648-649 (per curiam); *Professional Engineers*, 435 U.S., at 692-695; *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 43-44 (1930).

<sup>41</sup> See *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-310 (1956); *United States v. Socony-Vacuum Oil Co.*, 310 U.S., at 221. See also *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959).

<sup>42</sup> The Solicitor General correctly observes:

"There was no need for the respondents to establish monopoly power in any precisely defined market for television programming in order to prove the restraint unreasonable. Both lower courts found not only that NCAA has power over the market for intercollegiate sports, but also that in the market for television programming -- no matter how broadly or narrowly the market is defined -- the NCAA television restrictions have reduced output, subverted viewer choice, and distorted pricing. Consequently, unless the controls have some countervailing procompetitive justification, they should be deemed unlawful regardless of whether petitioner has substantial market power over advertising dollars. While the 'reasonableness' of a particular alleged restraint often depends on the market power of the parties involved, because a judgment about market power is the means by which the effects of the conduct on the market place can be assessed, market power is only one test of 'reasonableness.' And where the anti-competitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary." Brief for United States as Amicus Curiae 19-20 (footnote and citation omitted).

<sup>43</sup> See, e. g., *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S., at 394-395; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 612, n. 31 (1953).

<sup>44</sup> See [546 F.Supp., at 1297-1300](#). See also Hochberg & Horowitz, Broadcasting and CATV: The Beauty and the Bane of Major College Football, 38 Law & Contemp. Prob. 112, 118-120 (1973).

<sup>45</sup> See, e. g., *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S., at 27, n. 46; *id.*, at 37-38, n. 7 (O'CONNOR, J., concurring in judgment); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 504-506, and n. 2 (1969).

<sup>46</sup> See [546 F.Supp., at 1298-1300](#).

<sup>47</sup> As the District Court observed, *id.*, at 1297, the most analogous programming in terms of the demographic characteristics of its audience is professional football, and as a condition of its limited exemption from the antitrust laws the professional football leagues are prohibited from telecasting games at times that conflict with intercollegiate football. See [15 U. S. C. § 1293](#).

from that for nonchampionship events. See *id., at 249-252*.<sup>49</sup> Thus, respondents [\*\*\*91] have demonstrated that there is a separate market for telecasts of college football which "[rests] on generic qualities differentiating" viewers. *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 613 (1953)*. It inexorably follows that if college football broadcasts be defined as a separate market -- and we are convinced they are -- then the NCAA's complete control over those broadcasts provides a solid basis for the District Court's conclusion that the NCAA possesses market power with respect to those broadcasts. *HN11*[<sup>50</sup>] "When a product is controlled by one interest, [\*\*\*50] without substitutes available in the market, there is monopoly power." *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 394 (1956)*.<sup>50</sup>

[\*\*\*52]

[\*113] *LEdHN[1B]*[<sup>51</sup>] [1B]*LEdHN[16]*[<sup>52</sup>] [16]Thus, the NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the findings of the District Court establish that it has operated to raise prices and reduce output. *HN12*[<sup>53</sup>] Under the Rule of Reason, these hallmarks of anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market. See *Professional Engineers, 435 U.S., at 692-696*. We turn now to the NCAA's proffered justifications.

#### IV

Relying on *Broadcast Music*, petitioner argues that its television plan constitutes a cooperative "joint venture" which assists in the marketing of broadcast rights and hence is procompetitive. While joint ventures have no immunity from the antitrust laws,<sup>54</sup> as *Broadcast Music* indicates, a joint selling arrangement may "[make] possible a new [\*\*\*53] product by reaping otherwise unattainable efficiencies." *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 365 (1982)* (POWELL, J., dissenting) (footnote omitted). The essential contribution [\*\*2967] made by the NCAA's arrangement is to define the number of games that may be televised, to establish the price for each exposure, and to define the basic terms of each contract between the network and a home team. The NCAA does not, however, act as a selling agent for any school or for any conference of schools. The selection of individual games, and the negotiation of particular agreements, are matters left to the networks and the individual schools. Thus, the effect of the network plan is not to eliminate [\*\*\*92] individual sales of broadcasts, since these still occur, albeit subject to fixed prices and output limitations. Unlike *Broadcast Music*'s blanket license covering broadcast rights [\*114] to a large number of individual compositions, here the same rights are still sold on an individual basis, only in a noncompetitive market.

[\*\*\*54] The District Court did not find that the NCAA's television plan produced any procompetitive efficiencies which enhanced the competitiveness of college football television rights; to the contrary it concluded that NCAA

<sup>48</sup> We approved of the District Court's reliance on the greater revenue-producing potential and higher television ratings of championship events as opposed to other events to support its market definition. See *358 U.S., at 250-251*.

<sup>49</sup> For the same reasons, it is also apparent that the unique appeal of NCAA football telecasts for viewers means that "from the standpoint of the consumer -- whose interests the statute was especially intended to serve," *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S., at 15*, there can be no doubt that college football constitutes a separate market for which there is no reasonable substitute. Thus we agree with the District Court that it makes no difference whether the market is defined from the standpoint of broadcasters, advertisers, or viewers.

<sup>50</sup> See, e. g., *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S., at 24-25*; *Northern Pacific R. Co. v. United States, 356 U.S., at 7-8*; *Times-Picayune*, 345 U.S., at 611-613. Petitioner seems to concede as much. See Brief for Petitioner 36-37; Tr. of Oral Arg. 6.

<sup>51</sup> See *Citizen Publishing Co. v. United States, 394 U.S. 131, 134-136 (1969)*; *United States v. Sealy, Inc., 388 U.S., at 353*; *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 597-598 (1951)*; *Associated Press v. United States, 326 U.S., at 15-16*.

football could be marketed just as effectively without the television plan.<sup>52</sup> There is therefore no predicate in the findings for petitioner's efficiency justification. Indeed, petitioner's argument is refuted by the District Court's finding concerning price and output. If the NCAA's television plan produced procompetitive efficiencies, the plan would increase output and reduce the price of televised games. The District Court's contrary findings accordingly undermine petitioner's position. In light of these findings, it cannot be said that "the agreement on price is necessary to market the product at all." *Broadcast Music, 441 U.S., at 23*.<sup>53</sup> In *Broadcast Music*, the availability of a package product that no individual could offer enhanced the total volume of music that was sold. Unlike this case, there was no limit of any kind placed on the volume that might be sold in the entire market and each individual remained free to sell his own music [\*\*\*\*55] without restraint. Here production has been limited, not enhanced.<sup>54</sup> [\*115] No individual school is free to televise its own games without restraint. The NCAA's efficiency justification is not supported by the record.

[\*\*\*\*56] Neither is the NCAA's television plan necessary to enable the NCAA to penetrate the market through an attractive package sale. Since broadcasting rights to college football constitute a unique product for which there is no ready substitute, there is no need for collective action in order to enable the product to compete against its nonexistent competitors.<sup>55</sup> This is borne out by the District Court's finding that the NCAA's television plan *reduces* the volume of television rights sold.

V

[\*\*\*93] Throughout the history of its regulation of intercollegiate football telecasts, the NCAA has indicated its concern with [\*\*2968] [\*\*\*\*57] protecting live attendance. This concern, it should be noted, is not with protecting live attendance at games which are shown on television; that type of interest is not at issue in this case. Rather, the concern is that fan interest in a televised game may adversely affect ticket sales for games that will not appear on television.<sup>56</sup>

Although the NORC studies in the 1950's provided some support for the thesis that live attendance would suffer if [\*116] unlimited television were permitted,<sup>57</sup> [\*\*\*\*58] the District Court found that there was no evidence to

<sup>52</sup> See [546 F.Supp., at 1306-1308](#).

<sup>53</sup> Compare [id., at 1307-1308](#) ("The colleges are clearly able to negotiate agreements with whatever broadcasters they choose. We are not dealing with tens of thousands of relatively brief musical works, but with three-hour football games played eleven times each year"), with *Broadcast Music, 441 U.S., at 22-23* (footnotes omitted) ("[To] the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material. ASCAP, in short, made a market in which individual composers are inherently unable to compete fully effectively").

<sup>54</sup> Ensuring that individual members of a joint venture are free to increase output has been viewed as central in evaluating the competitive character of joint ventures. See Brodley, Joint Ventures and Antitrust Policy, 95 Harv. L. Rev. 1523, 1550-1552, 1555-1560 (1982). See also Note, United Charities and the Sherman Act, 91 Yale L. J. 1593 (1982).

<sup>55</sup> If the NCAA faced "interbrand" competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to compete. See *Continental T. V., Inc.*, 433 U.S., at 54-57. Our conclusion concerning the availability of substitutes in Part III, *supra*, forecloses such a justification in this case, however.

<sup>56</sup> The NCAA's plan is not even arguably related to a desire to protect live attendance by ensuring that a game is not televised in the area where it is to be played. No cooperative action is necessary for that kind of "blackout." The home team can always refuse to sell the right to telecast its game to stations in the immediate area. The NCAA does not now and never has justified its television plan by an interest in assisting schools in "blacking out" their home games in the areas in which they are played.

<sup>57</sup> During this period, the NCAA also expressed its concern to Congress in urging it to limit the antitrust exemption professional football obtained for telecasting its games to contests not held on Friday or Saturday when such telecasts might interfere with attendance at intercollegiate games. See H. R. Rep. No. 1178, 87th Cong., 1st Sess., 3-4 (1961); 107 Cong. Rec. 20060-20061

support that theory in today's market.<sup>58</sup> [\*\*\*\*59] Moreover, as the District Court found, the television plan has evolved in a manner inconsistent with its original design to protect gate attendance. Under the current plan, games are shown on television during all hours that college football games are played. The plan simply does not protect live attendance by ensuring that games will not be shown on television at the same time as live events.<sup>59</sup>

[LEdHN/17] [↑] [17]There is, however, a more fundamental reason for rejecting this defense. The NCAA's argument that its television plan is necessary to protect live attendance is not based on a desire to maintain the integrity of college football as a distinct and attractive product, [\*\*\*\*60] but rather on a fear that the product will not prove sufficiently attractive to draw live attendance when faced with competition from televised games. At bottom the NCAA's position is that ticket sales for most college games are unable to compete in a free market.<sup>60</sup> The [\*117] television plan protects ticket sales by limiting [\*\*\*94] output -- just as any monopolist increases revenues by reducing output. By seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, petitioner forwards a justification that is inconsistent with the basic policy of the Sherman Act. "[The] Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Professional Engineers, 435 U.S., at 696.*

[\*\*\*\*61] VI

Petitioner argues that the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important and that it justifies the regulations challenged in this case. We agree [\*\*2969] with the first part of the argument but not the second.

Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved.<sup>61</sup> It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.

[\*\*\*\*62] The NCAA does not claim that its television plan has equalized or is intended to equalize competition within any [\*118] one league.<sup>62</sup> [\*\*\*\*63] The plan is nationwide in scope and there is no single league or

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(1961) (remarks of Rep. Celler); *id.*, at 20662; Hearings, *supra* n. 28, at 66-68 (statement of William R. Reed). The provision enacted as a result is now found in [15 U. S. C. § 1293](#).

<sup>58</sup> See [546 F.Supp., at 1295-1296, 1315.](#)

<sup>59</sup> "[The] greatest flaw in the NCAA's argument is that it is manifest that the new plan for football television does not limit televised football in order to protect gate attendance. The evidence shows that under the new plan, many areas of the country will have access to nine hours of college football television on several Saturdays in the coming season. Because the 'ground rules' eliminate head-to-head programming, a full nine hours of college football will have to be shown on television during a nine-to-twelve hour period on almost every Saturday of the football season in most of the major television markets in the country. It can hardly be said that such a plan is devised in order to protect gate attendance." *Id., at 1296.*

<sup>60</sup> Ironically, to the extent that the NCAA's position has merit, it rests on the assumption that football telecasts are a unique product. If, as the NCAA argues, see [supra, at 111-112](#), all television programming is essentially fungible, it would not be possible to protect attendance without banning all television during the hours at which intercollegiate football games are held.

<sup>61</sup> See Part II, *supra*.

<sup>62</sup> It seems unlikely, for example, that there would have been a greater disparity between the football prowess of Ohio State University and that of Northwestern University in recent years without the NCAA's television plan. The District Court found that in fact the NCAA has been strikingly unsuccessful if it has indeed attempted to prevent the emergence of a "power elite" in

tournament in which all college football teams compete. There is no evidence of any intent to equalize the strength of teams in Division I-A with those in Division II or Division III, and not even a colorable basis for giving colleges that have no football program at all a voice in the management of the revenues generated by the football programs at other schools.<sup>63</sup> The [\*\*95] interest in maintaining a competitive balance that is asserted by the NCAA as a justification for regulating all television of intercollegiate football is not related to any neutral standard or to any readily identifiable group of competitors.

[\*\*\*64] [\*119] The television plan is not even arguably tailored to serve such an interest. It does not regulate the amount of money that any college may spend on its football program, nor the way in which the colleges may use the revenues that are generated by their football programs, whether derived from the sale of television rights, the sale of tickets, or the sale of concessions or program advertising.<sup>64</sup> The plan simply imposes a restriction on one source of revenue that is more important to some colleges than to others. There is no evidence that this restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity. At the same time, as [\*\*2970] the District Court found, the NCAA imposes a variety of other restrictions designed to preserve amateurism which are much better tailored to the goal of competitive balance than is the television plan, and which are "clearly sufficient" to preserve competitive balance to the extent it is within the NCAA's power to do so.<sup>65</sup> And much more than speculation supported the District Court's findings on this score. No other NCAA [\*\*\*65] sport employs a similar plan, and in particular the court found that in the most closely analogous sport, college basketball, competitive balance has been maintained without resort to a restrictive television plan.<sup>66</sup>

Perhaps the most important reason for rejecting the argument that the interest in competitive balance is served by the television plan is the District Court's unambiguous and well-supported finding that many more games would be televised in a free market than under the NCAA plan. The hypothesis that legitimates the maintenance of competitive balance as a procompetitive justification under the Rule of [\*120] Reason is that equal competition will maximize consumer demand [\*\*\*66] for the product.<sup>67</sup> The finding that consumption will materially increase if the controls are removed is a compelling demonstration that they do not in fact serve any such legitimate purpose.<sup>68</sup>

intercollegiate football. See [546 F.Supp., at 1310-1311](#). Moreover, the District Court's finding that there would be more local and regional telecasts without the NCAA controls means that Northwestern could well have generated more television income in a free market than was obtained under the NCAA regime.

<sup>63</sup> Indeed, the District Court found that the basic reason the television plan has endured is that the NCAA is in effect controlled by schools that are not restrained by the plan:

"The plaintiffs and other CFA members attempted to persuade the majority of NCAA members that NCAA had gone far beyond its legitimate role in football television. Not surprisingly, none of the CFA proposals were adopted. Instead the membership uniformly adopted the proposals of the NCAA administration which 'legitimized' NCAA's exercises of power. The result was not surprising in light of the makeup of the voting membership. Of approximately 800 voting members of the NCAA, 500 or so are in Divisions II and III and are not subjected to NCAA television controls. Of the 275 Division I members, only 187 play football, and only 135 were members of Division I-A at the time of the January Convention. Division I-A was made up of the most prominent football-playing schools, and those schools account for most of the football games shown on network television. Therefore, of some 850 voting members, less than 150 suffer any direct restriction on their right to sell football games to television." [Id., at 1317](#).

<sup>64</sup> Moreover, the District Court found that those schools which would realize increased revenues in a free market would not funnel those revenues into their football programs. See [id., at 1310](#).

<sup>65</sup> See [id., at 1296, 1309-1310](#).

<sup>66</sup> See [id., at 1284-1285, 1299](#).

<sup>67</sup> See *Continental T. V., Inc.*, 433 U.S., at 54-57. See also n. 55, *supra*.

VII

[\*\*\*96] LEdHN1C [↑] [1C] The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete [\*\*\*\*67] in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act. But consistent with the Sherman Act, the role of the NCAA must be to *preserve* a tradition that might otherwise die; rules that restrict output are hardly consistent with this role. Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life. Accordingly, the judgment of the Court of Appeals is

*Affirmed.*

**Dissent by:** WHITE

## Dissent

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JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

The NCAA is an unincorporated, nonprofit, educational association whose membership includes almost 800 nonprofit public and private colleges and universities and more than [\*121] 100 nonprofit athletic conferences and other organizations. Formed in 1905 in response to a public outcry concerning abuses in intercollegiate athletics, the NCAA, through its annual convention, establishes policies and rules governing its members' [\*\*\*\*68] participation in college sports, conducts national championships, exerts control over some of the economic aspects of revenue-producing sports, and engages in some more-or-less commercial activities. See Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 Yale L. J. 655, 656-657 (1978). Although some of the NCAA's activities, viewed in isolation, bear a resemblance to those undertaken by professional sports leagues and associations, the Court errs in treating intercollegiate athletics under the NCAA's control as a purely commercial venture in which colleges and universities participate solely, or [\*\*2971] even primarily, in the pursuit of profits. Accordingly, I dissent.

I

"While it would be fanciful to suggest that colleges are not concerned about the profitability of their ventures, it is clear that other, non-commercial goals play a central role in their sports programs." J. Weistart & C. Lowell, *The Law of Sports* § 5.12 (1979). The NCAA's member institutions have designed their competitive athletic programs "to be a vital part of the educational system." *Constitution and Interpretations of the NCAA*, Art. II, § 2(a) (1982-1983), reprinted [\*\*\*\*69] in App. 216. Deviations from this goal, produced by a persistent and perhaps inevitable desire to "win at all costs," have in the past led, and continue to lead, to a wide range of competitive excesses that prove harmful to students and institutions alike. See G. Hanford, *Report to the American Council on Education, An Inquiry into the Need for and Feasibility of a National Study of Intercollegiate Athletics* 74-76 (1974) (Hanford); [\*\*\*97] Marco, *The Place of Intercollegiate Athletics in Higher Education: The Responsibility of the Faculty*, 31 J. Higher Educ. 422, 426 (1968). The fundamental policy [\*122] underlying the NCAA's regulatory program, therefore, is to minimize such deviations and "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between college athletics and professional sports." *Constitution and Interpretations of the NCAA*, Art. II, § 2(a), reprinted in App. 216. See 546 F.Supp. 1276, 1309 (WD Okla. 1982).

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<sup>68</sup> This is true not only for television viewers, but also for athletes. The District Court's finding that the television exposure of all schools would increase in the absence of the NCAA's television plan means that smaller institutions appealing to essentially local or regional markets would get more exposure if the plan is enjoined, enhancing their ability to compete for student athletes.

The NCAA, in short, "[exists] primarily to enhance the contribution made by amateur athletic [\*\*\*\*70] competition to the process of higher education as distinguished from realizing maximum return on it as an entertainment commodity." *Association for Intercollegiate Athletics for Women v. NCAA*, 558 F.Supp. 487, 494 (DC 1983), aff'd, 236 U. S. App. D. C. 311, 735 F.2d 577 (1984). In pursuing this goal, the organization and its members seek to provide a public good -- a viable system of amateur athletics -- that most likely could not be provided in a perfectly competitive market. See *Hennessey v. NCAA*, 564 F.2d 1136, 1153 (CA5 1977). "Without regulation, the desire of member institutions to remain athletically competitive would lead them to engage in activities that deny amateurism to the public. No single institution could confidently enforce its own standards since it could not trust its competitors to do the same." Note, Antitrust and Nonprofit Entities, 94 Harv. L. Rev. 802, 817-818 (1981). The history of intercollegiate athletics prior to the advent of the NCAA provides ample support for this conclusion. By mitigating what appears to be a clear failure of the free market to serve the ends and goals of higher [\*\*\*\*71] education, the NCAA ensures the continued availability of a unique and valuable product, the very existence of which might well be threatened by unbridled competition in the economic sphere.

In pursuit of its fundamental goal and others related to it, the NCAA imposes numerous controls on intercollegiate athletic competition among its members, many of which "are similar to those which are summarily condemned when [\*123] undertaken in a more traditional business setting." Weistart & Lowell, *supra*, § 5.12.b. Thus, the NCAA has promulgated and enforced rules limiting both the compensation of student-athletes, see, e. g., *Justice v. NCAA*, 577 F.Supp. 356 (Ariz. 1983), and the number of coaches a school may hire for its football and basketball programs, see, e. g., *Hennessey v. NCAA*, *supra*; it also has prohibited athletes who formerly have been compensated for playing from participating in intercollegiate competition, see, e. g., *Jones v. NCAA*, 392 F.Supp. 295 (Mass. 1975), restricted the number of athletic scholarships its members may award, and established minimum academic standards for recipients of those scholarships; [\*\*\*\*72] and it has pervasively regulated the recruitment process, student eligibility, practice schedules, squad size, the number of games [\*2972] played, and many other aspects of intercollegiate athletics. See *707 F.2d 1147, 1153 (CA10 1983); 546 F.Supp., at 1309*. One clear effect of most, if not all, of these regulations is to prevent institutions [\*\*\*98] with competitively and economically successful programs from taking advantage of their success by expanding their programs, improving the quality of the product they offer, and increasing their sports revenues. Yet each of these regulations represents a desirable and legitimate attempt "to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives." *Kupec v. Atlantic Coast Conference*, 399 F.Supp. 1377, 1380 (MDNC 1975). Significantly, neither the Court of Appeals nor this Court questions the validity of these regulations under the Rule of Reason. See *ante*, at 100-102, 117; *707 F.2d, at 1153*.

Notwithstanding the contrary conclusion of the District Court, *546 F.Supp., at 1316*, [\*\*\*\*73] and the majority, *ante*, at 117, I do not believe that the restraint under consideration in this case -- the NCAA's television plan -- differs fundamentally for antitrust purposes from the other seemingly anticompetitive aspects of the organization's broader program of self-regulation. [\*124] The television plan, like many of the NCAA's actions, furthers several complementary ends. Specifically, the plan is designed

"to reduce, insofar as possible, the adverse effects of live television . . . upon football game attendance and, in turn, upon the athletic and related educational programs dependent upon the proceeds therefrom; to spread football television participation among as many colleges as practicable; to reflect properly the image of universities as educational institutions; to promote college football through the use of television, to advance the overall interests of intercollegiate athletics, and to provide college football television to the public to the extent compatible with these other objectives." App. 35.

See also *id., at 244, 323, 640, 651, 672*. More generally, in my view, the television plan reflects the NCAA's fundamental policy of preserving [\*\*\*\*74] amateurism and integrating athletics and education. Nor does the District Court's finding that the plan is intended to maximize television revenues, *546 F.Supp., at 1288-1289, 1315-1316*, warrant any implication that the NCAA and its member institutions pursue this goal without regard to the organization's stated policies.

Before addressing the infirmities in the Court's opinion, I should state my understanding of what the Court holds. To do so, it is necessary first to restate the essentials of the NCAA's television plan and to refer to the course of this case in the lower courts. Under the plan at issue, 4-year contracts were entered into with the American Broadcasting Cos. (ABC), Columbia Broadcasting System (CBS), and Turner Broadcasting System (Turner) after competitive bidding. Every fall, ABC and CBS were to present 14 exposures of college football and Turner would show 19 evening games. The overall price for each network was stated in the contracts. The networks select the games to be telecast and pay directly to the colleges involved what has developed to be [\*125] a uniform fee for each game telecast. Unless within one of the exceptions, only the [\*\*\*\*75] designated number of games may be broadcast, and no NCAA member [\*\*\*99] may arrange for televising its games other than pursuant to the plan. Under this scheme, of course, NCAA members must compete against one another for television appearances, although this competition is limited somewhat by the fact that no college may appear on television more than six times in any 2-year period. In 1983, 242 games were televised, 89 network games and 153 under the exceptions provided in the television plan. In 1983, 173 schools appeared on television, 89 on network games and an additional 84 teams under the exceptions. Report of the 1983 NCAA Football Television Committee to [\*\*2973] the 78th Annual Convention of the NCAA 61-65 (1984).<sup>1</sup>

[\*\*\*\*76] The District Court held that the plan constituted price fixing and output limitation illegal *per se* under [§ 1](#) of the Sherman Act; it also held that the scheme was an illegal group boycott, was monopolization forbidden by [§ 2](#), and was in any event an unreasonable restraint of trade. It then entered an injunction that for all practical purposes excluded the NCAA from interfering with or regulating its members' arrangements for televising their football games. The Court of Appeals, while disagreeing with the boycott and monopolization holdings, otherwise upheld the District Court's judgment that the television plan violated the Sherman Act, focusing almost entirely on the price-fixing and output-limiting aspects of the television plan. The Court of Appeals, however, differed with the District Court with respect to the injunction. After noting that the injunction vested exclusive control of television rights in the individual schools, the court stated that, "[while] we hold that the NCAA cannot [\*126] lawfully maintain exclusive control of the rights, how far such rights may be commonly regulated involves speculation that should not be made on the record of the instant [\*\*\*\*77] case." [707 F.2d, at 1162](#). The court expressly stated, for example, that the NCAA could prevent its members from telecasting games on Friday night in competition with high school games, *ibid.*, emphasized that the disparity in revenue between schools could be reduced by "[a] properly drawn system of pass-over payments to ensure adequate athletic funding for schools that do not earn substantial television revenues," [id., at 1159](#), and indicated that it was not outlawing "membership-wide [contracts] with opt-out and pass-over payment provisions, or blackout rules." [Id., at 1162](#). It nevertheless left the District Court's injunction in full force and remanded the case for further proceedings in light of its opinion. Anticipating that the Court would grant certiorari, I stayed the judgment of the Court of Appeals. [463 U.S. 1311 \(1983\)](#).

In affirming the Court of Appeals, the Court first holds that the television plan has sufficient redeeming virtues to escape condemnation as a *per se* violation of the Sherman Act, this because of the inherent characteristics of competitive athletics and the justifiable role of the [\*\*\*\*78] NCAA in regulating college athletics. It nevertheless [\*\*\*100] affirms the Court of Appeals' judgment that the NCAA plan is an unreasonable restraint of trade because of what it deems to be the plan's price-fixing and output-limiting aspects. As I shall explain, in reaching this result, the Court traps itself in commercial antitrust rhetoric and ideology and ignores the context in which the restraints have been imposed. But it is essential at this point to emphasize that neither the Court of Appeals nor this Court purports to hold that the NCAA may not (1) require its members who telecast their games to pool and share the compensation received among themselves, with other schools, and with the NCAA; (2) limit the number of times any member may arrange to have its games shown on [\*127] television; or (3) enforce reasonable blackout rules to avoid head-to-head competition for television audiences. As I shall demonstrate, the Court wisely and correctly does not condemn such regulations. What the Court does affirm is the Court of Appeals' judgment that the NCAA may not limit the number of games that are broadcast on television and that it may not contract for an overall

<sup>1</sup> Television plans with similar features have been in place since 1951. The 1951-1953 plans were submitted to the Antitrust Division of the Department of Justice for review. The Department took the matter "under study," App. 284-285, and, until this litigation, has apparently never taken the position that the NCAA's television plans were unlawful.

price [\*\*\*\*79] that has the effect of setting the price for individual game broadcast rights.<sup>2</sup> I disagree with the Court in these respects.

[\*\*2974] //

"In a competitive market," the District Court observed, "each football-playing institution would be an independent seller of the right to telecast its football games. Each seller would be free [\*\*\*\*80] to sell that right to any entity it chose," and "for whatever price it could get." [546 F.Supp., at 1318](#). Under the NCAA's television plan, member institutions' competitive freedom is restrained because, for the most part, television rights are bought and sold, not on a per-game basis, but as a package deal. With limited exceptions not particularly relevant to antitrust scrutiny of the plan, broadcasters wishing to televise college football must be willing and able to purchase a package of television rights without knowing in advance the particular games to which those rights apply. The real negotiations over price and terms take place between the broadcasters and the NCAA rather [\*128] than between the broadcasters and individual schools. Knowing that some games will be worth more to them than others, the networks undoubtedly exercise whatever bargaining power they possess to ensure that the minimum aggregate compensation they agree to provide for the package bears some relation to the average value to them of the games they anticipate televising. Because some schools' games contribute disproportionately to the total value of the package, see [id., at 1293](#), [\*\*\*\*81] the manner in which the minimum aggregate compensation is distributed among schools whose games [\*\*\*101] are televised has given rise to a situation under which less prominent schools receive more in rights fees than they would receive in a competitive market and football powers like respondents receive less. [Id., at 1315](#).

As I have said, the Court does not hold, nor did the Court of Appeals hold, that this redistributive effect alone would be sufficient to subject the television plan to condemnation under § 1 of the Sherman Act. Nor should it, for an agreement to share football revenues to a certain extent is an essential aspect of maintaining some balance of strength among competing colleges and of minimizing the tendency to professionalism in the dominant schools. Sharing with the NCAA itself is also a price legitimately exacted in exchange for the numerous benefits of membership in the NCAA, including its many-faceted efforts to maintain a system of competitive, amateur athletics. For the same reasons, limiting the number of television appearances by any college is an essential attribute of a balanced amateur athletic system. Even with shared television [\*\*\*\*82] revenues, unlimited appearances by a few schools would inevitably give them an insuperable advantage over all others and in the end defeat any efforts to maintain a system of athletic competition among amateurs who measure up to college scholastic requirements.

The Court relies instead primarily on the District Court's findings that (1) the television plan restricts output; and (2) the plan creates a noncompetitive price structure that is unresponsive to viewer demand. *Ante*, at 104-106. See, [\*129] e. g., [546 F.Supp., at 1318-1319](#). These findings notwithstanding, I am unconvinced that the television plan has a substantial anticompetitive effect.

First, it is not clear to me that the District Court employed the proper measure of output. I am not prepared to say that the District Court's finding that "many more college football games would be televised" in the absence of the NCAA controls, [id., at 1294](#), is clearly erroneous. To the extent that output is measured solely in terms of the number of televised games, I need not [\*\*2975] deny that it is reduced by the NCAA's television plan. But this measure of output is not the proper [\*\*\*\*83] one. The District Court found that eliminating the plan would reduce the number of games on network television and increase the number of games shown locally and regionally. [Id., at 1307](#). It made no finding concerning the effect of the plan on total viewership, which is the more appropriate measure of output or, at least, of the claimed anticompetitive effects of the NCAA plan. This is the NCAA's position,

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<sup>2</sup> This litigation was triggered by the NCAA's response to an attempt by the College Football Association (CFA), an organization of the more dominant football-playing schools and conferences, to develop an independent television plan. To the extent that its plan contains features similar to those condemned as anticompetitive by the Court, the CFA may well have antitrust problems of its own. To the extent that they desire continued membership in the NCAA, moreover, participation in a television plan developed by the CFA will not exempt football powers like respondents from the many kinds of NCAA controls over television appearances that the Court does not purport to invalidate.

and it seems likely to me that the television plan, by increasing network coverage at the expense of local broadcasts, actually expands the total television audience for NCAA football. The NCAA would surely be an irrational "profit maximizer" if this were not the case. In the absence of a contrary finding by the District Court, I cannot conclude that respondents carried their burden of showing that the television plan has an adverse effect on output and is therefore anticompetitive.

Second, and even more important, I am unconvinced that respondents have proved that any reduction in the number of televised college football [\*\*\*102] games brought about by the NCAA's television plan has resulted in an anticompetitive increase in the price of television rights. [\*\*\*84] The District Court found, of course, that "the networks are actually paying the large fees because the NCAA agrees to limit production. If the NCAA would not agree to limit production, the networks would not pay so large a fee." *Id., at 1294*. Undoubtedly, this is true. But the market for television rights to college football competitions should not be equated to the markets [\*130] for wheat or widgets. Reductions in output by monopolists in most product markets enable producers to exact a higher price for *the same product*. By restricting the number of games that can be televised, however, the NCAA creates a *new product* -- exclusive television rights -- that are more valuable to networks than the products that its individual members could market independently.

The television plan makes a certain number of games available for purchase by television networks and limits the incidence of head-to-head competition between football telecasts for the available viewers. Because competition is limited, the purchasing network can count on a larger share of the audience, which translates into greater advertising revenues and, accordingly, into larger payments [\*\*\*85] per game to the televised teams. There is thus a relationship between the size of the rights payments and the value of the product being purchased by the networks; a network purchasing a series of games under the plan is willing to pay more than would one purchasing the same games in the absence of the plan since the plan enables the network to deliver a larger share of the available audience to advertisers and thus to increase its own revenues. In short, by focusing only on the price paid by the networks for television rights rather than on the nature and quality of the product delivered by the NCAA and its member institutions, the District Court, and this Court as well, may well have deemed anticompetitive a rise in price that more properly should be attributed to an increase in output, measured in terms of viewership.

Third, the District Court's emphasis on the prices paid for particular games seems misdirected and erroneous as a matter of law. The distribution of the minimum aggregate fees among participants in the television plan is, of course, not wholly based on a competitive price structure that is responsive to viewer demand and is only partially related to the value those [\*\*\*86] schools contribute to the total package the networks agree to buy. But as I have already indicated, see [\*131] *supra*, at 128, this "redistribution" of total television revenues is a wholly justifiable, even necessary, aspect of maintaining a system of truly competitive college teams. As long as the NCAA cannot artificially fix the price of the entire package and demand supercompetitive prices, this aspect of the plan should be of little concern. And I find little, if anything, in the record to support [\*\*2976] the notion that the NCAA has power to extract from the television networks more than the broadcasting rights are worth in the marketplace.

### III

Even if I were convinced that the [\*\*\*103] District Court did not err in failing to look to total viewership, as opposed to the number of televised games, when measuring output and anticompetitive effect and in failing fully to consider whether the NCAA possesses power to fix the package price, as opposed to the distribution of that package price among participating teams, I would nevertheless hold that the television plan passes muster under the Rule of Reason. The NCAA argues strenuously that the plan and the network [\*\*\*87] contracts "are part of a joint venture among many of the nation's universities to create a product -- high-quality college football -- and offer that product in a way attractive to both fans in the stadiums and viewers on [television]. The cooperation in producing the product makes it more competitive against other [television] (and live) attractions." Brief for Petitioner 15. The Court recognizes that, "[if] the NCAA faced 'interbrand' competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to compete." *Ante*, at 115, n. 55. See *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-57 (1977). It rejects the NCAA's proffered procompetitive justification, however, on the ground that college football is a unique product for which there are no

available substitutes and "there is no need for collective action in [\*132] order to enable the product to compete against its nonexistent competitors." *Ante*, at 115 (footnote omitted). This proposition is singularly unpersuasive.

It is one thing to say that "NCAA football is a unique product," [546 F.Supp., at 1299](#), [\*\*\*\*88] that "intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience." *Ante*, at 111 (footnote omitted). See [707 F.2d, at 1158-1159](#); [546 F.Supp., at 1298-1300](#). It is quite another, in my view, to say that maintenance or enhancement of the quality of NCAA football telecasts is unnecessary to enable those telecasts to compete effectively against other forms of entertainment. The NCAA has no monopoly power when competing against other types of entertainment. Should the quality of the NCAA's product "deteriorate to any perceptible degree or should the cost of 'using' its product rise, some fans undoubtedly would turn to another form of entertainment. . . . Because of the broad possibilities for alternative forms of entertainment," the NCAA "properly belongs in the broader 'entertainment' market rather than in . . . [a] narrower [market]" like sports or football. Grauer, Recognition of the National Football League as a Single Entity Under [Section 1](#) of the Sherman Act: Implications of the Consumer Welfare Model, [82 Mich. L. Rev. 1, 34, n. 156 \(1983\)](#). [\*\*\*\*89] See *National Football League v. North American Soccer League*, 459 U.S. 1074, 1077 (1982) (REHNQUIST, J., dissenting from the denial of certiorari); R. Atwell, B. Grimes, & D. Lopiano, *The Money Game* 32-33 (1980); Hanford, at 67; J. Michener, *Sports in America* 208-209 (1976); Note, 87 Yale L. J., at 661, and n. 31.

The NCAA has suggested a number of plausible ways in which its television plan might enhance the [\*\*\*104] ability of college football telecasts to compete against other forms of entertainment. Brief for Petitioner 22-25. Although the District Court did conclude that the plan is "not necessary for effective marketing of the product," [546 F.Supp., at 1307](#), its [\*133] finding was directed only at the question whether college football telecasts would continue in the absence of the plan. It made no explicit findings concerning the effect of the plan on viewership and thus did not reject the factual premise of the NCAA's argument that the plan might enhance competition by increasing [\*\*2977] the market penetration of NCAA football. See also [707 F.2d, at 1154-1156, 1160](#). The District Court's finding [\*\*\*\*90] that network coverage of NCAA football would likely decrease if the plan were struck down, [546 F.Supp., at 1307](#), in fact, strongly suggests the validity of the NCAA's position. On the record now before the Court, therefore, I am not prepared to conclude that the restraints imposed by the NCAA's television plan are "such as may suppress or even destroy competition" rather than "such as merely [regulate] and perhaps thereby [promote] competition." [Chicago Board of Trade v. United States](#), 246 U.S. 231, 238 (1918).

#### IV

Finally, I return to the point with which I began -- the essentially noneconomic nature of the NCAA's program of self-regulation. Like Judge Barrett, who dissented in the Court of Appeals, I believe that the lower courts "erred by subjugating the NCAA's educational goals (and, incidentally, those which Oklahoma and Georgia insist must be maintained in any event) to the purely competitive commercialism of [an] 'every school for itself' approach to television contract bargaining." [707 F.2d, at 1168](#). Although the NCAA does not enjoy blanket immunity from the antitrust laws, cf. [Goldfarb v. Virginia State Bar](#), 421 U.S. 773 (1975), [\*\*\*\*91] it is important to remember that the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives." [Klor's, Inc. v. Broadway-Hale Stores, Inc.](#), 359 U.S. 207, 213, n. 7 (1959).

The fact that a restraint operates on nonprofit educational institutions as distinguished from business entities is as "relevant [\*134] in determining whether that particular restraint violates the Sherman Act" as is the fact that a restraint affects a profession rather than a business. [Goldfarb v. Virginia State Bar, supra, at 788, n. 17](#). Cf. *Community Communications Co. v. Boulder*, 455 U.S. 40, 56, n. 20 (1982). The legitimate noneconomic goals of colleges and universities should not be ignored in analyzing restraints imposed by associations of such institutions on their members, and these noneconomic goals "may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." [Goldfarb v. Virginia State Bar, supra, at 788, n. 17](#). [\*\*\*\*92] The Court of Appeals, like the District Court, flatly refused to consider what it termed "noneconomic" justifications advanced by the NCAA in support of the television plan. It was of the [\*\*\*105] view that our decision in [National Society of Professional Engineers v. United States](#), 435 U.S. 679 (1978), precludes

reliance on noneconomic factors in assessing the reasonableness of the television plan. [707 F.2d, at 1154](#); see Tr. of Oral Arg. 24-25. This view was mistaken, and I note that the Court does not in so many words repeat this error.

*Professional Engineers* did make clear that antitrust analysis usually turns on "competitive conditions" and "economic conceptions." [435 U.S., at 690](#), and n. 16. Ordinarily, "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." [Id., at 691](#). The purpose of antitrust analysis, the Court emphasized, "is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of [\*\*\*\*93] the members of an industry." [Id., at 692](#). Broadly read, these statements suggest that noneconomic values like the promotion of amateurism and fundamental educational objectives could not save the television plan from condemnation under the Sherman Act. [\*135] But these [\*\*2978] statements were made in response to "public interest" justifications proffered in defense of a ban on competitive bidding imposed by practitioners engaged in standard, profit-motivated commercial activities. The primarily non-economic values pursued by educational institutions differ fundamentally from the "overriding commercial purpose of [the] day-to-day activities" of engineers, lawyers, doctors, and businessmen, Gulland, Byrne, & Steinbach, *Intercollegiate Athletics and Television Contracts: Beyond Economic Justifications in Antitrust Analysis of Agreements Among Colleges*, [52 Ford. L. Rev. 717, 728 \(1984\)](#), and neither *Professional Engineers* nor any other decision of this Court suggests that associations of nonprofit educational institutions must defend their self-regulatory restraints solely in terms of their competitive impact, without regard for the legitimate [\*\*\*\*94] noneconomic values they promote.

When these values are factored into the balance, the NCAA's television plan seems eminently reasonable. Most fundamentally, the plan fosters the goal of amateurism by spreading revenues among various schools and reducing the financial incentives toward professionalism. As the Court observes, the NCAA imposes a variety of restrictions perhaps better suited than the television plan for the preservation of amateurism. *Ante*, at 119. Although the NCAA does attempt vigorously to enforce these restrictions, the vast potential for abuse suggests that measures, like the television plan, designed to limit the rewards of professionalism are fully consistent with, and essential to the attainment of, the NCAA's objectives. In short, "[the] restraints upon Oklahoma and Georgia and other colleges and universities with excellent football programs insure that they confine those programs within the principles of amateurism so that intercollegiate athletics supplement, rather than inhibit, educational achievement." [707 F.2d, at 1167](#) (Barrett, J., dissenting). The collateral consequences of the spreading of [\*136] regional and national [\*\*\*\*95] [\*\*\*106] appearances among a number of schools are many: the television plan, like the ban on compensating student-athletes, may well encourage students to choose their schools, at least in part, on the basis of educational quality by reducing the perceived economic element of the choice, see Note, 87 Yale L. J., at 676, n. 106; it helps ensure the economic viability of athletic programs at a wide variety of schools with weaker football teams; and it "[promotes] competitive football among many and varied amateur teams nationwide." Gulland, Byrne, & Steinbach, *supra*, at 722 (footnote omitted). These important contributions, I believe, are sufficient to offset any minimal anticompetitive effects of the television plan.

For all of these reasons, I would reverse the judgment of the Court of Appeals. At the very least, the Court of Appeals should be directed to vacate the injunction of the District Court pending the further proceedings that will be necessary to amend the outstanding injunction to accommodate the substantial remaining authority of the NCAA to regulate the telecasting of its members' football games.

## References

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[54 \[\\*\\*\\*\\*96\] Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 210](#)

[15 USCS 1](#)

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 16

L Ed Index to Annos, Restraints of Trade and Monopolies

468 U.S. 85, \*136; 104 S. Ct. 2948, \*\*2978; 82 L. Ed. 2d 70, \*\*\*106; 1984 U.S. LEXIS 130, \*\*\*\*96

ALR Quick Index, Restraints of Trade and Monopolies; Sports

Federal Quick Index, Monopolies and Restraints of Trade

Annotation References:

Application of federal antitrust laws to professional sports. 18 ALR Fed 489.

Application of state antitrust laws to athletic leagues or associations. 85 ALR3d 970.

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## **Marrese v. American Academy of Orthopaedic Surgeons**

Supreme Court of the United States

December 4, 1984, Argued ; March 4, 1985, Decided

No. 83-1452

### **Reporter**

470 U.S. 373 \*; 105 S. Ct. 1327 \*\*; 84 L. Ed. 2d 274 \*\*\*; 1985 U.S. LEXIS 61 \*\*\*\*; 53 U.S.L.W. 4265; 1985-1 Trade Cas. (CCH) P66,449

MARRESE ET AL. v. AMERICAN ACADEMY OF ORTHOPAEDIC SURGEONS

**Subsequent History:** [\*\*\*\*1] Petition For Rehearing Denied April 22, 1985; As Amended.

**Prior History:** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**Disposition:** [726 F.2d 1150](#), reversed and remanded.

## **Core Terms**

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federal court, state court, preclusive effect, claim preclusion, antitrust claim, court of appeals, preclusion, district court, state law, discovery order, exclusive jurisdiction, judgments, courts, cause of action, petitioners', competency, principles, plurality opinion, antitrust suit, contempt order, res judicata, Sherman Act, proceedings, membership, litigate, lawsuit, judgment of contempt, denial of a motion, criminal contempt, federal statute

## **LexisNexis® Headnotes**

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Civil Procedure > Sanctions > Contempt > General Overview

Criminal Law & Procedure > Appeals > Reviewability > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Criminal Law & Procedure > ... > Obstruction of Administration of Justice > Contempt > General Overview

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule

Criminal Law & Procedure > Appeals > Right to Appeal > Defendants

**[HN1](#)** **Sanctions, Contempt**

470 U.S. 373, \*373; 105 S. Ct. 1327, \*\*1327; 84 L. Ed. 2d 274, \*\*\*274; 1985 U.S. LEXIS 61, \*\*\*\*1

Criminal contempt judgments are immediately appealable pursuant to [28 U.S.C.S. § 1291](#) because they result from a separate and independent proceeding to vindicate the authority of the court and are not a part of the original cause.

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Governments > Federal Government > Employees & Officials

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Full Faith & Credit Statutes

Constitutional Law > Relations Among Governments > Full Faith & Credit

Governments > Courts > Judicial Comity

## [\*\*HN2\*\*](#) [down] **Preclusion of Judgments, Res Judicata**

The preclusive effect of state court judgment in subsequent federal lawsuit generally is determined by full faith and credit statute, which provides that state judicial proceedings shall have same full faith and credit in every court within United States as they have by law or usage in courts of such state from which they are taken. [28 U.S.C.S. § 1738](#). This statute directs federal court to refer to preclusion law of state in which judgment was rendered. [Section 1738](#) does not allow federal courts to employ their own rules of res judicata in determining effect of state judgments. Rather, it goes beyond common law and commands federal court to accept rules chosen by state from which judgment is taken. [Section 1738](#) embodies concerns of comity and federalism that allow states to determine, subject to requirements of statute and Due Process Clause, preclusive effect of judgments in their own courts.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Exclusive Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Patent Law > Preclusion > Collateral Estoppel

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

## [\*\*HN3\*\*](#) [down] **Jurisdiction, Exclusive Jurisdiction**

A state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Governments > Legislation > Expiration, Repeal & Suspension

470 U.S. 373, \*373; 105 S. Ct. 1327, \*\*1327; 84 L. Ed. 2d 274, \*\*\*274; 1985 U.S. LEXIS 61, \*\*\*\*1

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

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

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

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

#### **HN4** **Jurisdiction Over Actions, Exclusive Jurisdiction**

28 U.S.C.S. § 1738 requires a federal court to look first to state preclusion law in determining the preclusive effects of a state court judgment. An exception to §1738 will not be recognized unless a later statute contains an express or implied repeal. The basic approach adopted in Kremer applies in a lawsuit involving a claim within the exclusive jurisdiction of the federal courts. A federal court may rely on state preclusion principles to determine the extent to which an earlier state judgment bars subsequent litigation. Kremer illustrates that a federal court can apply state rules of issue preclusion to determine if a matter actually litigated in state court may be relitigated in a subsequent federal proceeding.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

#### **HN5** **Jurisdiction Over Actions, Exclusive Jurisdiction**

Claim preclusion generally does not apply where the plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter jurisdiction of the courts. If state preclusion law includes this requirement of prior jurisdictional competency, which is generally true, a state judgment will not have claim preclusive effect on a cause of action within the exclusive jurisdiction of the federal courts. Even in the event that a party asserting the affirmative defense of claim preclusion can show that state preclusion rules in some circumstances bar a claim outside the jurisdiction of the court that rendered the initial judgment, the federal court should first consider whether application of the state rules would bar the particular federal claim.

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Full Faith & Credit Statutes

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

## **HN6** Full Faith & Credit, Full Faith & Credit Statutes

The issue whether there is an exception to [28 U.S.C.S. § 1738](#) arises only if state law indicates that litigation of a particular claim or issue should be barred in the subsequent federal proceeding. To the extent that state preclusion law indicates that a judgment normally does not have claim preclusive effect as to matters that the court lacked jurisdiction to entertain, lower courts and commentators have correctly concluded that a state court judgment does not bar a subsequent federal antitrust claim.

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Full Faith & Credit Statutes

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

## **HN7** Full Faith & Credit, Full Faith & Credit Statutes

Under [28 U.S.C.S. § 1738](#), state law determines the preclusive effect of the state judgment.

Antitrust & Trade Law > Procedural Matters > Jurisdiction > Exclusive Jurisdiction

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Criminal Law & Procedure > ... > Challenges to Jury Venire > Bias & Prejudice > Implied Bias

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Full Faith & Credit Statutes

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

## **HN8** Jurisdiction, Exclusive Jurisdiction

Only if state law indicates that a particular claim or issue would be barred, is it necessary to determine if an exception to [28 U.S.C.S. § 1738](#) should apply.

## **Lawyers' Edition Display**

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### **Decision**

Determining preclusive effect of state court judgment in subsequent federal antitrust suit, without considering state preclusion law, held improper.

### **Summary**

Board-certified orthopaedic surgeons filed suit in a state court after they were denied membership in the American Academy of Orthopaedic Surgeons (Academy). The state court complaints were dismissed for failure to state a cause of action, and the surgeons then filed a federal antitrust suit in the United States District Court for the Northern District of Illinois based on the same events underlying their unsuccessful state court actions. The Academy filed a motion to dismiss arguing that claim preclusion barred the federal antitrust claim, since the earlier state court actions concerned the same facts and were dismissed with prejudice. The District Court denied this motion, reasoning that state courts lack jurisdiction over federal antitrust claims and, therefore, a state court judgment cannot have claim preclusive effect in a subsequent federal antitrust suit. Subsequently, the Academy was held in contempt for refusal to respond to discovery requests. While an appeal of the contempt order was pending, the District Court certified its denial of the motion to dismiss for immediate appeal. On consolidated appeals, the United States Court of Appeals for the Seventh Circuit held that as a matter of federal law, claim preclusion barred the federal antitrust suit, and reversed the contempt order because the discovery order was invalid ([726 F2d 1150](#)).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by O'Connor, J., joined by Brennan, White, Marshall, Powell, and Rehnquist, JJ., it was held (1) that the pendency of the appeal from the contempt judgment did not prevent the District Court from certifying the denial of the motion to dismiss for immediate interlocutory appeal, under [28 USCS 1292\(b\)](#), and, therefore, the Court of Appeals had jurisdiction to review the District Court's decision and (2) that, pursuant to the full faith and credit statute ([28 USCS 1738](#)), the lower federal courts erred in determining the preclusive effect of a state court judgment without regard to the law of the state in which the judgment was rendered.

Burger, Ch. J., concurred in the judgment, stating that in a situation in which state law is indeterminate as to the preclusive effect a state court judgment may have on a federal action, it may be consistent with 1738 for a federal court to formulate a federal rule to resolve the matter.

Blackmun and Stevens, JJ., did not participate.

## Headnotes

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JUDGMENT §386 > federal full faith and credit statute -- determination as to preclusive effect of state court judgments in subsequent federal lawsuit -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D] [LEdHN\[1E\]](#) [1E]

In determining the preclusive effect of a state court judgment in a subsequent lawsuit involving federal antitrust claims that could not have been raised in the state proceeding, the federal court, pursuant to the full faith and credit statute ([28 USCS 1738](#)), must consider the preclusion law of the state in which the judgment was rendered; there is no exception to 1738 for federal antitrust claims that would give state court judgments greater preclusive effect than would the courts of the state rendering the judgment.

APPEAL §31 > interlocutory appeal certification -- pendency of other appeal -- court's jurisdiction -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B] [LEdHN\[2C\]](#) [2C]

A Federal District Court which denies a motion to dismiss and subsequently holds a party in criminal contempt for refusing to comply with a discovery order has jurisdiction to amend its initial denial of the motion to dismiss to certify it for immediate interlocutory appeal under [28 USCS 1292\(b\)](#), even though the appeal from the contempt judgment is still pending, and a Federal Court of Appeals which authorizes the interlocutory appeal and orders its

consolidation with the appeal from the contempt judgment can properly exercise jurisdiction over the consolidated appeals.

JUDGMENT §392 > issue or claim preclusion -- federal reliance on state rules -- > Headnote:

[LEdHN\[3\]](#) [3]

Although a state court will not have occasion to address the specific question whether a state judgment has issue or claim preclusive effect in a later action that can be brought only in federal court, a federal court may rely in the first instance on state preclusion principles to determine the extent to which an earlier state judgment bars subsequent litigation; a federal court can apply state rules of issue preclusion to determine if a matter actually litigated in state court may be relitigated in a subsequent federal proceeding.

## Syllabus

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After being denied membership in respondent American Academy of Orthopaedic Surgeons, petitioner orthopaedic surgeons each filed an action in an Illinois Circuit Court, alleging that the denial of membership violated their associational rights under Illinois common law. After the Illinois Appellate Court ultimately held that the complaint in one action failed to state a cause of action, the Circuit Court then dismissed the other complaint. Subsequently, petitioners filed an action in Federal District Court, alleging that the denial of membership constituted a boycott in violation of [§ 1](#) of the Sherman Act. Respondent filed a motion to dismiss on the ground that claim preclusion barred the federal antitrust claim because the state actions concerned the same facts and were dismissed with prejudice. The District Court denied the motion, holding, in reliance on federal law, that the state judgments did not bar the Sherman Act claim. Thereafter, the District Court held respondent in criminal contempt [\*\*\*\*2] for refusing to comply with a discovery order as to its membership application files. Respondent then appealed from the contempt order, and, while this appeal was pending, the District Court certified its denial of the motion to dismiss for immediate appeal. The Court of Appeals authorized an interlocutory appeal and ordered it consolidated with the appeal from the contempt order. Ultimately, the Court of Appeals held that, as a matter of federal law, claim preclusion barred the federal antitrust action, and reversed the contempt order because the discovery order was invalid.

*Held:*

1. The Court of Appeals had jurisdiction to review the District Court's denial of the motion to dismiss. The pendency of the appeal from the contempt order did not prevent the District Court from certifying such denial for immediate appeal. Pp. 378-379.
2. The courts below erred in not considering Illinois law in determining the preclusive effect of the state judgments. Pp. 379-386.

(a) Title [28 U. S. C. § 1738](#) -- which provides that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of [\*\*\*\*3] such State . . . from which they are taken" -- requires a federal court to look first to state law in determining the preclusive effects of a state-court judgment. [Kremer v. Chemical Construction Corp., 456 U.S. 461](#). The fact that petitioners' antitrust claim is within the exclusive jurisdiction of the federal courts does not necessarily make [§ 1738](#) inapplicable in this case. While a state court will have no occasion to address the question whether a state judgment has issue or claim preclusive effect in a later action that can be brought only in federal court, a federal court may nevertheless rely in the first instance on state preclusion principles to determine the extent to which an earlier state judgment bars subsequent litigation. Pp. 379-382.

(b) Reference to state preclusion law may make it unnecessary to determine if a federal court, as an exception to § 1738, should refuse to give preclusive effect to a state-court judgment. Here, unless application of Illinois preclusion law suggests that petitioners' federal antitrust claim is barred, there will be no need to decide if there is an exception to § 1738. This Court will not create a special [\*\*\*\*4] exception to § 1738 for federal antitrust claims that would give state-court judgments greater preclusive effect than would the courts of the State rendering judgment, and that effectively holds as a matter of federal law that a plaintiff can bring state-law claims initially in state court only at the cost of forgoing subsequent federal antitrust claims. Pp. 383-386.

**Counsel:** Michael T. Sawyier argued the cause for petitioners. With him on the briefs were Stephen B. Cohen, George C. Pontikes, and John J. Casey, Jr.

Charles W. Murdock, Deputy Attorney General of Illinois, argued the cause for the State of Illinois et al. as amici curiae urging reversal. With him on the brief were Neil F. Hartigan, Attorney General of Illinois, and Robert E. Davy, Thomas J. DeMay, and James N. O'Hara, Assistant Attorneys General, Linley E. Pearson, Attorney General of Indiana, and Frank A. Baldwin, Deputy Attorney General, Bronson C. La Follette, Attorney General of Wisconsin, and Michael L. Zaleski, Assistant Attorney General.

D. Kendall Griffith argued the cause for respondent. With him on the brief were Thomas M. Crisham, Robert E. Nord, and Pamela S. Hollis.

**Judges:** O'CONNOR, J., delivered the opinion of the [\*\*\*\*5] Court, in which BRENNAN, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, post, p. 387. BLACKMUN and STEVENS, JJ., took no part in the consideration or decision of the case.

**Opinion by:** O'CONNOR

## Opinion

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[\*375] [\*378] [\*\*1329] JUSTICE O'CONNOR delivered the opinion of the Court.

LEdHN[1A] [1A]This case concerns the preclusive effect of a state court judgment in a subsequent lawsuit involving federal antitrust claims within the exclusive jurisdiction of the federal courts. The Court of Appeals for the Seventh Circuit, sitting en banc, held as a matter of federal law that the earlier state court judgments barred the federal antitrust suit. 726 F.2d 1150 (1984). Under 28 U. S. C. § 1738, a federal court generally is required to consider first the law of the State in which the judgment was rendered to determine its preclusive effect. Because the lower courts did not consider state preclusion law in this case, we reverse and remand.

I

Petitioners are board-certified orthopaedic surgeons who applied for membership in respondent American Academy of Orthopaedic Surgeons (Academy). Respondent denied the membership applications without [\*\*\*\*6] providing a hearing or a statement of reasons. In November 1976, petitioner Dr. Treister filed suit in the Circuit Court of Cook County, State of Illinois, alleging that the denial of membership in the Academy violated associational rights protected by Illinois common law. Petitioner Dr. Marrese separately filed a similar action in state court. Neither petitioner alleged a violation of state antitrust law in his state court action; nor did either petitioner contemporaneously file a federal antitrust suit. The Illinois Appellate Court ultimately held that Dr. Treister's complaint failed to state a cause of action, Treister v. American Academy of Orthopaedic Surgeons, 78 Ill. App. 3d 746, 396 N. E. 2d 1225 (1979), and the Illinois Supreme Court denied leave to appeal. 79 Ill. 2d 630 (1980). After the Appellate Court ruled against Dr. Treister, the Circuit Court dismissed Dr. Marrese's complaint.

[\*376] In March 1980, petitioners filed a federal antitrust suit in the United States District Court for the Northern District of Illinois based on the same events underlying their unsuccessful state court actions. As amended, the [\*\*\*\*7] complaint alleged that respondent Academy possesses monopoly power, that petitioners were denied

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membership in order to discourage competition, and that their exclusion constituted a boycott in violation of § 1 of the Sherman Act, [15 U. S. C. § 1](#). App. 8, 26-30, 33. Respondent filed a motion to dismiss arguing that claim preclusion barred the federal antitrust claim because the earlier state court actions concerned the same facts and were dismissed with prejudice.<sup>1</sup> In denying this [\*\*1330] motion, the District Court reasoned that state courts lack jurisdiction over federal antitrust claims, and therefore a state court judgment cannot have claim preclusive effect in a subsequent federal [\*\*\*279] antitrust suit. [496 F.Supp. 236, 238-239 \(1980\)](#), on reconsideration, [524 F.Supp. 389 \(1981\)](#). Discovery began and respondent refused to allow petitioners access to certain files relating to membership applications. After respondent persisted in this refusal despite a discovery order, the District Court held respondent in criminal contempt. App. to Pet. for Cert. N-1.

[\*\*\*8] The judgment of contempt was reversed by a divided panel of the Court of Appeals in an opinion holding that the District Judge had abused his discretion by authorizing discovery of the membership files and also suggesting that the federal action was barred by claim preclusion and that the antitrust claims were groundless. [692 F.2d 1083 \(1982\)](#). This opinion was vacated by an en banc vote, and the original panel issued a narrower opinion that did not discuss claim preclusion. [\*377] [706 F.2d 1488 \(1983\)](#). The Court of Appeals then vacated the second opinion and ordered rehearing en banc. In a divided vote, the Court of Appeals held that claim preclusion barred the federal antitrust suit and reversed the contempt order because the discovery order was invalid. [726 F.2d 1150 \(1984\)](#).

On the claim preclusion issue, no opinion commanded the votes of a majority of the Court of Appeals. A plurality opinion concluded that a state court judgment bars the subsequent filing of a federal antitrust claim if the plaintiff could have brought a state antitrust claim under a state statute "materially identical" to the Sherman Act. [Id. at 1153](#). [\*\*\*9] The plurality examined the Illinois Antitrust Act, Ill. Rev. Stat., ch. 38, para. 60-3(2) (1981), and found that it is sufficiently similar to the Sherman Act to bar petitioners' federal antitrust claims in the instant case. [Id. at 1155-1156](#). An opinion concurring in part concluded that res judicata required petitioners to bring their "entire cause of action within a reasonable period of time." [Id. at 1166](#) (Flaum, J.). To avoid preclusion of their federal antitrust claim, petitioners should have either filed concurrent state and federal actions or brought their state claims in federal court pendent to their Sherman Act claim. *Ibid.*

Five judges also concluded that the discovery order was invalid and therefore the contempt judgment should be reversed. A plurality opinion first observed that the discovery order was invalid because the District Court should have dismissed the suit on claim preclusion grounds before the discovery order was entered. [Id. at 1158](#). Alternatively, the order constituted an abuse of discretion because it did not adequately prevent petitioners from misusing the discovery process. [Id. at 1158-1162](#). [\*\*\*10] Three judges joined the entire discussion concerning the discovery order. A fourth judge did not believe that claim preclusion applied, but he agreed that the discovery order constituted an abuse of discretion. [Id. at 1162](#) (Eschbach, J., concurring in part and dissenting in part). Finally, the fifth judge observed that it was sufficient [\*378] to hold that the complaint should have been dismissed on claim preclusion grounds; he added, however, that if he thought it necessary he would join the portion of the plurality opinion holding the discovery order invalid. [Id. at 1162](#) (Bauer, J., concurring).

We granted certiorari limited to [\*\*\*280] the question whether the Court of Appeals correctly held that claim preclusion requires dismissal of the federal antitrust action, [467 U.S. 1258 \(1984\)](#), and we now reverse.

II

[LEdHN/2A](#) [↑] [2A] Before addressing the merits of the decision below, we first examine whether the Court of Appeals had jurisdiction to review the District Court's denial of the motion to dismiss. Although the parties did not

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<sup>1</sup> In this opinion we use the term "claim preclusion" to refer to "res judicata" in a narrow sense, *i. e.*, the preclusive effect of a judgment in foreclosing litigation of matters that should have been raised in an earlier suit. In contrast, we use the term "issue preclusion" to refer to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. See [Migra v. Warren City School Dist. Bd. of Ed.](#), [465 U.S. 75, 77, n. 1 \(1984\)](#).

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raise the jurisdictional issue before this Court, we address it to assure that the claim preclusion [\*\*\*11] issue is properly before us. See, [\*\*1331] e. g., *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 197 (1956). In the present case, the District Court initially refused to certify its denial of the motion to dismiss for immediate appeal pursuant to 28 U. S. C. § 1292(b). The District Court subsequently held respondent in criminal contempt for refusing to comply with a discovery order. Respondent then appealed from the judgment of criminal contempt pursuant to 28 U. S. C. § 1291. See *Bray v. United States*, 423 U.S. 73 (1975) (*per curiam*). While the appeal from the contempt judgment was pending, the District Court amended the earlier denial of the motion to dismiss in order to certify it for immediate appeal. App. to Pet. for Cert. I-1. The Court of Appeals authorized interlocutory appeal pursuant to § 1292(b), and ordered proceedings consolidated with the appeal from the contempt order. 726 F.2d, at 1152; App. to Pet. for Cert. J-1.

**LEdHN[2B]** [2B]Petitioners argued below that because the appeal from the contempt order was pending, the District Court lacked jurisdiction to amend its order denying the motion to [\*\*\*12] dismiss to [\*379] allow interlocutory appeal. In general, filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (*per curiam*). This proposition, however, does not imply that an appeal from a judgment of criminal contempt based on noncompliance with a discovery order transfers jurisdiction over the entire case to the court of appeals. **HN1** [2C]Criminal contempt judgments are immediately appealable pursuant to § 1291 because they result from "a separate and independent proceeding . . . to vindicate the authority of the court" and are "not a part of the original cause." *Bray, supra, at 75*, quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 445, 451 (1911).

**LEdHN[2C]** [2C]Thus, prior to certification of the claim preclusion issue pursuant to § 1292(b), the contempt judgment was the only matter before the Court of Appeals. See 706 F.2d, at 1497-1498; 692 F.2d, at 1096. The District Court's amendment of its initial [\*\*\*13] denial of the motion to dismiss did not interfere with but instead facilitated review of the pending appeal from the contempt order. We agree with the Court of Appeals, 726 F.2d, at 1152, that the pendency of the appeal from the contempt judgment did not prevent the District Court from certifying the denial of the motion to dismiss for immediate appeal under § 1292(b). [\*\*\*281] Accordingly, the Court of Appeals properly exercised jurisdiction over the consolidated appeals, and we have jurisdiction to review that court's decision with respect to dismissal of the antitrust claim.

### III

**LEdHN[1B]** [1B]The issue presented by this case is whether a state court judgment may have preclusive effect on a federal antitrust claim that could not have been raised in the state proceeding. Although federal antitrust claims are within the exclusive jurisdiction of the federal courts, see, e. g., *General Investment* [\*380] Co. v. *Lake Shore & M. S. R. Co.*, 260 U.S. 261, 286-288 (1922), the Court of Appeals ruled that the dismissal of petitioners' complaints in state court barred them from bringing a claim based on the same facts under the Sherman Act. The Court of [\*\*\*14] Appeals erred by suggesting that in these circumstances a federal court should determine the preclusive effect of a state court judgment without regard to the law of the State in which judgment was rendered.

**LEdHN[1C]** [1C]**HN2** [1C]The preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute, which provides that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have [\*\*1332] by law or usage in the courts of such State . . . from which they are taken." 28 U. S. C. § 1738. This statute directs a federal court to refer to the preclusion law of the State in which judgment was rendered. "It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481-482 (1982); see also

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Allen v. McCurry, 449 U.S. 90, 96 (1980). Section [\*\*\*\*15] 1738 embodies concerns of comity and federalism that allow the States to determine, subject to the requirements of the statute and the Due Process Clause, the preclusive effect of judgments in their own courts. See Kremer, supra, at 478, 481-483. Cf. Riley v. New York Trust Co., 315 U.S. 343, 349 (1942) (discussing preclusive effect of state judgment in proceedings in another State).

The fact that petitioners' antitrust claim is within the exclusive jurisdiction of the federal courts does not necessarily make § 1738 inapplicable to this case. Our decisions indicate that HN3[<sup>1</sup>] a state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts. Without discussing § 1738, [\*381] this Court has held that the issue preclusive effect of a state court judgment barred a subsequent patent suit that could not have been brought in state court. Becher v. Contoure Laboratories, Inc., 279 U.S. 388 (1929). Moreover, *Kremer* held that § 1738 applies to a claim of employment discrimination under Title VII of the Civil Rights Act of 1964, 78 [\*\*\*\*16] Stat. 253, as amended, 42 U. S. C. § 2000e et seq., although the Court expressly declined to decide [\*\*\*282] whether Title VII claims can be brought only in federal courts. 456 U.S., at 479, n. 20. *Kremer* implies that absent an exception to § 1738, state law determines at least the issue preclusive effect of a prior state judgment in a subsequent action involving a claim within the exclusive jurisdiction of the federal courts.

More generally, HN4[<sup>1</sup>] *Kremer* indicates that § 1738 requires a federal court to look first to state preclusion law in determining the preclusive effects of a state court judgment. Cf. Haring v. Prosise, 462 U.S. 306, 314, and n. 8 (1983); Smith, Full Faith and Credit and Section 1983: A Reappraisal, 63 N. C. L. Rev. 59, 110-111 (1984). The Court's analysis in *Kremer* began with the finding that state law would in fact bar relitigation of the discrimination issue decided in the earlier state proceedings. 456 U.S., at 466-467. That finding implied that the plaintiff could not relitigate the same issue in federal court unless some exception to § 1738 applied. *Ibid.* *Kremer*[\*\*\*\*17] observed that "an exception to § 1738 will not be recognized unless a later statute contains an express or implied repeal." Id., at 468; see also Allen v. McCurry, supra, at 99. Title VII does not expressly repeal § 1738, and the Court concluded that the statutory provisions and legislative history do not support a finding of implied repeal. 456 U.S., at 476. We conclude that the basic approach adopted in *Kremer* applies in a lawsuit involving a claim within the exclusive jurisdiction of the federal courts.

LEdHN[3][<sup>1</sup>] [3]To be sure, a state court will not have occasion to address the specific question whether a state judgment has issue or claim preclusive effect in a later action that can be brought [\*382] only in federal court. Nevertheless, a federal court may rely in the first instance on state preclusion principles to determine the extent to which an earlier state judgment bars subsequent litigation. Cf. FDIC v. Eckhardt, 691 F.2d 245, 247-248 (CA6 1982) (applying state law to determine preclusive effect on claim [\*\*1333] within concurrent jurisdiction of state and federal courts). *Kremer* [\*\*\*\*18] illustrates that a federal court can apply state rules of issue preclusion to determine if a matter actually litigated in state court may be relitigated in a subsequent federal proceeding. See 456 U.S., at 467.

With respect to matters that were not decided in the state proceedings, we note that HN5[<sup>1</sup>] claim preclusion generally does not apply where "[the] plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy because of the limitations on the subject matter jurisdiction of the courts . . . ." Restatement (Second) of Judgments § 26(1)(c) (1982). If state preclusion law includes this requirement of prior jurisdictional competency, which is generally true, a state judgment will not have claim preclusive effect on a cause of action within the exclusive jurisdiction of the federal courts. Even in the event that a party asserting the affirmative defense of claim preclusion can show that state preclusion rules in some circumstances bar a claim outside the jurisdiction of the court that rendered the initial judgment, the federal court should first consider whether application of the state [\*\*\*283] rules would bar the particular federal claim. [\*\*\*\*19]<sup>2</sup>

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<sup>2</sup>Our analysis does not necessarily suggest that the Court of Appeals for the Fourth Circuit erred in its holding in Nash County Board of Education v. Biltmore Co., 640 F.2d 484, cert. denied, 454 U.S. 878 (1981). The Court of Appeals there applied federal

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[\*383] Reference to state preclusion law may [\*\*\*\*20] make it unnecessary to determine if the federal court, as an exception to [§ 1738](#), should refuse to give preclusive effect to a state court judgment. [HN6](#)<sup>↑</sup> The issue whether there is an exception to [§ 1738](#) arises only if state law indicates that litigation of a particular claim or issue should be barred in the subsequent federal proceeding. To the extent that state preclusion law indicates that a judgment normally does not have claim preclusive effect as to matters that the court lacked jurisdiction to entertain, lower courts and commentators have correctly concluded that a state court judgment does not bar a subsequent federal antitrust claim. See [726 F.2d, at 1174](#) (Cudahy, J., dissenting) (citing cases); [692 F.2d, at 1099](#) (Stewart, J., dissenting); Restatement, *supra*, § 25(1), Comment e; *id.*, [§ 26\(1\)\(c\)](#), Illustration 2; 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4470, pp. 687-688 (1981). Unless application of Illinois preclusion law suggests, contrary to the usual view, that petitioners' federal antitrust claim is somehow barred, there will be no need to decide in this case if there is an exception to [§ 1738](#).<sup>3</sup>

[\*\*\*\*21] [\*384] [\*1334] The Court of Appeals did not apply the approach to [§ 1738](#) that we have outlined. Both the plurality opinion, see [726 F.2d, at 1154](#), and an opinion concurring in part, see [id., at 1163-1164](#) (Flaum, J.), express the view that [§ 1738](#) allows a federal court to give a state court judgment greater preclusive effect than the state courts themselves would give to it. This proposition, however, was rejected by [Migra v. Warren City School Dist. Bd. of Ed.](#), [465 U.S. 75](#) [\*\*284] (1984), a case decided shortly after the Court of Appeals announced its decision in the instant case. In *Migra*, a discharged schoolteacher filed suit under [42 U. S. C. § 1983](#) in federal court after she prevailed in state court on a contract claim involving the same underlying events. The Federal District Court dismissed the [§ 1983](#) action as barred by claim preclusion. The opinion of this Court emphasized that [HN7](#)<sup>↑</sup> under [§ 1738](#), state law determined the preclusive effect of the state judgment. [Id., at 81](#). Because it was unclear from the record whether the District Court's ruling was based on state preclusion law, [\*\*\*\*22] we remanded for clarification on this point. [Id., at 87](#). Such a remand obviously would have been unnecessary were a federal court free to give greater preclusive effect to a state court judgment than would the judgment-rendering State. See [id., at 88](#) (WHITE, J., concurring).

[LEdHN\[1D\]](#)<sup>↑</sup> [1D] We are unwilling to create a special exception to [§ 1738](#) for federal antitrust claims that would give state court judgments greater preclusive effect than would the courts of the State rendering the judgment. Cf. [Haring v. Prosise](#), [462 U.S., at 317-318](#) (refusing to create special preclusion rule for [§ 1983](#) claim subsequent to plaintiff's guilty plea). The plurality opinion for the Court of Appeals relied on *Federated* [\*385] *Department Stores, Inc. v. Moitie*, [452 U.S. 394](#) (1981), to observe that the doctrine of claim preclusion protects defendants from repetitive lawsuits based on the same conduct, [726 F.2d, at 1152](#), and that there is a practical need to require plaintiffs "to litigate their claims in an economical and parsimonious fashion." [Id., at 1153](#). We agree that these [\*\*\*\*23] are valid and important concerns, and we note that under [§ 1738](#) state issue preclusion law may promote

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preclusion principles to conclude that a state judgment approving settlement of state antitrust claims barred a subsequent federal antitrust claim. Although our decision today indicates that the Court of Appeals should have looked in the first instance to state law to determine the preclusive effect of the state judgment, the same holding would result if application of state preclusion law suggests that the settlement bars the subsequent federal claim and if there is no exception to [§ 1738](#) in these circumstances. Cf. [640 F.2d, at 487, n. 5](#) (noting that state law gives preclusive effect to consent judgment). We, of course, do not address those issues here.

<sup>3</sup> THE CHIEF JUSTICE notes that preclusion rules bar the splitting of a cause of action between a court of limited jurisdiction and one of general jurisdiction, and suggests that state requirements of jurisdictional competency may leave unclear whether a state court action precludes a subsequent federal antitrust claim. *Post*, at 388-390. The rule that the judgment of a court of limited jurisdiction concludes the entire claim assumes that the plaintiff might have commenced his action in a court *in the same system of courts* that was competent to give full relief. See [Restatement \(Second\) of Judgments § 24, Comment g](#) (1982). Moreover, the jurisdictional competency requirement generally is understood to imply that state court litigation based on a state statute analogous to a federal statute, e. g., a state [antitrust law](#), does not bar subsequent attempts to secure relief in federal court if the state court lacked jurisdiction over the federal statutory claim. *Id.*, [§ 26\(1\)\(c\)](#), Illustration 2. Although a particular State's preclusion principles conceivably could support a rule similar to that proposed by THE CHIEF JUSTICE, *post*, at 390-391, where state preclusion rules do not indicate that a claim is barred, we do not believe that federal courts should fashion a federal rule to preclude a claim that could not have been raised in the state proceedings.

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the goals of repose and conservation of judicial resources by preventing the relitigation of certain issues in a subsequent federal proceeding. See [Kremer, 456 U.S., at 485](#) (state judgment barred subsequent Title VII action in federal court).

If we had a single system of courts and our only concerns were efficiency and finality, it might be desirable to fashion claim preclusion rules that would require a plaintiff to bring suit initially in the forum of most general jurisdiction, thereby resolving as many issues as possible in one proceeding. See [Restatement \(Second\) of Judgments § 24, Comment g](#) (1982); C. Wright, A. Miller, & E. Cooper, *supra*, § 4407, p. 51; *id.* § 4412, p. 93. The decision of the Court of Appeals approximates such a rule inasmuch as it encourages plaintiffs to file suit initially in federal district court and to attempt to bring any state law claims pendent to their federal antitrust claims. Whether this result would reduce the overall burden of litigation is debatable, see [726 F.2d, at 1181-1182](#) (Cudahy, J., dissenting); [\*\*\*\*24] C. Wright, A. Miller, & E. Cooper, *supra*, § 4407, p. 51-52, and we decline to base our interpretation of [§ 1738](#) on our opinion on this question.

More importantly, we have parallel systems of state and federal courts, and the concerns of comity reflected in [§ 1738](#) generally allow States to determine the preclusive [\*\*\*285] scope of their own courts' judgments. See [Kremer, supra, at 481-482](#); [Allen v. McCurry, 449 U.S., at 96](#); cf. Currie, *Res Judicata: The Neglected Defense*, 45 U. Chi. L. Rev. 317, 327 (1978) (state policies may seek to limit preclusive effect of state court judgment). These concerns certainly are not made less compelling because state courts lack jurisdiction [\*386] over federal antitrust [\*\*1335] claims. We therefore reject a judicially created exception to [§ 1738](#) that effectively holds as a matter of federal law that a plaintiff can bring state law claims initially in state court only at the cost of forgoing subsequent federal antitrust claims. *Federated Department Stores, Inc. v. Moitie* does not suggest a contrary conclusion. That case did not involve [§ 1738](#); rather it held that "accepted [\*\*\*25] principles of res judicata" determine the preclusive effect of a federal court judgment. See [452 U.S., at 401](#).

**LEdHN1E[↑]** [1E] In this case the Court of Appeals should have first referred to Illinois law to determine the preclusive effect of the state judgment. **HN8[↑]** Only if state law indicates that a particular claim or issue would be barred, is it necessary to determine if an exception to [§ 1738](#) should apply. Although for purposes of this case, we need not decide if such an exception exists for federal antitrust claims, we observe that the more general question is whether the concerns underlying a particular grant of exclusive jurisdiction justify a finding of an implied partial repeal of [§ 1738](#). Resolution of this question will depend on the particular federal statute as well as the nature of the claim or issue involved in the subsequent federal action. Our previous decisions indicate that the primary consideration must be the intent of Congress. See [Kremer, supra, at 470-476](#) (finding no congressional intent to depart from [§ 1738](#) for purposes of Title VII); cf. [Brown v. Felsen, 442 U.S. 127, 138 \(1979\)](#) (finding congressional intent that [\*\*\*26] state judgments would not have claim preclusive effect on dischargeability issue in bankruptcy).

#### IV

The decisions below did not consider Illinois preclusion law in their discussion of the claim preclusion issue. The District Court relied on federal law to conclude that the state judgments did not bar the claims under the Sherman Act. See [496 F.Supp., at 238-239](#). Similarly, the plurality opinion of the Court of Appeals did not discuss Illinois principles of [\*387] claim preclusion. See [726 F.2d, at 1154](#). Although an opinion concurring in part also concluded that petitioners' antitrust claim was barred as a matter of federal law, it did suggest that this conclusion was consistent with Illinois law. See [id., at 1164](#) (Flaum, J.). A dissenting opinion vigorously argued that principles of Illinois claim preclusion law did not require dismissal of the federal antitrust claims. See [id., at 1176-1177](#) (Cudahy, J.). Before this Court, the parties have continued to disagree about the content of Illinois preclusion law. We believe that this dispute is best resolved in the first instance by the District Court. [\*\*\*27] Cf. [Migra v. Warren City School Dist. Bd. of Ed., 465 U.S., at 87](#).

Petitioners also urge us to reverse the decision of the Court of Appeals with respect to the contempt order. [\*\*\*286] We specifically declined to grant certiorari on questions related to the discovery order or the subsequent contempt order, and we do not address those issues here.

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The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE BLACKMUN and JUSTICE STEVENS took no part in the consideration or decision of this case.

**Concur by:** BURGER

## Concur

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CHIEF JUSTICE BURGER, concurring in the judgment.

I agree with the Court's implicit conclusion that the Court of Appeals approached [28 U. S. C. § 1738](#) too narrowly and technically by holding it irrelevant on the ground that Illinois law does not address the preclusive effect of a state court judgment on a federal antitrust suit, see [726 F.2d 1150, 1154 \(1984\)](#). In the circumstances presented by this case, a fair reading of [§ 1738](#) requires federal courts to look first to general principles of state preclusion law. Those principles control if they [\*\*\*28] clearly establish that the state court judgment does not bar the later federal action: Only [\*\*1336] recently, we reaffirmed [\*388] in [Migra v. Warren City School District Board of Education, 465 U.S. 75 \(1984\)](#), that a federal court is not free to accord greater preclusive effect to a state court judgment than the state courts themselves would give to it.

The Court now remands with directions for the District Court to consider Illinois claim preclusion law, but no guidance is given as to how the District Court should proceed if it finds state law silent or indeterminate on the claim preclusion question. The Court's refusal to acknowledge this potential problem appears to stem from a belief that the jurisdictional competency requirement of res judicata doctrine will dispose of most cases like this. See *ante*, at 382.

I cannot agree with the Court's interpretation of the jurisdictional competency requirement. If state law provides a cause of action that is virtually identical with a federal statutory cause of action, a plaintiff suing in state court is able to rely on the same theory of the case and obtain the same remedy as would be available in [\*\*\*29] federal court, even when the plaintiff cannot expressly invoke the federal statute because it is within the exclusive jurisdiction of the federal courts. In this situation, the jurisdictional competency requirement is effectively satisfied. Therefore, the fact that state law recognizes the jurisdictional competency requirement does not necessarily imply that a state court judgment has no claim preclusive effect on a cause of action within exclusive federal jurisdiction.

The states that recognize the jurisdictional competency requirement do not all define it in the same terms. Illinois courts have expressed the doctrine in the following manner: "The principle [of res judicata] extends not only to questions which were actually litigated but also to all questions which could have been raised or determined." [Spiller v. Continental Tube Co., 95 Ill. 2d 423, 432, \[\\*\\*287\] 447 N. E. 2d 834, 838 \(1983\)](#) (emphasis added); see also, e. g., [LaSalle National Bank v. County Board of School Trustees, 61 Ill. 2d 524, 529, 337 N. E. 2d 19, 22 \(1975\)](#); [People v. Kidd, 398 Ill. 405, 408, 75 N. E. 2d 851, 853-854 \(1947\)](#). [\*\*\*30] In the present case, each [\*389] petitioner could have alleged a cause of action under the Illinois Antitrust Act, Ill. Rev. Stat., ch. 38, para. 60-1 et seq. (1981), in his prior state court lawsuit against respondent. The principles of Illinois res judicata doctrine appear to be indeterminate as to whether petitioners' ability to raise state antitrust claims in their prior state court suits should preclude their assertion of essentially the same claims in the present federal action. This indeterminacy arises from the fact that the Illinois courts have not addressed whether the notion of "questions which could have been raised" should be applied narrowly <sup>1</sup> [\*\*\*31] or broadly. <sup>2</sup> No Illinois court has considered how the

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<sup>1</sup> E. g., by inquiring whether the plaintiff could have raised the question whether the defendant violated a particular statute.

<sup>2</sup> E. g., by inquiring whether the plaintiff could have raised the question whether the defendant engaged in a group boycott.

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jurisdictional competency requirement should apply in the type of situation presented by this case, where the same theory of recovery may be asserted under different statutes. Nor has any Illinois court considered whether res judicata precludes splitting a cause of action between a court of limited jurisdiction and one of general jurisdiction.<sup>3</sup>

[\*\*\*32] [\*390] Hence it is likely that the principles of Illinois claim preclusion law do not speak to [\*\*1337] the preclusive effect that petitioners' state court judgments should have on the present action. In this situation, it may be consistent with § 1738 for a federal court to formulate a federal rule to resolve the matter. If state law is simply indeterminate, the concerns of comity and federalism underlying § 1738 do not come into play. At the same time, the federal courts have direct interests in ensuring that their resources are used efficiently and not as a means of harassing defendants with repetitive lawsuits, as well as in ensuring that parties asserting federal rights have an adequate [\*\*\*288] opportunity to litigate those rights. Given the insubstantiality of the state interests and the weight of the federal interests, a strong argument could be made that a federal rule would be more appropriate than a creative interpretation of ambiguous state law.<sup>4</sup> When state law is indeterminate or ambiguous, a clear federal rule would promote substantive interests as well: "Uncertainty intrinsically works to defeat the opportunities for repose and reliance sought by the rules [\*\*\*33] of preclusion, and confounds the desire for efficiency by inviting repetitious litigation to test the preclusive effects of the first effort." 18 C. Wright, A. Miller, & E. Cooper, *supra* n. 3, § 4407, at 49.

A federal rule might be fashioned from the test, which this Court has applied in other contexts, that a party is precluded [\*391] from asserting a claim that he had a "full and fair opportunity" to litigate in a prior action. See, e.g., Kremer v. Chemical Construction Corp., 456 U.S. 461, 485 (1982); Allen v. McCurry, 449 U.S. 90, 95 (1980); Montana v. United States, 440 U.S. 147, 153 (1979); Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328 (1971). [\*\*\*34] Thus, if a state statute is identical in all material respects with a federal statute within exclusive federal jurisdiction, a party's ability to assert a claim under the state statute in a prior state court action might be said to have provided, in effect, a "full and fair opportunity" to litigate his rights under the federal statute. Cf. Derish v. San Mateo-Burlingame Board of Realtors, 724 F.2d 1347 (CA9 1983); Nash County Board of Education v. Biltmore Co., 640 F.2d 484 (CA4), cert. denied, 454 U.S. 878 (1981).

The Court will eventually have to face these questions; I would resolve them now.

## References

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47 Am Jur 2d, Judgments 1217, 1289

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<sup>3</sup> Compare Restatement (Second) of Judgments § 24, Comment g, Illustration 14, pp. 204-205 (1982):

"In an automobile collision, A is injured and his car damaged as a result of the negligence of B. Instead of suing in a court of general jurisdiction of the state, A brings his action for the damage to his car in a justice's court, which has jurisdiction in actions for damage to property but has no jurisdiction in actions for injury to the person. Judgment is rendered for A for the damage to the car. A cannot thereafter maintain an action against B to recover for the injury to his person arising out of the same collision."

See also 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4412, p. 95 (1981), stating that the "general rule" in state courts is that "[a] second action will not be permitted on parts of a single claim that could have been asserted in a court of broader jurisdiction simply because the plaintiff went first to a court of limited jurisdiction in the same state that could not hear them." The holding in Lucas v. Le Compte, 42 Ill. 303 (1866), is similar to this "general rule," but that holding was based on a construction of an Illinois statute, Ill. Rev. Stat., ch. 59, § 35 (1845), which (a) has been repealed, see Act of Apr. 15, 1965, 1965 Ill. Laws 331, and (b) had a broader preclusive effect than general Illinois res judicata doctrine has. Clancey v. McBride, 338 Ill. 35, 169 N.E. 729 (1929), involved the same circumstances as the above-quoted illustration from the Restatement. The court resolved the case, however, without reference to the limited jurisdiction of the justice's court, by concluding that injury to the person and injury to property are distinct legal wrongs that can be the subject of separate lawsuits.

<sup>4</sup> By contrast, when a federal court construes substantive rights and obligations under state law in the context of a diversity action, the federal interest is insignificant and the state's interest is much more direct than it is in the present situation, even if the relevant state law is ambiguous.

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## 21 Federal Procedure, L Ed, Judgments and Orders 51:221

### 28 USCS 1292(b), 1738

US L Ed Digest, Appeal 31; Judgment 386, 392.

L Ed Index to Annos, Full Faith and Credit; Judgment

ALR Quick Index, Full Faith and Credit; Judgments

Federal Quick Index, Full Faith and Credit; Judgments and Decrees

Annotation References:

Supreme Court's views as to res judicata or collateral estoppel effect of state court judgment [\*\*\*\*35] on federal courts. [72 L Ed 2d 911](#).

State or federal law as governing applicability of doctrine of res judicata or collateral estoppel in federal court action. 19 ALR Fed 709.

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## Hallie v. Eau Claire

Supreme Court of the United States

November 26, 1984, Argued ; March 27, 1985, Decided

No. 82-1832

### **Reporter**

471 U.S. 34 \*; 105 S. Ct. 1713 \*\*; 85 L. Ed. 2d 24 \*\*\*; 1985 U.S. LEXIS 191 \*\*\*\*; 53 U.S.L.W. 4418; 1985-1 Trade Cas. (CCH) P66,484; 23 ERC (BNA) 1544; 15 ELR 20373

TOWN OF HALLIE ET AL. v. CITY OF EAU CLAIRE

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**Disposition:** [700 F.2d 376](#), affirmed.

## **Core Terms**

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municipality, sewage, state policy, state action, supervision, exemption, anticompetitive, articulated, anticompetitive conduct, anti trust law, regulation, private party, displace, effects, home rule, authorization, Sherman Act, cases

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

Governments > Public Improvements > General Overview

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

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

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

### [\*\*HN1\*\*](#) Antitrust & Trade Law, Sherman Act

Relying on principles of federalism and state sovereignty, the United States Supreme Court has refused to construe the Sherman Act, [15 U.S.C.S. § 1 et seq.](#), as applying to the anticompetitive conduct of a State acting through its legislature. Rather, the Court has ruled that the Sherman Act was intended to prohibit private restraints on trade, and it refused to infer an intent to nullify a state's control over its officers and agents in activities directed by the legislature. Municipalities, on the other hand, are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign. Rather, to obtain exemption, municipalities must demonstrate that their anticompetitive activities were authorized by the State pursuant to state policy to displace competition with regulation or monopoly public service.

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

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

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

Before a municipality will be entitled to the protection of the state action exemption from the antitrust laws, it must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy.

Governments > Local Governments > Duties & Powers

Governments > Public Improvements > Sanitation & Water

## **HN3**[] Local Governments, Duties & Powers

Wis. Stat. § 62.18(1) (1981-1982) grants authority to cities to construct, add to, alter, and repair sewage systems. The authority includes the power to describe with reasonable particularity the district to be served. This grant of authority is supplemented by Wis. Stat. § 66.069(2)(c) (1981-1982) providing that a city operating a public utility may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated.

Governments > Local Governments > Boundaries

Governments > Local Governments > Duties & Powers

Governments > Public Improvements > Sanitation & Water

## **HN4**[] Local Governments, Boundaries

Wis. Stat. § 144.07(1) (1981-1982) provides that the State's Department of Natural Resources may require a city's sewage system to be constructed so that other cities, towns, or areas may connect to the system, and the Department may order that such connections be made. Wis. Stat. § 144.07(1m) provides, however, that an order by the Department of Natural Resources for the connection of unincorporated territory to a city system shall be void if that territory refuses to become annexed to the city.

Governments > Local Governments > Duties & Powers

## **HN5**[] Local Governments, Duties & Powers

A municipality is an arm of the State. It is presumed, absent a showing to the contrary, that the municipality acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf.

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

Governments > Local Governments > Duties & Powers

#### **HN6** Exemptions & Immunities, Parker State Action Doctrine

The application of the state action exemption to a municipality has required that compulsion be shown. This is so because where the actor is a municipality, acting pursuant to a clearly articulated state policy, compulsion is simply unnecessary as an evidentiary matter to prove that the challenged practice constitutes state action. In short, although compulsion affirmatively expressed may be the best evidence of state policy, it is by no means a prerequisite to a finding that a municipality acted pursuant to clearly articulated state policy. Where state or municipal regulation by a private party is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists.

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

Governments > Local Governments > Duties & Powers

Governments > Local Governments > Finance

#### **HN7** Exemptions & Immunities, Parker State Action Doctrine

Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy. Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Governments > Local Governments > Duties & Powers

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

#### **HN8** Scope, Exemptions

Active state supervision is not a prerequisite to exemption from the antitrust laws where the actor is a municipality rather than a private party.

## **Lawyers' Edition Display**

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### **Decision**

Municipality's anticompetitive activities, authorized but not compelled or actively supervised by state, held to be within the "state action" exemption from the federal antitrust laws.

### **Summary**

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A group of unincorporated Wisconsin townships filed suit against an adjacent city in the United States District Court for the Western District of Wisconsin, alleging that the city had violated the Sherman Act ([15 USCS 1 et seq.](#)) by acquiring a monopoly over sewage treatment in the area and providing that service only to areas which were willing to be annexed by the city and to use its sewage collection services rather than those of the towns. The District Court ruled in favor of the city, pointing to a Wisconsin law which authorized cities providing sewage services to limit the unincorporated areas covered by their service unless ordered by the state to service certain areas, and holding that the city's conduct fell within the "state action" exemption from the federal antitrust laws. The United States Court of Appeals for the Seventh Circuit affirmed ([700 F2d 376](#)).

On certiorari, the United States Supreme Court affirmed. In an opinion by Powell, J., expressing the unanimous view of the court, it was held that anticompetitive conduct by a municipality is protected by the state action exemption to the federal antitrust laws where it is authorized by state law, even though the state does not compel or actively supervise the anticompetitive conduct or expressly assert that the law is intended to have an anticompetitive effect.

## Headnotes

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > "state action" exemption -- municipalities -- sewage service -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C]

A city's actions in acquiring a monopoly over sewage treatment services in two counties, and making those services available only to areas which agree to be annexed by the city and to use its sewage collection services rather than those of adjacent towns, are exempt from challenge under the federal antitrust laws as "state action," where such actions are authorized, though not compelled, by the state pursuant to a clearly articulated state policy to replace competition in the provision of sewage services with regulation.

RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §9 > "state action" exemption -- municipalities -- action pursuant to state policy -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

Municipalities are not beyond the reach of the federal antitrust laws by virtue of their status because they are not themselves sovereign; rather, in order to obtain the protection of the "state action" exemption, municipalities must demonstrate that their anticompetitive activities were authorized by the state pursuant to a clearly expressed state policy to displace competition with regulation or monopoly public service.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > "state action" exemption -- municipalities -- express statement of policy -- > Headnote:

[LEdHN\[3\]](#) [3]

A state legislature need not expressly state in a statute or its legislative history that it intends actions delegated to municipalities therein to have anticompetitive effects, in order for that statute to constitute a "clear articulation" of an anticompetitive policy and thus bring municipal actions based on that statute within the "state action" exemption from the federal antitrust laws.

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RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > "state action" exemption -- municipalities -- state compulsion -- > Headnote:

[LEdHN\[4\]](#) [4]

It is not necessary to show that a municipality's anticompetitive conduct was compelled by the state in order to find that the municipality acted pursuant to a clearly articulated state policy, and thus bring such conduct within the "state action" exemption from the federal antitrust laws.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > "state action" exemption -- municipalities -- state supervision -- > Headnote:

[LEdHN\[5\]](#) [5]

A municipality need not show that its anticompetitive conduct was actively supervised by the state in order to bring that conduct within the "state action" exemption from the federal antitrust laws.

## Syllabus

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Petitioners, unincorporated townships located in Wisconsin adjacent to respondent city, filed suit against respondent in Federal District Court, alleging that petitioners were potential competitors of respondent in the collection and transportation of sewage, and that respondent had violated the Sherman Act by acquiring a monopoly over the provision of sewage treatment services in the area and by tying the provision of such services to the provision of sewage collection and transportation services. Respondent refused to supply sewage treatment services to petitioners, but supplied the services to individual landowners in petitioners' areas if a majority of the individuals in the area voted by referendum election to have their homes annexed by respondent and to use its sewage collection and transportation services. The District Court dismissed the complaint, finding, *inter alia*, that Wisconsin statutes regulating the municipal provision of sewage services expressed a clear state policy to replace competition with regulation. The court concluded that respondent's [\*\*\*2] allegedly anticompetitive conduct fell within the "state action" exemption to the federal antitrust laws established by [Parker v. Brown, 317 U.S. 341](#). The Court of Appeals affirmed.

*Held:* Respondent's anticompetitive activities are protected by the state action exemption to the federal antitrust laws. Pp. 38-47.

(a) Before a municipality may claim the protection of the state action exemption, it must demonstrate that it is engaging in the challenged activity pursuant to a "clearly articulated" state policy. [Lafayette v. Louisiana Power & Light Co., 435 U.S. 389](#). Pp. 38-40.

(b) Wisconsin statutes grant authority to cities to construct and maintain sewage systems, to describe the district to be served, and to refuse to serve unannexed areas. The statutes are not merely neutral on state policy but, instead, clearly contemplate that a city may engage in anticompetitive conduct. To pass the "clear articulation" test, the legislature need not expressly state in a statute or the legislative history that it intends for the delegated action to have anticompetitive effects. The Wisconsin statutes evidence a clearly articulated state [\*\*\*3] policy to displace competition with regulation in the area of municipal provision of sewage services. Pp. 40-44.

(c) The "clear articulation" requirement of the state action test does not require that respondent show that the State "compelled" it to act. Although compulsion affirmatively expressed may be the best evidence of state policy, it is by

no means a prerequisite to a finding that a municipality acted pursuant to clearly articulated state policy. [Cantor v. Detroit Edison Co., 428 U.S. 579](#), and [Goldfarb v. Virginia State Bar, 421 U.S. 773](#), distinguished. Pp. 45-46.

(d) Active state supervision of anticompetitive conduct is not a prerequisite to exemption from the antitrust laws where the actor is a municipality rather than a private party. The requirement of active state supervision serves essentially the evidentiary function of ensuring that the actor is engaging in the challenged conduct pursuant to state policy. Where the actor is a municipality rather than a private party, there is little or no danger that it is involved in a *private* price-fixing arrangement. The danger that a municipality will seek to further [\*\*\*\*4] purely parochial public interests at the expense of more overriding state goals is minimal, because of the requirement that the municipality act pursuant to a clearly articulated state policy. Pp. 46-47.

**Counsel:** John J. Covelli argued the cause for petitioners. With him on the briefs was Michael P. May.

Frederick W. Fischer argued the cause and filed a brief for respondent.\*

[\*\*\*\*5]

**Judges:** POWELL, J., delivered the opinion for a unanimous Court.

**Opinion by:** POWELL

## Opinion

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[\*36] [\*27] [\*\*1715] JUSTICE POWELL delivered the opinion of the Court.

[LEdHN\[1A\]!\[\]\(7f4569f4d9dcdb5c8fdad0daca5f84d7\_img.jpg\)](#) [1A] This case presents the question whether a municipality's anticompetitive activities are protected [\*\*\*28] by the state action exemption to the federal antitrust laws established by [Parker v. Brown, 317 U.S. 341 \(1943\)](#), when the activities are authorized, but not compelled, by the State, and the State does not actively supervise the anticompetitive conduct.

I

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\* Ronald A. Zumbrun and Robert K. Best filed a brief for the Pacific Legal Foundation as amicus curiae urging reversal.

Briefs of amici curiae urging affirmance were filed for the United States by Solicitor General Lee, Assistant Attorney General McGrath, Deputy Solicitor General Wallace, Deputy Assistant Attorney General Rule, Carter G. Phillips, Catherine G. O'Sullivan, and Nancy C. Garrison; for the State of Illinois et al. by Neil F. Hartigan, Attorney General of Illinois, Robert E. Davy, Thomas J. DeMay, Linley E. Pearson, Attorney General of Indiana, Frank A. Baldwin, Deputy Attorney General, Bronson C. LaFollette, Attorney General of Wisconsin, and Michael L. Zaleski, Assistant Attorney General; for the Commonwealth of Virginia et al. by Gerald L. Baliles, Attorney General of Virginia, Elizabeth B. Lacy, Deputy Attorney General, Craig Thomas Merritt, Assistant Attorney General, Joseph I. Lieberman, Attorney General of Connecticut, Robert M. Langer, Assistant Attorney General, Hubert H. Humphrey III, Attorney General of Minnesota, Stephen P. Kilgriff, Assistant Attorney General, LeRoy S. Zimmerman, Attorney General of Pennsylvania, Eugene F. Waye, Deputy Attorney General, Brian McKay, Attorney General of Nevada, David L. Wilkerson, Attorney General of Utah, and Suzanne M. Dallimore, Assistant Attorney General; for the U.S. Conference of Mayors et al. by Stephen Chapple, Frederic Lee Ruck, and Ross D. Davis; for the American Public Power Association et al. by Carlos C. Smith, Frederick L. Hitchcock, Edward D. Meyer, Stanley P. Hebert, John W. Pestle, John D. Maddox, June W. Wiener, Clifford D. Pierce, Jr., Donald W. Jones, Eugene N. Collins, and Randall L. Nelson; and for the National Institute of Municipal Law Officers by Roger F. Cutler, Roy D. Bates, George Agnost, Benjamin L. Brown, J. Lamar Shelley, John W. Witt, Robert J. Alfton, James K. Baker, Clifford D. Pierce, Jr., William H. Taube, William I. Thornton, Jr., Henry W. Underhill, Jr., and Charles S. Rhyne.

David Epstein filed a brief for the American Ambulance Association et al. as amici curiae.

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Petitioners -- Town of Hallie, Town of Seymour, Town of Union, and Town of Washington (the Towns) -- are four Wisconsin unincorporated townships located adjacent to respondent, the City of Eau Claire (the City). Town of Hallie is located in Chippewa County, and the other three towns are located in Eau Claire County.<sup>1</sup> The Towns filed suit against the City in United States District Court for the Western District of Wisconsin seeking injunctive relief and alleging that the City violated the Sherman Act, [15 U. S. C. § 1 et seq.](#), by acquiring a monopoly over the provision of sewage treatment services in Eau Claire and Chippewa Counties, and by tying [<sup>\*37</sup>] [<sup>\*\*\*\*6</sup>] the provision of such services to the provision of sewage collection and transportation services.<sup>2</sup> Under the Federal Water Pollution Control Act, [33 U. S. C. § 1251 et seq.](#), the City had obtained federal funds to help build a sewage treatment facility within the Eau Claire Service Area, that included the Towns; the facility is the only one in the market available to the Towns. The City has refused to supply sewage treatment services to the Towns. It does supply the services to individual landowners in areas of the Towns if a majority of the individuals in the area vote by referendum election to have their homes annexed by the City, see Wis. Stat. §§ 66.024(4), 144.07(1) (1982), and to use the City's sewage collection and transportation services.

[<sup>\*\*\*\*7</sup>] Alleging that they are potential competitors of the City in the collection and transportation of sewage, the Towns contended in the District Court that the City used its monopoly over sewage treatment to gain an unlawful monopoly over the provision of sewage collection and transportation services, in violation of the Sherman Act. They also contended that the City's actions constituted an illegal tying arrangement and an unlawful refusal to deal with the Towns.

[<sup>\*\*1716</sup>] The District Court ruled for the City. It found that Wisconsin's statutes regulating the municipal provision of sewage service expressed a clear state policy to replace competition with regulation. The court also found that the State adequately supervised the municipality's conduct through the State's Department of Natural Resources, that was authorized to review municipal decisions concerning provision of sewage services and corresponding annexations of land. The court concluded that the City's allegedly anticompetitive conduct fell within the state action exemption to the federal antitrust laws, as set forth in *Community Communications* [<sup>\*38</sup>] Co. v. [Boulder](#), [455 U.S. 40](#) [<sup>\*\*\*291</sup> (1982)], [<sup>\*\*\*\*8</sup>] and [Parker v. Brown, supra](#). Accordingly, it dismissed the complaint.

The United States Court of Appeals for the Seventh Circuit affirmed. [700 F.2d 376 \(1983\)](#). It ruled that the Wisconsin statutes authorized the City to provide sewage services and to refuse to provide such services to unincorporated areas. The court therefore assumed that the State had contemplated that anticompetitive effects might result, and concluded that the City's conduct was thus taken pursuant to state authorization within the meaning of [Parker v. Brown, supra](#). The court also concluded that in a case such as this involving "a local government performing a traditional municipal function," [700 F.2d, at 384](#), active state supervision was unnecessary for *Parker* immunity to apply. Requiring such supervision as a prerequisite to immunity would also be unwise in this situation, the court believed, because it would erode traditional concepts of local autonomy and home rule that were clearly expressed in the State's statutes.

We granted certiorari, [467 U.S. 1240](#) (1984), and now affirm.

## II

The starting point in any [<sup>\*\*\*\*9</sup>] analysis involving the state action doctrine is the reasoning of *Parker v. Brown*. In *Parker*, [HN1](#) relying on principles of federalism and state sovereignty, the Court refused to construe the Sherman Act as applying to the anticompetitive conduct of a State acting through its legislature. [317 U.S., at 350-351](#). Rather, it ruled that the Sherman Act was intended to prohibit *private* restraints on trade, and it refused to infer an intent to "nullify a state's control over its officers and agents" in activities directed by the legislature. [Id., at 351](#).

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<sup>1</sup> The City is located in both Eau Claire and Chippewa Counties.

<sup>2</sup> The complaint also alleged violations of the Federal Water Pollution Control Act, [33 U. S. C. § 1251 et seq.](#), and of a common-law duty of a utility to serve. The District Court dismissed these claims, and they are not at issue in this Court.

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LEdHN[2A][<sup>↑</sup>] [2A]Municipalities, on the other hand, are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign. Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412 (1978) (opinion of BRENNAN, J.). Rather, to obtain exemption, municipalities [\*39] must demonstrate that their anticompetitive activities were authorized by the State "pursuant to state policy to displace competition with regulation or monopoly public service." Id., at 413.

The determination that a municipality's activities constitute [\*\*\*10] state action is not a purely formalistic inquiry; the State may not validate a municipality's anticompetitive conduct simply by declaring it to be lawful. Parker v. Brown, 317 U.S., at 351. On the other hand, in proving that a state policy to displace competition exists, the municipality need not "be able to point to a specific, detailed legislative authorization" in order to assert a successful *Parker* defense to an antitrust suit. 435 U.S., at 415. Rather, *Lafayette* suggested, without deciding the issue, that it would be sufficient to obtain *Parker* immunity for a municipality to show that it acted pursuant to a "clearly articulated and affirmatively expressed . . . state policy" that was "actively supervised" by the State. 435 U.S., at 410. The [\*\*\*30] plurality viewed this approach as desirable because it "[preserved] to the States their freedom . . . to administer state regulatory policies free of the inhibitions of the federal antitrust laws" [\*\*1717] without at the same time permitting purely parochial interests to disrupt the Nation's free-market goals." Id., at 415-416.

In *California* [\*\*\*11] *Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)*, a unanimous Court applied the *Lafayette* two-pronged test to a case in which the state action exemption was claimed by a private party.<sup>3</sup> In [\*40] that case, we found no antitrust immunity for California's wine-pricing system. Even though there was a clear legislative policy to permit resale liquor price maintenance, there was no state supervision of the anticompetitive activity. Thus, the private wine producers who set resale prices were not entitled to the state action exemption. When we again addressed the issue of a municipality's exemption from the antitrust laws in *Boulder, supra*, we declined to accept *Lafayette*'s suggestion that a municipality must show more than that a state policy to displace competition exists. We held that Colorado's Home Rule Amendment to its Constitution, conferring on municipal governments general authority to govern local affairs, did not constitute a "clear articulation" of a state policy to authorize anticompetitive conduct with respect to the regulation of cable television in the locale. Because the city could not meet [\*\*\*12] this requirement of the state action test, we declined to decide whether governmental action by a municipality must also be actively supervised by the State. 455 U.S., at 51-52, n. 14.

LEdHN[2B][<sup>↑</sup>] [2B]It is therefore clear from our cases that HN2[<sup>↑</sup>] before a municipality will be entitled to the protection of the state action exemption from the antitrust laws, it must demonstrate that it is [\*\*\*13] engaging in the challenged activity pursuant to a clearly expressed state policy. We have never fully considered, however, how clearly a state policy must be articulated for a municipality to be able to establish that its anticompetitive activity constitutes state action. Moreover, we have expressly left open the question whether action by a municipality -- like action by a private party -- must satisfy the "active state supervision" requirement. Boulder, supra, at 51-52, n. 14. We consider both of those issues below.

### III

The City cites several provisions of the Wisconsin code to support its claim that its allegedly anticompetitive activity [\*41] constitutes state action. We therefore examine the statutory structure in some detail.

[\*\*\*31] A

Wisconsin Stat. § 62.18(1) (1981-1982) HN3[<sup>↑</sup>] grants authority to cities to construct, add to, alter, and repair sewage systems. The authority includes the power to "describe with reasonable particularity the district to be

<sup>3</sup> *Midcal* was originally brought as a mandamus action seeking an injunction against a state agency, the California Department of Alcoholic Beverage Control. The State played no role, however, in setting prices or reviewing their reasonableness, activities carried out by the private wine dealers. 445 U.S., at 100-101. The mere fact that the state agency was a named defendant was not sufficient to alter the state action analysis from that appropriate to a case involving the state regulation of private anticompetitive acts. See *Southern Motor Carriers Rate Conference, Inc. v. United States*, post, at 56-57.

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[served]." *Ibid.* This grant of authority is supplemented by Wis. Stat. § 66.069(2)(c) (1981-1982), providing that a city operating a public utility

"may by ordinance fix the limits of such service [\*\*\*\*14] in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated."

With respect to joint sewage systems, Wis. Stat. § 144.07(1) (1981-1982) [HN4↑](#) provides that the State's Department of Natural Resources may require a city's sewage system to be constructed so that other cities, towns, or areas may connect to the system, and the Department may order that such [\\*\\*1718](#) connections be made. Subsection (1m) provides, however, that an order by the Department of Natural Resources for the connection of unincorporated territory to a city system shall be void if that territory refuses to become annexed to the city.<sup>4</sup>

## B

The Towns contend that these statutory provisions do not evidence a state policy to displace competition in the provision of sewage services because they make no express mention [\[\\*42\]](#) of anticompetitive [\[\\*\\*\\*\\*15\]](#) conduct.<sup>5</sup> As discussed above, the statutes clearly contemplate that a city may engage in anticompetitive conduct. Such conduct is a foreseeable result of empowering the City to refuse to serve unannexed areas. It is not necessary, as the Towns contend, for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects. Applying the analysis of [\*Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 \(1978\)\*](#), it is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served. We think it is clear that anticompetitive effects logically would result from this broad authority to regulate. See [\*New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96, 109 \[\\*\\*321 \(1978\)\]\*](#) (no express intent to displace the antitrust laws, but statute provided regulatory structure that inherently "[displaced] unfettered business freedom"). Accord, 1 P. Areeda & D. Turner, [\*Antitrust Law\*](#) para. 212.3, p. 54 (Supp. 1982).

[\[\\*\\*\\*\\*16\]](#) [\[\\*43\]](#) Nor do we agree with the Towns' contention that the statutes at issue here are neutral on state policy. The Towns attempt to liken the Wisconsin statutes to the Home Rule Amendment involved in *Boulder*, arguing that the Wisconsin statutes are neutral because they leave the City free to pursue either anticompetitive conduct or free-market competition in the field of sewage services. The analogy to the Home Rule Amendment involved in *Boulder* is inapposite. That Amendment to the Colorado Constitution allocated only the most general authority to municipalities to govern local affairs. We held that it was neutral and did not satisfy the "clear articulation" component of the state action test. The Amendment simply did not address the regulation of cable television. Under Home Rule the municipality was to be free to decide every aspect of policy relating to cable television, as well as policy relating to any other field of regulation of local concern. Here, in contrast, the State has specifically authorized Wisconsin cities to provide sewage services and has delegated to the cities the express

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<sup>4</sup> There is no such order of the Department of Natural Resources at issue in this case.

<sup>5</sup> The Towns also rely on Wis. Stat. Ann. §§ 66.076(1) and 66.30 (1965 and Supp. 1984) to argue that the State's policy on the provision of sewage services is actually procompetitive. This claim must fail because, aside from the fact that it was not raised below, the provisions relied upon do not support the contention. First, it is true that § 66.076(1) permits certain municipalities, including towns, to operate sewage systems. The provision is simply a general enabling statute, however, not a mandatory prescription. In addition, subsection (8) of § 66.076 incorporates into the enabling statute all of the limitations of § 66.069, including the power to limit the area of service. Thus, § 66.076(1) does not express a procompetitive state attitude.

Nor does § 66.30 aid the Towns. It is a general provision concerning all utilities -- not just sewage systems -- that permits municipalities to enter into cooperative agreements. The statute is not mandatory, but merely permissive. Moreover, even assuming two municipalities agreed pursuant to this section to cooperate in providing sewage services, the result would not necessarily be greater competition. Rather, the two combined might well be more effective than either alone in keeping other municipalities out of the market.

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authority to take action that foreseeably will result in anticompetitive [\*\*\*\*17] effects. No reasonable argument can be made that these statutes are neutral in the same way that Colorado's Home Rule Amendment was.<sup>6</sup>

[\*\*1719] [LEdHN\[3\]](#)<sup>↑</sup> [3]The Towns' argument amounts to a contention that to pass the "clear articulation" test, a legislature must expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects. This contention embodies an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalog all of the anticipated effects of a statute of this kind.

[\*44] Furthermore, requiring such explicit authorization by the State might have deleterious and unnecessary consequences. Justice Stewart's dissent in *Lafayette* was concerned that the plurality's opinion would [\*\*\*\*18] impose this kind of requirement on legislatures, with detrimental side effects upon municipalities' local autonomy and authority to govern themselves. [435 U.S., at 434-435](#). In fact, this Court has never required the degree of specificity that the Towns insist is necessary.<sup>7</sup>

[LEdHN\[1B\]](#)<sup>↑</sup> [1B]In sum, we conclude that the Wisconsin statutes evidence a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation in the area of municipal provision of [\*\*\*33] sewage services. These statutory [\*\*\*\*19] provisions plainly show that "the legislature contemplated the kind of action complained of." [Lafayette, supra, at 415](#) (quoting the decision of the Court of [Appeals, 532 F.2d 431, 434 \(CA5 1976\)](#)).<sup>8</sup> This is sufficient to satisfy the "clear articulation" requirement of the state action test.

[\*\*\*\*20] [\*45] C

The Towns further argue that the "clear articulation" requirement of the state action test requires at least that the City show that the State "compelled" it to act. In so doing, they rely on language in [Cantor v. Detroit Edison Co., 428 U.S. 579 \(1976\)](#), and [Goldfarb v. Virginia State Bar, 421 U.S. 773 \(1975\)](#). We disagree with this contention for several reasons. *Cantor* and *Goldfarb* concerned private parties -- not municipalities -- claiming the state action exemption. This fact distinguishes those cases because [HN5](#)<sup>↑</sup> a municipality is an arm of the State. We may

<sup>6</sup> Nor does it help the Towns' claim that the statutes leave to the City the discretion whether to provide sewage services. States must always be free to delegate such authority to their political subdivisions.

<sup>7</sup> Requiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable also because it would embroil the federal courts in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny. See 1 P. Areeda & D. Turner, [Antitrust Law](#) para. 212.3(b) (Supp. 1982).

<sup>8</sup> Our view of the legislature's intent is supported by [Town of Hallie v. City of Chippewa Falls, 105 Wis. 2d 533, 314 N. W. 2d 321 \(1982\)](#), in which the Supreme Court of Wisconsin rejected the Town of Hallie's challenge under state antitrust laws against the City of Chippewa Falls in a case quite similar to the one at bar. There, the Town of Hallie argued that the City's refusal to provide it with sewage treatment services, the requirement of annexation, and the City's conditioning of the provision of treatment services on the acceptance also of sewage collection and other city services, violated the state antitrust laws. The State Supreme Court disagreed, concluding that the legislature intended the City to undertake the challenged actions. Those actions therefore were exempt from the State's antitrust laws. Analyzing §§ 66.069(2)(c) and 144.07(1m), the court concluded that the legislature had "viewed annexation by the city of a surrounding unincorporated area as a reasonable *quid pro quo* that a city could require before extending sewer services to the area." [Id., at 540-541, 314 N. W. 2d, at 325](#).

Although the Wisconsin Supreme Court's opinion does not, of course, decide the question presented here of the City's immunity under the *federal* antitrust laws, it is instructive on the question of the state legislature's intent in enacting the statutes relating to the municipal provision of sewage services.

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presume, absent a showing to the contrary, that the municipality acts in the public interest.<sup>9</sup> A private party, on the [\*\*1720] other hand, may be presumed to be acting primarily on his or its own behalf.

[\*\*\*21] LEdHN[4]<sup>↑</sup> [4]None of our cases involving HN6<sup>↑</sup> the application of the state action exemption to a municipality has required that compulsion be shown. Both Boulder, 455 U.S., at 56-57, and Lafayette, 435 U.S., at 416-417, spoke in terms of the State's direction or authorization of the anticompetitive practice at issue. This is so because where the actor is a municipality, acting pursuant to a clearly articulated state policy, compulsion is simply unnecessary as an evidentiary matter to prove that the challenged practice constitutes state action. In short, although compulsion affirmatively [\*46] expressed may be the best evidence of state policy, it is by no means a prerequisite to a finding that a municipality [\*\*\*34] acted pursuant to clearly articulated state policy.

#### IV

LEdHN[5]<sup>↑</sup> [5]Finally, the Towns argue that as there was no active state supervision, the City may not depend on the state action exemption. The Towns rely primarily on language in *Lafayette*. It is fair to say that our cases have not been entirely clear. The plurality opinion in *Lafayette* did suggest, without elaboration and without deciding the issue, that a city claiming the exemption [\*\*\*22] must show that its anticompetitive conduct was actively supervised by the State. 435 U.S., at 410. In *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), a unanimous Court held that supervision is required where the anticompetitive conduct is by private parties. In *Boulder*, however, the most recent relevant case, we expressly left this issue open as to municipalities. 455 U.S., at 51-52, n. 14. We now conclude that the active state supervision requirement should not be imposed in cases in which the actor is a municipality.<sup>10</sup>

[\*\*\*23] As with respect to the compulsion argument discussed above, the requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy. In *Midcal*, we stated that the active state supervision requirement was necessary to prevent a State from circumventing the Sherman Act's proscriptions "by casting . . . a gauzy cloak of state involvement over what is [\*47] essentially a private price-fixing arrangement." 445 U.S., at 106. HN7<sup>↑</sup> Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy. Once it is clear that state authorization [\*\*\*24] exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.

#### V

LEdHN[1C]<sup>↑</sup> [1C]We conclude that the actions of the City of Eau Claire in this case are exempt from the Sherman Act. They were taken pursuant to a clearly articulated state policy to replace competition in the provision of sewage services with regulation. We further hold that HN8<sup>↑</sup> active state supervision is not a prerequisite to

<sup>9</sup> Among other things, municipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct. Municipalities in some States are subject to "sunshine" laws or other mandatory disclosure regulations, and municipal officers, unlike corporate heads, are checked to some degree through the electoral process. Such a position in the public eye may provide some greater protection against antitrust abuses than exists for private parties.

<sup>10</sup> In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue. Where state or municipal regulation by a private party is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists. See *Southern Motor Carriers Rate Conference, Inc. v. United States*, *post*, at 62.

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[\*\*\*35] exemption from the antitrust laws where the actor is a municipality rather than a private party. We accordingly [\*\*1721] affirm the judgment of the Court of Appeals for the Seventh Circuit.

*It is so ordered.*

## References

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54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practice 15

24 Federal Procedure, L Ed, Monopolies and Restraints of Trade 54:1 et seq.

12 Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade 48:81 et seq.

24 Am Jur Trials 1, Defending Antitrust Lawsuits

### 15 USCS 1 et seq.

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair [\*\*\*\*25] Trade Practices 9

L Ed Index to Annos, Municipal Corporations; Restraints of Trade and Monopolies

ALR Quick Index, Municipal Corporations; Restraints of Trade and Monopolies

Federal Quick Index, Monopolies and Restraints of Trade

Annotation References:

What constitutes "state action" under rule exempting state and local governmental action from antitrust laws. [70 L Ed 2d 973](#).

Supreme Court's views as to what constitutes per se illegal "price fixing" under the Sherman Act ([15 USCS 1 et seq.](#)). [64 L Ed 2d 997](#).

Applicability of federal antitrust laws as affected by other federal statutes or by [Federal Constitution. 45 L Ed 2d 841](#).

Valid governmental action as conferring immunity or exemption from private liability under the federal antitrust laws. 12 ALR Fed 329.

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## Southern Motor Carriers Rate Conference v. United States

Supreme Court of the United States

November 26, 1984, Argued ; March 27, 1985, Decided

No. 82-1922

### **Reporter**

471 U.S. 48 \*; 105 S. Ct. 1721 \*\*; 85 L. Ed. 2d 36 \*\*\*; 1985 U.S. LEXIS 196 \*\*\*\*; 53 U.S.L.W. 4422; 1985-1 Trade Cas. (CCH) P66,485

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., ET AL. v. UNITED STATES

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

**Disposition:** [702 F.2d 532](#), reversed.

## **Core Terms**

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immunity, ratemaking, Sherman Act, compulsion, bureaus, regulated, rates, anti trust law, private party, price fixing, anticompetitive, articulated, exemption, anticompetitive conduct, regulatory program, common carrier, motor carrier, state-action, intrastate, carriers, state action, antitrust, sovereign, policies, state policy, Commissions, transportation, supervise, state agency, proposals

## **LexisNexis® Headnotes**

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

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

### [\*\*HN1\*\*](#) **Air & Space Transportation, Charters**

The Interstate Commerce Act expressly reserves to the states the regulation of common carriers' intrastate rates, even if these rates affect interstate commerce. [49 U.S.C.S. § 10521\(b\)](#).

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

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

### [\*\*HN2\*\*](#) **Exemptions & Immunities, Parker State Action Doctrine**

There is a two-pronged test for determining whether state regulation of private parties is shielded from the federal antitrust laws. First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy. Second, the state must supervise actively any private anticompetitive conduct. This supervision requirement prevents the state from frustrating the national policy in favor of competition by casting a gauzy cloak of state involvement over what is essentially private anticompetitive conduct.

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

Antitrust & Trade Law > Exemptions & Immunities > General Overview

#### **HN3** Exemptions & Immunities, Parker State Action Doctrine

State action immunity is not dependent on a finding that an exemption from the federal antitrust laws is "necessary."

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

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

#### **HN4** Exemptions & Immunities, Parker State Action Doctrine

The success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant.

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

#### **HN5** Exemptions & Immunities, Parker State Action Doctrine

The federal antitrust laws do not forbid the states to adopt policies that permit, but do not compel, anticompetitive conduct by regulated private parties. The state must clearly articulate its intent to adopt a permissive policy.

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Commercial Vehicles > Rates & Tariffs

#### **HN6** Common Carrier Duties & Liabilities, Rates & Tariffs

Under the Interstate Commerce Act, motor common carriers are permitted, but not compelled, to engage in collective interstate ratemaking. [49 U.S.C.S. §§ 10706\(b\)\(2\)](#) and [10706\(d\)\(2\)\(C\)](#).

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

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

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

## [HN7](#) Parker State Action Doctrine, Local Governments & Private Parties

Private parties are entitled to Parker immunity only if the state "acting as sovereign" intended to displace competition. For purposes of the Parker doctrine, not every act of a state agency is that of the state as sovereign.

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

## [HN8](#) Exemptions & Immunities, Parker State Action Doctrine

A state policy that expressly permits, but does not compel, anticompetitive conduct may be "clearly articulated" within the meaning of Midcal. A clearly articulated permissive policy will satisfy the first prong of the Midcal test. The second prong, however, prevents states from casting a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. This active supervision requirement ensures that a state's actions will immunize the anticompetitive conduct of private parties only when the state has demonstrated its commitment to a program through its exercise of regulatory oversight.

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

## [HN9](#) Exemptions & Immunities, Parker State Action Doctrine

When other evidence conclusively shows that a state intends to adopt a permissive policy, the absence of compulsion should not prove fatal to a claim of Parker immunity.

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

Energy & Utilities Law > Utility Companies > Rates > General Overview

## [HN10](#) Exemptions & Immunities, Parker State Action Doctrine

A private party may claim state action immunity only if both prongs of the Midcal test are satisfied.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Governments > State & Territorial Governments > Claims By & Against

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

## [HN11](#) Exemptions & Immunities, Parker State Action Doctrine

Parker immunity is available only when the challenged activity is undertaken pursuant to a clearly articulated policy of the state itself, such as a policy approved by a state legislature.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Energy & Utilities Law > Utility Companies > Rates > General Overview

Transportation Law > Intrastate Commerce

Communications Law > Regulators > State Agencies Regulating Intrastate Communications > General Overview

Energy & Utilities Law > Utility Companies > General Overview

### **HN12**[ **Interstate Commerce, State Powers**

The Mississippi Motor Carrier Regulatory Law of 1938, [\*Miss. Code Ann. § 77-7-1 et seq.\*](#) (1972 and Supp. 1984), gives the State Public Service Commission authority to regulate common carriers. The statute provides that the Commission is to prescribe "just and reasonable" rates for the intrastate transportation of general commodities. [\*Miss. Code Ann. § 77-7-221\*](#).

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

### **HN13**[ **Exemptions & Immunities, Parker State Action Doctrine**

A private party acting pursuant to an anticompetitive regulatory program need not point to a specific, detailed legislative authorization for its challenged conduct, as long as the state as sovereign clearly intends to displace competition in a particular field with a regulatory structure.

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

### **HN14**[ **Exemptions & Immunities, Parker State Action Doctrine**

If a state's intent to establish an anticompetitive regulatory program is clear, the state's failure to describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws.

## **Lawyers' Edition Display**

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### **Decision**

Collective ratemaking activities of rate bureaus, composed of motor common carriers operating in four southeastern states, held immune from federal antitrust liability under the state action doctrine even though such activities were not compelled by the states.

### **Summary**

"Rate bureaus" composed of motor common carriers operating in four southeastern states, on behalf of their members, submit joint rate proposals to the public service commissions in each state for approval or rejection. This collective ratemaking is authorized, but not compelled, by the states in which the rate bureaus operate. The United States, contending that collective ratemaking violates the federal antitrust laws, filed an action in the United States District Court for the Northern District of Georgia to enjoin the rate bureaus' alleged anticompetitive practices. The rate bureaus responded that their conduct was exempt from the federal antitrust laws by virtue of the "state action" doctrine. The District Court found the rate bureaus' arguments meritless, and entered a summary judgment in favor of the government, enjoining the rate bureaus from engaging in collective ratemaking activities with their members ([\*476 F Supp 471\*](#)). The United States Court of Appeals for the Fifth Circuit, sitting en banc, affirmed ([\*702 F2d 532\*](#)).

On certiorari, the United States Supreme Court reversed. In an opinion by Powell, J., joined by Burger, Ch. J., and Brennan, Marshall, Blackmun, Rehnquist, and O'Connor, JJ., it was held (1) that the two-pronged test for determining the applicability of the state action exemption from the federal antitrust laws--the challenged restraint must be one clearly articulated and affirmatively expressed as state policy and the state must supervise actively any private anticompetitive conduct--is applicable to private parties' claims of state action immunity, (2) that a state policy that expressly permits but does not compel anticompetitive conduct may be clearly articulated within the meaning of the first prong of this test, and (3) that the collective ratemaking activities of the rate bureaus were thus immune from federal antitrust liability, even though such activities were not compelled by the states, since the challenged conduct was taken pursuant to a clearly articulated state policy--three of the four states expressly permit collective ratemaking and the fourth state, while not expressly approving collective ratemaking, has articulated clearly its intent to displace price competition among common carriers with a regulatory structure--and since the government conceded that the states, through their agencies, actively supervise the parties' conduct, thereby satisfying both prongs of the test.

Stevens, J., joined by White, J., dissented, expressing the view that private parties may not claim state action immunity unless their unlawful conduct is compelled by the state.

## Headnotes

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RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §45 > carriers' rates and charges -- motor common carriers -- state action doctrine -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D]

The collective ratemaking activities of "rate bureaus" composed of motor common carriers operating in four southeastern states, whereby the rate bureaus, on behalf of their members, submit joint rate proposals to the public service commissions in each state for approval or rejection, are immune from federal antitrust liability under the state action doctrine where such activities, though not compelled by the states, are taken pursuant to a clearly articulated policy of each of the states and the states, through their agencies, actively supervise the rate bureaus' activities. (Stevens and White, JJ., dissented from this holding.)

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > acts prohibited -- state action exemption -- private parties -- compulsion -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B] [LEdHN\[2C\]](#) [2C] [LEdHN\[2D\]](#) [2D]

The two-pronged test for determining the applicability of the state action exemption from the federal antitrust laws--(1) the challenged restraint must be one clearly articulated and affirmatively expressed as state policy, and (2) the state must supervise actively any private anticompetitive conduct--is applicable to private parties' claims of state action immunity; moreover, a state policy that expressly permits, but does not compel, anticompetitive conduct may be "clearly articulated" within the meaning of the first prong of this test, and thus when other evidence conclusively shows that a state intends to adopt a permissive policy, the absence of compulsion should not prove fatal to a claim of state action immunity. (Stevens and White, JJ., dissented from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > acts prohibited -- exemption -- test --

> Headnote:

[LEdHN\[3A\]](#) [ ] [3A] [LEdHN\[3B\]](#) [ ] [3B]

The state action immunity from federal antitrust laws is not dependent on a finding that an exemption from the federal antitrust laws is necessary to make a state regulatory program work. (Stevens and White, JJ., dissented from this holding.)

## Syllabus

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Petitioner Southern Motor Carriers Rate Conference and petitioner North Carolina Motor Carriers Association (petitioners), "rate bureaus" composed of motor common carriers operating in North Carolina, Georgia, Tennessee, and Mississippi, submit, on behalf of their members, joint rate proposals to the Public Service Commission in each State. This collective ratemaking is authorized, but not compelled, by the respective States. The United States, contending that petitioners' collective ratemaking violates the federal antitrust laws, filed an action in Federal District Court to enjoin it. Petitioners responded that their conduct was immune from the federal antitrust laws by virtue of the "state action" doctrine of [\*Parker v. Brown, 317 U.S. 341\*](#). The District Court entered a summary judgment in the Government's favor. The Court of Appeals affirmed, holding that compulsion is a threshold requirement to a finding of *Parker* immunity. The court reasoned that the two-pronged test of [\*California Retail Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97\*](#), [\*\*\*\*2] for determining whether state regulation of private parties is shielded from the federal antitrust laws -- the challenged restraint must be one clearly articulated and affirmatively expressed as a state policy and the State must supervise actively any private anticompetitive conduct -- is inapplicable to suits against private parties; that even if *Midcal* is applicable, private conduct that is not compelled cannot be taken pursuant to a "clearly articulated state policy" within the meaning of *Midcal*'s first prong; and that because [\*Goldfarb v. Virginia State Bar, 421 U.S. 773\*](#) -- which held that a State Bar, acting alone, could not immunize from the federal antitrust laws its anticompetitive conduct in fixing minimum fees for lawyers -- was cited with approval in *Midcal*, the *Midcal* Court endorsed the continued validity of a "compulsion requirement."

**Held:** Petitioners' collective ratemaking activities, although not compelled by the respective States, are immune from federal antitrust liability under the state action doctrine. The *Midcal* test should be used to determine whether the private rate bureaus' collective ratemaking activities [\*\*\*\*3] are protected under the federal antitrust laws. Moreover, the actions of a private party can be attributed to a "clearly articulated state policy," within the meaning of the *Midcal* test's first prong, even in the absence of compulsion. The anticompetitive conduct is taken pursuant to a "clearly articulated state policy" under the first prong of the *Midcal* test. Here North Carolina, Georgia, and Tennessee statutes expressly permit collective ratemaking. Mississippi, while not expressly approving of collective ratemaking, has clearly articulated its intent to displace price competition among common carriers with a regulatory structure. Because the Government conceded that there was adequate state supervision, both prongs of the *Midcal* test are satisfied. Pp. 55-66.

**Counsel:** Allen I. Hirsch argued the cause for petitioners. With him on the brief for petitioner Southern Motor Carriers Rate Conference, Inc., was Simon A. Miller. Bryce Rea, Jr., and Patrick McEligot filed briefs for petitioner North Carolina Motor Carriers Association, Inc. William Paul Rodgers, Jr., filed briefs for petitioner National Association of Regulatory Utility Commissioners.

Deputy Solicitor General [\*\*\*\*4] Wallace argued the cause for the United States. With him on the brief were Solicitor General Lee, Assistant Attorney General McGrath, Deputy Assistant Attorney General Rule, Carter G. Phillips, Catherine G. O'Sullivan, Elliott M. Seiden, and Nancy C. Garrison.\*

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\* Briefs of amici curiae urging reversal were filed for the American Movers Conference et al. by James A. Calderwood, Edward J. Kiley, and Robert R. Harris; and for the Edison Electric Institute by S. Eason Balch and H. Hampton Boles.

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**Judges:** POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE, J., joined, post, p. 66.

**Opinion by:** POWELL

## Opinion

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[\*50] [\*40] [\*\*1723] JUSTICE POWELL delivered the opinion of the Court.

LEdHN[1A] [1A]Southern Motor Carriers Rate Conference, Inc. (SMCRC), and North Carolina Motor Carriers Association, Inc. (NCMCA), petitioners, are "rate bureaus" composed of motor common carriers operating in four Southeastern States. The rate bureaus, on behalf of their members, submit joint rate proposals to the Public Service Commission in each State for approval or rejection. This collective ratemaking is authorized, but not compelled, by the States in which the rate bureaus operate. The United States, contending that collective ratemaking violates the federal antitrust laws, filed this action to enjoin the rate bureaus' alleged anticompetitive practices. We here [\*\*\*41] consider whether the petitioners' collective ratemaking activities, though not compelled by the States, are entitled to Sherman Act immunity under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943).

[\*\*\*\*6] I

A

In North Carolina, Georgia, Mississippi, and Tennessee, Public Service Commissions set motor common carriers' rates for the intrastate transportation of general commodities.<sup>1</sup> [\*\*\*\*7] Common carriers are required to submit proposed rates to the relevant Commission for approval.<sup>2</sup> A proposed [\*51] rate becomes effective if the state agency takes no action within a specified period of time. If a hearing is scheduled, however, a rate will become effective only after affirmative agency approval.<sup>3</sup> The State Public Service Commissions thus have and exercise ultimate authority and control over all intrastate rates.

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Briefs of amici curiae urging affirmance were filed for the State of Iowa et al. by Thomas G. Miller, Attorney General of Iowa, John R. Perkins and William F. Raisch, Assistant Attorneys General, Charles M. Oberly III, Attorney General of Delaware, Dennis J. Roberts II, Attorney General of Rhode Island, Faith A. La Salle, Special Assistant Attorney General, Bronson C. La Follette, Attorney General of Wisconsin, Michael L. Zaleski, Assistant Attorney General, Linley E. Pearson, Attorney General of Indiana, and Frank A. Baldwin, Deputy Attorney General; for the National Industrial Transportation League by John F. Donelan and Frederic L. Wood; and for the National Small Shipments Traffic Conference et al. by Daniel J. Sweeney.

<sup>1</sup> N. C. Gen. Stat. § 62-130(a) (1982); Ga. Code Ann. § 46-7-18 (Supp. 1984); Miss. Code Ann. § 77-7-217 (1972); Tenn. Code Ann. § 65-15-106(a) (Supp. 1984).

The Interstate Commerce Commission has the power to fix common carriers' rates for the interstate transportation of general commodities. 49 U. S. C. § 10704. HN1 The Interstate Commerce Act, however, expressly reserves to the States the regulation of common carriers' intrastate rates, even if these rates affect interstate commerce. 49 U. S. C. § 10521(b).

<sup>2</sup> N. C. Gen. Stat. § 62-134(a) (1982); Ga. Code Ann. § 46-2-25(a) (1982); Miss. Code Ann. §§ 77-7-211 and 77-7-215 (1972); Tenn. Code Ann. § 65-5-202 (1982).

<sup>3</sup> N. C. Gen. Stat. § 62-134(b) (1982); Ga. Code Ann. § 46-2-25(b) (1982); Miss. Code Ann. §§ 77-7-217 and 77-7-219 (1972); Tenn. Code Ann. § 65-5-203(a) (Supp. 1984).

In all four States, common carriers are allowed to agree on rate proposals prior to their joint submission to the regulatory agency.<sup>4</sup> [\*\*\*\*8] By reducing the number of proposals, collective ratemaking permits the agency to consider more carefully each submission. In fact, some Public Service Commissions have stated that without collective [\*\*1724] ratemaking they would be unable to function effectively as rate-setting bodies.<sup>5</sup> Nevertheless, collective ratemaking is not compelled by any of the States; every common carrier remains free to submit individual rate proposals to the Public Service Commissions.<sup>6</sup>

[\*52] As indicated above, SMCRC and NCMCA are private associations composed of motor common carriers operating in North Carolina, Georgia, Mississippi, and [\*\*\*42] Tennessee.<sup>7</sup> Both organizations have committees that consider possible rate changes.<sup>8</sup> If a rate committee concludes that an intrastate rate should be changed, a collective [\*\*\*\*9] proposal for the changed rate is submitted to the State Public Service Commission. Members of the Bureau, however, are not bound by the joint proposal. Any disapproving member may submit an independent rate proposal to the state regulatory Commission.<sup>9</sup>

#### [\*\*\*\*10] B

On November 17, 1976, the United States instituted this action against SMCRC and NCMCA in the United States District Court for the Northern District of Georgia.<sup>10</sup> [\*\*\*\*11] The [\*53] United States charged that the two rate bureaus had violated § 1 of the Sherman Act by conspiring with their members to fix rates for the intrastate transportation of general commodities. The rate bureaus responded that their conduct was exempt from the federal

<sup>4</sup> [N. C. Gen. Stat. § 62-152.1\(b\)](#) (1982); Ga. Code Ann. § 46-7-18 (Supp. 1984), Ga. Pub. Serv. Comm'n Rule 1-3-1-14 (1983); Response of the State of Mississippi and the Mississippi Public Service Comm'n as *Amici Curiae* in No. 76-1909A (ND Ga. 1977), p. 11; Tenn. Code Ann. § 65-15-119 (Supp. 1984), Tenn. Pub. Serv. Comm'n Rule 1220-2-1-40, Rules, Regulations and Statutes Governing Motor Carriers, p. 29 (1974).

<sup>5</sup> See, e. g., Response of the State of Mississippi and the Mississippi Public Service Comm'n, *supra*, at 15-16.

Moreover, the uniformity in prices that collective ratemaking tends to produce is considered desirable by the legislature of at least one State and the Public Service Commission of another. See [N. C. Gen. Stat. § 62-152.1\(b\)](#) (1982); Miss. Pub. Serv. Comm'n Rule 39D(4), Rules of Practice and Procedure and General Rules and Regulations under the Miss. Motor Carrier Act of 1938, as amended, p. 37 (1972).

<sup>6</sup> [N. C. Gen. Stat. § 62-152.1\(e\)](#) (1982); Ga. Pub. Serv. Comm'n Rule 1-3-1-14, *supra*; Response of the State of Mississippi and the Mississippi Public Service Comm'n, *supra*, at 11; Tenn. Pub. Serv. Comm'n Rule 1220-2-1-40, *supra*.

<sup>7</sup> At the time this action was filed, SMCRC represented its common carrier members before Public Service Commissions in North Carolina, Georgia, Mississippi, Tennessee, and Alabama. SMCRC, however, is no longer active before the Alabama Public Service Commission. Brief for Petitioners 3, n. 2. NCMCA represents its members before the regulatory agency in North Carolina.

<sup>8</sup> SMCRC has a separate rate committee for each of the States in which its members operate -- North Carolina, Georgia, Mississippi, and Tennessee. NCMCA, which is concerned solely with matters before the North Carolina Public Service Commission, has only one rate committee.

<sup>9</sup> In addition to providing a forum for their members to discuss rate proposals, the rate bureaus: "[(i)] publish tariffs and supplements containing the rates on which the carriers agree; and [(ii)] provide counsel, staff experts, and facilities for the preparation of cost studies, other exhibits and testimony for use in support of proposed rates at hearings held by the regulatory commissions." [702 F.2d 532, 534 \(1983\)](#).

<sup>10</sup> Motor Carriers Traffic Association, Inc. (MCTA), another rate bureau operating in North Carolina, also was named as a defendant. MCTA did not appeal from the District Court's judgment, and is not a party before this Court.

The District Court permitted the National Association of Regulatory Utility Commissioners (NARUC), an organization composed of state agencies, to intervene as a defendant. See [Fed. Rule Civ. Proc. 24\(a\)](#). Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions of those States in which the defendant rate bureaus operate.

471 U.S. 48, \*53; 105 S. Ct. 1721, \*\*1724; 85 L. Ed. 2d 36, \*\*\*42; 1985 U.S. LEXIS 196, \*\*\*\*11

antitrust laws by virtue of the state action doctrine. See [\*Parker v. Brown, 317 U.S. 341 \(1943\)\*](#).<sup>11</sup> They further asserted that their collective ratemaking activities did not violate the Sherman Act because the rates ultimately were determined by the appropriate state agencies. The District Court found the rate bureaus' arguments meritless, and entered a summary [\*\*1725] judgment in favor of the Government. [\*467 F.Supp. 471 \(1979\)\*](#). The defendants were enjoined from engaging in collective ratemaking activities with their members.

The Court of Appeals for the Fifth Circuit (Unit B, now the Eleventh Circuit), sitting en banc, affirmed the judgment of the District Court. [\*702 F.2d 532, \\*\\*\\*431 \(1983\)\*](#).<sup>12</sup> Relying primarily on [\*Goldfarb v. Virginia State Bar, 421 U.S. 773 \(1975\)\*](#), the court held that the rate bureaus' challenged conduct, because it was not compelled by the State, was not entitled to *Parker* immunity. The two-pronged test set forth in [\*California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 \(1980\)\*](#), was irrelevant, the court reasoned, for in that case a public official was the [\*54] named [\*\*\*\*12] defendant.<sup>13</sup> [\*702 F.2d, at 539\*](#). The Court of Appeals further held that even if *Midcal* were applicable to a private party's claim of state action immunity, the rate bureaus were not shielded from liability under the Sherman Act. The court concluded that only if the anticompetitive acts of a private party are compelled can a State's policy be held "clearly articulated and affirmatively expressed" within the meaning of *Midcal*. [\*702 F.2d, at 539\*](#).

After finding the rate bureaus not entitled to *Parker* immunity, the Court of Appeals held that their collective ratemaking activities violated [\*\*\*\*13] the [\*Sherman Act, 672 F.2d 469, 481 \(1982\)\*](#).<sup>14</sup> It rejected the rate bureaus' contention that because the regulatory agencies had ultimate authority and control over the rates charged, the federal antitrust laws were not violated. The Court of Appeals found that "joint ratesetting . . . [reduced] the amount of independent rate filing that otherwise would characterize the market process," and thus raised the prices charged for intrastate transportation of general commodities. [\*Id., at 478\*](#). This "naked price restraint," the court reasoned, is *per se* illegal. *Ibid.*

Four judges strongly dissented. They argued that *Midcal* was applicable to a private party's claim of state action immunity. The success of an antitrust action should depend upon the activity challenged rather than the identity of the defendant. [\*702 F.2d, at 543-544\*](#). [\*\*\*\*14] After asserting that *Midcal* provided the relevant test, the dissenters concluded that the lack of compulsion was not dispositive. Even in the absence of compulsion, a "state can articulate a clear and express policy." [\*Id., at 546\*](#). The dissent further concluded that a *per se* compulsion requirement denies States needed flexibility in the formation of regulatory programs, and thus is [\*55] inconsistent with the principles of federalism that Congress intended to embody in the Sherman Act.<sup>15</sup>

We granted certiorari,<sup>16</sup> [\*\*\*\*15] [\*467 U.S. 1240 \(1984\)\*](#), to decide whether petitioners' collective ratemaking activities, though not compelled by the States [\*\*\*44] in which they operate, are entitled to *Parker* immunity.<sup>17</sup>

<sup>11</sup> The defendants also contended that their collective ratemaking activities were protected by the *Noerr-Pennington* doctrine. See [\*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 \(1961\)\*](#); [\*Mine Workers v. Pennington, 381 U.S. 657 \(1965\)\*](#). Both the District Court and the Court of Appeals rejected this defense, and we do not address it. See n. 17, *infra*.

<sup>12</sup> A panel of that court, with one judge dissenting, had affirmed the District Court's judgment. [\*United States v. Southern Motor Carriers Rate Conference, Inc., 672 F.2d 469 \(1982\)\*](#).

<sup>13</sup> In this case, the Government elected, without explanation, not to name as defendants the state Public Service Commissions that regulated the motor common carriers' intrastate rates.

<sup>14</sup> The en banc Court of Appeals reinstated the part of the panel's opinion that addressed the Sherman Act violation. [\*702 F.2d, at 542\*](#).

<sup>15</sup> Judge Clark's separate dissenting opinion criticized the majority for ignoring "the Interstate Commerce Act, public policy, history, and fairness." [\*Id., at 548\*](#).

<sup>16</sup> The joint petition for a writ of certiorari was filed by SMCRC, NCMCA, and the NARUC.

II

In [\*Parker v. Brown\*, 317 U.S., at 341](#), this Court held that the Sherman Act was not intended to prohibit [\*\*1726] States from imposing restraints on competition.<sup>18</sup> There, a raisin producer [\*56] filed an action against the California Director of Agriculture to enjoin the enforcement of the State's Agricultural Prorate Act. Under that statute, a cartel of private raisin producers was created in order to stabilize prices and prevent "economic waste." [\*Id., at 346\*](#). The Court recognized that the State's program was anticompetitive, and it assumed that Congress, "in the exercise of its commerce power, [could] prohibit a state from maintaining [such] a stabilization program. . . ." [\*Id., at 350\*](#). Nevertheless, the Court refused to find in the Sherman Act "an unexpressed purpose to nullify [\*\*\*\*16] a state's control over its officers and agents. . . ." [\*Id., at 351\*](#).

[\*\*\*\*17] [\*LEdHN\[2A\]\*](#) [2A]Although *Parker* involved an action against a state official, the Court's reasoning extends to suits against private parties. The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce.<sup>19</sup> If *Parker* immunity were limited to the actions of public officials, this assumed congressional purpose would be frustrated, for a State would be unable to implement programs that restrain competition among private parties. A plaintiff could frustrate any such program merely by filing suit against the regulated private parties, rather than the [\*57] state officials who implement the plan. We decline to reduce *Parker*'s holding to a formalism that would stand for little more than the proposition that Porter Brown sued the wrong parties. [\*Cantor v. Detroit Edison Co.\*, 428 U.S. 579, 616-617, n. 4 \(1976\)](#) (Stewart, J., dissenting).

[\*\*\*\*18]

[\*\*\*45] [\*LEdHN\[2B\]\*](#) [2B] [\*LEdHN\[3A\]\*](#) [3A]The circumstances in which *Parker* immunity is available to private parties, and to state agencies or officials regulating the conduct of private parties, are defined most specifically by our decision in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S., at 97. See

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<sup>17</sup> Although we granted certiorari on the *Noerr-Pennington* issue as well, see n. 11, *supra*, our disposition of this case makes it unnecessary to consider the applicability of that doctrine to the petitioners' collective ratemaking activities.

<sup>18</sup> JUSTICE STEVENS, noting that "[implied] antitrust immunities . . . are disfavored . . . , post, at 67, cites [\*United States v. South-Eastern Underwriters Assn.\*, 322 U.S. 533 \(1944\)](#), for the proposition that "if exceptions are to be written into the Sherman Act, they must come from Congress, and not this Court." [\*Id., at 561\*](#). The dissent apparently finds some significance in the fact that no federal statute expressly exempts the petitioners' collective ratemaking activities from the antitrust laws. See *post*, at 70.

The dissent's argument on this point, of course, does not suggest that compulsion should be a prerequisite to a finding of state action immunity. Instead, the logical result of its reasoning would require us to overrule *Parker v. Brown* and its progeny, for the state action doctrine is an implied exemption to the antitrust laws. After over 40 years of congressional acquiescence, we are unwilling to abandon the *Parker* doctrine.

JUSTICE STEVENS relies primarily upon [\*United States v. South-Eastern Underwriters, supra\*](#), and [\*Georgia v. Pennsylvania R. Co.\*, 324 U.S. 439 \(1945\)](#), in the first section of his dissent. Neither of these cases, however, has any bearing on the scope of *Parker* immunity. In [\*South-Eastern Underwriters, supra\*](#), the Court held only that the "business of insurance is interstate commerce," *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 217 (1979), and thus is subject to the Sherman Act's proscriptions. The Court did not suggest that, because of congressional silence, state regulation could not immunize insurance companies from the federal antitrust laws. Instead, it reasoned that *Parker* did not protect the insurance companies because "no states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner . . . [there] alleged." [\*322 U.S., at 562\*](#). In [\*Georgia v. Pennsylvania R. Co., supra\*](#), the Court was concerned with whether Congress intended to immunize a *federal* regulatory program from the antitrust laws. See n. 21, *infra*.

<sup>19</sup> In holding that the States were free to regulate "domestic commerce," the *Parker* Court relied upon congressional silence. There are, however, some statements in the legislative history that affirmatively express a desire not "to invade the legislative authority of the several States. . . ." H. R. Rep. No. 1707, 51st Cong., 1st Sess., 1 (1890). See [\*Cantor v. Detroit Edison Co.\*, 428 U.S. 579, 632 \(1976\)](#) (Stewart, J., dissenting).

*Hallie v. Eau Claire, ante*, at 46, n. 10. [\*\*1727] In *Midcal*, we affirmed a state-court injunction prohibiting officials from enforcing a statute requiring wine producers to establish resale price schedules. [HN2](#)[<sup>↑</sup>] We set forth a two-pronged test for determining whether state regulation of private parties is shielded from the federal antitrust laws. First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy." [445 U.S., at 105](#), quoting [Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 \(1978\)](#) (opinion of BRENNAN, J.). Second, the State must supervise actively any private anticompetitive conduct. [445 U.S., at 105](#).<sup>20</sup> This supervision requirement prevents the State from frustrating the national policy in favor of competition by casting [\*\*\*\*19] a "gauzy cloak of state involvement" over what is essentially private anticompetitive conduct. [Id., at 106.](#)<sup>21</sup>

### [LEdHN\[3B\]](#)[<sup>↑</sup>] [3B]

[\*\*\*20] [\*58] [\*\*\*46] III

[LEdHN\[2C\]](#)[<sup>↑</sup>] [2C]The *Midcal* test does not expressly provide that the actions of a private party must be compelled by a State in order to be protected from the federal antitrust laws. The Court of Appeals, however, held that compulsion is a threshold requirement to a finding of *Parker* immunity. It reached this conclusion by finding that: (i) *Midcal* is inapplicable to suits brought against private parties; (ii) even if *Midcal* is applicable, private conduct that is not compelled cannot be taken pursuant to a "clearly articulated state policy," within the meaning of *Midcal*'s first prong; and (iii) because *Goldfarb* was cited with approval in *Midcal*, the *Midcal* Court endorsed the continued validity of a "compulsion requirement." We consider these points in order.

A

The Court of Appeals held that *Midcal*, that involved a suit against a state agency, is inapplicable where a private party is the named defendant. *Midcal*, however, should not be given such a narrow reading. In that case we were concerned, as we are here, with state regulation restraining competition among private parties. Therefore, the two-pronged test set forth in *Midcal*[\*\*\*\*21] should be used to determine whether the private rate bureaus' collective ratemaking activities are protected from the federal antitrust laws. [HN4](#)[<sup>↑</sup>] The success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the [\*59] defendant. See [Cantor v. Detroit Edison Co., supra, at 604](#) (BURGER, C. J., concurring in part and concurring in judgment); [Lafayette v. Louisiana Power & Light Co., supra, at 420](#) (BURGER, C. J., concurring in part and concurring in judgment).

### [[\*\*1728]] B

The Court of Appeals held that even if *Midcal* were applicable here, the rate bureaus would not be immune from federal antitrust liability. According to that court, the actions of a private party cannot be attributed to a clearly articulated state policy, within the meaning of the *Midcal* test's first prong, "when it is left to the private party to carry out that policy or not as he sees fit." [702 F.2d, at 539](#). In the four States in which petitioners operate, all common

<sup>20</sup> As we hold today in *Hallie v. Eau Claire, ante*, at 46, the second prong of the *Midcal* test is inapplicable to municipalities. Although its anticompetitive conduct must be taken pursuant to a clearly articulated state policy, a municipality need not be supervised by the State in order to qualify for *Parker* immunity. See *ante*, at 46.

<sup>21</sup> The dissent argues that a state regulatory program is entitled to *Parker* immunity only if an antitrust exemption is "necessary . . . to make the [program] work. . . ." *Post*, at 74 (quoting [Cantor v. Detroit Edison Co., supra, at 597](#)). This argument overlooks the fact that, with the exception of a questionable dictum in [Cantor, supra](#), the dissent's proposed test has been used only in deciding whether Congress intended to immunize a federal regulatory program from the Sherman Act's proscriptions. See, e. g., [Silver v. New York Stock Exchange, 373 U.S. 341, 357 \(1963\)](#). In this context, if the federal courts wrongly conclude that an antitrust exemption is "unnecessary," Congress can correct the error. As the dissent recognizes, however, the [Supremacy Clause](#) would prevent state legislatures from taking similar remedial action. *Post*, at 67. Moreover, the proposed test would prompt the "kind of interference with state sovereignty . . . that . . . *Parker* was intended to prevent." 1 P. Areeda & D. Turner, [Antitrust Law](#) para. 214, p. 88 (1978). Therefore, we hold that [HN3](#)[<sup>↑</sup>] state action immunity is not dependent on a finding that an exemption from the federal antitrust laws is "necessary."

carriers are free to submit proposals individually. The court therefore reasoned that the States' policies are neutral [\*\*\*\*22] with respect to collective ratemaking, and that these policies will not be frustrated if the federal antitrust laws are construed to require individual submissions.

In reaching its conclusion, the Court of Appeals assumed that if anticompetitive activity is not compelled, the State can have no interest in whether private parties engage in that conduct. This type of analysis ignores the manner in which the States in this case clearly have intended their permissive policies to work. Most common carriers probably will engage in collective ratemaking, as that will allow them to share the cost of preparing rate proposals. If the joint rates are viewed as too high, however, carriers individually may submit lower proposed [\*\*\*47] rates to the Commission in order to obtain a larger share of the market. Thus, through the self-interested actions of private common carriers, the States may achieve the desired balance between the efficiency of collective ratemaking and the competition fostered by individual submissions. Construing the Sherman Act to prohibit collective rate proposals eliminates the free choice necessary to ensure that these policies function in the manner intended [\*60] [\*\*\*\*23] by the States. [HN5](#)<sup>↑</sup> The federal antitrust laws do not forbid the States to adopt policies that permit, but do not compel, anticompetitive conduct by *regulated* private parties. As long as the State clearly articulates its intent to adopt a permissive policy, the first prong of the *Midcal* test is satisfied.<sup>22</sup>

## C

In [Goldfarb v. Virginia State Bar, 421 U.S. 773 \(1975\)](#), this Court said that "[the] threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State [\*\*\*\*24] acting as sovereign." [Id., at 790](#). *Midcal* cited *Goldfarb* with approval. [445 U.S., at 104](#). On the basis of this citation, the Court of Appeals reasoned that *Midcal* did not eliminate the "compulsion requirement" of *Goldfarb*.

*Goldfarb*, however, is not properly read as making compulsion a *sine qua non* to state action immunity. In that case, the Virginia State Bar, a state agency, compelled Fairfax County lawyers to adhere to a minimum-fee schedule. [421 U.S., at 776-778](#). The *Goldfarb* Court therefore was not concerned with the necessity of compulsion -- its presence in the case was not an issue. The focal point of the *Goldfarb* opinion was the source of the anticompetitive policy, rather than whether the challenged conduct was *compelled*. The Court held that a State Bar, *acting alone*, could not immunize its anticompetitive conduct. Instead, the Court held that [HNT](#)<sup>↑</sup> private parties were entitled to *Parker* immunity only if the State "acting as sovereign" intended to displace competition. [421 U.S., at 790](#); see [Lafayette v. Louisiana Power \[\\*61\] & Light Co., 435 U.S., at 410](#) [\*\*\*\*25] (opinion of BRENNAN, J.) ("*Goldfarb* . . . made it clear that, for purposes of the [\*\*1729] *Parker* doctrine, not every act of a state agency is that of the State as sovereign").

Although *Goldfarb* did employ language of compulsion, it is beyond dispute that the Court would have reached the same result had it applied the two-pronged test later set forth in *Midcal*. As stated above, Virginia "as sovereign" did not have a "clearly articulated policy" designed to displace price competition among lawyers. In fact, the Supreme Court of Virginia had explicitly directed lawyers not "to be controlled" [\*\*\*48] by minimum-fee schedules. [Goldfarb, supra, at 789, n. 19](#). Although we recognize that the language in *Goldfarb* is not without ambiguity, we do not read that opinion as making compulsion a prerequisite to a finding of state action immunity.

## D

The *Parker* doctrine represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace. A compulsion requirement is inconsistent with both values. It reduces the range of regulatory alternatives available [\*\*\*\*26] to the State. At the same time,

<sup>22</sup> [HN6](#)<sup>↑</sup> Under the Interstate Commerce Act, motor common carriers are permitted, but not compelled, to engage in collective *interstate* ratemaking. [49 U. S. C. §§ 10706\(b\)\(2\)](#) and [10706\(d\)\(2\)\(C\)](#). It is clear, therefore, that Congress has recognized the advantages of a permissive policy. We think it unlikely that Congress intended to prevent the States from adopting virtually identical policies at the intrastate level.

insofar as it encourages States to require, rather than merely permit, anticompetitive conduct, a compulsion requirement may result in greater restraints on trade. We do not believe that Congress intended to resolve conflicts between two competing interests by impairing both more than necessary.

LEdHN[2D] [↑] [2D] In summary, we hold *Midcal*'s two-pronged test applicable to private parties' claims of state action immunity. Moreover, HN8 [↑] a state policy that expressly permits, but does not compel, anticompetitive conduct may be "clearly articulated" within the meaning of *Midcal*.<sup>23</sup> Our holding today does not [\*62] suggest, however, that compulsion is irrelevant. To the contrary, compulsion often is the best evidence that the State has a clearly articulated and affirmatively expressed policy to displace competition. See *Hallie v. Eau Claire, ante*, at 45-46; 1 P. Areeda & D. Turner, Antitrust Law para. 212.5, p. 62 (Supp. 1982) (compulsion is "powerful evidence" of existence of state policy). Nevertheless, HN9 [↑] when other evidence conclusively shows that a State intends to adopt a permissive policy, the absence of compulsion should not prove fatal [\*\*\*\*27] to a claim of *Parker* immunity.

IV

A

LEdHN[1B] [↑] [1B] Our holding that there is no inflexible "compulsion [\*\*\*\*28] requirement" does not suggest necessarily that petitioners' collective ratemaking activities are shielded from the federal antitrust laws. HN10 [↑] A private party may claim state action immunity only if both prongs of the *Midcal* test are satisfied. Here the Court of Appeals found, and the Government concedes, that the State Public Service Commissions actively supervise the collective ratemaking activities of the rate bureaus. Therefore, the only issue left to resolve is whether the petitioners' challenged conduct was [\*\*\*49] taken pursuant to a clearly articulated state policy.

The Public Service Commissions in North Carolina, Georgia, Mississippi, and Tennessee permit collective ratemaking. See n. 4, *supra*. Acting alone, however, these agencies [\*63] [\*\*1730] could not immunize private anticompetitive conduct. In *Goldfarb*, the State Bar -- a special type of "state agency" -- prohibited lawyers from charging fees lower than those set forth in schedules published by the local bar. Nevertheless, this Court held that the local lawyers were not immune from antitrust liability because their anticompetitive conduct was not required by the State as sovereign. 421 U.S., at 790. [\*\*\*\*29] HN11 [↑] *Parker* immunity is available only when the challenged activity is undertaken pursuant to a clearly articulated policy of the State itself, such as a policy approved by a state legislature, see *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), or a State Supreme Court, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

In this case, therefore, the petitioners are entitled to *Parker* immunity only if collective ratemaking is clearly sanctioned by the legislatures of the four States in which the rate bureaus operate. North Carolina, Georgia, and Tennessee have statutes that explicitly permit collective ratemaking by common carriers.<sup>24</sup> The rate bureaus' challenged actions, at least in these States, are taken pursuant to an express and clearly articulated state policy. Mississippi's legislature, however, has not specifically addressed collective ratemaking. We therefore must consider whether, in the absence of a statute expressly permitting the challenged conduct, the first prong of the *Midcal* test can be satisfied.

[\*\*\*\*30] B

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<sup>23</sup> Contrary to the Government's arguments, our holding here does not suggest that a State may "give immunity to those who violate the Sherman Act by authorizing them to violate it." *Parker v. Brown*, 317 U.S., at 351; see *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). A clearly articulated permissive policy will satisfy the first prong of the *Midcal* test. The second prong, however, prevents States from "casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U.S., at 106. This active supervision requirement ensures that a State's actions will immunize the anticompetitive conduct of private parties only when the "state has demonstrated its commitment to a program through its exercise of regulatory oversight." See 1 P. Areeda & D. Turner, Antitrust Law § 213a, p. 73 (1978).

<sup>24</sup> N. C. Gen. Stat. § 62-152.1(b) (1982); Ga. Code Ann. § 46-7-18 (1982 and Supp. 1984); Tenn. Code Ann. § 65-15-119 (1982).

**HN12**[<sup>↑</sup>] The Mississippi Motor Carrier Regulatory Law of 1938, *Miss. Code Ann. § 77-7-1 et seq.* (1972 and Supp. 1984), gives the State Public Service Commission authority to regulate common carriers. The statute provides that the Commission is to prescribe "just and reasonable" rates for the intrastate transportation of general commodities. *§ 77-7-221*. The legislature thus made clear its intent that intrastate rates [**\*64**] would be determined by a regulatory agency, rather than by the market. The details of the inherently anticompetitive rate-setting process, however, are left to the agency's discretion. The State Commission has exercised its discretion by actively encouraging collective ratemaking among common carriers. See Response of the State of Mississippi and the Mississippi Public Service Comm'n as *Amici Curiae* in District Court, No. 76-1909A (ND Ga. 1977), p. 11. We do not believe that the actions petitioners took pursuant to this regulatory program should be deprived of *Parker* immunity.

**HN13**[<sup>↑</sup>] A private party acting pursuant to an anticompetitive regulatory program need not "point to a specific, detailed legislative authorization" for its challenged conduct. *Lafayette v. Louisiana Power & Light Co.*, 435 U.S., at **415** [\*\*\*\*31] (opinion of BRENNAN, [\*\*\*50] J.). As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied. In *Goldfarb*, the Court held that *Parker* immunity was unavailable only because the State as sovereign did not intend to do away with competition among lawyers. *421 U.S., at 790*. Similarly, in *Cantor* the anticompetitive acts of a private utility were held unprotected because the Michigan Legislature had indicated no intention to displace competition in the relevant market. *428 U.S., at 584-585*.

If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside [\*\*1731] the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness. Cf. *Hallie v. Eau Claire*, ante [\*\*\*\*32], at 44 (requiring explicit legislative authorization of anticompetitive activity would impose "detrimental side effects upon municipalities' local autonomy"). Therefore, we hold [**\*65**] that **HN14**[<sup>↑</sup>] if the State's intent to establish an anticompetitive regulatory program is clear, as it is in Mississippi,<sup>25</sup> the State's failure to describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws.

[\*\*\*\*33] C

**LEdHN1C**[<sup>↑</sup>] [1C]In summary, we hold that the petitioners' collective ratemaking activity is immune from Sherman Act liability. This anticompetitive conduct is taken pursuant to a "clearly articulated state policy." The legislatures of North Carolina, Georgia, and Tennessee expressly permit motor common carriers to submit collective rate proposals to Public Service Commissions, which have the authority to accept, reject, or modify any recommendation. Mississippi, the fourth State in which the petitioners [\*\*\*51] operate, has not expressly approved of collective ratemaking, but it has articulated clearly its intent to displace price competition among common carriers with a regulatory structure. Anticompetitive conduct taken pursuant to such a regulatory program satisfies the first

<sup>25</sup> The Mississippi statute stands in sharp contrast to the Colorado Home Rule Amendment, which we considered in *Community Communications Co. v. Boulder*, 455 U.S. 40 (1982). In *Boulder*, the State Constitution gave municipalities extensive powers of self-government. *Id., at 43-44*. Pursuant to this authority, the City of Boulder prohibited a cable television company from expanding its operations. The Court held that because the Home Rule Amendment did not evidence an intent to displace competition in the cable television industry, *id., at 55*, Boulder's anticompetitive ordinance was not enacted pursuant to a clearly articulated state policy. This holding was premised on the fact that Boulder, as a "home rule municipality," was authorized to elect free-market competition as an alternative to regulation. *Id., at 56*.

In this case, on the other hand, the Mississippi Public Service Commission is not authorized to choose free-market competition. Instead, it is required to prescribe rates for motor common carriers on the basis of statutorily enumerated factors. *Miss. Code Ann. § 77-7-221* (1972). These factors bear no discernible relationship to the prices that would be set by a perfectly efficient and unregulated market. Therefore, the Mississippi statute clearly indicates that the legislature intended to displace competition in the intrastate trucking industry with a regulatory program.

[\*66] prong of the *Midcal* test. The second prong of the *Midcal* test likewise is met, for the Government has conceded that the relevant States, through their agencies, actively supervise the conduct of private parties.

V

[LEdHN\[1D\]](#) [1D] We conclude that the petitioners' collective ratemaking activities, although not compelled by the States, are immune from antitrust liability under the doctrine of *Parker v. Brown* [\*\*\*\*34]. Accordingly, the judgment of the Court of Appeals is reversed.

*It is so ordered.*

**Dissent by:** STEVENS

## Dissent

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JUSTICE STEVENS, with whom JUSTICE WHITE joins, dissenting.

The term "price fixing" generally refers to a process by which competitors agree upon the prices that will prevail in the market for the goods or services they offer. Such behavior is not essential to every public program for regulating industry. In this case, for example, four Southern States have established programs for evaluating the reasonableness of rates that motor carriers propose to charge for intrastate transport, but the States do not require price fixing by motor carriers. They merely tolerate it.

Reasoning deductively from a dictum in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980), the Court holds that Congress did not intend [\*\*1732] to prohibit price fixing by motor carrier rate bureaus -- at least when such conduct is prompted, but not required, by a State Public Service Commission. The result is inconsistent with the language<sup>1</sup> and policies of the Sherman Act, and this Court's precedent. The Sherman Act only would interfere with the regulatory [\*\*\*35] process if the States compelled price [\*67] fixing that is unlawful under federal law. In that situation, the regulated carriers would face conflicting obligations under state and federal law, and the success of the States' regulatory programs would be threatened. Except under those circumstances, immunity from the antitrust laws under the state-action doctrine is not available for private persons.  
2

[\*\*\*36] I

"Whatever may be its peculiar problems and characteristics, the [\*\*\*52] Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike":<sup>3</sup> [\*\*\*37] agreements and combinations tampering with competitive price structures are unlawful. State legislatures, whose powers are limited by the Supremacy Clause,<sup>4</sup> may not expressly modify the obligations of any person under this federal law.

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<sup>1</sup> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U. S. C. § 1.

<sup>2</sup> Of course, public agencies like municipalities need only establish that their anticompetitive conduct is taken pursuant to a clearly articulated and affirmatively expressed state policy. *Hallie v. Eau Claire*, ante, at 46-47. The less stringent requirement reflects the presumption "that the municipality acts in the public interest." *Ante*, at 45; cf. *Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1571-1572 (CA5 1984) (en banc) (Higginbotham, J., concurring), cert. pending, No. 84-951.

<sup>3</sup> United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222 (1940); see also Goldfarb v. Virginia State Bar, 421 U.S. 773, 785 (1975); United States v. McKesson & Robbins, Inc., 351 U.S. 305, 309-310 (1956); United States v. Paramount Pictures, Inc., 334 U.S. 131, 143 (1948).

Only Congress, expressly or by implication, may authorize price fixing, and has done so in particular industries or compelling circumstances. Implied antitrust immunities, however, are disfavored,<sup>5</sup> and any exemptions [\*68] from the antitrust laws are to be strictly construed.<sup>6</sup> These "[canons] of construction . . . [reflect] the felt indispensable role of antitrust policy in the maintenance of a free economy." *United States v. Philadelphia National Bank*, 374 U.S. 321, 348 (1963).

Applying these principles, this Court has consistently embraced the view that "[regulated] industries are not *per se* exempt from the Sherman Act." *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456 (1945). For many years prior to the enactment of the Sherman Act, state agencies regulated [\*\*\*\*38] the business of insurance, but we rejected the view that these programs of public scrutiny supported "our reading into the Act an exemption" allowing insurance businesses to fix premium rates and agents' commissions. *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 559 (1944). In *South-Eastern Underwriters*, the Court [\*\*1733] tersely observed that "if exceptions are to be written into the Act, they must come from Congress, not this Court." *Id.*, at 561. Thereafter, in the McCarran-Ferguson Act of 1945, 59 Stat. 33, Congress decided, as a matter of policy, that the Sherman Act's prohibition of price fixing "shall [only] be applicable to the business of insurance to the extent that such business is not regulated by State Law." *15 U. S. C. § 1012(b)*.

Consistent with its treatment of the insurance business in *South-Eastern Underwriters*, this Court has repeatedly held that collusive price fixing by railroads is unlawful even though the end result is a reasonable charge approved by a public rate commission.<sup>7</sup> *Georgia v. Pennsylvania* [\*\*\*53] R. Co., \*691 324 U.S., at 455-463.; *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 337-340 (1897). [\*\*\*39] In the *Pennsylvania Railroad* case, the Court explained why this is so:

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"The fact that the rates which have been fixed may or may not be held unlawful by the [Interstate Commerce] Commission is immaterial to the issue before us. . . . [Even] a combination to fix reasonable and non-discriminatory

<sup>4</sup> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *U.S. Const., Art. VI, cl. 2*.

<sup>5</sup> E. g., *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388-389 (1981); *United States v. National Assn. of Securities Dealers, Inc.*, 422 U.S. 694, 719-720 (1975).

<sup>6</sup> E. g., *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979); *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U.S. 1, 11 (1976).

<sup>7</sup> "In [*Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156 (1922)], the suit was one for damages under the Sherman Act. The charge was that the defendant carriers had formed a rate bureau or committee to secure agreement in respect to freight rates among the constituent railroad companies which would otherwise be competing carriers. As we have seen, the Court held that damages could not be recovered. But Mr. Justice Brandeis speaking for a unanimous Court stated that a conspiracy to fix rates might be illegal though the rates fixed were reasonable and nondiscriminatory. He said . . . : 'All the rates fixed were reasonable and non-discriminatory. That was settled by the proceedings before the Commission. . . . But under the Anti-Trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by injunction under § 4, and by forfeiture under § 6. That was settled by *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 [1897], and *United States v. Joint Traffic Association*, 171 U.S. 505 [1898]. The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government.' [260 U.S., at 161-162]." *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 457-458 (1945). Although the Court in *Pennsylvania Railroad* was divided on the question whether Georgia could pursue its antitrust remedy by invoking this Court's original jurisdiction, the dissenting Justices recognized that the United States could obtain an injunction against the alleged price fixing in an appropriate forum. See *id.*, at 484, 489 (Stone, C. J., dissenting). It is, of course, the United States that seeks relief in the case now before us.

rates may be illegal. [*Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 161 (1922)]. The reason is that the Interstate Commerce Act does not provide remedies for the correction of all the abuses of rate-making which might constitute violations of the anti-trust laws. Thus a 'zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself.' *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 506 [1935]. Within that zone the Commission lacks power to grant relief even though the rates are raised to the maxima by a conspiracy among carriers who employ [\*70] unlawful tactics. . . . Damage must be presumed to flow from a conspiracy to manipulate rates within that zone." *324 U.S.*, at 460-461.

Collusive price fixing by regulated carriers [\*\*\*\*40] causes upward pressure on rates within the zone of reasonableness, and such combinations and conspiracies are generally actionable under the Sherman Act on the theory of the *Pennsylvania Railroad* case.

[\*\*\*\*41] Congress reacted to the *Pennsylvania Railroad* decision much as it reacted to the *South-Eastern Underwriters* decision. It decided, as a matter of policy, that some price fixing should be permitted in the transportation industry, and enacted the Reed-Bulwinkle Act of 1948 to effectuate [\*\*1734] that policy choice.<sup>8</sup> In [\*\*\*54] the Motor Carrier Act of 1980,<sup>9</sup> however, Congress sharply curtailed the availability of this antitrust exemption. Collective ratemaking is still permitted in limited circumstances, but rate bureaus must comply with strict procedural requirements. See n. 19, *infra*.

[\*\*\*\*42] The defendants have stipulated that their price-fixing arrangements are identical to those followed by the Carrier Rate Committees in the *Pennsylvania Railroad* case which were declared unlawful under the Sherman Act. See App. 40-41. They also acknowledge that neither the Reed-Bulwinkle Act nor any other federal statute expressly exempts their price fixing from the antitrust laws. Nevertheless, they contend that Congress would not have intended to prohibit collective ratemaking by intrastate motor carriers when it is permitted, but not required, by state law.

[\*71] II

The basis for the defendants' claim of implied immunity from the antitrust laws is the state-action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). This Court, however, has repeatedly recognized that private entities may not claim the state-action immunity unless their unlawful conduct is compelled by the state.

In the *Parker* case, this Court held that the Sherman Act does not reach "state action or official action directed by a state." *Id.*, at 351. The case involved price fixing that was mandated by a California statute in the furtherance of a price-support [\*\*\*43] program for raisin farmers. The Court held that the price fixing was not prohibited by the Sherman Act:

"[The] prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.*, at 350-351.

<sup>8</sup> "Parties to any agreement approved by the Commission under this section and other persons are . . . hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission." 62 Stat. 473. The current version of the exemption is codified at *49 U. S. C. § 10706(b)(2)*.

<sup>9</sup> 94 Stat. 803, *49 U. S. C. §§ 10706(b)(3)(B)-(D)*.

Under *Parker*, private anticompetitive conduct must be "directed" by the State to be eligible for the state-action immunity.

In a later case involving price fixing by attorneys through minimum-fee schedules, the Court unanimously stated: "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. *Parker v. Brown*, 317 U.S., at 350-352; *Continental Co. v. Union Carbide*, 370 U.S. 690, 706-707 (1962). [\*\*\*\*44] " *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790 (1975). In *Goldfarb*, no state [\*\*\*55] statute or Supreme Court rule required the defendant County Bar Association to [\*72] adopt the minimum-fee schedule, and this Court concluded that this "is not state action for Sherman Act purposes. It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." *Id.* at 791.

In *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the Court was also unanimous in its understanding that sovereign compulsion was a prerequisite for state-action immunity.<sup>10</sup> [\*\*1735] The opinion for the Court observed that it has long been settled "that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." *Id.*, at 592-593 (footnotes omitted).<sup>11</sup> The dissenting Justices agreed: "private conduct, if it is to come within the state-action exemption, must be not merely 'prompted' but 'compelled' by state action." [\*\*\*\*45] *Id.* at 637 (Stewart, J., dissenting, joined by POWELL and REHNQUIST, JJ.).

In *Cantor*, the Court only divided on the question whether the compulsion requirement *alone* was sufficient to confer antitrust immunity. The dissent argued that Congress would not have intended to penalize Detroit Edison for engaging in a light-bulb-distribution program that had been approved by the Michigan Public Service [\*\*\*\*46] Commission and that could not be discontinued without approval of the Commission. *Id.*, at 614-615. The Court, on the other hand, acknowledged that continuation of the light-bulb program was ostensibly required by the State, but went on to consider [\*73] whether an antitrust exemption for this conduct was fundamental to the State's regulatory program. Since Michigan's statutes only expressed an interest in regulating the electricity market, and not the light-bulb market, the Court concluded that "[regardless] of the outcome of this case, Michigan's interest in regulating its utilities' distribution of electricity will be almost entirely unimpaired." *Id.*, at 598. Because the State had not articulated any intention to regulate the light-bulb market, and the idea for the distribution program had come from the private utility, the State's requirement that the program continue was not sufficient to establish state-action immunity from the antitrust laws.

The Court's unanimous decision in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), signaled no departure from settled principles in this area. In discussing the [\*\*\*\*47] principles of law applicable to state-action immunity, the Court quoted extensively from [\*\*\*56] the language in *Parker* and *Goldfarb*<sup>12</sup> [\*\*\*\*48] that recognized the compulsion requirement. In any case, it was quite clear in *Midcal* that the California statutes required the unlawful resale-price-maintenance activities. Thus, this Court had no occasion in that case to explore the contours of the compulsion requirement. The references, in the *Midcal* opinion, to "clearly articulated

<sup>10</sup> See, e. g., *Cantor v. Detroit Edison Co.*, 428 U.S., at 609 (BLACKMUN, J., concurring in judgment).

<sup>11</sup> For the proposition stated, the Court relied on *Goldfarb v. Virginia State Bar*, 421 U.S., at 791; *Continental Co. v. Union Carbide*, 370 U.S. 690, 706-707 (1962); *Parker v. Brown*, 317 U.S. 341, 351 (1943); *Union Pacific R. Co. v. United States*, 313 U.S. 450, 467-468 (1941); and *Northern Securities Co. v. United States*, 193 U.S. 197, 346 (1904).

<sup>12</sup> Several recent decisions have applied *Parker*'s analysis. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court concluded that fee schedules enforced by a state bar association were not mandated by ethical standards established by the State Supreme Court. The fee schedules therefore were not immune from antitrust attack. 'It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anti-competitive activities must be compelled by direction of the State acting as a sovereign.' *Id.*, at 791." 445 U.S., at 104.

and affirmatively expressed" policies and "actively supervised" activities merely restated the standards to be applied in evaluating whether conduct ostensibly compelled by the State is entitled to the state-action immunity. These requirements *limited* the scope of the [\*74] state-action immunity for private entities; they did not expand the immunity to protect conduct that is merely prompted by the State.<sup>13</sup>

### [\*\*1736] III

Today the Court abandons the settled view that a private party is not entitled to state-action immunity unless the State compelled him to act in violation of federal law. Hereafter, a State may exempt price fixing from the federal antitrust laws if it clearly articulates its intention to supplant competition with regulation in the relevant market, and if it actively supervises the unlawful conduct by [\*\*\*\*49] evaluating the reasonableness of the prices charged. The Court justifies this change in the law by finding it more consistent with "principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace." *Ante*, at 61. I believe these conclusions are unsound.

#### *Deference to State Regulatory Programs*

The Court's reliance today on vague "principles of federalism" obscures our traditional disfavor for implied exemptions to the Sherman Act. We have only authorized exemptions from the Sherman Act for businesses regulated by federal law when "that exemption was necessary in order to make the regulatory Act work 'and even then only to the minimum extent necessary.'"<sup>14</sup> No [\*\*\*57] lesser showing of repugnancy [\*75] should be sufficient to justify an implied exemption based on a state regulatory program.

[\*\*\*\*50] Any other view separates the state-action exemption from the reason for its existence. The program involved in the *Parker* case was designed to enhance the market price of raisins by regulating both output and price.<sup>15</sup> In other words, the state policy was one that replaced price competition with economic regulation. Price support programs like the one involved in *Parker* cannot possibly succeed if every individual producer is free to participate or not participate in the program at his option. In *Parker*, the challenged price fixing was the heart of California's support program for agriculture; without immunity from the Sherman Act, the State would have had to abandon the project.

<sup>13</sup> As in *Cantor*, the Court concluded in the *Midcal* case that the State's ostensible compulsion of the resale-price-maintenance program was not alone sufficient to confer state-action immunity. The State neither set the prices nor reviewed their reasonableness, nor did it monitor market conditions and evaluate the effectiveness of the program. Under those conditions, the "State simply authorizes price setting and enforces the prices set by private parties. . . . The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." [445 U.S., at 105-106](#).

<sup>14</sup> [Cantor v. Detroit Edison Co., 428 U.S., at 597](#) (quoting [Silver v. New York Stock Exchange, 373 U.S. 341, 357 \(1963\)](#)). In *United States v. National Assn. of Securities Dealers*, the Court pointed out that "[implied] antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between antitrust laws and the regulatory system. See, e. g., [United States v. Philadelphia National Bank, 374 U.S., at 348](#); [United States v. Borden Co., 308 U.S. 188, 197-206 \(1939\)](#)." [422 U.S., at 719-720](#); see also nn. 5, 6, *supra*. These cases are, of course, consistent with the "cardinal rule," applicable to legislation generally, that repeals by implication are not favored. [Posadas v. National City Bank, 296 U.S. 497, 503](#). (1936).

<sup>15</sup> "The California Agricultural Prorate Act authorizes the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers. The declared purpose of the Act is to 'conserve the agricultural wealth of the State' and to 'prevent economic waste in the marketing of agricultural products' of the state." [317 U.S., at 346](#).

"The declared objective of the California Act is to prevent excessive supplies of agricultural commodities from 'adversely affecting' the market, and although the statute speaks in terms of 'economic stability' and 'agricultural waste' rather than of price, the evident purpose and effect of the regulation is to 'conserve agricultural wealth of the state' by raising and maintaining prices, but 'without permitting unreasonable profits to producers.'" [Id. at 355](#).

[\*\*\*\*51] In this case, the common denominator in the States' regulatory programs for motor carriers is their reservation of the power to evaluate the reasonableness of proposed rates and [\*76] terms of carriage.<sup>16</sup> In these [\*\*1737] programs, "no State requires that all rates among competing carriers for identical service be uniform, [and] no State requires, either by statute or regulation, or other express legislative or administrative mandate, that rates proposed by carriers be formulated by rate conferences." *467 F.Supp. 471, 477 (ND Ga. 1979)*. When, as here, state regulatory policies are permissive rather than mandatory, there is no necessary conflict between the antitrust laws and the regulatory systems; the regulated entity may comply with the edicts of each sovereign. Indeed, it is almost meaningless to contemplate a "regulatory" policy that gives every regulated entity *carte blanche* to excuse itself from the consequences of the regulation. Even a policy against speeding could not be enforced if every motorist could drive as fast as he chose. When a State declares that a regulated entity need not follow a regulatory procedure, it as much as admits that [\*\*\*\*52] this element is inconsequential [\*\*\*58] to the ultimate success of the regulatory program.<sup>17</sup>

[\*\*\*\*53] [\*77] As I have noted, the Reed-Bulwinkle Act<sup>18</sup> [\*\*\*\*54] authorizes collective ratemaking by interstate carriers under some circumstances. The Court doubts whether "Congress intended to prevent the States from adopting virtually identical policies at the intrastate level." *Ante*, at 60, n. 22. The Reed-Bulwinkle exemption, however, has been abolished for single-line rate requests, and to the extent that it still applies to general rate requests, the rate bureaus must follow stringent procedural safeguards which channel their conduct into useful informational tasks and thereby diminish the threat of anticompetitive misconduct.<sup>19</sup> [\*\*\*\*55] Even if there were sound policy reasons<sup>20</sup> for extending the Reed-Bulwinkle [\*\*1738] exemption, [\*78] as amended, to a state

<sup>16</sup> See *Ga. Code Ann. §§ 46-2-25(b)*, 46-7-18 (Supp. 1984); *Miss. Code Ann. §§ 77-7-217, 77-7-221* (1972); *N. C. Gen. Stat. §§ 62-134(b), 62-146, 62-147* (1982); *Tenn. Code Ann. §§ 65-5-203*, 65-15-119 (1982).

<sup>17</sup> By consolidating petitions for rate modifications, collective ratemaking arguably preserves the resources of the state regulatory Commissions and promotes simplicity and uniformity in the intrastate rate structure. See App. 60-61, 83-84, 90-91. Under the statutes governing the state regulatory programs, however, the carriers may, at any time, decline to participate in collective ratemaking, and deprive the States of these purported advantages. *Ante*, at 51. That being so, it is difficult for the States to argue that these facets of their regulatory systems are essential to the program's success. Brief for State of Iowa et al. as *Amici Curiae* 6 ("The authorization of the price-fixing agreement, collective ratemaking, by the states serves no cognizable state interest").

The States also contend that the defendants provide a valuable information-gathering service for motor carriers. App. 60-61, 84, 90. The District Court's final judgment, however, would not have interfered with this function. *Id.*, at 99 ("Each defendant may provide statistical and other economic data and advice to any carrier wishing to avail itself of defendants' expertise").

<sup>18</sup> See n. 8, *supra*.

<sup>19</sup> Under the exemption, as amended, the ratemaking conferences, among other things, must disclose the names of their members and affiliates of their members, *49 U. S. C. § 10706(b)(3)(A)*; the organization must limit discussion and voting to allowed subjects and parties, *§ 10706(b)(3)(B)(i)*; "the organization may not file a protest or complaint with the Commission against any tariff item published by or for the account of any motor carrier," *§ 10706(b)(3)(B)(ii)*; "the organization may not permit one of its employees or any employee committee to docket or act upon any proposal effecting a change in any tariff item," *§ 10706(b)(3)(B)(iv)*; "upon request, the organization must divulge to any person the name of the proponent of a rule or rate docketed with it, must admit any person to any meeting at which rates or rules will be discussed or voted upon, and must divulge to any person the vote cast by any member carrier on any proposal before the organization," *§ 10706(b)(3)(B)(v)*; and the organization shall make a final disposition of rate proposals within 120 days, *§ 10706(b)(3)(B)(vii)*. See generally *ICC v. American Trucking Assns., Inc.*, 467 U.S. 354 (1984).

<sup>20</sup> In the legislative history of the 1980 Motor Carrier Act, however, Congress suggested otherwise:

"During the course of its hearings, the Committee heard a good deal of criticism of the rate bureau process. . . . The disadvantage is that the system inherently tends to result in rates that will be compensatory for even the least efficient motor carrier participating in the rate discussions. When this happens, consumers lose the benefit of price competition that would occur if more efficient carriers were able to offer more attractive rates. Another serious problem has been the closed nature of

regulatory program that did not contain comparable procedural safeguards, "[these] considerations are . . . not for us. . . . Congress is the body to amend [the statute] and not this court, by a process of judicial legislation wholly unjustifiable." [United States v. Trans-Missouri](#) [\[\\*\\*\\*59\]](#) [Freight Assn.](#), [166 U.S.](#), at 340.

### *The Policy of Competition*

The Court embraces the defendants' specious argument that "insofar as it encourages States to require, rather than merely permit, anticompetitive conduct, a compulsion requirement may result in greater restraints on trade." *Ante*, at 61. The Court finds this "result" inconsistent with the [\\*\\*\\*\\*56](#) policies of the Sherman Act. This argument is seriously flawed.

On a practical level, the Court's argument assumes that a decision for the Government today would cause the States to rush into enactment legislation compelling price fixing in the motor carrier industry. Moreover, the Court's argument assumes that a Congress that only recently has acted to increase competition in the interstate motor carrier field would remain silent in the face of anticompetitive legislation at the intrastate level. These assumptions are wholly speculative.

On a more theoretical level, the Court ignores the anticompetitive effect of the collective ratemaking practices challenged in *this* litigation.<sup>21</sup> The Court of Appeals correctly observed that "[collective] [rate] formulation clearly tampers with the price structure for intrastate commodities; the rate [\\*79](#) bureau arrangement substitutes concerted pricing decisions among competing carriers for the influence of impersonal market forces on proposed rates." [672 F.2d 469, 478](#) (CA5, Unit B, now CA11, 1982). The increased rates for transportation caused by this behavior are especially grave in a basic industry, like transportation, [\\*\\*\\*\\*57](#) where the ripple effects of the increased rates are magnified as raw materials, semifinished and finished goods are transported at various stages of production and distribution.

Active supervision of the rate bureau process -- like that provided in the Motor Carrier Act of 1980 -- might minimize the anticompetitive effects of collective ratemaking.<sup>22</sup> To the extent that the State Regulatory Commissions are structured like the ICC in the *Pennsylvania Railroad* case, however, they only have the power to reject the rates proposed by the carriers if those rates fall outside the "zone of reasonableness." Unless the Commissions "actively supervise" the price-fixing [\\*\\*\\*\\*58](#) process itself, they cannot eliminate the upward pressure on rates caused by collusive ratemaking. Unfortunately, the nature of the "active supervision" of those carriers who take part in collective ratemaking is not fully disclosed by the record.<sup>23</sup>

### IV

Whether it is wise or unwise policy [\\*\\*\\*\\*60](#) for the Federal Government to seek to enforce the Sherman Act in this case is not a question that this Court is authorized to consider. The District Court and the Court of Appeals [\\*\\*\\*\\*59](#) correctly applied established precedent [\\*\\*1739](#) in holding that the Government is entitled [\\*80](#) to an injunction against the defendants' price fixing. Such price fixing is unlawful unless it is expressly authorized by statute, or

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the rate bureau proceedings. Voting upon specific rate proposals is done behind closed doors." S. Rep. No. 96-641, p. 13 (1980). See also H. R. Rep. No. 96-1069, p. 27 (1980).

<sup>21</sup> "It has been held too often to require elaboration now that price fixing is contrary to the policy of competition underlying the Sherman Act and that its illegality does not depend on a showing of unreasonableness since it is conclusively presumed to be unreasonable." [United States v. McKesson & Robbins, Inc.](#), [351 U.S.](#), at 309-310.

<sup>22</sup> The Court of Appeals, however, found that the State Commissions' scrutiny of the reasonableness of proposed rates satisfies the active supervision requirement. [702 F.2d 532, 539, n. 12](#) (CA5, Unit B, now CA11, 1983) (en banc).

<sup>23</sup> Some of the States' statutes and implementing regulations indicate that the process of collective ratemaking is being supervised on a limited basis. See, e. g., [N. C. Gen. Stat. § 62-152.1\(c\)](#) (1982); Ga. Pub. Serv. Comm'n Rule 1-3-1-14 (1983); Tenn. Pub. Serv. Comm'n Rule 1220-2-1-40 (1974).

required by a State's regulatory program. Today the Court authorizes collective ratemaking by intrastate motor carriers even though the State has only permitted it in a program regulating the reasonableness of prices in the industry. Immunity of this type was rejected by the Court in the *South-Eastern Underwriters* and *Pennsylvania Railroad* cases, but today, under the shroud of the state-action doctrine,<sup>24</sup> it is resurrected.

Accordingly, I respectfully [\*\*\*\*60] dissent.

## References

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[13 Am Jur 2d, Carriers 105; 54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 15, 45](#)

24 Federal Procedure, L Ed, Monopolies and Restraints of Trade 54:1 et seq.

12 Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade 48:101 et seq.

18 Am Jur PI & Pr Forms (Rev), Monopolies, Restraints of Trade, and Unfair Trade Practices, Forms 21-30

12 Am Jur Legal Forms 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 178:1 et seq.

24 Am Jur Trials 1, Defending Antitrust Lawsuits

[15 USCS 1 et seq.](#)

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 9, 45

L Ed Index to Annos, Carriers; Restraints of Trade and Monopolies; "State Action"; States

ALR Quick Index ,Carriers ;Restraints of Trade and Monopolies ;States

Federal Quick Index, Carriers; Monopolies [\*\*\*\*61] and Restraints of Trade; States

Annotation References:

What constitutes "state action" under rule exempting state and local governmental action from antitrust laws. [70 L Ed 2d 973](#).

Supreme Court's views as to what constitutes per se illegal "price fixing" under the Sherman Act ([15 USCS 1 et seq.](#)). [64 L Ed 2d 997](#).

Applicability of federal antitrust laws as affected by other federal statutes or by [Federal Constitution. 45 L Ed 2d 841](#).

Valid governmental action as conferring immunity or exemption from private liability under the federal antitrust laws.  
12 ALR Fed 329.

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<sup>24</sup> Since the Court does not reach it, *ante*, at 53, n. 11, 55, n. 17, I do not address the merits of the *Noerr-Pennington* question. See [Mine Workers v. Pennington, 381 U.S. 657 \(1965\)](#); [Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 \(1961\)](#).



## **Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.**

Supreme Court of the United States

February 19, 1985, Argued ; June 11, 1985, Decided

No. 83-1368

### **Reporter**

472 U.S. 284 \*; 105 S. Ct. 2613 \*\*; 86 L. Ed. 2d 202 \*\*\*; 1985 U.S. LEXIS 94 \*\*\*\*; 53 U.S.L.W. 4733; 1985-1 Trade Cas. (CCH) P66,640

NORTHWEST WHOLESALE STATIONERS, INC. v. PACIFIC STATIONERY & PRINTING CO.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

**Disposition:** [715 F.2d 1393](#), reversed and remanded.

## **Core Terms**

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cooperative, expulsion, anticompetitive, retailers, wholesale, Sherman Act, concerted refusal, antitrust, self-regulation, effects, per se rule, rule-of-reason, predominantly, nonmember, procedural protections, procedural safeguards, per se violation, group boycott, Securities Exchange Act, expel, stock, Robinson-Patman Act, purchasing, immunity, supplies, markets

## **LexisNexis® Headnotes**

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

### [\*\*HN1\*\*](#) **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Rule-of-reason analysis guides the inquiry into whether an action constitutes an unreasonable restraint of trade, unless the challenged action falls into the category of agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

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

### [\*\*HN2\*\*](#) **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The decision to apply the per se rule turns on whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output or instead one designed to increase economic

efficiency and render markets more, rather than less, competitive. Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Energy & Utilities Law > Pipelines & Transportation > Eminent Domain Proceedings

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

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

### **HN3** [] Practices Governed by Per Se Rule, Boycotts

Certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as per se violations of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Business & Corporate Law > Cooperatives > Member Duties & Liabilities

Business & Corporate Law > Cooperatives > General Overview

### **HN4** [] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

The act of expulsion from a wholesale cooperative does not necessarily imply anticompetitive animus and thereby raise a probability of anticompetitive effect. Unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted.

## **Lawyers' Edition Display**

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### **Decision**

Expulsion of a member from a cooperative buying agency held not to be a per se violation of the antitrust laws.

### **Summary**

This case presented the question whether a per se violation of 1 of the Sherman Act ([15 USCS 1](#)) occurs when a cooperative buying agency comprising various retailers expels a member without providing any procedural means for challenging the expulsion. The United States District Court for the District of Oregon entered summary judgment in favor of the cooperative, holding that a rule-of-reason analysis should govern the case, and finding no anticompetitive effect of the expulsion on the basis of the record as presented. The United States Court of Appeals

for the Ninth Circuit reversed, holding that the expulsion of a member from a cooperative providing favorable prices to members amounts to a group boycott, which is a per se violation of 1 of the Sherman Act unless sanctioned by a specific legislative mandate for industry self-regulation, and that, while 4 of the Robinson-Patman Act ([15 USCS 13b](#)) provides such a mandate by authorizing price discrimination by cooperatives in favor of their members, this does not immunize an expulsion from per se invalidation unless the cooperative provides procedural safeguards sufficient to prevent arbitrary expulsions and to furnish a basis for judicial review ([715 F2d 1393](#)).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Brennan, J., expressing the unanimous view of the seven participating members of the court, it was held (1) that 4 of the Robinson-Patman Act insulates cooperatives only from the price discrimination provisions of that Act, and is not a mandate for self-regulation by cooperatives which limits the application of the Sherman Act; (2) that the presence or absence of procedural safeguards in the expulsion of a cooperative member thus does not determine the appropriate mode of antitrust analysis; and (3) that the act of expulsion from a wholesale cooperative does not raise a probability of anticompetitive effect, allowing the application of the per se rule, unless the party seeking the application of that rule makes some showing that the cooperative possesses market power or unique access to a business element necessary for effective competition.

Marshall and Powell, JJ., did not participate.

## Headnotes

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > per se rule -- application to cooperatives -- effect of procedure in expulsion of member -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B]

Whether a per se violation of 1 of the Sherman Act ([15 USCS 1](#)) occurs when a cooperative buying agency comprising various retailers expels a member, and thus allegedly engages in a concerted refusal to deal with the former member on an equal footing, does not depend on whether or not the cooperative has adequate procedural safeguards governing the expulsion decision; if the challenged concerted activity amounts to a per se violation, no amount of procedural protection will save it, and if it does not, no lack of procedural protections will convert it into a per se violation.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > per se rule -- application to expulsion of member from cooperative -- required showing of anticompetitive effect -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

The expulsion of a member from a cooperative buying agency, allegedly resulting in a concerted refusal to deal with the former member on an equal basis, is not properly analyzed as a per se violation of 1 of the Sherman Act ([15 USCS 1](#)) unless the member challenging expulsion makes some showing that the cooperative possesses market power or unique access to a business element necessary for effective competition.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > per se rule -- when applicable -- > Headnote:

[LEdHN\[3\]](#) [3]

The decision to apply a per se rule in determining whether a practice violates 1 of the Sherman Act ([15 USCS 1](#)), rather than undertaking a full-fledged rule-of-reason inquiry, turns on whether the practice facially appears to be one that would always or almost always tend to restrict competition and to decrease output, or whether it is instead one designed to increase economic efficiency and render markets more, rather than less, competitive.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §12 > cooperatives -- scope of exemption from antitrust laws -- > Headnote:

[LEdHN\[4A\]](#) [4A] [LEdHN\[4B\]](#) [4B]

Section 4 of the Robinson-Patman Act ([15 USCS 13b](#)) is no more than a narrow immunity for cooperatives from the price discrimination provisions of that Act, and cannot be construed as granting cooperatives a blanket exception from that Act or from any portion of the Sherman Act ([15 USCS 1 et seq.](#)); it does not provide a broad mandate for industry self-regulation which would have to be accommodated by narrowing the application of the Sherman Act.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > joint ventures -- process requirement -- > Headnote:

[LEdHN\[5\]](#) [5]

The antitrust laws do not themselves impose on joint ventures a requirement of process.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > per se rule -- required showing by plaintiff -- > Headnote:

[LEdHN\[6\]](#) [6]

A plaintiff seeking application of the per se rule in an antitrust case must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects.

## Syllabus

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Petitioner is a wholesale purchasing cooperative whose membership consists of office supply retailers in the Pacific Northwest States. Nonmember retailers can purchase supplies from petitioner at the same price as members, but since petitioner annually distributes its profits to members in the form of a percentage rebate, members effectively purchase supplies at a lower price than do nonmembers. Petitioner expelled respondent from membership without any explanation, notice, or hearing. Thereafter, respondent brought suit in Federal District Court, alleging that the expulsion without procedural protections was a group boycott that limited its ability to compete and should be considered *per se* violative of [§ 1](#) of the Sherman Act. On cross-motions for summary judgment, the District Court rejected application of the *per se* rule and held instead that rule-of-reason analysis should govern the case. Finding no anticompetitive effect on the basis of the record, the court granted summary judgment for petitioner. The Court of Appeals reversed, holding [\*\*\*\*2] that although § 4 of the Robinson-Patman Act expressly approves price discrimination occasioned by such an expulsion as the one in question and thus provides a mandate for self-regulation, nevertheless, because petitioner had not provided any procedural

safeguards, the expulsion of respondent was not shielded by § 4 and therefore constituted a *per se* group boycott in violation of [§ 1](#) of the Sherman Act.

*Held:* Petitioner's expulsion of respondent does not fall within the category of activity that is conclusively presumed to be anticompetitive so as to mandate *per se* invalidation under [§ 1](#) of the Sherman Act as a group boycott or concerted refusal to deal. Pp. 289-298.

(a) Section 4 of the Robinson-Patman Act, which is no more than a narrow immunity from the price discrimination prohibitions of that Act, cannot properly be construed as an exemption from or repeal of any portion of the Sherman Act or as a broad mandate for industry self-regulation. [Silver v. New York Stock Exchange](#), 373 U.S. 341, distinguished. In any event, the absence of procedural safeguards in this case can in no sense determine the antitrust analysis, since if the challenged [\*\*\*3] expulsion amounted to a *per se* violation of [§ 1](#), no amount of procedural protection would save it, whereas if the expulsion did not amount to a violation of [§ 1](#), no lack of procedural protections would convert it into a *per se* violation. Pp. 291-293.

(b) The act of expulsion from a wholesale cooperative does not necessarily imply anticompetitive animus so as to raise a probability of anticompetitive effect. Unless it is shown that the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted. Absent such a showing with respect to a cooperative buying arrangement, courts should apply a rule-of-reason analysis. Here, respondent, focusing on the argument that the lack of procedural safeguards required *per se* liability, made no such showing. But because the Court of Appeals applied an erroneous *per se* analysis, it never evaluated the District Court's rule-of-reason analysis rejecting respondent's claim, and therefore a remand is appropriate to permit appellate review of that determination. Pp. 293-298.

**Counsel:** David J. [\*\*\*4] Sweeney argued the cause for petitioner. With him on the briefs were Douglas R. Grim and Mark B. Weintraub.

Catherine G. O'Sullivan argued the cause for the United States as amicus curiae urging reversal. With her on the brief were Solicitor General Lee, Assistant Attorney General McGrath, Deputy Solicitor General Wallace, Deputy Assistant Attorney General Rule, and Edward T. Hand.

Joseph P. Bauer argued the cause for respondent. With him on the brief was Robert R. Carney. \*

**Judges:** BRENNAN, J., delivered the opinion of the Court, in which all other Members joined except MARSHALL and POWELL, JJ., who took no part in the decision of the case.

**Opinion by:** BRENNAN

## Opinion

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[\*285] [\*\*\*206] [\*\*2615] JUSTICE BRENNAN delivered the opinion of the Court.

[LEdHN\[1A\]](#) [↑] [1A] [LEdHN\[2A\]](#) [↑] [2A] This case requires that we decide whether a *per se* violation of [§ 1](#) of the Sherman Act, [15 U. S. C. § 1](#), occurs when a cooperative buying agency comprising various retailers expels a member without providing any procedural means for [\*286] challenging the expulsion.<sup>1</sup> The case also raises

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\* Ira S. Sacks filed a brief for Indian Head Inc. as amicus curiae urging affirmance.

<sup>1</sup> That section reads in relevant part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

broader questions as to when *per se* antitrust analysis is appropriately [\*\*\*\*5] applied to joint activity that is susceptible of being characterized as a concerted refusal to deal.

I

Because the District Court ruled on cross-motions for summary judgment after only limited discovery, this case comes to us on a sparse record. Certain background facts are undisputed. Petitioner Northwest Wholesale Stationers is a purchasing cooperative made up of approximately 100 office supply retailers in the Pacific Northwest States. The cooperative acts as the primary wholesaler for the retailers. Retailers that are not members of the cooperative can purchase wholesale supplies from Northwest at the same price as members. At the end of each year, however, Northwest distributes its profits to members in the form of a percentage rebate on purchases. Members therefore effectively [\*\*\*\*6] purchase supplies at a price significantly lower than do nonmembers.<sup>2</sup> Northwest also provides certain warehousing facilities. The cooperative arrangement thus permits the participating retailers to achieve economies of scale in purchasing and warehousing that would otherwise be [\*287] unavailable to them. In fiscal 1978 Northwest had \$ 5.8 million in sales. App. 73.

Respondent Pacific Stationery & Printing Co. sells office supplies at [\*\*\*\*7] both the retail and wholesale levels. Its total sales in fiscal 1978 were approximately \$ 7.6 million; the record does not indicate what percentage of revenue is attributable to retail and what percentage is attributable to wholesale. Pacific became a member of Northwest in 1958. In 1974 Northwest amended its bylaws [\*\*\*207] to prohibit members from engaging in both retail and wholesale operations. See *id.*, at 50, 59. A grandfather clause preserved Pacific's membership rights. See *id.*, at 59. In 1977 ownership of a controlling share of the stock of Pacific changed hands, *id.*, at 70, and the new owners did not officially bring this change to the attention of the directors of Northwest. This failure to notify apparently violated another of Northwest's bylaws. See *id.*, at 59 (Bylaws, Art. VIII, § 5).

In 1978 the membership of Northwest voted to expel Pacific. Most factual matters relevant to the expulsion are in dispute. No explanation for the expulsion was advanced at the time, and Pacific was given neither notice, a hearing, nor any other opportunity to challenge the decision. Pacific argues that the expulsion resulted from Pacific's decision to maintain [\*\*\*\*8] a wholesale [\*\*2616] operation. See Brief in Opposition 11. Northwest contends that the expulsion resulted from Pacific's failure to notify the cooperative members of the change in stock ownership. See Pet. for Cert. 8. The minutes of the meeting of Northwest's directors do not definitively indicate the motive for the expulsion. App. 75-77. It is undisputed that Pacific received approximately \$ 10,000 in rebates from Northwest in 1978, Pacific's last year of membership. Beyond a possible inference of loss from this fact, however, the record is devoid of allegations indicating the nature and extent of competitive injury the expulsion caused Pacific to suffer.

[\*288] Pacific brought suit in 1980 in the United States District Court for the District of Oregon alleging a violation of § 1 of the Sherman Act. The gravamen of the action was that Northwest's expulsion of Pacific from the cooperative without procedural protections was a group boycott that limited Pacific's ability to compete and should be considered *per se* violative of § 1. See Complaint para. 8, App. 4-5. On cross-motions for summary judgment the District Court rejected application of the *per se* rule [\*\*\*\*9] and held instead that rule-of-reason analysis should govern the case. Finding no anticompetitive effect on the basis of the record as presented, the court granted summary judgment for Northwest. See App. to Pet. for Cert. 22-24.

<sup>2</sup> Although this patronage rebate policy is a form of price discrimination, § 4 of the Robinson-Patman Act specifically sanctions such activity by cooperatives:

"Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association." 49 Stat. 1528, 15 U. S. C. § 13b.

A relevant state-law provision provides analogous protection. Ore. Rev. Stat. § 646.030 (1983).

472 U.S. 284, \*288; 105 S. Ct. 2613, \*\*2616; 86 L. Ed. 2d 202, \*\*\*207; 1985 U.S. LEXIS 94, \*\*\*\*9

The Court of Appeals for the Ninth Circuit reversed, holding "that the uncontested facts of this case support a finding of *per se* liability." [715 F.2d 1393, 1395 \(1983\)](#). The court reasoned that the cooperative's expulsion of Pacific was an anticompetitive concerted refusal to deal with Pacific on equal footing, which would be a *per se* violation of § 1 in the absence of any specific legislative mandate for self-regulation sanctioning the expulsion. The court noted that § 4 of the Robinson-Patman Act, [15 U. S. C. § 13b](#), specifically approves the price discrimination occasioned by such expulsion and concluded that § 4 therefore provided a mandate for self-regulation. Such a legislative mandate, according to the court, would ordinarily result in evaluation of the challenged practice under the rule of reason. But, drawing on [Silver v. New York Stock Exchange, 373 U.S. 341, 348-349 \(1963\)](#), the court decided [\*\*\*\*10] that rule-of-reason analysis was appropriate only on the condition that the cooperative had provided procedural safeguards sufficient to prevent arbitrary expulsion [\*\*\*208] and to furnish a basis for judicial review. Because Northwest had not provided any procedural safeguards, the court held that the expulsion of Pacific was not shielded by Robinson-Patman immunity and therefore constituted [\*289] a *per se* group boycott in violation of § 1 of the Sherman Act. 715 F.2d, at 1395-1398.

We granted certiorari to examine this application of [Silver v. New York Stock Exchange, supra](#), in an area of **antitrust law** that has not been free of confusion.<sup>3</sup> 469 U.S. 814 (1984). We reverse.

## II

The decision of the cooperative members to expel Pacific was certainly a restraint of trade [\*\*\*\*11] in the sense that every commercial agreement restrains trade. [Chicago Board of Trade v. United States, 246 U.S. 231, 238 \(1918\)](#). Whether this action violates § 1 of the Sherman Act depends on whether it is adjudged an *unreasonable* restraint. *Ibid.* [HN1](#) Rule-of-reason analysis guides the inquiry, see [Standard Oil Co. v. United States, 221 U.S. 1 \(1911\)](#), [\*\*2617] unless the challenged action falls into the category of "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." [Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 \(1958\)](#).

[LEdHN\[3\]](#) [3]This *per se* approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive. Courts can thereby avoid the "significant costs" in "business certainty and litigation efficiency" that a full-fledged rule-of-reason inquiry entails. [Arizona v. Maricopa County Medical Society, 457 U.S. 332, 343-344 \(1982\)](#). [\*\*\*\*12] See also [United States v. Topco Associates, Inc., 405 U.S. 596, 609-610 \(1972\)](#). [HN2](#) The decision to apply the *per se* rule turns on "whether the practice facially appears to be one that would always or almost always tend to restrict [\*290] competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" [Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20 \(1979\)](#) (citations omitted). See also [National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma, 468 U.S. 85, 103-104 \(1984\)](#) ("*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct").

This Court has long held that [HN3](#) certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as *per se* violations of § 1 of the Sherman Act. See [Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207](#) [\*\*209] (1959); [\*\*\*\*13] [United States v. General Motors Corp., 384 U.S. 127 \(1966\)](#); [Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 \(1961\)](#); [Associated Press v. United States, 326 U.S. 1 \(1945\)](#); [Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 \(1941\)](#); [Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U.S. 600 \(1914\)](#). The question presented in this case is whether Northwest's decision to expel Pacific should fall within this category of activity that is conclusively presumed to be anticompetitive.<sup>4</sup> The Court of Appeals held that the exclusion of Pacific

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<sup>3</sup>See L. Sullivan, Law of Antitrust 229-230 (1977); Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 Colum. L. Rev. 685 (1979).

from the cooperative should conclusively be presumed unreasonable on the ground that Northwest provided no procedural protections to Pacific. Even if the lack of procedural protections does not justify a conclusive presumption of predominantly anticompetitive effect, the mere act of expulsion of a competitor from a wholesale cooperative might be argued to be sufficiently likely to have such effects under [\*291] the present circumstances and therefore to justify application of the [\*\*\*\*14] *per se* rule. These possibilities will be analyzed separately.

A

The Court of Appeals drew from [\*Silver v. New York Stock Exchange, 373 U.S. 341 \(1963\)\*](#), a broad rule that the conduct of a cooperative venture -- including a concerted refusal to deal -- undertaken pursuant to a [\*\*2618] legislative mandate for self-regulation is immune from *per se* scrutiny and subject to rule-of-reason analysis only if adequate procedural safeguards accompany self-regulation. We disagree and conclude that the approach of the Court in *Silver* has no proper application to the present controversy.

The Court in *Silver* framed the issue as follows:

"[Whether] the New York Stock Exchange is to be held liable to a nonmember broker-dealer under the antitrust [\*\*\*15] laws or regarded as impliedly immune therefrom when, pursuant to rules the Exchange has adopted under the Securities Exchange Act of 1934, it orders a number of its members to remove private direct telephone wire connections previously in operation between their offices and those of the nonmember, without giving the nonmember notice, assigning him any reason for the action, or affording him an opportunity to be heard."  
*Id., at 343.*

Because the New York Stock Exchange occupied such a dominant position in the securities trading markets that the boycott would devastate the nonmember, the Court concluded that the refusal to deal with the nonmember would amount to a *per se* violation of [§ 1](#) unless the Securities Exchange Act provided an immunity. *Id., at 347-348.* The question for the Court thus was whether effectuation of the policies of the Securities Exchange Act required partial repeal of the Sherman Act insofar as [\*\*\*210] it proscribed this aspect of exchange self-regulation.

[\*292] Finding exchange self-regulation -- including the power to expel members and limit dealings with nonmembers -- to be an essential policy of the Securities [\*\*\*16] Exchange Act, the Court held that the Sherman Act should be construed as having been partially repealed to permit the type of exchange activity at issue. But the interpretive maxim disfavoring repeals by implication led the Court to narrow permissible self-policing to situations in which adequate procedural safeguards had been provided.

"Congress . . . cannot be thought to have sanctioned and protected self-regulative activity when carried out in a fundamentally unfair manner. The point is not that the antitrust laws impose the requirement of notice and a hearing here, but rather that, in acting without according petitioners these safeguards in response to their request, the Exchange has plainly exceeded the scope of its authority under the Securities Exchange Act to engage in self-regulation." *Id., at 364* (footnote omitted).

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<sup>4</sup> Northwest raises no challenge before this Court to the conclusion of the Court of Appeals that the cooperative's decision to expel Pacific was a "combination or conspiracy" affecting interstate commerce within the meaning of [§ 1](#) of the Sherman Act.

Thus it was the specific need to accommodate the important national policy of promoting effective exchange self-regulation, tempered by the principle that the Sherman Act should be narrowed only to the extent necessary to effectuate that policy, that dictated the result in *Silver*.

[LEdHN\[4A\]](#) [4A]Section 4 of the Robinson-Patman Act is not comparable [\*\*\*\*17] to the self-policing provisions of the Securities Exchange Act. That section is no more than a narrow immunity from the price discrimination prohibitions of the Robinson-Patman Act itself. The Conference Report makes clear that the exception was intended solely to "safeguard producer and consumer cooperatives against any charge of violation of the act based on their distribution of earnings or surplus among their members on a patronage basis." H. R. Conf. Rep. No. 2951, 74th Cong., 2d Sess., 9 (1936) (emphasis added). This section has never been construed as granting cooperatives a blanket exception from the Robinson-Patman Act and cannot plausibly be construed as an exemption to or [\*293] repeal of any portion of the Sherman Act.<sup>5</sup> "There is nothing in the last section of the bill [containing § 4] [\*\*2619] that distinguishes cooperatives, either favorably or unfavorably, from other agencies in the streams of production and trade, so far as concerns their dealings with others." 80 Cong. Rec. 9419 (1936) (remarks of Rep. Utterback).

[\*\*\*\*18] [LEdHN\[1B\]](#) [1B] [LEdHN\[4B\]](#) [4B] [LEdHN\[5\]](#) [5]In light of this circumscribed congressional intent, there can be no argument that § 4 of the Robinson-Patman Act should be viewed as a broad mandate for industry self-regulation. No need exists, therefore, to narrow the Sherman Act in order to accommodate any competing congressional policy requiring discretionary self-policing. Indeed, Congress would appear to have taken some care to make clear that no constriction of the Sherman Act was intended. In any event, the absence of procedural safeguards can in no sense determine the antitrust analysis. If the challenged concerted [\*\*\*211] activity of Northwest's members would amount to a *per se* violation of [§ 1](#) of the Sherman Act, no amount of procedural protection would save it. If the challenged action would not amount to a violation of [§ 1](#), no lack of procedural protections would convert it into a *per se* violation because the antitrust laws do not themselves impose on joint ventures a requirement of process.

B

This case therefore turns not on the lack of procedural protections but on whether the decision to expel Pacific is properly viewed as a group boycott or concerted refusal to deal mandating *per se* invalidation. [\*\*\*\*19] "Group boycotts" are often listed among the classes of economic activity that merit *per se* invalidation under [§ 1](#). See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, [359 U.S., at 212](#); *Northern Pacific R. Co. v. United States*, [356 U.S., at 5](#); *Silver v. New York Stock Exchange*, [373 U.S., at 348](#); *White Motor Co. v. United* [[\\*294](#)] *States*, [372 U.S. 253, 259-260 \(1963\)](#). Exactly what types of activity fall within the forbidden category is, however, far from certain. "[There] is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine." L. Sullivan, Law of Antitrust 229-230 (1977). Some care is therefore necessary in defining the category of concerted refusals to deal that mandate *per se* condemnation. See *St. Paul Fire & Marine Ins. Co. v. Barry*, [438 U.S. 531, 543 \(1978\)](#) (concerted refusals to deal "are not a unitary phenomenon"). Cf. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, [441 U.S., at 9](#).

Cases to which this Court [\*\*\*\*20] has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." Sullivan, *supra*, at 261-262. See, e. g., *Silver, supra* (denial of necessary access to exchange members); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, [364 U.S. 656 \(1961\)](#) (denial of necessary certification of product); *Associated Press v. United States*, [326 U.S. 1 \(1945\)](#) (denial of important sources of news); *Klor's, Inc., supra* (denial of wholesale supplies). In these cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete, *Silver, supra*; *Radiant Burners, Inc., supra*, and frequently the boycotting firms possessed a dominant position in the relevant market. E. g., *Silver, supra*; *Associated Press, supra*; *Fashion Originators' Guild of America, Inc. v. FTC*,

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<sup>5</sup> See, e. g., *American Motor Specialties Co. v. FTC*, [278 F.2d 225, 229 \(CA2\)](#), cert. denied, [364 U.S. 884 \(1960\)](#).

312 U.S. 457 (1941). See generally Brodley, Joint [\*\*\*\*21] Ventures and Antitrust Policy, 95 Harv. L. Rev. 1523, 1533, 1563-1565 (1982). In addition, the practices were generally not justified [\*\*2620] by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive. Under such circumstances the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote.

[\*295] [\*\*\*212] Although a concerted refusal to deal need not necessarily possess all of these traits to merit *per se* treatment, not every cooperative activity involving a restraint or exclusion will share with the *per se* forbidden boycotts the likelihood of predominantly anticompetitive consequences. For example, we recognized last Term in *National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma* that *per se* treatment of the NCAA's restrictions on the marketing of televised college football was inappropriate -- despite the obvious restraint on output -- because the "case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all." 468 U.S., at 101. [\*\*\*22]

Wholesale purchasing cooperatives such as Northwest are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects. Rather, such cooperative arrangements would seem to be "designed to increase economic efficiency and render markets more, rather than less, competitive." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., supra, at 20*. The arrangement permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice. The cost savings and order-filling guarantees enable smaller retailers to reduce prices and maintain their retail stock so as to compete more effectively with larger retailers.

Pacific, of course, does not object to the existence of the cooperative arrangement, but rather raises an antitrust challenge to Northwest's decision to bar Pacific from continued membership.<sup>6</sup> [\*\*\*25] It is therefore the action of expulsion that [\*296] must be evaluated to determine whether *per se* treatment is appropriate. HN4[ The act of expulsion from [\*\*\*23] a wholesale cooperative does not necessarily imply anticompetitive animus and thereby raise a probability of anticompetitive effect. See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., supra, at 9*. Wholesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively. Disclosure rules, such as the one on which Northwest relies, may well provide the cooperative with a needed means for monitoring the creditworthiness of its members.<sup>7</sup> [\*\*\*213] Nor would the expulsion characteristically be likely to result in predominantly anticompetitive effects, at least in the type of situation this case presents. Unless the cooperative possesses market power or exclusive access to an element [\*\*2621] essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted. See L. Sullivan, Law of Antitrust 292-293 (1977); Brodley, 95 Harv. L. Rev., at 1563-1565. Cf. *Jefferson Parish Hospital Dist. v. Hyde*, 466 U.S. 2, 12-15 (1984) (absent indication of market power, tying arrangement does not warrant [\*\*\*24] *per se* invalidation). See generally *National [\*297] Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma*, 468 U.S., at 104, n. 26 ("Per *se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct"). Absent such a showing with respect to a cooperative buying arrangement, courts should apply a rule-of-reason

<sup>6</sup> Because Pacific has not been wholly excluded from access to Northwest's wholesale operations, there is perhaps some question whether the challenged activity is properly characterized as a concerted refusal to deal. To be precise, Northwest's activity is a concerted refusal to deal with Pacific on substantially equal terms. Such activity might justify *per se* invalidation if it placed a competing firm at a severe competitive disadvantage. See generally Brodley, Joint Ventures and Antitrust Policy, 95 Harv. L. Rev. 1521, 1532 (1982) ("Even if the joint venture does deal with outside firms, it may place them at a severe competitive disadvantage by treating them less favorably than it treats the [participants in the joint venture]").

<sup>7</sup> Pacific argues, however, that this justification for expulsion was a pretext because the members of Northwest were fully aware of the change in ownership despite lack of formal notice. According to Pacific, Northwest's motive in the expulsion was to place Pacific at a competitive disadvantage to retaliate for Pacific's decision to engage in an independent wholesale operation. Such a motive might be more troubling. If Northwest's action were not substantially related to the efficiency-enhancing or procompetitive purposes that otherwise justify the cooperative's practices, an inference of anticompetitive animus might be appropriate. But such an argument is appropriately evaluated under the rule-of-reason analysis.

analysis. At no time has Pacific made a threshold showing that these structural characteristics are present in this case. See Complaint, App. 2; Motion for Partial Summary Judgment, App. 9.<sup>8</sup>

[\*\*\*\*26] [LEdHN\[2B\]](#) [↑] [2B] [LEdHN\[6\]](#) [↑] [6]The District Court appears to have followed the correct path of analysis -- recognizing that not all concerted refusals to deal should be accorded *per se* treatment and deciding this one should not.<sup>9</sup> The foregoing discussion suggests, however, that a satisfactory threshold determination whether anticompetitive effects would be likely might require a more detailed factual picture of market structure than the District [\*298] Court had before it. Nonetheless, in our judgment the District Court's rejection of *per se* analysis in this case was correct. A plaintiff seeking application of the *per se* rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects. The mere allegation of a concerted refusal to deal does not suffice because not all concerted refusals to deal are predominantly anticompetitive. When [\*\*\*214] the plaintiff challenges expulsion from a joint buying cooperative, some showing must be made that the cooperative possesses market power or unique access to a business element necessary for effective competition. Focusing on the argument that the lack of procedural safeguards [\*\*\*\*27] required *per se* liability, Pacific did not allege any such facts. Because the Court of Appeals applied an erroneous *per se* analysis in this case, the court never evaluated the District Court's rule-of-reason analysis rejecting Pacific's claim. A remand is therefore appropriate for the limited purpose of permitting appellate review of that determination.

### [\*\*\*\*28] III

"The *per se* rule is a valid and useful tool of antitrust policy and enforcement." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S., at 8. It does not denigrate the [\*\*2622] *per se* approach to suggest care in application. In this case, the Court of Appeals failed to exercise the requisite care and applied *per se* analysis inappropriately. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE MARSHALL and JUSTICE POWELL took no part in the decision of this case.

## References

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[18 Am Jur 2d, Cooperative Associations](#) 5, 22; [54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices](#) 30-32, 80

74 Am Jur Trials 1, Defending Antitrust Lawsuits

[15 USCS](#) 1, 136

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<sup>8</sup> Given the state of this record it is difficult to understand how the Court of Appeals could have concluded that Pacific "loses the ability to use Northwest's superior warehousing and expedited order-filling facilities, as well as any competitive advantages that may flow simply from being known in the industry as a member of an established cooperative." [715 F.2d 1393, 1395 \(1983\)](#). The District Court had specifically found no anticompetitive effect.

<sup>9</sup> The District Court stated:

"I think that in a case of this nature, in order to move an antitrust violation, it is necessary to show some restraint of competition, and I don't believe that is shown here. Even if it is a group boycott, I still believe under [[Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.](#), 416 F.2d 71 (CA9 1969)], and [Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.](#), 637 F.2d 1376 (CA9 1981)], that the Rule of Reason operates. And I think if you apply the Rule of Reason to the facts that are submitted by the parties here that are not disputed in this case, you come to the conclusion that there is [sic] simply been no showing by the Plaintiff in this case of a restraint of competition as distinguished from possible damage to the Plaintiff by being expelled from the association." App. to Pet. for Cert. 23-24.

472 U.S. 284, \*298; 105 S. Ct. 2613, \*\*2622; 86 L. Ed. 2d 202, \*\*\*214; 1985 U.S. LEXIS 94, \*\*\*\*28

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 9, 12, 16

L Ed Index to Annos, Co-operatives; Restraints of Trade and Monopolies

ALR Quick Index, Co-operative Associations; Restraints of Trade and Monopolies

Federal Quick Index, Cooperative Associations; Monopolies [\*\*\*\*29] and Restraints of Trade

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## **Aspen Skiing Co. v. Aspen Highlands Skiing Corp.**

Supreme Court of the United States

March 27, 1985, Argued ; June 19, 1985, Decided

No. 84-510

### **Reporter**

472 U.S. 585 \*; 105 S. Ct. 2847 \*\*; 86 L. Ed. 2d 467 \*\*\*; 1985 U.S. LEXIS 115 \*\*\*\*; 53 U.S.L.W. 4818; 1985-2 Trade Cas. (CCH) P66,653

ASPEN SKIING CO. v. ASPEN HIGHLANDS SKIING CORP.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

**Disposition:** [738 F.2d 1509](#), affirmed.

## **Core Terms**

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Ski, ticket, mountains, all-Aspen, skiers, season, monopoly power, usage, coupons, competitor, monopolization, lift, exclusionary, consumers, anticompetitive, monopolist, cooperate, marketing, rivals, Sherman Act, interchangeable, advertising, customers, monitored, reasons, pattern of conduct, relevant market, instructions, facilities, multiarea

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

[\*\*HN1\*\*](#) [] **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

[\*\*HN2\*\*](#) [] **Antitrust & Trade Law, Sherman Act**

The offense of monopoly under [§ 2](#) of the Sherman Act, [15 U.S.C.S. § 2](#), has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > Sherman Act > General Overview

### **[HN3](#)[] Antitrust & Trade Law, Sherman Act**

Under [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), a business generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

### **[HN4](#)[] Monopolies & Monopolization, Attempts to Monopolize**

In the absence of any purpose to create or maintain a monopoly, the Sherman Act, [15 U.S.C.S. § 2](#), does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > Sherman Act > General Overview

### **[HN5](#)[] Antitrust & Trade Law, Sherman Act**

If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory.

Antitrust & Trade Law > Sherman Act > General Overview

### **[HN6](#)[] Antitrust & Trade Law, Sherman Act**

"Exclusionary" comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.

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### **Decision**

Ski facility operator's refusal to continue marketing arrangement with smaller competitor held to violate 2 of the Sherman Act ([15 USCS 2](#)).

### **Summary**

A ski resort operator filed suit in the United States District Court for the District of Colorado against the operator of three other skiing facilities in the area, alleging that the latter had monopolized the local market for downhill ski services, in violation of 2 of the Sherman Act ([15 USCS 2](#)), by refusing to continue a long-standing marketing arrangement whereby skiers could purchase 6-day tickets usable on a given day at any of the four facilities and the

competitors would divide up the revenues based on statistics as to actual usage, and by taking additional actions which made it difficult for the smaller operator to market a multi-area package of its own. The District Court entered judgment on a jury verdict in favor of the smaller operator, after instructing the jury that a firm possessing monopoly power violates 2 of the Sherman Act if it willfully acquires, maintains, or uses that power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes, but does not violate the law by refusing to deal with a competitor if there are valid business reasons for that refusal. The United States Court of Appeals for the Tenth Circuit affirmed, holding that the multi-day, multi-area tickets in question could be characterized as an "essential facility" which the larger operator had a duty to market jointly with its competitor, and that there was sufficient evidence to support a finding that the larger operator's intent in refusing to continue the marketing arrangement was to create or maintain a monopoly ([738 F2d 1509](#)).

On certiorari, the United States Supreme Court affirmed. In an opinion by Stevens, J., expressing the unanimous view of the eight participating members of the court, it was held that the actions of the larger operator were properly held to violate 2 of the Sherman Act since the evidence was sufficient to support a conclusion that they were not taken for legitimate business reasons, but for the purpose of injuring a competitor.

White, J., did not participate.

## Headnotes

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RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30 > acts prohibited -- refusal to continue joint marketing arrangement with competitor -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D]

The operator of three of the four skiing facilities in a locality is properly found to have violated 2 of the Sherman Act ([15 USCS 2](#)) by refusing to continue a long-standing joint marketing arrangement with the operator of the remaining facility whereby skiers could purchase 6-day tickets redeemable on a given day at any of the four facilities and the competitors would divide up the revenues based on statistics as to actual usage, and by taking additional actions which made it difficult for the smaller operator to market a multi-area package of its own, where there is sufficient evidence to support a conclusion that the larger operator did not take these actions because of legitimate business concerns, but instead made a deliberate effort to discourage its customers from doing business with its smaller rival, sacrificing short-run benefits and consumer good will in exchange for a perceived long-run impact on that rival; such a judgment is not based on any erroneous assumption that a firm with monopoly power has a general duty to cooperate with its smaller rivals in a marketing arrangement in order to avoid violating the law.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30 > acts prohibited -- refusal to deal with competitors -- co-operative ventures -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B] [LEdHN\[2C\]](#) [2C]

Even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor, but the absence of an unqualified duty to co-operate does not mean that every time a firm declines to participate in a particular co-operative venture, that decision may not have evidentiary significance, or that it may not give rise to antitrust liability in certain circumstances; under 1 of the Sherman Act, a business generally has a right to deal, or refuse to deal, with whomever it likes, but the high value placed on that right does not mean that it is unqualified.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §15 > application of antitrust laws -- effect of motive or intent -- > Headnote:

[LEdHN\[3\]](#) [3]

In determining violations of 2 of the Sherman Act ([15 USCS 2](#)), the question of intent is relevant to both the offense of attempt to monopolize and that of monopolization: in the former case, it is necessary to prove a specific intent to accomplish the forbidden objective, an intent which goes beyond the mere intent to do the act; but in the latter case, evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as exclusionary, anticompetitive, or predatory.

## Syllabus

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Respondent, which owns one of the four major mountain facilities for downhill skiing at Aspen, Colo., filed a treble-damages action in Federal District Court in 1979 against petitioner, which owns the other three major facilities, alleging that petitioner had monopolized the market for downhill skiing services at Aspen in violation of [§ 2](#) of the Sherman Act. The evidence showed that in earlier years, when there were only three major facilities operated by three independent companies (including both petitioner and respondent), each competitor offered both its own tickets for daily use of its mountain and an interchangeable 6-day all-Aspen ticket, which provided convenience to skiers who visited the resort for weekly periods but preferred to remain flexible about what mountain they might ski each day. Petitioner, upon acquiring its second of the three original facilities and upon opening the fourth, also offered, during most of the ski seasons, a weekly multiarea ticket covering only its mountains, but eventually the all-Aspen ticket outsold petitioner's own multiarea [\*\*\*\*2] ticket. Over the years, the method for allocation of revenues from the all-Aspen ticket to the competitors developed into a system based on random-sample surveys to determine the number of skiers who used each mountain. However, for the 1977-1978 ski season, respondent, in order to secure petitioner's agreement to continue to sell all-Aspen tickets, was required to accept a fixed percentage of the ticket's revenues. When respondent refused to accept a lower percentage -- considerably below its historical average based on usage -- for the next season, petitioner discontinued its sale of the all-Aspen ticket; instead sold 6-day tickets featuring only its own mountains; and took additional actions that made it extremely difficult for respondent to market its own multiarea package to replace the joint offering. Respondent's share of the market declined steadily thereafter. The jury returned a verdict against petitioner, fixing respondent's actual damages, and the court entered a judgment for treble damages. The Court of Appeals affirmed, rejecting petitioner's contention that there cannot be a requirement of cooperation between competitors, even when one possesses monopoly powers.

[\*\*\*\*3] Held:

1. Although even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor (and the jury was so instructed here), the absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a particular cooperative venture, that decision may not have evidentiary significance, or that it may not give rise to liability in certain circumstances. [Lorain Journal Co. v. United States, 342 U.S. 143](#). The question of intent is relevant to the offense of monopolization in determining whether the challenged conduct is fairly characterized as "exclusionary," "anticompetitive," or "predatory." In this case, the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor, but instead elected to make an important change in a pattern of distribution of all-Aspen tickets that had originated in a competitive market and had persisted for several years. It must be assumed that the jury, as instructed by the trial court, drew a distinction "between practices which tend to exclude or restrict competition on the one hand, [\*\*\*\*4] and the success of a business which reflects only a superior product, a well-run business, or luck, on the other," and that the jury concluded that there were no "valid business reasons" for petitioner's refusal to deal with respondent. Pp. 600-605.
2. The evidence in the record, construed most favorably in support of respondent's position, is adequate to support the verdict under the instructions given. In determining whether petitioner's conduct may properly be characterized

as exclusionary, it is appropriate to examine the effect of the challenged pattern of conduct on consumers, on respondent, and on petitioner itself. Pp. 605-611.

(a) The evidence showed that, over the years, skiers developed a strong demand for the all-Aspen ticket, and that they were adversely affected by its elimination. Pp. 605-607.

(b) The adverse impact of petitioner's pattern of conduct on respondent was established by evidence showing the extent of respondent's pecuniary injury, its unsuccessful attempt to protect itself from the loss of its share of the patrons of the all-Aspen ticket, and the steady decline of its share of the relevant market after the ticket was terminated. Pp. 607-608.

(c) The [\*\*\*\*5] evidence relating to petitioner itself did not persuade the jury that its conduct was justified by any normal business purpose, but instead showed that petitioner sought to reduce competition in the market over the long run by harming its smaller competitor. That conclusion is strongly supported by petitioner's failure to offer any efficiency justification whatever for its pattern of conduct. Pp. 608-611.

**Counsel:** Richard M. Cooper argued the cause for petitioner. With him on the briefs were Edward Bennett Williams, Harold Ungar, David G. Palmer, and William W. Maywhort.

Tucker K. Trautman argued the cause for respondent. With him on the brief were John H. Evans, Owen C. Rouse, and John H. Shenefield.\*

**Judges:** STEVENS, J., delivered the opinion of the Court, in which all other Members joined, except WHITE, J., who took no part in the decision of the case.

**Opinion by:** STEVENS

## Opinion

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[\*587] [\*\*471] [\*\*2849] JUSTICE STEVENS delivered the opinion of the Court.

LEdHN1A [↑] [1A] In a private treble-damages action, the jury found that petitioner Aspen Skiing Company (Ski Co.) had monopolized the market for [\*\*\*\*6] downhill skiing services in Aspen, Colorado. The question presented is whether that finding is erroneous as a matter of law because it rests on an assumption that a firm with monopoly power has a duty to cooperate with its smaller rivals in a marketing arrangement in order to avoid violating § 2 of the Sherman Act.<sup>1</sup>

I

[\*\*2850] Aspen is a destination ski resort with a reputation for "super powder," "a wide range of runs," and an "active night life," including "some of the best restaurants in North America." Tr. 765-767. Between 1945 and 1960, private investors independently developed three major facilities for downhill skiing: Aspen Mountain (Ajax),<sup>2</sup> Aspen

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\* Robert E. Cooper and Theodore B. Olson filed a brief for American Airlines, Inc., as amicus curiae urging reversal.

<sup>1</sup> The statute provides, in relevant part:

HN1 [↑] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ." 15 U. S. C. § 2.

<sup>2</sup> Ski Co. developed Ajax in 1946. The runs are quite steep and primarily designed for expert or advanced intermediate skiers. The base area of Ajax is located within the village of Aspen.

Highlands [\*588] (Highlands), <sup>3</sup> [\*\*\*\*8] and [\*\*\*\*7] Buttermilk. <sup>4</sup> A [\*\*\*472] fourth mountain, Snowmass, <sup>5</sup> opened in 1967.

The development [\*\*\*\*9] of any major additional facilities is hindered by practical considerations and regulatory obstacles. <sup>6</sup> The identification of appropriate topographical conditions for a new site and substantial financing are both essential. Most of the terrain in the vicinity of Aspen that is suitable for downhill skiing cannot be used for that purpose without the approval of the United States Forest Service. That approval is contingent, in part, on environmental concerns. Moreover, the county government must also approve the [\*589] project, and in recent years it has followed a policy of limiting growth.

Between 1958 and 1964, three independent companies operated Ajax, Highlands, and Buttermilk. In the early years, each company offered its own day or half-day tickets for use of its mountain. *Id., at 152*. In 1962, however, the three competitors also introduced an interchangeable ticket. <sup>7</sup> *Id.*, at 1634. The 6-day, all-Aspen ticket provided convenience to [\*\*\*\*10] the vast majority of skiers who visited the resort for weekly periods, but preferred to remain flexible about what mountain they might ski each day during the visit. App. 92. It also emphasized the unusual variety in ski mountains available in Aspen.

As initially designed, the all-Aspen ticket program consisted of booklets containing six coupons, each redeemable for a daily lift ticket at Ajax, Highlands, or Buttermilk. The price of the booklet was often discounted from the price of six daily tickets, but [\*\*\*\*11] all six coupons had to be used [\*\*2851] within a limited period of time -- seven days, for example. The revenues from the sale of the 3-area coupon books were distributed in accordance with the number of coupons collected at each mountain. Tr. 153, 1634-1638.

In 1964, Buttermilk was purchased by Ski Co., but the interchangeable ticket program continued. In most seasons after it acquired Buttermilk, Ski Co. offered 2-area, 6- or 7-day tickets featuring Ajax and Buttermilk in competition with the 3-area, 6-coupon booklet. Although it sold briskly, the all-Aspen ticket did not sell as well as Ski Co.'s multiarea ticket until Ski Co. opened Snowmass in 1967. Thereafter, [\*590] the all-Aspen coupon booklet began to outsell Ski Co.'s ticket featuring only its mountains. Record Ex. LL; Tr. 1646, 1675-1676.

<sup>3</sup> In 1957, the United States Forest Service suggested that Ajax "was getting crowded, and . . . that a ski area ought to be started at Highlands." Tr. 150. Whipple V. N. Jones, who owned an Aspen lodge at the time, discussed the project with Ski Co. officials, but they expressed little interest, telling him that they had "plenty of problems at Aspen now, and we don't think we want to expand skiing in Aspen." *Id., at 150-151*. Jones went ahead with the project on his own, and laid out a well-balanced set of ski runs: 25% beginner, 50% intermediate, 25% advanced. The base area of Highlands Mountain is located 1 1/2 miles from the village of Aspen. *Id., at 154*. Respondent Aspen Highlands Skiing Corporation provides the downhill skiing services at Highlands Mountain. Throughout this opinion we refer to both the respondent and its mountain as Highlands.

<sup>4</sup> In 1958, Friedl Pfeiffer and Arthur Pfister began developing the ranches they owned at the base of Buttermilk Mountain into a third ski area. Pfeiffer, a former Olympian, was the director of the ski school for Ski Co., and the runs he laid out were primarily for beginners and intermediate skiers. More advanced runs have since been developed. The base area of Buttermilk is located approximately 2 1/4 miles from the village of Aspen. *Id., at 152, 1471-1472, 1526*; Deposition of Paul Nitze 6-7.

<sup>5</sup> In the early 1960's William Janss, a former ski racer, and his associates had acquired three ranches in the Snowmass Valley, and had secured Forest Service permits for a ski area. The developer sold the company holding the permits to Ski Co. to allow it to develop a downhill skiing facility for the project, leaving him to develop the land at the base of the site. A fairly balanced mountain was developed with a mixture of beginner, intermediate, and advanced runs. *Id.*, at 14-16; Tr. 1475-1476. The base area of Snowmass is eight miles from the village of Aspen.

<sup>6</sup> *Id.*, at 378-379, 638, 2040-2051, 2069-2070, 2078-2082.

<sup>7</sup> Friedl Pfeiffer, one of the developers of Buttermilk, initiated the idea of an all-Aspen ticket at a luncheon with the owner of Highlands and the President of Ski Co. Pfeiffer, a native of Austria, informed his competitors that "[in] St. Anton, we have a mountain that has three different lift companies -- lifts owned by three different lift companies. . . . We sell a ticket that is interchangeable.' It was good on any of those lifts; and he said, 'I think we should do the same thing here.'" *Id., at 153*.

[\*\*\*473] In the 1971-1972 season, the coupon booklets were discontinued and an "around the neck" all-Aspen ticket was developed. This refinement on the interchangeable ticket was advantageous to the skier, who no longer found it necessary to visit the ticket window every morning before gaining access to the slopes. Lift operators at Highlands monitored usage of the ticket [\*\*\*12] in the 1971-1972 season by recording the ticket numbers of persons going onto the slopes of that mountain. Highlands officials periodically met with Ski Co. officials to review the figures recorded at Highlands, and to distribute revenues based on that count. *Id.*, at 1622, 1639.

There was some concern that usage of the all-Aspen ticket should be monitored by a more scientific method than the one used in the 1971-1972 season. After a one-season absence, the 4-area ticket returned in the 1973-1974 season with a new method of allocating revenues based on usage. Like the 1971-1972 ticket, the 1973-1974 4-area ticket consisted of a badge worn around the skier's neck. Lift operators punched the ticket when the skier first sought access to the mountain each day. A random-sample survey was commissioned to determine how many skiers with the 4-area ticket used each mountain, and the parties allocated revenues from the ticket sales in accordance with the survey's results.

In the next four seasons, Ski Co. and Highlands used such surveys to allocate the revenues from the 4-area, 6-day ticket. Highlands' share of the revenues from the ticket was 17.5% in 1973-1974, 18.5% in 1974-1975, [\*\*\*13] 16.8% in 1975-1976, and 13.2% in 1976-1977.<sup>8</sup> During these four seasons, Ski Co. did not offer its own 3-area, multiday ticket in competition [\*591] with the all-Aspen ticket.<sup>9</sup> By 1977, multiarea tickets accounted for nearly 35% of the total market. *Id.*, at 614, 1367. Holders of multiarea passes also accounted for additional daily ticket sales to persons skiing with them.

[\*\*\*14] Between 1962 and 1977, Ski Co. and Highlands had independently offered various mixes of 1-day, 3-day, and 6-day passes at their own mountains.<sup>10</sup> In every season except one, however, they had also offered some form of all-Aspen, 6-day ticket, and divided the revenues from those sales on the basis of usage. Nevertheless, for the 1977-1978 season, Ski Co. offered to continue the all-Aspen ticket only if Highlands would accept a 13.2% fixed share of the ticket's revenues.

Although [\*\*2852] that had been Highlands' share of the ticket revenues [\*\*\*474] in 1976-1977, Highlands contended that that season was an inaccurate measure of its market performance since it had been marked by unfavorable weather and an unusually low number of visiting skiers.<sup>11</sup> Moreover, Highlands wanted to continue [\*\*\*15] to divide revenues on the basis of actual usage, as that method of distribution allowed it to compete [\*592] for the daily loyalties of the skiers who had purchased the tickets. Tr. 172. Fearing that the alternative might be no interchangeable ticket at all, and hoping to persuade Ski Co. to reinstate the usage division of revenues, Highlands eventually accepted a fixed percentage of 15% for the 1977-1978 season. *Ibid.* No survey was made during that season of actual usage of the 4-area ticket at the two competitors' mountains.

<sup>8</sup> *Id.*, at 167. Highlands' share of the total market during those seasons, as measured in skier visits was 15.8% in 1973-1974, 17.1% in 1974-1975, 17.4% in 1975-1976, and 20.5% in 1976-1977. Record Ex. No. 97, App. 183.

<sup>9</sup> In 1975, the Colorado Attorney General filed a complaint against Ski Co. and Highlands alleging, in part, that the negotiations over the 4-area ticket had provided them with a forum for price fixing in violation of § 1 of the Sherman Act and that they had attempted to monopolize the market for downhill skiing services in Aspen in violation of § 2. Record Ex. X. In 1977, the case was settled by a consent decree that permitted the parties to continue to offer the 4-area ticket provided that they set their own ticket prices unilaterally before negotiating its terms. Tr. 229-231.

<sup>10</sup> About 15-20% of each company's ticket revenues were derived from sales to tour operators at a wholesale discount of 10-15%, while 80-85% of the ticket revenues were derived from sales to skiers in Aspen. *Id.*, at 623, 1772.

<sup>11</sup> The 1976-1977 season was "a no snow year." There were less than half as many skier visits (529,800) in that season as in either 1975-1976 (1,238,500) or 1977-1978 (1,273,400). Record Ex. No. 97, App. 183. In addition, Highlands opened earlier than Ski Co.'s mountains and its patrons skied off all the good snow. Ski Co. waited until January and had a better base for the rest of the season. Tr. 228.

In the 1970's the management of Ski Co. increasingly expressed their dislike [\*\*\*\*16] for the all-Aspen ticket. They complained that a coupon method of monitoring usage was administratively cumbersome. They doubted the accuracy of the survey and decried the "appearance, deportment, [and] attitude" of the college students who were conducting it. *Id.*, at 1627. See also *id.*, at 398, 405-407, 959. In addition, Ski Co.'s president had expressed the view that the 4-area ticket was siphoning off revenues that could be recaptured by Ski Co. if the ticket was discontinued. *Id.*, at 586-587, 950, 960. In fact, Ski Co. had reinstated its 3-area, 6-day ticket during the 1977-1978 season, but that ticket had been outsold by the 4-area, 6-day ticket nearly two to one. *Id.*, at 613-614.

In March 1978, the Ski Co. management recommended to the board of directors that the 4-area ticket be discontinued for the 1978-1979 season. The board decided to offer Highlands a 4-area ticket provided that Highlands would agree to receive a 12.5% fixed percentage of the revenue -- considerably below Highlands' historical average based on usage. *Id.*, at 396, 585-586. Later in the 1978-1979 season, a member of Ski Co.'s board of directors candidly informed a Highlands official [\*\*\*\*17] that he had advocated making Highlands "an offer that [it] could not accept." *Id.*, at 361.

Finding the proposal unacceptable, Highlands suggested a distribution of the revenues based on usage to be monitored by coupons, electronic counting, or random sample surveys. *Id.*, at 188. If Ski Co. was concerned about who was to conduct the survey, Highlands proposed to hire disinterested [\*593] ticket counters at its own expense -- "somebody like Price Waterhouse" -- to count or survey usage of the 4-area ticket at Highlands. *Id.*, at 191. Ski Co. refused to consider any counterproposals, and Highlands finally rejected the offer of the fixed percentage.

As far as Ski Co. was concerned, the all-Aspen ticket was dead. In its place Ski Co. offered the 3-area, 6-day ticket featuring only its mountains. In an effort to promote this ticket, Ski Co. embarked on a national advertising campaign that strongly implied to people who were unfamiliar with Aspen that Ajax, [\*\*\*475] Buttermilk, and Snowmass were the only ski mountains in the area. For example, Ski Co. had a sign changed in the Aspen Airways waiting room at Stapleton Airport in Denver. The old sign had a picture of [\*\*\*\*18] the four mountains in Aspen touting "Four Big Mountains" whereas the new sign retained the picture but referred only to three. *Id.*, at 844, 847, 858-859.<sup>12</sup>

Ski [\*\*2853] Co. took additional actions that made it extremely difficult for Highlands to market its own multiarea package to replace the joint offering. Ski Co. discontinued the 3-day, 3-area pass for the 1978-1979 season,<sup>13</sup> and also refused to sell Highlands any lift tickets, either at the tour operator's discount or at retail. *Id.*, at 327.<sup>14</sup> Highlands finally developed [\*594] an alternative product, the "Adventure Pack," which consisted of a 3-day pass at Highlands and three vouchers, each equal to the price of a daily lift [\*\*\*\*19] ticket at a Ski Co. mountain. The vouchers were guaranteed by funds on deposit in an Aspen bank, and were redeemed by Aspen merchants at full value. *Id.*, at 329-334. Ski Co., however, refused to accept them.

<sup>12</sup> Ski Co. circulated another advertisement to national magazines labeled "Aspen, More Mountains, More Fun." App. 184. The advertisement depicted the four mountains of Aspen, but labeled only Ajax, Buttermilk, and Snowmass. Buttermilk's label is erroneously placed directly over Highlands Mountain. Tr. 860, 1803.

<sup>13</sup> Highlands' owner explained that there was a key difference between the 3-day, 3-area ticket and the 6-day, 3-area ticket: "with the three day ticket, a person could ski on the . . . Aspen Skiing Corporation mountains for three days and then there would be three days in which he could ski on our mountain; but with the six-day ticket, we are absolutely locked out of those people." *Id.*, at 245. As a result of "tremendous consumer demand" for a 3-day ticket, Ski Co. reinstated it late in the 1978-1979 season, but without publicity or a discount off the daily rate. *Id.*, at 622.

<sup>14</sup> In the 1977-1978 negotiations, Ski Co. previously had refused to consider the sale of any tickets to Highlands, noting that it was "obviously not interested in helping sell" a package competitive with the 3-area ticket. Record Ex. No. 16; Tr. 269-270. Later, in the 1978-1979 negotiations, Ski Co.'s vice president of finance told a Highlands official that "[we] will not have anything to do with a four-area ticket sponsored by the Aspen Highlands Skiing Corporation." *Id.*, at 335. When the Highlands official inquired why Ski Co. was taking this position considering that Highlands was willing to pay full retail value for the daily lift tickets, the Ski Co. official answered tersely: "we will not support our competition." *Ibid.*

472 U.S. 585, \*594; 105 S. Ct. 2847, \*\*2853; 86 L. Ed. 2d 467, \*\*\*475; 1985 U.S. LEXIS 115, \*\*\*\*19

[\*\*\*\*20] Later, Highlands redesigned the Adventure Pack to contain American Express Traveler's Checks or money orders instead of vouchers. Ski Co. eventually accepted these negotiable instruments in exchange for daily lift tickets.<sup>15</sup> *Id.*, at 505, 507, 549. Despite some strengths of the product, the Adventure Pack met considerable resistance from tour operators and consumers who had grown accustomed to the convenience and flexibility provided by the all-Aspen ticket. *Id.*, at 784-785, 1041.

Without a convenient all-Aspen ticket, Highlands basically "becomes a day ski area in a destination resort." *Id.*, at 1425. [\*\*\*\*21] Highlands' share of the market for downhill skiing services in Aspen declined steadily [\*\*\*476] after the 4-area ticket based on usage was abolished in 1977: from 20.5% in 1976-1977, to 15.7% in 1977-1978, to 13.1% in 1978-1979, to [\*595] 12.5% in 1979-1980, to 11% in 1980-1981.<sup>16</sup> Record Ex. No. 97, App. 183. Highlands' revenues from associated skiing services like the ski school, ski rentals, amateur racing events, and restaurant facilities declined sharply as well.<sup>17</sup>

[\*\*\*\*22] II

In 1979, Highlands filed a complaint in the United States District Court for the District of Colorado naming Ski Co. as a [\*\*2854] defendant. Among various claims,<sup>18</sup> the complaint alleged that Ski Co. had monopolized the market for downhill skiing services at Aspen in violation of § 2 of the Sherman Act, and prayed for treble damages. The case was tried to a jury which rendered a verdict finding Ski Co. guilty of the § 2 violation and calculating Highlands' actual damages at \$ 2.5 million. App. 187-190.

In her instructions to the jury, the District Judge explained that the offense of monopolization under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in a relevant market, and (2) the willful acquisition, maintenance, or use of that power by anticompetitive [\*\*\*\*23] or exclusionary means or for anticompetitive or exclusionary [\*596] purposes.<sup>19</sup> Tr. 2310. Although the first element was vigorously disputed at the trial and in the Court of Appeals, in this Court Ski Co. does not challenge the jury's special verdict finding that it possessed monopoly power.<sup>20</sup> Nor does Ski Co. criticize the trial court's instructions to the jury concerning the second element of the § 2 offense.

<sup>15</sup> Of course, there was nothing to identify Highlands as the source of these instruments, unless someone saw the skier "taking it out of an Adventure Pack envelope." *Id.*, at 505. For the 1981-1982 season, Ski Co. set its single ticket price at \$ 22 and discounted the 3-area, 6-day ticket to \$ 114. According to Highlands, this price structure made the Adventure Pack unprofitable. *Id.*, at 535.

<sup>16</sup> In these seasons, Buttermilk Mountain, in particular, substantially increased its market share at the expense of Highlands. Record Ex. BB; Tr. 1806.

<sup>17</sup> See Record Ex. No. 91; Tr. 488, 571-572, 692-694, 698, 701-702. Highlands' ski school had an outstanding reputation, and its share of the ski school market had always outperformed Highlands' share of the downhill skiing market. *Id.*, at 1822. Even some Ski Co. officials had sent their children to ski school at Highlands. *Id.*, at 560-570, 588. After the elimination of the 4-area ticket, however, families or groups purchasing 3-area tickets were reluctant to enroll a beginner among them in the Highlands ski school when the more experienced skiers would have to leave to ski at Ajax, Buttermilk, or Snowmass. *Id.*, at 571.

<sup>18</sup> Highlands also alleged that Ski Co. had conspired with various third parties in violation of § 1 of the Sherman Act. The District Court allowed this claim to go to the jury which rendered a verdict in Ski Co.'s favor. App. 189.

<sup>19</sup> In United States v. Grinnell Corp., 384 U.S. 563, 570-571 (1966), we explained:

**HN2** [↑] "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

<sup>20</sup> The jury found that the relevant product market was "[downhill] skiing at destination ski resorts," that the "Aspen area" was a relevant geographic submarket, and that during the years 1977-1981, Ski Co. possessed monopoly power, defined as the power to control prices in the relevant market or to exclude competitors. See App. 187-188.

[\*\*\*\*24] On this element, the jury was instructed that it had to consider whether "Aspen Skiing Corporation willfully acquired, maintained, or used that power by anti-competitive or exclusionary means or for anti-competitive or exclusionary purposes." App. 181. The instructions elaborated:

[\*\*\*477] "In considering whether the means or purposes were anti-competitive or exclusionary, you must draw a distinction here between practices which tend to exclude or restrict competition on the one hand and the success of a business which reflects only a superior product, a well-run business, or luck, on the other. The line between legitimately gained monopoly, its proper use and maintenance, and improper conduct has been described in various ways. It has been said that obtaining or maintaining monopoly power cannot represent monopolization if the power was gained and maintained by conduct that was honestly industrial. Or it is said that monopoly power which is thrust upon a firm due to its [\*597] superior business ability and efficiency does not constitute monopolization.

"For example, a firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies [\*\*\*25] by constructing a large and efficient factory. These benefits are a consequence of size and not an exercise of monopoly power. Nor is a corporation which possesses monopoly power under a duty to cooperate with its business rivals. Also a company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor or otherwise refuses to deal with a competitor in some manner does not violate Section 2 if valid business reasons exist for that refusal.

"In other words, if there were legitimate business reasons for the refusal, then the defendant, even if he is found to possess monopoly power in a relevant market, has not violated the law. We are concerned with conduct which unnecessarily excludes or handicaps competitors. This is conduct which does not benefit consumers by making a better product or service available -- or in other [\*\*2855] ways -- and instead has the effect of impairing competition.

"To sum up, you must determine whether Aspen Skiing Corporation gained, maintained, or used monopoly power in a relevant market by arrangements and policies which rather than being a consequence of a superior product, superior business sense, [\*\*\*26] or historic element, were designed primarily to further any domination of the relevant market or sub-market." *Id., at 181-182.*

The jury answered a specific interrogatory finding the second element of the offense as defined in these instructions.<sup>21</sup>

[\*598] Ski Co. filed a motion for judgment notwithstanding the verdict, contending that the evidence was insufficient to support a § 2 violation as a matter of law. In support of that motion, Ski Co. incorporated the arguments that it had advanced in support of its motion for a directed verdict, at which time it had primarily [\*\*\*27] contested the sufficiency of [\*\*\*478] the evidence on the issue of monopoly power. Counsel had, however, in the course of the argument at that time, stated: "Now, we also think, Judge, that there clearly cannot be a requirement of cooperation between competitors." Tr. 1452.<sup>22</sup> [\*\*\*28] The District Court denied Ski Co.'s motion and entered a judgment awarding Highlands treble damages of \$ 7,500,000, costs, and attorney's fees.<sup>23</sup> App. 191-192.

<sup>21</sup> It answered this interrogatory affirmatively:

"Willful Acquisition, Maintenance or Use of Monopoly Power: Do you find by a preponderance of the evidence that the defendants willfully acquired, maintained or used monopoly power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes, rather than primarily as a consequence of a superior product, superior business sense, or historic accident?" *Id., at 189.*

<sup>22</sup> Counsel also appears to have argued that Ski Co. was under a legal obligation to refuse to participate in any joint marketing arrangement with Highlands:

"Aspen Skiing Corporation is required to compete. It is required to make independent decisions. It is required to price its own product. It is required to make its own determination of the ticket that it chooses to offer and the tickets that it chooses not to offer." Tr. 1454.

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[\*599] The Court of Appeals affirmed in all respects. [738 F.2d 1509 \(CA10 1984\)](#). The court advanced two reasons for rejecting Ski Co.'s argument that "there was insufficient evidence to present a jury issue of monopolization because, as a matter of law, the conduct at issue was pro-competitive conduct that a monopolist could lawfully engage in."<sup>24</sup> First, relying on [United States v. Terminal Railroad Assn. of St. Louis, 224 U.S. 383 \(1912\)](#), [\*\*\*\*29] the Court of Appeals held that the multiday, multiarea ticket could be characterized as an "essential facility" that Ski Co. had a duty to market jointly with Highlands. [738 F.2d, at 1520-1521](#). Second, it held that there was sufficient evidence to support a finding that Ski Co.'s intent in refusing to market the 4-area ticket, "considered together with its other conduct," was to create or maintain a monopoly. [Id., at 1522](#).

In its review of the evidence on the question of intent, the Court of Appeals considered the record "as a whole" and concluded [\*\*2856] that it was not necessary for Highlands to prove that each allegedly anticompetitive act was itself sufficient to demonstrate an abuse of monopoly power. [Id., at 1522, n. 18](#).<sup>25</sup> The court noted that by "refusing to cooperate" with Highlands, Ski Co. "became the only business in Aspen that could offer a multi-day multi-mountain [\*\*\*\*30] skiing experience"; that the refusal to offer a 4-mountain ticket resulted in "skiers' frustration over its unavailability"; that there was apparently no valid business reason for refusing to accept the coupons in Highlands' [\*\*\*479] Adventure Pack; and that after Highlands had modified its Adventure Pack to meet Ski Co.'s objections, Ski Co. had increased its single ticket price to \$ 22 "thereby making it unprofitable . . . to market [the] Adventure Pack." [Id., at 1521-1522](#). In reviewing Ski Co.'s argument that it was entitled to a directed verdict, the Court of Appeals assumed that the jury had resolved all contested questions of fact in Highlands' favor.

### [\*600] III

In this Court, Ski Co. contends that even a firm with monopoly power has no duty to engage in joint marketing with a competitor, that a [\*\*\*31] violation of [§ 2](#) cannot be established without evidence of substantial exclusionary conduct, and that none of its activities can be characterized as exclusionary. It also contends that the Court of Appeals incorrectly relied on the "essential facilities" doctrine and that an "anticompetitive intent" does not transform nonexclusionary conduct into monopolization. In response, Highlands submits that, given the evidence in the record, it is not necessary to rely on the "essential facilities" doctrine in order to affirm the judgment.<sup>26</sup> Tr. of Oral Arg. 34.

In this Court, Ski Co. does not question the validity of the joint marketing arrangement under [§ 1](#) of the Sherman Act. Thus, we have no occasion to consider the circumstances that might permit such combinations in the skiing industry. See generally [National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85, 113-115 \(1984\)](#); [Broadcast Music, Inc., v. Columbia Broadcasting System, Inc., 441 U.S. 1, 18-23 \(1979\)](#); [Continental T. V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51-57 \(1977\)](#).

<sup>23</sup> The District Court also entered an injunction requiring the parties to offer jointly a 4-area, 6-out-of-7-day coupon booklet substantially identical to the "Ski the Summit" booklet accepted by Ski Co. at its Breckenridge resort in Summit County, Colorado. See n. 30, *infra*. See also [supra, at 589](#). The injunction was initially for a 3-year period, but was later extended through the 1984-1985 season by stipulation of the parties. Highlands represents that "it will not seek an extension of the injunction." Brief for Respondent 1, n. 1. No question is raised concerning the character of the injunctive relief ordered by the District Court.

<sup>24</sup> [738 F.2d, at 1516-1517](#) (quoting Ski Co.'s brief below).

<sup>25</sup> See [Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 \(1962\)](#); [Associated Press v. United States, 326 U.S. 1, 14 \(1945\)](#).

<sup>26</sup> Highlands also contends that Ski Co.'s present contentions were not properly raised in the District Court. In that court, Ski Co. primarily questioned whether the evidence supported a finding that it possessed monopoly power in a properly defined market. In this Court, on the other hand, Ski Co.'s entire argument relates to the question whether it misused that power. Nevertheless, we agree with the Court of Appeals' conclusion, [738 F.2d, at 1517-1518](#), that Ski Co.'s motion for a directed verdict did raise the question whether the judgment improperly rested on an assumption that [§ 2](#) required a monopolist to cooperate with its rivals.

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[\*\*\*\*32] "

[LEdHN\[1B\]](#) [↑] [1B] [LEdHN\[2A\]](#) [↑] [2A] The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion -- that is, by competing successfully rather than by arranging treaties with its competitors." [United States v. Citizens & Southern National Bank, 422 U.S. 86, 116 \(1975\)](#). Ski Co., therefore, is surely correct in submitting that even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor. Ski Co. is quite wrong, however, in suggesting that the judgment in this case rests on any such proposition of law. For the trial court unambiguously instructed the jury that a firm possessing monopoly power has no duty to cooperate with its business rivals. [Supra, at 596-597.](#)

[\*601] [LEdHN\[2B\]](#) [↑] [2B] The absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a particular cooperative venture, that decision may not have evidentiary significance, or that it may not give rise to liability in certain circumstances. The absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman's [\*\*\*\*33] cherished right to select his customers and his associates. The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.<sup>27</sup>

[LEdHN\[2C\]](#) [↑] [2C]

In [\*\*\*480] [\*\*2857] *Lorain Journal Co. v. United States, 342 U.S. 143 (1951)*, we squarely held that this right was not unqualified. Between 1933 and 1948 the publisher of the Lorain Journal, a newspaper, was the only local business disseminating news and advertising in that Ohio town. In 1948, a small radio station was established in a nearby community. In an effort to destroy its small competitor, and thereby regain its "pre-1948 substantial monopoly over the mass dissemination [\*\*\*\*34] of all news and advertising," the Journal refused to sell advertising to persons that patronized the radio station. [Id., at 153.](#)

In holding that this conduct violated § 2 of the Sherman Act, the Court dispatched the same argument raised by the monopolist here:

"The publisher claims a right as a private business concern to select its customers and to refuse to accept advertisements from whomever it pleases. We do not dispute that general right. 'But the word "right" is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified.' *American [\*602] Bank & Trust Co. v. Federal Bank, 256 U.S. 350, 358*. The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act. The operator of the radio station, equally with the publisher of the newspaper, is entitled to the protection of that Act. [HN4](#) [↑] 'In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right [\*\*\*\*35] of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.' (Emphasis supplied.) [United States v. Colgate & Co., 250 U.S. 300, 307](#). See [Associated Press v. United States, 326 U.S. 1, 15; United States v. Bausch & Lomb Co., 321 U.S. 707, 721-723.](#) [342 U.S. at 155.](#)

The Court approved the entry of an injunction ordering the Journal to print the advertisements of the customers of its small competitor.

<sup>27</sup> [HN3](#) [↑] Under § 1 of the Sherman Act, a business "generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984); United States v. Colgate & Co., 250 U.S. 300, 307 (1919).*

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LEdHN[3] [3] In *Lorain Journal*, the violation of § 2 was an "attempt to monopolize," rather than monopolization, but the question of intent is relevant to both offenses. In the former case it is necessary to prove a "specific intent" to accomplish the forbidden objective -- as Judge Hand explained, "an intent which goes beyond the mere intent to do the act." United States v. Aluminum Co. of America, 148 F.2d 416, 432 (CA2 1945). In the latter case evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as "exclusionary" or "anticompetitive" [\*\*\*\*36] -- to use the words in the trial court's instructions -- or "predatory," to use a word that scholars seem to favor. Whichever label is used, there is agreement on the proposition that "no monopolist monopolizes unconscious [\*\*\*481] of what he is doing."<sup>28</sup> As Judge [\*603] Bork stated more recently: "Improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended."<sup>29</sup>

[\*\*\*\*37] The qualification on the right of a monopolist to deal with whom he pleases is [\*\*2858] not so narrow that it encompasses no more than the circumstances of *Lorain Journal*. In the actual case that we must decide, the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years. The all-Aspen, 6-day ticket with revenues allocated on the basis of usage was first developed when three independent companies operated three different ski mountains in the Aspen area. Supra, at 589, and n. 7. It continued to provide a desirable option for skiers when the market was enlarged to include four mountains, and when the character of the market was changed by Ski Co.'s acquisition of monopoly power. Moreover, since the record discloses that interchangeable tickets are used in other multimountain areas which apparently are competitive,<sup>30</sup> it seems appropriate to infer that such tickets satisfy consumer demand in free competitive markets.

[\*\*\*\*38] [\*604] Ski Co.'s decision to terminate the all-Aspen ticket was thus a decision by a monopolist to make an important change in the character of the market.<sup>31</sup> Such a decision is not necessarily [\*\*\*482] anticompetitive, and Ski Co. contends that neither its decision, nor the conduct in which it engaged to implement that decision, can fairly be characterized as exclusionary in this case. It recognizes, however, that as the case is presented to us, we must interpret the entire record in the light most favorable to Highlands and give to it the benefit of all inferences

<sup>28</sup> "In order to fall within § 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any 'specific,' intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing. So here, 'Alcoa' meant to keep, and did keep, that complete and exclusive hold upon the ingot market with which it started. That was to 'monopolize' that market, however innocently it otherwise proceeded." United States v. Aluminum Co. of America, 148 F.2d, at 432.

<sup>29</sup> R. Bork, *The Antitrust Paradox* 160 (1978) (hereinafter Bork).

<sup>30</sup> Ski Co. itself participates in interchangeable ticket programs in at least two other markets. For example, since 1970, Ski Co. has operated the Breckenridge resort in Summit County, Colorado. Breckenridge participates in the "Ski the Summit" 4-area interchangeable coupon booklet which allows the skier to ski at any of the four mountains in the region: Breckenridge, Copper Mountain, Keystone, and Arapahoe Basin. Tr. 188, 590, 966, 1070-1081. In the 1979-1980 season Keystone and Arapahoe Basin -- which are jointly operated -- had about 40% of the Summit County market, and the other two ski mountains each had a market share of about 30%. *Id.*, at 1100. During the relevant period of time, Ski Co. also operated Blackcomb Mountain, northeast of Vancouver, British Columbia, which has an interchangeable ticket arrangement with nearby Whistler Mountain, an independently operated facility. Id., at 369, 873-874. Interchangeable lift tickets apparently are also available in some European skiing areas. See n. 7, *supra*; Tr. 720.

<sup>31</sup> "In any business, patterns of distribution develop over time; these may reasonably be thought to be more efficient than alternative patterns of distribution that do not develop. The patterns that do develop and persist we may call the optimal patterns. By disturbing optimal distribution patterns one rival can impose costs upon another, that is, force the other to accept higher costs." Bork 156.

In § 1 cases where this Court has applied the *per se* approach to invalidity to concerted refusals to deal, "the boycott often cut off access to a supply, facility or market necessary to enable the boycotted firm to compete, . . . and frequently the boycotting firms possessed a dominant position in the relevant market." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, *ante*, at 294.

which the evidence fairly supports, even though contrary inferences might reasonably be drawn. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962).

[\*\*\*\*39] [LEdHN1C](#) [↑] [1C] Moreover, we must assume that the jury followed the court's instructions. The jury must, therefore, have drawn a distinction "between practices which tend to exclude or restrict competition on the one hand, and the success of a business which reflects only a superior product, a well-run business, or luck, on the other." [Supra, at 596](#). Since the jury was unambiguously instructed that Ski Co.'s refusal to [\*605] deal with Highlands "does not violate [Section 2](#) if valid business reasons exist for that refusal," [supra, at 597](#), we must assume that the jury concluded that there were no valid business reasons for the refusal. The question then is whether that conclusion finds support in the record.

#### IV

The question whether Ski Co.'s conduct may properly be characterized as [\\*\\*2859](#) exclusionary cannot be answered by simply considering its effect on Highlands. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.<sup>32</sup> [HN5](#) [↑] If a firm has been "attempting to exclude rivals on some basis other than efficiency,"<sup>33</sup> it is fair to characterize its behavior as predatory. It is, accordingly, appropriate [\\*\\*\\*\\*40](#) to examine the effect of the challenged pattern of conduct on consumers, on Ski Co.'s smaller rival, and on Ski Co. itself.

#### *Superior Quality of the All-Aspen Ticket*

The average Aspen visitor "is a well-educated, relatively affluent, experienced skier who has skied a number of times in the past . . ." Tr. 764. Over 80% of the skiers visiting the resort each year have been there before -- 40% of these repeat visitors have skied Aspen at least five times. [Id., at 768](#). Over the years, they developed a strong demand for the 6-day, all-Aspen ticket in its various refinements. Most experienced skiers quite logically prefer to purchase their tickets at once for the whole period that they will spend [\\*\\*\\*\\*41](#) at the resort; they can then spend more time on the slopes and enjoying apres-ski amenities and less time standing in ticket lines. The 4-area attribute of the ticket allowed the skier to [\\*606](#) purchase his 6-day ticket in advance while reserving the right to decide in his own time and for his own reasons which mountain he would ski on each day. [\\*\\*\\*483](#) It provided convenience and flexibility, and expanded the vistas and the number of challenging runs available to him during the week's vacation.<sup>34</sup>

[\*\*\*\*42] While the 3-area, 6-day ticket offered by Ski Co. possessed some of these attributes, the evidence supports a conclusion that consumers were adversely affected by the elimination of the 4-area ticket. In the first place, the actual record of competition between a 3-area ticket and the all-Aspen ticket in the years after 1967 indicated that skiers demonstrably preferred four mountains to three. [Supra, at 589-590, 592](#). Highlands' expert marketing witness testified that many of the skiers who come to Aspen want to ski the four mountains, and the abolition of the 4-area pass made it more difficult to satisfy that ambition. Tr. 775. A consumer survey undertaken

<sup>32</sup> "Thus, [HN6](#) [↑] 'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." 3 P. Areeda & D. Turner, [Antitrust Law](#) 78 (1978).

<sup>33</sup> Bork 138.

<sup>34</sup> Highlands' expert marketing witness testified that visitors to the Aspen resort "are looking for a variety of skiing experiences, partly because they are going to be there for a week and they are going to get bored if they ski in one area for very long; and also they come with people of varying skills. They need some variety of slopes so that if they want to go out and ski the difficult areas, their spouses or their buddies who are just starting out skiing can go on the bunny hill or the not-so-difficult slopes." Tr. 765. The owner of a condominium management company added: "The guest is coming for a first-class destination ski experience, and part of that, I think, is the expectation of perhaps having available to him the ability to ski all of what is there; i.e., four mountains vs. three mountains. It helps enhance the quality of the vacation experience." [Id., at 720](#). See also *id.*, at 685.

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in the 1979-1980 season indicated that 53.7% of the respondents wanted to ski Highlands, but would not; 39.9% said that they would not be skiing at the mountain of their choice because their ticket would not permit it. Record Ex. No. 75, pp. 36-37.

Expert testimony and anecdotal evidence supported these statistical measures of consumer preference. A major wholesale [**\*607**] tour operator asserted that he would not even consider marketing a 3-area ticket if a 4-area ticket were available.<sup>35</sup> During the 1977-1978 and [\*\*\*\*43] 1978-1979 seasons, people with Ski Co.'s 3-area ticket came to Highlands "on a very regular basis [**\*\*2860**]" and attempted to board the lifts or join the ski school.<sup>36</sup> [\*\*\*\*44] Highlands officials were left to explain to angry skiers that they could only ski at Highlands or join its ski school by paying for a 1-day lift ticket. Even for the affluent, this was an irritating situation because it left the skier the option of either wasting 1 day of the 6-day, 3-area pass or obtaining a refund which could take all morning and entailed the forfeit of the 6-day discount.<sup>37</sup> An active officer in the Atlanta Ski Club [**\*\*\*484**] testified that the elimination of the 4-area pass "infuriated" him. Tr. 978.

#### *Highlands' Ability to Compete*

The adverse impact of Ski Co.'s pattern of conduct on Highlands is not disputed in this Court. Expert testimony described the extent of its pecuniary injury. The evidence concerning its attempt to develop a substitute product either by buying Ski Co.'s daily tickets in bulk, or by marketing its [**\*608**] own Adventure Pack, demonstrates that it tried to protect itself from the loss of its share of the patrons of the all-Aspen ticket. The development of a new distribution system for providing the experience that skiers had learned to expect in Aspen proved to be prohibitively expensive. As a result, Highlands' share of the relevant market steadily declined after the 4-area ticket was terminated. The size of the damages award also confirms the substantial character of the effect of Ski Co.'s conduct upon Highlands.<sup>38</sup>

#### **[\*\*\*\*45] Ski Co.'s Business Justification**

Perhaps most significant, however, is the evidence relating to Ski Co. itself, for Ski Co. did not persuade the jury that its conduct was justified by any normal business purpose. Ski Co. was apparently willing to forgo daily ticket sales both to skiers who sought to exchange the coupons contained in Highlands' Adventure Pack, and to those who would have purchased Ski Co. daily lift tickets from Highlands if Highlands had been permitted to purchase them in bulk. The jury may well have concluded that Ski Co. elected to forgo these short-run benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor.

<sup>35</sup> "Our philosophy is that . . . to offer [Aspen] as a premier ski resort, our clients should be offered all of the terrain. Therefore, we would never consciously consider offering a three-mountain ticket if there were a four-mountain ticket available." *Id.*, at 1026.

<sup>36</sup> *Id., at 356, 492, 572, 679, 1001-1002*. For example, the marketing director of Highlands' ski school reported that one frustrated consumer was a dentist from "the Des Moines area [who] came out with two of his children, and he had been told by our base lift operator that he could not board. He became somewhat irate and she had referred him to my office, which is right there on the ski slopes. He came into my office and started out, 'Well, I want to go skiing here, and I don't understand why I can't.' When we got the situation slowed down and explained that there were two different tickets, well, what came out is irritation occurred because he had intended when he came to Aspen to be able to ski all areas . . ." *Id., at 356*.

<sup>37</sup> The refund policy was cumbersome, and poorly publicized. *Id.*, at 994, 1044, 1053.

<sup>38</sup> In considering the competitive effect of Ski Co.'s refusal to deal or cooperate with Highlands, it is not irrelevant to note that similar conduct carried out by the concerted action of three independent rivals with a similar share of the market would constitute a *per se* violation of § 1 of the Sherman Act. See *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, ante, at 294. Cf. *Lorain Journal Co. v. United States*, 342 U.S. 143, 154 (1951).

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That conclusion is strongly supported by Ski Co.'s failure to offer any efficiency justification whatever for its pattern of conduct.<sup>39</sup> [\*\*\*\*47] In defending the decision to terminate the jointly [\*\*609] offered ticket, Ski Co. claimed that usage could not be properly monitored. The evidence, however, established that Ski Co. itself monitored the use [\*\*2861] of the 3-area passes based on a count taken by lift operators, and distributed the revenues among its mountains on [\*\*\*\*46] that basis.<sup>40</sup> Ski Co. contended that coupons [\*\*\*485] were administratively cumbersome, and that the survey takers had been disruptive and their work inaccurate. Coupons, however, were no more burdensome than the credit cards accepted at Ski Co. ticket windows. Tr. 330-331. Moreover, in other markets Ski Co. itself participated in interchangeable lift tickets using coupons, n. 30, *supra*. As for the survey, its own manager testified that the problems were much overemphasized by Ski Co. officials, and were mostly resolved as they arose. Tr. 663-667, 673. Ski Co.'s explanation for the rejection of Highlands' offer to hire -- at its own expense -- a reputable national accounting firm to audit usage of the 4-area tickets at Highlands' mountain, was that there was no way to "control" the audit. *Id., at 598.*

In the end, Ski Co. was pressed to justify its pattern of conduct on a desire to disassociate itself from -- what it considered [\*610] -- the inferior skiing services offered at Highlands. *Id.*, at 401, 422. The all-Aspen ticket based on usage, however, allowed consumers to [\*\*\*\*48] make their own choice on these matters of quality. Ski Co.'s purported concern for the relative quality of Highlands' product was supported in the record by little more than vague insinuations, and was sharply contested by numerous witnesses. Moreover, Ski Co. admitted that it was willing to associate with what it considered to be inferior products in other markets. *Id.*, at 964.

**LEdHN[1D]** [1D] Although Ski Co.'s pattern of conduct may not have been as "bold, relentless, and predatory" as the publisher's actions in *Lorain Journal*,<sup>41</sup> the record in this case comfortably supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival. The sale of its 3-area, 6-day ticket, particularly when it was discounted below the daily ticket price, deterred the ticket holders from skiing at Highlands.<sup>42</sup> [\*\*\*\*50] The refusal to accept the Adventure Pack coupons in exchange for daily tickets was apparently motivated entirely by a decision to avoid providing any benefit to Highlands even though accepting the coupons would have entailed no cost to Ski Co. itself, would have provided it with immediate benefits, and would have satisfied [\*\*\*\*49] its potential customers. Thus the evidence supports an inference that Ski Co. was

<sup>39</sup> "The law can usefully attack this form of predation only when there is evidence of specific intent to drive others from the market by means other than superior efficiency and when the predator has overwhelming market size, perhaps 80 or 90 percent. Proof of specific intent to engage in predation may be in the form of statements made by the officers or agents of the company, evidence that the conduct was used threateningly and did not continue when a rival capitulated, or *evidence that the conduct was not related to any apparent efficiency*. These matters are not so difficult of proof as to render the test overly hard to meet." Bork 157 (emphasis added).

<sup>40</sup> Under the Ski Co. system, each skier's ticket, whether a daily or weekly ticket, is punched before he goes out on the slopes for the day. Revenues are distributed between the mountains on the basis of this count. Tr. 650-651. Ski Co.'s vice president for finance testified that Ski Co. "would never consider" a system like that for monitoring usage on a 4-area ticket: "it's fine to approximate within your own company." *Id., at 599.* The United States Forest Service, however, required the submission of financial information on a mountain-by-mountain basis as a condition of the permits issued for each mountain. *Id., at 643, 945.* A lift operator at Ajax conceded that the survey count during the years of the 4-area ticket was "generally pretty close" to the count made by Ski Co.'s staff. *Id.*, at 1627.

<sup>41</sup> *Lorain Journal Co. v. United States*, 342 U.S., at 149 (quoting opinion below, 92 F.Supp. 794, 796 (ND Ohio 1950)).

<sup>42</sup> "[Why] didn't they buy an individual daily lift ticket at Aspen Highlands? . . . For those who had bought six-day tickets, I think despite the fact that they are all relatively affluent -- a lot of them are relatively affluent when they go to Aspen -- they are all sort of managerial types and they seem to be pretty cautious. Certainly the comments that I have had from individual skiers and from the tour operators, club people that I have talked to -- they are pretty careful with their money and they would feel -- these are the people who will buy the six-day, three-area ticket that giving up one of those days and going over to ski at Aspen Highlands would mean spending extra money." Tr. 777.

not motivated by efficiency concerns and that it was willing to sacrifice [\*611] short-run benefits and consumer goodwill in exchange for a [\*\*\*486] perceived long-run impact on its smaller rival.<sup>43</sup>

Because [\*\*2862] we are satisfied that the evidence in the record,<sup>44</sup> construed most favorably in support of Highlands' position, is adequate to support the verdict under the instructions given by the trial court, the judgment of the Court of Appeals is

*Affirmed.*

[\*\*\*51] JUSTICE WHITE took no part in the decision of this case.

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US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 15, 30

L Ed Index to Annos, Restraints of Trade and Monopolies

ALR Quick Index, Restraints of Trade and Monopolies

Federal Quick Index, Monopolies and Restraints of Trade

Annotation References:

Refusals to deal as violations of the federal antitrust laws ([15 USCS 1, 2, 13](#)). 41 ALR Fed 175.

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<sup>43</sup> The Ski Co. advertising that conveyed the impression that there were only three skiing mountains in Aspen, *supra*, at 593, and n. 12, is consistent with this conclusion, even though this evidence would not be sufficient in itself to sustain the judgment.

<sup>44</sup> Given our conclusion that the evidence amply supports the verdict under the instructions as given by the trial court, we find it unnecessary to consider the possible relevance of the "essential facilities" doctrine, or the somewhat hypothetical question whether nonexclusionary conduct could ever constitute an abuse of monopoly power if motivated by an anticompetitive purpose. If, as we have assumed, no monopolist monopolizes unconscious of what he is doing, that case is unlikely to arise.



## Data General Corp. v. Digidyne Corp.

Supreme Court of the United States

July 1, 1985, Decided

No. 84-761

### **Reporter**

473 U.S. 908 \*; 1985 U.S. LEXIS 2529 \*\*; 105 S. Ct. 3534; 87 L. Ed. 2d 657; 53 U.S.L.W. 3910; 1985-2 Trade Cas. (CCH) P66,668

DATA GENERAL CORP. v. DIGIDYNE CORP. ET AL.

**Prior History:** [\[\\*\\*1\]](#) C. A. 9th Cir.

Reported below: [734 F.2d 1336](#).

**Disposition:** Certiorari denied

## **Core Terms**

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market power, operating system, processing, customers, forcing, buyers, tying arrangement, anti trust law, jury verdict, tied product, reinstated, consumers, locked, tie-in, buy

## **Opinion**

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[\[\\*908\]](#) Certiorari denied.

**Dissent by:** WHITE

## **Dissent**

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JUSTICE WHITE, with whom JUSTICE BLACKMUN joins, dissenting.

Petitioner in this case manufactured and sold a central processing unit for computers known as NOVA. Petitioner also created and sold a copyrighted operating system for NOVA called RDOS. RDOS was a very popular operating system, but petitioner's licensing agreement prevented customers from using it with any central processing unit other than petitioner's NOVA.

Respondents sued, claiming that petitioner's marketing strategy amounted to an illegal tie-in in violation of the antitrust laws. After a jury trial, the District Court granted petitioner's motion for a judgment notwithstanding the verdict, defining the appropriate market as the "market for general purpose minicomputers and microprocessors." [In re Data General Corp. Antitrust Litigation, 529 F.Supp. 801, 821 \(ND Cal. 1981\)](#). No reasonable juror could find, the court determined, that within this large and dynamic market with much larger competitors petitioner had the market power to restrain trade through an illegal tie-in arrangement. [\[\\*\\*2\]](#) The Court of Appeals for the Ninth Circuit reversed and reinstated the jury verdict in favor of respondents. [734 F.2d 1336 \(1984\)](#). The court concluded that the tying arrangement was illegal *per se*, because petitioner's RDOS operating system was sufficiently unique and

desirable to an appreciable number of buyers to enable petitioner to force those consumers to buy its tied product, the NOVA central processing unit.

The Court of Appeals' decision in this case is suspect on several grounds. As we have consistently explained, a particular tying arrangement may have procompetitive justifications, and it is thus inappropriate to condemn such an arrangement without considerable market analysis. *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104, n. 26 (1984); *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 11-14 (1984). Anticompetitive forcing only exists if consumers are forced to buy a tied product as a result of the [\*909] sellers' market power, not simply because of the desirability of the package. *Id., at 24-25*. The Court of Appeals [\*\*3] looked to market power over "locked in" customers who had already purchased petitioner's wares, viewed the copyright on the operating system as creating a presumption of market power, and seemingly concluded that forcing power is sufficiently established to demonstrate *per se* antitrust liability if some buyers find the tying product unique and desirable.

Drawing distinctions between the permissible and the forbidden in this area is difficult, and the posture of this case -- a jury verdict overturned by the District Court but reinstated on appeal -- creates an additional layer of complexity, since each court below took a different view of what facts were relevant. Nonetheless, this case raises several substantial questions of **antitrust law** and policy, including what constitutes forcing power in the absence of a large share of the general market, whether market power over "locked in" customers must be analyzed at the outset of the original decision to purchase, and what effect should be given to the existence of a copyright or other legal monopoly in determining market power.

At stake is more than the resolution of this single controversy or even the clarification of what may [\*\*4] seem at times to be a collection of arcane legal distinctions. In the highly competitive, multibillion dollar a year computer industry, bundling of software and hardware, or of operating systems and central processing units, is somewhat common, and any differentiated product is especially attractive to some buyers. The reach of the decision in this case is potentially enormous, and as the United States strongly urges us to do, I would grant certiorari to address the substantial issues of federal law presented.

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## Sedima v. Imrex Co.

Supreme Court of the United States

April 17, 1985, Argued ; July 1, 1985, Decided

No. 84-648

**Reporter**

473 U.S. 479 \*; 105 S. Ct. 3275 \*\*; 87 L. Ed. 2d 346 \*\*\*; 1985 U.S. LEXIS 119 \*\*\*\*; 53 U.S.L.W. 3914; 53 U.S.L.W. 5034; 1985-2 Trade Cas. (CCH) P66,666; Fed. Sec. L. Rep. (CCH) P92,086

SEDIMA, S.P.R.L. v. IMREX CO., INC., ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

**Disposition:** [741 F.2d 482](#), reversed and remanded.

## Core Terms

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racketeering, predicate act, organized crime, legislative history, enterprise, antitrust, provisions, mail, courts, wire fraud, civil remedy, racketeering activity, infiltration, cases, treble-damages, pattern of racketeering activity, treble damages, remedies, Hearings, anti trust law, civil action, competitors, damages, legitimate business, statutory language, businessmen, federal law, customers, target, suits

## LexisNexis® Headnotes

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Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

Education Law > ... > Gender & Sex Discrimination > Title IX > Enforcement of Title IX

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

Education Law > ... > Gender & Sex Discrimination > Title IX > Scope of Title IX

Education Law > ... > Gender & Sex Discrimination > Title IX > Remedies

Securities Law > RICO Actions > General Overview

### **HN1[] Racketeer Influenced & Corrupt Organizations, Remedies**

The Racketeer Influenced and Corrupt Organizations Act provides a private civil action to recover treble damages for injury by reason of a violation of its substantive provisions. [18 U.S.C.S. § 1964\(c\)](#).

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Criminal Law & Procedure > ... > Fraud > Securities Fraud > Elements

Securities Law > RICO Actions > Elements of Proof > Definition of Racketeering Activity

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Penalties

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Penalties

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

Securities Law > RICO Actions > General Overview

## **HN2** **Securities Fraud, Elements**

The Racketeer Influenced and Corrupt Organizations Act defines "racketeering activity" as any act "chargeable" under several generically described state criminal laws, any act "indictable" under numerous specific federal criminal provisions, including mail and wire fraud, and any "offense" involving bankruptcy or securities fraud or drug-related activities that is "punishable" under federal law. [18 U.S.C.S. § 1961\(1\)](#).

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

Securities Law > RICO Actions > General Overview

## **HN3** **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

The Racketeer Influenced and Corrupt Organizations Act prohibits the use of income derived from a "pattern of racketeering activity" to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce; the acquisition or maintenance of any interest in an enterprise "through" a pattern of racketeering activity; conducting or participating in the conduct of an enterprise through a pattern of racketeering activity; and conspiring to violate any of these provisions. [18 U.S.C.S. § 1962](#).

Criminal Law & Procedure > Sentencing > Fines

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

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

Criminal Law & Procedure > Sentencing > Forfeitures > General Overview

## **HN4** **Sentencing, Fines**

The Racketeer Influenced and Corrupt Organizations Act provides criminal penalties of imprisonment, fines, and forfeiture for violation of its provisions. [18 U.S.C.S. § 1963](#).

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

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Securities Law > RICO Actions > General Overview

## **HN5** [down] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

See [18 U.S.C.S. § 1964\(c\)](#).

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

Securities Law > RICO Actions > General Overview

## **HN6** [down] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

The language of the Racketeer Influenced and Corrupt Organizations Act gives no obvious indication that a civil action can proceed only after a criminal conviction. The word "conviction" does not appear in any relevant portion of the statute. To the contrary, the predicate acts involve conduct that is "chargeable" or "indictable," and "offenses" that are "punishable, " under various criminal statutes. [18 U.S.C.S. § 1961\(1\)](#). As defined in the statute, racketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he could be.

Civil Procedure > Sanctions > General Overview

## **HN7** [down] **Civil Procedure, Sanctions**

In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard.

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

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Securities Law > RICO Actions > General Overview

## **HN8** [down] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

That the offending conduct under the Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C.S. §§ 1961-68](#), is described by reference to criminal statutes does not mean that its occurrence must be established by criminal standards or that the consequences of a finding of liability in a private civil action are identical to the consequences of a criminal conviction.

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > General Overview

Securities Law > RICO Actions > General Overview

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

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## **HN9** [blue down arrow] **Adjustments & Enhancements, Criminal History**

To the extent an action under the Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C.S. § 1964\(c\)](#), might be considered quasi-criminal, requiring protections normally applicable only to criminal proceedings, the solution is to provide those protections, not to ensure that they were previously afforded by requiring prior convictions.

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

Securities Law > RICO Actions > General Overview

## **HN10** [blue down arrow] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

There is no support in the statute's history, its language, or considerations of policy for a requirement that a private treble-damages action under [18 U.S.C.S. § 1964\(c\)](#) of the Racketeer Influenced and Corrupt Organizations Act can proceed only against a defendant who has already been criminally convicted. To the contrary, every indication is that no such requirement exists.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

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

Securities Law > RICO Actions > General Overview

## **HN11** [blue down arrow] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C.S. §§ 1961-1968](#), imposes no distinct "racketeering injury" requirement for civil liability to attach.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

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

Securities Law > RICO Actions > General Overview

## **HN12** [blue down arrow] **Shareholder Actions, Actions Against Corporations**

A violation of the Racketeer Influenced and Corrupt Organizations Act, [18 U.S.C.S. § 1962\(c\)](#) requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The plaintiff must allege each of these elements to state a claim. In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Securities Law > RICO Actions > General Overview

### **[HN13](#) [ ] Racketeer Influenced & Corrupt Organizations, Remedies**

The "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of "pattern."

## **Lawyers' Edition Display**

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### **Decision**

RICO private action under [18 USCS 1964\(c\)](#) held not to require either distinct racketeering injury or prior conviction of defendant.

### **Summary**

A Belgian corporation which had entered into a joint business venture with an American corporation filed an action in the United States District Court for the Eastern District of New York, asserting, inter alia, claims against the American corporation and two of its officers under [18 USCS 1964\(c\)](#) of the Racketeer Influenced and Corrupt Organizations Act (RICO) for alleged violations of [18 USCS 1962\(c\)](#), based on predicate acts of mail and wire fraud. The District Court dismissed the RICO counts for failure to state a claim ([574 F Supp 963](#)). The United States Court of Appeals for the Second Circuit affirmed, holding that the complaint was defective (1) for failing to allege a "racketeering injury"--an injury "different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter," and (2) for not alleging that the defendants had already been criminally convicted of the predicate acts of mail and wire fraud, or of a RICO violation ([741 F2d 482](#)).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by White, J., joined by Burger, Ch. J., and Rehnquist, Stevens, and O'Connor, JJ., it was held that the plaintiffs' complaint was not deficient for failure to allege either an injury separate from the financial loss stemming from the alleged predicate acts of mail and wire fraud, or prior convictions of the defendants.

Marshall, J., joined by Brennan, Blackmun, and Powell, JJ., dissented on the ground that [18 USCS 1964\(c\)](#) contemplates recovery for injury resulting from the confluence of events described in [18 USCS 1962](#) and not merely from the commission of a predicate act.

Powell, J., dissented on the ground that [18 USCS 1964\(c\)](#) should not be applied to authorize private civil actions against respected businesses to redress ordinary fraud and breach of contract cases.

## **Headnotes**

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EXTORTION AND BLACKMAIL §1 > FRAUD AND DECEIT §4 > RICO private civil action -- prior conviction as not required --

> Headnote:

[LEdHN\[1A\]](#) [ ] [1A] [LEdHN\[1B\]](#) [ ] [1B] [LEdHN\[1C\]](#) [ ] [1C]

A private civil action under [18 USCS 1964\(c\)](#), which authorizes recovery of treble damages by any person injured in his business or property by reason of a violation of the substantive provisions of the Racketeer Influenced and

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Corrupt Organizations Act (RICO) (18 USCS 1961-1968), does not require the defendant's prior conviction of a RICO violation, or of the underlying predicate offenses.

EXTORTION AND BLACKMAIL §1 > FRAUD AND DECEIT §4 > RICO private civil action -- distinct racketeering injury as not required -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B] [LEdHN\[2C\]](#) [2C]

A private civil action under [18 USCS 1964\(c\)](#), which authorizes recovery of treble damages by any person injured in his business or property by reason of a violation of the substantive provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USCS 1961-1968), does not require that the plaintiff establish a racketeering injury distinct from that occurring as a result of the predicate acts themselves. (Marshall, Brennan, Blackmun, and Powell, JJ., dissented from this holding.)

STATUTES §184 > Racketeer Influence and Corrupt Organizations Act -- broad construction -- > Headnote:

[LEdHN\[3\]](#) [3]

The Racketeer Influenced and Corrupt Organizations Act (18 USCS 1961-1968) is to be read broadly not only because of Congress' expansive language and overall approach, but also because of its express admonition that the Act is to be liberally construed to effectuate its remedial purposes.

## Syllabus

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The Racketeer Influenced and Corrupt Organizations Act (RICO), [18 U. S. C. §§ 1961-1968](#), which is directed at "racketeering activity" -- defined in [§ 1961\(1\)](#) to encompass, *inter alia*, acts "indictable" under specific federal criminal provisions, including mail and wire fraud -- provides in [§ 1964\(c\)](#) for a private civil action to recover treble damages by any person injured in his business or property "by reason of a violation of [section 1962](#)." [Section 1962\(c\)](#) prohibits conducting or participating in the conduct of an enterprise "through a pattern of racketeering activity." Petitioner corporation, which had entered into a joint business venture with respondent company and which believed that it was being cheated by alleged overbilling, filed suit in Federal District Court, asserting, *inter alia*, RICO claims against respondent company and two of its officers (also respondents) under [§ 1964\(c\)](#) for alleged violations of [§ 1962\(c\)](#), based on predicate acts of mail and wire fraud. The court dismissed the RICO counts for failure to state a claim. The Court [\*\*\*\*2] of Appeals affirmed, holding that under [§ 1964\(c\)](#) a RICO plaintiff must allege a "racketeering injury" -- an injury "caused by an activity which RICO was designed to deter," not just an injury occurring as a result of the predicate acts themselves -- and that the complaint was also defective for not alleging that respondents had been convicted of the predicate acts of mail and wire fraud, or of a RICO violation.

*Held:*

1. There is no requirement that a private action under [§ 1964\(c\)](#) can proceed only against a defendant who has already been convicted of a predicate act or of a RICO violation. A prior-conviction requirement is not supported by RICO's history, its language, or considerations of policy. To the contrary, every indication is that no such requirement exists. Accordingly, the fact that respondents have not been convicted under RICO or the federal mail and wire fraud statutes does not bar petitioner's action. Pp. 488-493.

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2. Nor is there any requirement that in order to maintain a private action under § 1964(c) the plaintiff must establish a "racketeering injury," not merely an injury resulting from the predicate acts themselves. A reading of the statute belies any [\*\*\*\*3] "racketeering injury" requirement. If the defendant engages in a pattern of racketeering activity in a manner forbidden by § 1962, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous "racketeering injury" requirement. Where the plaintiff alleges each element of a violation of § 1962, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Pp. 493-500.

**Counsel:** Franklyn H. Snitow argued the cause for petitioner. With him on the brief was William H. Pauley III.

Richard Eisenberg argued the cause for respondents. With him on the brief were Alfred Weintraub and Joel I. Klein.<sup>\*</sup>

[\*\*\*\*4]

**Judges:** WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and POWELL, JJ., joined, post, p. 500. POWELL, J., filed a dissenting opinion, post, p. 523.

**Opinion by:** WHITE

## Opinion

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[\*481] [\*\*\*349] [\*\*3277] JUSTICE WHITE delivered the opinion of the Court.

LEdHN[1A][↑] [1A] LEdHN[2A][↑] [2A]HN1[↑] The Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. 91-452, Title IX, 84 Stat. 941, as amended, 18 U. S. C. §§ 1961-1968, provides a private civil action to recover treble damages for injury "by reason of a violation of" its substantive provisions. 18 U. S. C. § 1964(c). The initial dormancy of this provision and its recent greatly increased utilization<sup>1</sup> [\*\*\*\*5] are now familiar history.<sup>2</sup>

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\* Briefs of amici curiae urging reversal were filed for the State of Arizona et al. by the Attorneys General for their respective States as follows: Robert K. Corbin of Arizona, Norman C. Gorsuch of Alaska, John Van de Kamp of California, Duane Woodard of Colorado, Joseph Lieberman of Connecticut, Jim Smith of Florida, Michael Lilly of Hawaii, Jim Jones of Idaho, Neil Hartigan of Illinois, Linley E. Pearson of Indiana, David L. Armstrong of Kentucky, William J. Guste, Jr., of Louisiana, Frank J. Kelley of Michigan, Edward L. Pittman of Mississippi, William L. Webster of Missouri, Mike Greely of Montana, Brian McKay of Nevada, Irwin L. Kimmelman of New Jersey, Paul Bardacke of New Mexico, Lacy H. Thornburg of North Carolina, Nicholas J. Spaeth of North Dakota, Anthony Celebrezze of Ohio, Michael Turpen of Oklahoma, David Fronmayer of Oregon, Dennis J. Roberts II of Rhode Island, T. Travis Medlock of South Carolina, Mark V. Meierhenry of South Dakota, W. J. Michael Cody of Tennessee, David L. Wilkinson of Utah, John J. Easton of Vermont, Kenneth O. Eikenberry of Washington, Charlie Brown of West Virginia, Bronson C. La Follette of Wisconsin, Archie G. McClintock of Wyoming; for the State of New York by Robert Abrams, Attorney General, and Robert Hermann, Solicitor General; for the City of New York et al. by Frederick A. O. Schwarz, Jr., James D. Montgomery, and Barbara W. Mather; and for the County of Suffolk, New York, by Mark D. Cohen.

Briefs of amici curiae urging affirmance were filed for the Alliance of American Insurers et al. by James F. Fitzpatrick and John M. Quinn; for the American Institute of Certified Public Accountants by Philip A. Lacovara, Jay Kelly Wright, Kenneth J. Bialkin, and Louis A. Craco; and for the Securities Industry Association by Joel W. Sternman, Eugene A. Gaer, and William J. Fitzpatrick.

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In response to what it perceived to be misuse of civil RICO by private plaintiffs, the court below construed [§ 1964\(c\)](#) to permit private actions only against defendants who had been convicted on criminal charges, and only where there had occurred a "racketeering injury." While we understand the court's concern over the consequences of an unbridled reading of the statute, we reject both of its holdings.

I

[HN2](#) RICO takes aim at "racketeering activity," which it defines as any act "chargeable" under several generically described state criminal laws, [\[\\*\\*\\*350\]](#) any act "indictable" under numerous specific federal criminal provisions, including mail and wire fraud, and any "offense" involving bankruptcy or securities [\[\\*482\]](#) fraud or drug-related activities that is "punishable" under federal law. [§ 1961\(1\)](#).<sup>3</sup> [\[\\*\\*\\*6\]](#) [Section 1962](#), entitled "Prohibited [\[\\*\\*3278\]](#) Activities," [HN3](#) outlaws the use of income derived from a "pattern of racketeering activity" to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce; the acquisition or maintenance of any interest in an enterprise "through" a pattern of racketeering activity; [\[\\*483\]](#) conducting or participating in the conduct of an enterprise through a pattern of racketeering activity; and conspiring to violate any of these provisions.

<sup>4</sup>

<sup>1</sup> Of 270 District Court RICO decisions prior to this year, only 3% (nine cases) were decided throughout the 1970's, 2% were decided in 1980, 7% in 1981, 13% in 1982, 33% in 1983, and 43% in 1984. Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 55 (1985) (hereinafter ABA Report); see also *id.*, at 53a (table).

<sup>2</sup> For a thorough bibliography of civil RICO decisions and commentary, see Milner, A Civil RICO Bibliography, 21 C.W.L.R. 409 (1985).

<sup>3</sup> RICO defines "racketeering activity" to mean

"(A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title [18, United States Code: Section 201](#) (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), [section 1341](#) (relating to mail fraud), [section 1343](#) (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-2424 (relating to white slave traffic), (C) any act which is indictable under title [29, United States Code, section 186](#) (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act." [18 U. S. C. § 1961\(1\) \(1982 ed., Supp. III\)](#).

<sup>4</sup> In relevant part, [18 U. S. C. § 1962](#) provides:

"(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

"(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

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[\*\*\*7] [HN4](#) [+] Congress provided criminal penalties of imprisonment, fines, and forfeiture [\*\*\*351] for violation of these provisions. [§ 1963](#). In addition, it set out a far-reaching civil enforcement scheme, [§ 1964](#), including the following provision for private suits:

[HN5](#) [+] "Any person injured in his business or property by reason of a violation of [section 1962](#) of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." [§ 1964\(c\)](#).

In 1979, petitioner Sedima, a Belgian corporation, entered into a joint venture with respondent Imrex Co. to provide electronic components to a Belgian firm. The buyer was to order parts through Sedima; Imrex was to obtain the parts [\*484] in this country and ship them to Europe. The agreement called for Sedima and Imrex to split the net proceeds. Imrex filled roughly \$ 8 million in orders placed with it through Sedima. Sedima became convinced, however, that Imrex was presenting inflated bills, cheating Sedima out of a portion of its proceeds by collecting for nonexistent expenses.

In 1982, Sedima filed this action in the Federal [\*\*\*8] District Court for the Eastern District of New York. The complaint set out common-law claims of unjust enrichment, conversion, and breach of contract, fiduciary duty, and a constructive trust. In addition, it asserted RICO claims under [§ 1964\(c\)](#) against Imrex and two of its officers. Two counts alleged violations of [§ 1962\(c\)](#), based on predicate acts of mail and wire fraud. See [18 U. S. C. §§ 1341, 1343, 1961\(1\)\(B\)](#). A third count alleged a conspiracy to violate [§ 1962\(c\)](#). Claiming injury of at least \$ 175,000, the amount of the alleged over-billing, Sedima sought treble damages and attorney's fees.

The District Court held that for an injury to be "by reason of a violation of [section 1962](#)," as required by [§ 1964\(c\)](#), it must be somehow different in kind from the direct injury resulting from the predicate acts of [\*\*3279] racketeering activity. [574 F.Supp. 963 \(1983\)](#). While not choosing a precise formulation, the District Court held that a complaint must allege a "RICO-type injury," which was either some sort of distinct "racketeering injury," or a "competitive injury." It found "no allegation here of any injury apart from that which would result directly from [\*\*\*9] the alleged predicate acts of mail fraud and wire fraud," *id., at 965*, and accordingly dismissed the RICO counts for failure to state a claim.

A divided panel of the Court of Appeals for the Second Circuit affirmed. [741 F.2d 482 \(1984\)](#). After a lengthy review of the legislative history, it held that Sedima's complaint was defective in two ways. First, it failed to allege an injury "by reason of a violation of [section 1962](#)." In the court's view, [\*485] this language was a limitation on standing, reflecting Congress' intent to compensate victims of "certain specific kinds of organized criminality," not to provide additional remedies for already compensable injuries. *Id., at 494*. Analogizing to the Clayton Act, which had been the model for [§ 1964\(c\)](#), the court concluded that just as an antitrust plaintiff must allege an "antitrust injury," so a RICO plaintiff must allege a "racketeering injury" -- an injury "different in kind from that occurring as a result of the [\*\*\*352] predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter." *Id., at 496*. [\*\*\*10] Sedima had failed to allege such an injury.

The Court of Appeals also found the complaint defective for not alleging that the defendants had already been criminally convicted of the predicate acts of mail and wire fraud, or of a RICO violation. This element of the civil cause of action was inferred from [§ 1964\(c\)](#)'s reference to a "violation" of [§ 1962](#), the court also observing that its prior-conviction requirement would avoid serious constitutional difficulties, the danger of unfair stigmatization, and problems regarding the standard by which the predicate acts were to be proved.

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"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

"(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

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The decision below was one episode in a recent proliferation of civil RICO litigation within the Second Circuit<sup>5</sup> [\*\*\*\*11] and [\*486] in other Courts of Appeals.<sup>6</sup> In light of the variety [\*\*3280] of approaches taken by the lower courts and the importance of the issues, we granted certiorari. 469 U.S. 1157 (1984). We now reverse.

[\*\*\*12] //

As a preliminary matter, it is worth briefly reviewing the legislative history of the private treble-damages action. RICO formed Title IX of the Organized Crime Control [\*\*\*353] Act of 1970, Pub. L. 91-452, 84 Stat. 922. The civil remedies in the bill passed by the Senate, S. 30, were limited to injunctive actions by the United States and became §§ 1964(a), (b), and [\*487] (d). Previous versions of the legislation, however, had provided for a private treble-damages action in exactly the terms ultimately adopted in § 1964(c). See S. 1623, 91st Cong., 1st Sess., § 4(a) (1969); S. 2048 and S. 2049, 90th Cong., 1st Sess. (1967).

During hearings on S. 30 before the House Judiciary Committee, Representative Steiger proposed the addition of a private treble-damages action "similar to the private damage remedy found in the anti-trust laws. . . . [Those] who have been wronged by organized crime should at least be given access to a legal remedy. In addition, the availability of such a remedy would enhance the effectiveness of title IX's prohibitions." Hearings on S. 30, and Related Proposals, before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., [\*\*\*\*13] 520 (1970) (hereinafter House Hearings). The American Bar Association also proposed an amendment "based upon the concept of Section 4 of the Clayton Act." Id., at 543-544, 548, 559; see 116 Cong. Rec. 25190-25191 (1970). See also H. R. 9327, 91st Cong., 1st Sess. (1969) (House counterpart to S. 1623).

Over the dissent of three members, who feared the treble-damages provision would be used for malicious harassment of business competitors, the Committee approved the amendment. H. R. Rep. No. 91-1549, pp. 58, 187 (1970). In summarizing the bill on the House floor, its sponsor described the treble-damages provision as

<sup>5</sup> The day after the decision in this case, another divided panel of the Second Circuit reached a similar conclusion. *Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (1984), cert. pending, No. 84-657. It held that § 1964(c) allowed recovery only for injuries resulting not from the predicate acts, but from the fact that they were part of a *pattern*. "If a plaintiff's injury is that caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured *by* the pattern," and cannot recover. Id., at 517 (emphasis in original).

The following day, a third panel of the same Circuit, this time unanimous, decided *Furman v. Cirrito*, 741 F.2d 524 (1984), cert. pending, No. 84-604. In that case, the District Court had dismissed the complaint for failure to allege a distinct racketeering injury. The Court of Appeals affirmed, relying on the opinions in *Sedima* and *Bankers Trust*, but wrote at some length to record its disagreement with those decisions. The panel would have required no injury beyond that resulting from the predicate acts.

<sup>6</sup> A month after the trio of Second Circuit opinions was released, the Eighth Circuit decided *Alexander Grant & Co. v. Tiffany Industries, Inc.*, 742 F.2d 408 (1984), cert. pending, Nos. 84-1084, 84-1222. Viewing its decision as contrary to *Sedima* but consistent with, though broader than, *Bankers Trust*, the court held that a RICO claim does require some unspecified element beyond the injury flowing directly from the predicate acts. At the same time, it stood by a prior decision that had rejected any requirement that the injury be solely commercial or competitive, or that the defendants be involved in organized crime. 742 F.2d, at 413; see *Bennett v. Berg*, 685 F.2d 1053, 1058-1059, 1063-1064 (CA8 1982), aff'd in part and rev'd in part, 710 F.2d 1361 (en banc), cert. denied, 464 U.S. 1008 (1983).

Two months later, the Seventh Circuit decided *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384 (1984), aff'd, post, p. 606. Dismissing *Sedima* as the resurrection of the discredited requirement of an organized crime nexus, and *Bankers Trust* as an emasculation of the treble-damages remedy, the Seventh Circuit rejected "the elusive racketeering injury requirement." 747 F.2d, at 394, 398-399. The Fifth Circuit had taken a similar position. *Alcorn County v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1169 (1984).

The requirement of a prior RICO conviction was rejected in *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1286-1287 (CA7 1983), and *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94 (CA6 1982). See also *United States v. Cappetto*, 502 F.2d 1351 (CA7 1974), cert. denied, 420 U.S. 925 (1975) (civil action by Government).

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"another example of the antitrust remedy being adapted for use against organized criminality." 116 Cong. Rec. 35295 (1970). The full House then rejected a proposal to create a complementary treble-damages remedy for those injured by being named as defendants in malicious private suits. *Id.*, at 35342. Representative Steiger also offered an amendment that would have allowed private injunctive actions, fixed a statute of limitations, and clarified venue and process requirements. *Id.*, at 35346; see *id.*, at 35226-35227. The proposal was greeted with [\*\*\*\*14] some hostility because it had not been reviewed in Committee, [\*488] and Steiger withdrew it without a vote being taken. *Id.*, at 35346-35347. The House then passed the bill, with the treble-damages provision in the form recommended by the Committee. *Id.*, at 35363-35364.

The Senate did not seek a conference and adopted the bill as amended in the House. *Id.*, at 36296. The treble-damages provision had been drawn to its attention while the legislation was still in the House, and had received the endorsement of Senator McClellan, the sponsor of S. 30, who was of the view that the provision would be "a major new tool in extirpating the baneful influence of organized crime in our economic life." *Id.*, at 25190.

### III

**HN6** The language of RICO gives no obvious indication that a civil action can proceed only after a criminal conviction. The word "conviction" does not appear in any relevant portion of the statute. See § 1961, 1962, 1964(c). To the contrary, the predicate acts involve conduct that is "chargeable" or "indictable," and "[offenses]" that [\*\*3281] are "punishable, [\*\*354]" under various criminal statutes. § 1961(1). As defined in the statute, racketeering [\*\*\*\*15] activity consists not of acts for which the defendant has been convicted, but of acts for which he could be. See also S. Rep. No. 91-617, p. 158 (1969): "a racketeering activity . . . must be an act in itself *subject to* criminal sanction" (emphasis added). Thus, a prior-conviction requirement cannot be found in the definition of "racketeering activity." Nor can it be found in § 1962, which sets out the statute's substantive provisions. Indeed, if either § 1961 or § 1962 did contain such a requirement, a prior conviction would also be a prerequisite, nonsensically, for a criminal prosecution, or for a civil action by the Government to enjoin violations that had not yet occurred.

The Court of Appeals purported to discover its prior-conviction requirement in the term "violation" in § 1964(c), 741 F.2d, at 498-499. However, even if that term were [\*489] read to refer to a criminal conviction, it would require a conviction under RICO, not of the predicate offenses. That aside, the term "violation" does not imply a criminal conviction. See United States v. Ward, 448 U.S. 242, 249-250 (1980). It refers only to a failure to adhere to [\*\*\*\*16] legal requirements. This is its indisputable meaning elsewhere in the statute. Section 1962 renders certain conduct "unlawful"; § 1963 and § 1964 impose consequences, criminal and civil, for "violations" of § 1962. We should not lightly infer that Congress intended the term to have wholly different meanings in neighboring subsections.<sup>7</sup>

The legislative history also undercuts the reading of the court below. The clearest current in that history is the reliance on the Clayton Act model, under which private and governmental actions are entirely distinct. E. g., United States v. Borden Co., 347 U.S. 514, 518-519 (1954). [\*\*\*\*17]<sup>8</sup> The only [\*490] specific reference in the

<sup>7</sup> When Congress intended that the defendant have been previously convicted, it said so. Title 18 U. S. C. § 1963(f) (1982 ed., Supp. III) states that "[upon] conviction of a person under this section," his forfeited property shall be seized. Likewise, in Title X of the same legislation Congress explicitly required prior convictions, rather than prior criminal activity, to support enhanced sentences for special offenders. See 18 U. S. C. § 3575(e).

<sup>8</sup> The court below considered it significant that § 1964(c) requires a "violation of section 1962," whereas the Clayton Act speaks of "anything forbidden in the antitrust laws." 741 F.2d, at 488; see 15 U. S. C. § 15(a). The court viewed this as a deliberate change indicating Congress' desire that the underlying conduct not only be forbidden, but also have led to a criminal conviction. There is nothing in the legislative history to support this interpretation, and we cannot view this minor departure in wording, without more, to indicate a fundamental departure in meaning. Representative Steiger, who proposed this wording in the House, nowhere indicated a desire to depart from the antitrust model in this regard. See 116 Cong. Rec. 35227, 35246 (1970). To the contrary, he viewed the treble-damages provision as a "parallel private remedy." *Id.*, at 27739 (letter to House Judiciary

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legislative history to prior convictions of which we are aware is an objection that the treble-damages provision is too broad precisely because "there need [\[\\*\\*\\*355\]](#) not be a conviction under any of these laws for it to be racketeering." 116 Cong. Rec. 35342 (1970) (emphasis added). The history is otherwise silent on this point and contains nothing to contradict the import of the language appearing in the statute. Had Congress intended to impose this novel requirement, there would have been at least some mention of it in the legislative history, even if not in the statute.

[\[\\*\\*\\*\\*18\]](#) The Court of Appeals was of the view that its narrow construction of the statute was essential to avoid intolerable practical [\[\\*\\*3282\]](#) consequences.<sup>9</sup> First, without a prior conviction to rely on, the plaintiff would have to prove commission of the predicate acts beyond a reasonable doubt. This would require instructing the jury as to different standards of proof for different aspects of the case. To avoid this awkwardness, [\[\\*491\]](#) the court inferred that the criminality must already be established, so that the civil action could proceed smoothly under the usual preponderance standard.

[\[\\*\\*\\*\\*19\]](#) We are not at all convinced that the predicate acts must be established beyond a reasonable doubt in a proceeding under [§ 1964\(c\)](#). [HN7](#) In a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard. See, e. g., [United States v. One Assortment of 89 Firearms](#), 465 U.S. 354 (1984); [One Lot Emerald Cut Stones v. United States](#), 409 U.S. 232, 235 (1972); [Helvering v. Mitchell](#), 303 U.S. 391, 397 (1938); [United States v. Regan](#), 232 U.S. 37, 47-49 (1914). There is no indication that Congress sought to depart from this general principle here. See Measures Relating to Organized Crime, Hearings on S. 30 et al. before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 388 (1969) (statement of Assistant Attorney General Wilson); House Hearings, at 520 (statement of Rep. Steiger); *id.*, at 664 (statement of Rep. Poff); 116 Cong. Rec. 35313 (1970) (statement of Rep. Minish). [HN8](#) That the offending conduct is described by reference to criminal statutes [\[\\*\\*\\*\\*20\]](#) does not mean that its occurrence must be established by criminal standards or that the consequences of a finding of liability in a private civil action are identical [\[\\*\\*\\*356\]](#) to the consequences of a criminal conviction. Cf. [United States v. Ward](#), *supra*, at 248-251. But we need not decide the standard of proof issue today. For even if the stricter standard is applicable to a portion of the plaintiff's proof, the resulting logistical difficulties, which are accepted in other contexts, would not be so great as to require invention of a requirement that cannot be found in the statute and that Congress, as even the Court of Appeals had to concede, [741 F.2d, at 501](#), did not envision.<sup>10</sup>

Committee). Likewise, Senator Hruska's discussion of his identically worded proposal gives no hint of any such intent. See 115 Cong. Rec. 6993 (1969). In any event, the change in language does not support the court's drastic inference. It seems more likely that the language was chosen because it is more succinct than that in the Clayton Act, and is consistent with the neighboring provisions. See [§§ 1963\(a\), 1964\(a\)](#).

<sup>9</sup> It is worth bearing in mind that the holding of the court below is not without problematic consequences of its own. It arbitrarily restricts the availability of private actions, for lawbreakers are often not apprehended and convicted. Even if a conviction has been obtained, it is unlikely that a private plaintiff will be able to recover for all of the acts constituting an extensive "pattern," or that multiple victims will all be able to obtain redress. This is because criminal convictions are often limited to a small portion of the actual or possible charges. The decision below would also create peculiar incentives for plea bargaining to non-predicate-act offenses so as to ensure immunity from a later civil suit. If nothing else, a criminal defendant might plead to a tiny fraction of counts, so as to limit future civil liability. In addition, the dependence of potential civil litigants on the initiation and success of a criminal prosecution could lead to unhealthy private pressures on prosecutors and to self-serving trial testimony, or at least accusations thereof. Problems would also arise if some or all of the convictions were reversed on appeal. Finally, the compelled wait for the completion of criminal proceedings would result in pursuit of stale claims, complex statute of limitations problems, or the wasteful splitting of actions, with resultant claim and issue preclusion complications.

<sup>10</sup> The Court of Appeals also observed that allowing civil suits without prior convictions "would make a hash" of the statute's liberal-construction requirement. [741 F.2d, at 502](#); see RICO § 904(a). Since criminal statutes must be strictly construed, the court reasoned, allowing liberal construction of RICO -- an approach often justified on the ground that the conduct for which liability is imposed is "already criminal" -- would only be permissible if there already existed criminal convictions. Again, we have doubts about the premise of this rather convoluted argument. The strict-construction principle is merely a guide to statutory interpretation. Like its identical twin, the "rule of lenity," it "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." [Callanan v. United States](#), 364 U.S. 587, 596 (1961); see also [United States v. Turkette](#), 452 U.S. 576, 587-588

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[\*\*\*21] [\*492] The [\*\*3283] court below also feared that any other construction would raise severe constitutional questions, as it "would provide civil remedies for offenses criminal in nature, stigmatize defendants with the appellation 'racketeer,' authorize the award of damages which are clearly punitive, including attorney's fees, and constitute a civil remedy aimed in part to avoid the constitutional protections of the criminal law." *Id. at 500, n. 49*. We do not view the statute as being so close to the constitutional edge. As noted above, the fact that conduct can result in both criminal liability and treble damages does not mean that there is not a bona fide civil action. The familiar provisions for both criminal liability and treble damages under the antitrust laws indicate as much. Nor are attorney's fees "clearly punitive." Cf. [42 U. S. C. § 1988](#). As for stigma, a civil RICO proceeding leaves no greater stain than do a number of other civil proceedings. Furthermore, requiring conviction of the predicate acts would not protect against an unfair imposition of the "racketeer" label. If there is a problem with thus stigmatizing a garden variety defrauder [\*\*\*22] by means of a civil action, it is not reduced by making certain that the defendant is guilty of *fraud* beyond a reasonable doubt. Finally, [HN9](#) [↑] to the extent an [\*493] action under [§ 1964\(c\)](#) might be considered quasi-criminal, requiring protections normally applicable only to criminal proceedings, cf. [One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 \(1965\)](#), the solution is to provide those protections, not to ensure that they were previously afforded by requiring prior convictions.<sup>11</sup>

Finally, [\*\*\*357] we note that a prior-conviction requirement would be inconsistent with Congress' [\*\*\*23] underlying policy concerns. Such a rule would severely handicap potential plaintiffs. A guilty party may escape conviction for any number of reasons -- not least among them the possibility that the Government itself may choose to pursue only civil remedies. Private attorney general provisions such as [§ 1964\(c\)](#) are in part designed to fill prosecutorial gaps. Cf. [Reiter v. Sonotone Corp., 442 U.S. 330, 344 \(1979\)](#). This purpose would be largely defeated, and the need for treble damages as an incentive to litigate unjustified, if private suits could be maintained only against those already brought to justice. See also n. 9, *supra*.

[LEdHN\[1B\]](#) [↑] [1B]In sum, [HN10](#) [↑] we can find no support in the statute's history, its language, or considerations of policy for a requirement that a private treble-damages action under [§ 1964\(c\)](#) can proceed only against a defendant who has already been criminally convicted. To the contrary, every indication is that no such requirement exists. Accordingly, the fact that Imrex and the individual defendants have not been convicted under RICO or the federal mail and wire fraud statutes does not bar Sedima's action.

#### IV

In considering the Court of Appeals' [\*\*\*24] second prerequisite for a private civil RICO action -- "injury . . . caused by an [\*494] activity which RICO was designed to deter" -- we are somewhat hampered by the vagueness of that concept. Apart from reliance on the general purposes of RICO and a reference to "mobsters," the court provided scant indication of what the requirement of [\*\*3284] racketeering injury means. It emphasized Congress' undeniable desire to strike at organized crime, but acknowledged and did not purport to overrule Second Circuit precedent rejecting a requirement of an organized crime nexus. [741 F.2d, at 492](#); see [Moss v. Morgan Stanley, Inc., 719 F.2d 5, 21 \(CA2 1983\)](#), cert. denied *sub nom. Moss v. Newman*, 465 U.S. 1025 (1984). The court also stopped short of adopting a "competitive injury" requirement; while insisting that the plaintiff show "the kind of economic injury which has an effect on competition," it did not require "actual anticompetitive effect." [741 F.2d, at 496](#); see also *id. at 495, n. 40*.

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(1981). But even if that principle has some application, it does not support the court's holding. The strict- and liberal-construction principles are not mutually exclusive; [§ 1961](#) and [§ 1962](#) can be strictly construed without adopting that approach to [§ 1964\(c\)](#). Cf. [United States v. United States Gypsum Co., 438 U.S. 422, 443, n. 19 \(1978\)](#). Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in [§ 1964](#), where RICO's remedial purposes are most evident.

<sup>11</sup> Even were the constitutional questions more significant, any doubts would be insufficient to overcome the mandate of the statute's language and history. "Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature." [United States v. Albertini, 472 U.S. 675, 680 \(1985\)](#).

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The court's statement that the plaintiff must seek redress for an injury caused by conduct that [\*\*\*25] RICO was designed to deter is unhelpfully tautological. Nor is clarity furnished by a negative statement of its rule: standing is not provided by the injury resulting from the predicate acts themselves. That statement is itself apparently inaccurate when applied to those predicate acts that unmistakably constitute the kind of conduct Congress sought to deter. See *id.*, at 496, n. 41. The opinion does not explain how to distinguish such crimes from the other predicate acts Congress has lumped together in § 1961(1). The court below is not alone in struggling to define "racketeering injury," and the difficulty of [\*\*\*358] that task itself cautions against imposing such a requirement.<sup>12</sup>

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[\*495] **LEdHN[2B]** [↑] [2B] We need not pinpoint the Second Circuit's precise holding, for we perceive **HN11** [↑] no distinct "racketeering injury" requirement. Given that "racketeering activity" consists of no more and no less than commission of a predicate act, **§ 1961(1)**, we are initially doubtful about a requirement of a "racketeering injury" separate from the harm from the predicate acts. A reading of the statute belies any such requirement. **Section 1964(c)** authorizes a private suit by "[any] person injured in his business or property by reason of a violation of § 1962." **Section 1962** in turn makes it unlawful for "any person" -- not just mobsters -- to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity. **§§ 1962(a)-(c)**. If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under **§ 1964(c)**. There is no room in the statutory language for an additional, amorphous [\*\*\*\*27] "racketeering injury" requirement.<sup>13</sup>

[\*496] [HN12](#) A [\\*\\*3285](#) violation of [§ 1962\(c\)](#), the section on which Sedima relies, requires (1) conduct (2) of an enterprise (3) through a pattern <sup>14</sup> (4) of racketeering [\\*\\*\\*359](#) activity. The plaintiff must, of course, allege each

<sup>12</sup> The decision below does not appear identical to *Bankers Trust*. It established a standing requirement, whereas *Bankers Trust* adopted a limitation on damages. The one focused on the mobster element, the other took a more conceptual approach, distinguishing injury caused by the individual acts from injury caused by their cumulative effect. Thus, the Eighth Circuit has indicated its agreement with *Bankers Trust* but not *Sedima*. *Alexander Grant & Co. v. Tiffany Industries, Inc.*, 742 F.2d, at 413. See also *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d, at 396. The two tests were described as "very different" by the ABA Task Force. See ABA Report, at 310.

Yet the *Bankers Trust* court itself did not seem to think it was departing from *Sedima*, see [741 F.2d, at 516-517](#), and other Second Circuit panels have treated the two decisions as consistent, see [Furman v. Cirrito, 741 F.2d 524 \(1984\)](#), cert. pending, No. 84-604; *Durante Brothers & Sons, Inc. v. Flushing National Bank, 755 F.2d 239, 246 (1985)*. The evident difficulty in discerning just what the racketeering injury requirement consists of would make it rather hard to apply in practice or explain to a jury.

<sup>13</sup> Given the plain words of the statute, we cannot agree with the court below that Congress could have had no "inkling of § 1964(c)'s implications." 741 F.2d, at 492. Congress' "inklings" are best determined by the statutory language that it chooses, and the language it chose here extends far beyond the limits drawn by the Court of Appeals. Nor does the "clanging silence" of the legislative history, *ibid.*, justify those limits. For one thing, § 1964(c) did not pass through Congress unnoticed. See Part II, *supra*. In addition, congressional silence, no matter how "clanging," cannot override the words of the statute.

<sup>14</sup> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "requires at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two such acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[the] term 'pattern' itself requires the showing of a relationship . . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern . . . ." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). See also *id.*, at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665.

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of these elements to state a claim. Conducting an enterprise that affects interstate commerce is obviously [\*\*\*\*28] not in itself a violation of [§ 1962](#), nor is mere commission of the predicate offenses. In addition, the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. As the Seventh Circuit has stated, "[a] defendant who violates [section 1962](#) is not liable [\*497] for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured." *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 398 (1984), aff'd, *post*, p. 606.

[\*\*\*\*29] But the statute requires no more than this. Where the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Those acts are, when committed in the circumstances delineated in [§ 1962\(c\)](#), "an activity which RICO was designed to deter." Any recoverable damages occurring by reason of a violation of [§ 1962\(c\)](#) will flow from the commission of the predicate acts.<sup>15</sup>

[\*\*\*\*30] [LEdHN\[3\]](#) [3] This less restrictive reading is amply supported by our prior cases and the general principles surrounding this statute. RICO is to be read broadly. This is the lesson not only [\*498] of Congress' self-consciously [\*\*3286] expansive language and overall approach, see [United States v. Turkette](#), 452 U.S. 576, 586-587 [\*\*\*360] (1981), but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes," Pub. L. 91-452, § 904(a), 84 Stat. 947. The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity. See also n. 10, *supra*. Far from effectuating these purposes, the narrow readings offered by the dissenters and the court below would in effect eliminate [§ 1964\(c\)](#) from the statute.

RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime. See generally [Russello v. United States](#), 464 U.S. 16, 26-29 (1983). While few of the legislative statements about novel remedies and attacking crime on all fronts, see *ibid.*, were made with direct reference to [§ 1964\(c\)](#), it is in this spirit that all of the Act's provisions should be read. The specific references to [§ 1964\(c\)](#) are consistent with this overall approach. Those supporting [§ 1964\(c\)](#) hoped it would "enhance the effectiveness of title IX's prohibitions," House Hearings, at 520, and provide "a major new tool," 116 Cong. Rec. 35227 (1970). See also *id.*, at 25190; 115 Cong. Rec. 6993-6994 (1969). Its opponents, also recognizing the provision's scope, complained that it provided too easy a weapon against "innocent businessmen," H. R. Rep. No. 91-1549, p. 187 (1970), and would be prone to abuse, 116 Cong. Rec. 35342 (1970). It is also significant that a previous proposal to add RICO-

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Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "[Criminal] conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U. S. C. § 3575(e). This language may be useful in interpreting other sections of the Act. Cf. [Iannelli v. United States](#), 420 U.S. 770, 789 (1975).

<sup>15</sup> Such damages include, but are not limited to, the sort of competitive injury for which the dissenters would allow recovery. See *post*, at 521-522. Under the dissent's reading of the statute, the harm proximately caused by the forbidden conduct is not compensable, but that ultimately and indirectly flowing therefrom is. We reject this topsy-turvy approach, finding no warrant in the language or the history of the statute for denying recovery thereunder to "the direct victims of the [racketeering] activity," *post*, at 522, while preserving it for the indirect. Even the court below was not that grudging. It would apparently have allowed recovery for both the direct and the ultimate harm flowing from the defendant's conduct, requiring injury "not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter." [741 F.2d, at 496](#) (emphasis added).

The dissent would also go further than did the Second Circuit in its requirement that the plaintiff have suffered a competitive injury. Again, as the court below stated, Congress "nowhere suggested that actual anticompetitive effect is required for suits under the statute." *Ibid.* The language it chose, allowing recovery to "[any] person injured in his business or property," [§ 1964\(c\)](#) (emphasis added), applied to this situation, suggests that the statute is not so limited.

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like provisions to the Sherman Act had come to grief in part precisely because it "could create inappropriate and unnecessary obstacles in the way of . . . a private litigant [who] would have to contend with a body of precedent -- appropriate in a purely antitrust context -- setting strict requirements on questions such as 'standing to sue' and 'proximate cause.'" 115 Cong. Rec. 6995 (1969) (ABA comments on S. 2048); see also *id.*, at 6993 (S. 1623 proposed as an amendment to Title 18 to avoid [\*\*\*32] these problems). In borrowing its "racketeering" [\*499] injury" requirement from antitrust standing principles, the court below created exactly the problems Congress sought to avoid.

Underlying the Court of Appeals' holding was its distress at the "extraordinary, if not outrageous," uses to which civil RICO has been put. 741 F.2d, at 487. Instead of being used against mobsters and organized criminals, it has become a tool for everyday fraud cases brought against "respected and legitimate 'enterprises.'" *Ibid.* Yet Congress wanted to reach both "legitimate" and "illegitimate" enterprises. *United States v. Turkette, supra*. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued. Nor does it reveal the "ambiguity" discovered by the court below. "[The] fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. [\*\*\*33] It demonstrates breadth." *Haroco, Inc. v. American National Bank & Trust Co. of Chicago, supra, at 398*.

[\*\*\*361] It is true that private civil actions under the statute are being brought almost solely against such defendants, rather than against the archetypal, intimidating mobster.<sup>16</sup> Yet this defect -- if defect it is -- is [\*3287] inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations [\*500] where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications.

[\*\*\*34] We nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors. See generally ABA Report, at 55-69. Though sharing the doubts of the Court of Appeals about this increasing divergence, we cannot agree with either its diagnosis or its remedy. *HN13* [↑] The "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of "pattern." We do not believe that the amorphous standing requirement imposed by the Second Circuit effectively responds to these problems, or that it is a form of statutory amendment appropriately undertaken by the courts.

V

*LEdHN[1C]* [↑] [1C] *LEdHN[2C]* [↑] [2C] Sedima may maintain this action if the defendants conducted the enterprise through a pattern of racketeering activity. The questions whether the defendants committed the requisite predicate acts, and whether the commission of those acts fell into a pattern, are not before us. The complaint is not deficient for failure to allege either an injury separate from [\*\*\*35] the financial loss stemming from the alleged acts of mail and wire fraud, or prior convictions of the defendants. The judgment below is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

**Dissent by:** MARSHALL; POWELL

<sup>16</sup> The ABA Task Force found that of the 270 known civil RICO cases at the trial court level, 40% involved securities fraud, 37% common-law fraud in a commercial or business setting, and only 9% "allegations of criminal activity of a type generally associated with professional criminals." ABA Report, at 55-56. Another survey of 132 published decisions found that 57 involved securities transactions and 38 commercial and contract disputes, while no other category made it into double figures. American Institute of Certified Public Accountants, The Authority to Bring Private Treble-Damage Suits Under "RICO" Should be Removed 13 (Oct. 10, 1984).

## Dissent

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JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE POWELL join, dissenting.\*

The Court today recognizes that "in its private civil version, RICO is evolving into something quite different from [\*501] the original conception of its enactors." *Ante*, at 500. The Court, however, expressly validates this result, imputing it to the manner in which the statute was drafted. I fundamentally \*\*\*362 disagree both with the Court's reading of the statute and with its conclusion. I believe that the statutory language and history disclose a narrower interpretation of the statute [\*\*\*36] that fully effectuates Congress' purposes, and that does not make compensable under civil RICO a host of claims that Congress never intended to bring within RICO's purview.

I

The Court's interpretation of the civil RICO statute quite simply revolutionizes private litigation; it validates the federalization of broad areas of state common law of frauds, and it approves the displacement of well-established federal remedial provisions. We do not lightly infer a congressional intent to effect such fundamental changes. To infer such intent here would be untenable, for there is no indication that Congress even considered, much less approved, the scheme that the Court today defines.

The single most significant reason for the expansive use of civil RICO has been the presence in the statute, as predicate acts, of mail and wire fraud violations. See [18 U. S. C. § 1961\(1\) \(1982 ed., Supp. III\)](#). Prior to RICO, no federal statute had expressly provided a private damages remedy based upon a violation of the mail or wire fraud statutes, which make it a federal crime to use the mail or wires in furtherance of a scheme to defraud. See [18 U. S. C. §§ 1341, 1343](#). Moreover, the Courts of Appeals [\*\*\*37] consistently had held that no implied federal private causes of action accrue to victims of these federal violations. See, e. g., [Ryan v. Ohio Edison Co., 611 F.2d 1170, 1178-1179 \(CA6 1979\)](#) (mail fraud); [Napper v. Anderson, Henley, Shields, Bradford & Pritchard, 500 F.2d 634, 636 \(CA5 1974\)](#) (wire fraud), cert. denied, 423 U.S. 837 (1975). The victims normally were restricted to bringing actions in state court under common-law fraud theories.

[\*502] Under the Court's opinion today, two fraudulent mailings or uses of the wires occurring within 10 years of each other might constitute a "pattern of racketeering activity," [§ 1961\(5\)](#), leading to civil RICO liability. See [§ 1964\(c\)](#). The effects of making a mere two instances of mail or wire fraud potentially actionable under civil RICO are staggering, because in recent years the Courts of Appeals have "tolerated an extraordinary expansion of mail and wire fraud statutes to permit federal prosecution for conduct that some had thought was subject only to state criminal and civil law." [United States v. Weiss, 752 F.2d 777, 791 \(CA2 1985\)](#) (Newman, [\*\*\*38] J., dissenting). In bringing criminal actions under those statutes, prosecutors need not show either a substantial connection between the scheme to defraud and the mail and wire fraud statutes, see [Pereira v. United States, 347 U.S. 1, 8 \(1954\)](#), or that the fraud involved money or property. Courts have sanctioned prosecutions based on deprivations of such intangible rights as a shareholder's right to "material" information, [United States v. Siegel, 717 F.2d 9, 14-16 \(CA2 1983\)](#); a client's right to the "undivided loyalty" of his attorney, [United States v. Bronston, 658 F.2d 920, 927 \(CA2 1981\)](#), cert. denied, 456 U.S. 915 (1982); an employer's right to the honest and faithful service of his employees, [United States \[\\*\\*\\*363\] v. Bohonus, 628 F.2d 1167, 1172 \(CA9\)](#), cert. denied, 447 U.S. 928 (1980); and a citizen's right to know the nature of agreements entered into by the leaders of political parties, [United States v. Margiotta, 688 F.2d 108, 123-125 \(CA2 1982\)](#), cert. denied, 461 U.S. 913 (1983).

The only restraining [\*\*\*39] influence on the "ineluctable expansion of the mail and wire fraud statutes," [United States v. Siegel, supra, at 24](#) (Winter, J., dissenting in part and concurring in part), has been the prudent use of

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\* [This opinion applies also to No. 84-822, *American National Bank & Trust Company of Chicago et al. v. Haroco, Inc., et al.*, post, p. 606.]

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prosecutorial discretion. Prosecutors simply do not invoke the mail and wire fraud provisions in every case in which a violation of the relevant statute can be proved. See U.S. Dept. of Justice, United States Attorney's Manual § 9-43.120 (Feb. 16, 1984). [**\*503**] For example, only where the scheme is directed at a "class of persons or the general public" and includes "a substantial pattern of conduct," will "serious consideration . . . be given to [mail fraud] prosecution." In all other cases, "the parties should be left to settle their differences by civil or criminal litigation in the state courts." *Ibid.*

The responsible use of prosecutorial discretion is particularly important with respect to criminal RICO prosecutions - - which often rely on mail and wire fraud as predicate acts -- given the extremely severe penalties authorized by RICO's criminal provisions. Federal prosecutors are therefore instructed that "[utilization] of the RICO statute, more [**\*\*\*\*40**] so than most other federal criminal sanctions, requires particularly careful and reasoned application." *Id.*, § 9-110.200 (Mar. 9, 1984). The Justice Department itself recognizes that a broad interpretation of the criminal RICO provisions would violate "the principle that the primary responsibility for enforcing state laws rests with the state concerned." *Ibid.* Specifically, the Justice Department will not bring RICO prosecutions unless the pattern of racketeering activity required by [18 U. S. C. § 1962](#) has "some relation to the purpose of the enterprise." United States Attorney's Manual § 9-110.350 (Mar. 9, 1984).

Congress was well aware of the restraining influence of prosecutorial discretion when it enacted the criminal RICO provisions. It chose to confer broad statutory authority on the Executive fully expecting that this authority would be used only in cases in which its use was warranted. See Measures Relating to Organized Crime: Hearings on S. 30 et al. before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., 346-347, 424 (1969) (hereinafter cited as Senate Hearings). Moreover, in seeking a broad interpretation [**\*\*\*\*41**] of RICO from this Court in [United States v. Turkette, 452 U.S. 576 \(1981\)](#), the Government stressed that no "extreme cases" would be brought because the Justice Department would exercise [**\*504**] "sound discretion" through a centralized review process. See Brief for United States in No. 80-808, O.T. 1980, p. 25, n. 20.

In the context of civil RICO, however, the restraining influence of prosecutors is completely absent. Unlike the Government, private litigants have no reason to avoid displacing state common-law remedies. Quite to the contrary, such litigants, lured by the prospect of treble damages and attorney's fees, have a [**\*\*\*364**] strong incentive to invoke RICO's provisions whenever they can allege in good faith two instances of mail or wire fraud. Then the defendant, facing a tremendous financial exposure in addition to the threat of being labeled a "racketeer," will have a strong interest in settling the dispute. See Rakoff, Some Personal Reflections on the Sedima Case and on Reforming RICO, in RICO: Civil and Criminal 400 (Law Journal Seminars-Press 1984). The civil RICO provision consequently stretches the mail and wire fraud statutes to their [**\*\*\*\*42**] absolute limits and federalizes important areas of civil litigation that until now were solely within the domain of the States.

In addition to altering fundamentally the federal-state balance in civil remedies, the broad reading of the civil RICO provision also displaces important areas of federal law. For example, one predicate offense under RICO is "fraud in the sale of securities." [18 U. S. C. § 1961\(1\) \(1982 ed., Supp. III\)](#). By alleging two instances of such fraud, a plaintiff might be able to bring a case within the scope of the civil RICO provision. It does not take great legal insight to realize that such a plaintiff would pursue his case under RICO rather than do so solely under the Securities Act of 1933 or the Securities Exchange Act of 1934, which provide both express and implied causes of action for violations of the federal securities laws. Indeed, the federal securities laws contemplate only compensatory damages and ordinarily do not authorize recovery of attorney's fees. By invoking RICO, in contrast, a successful [**\*505**] plaintiff will recover both treble damages and attorney's fees.

More importantly, under the Court's interpretation, the civil RICO provision [**\*\*\*\*43**] does far more than just increase the available damages. In fact, it virtually eliminates decades of legislative and judicial development of private civil remedies under the federal securities laws. Over the years, courts have paid close attention to matters such as standing, culpability, causation, reliance, and materiality, as well as the definitions of "securities" and "fraud." See, e. g., [Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 \(1975\)](#) (purchaser/seller requirement). All of this law is now an endangered species because plaintiffs can avoid the limitations of the securities laws merely by alleging violations of other predicate acts. For example, even in cases in which the investment instrument is not a "security"

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covered by the federal securities laws, RICO will provide a treble-damages remedy to a plaintiff who can prove the required pattern of mail or wire fraud. Cf. [Crocker National Bank v. Rockwell International Corp., 555 F.Supp. 47 \(ND Cal. 1982\)](#). Before RICO, of course, the plaintiff could not have recovered under federal law for the mail or wire fraud violation.

Similarly, a customer who refrained from selling [\*\*\*44] a security during a period in which its market value was declining could allege that, on two occasions, his broker recommended by telephone, as part of a scheme to defraud, that the customer not sell the security. The customer might thereby prevail under civil RICO even though, as neither a purchaser nor a seller, he would not have had standing to bring an action under the federal securities laws. See also [741 F.2d 482, 499 \(1984\)](#) ("two misstatements [\*\*\*365] in a proxy solicitation could subject any director in any national corporation to 'racketeering' charges and the threat of treble damages and attorneys' fees").

The effect of civil RICO on federal remedial schemes is not limited to the securities laws. For example, even though [\*506] commodities fraud is not a predicate offense listed in [§ 1961](#), the carefully crafted private damages causes of action under the Commodity Exchange Act may be circumvented in a commodities case through civil RICO actions alleging mail or wire fraud. See, e. g., [Parnes v. Heinold Commodities, Inc., 487 F.Supp. 645 \(ND Ill. 1980\)](#). The list goes on and on.

The dislocations caused by the Court's reading [\*\*\*45] of the civil RICO provision are not just theoretical. In practice, this provision frequently has been invoked against legitimate businesses in ordinary commercial settings. As the Court recognizes, the ABA Task Force that studied civil RICO found that 40% of the reported cases involved securities fraud and 37% involved common-law fraud in a commercial or business setting. See *ante*, at 499, n. 16. Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils that it was designed to combat. Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 69 (1985) (hereinafter cited as ABA Report).

Only 9% of all civil RICO cases have involved allegations of criminal activity normally associated with professional criminals. See *ante*, at 499, n. 16. The central purpose that Congress sought to promote through civil RICO is now a mere footnote.

In summary, in both theory and practice, civil RICO has brought profound changes to our legal landscape. Undoubtedly, Congress has the power to [\*\*\*46] federalize a great deal of state common law, and there certainly are no relevant constraints on its ability to displace federal law. Those, however, are not the questions that we face in this case. What we have to decide here, instead, is whether Congress in fact intended to produce these far-reaching results.

[\*507] Established canons of statutory interpretation counsel against the Court's reading of the civil RICO provision. First, we do not impute lightly a congressional intention to upset the federal-state balance in the provision of civil remedies as fundamentally as does this statute under the Court's view. For example, in *Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977)*, we stated that "[absent] a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities." *Id., at 479*. Here, with striking nonchalance, the Court does what it declined to do in *Santa Fe Industries* -- and much more as well. Second, with respect to effects on the federal securities laws and other federal regulatory statutes, we should be reluctant [\*\*\*47] to displace the well-entrenched federal remedial schemes absent clear direction from Congress. See, e. g., [Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 23-24 \(1976\)](#); [Radzanower \[\\*\\*\\*366\] v. Touche Ross & Co., 426 U.S. 148, 153 \(1976\)](#).

In this case, nothing in the language of the statute or the legislative history suggests that Congress intended either the federalization of state common law or the displacement of existing federal remedies. Quite to the contrary, all that the statute and the legislative history reveal as to these matters is what Judge Oakes called a "clanging silence," [741 F.2d, at 492](#).

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Moreover, if Congress had intended to bring about dramatic changes in the nature of commercial litigation, it would at least have paid more than cursory attention to the civil RICO provision. This provision was added in the House of Representatives after the Senate already had passed its version of the RICO bill; the House itself adopted a civil remedy provision almost as an afterthought; and the Senate thereafter accepted the House's version of the bill without even requesting a Conference. See [\*\*\*\*48] *infra*, at 518-519. Congress simply does not act in this way when it intends to effect fundamental changes in the structure of federal law.

[\*508] II

The statutory language and legislative history support the view that Congress did not intend to effect a radical alteration of federal civil litigation. In fact, the language and history indicate a congressional intention to limit, in a workable and coherent manner, the type of injury that is compensable under the civil RICO provision. As the following demonstrates, Congress sought to fill an existing gap in civil remedies and to provide a means of compensation that otherwise did not exist for the honest businessman harmed by the economic power of "racketeers."

A

I begin with a review of the statutory language. Section 1964(c) grants a private right of action to any person "injured in his business or property by reason of a violation of section 1962." Section 1962, in turn, makes it unlawful to invest, in an enterprise engaged in interstate commerce, funds "derived . . . from a pattern of racketeering activity," to acquire or operate an interest in any such enterprise through "a pattern of racketeering activity," or to conduct [\*\*\*\*49] or participate in the conduct of that enterprise "through a pattern of racketeering activity." Section 1961 defines "racketeering activity" to mean any of numerous acts "chargeable" or "indictable" under enumerated state and federal laws, including state-law murder, arson, and bribery statutes, federal mail and wire fraud statutes, and the antifraud provisions of federal securities laws. It states that "a pattern" of racketeering activity requires proof of at least two acts of racketeering within 10 years.

By its terms, § 1964(c) therefore grants a cause of action only to a person injured "by reason of a violation of § 1962." The Court holds today that the only injury a plaintiff need allege is injury occurring by reason of a predicate, or racketeering, act -- *i. e.*, one of the offenses listed in § 1961. But § 1964(c) does not by its terms provide a remedy for injury by [\*\*509] reason of § 1961; it requires an injury by reason of § 1962. In other words:

"[\*\*\*367] While section 1962 prohibits the involvement of an 'enterprise' in 'racketeering activity,' racketeering *itself* is not a violation of § 1962. Thus, a construction of RICO permitting recovery [\*\*\*\*50] for damages arising out of the racketeering acts simply does not comport with the statute as written by Congress. In effect, the broad construction replaces the rule that treble damages can be recovered only when they occur '*by reason of* a violation of section 1962,' with a rule permitting recovery of treble damages *whenever* there has been a violation of section 1962. Such unwarranted judicial interference with the Act's plain meaning cannot be justified." Comment, 76 Nw. U. L. Rev. 100, 128 (1981) (footnotes omitted).

See also Bridges, Private RICO Litigation Based Upon "Fraud in the Sale of Securities," 18 Ga. L. Rev. 43, 67 (1983).

In addition, the statute permits recovery only for injury to business or property. It therefore excludes recovery for personal injuries. However, many of the predicate acts listed in § 1961 threaten or inflict personal injuries -- such as murder and kidnaping. If Congress in fact intended the victims of the predicate acts to recover for their injuries, as the Court holds it did, it is inexplicable why Congress would have limited recovery to business or property injury. It simply makes no sense to allow [\*\*\*\*51] recovery by some, but not other victims of predicate acts, and to make recovery turn solely on whether the defendant has chosen to inflict personal pain or harm to property in order to accomplish its end.

In summary, the statute clearly contemplates recovery for injury resulting from the confluence of events described in § 1962 and not merely from the commission of a predicate act. The Court's contrary interpretation distorts the

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statutory language under the guise of adopting a plain-meaning definition, and it does so without offering any indication of congressional [\*\*510] intent that justifies a deviation from what I have shown to be the plain meaning of the statute. However, even if the statutory language were ambiguous, see *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 389 (CA7 1984), aff'd, post, p. 606, the scope of the civil RICO provision would be no different, for this interpretation of the statute finds strong support in the legislative history of that provision.

B

In reviewing the legislative history of civil RICO, numerous federal courts have become mired in controversy about the extent to which Congress intended [\*\*\*52] to adopt or reject the federal antitrust laws as a model for the RICO provisions. The basis for the dispute among the lower courts is the language of the treble-damages provision, which tracks virtually word for word the treble-damages provision of the antitrust laws, § 4 of the Clayton Act;<sup>1</sup> given this parallel, [\*\*\*368] there can be little doubt that the latter served as a model for the former. Some courts have relied heavily on this congruity to read an antitrust-type "competitive injury" requirement into the civil RICO statute. See, e. g., *North Barrington Development, Inc. v. Fanslow*, 547 F.Supp. 207 (ND Ill. 1980). Other courts have rejected a competitive-injury requirement, or any antitrust analogy, relying in significant part on what [\*511] they perceive as Congress' rejection of a wholesale adoption of antitrust precedent. See, e. g., *Yancoski v. E.F. Hutton & Co., Inc.*, 581 F.Supp. 88 (ED Pa. 1983); *Mauriber v. Shearson/American Express, Inc.*, 567 F.Supp. 1231, 1240 (SDNY 1983).

[\*\*\*53] Many of these courts have read far too much into the antitrust analogy. The legislative history makes clear that Congress viewed the form of civil remedies under RICO as analogous to such remedies under the antitrust laws, but that it did not thereby intend the substantive compensable injury to be exactly the same. The legislative history also suggests that Congress might have wanted to avoid saddling the civil RICO provisions with the same standing requirements that at the time limited standing to sue under the antitrust laws. However, the Committee Reports and hearings in no way suggest that Congress considered and rejected a requirement of injury separate from that resulting from the predicate acts. Far from it, Congress offered considerable indication that the kind of injury it primarily sought to attack and compensate was that for which existing civil and criminal remedies were inadequate or nonexistent; the requisite injury is thus akin to, but broader than, that targeted by the antitrust laws and different in kind from that resulting from the underlying predicate acts.

A brief look at the legislative history makes clear that the antitrust laws in no relevant respect constrain [\*\*\*54] our analysis or preclude formulation of an independent RICO-injury requirement. When Senator Hruska first introduced to Congress the predecessor to RICO, he proposed an amendment to the Sherman Act that would have prohibited the investment or use of intentionally unreported income from one line of business to establish, operate, or invest in another line of business. S. 2048, 90th Cong., 1st Sess. (1967). After studying the provision, the American Bar Association issued a report that, while acknowledging the effects of organized crime's infiltration of legitimate business, stated a preference for a [\*512] provision separate from the antitrust laws. See 115 Cong. Rec. 6994 (1969). According to the report:

<sup>1</sup> [Section 1964\(c\)](#) provides:

"Any person injured in his business or property by reason of a violation of [section 1962](#) of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

Section 4 of the Clayton Act, [15 U. S. C. § 15](#), provides in relevant part:

"[Any] person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

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"By placing the antitrust-type enforcement and recovery procedures in a separate statute, a commingling of criminal enforcement goals with the goals of regulating competition is avoided.

....

"Moreover, the use of antitrust laws themselves as a vehicle for combating organized crime could create inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery. Such a private litigant [\*\*\*369] would have to [\*\*\*\*55] contend with a body of precedent -- appropriate in a purely antitrust context -- setting strict requirements on questions such as 'standing to sue' and 'proximate cause.'" *Id.*, at 6995.

Congress subsequently decided not to pursue an addition to the antitrust laws but instead to fashion a wholly separate criminal statute. If in fact that decision was made in response to the ABA's statement and not to other political concerns, it may be interpreted at most as a rejection of antitrust *standing* requirements. Court-developed standing rules define the requisite proximity between the plaintiff's injury and the defendant's antitrust violation. See *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476 (1982) (discussing antitrust standing rules developed in the Federal Circuits). Thus, at most we may read the early legislative history to eschew wholesale adoption of the particular nexus requirements that limit the class of potential antitrust plaintiffs. Courts that read this history to bar *any* analogy to the antitrust laws simply read too much into the scant evidence available to us. In particular, courts that read this history to bar an injury requirement [\*\*\*\*56] akin to "antitrust" injury are in error. The requirement of antitrust injury, as articulated in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), differs in kind from the standing requirement to [\*513] which the ABA referred and, in fact, had not been articulated at the time of the ABA comments.

At the same time, courts that believe civil RICO doctrine should mirror civil antitrust doctrine also read too much into the legislative history. It is absolutely clear that Congress intended to adopt antitrust *remedies*, such as civil actions by the Government and treble damages. The House of Representatives added the civil provision to Title IX in response to suggestions from the ABA and Congressmen that there be a remedy "similar to the private damage remedy found in the anti-trust laws," Organized Crime Control: Hearings on S. 30 and Related Proposals, before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 520 (1970) (statement of Rep. Steiger) (hereinafter House Hearings); see also *id.*, at 543 (statement of Edward L. Wright, ABA president-elect) (suggesting an amendment "to include the [\*\*\*57] additional civil remedy of authorizing private damage suits based upon the concept of Section 4 of the Clayton (Antitrust) Act"); 116 Cong. Rec. 35295 (1970) (remarks of Rep. Poff, chief spokesman for the bill) (explaining bill's adoption of the antitrust remedy for use against organized crime). The decision to adopt antitrust remedies does not, however, compel the conclusion that Congress intended to adopt substantive antitrust doctrine. Courts that construe these references to the antitrust laws as indications of Congress' intent to adopt the substance of antitrust doctrine also read too much into too little language.

C

While the foregoing establishes that Congress sought to adopt remedies akin to those used in antitrust law -- such as civil government enforcement -- and to reject antitrust standing rules, other portions of the legislative history reveal just what [\*\*\*370] Congress intended the substantive dimensions of the civil action to be. Quite simply, its principal target was the economic power of racketeers, and its toll on legitimate businessmen. [\*514] To this end, Congress sought to fill a gap in the civil and criminal laws and to provide new remedies broader than [\*\*\*58] those already available to private or government antitrust plaintiffs, different from those available to government and private citizens under state and federal laws, and significantly narrower than those adopted by the Court today.

In 1967, Senator Hruska proposed two bills, S. 2048 and S. 2049, 90th Cong., 1st Sess., which were designed in part to implement recommendations of the President's Commission on Law Enforcement and the Administration of Justice (the Katzenbach Commission) on the fight against organized crime. See 113 Cong. Rec. 17998-18001 (1967). The former bill proposed an amendment to the Sherman Act prohibiting the investment or use of unreported income derived from one line of business in another business. *Id.*, at 17999. The latter bill, which was separate from the Sherman Act, prohibited the acquisition of a business interest with income derived from criminal

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activity. *Ibid.* Representative Poff introduced similar bills in the House of Representatives. See H. R. 11266, H. R. 11268, 90th Cong., 1st Sess. (1967); 113 Cong. Rec. 17976 (1967).

Introducing S. 2048, Senator Hruska explained that "[by] limiting its application to intentionally unreported [\*\*\*\*59] income, this proposal highlights the fact that *the evil* to be curbed is the unfair competitive advantage inherent in the large amount of illicit income available to organized crime." *Id.*, at 17999 (emphasis added). He described how organized crime had infiltrated a wide range of businesses, and he observed that "[in] each of these instances, large amounts of cash coupled with threats of violence, extortion, and similar techniques were utilized by mobsters to achieve their desired objectives: monopoly control of these enterprises." *Id.*, at 17998 (emphasis added). He identified four means by which control of legitimate business had been acquired:

"First. Investing concealed profits acquired from gambling and other illegal enterprises.

[\*515] "Second. Accepting business interests in payment of the owner's gambling debts.

"Third. Foreclosing on usurious loans.

"Fourth. Using various forms of extortion." *Id.*, at 17998-17999.

The Senator then explained how this infiltration takes its toll:

"The proper functioning of a free economy requires that economic decisions be made by persons free to exercise their own judgment. Force or fear limits choice, ultimately [\*\*\*\*60] reduces quality, and increases prices. When organized crime moves into a business, it brings all the techniques of violence and intimidation which it used in its illegal businesses. Competitors are eliminated and customers confined to sponsored suppliers. Its effect is even more unwholesome than other monopolies because its position does not rest on economic superiority." *Id.*, at 17999.

Congress never took action on these bills.

[\*\*\*371] In 1969, Senator McClellan introduced the Organized Crime Control Act, which altered numerous criminal law areas such as grand juries, immunity, and sentencing, but which contained no provision like that now known as RICO. See S. 30, 91st Cong., 1st Sess.; 115 Cong. Rec. 769 (1969). Shortly thereafter, Senator Hruska introduced the Criminal Activities Profits Act. S. 1623, 91st Cong., 1st Sess.; 115 Cong. Rec. 6995-6996 (1969). He explained that S. 1623 was designed to synthesize the earlier two bills (S. 2048 and S. 2049) while placing the "unified whole" outside the Sherman Act in response to the ABA's concerns. According to the Senator, the bill was meant to attack "*the economic power of organized crime and its exercise of unfair [\*\*\*\*61] competition with honest businessmen,*" and to address "[the] power of organized crime to establish a monopoly within numerous business fields" and the impact on the free market and honest [\*516] competitors of "a racketeer dominated venture." *Id.*, at 6993 (emphasis added).

As introduced, S. 1623 contained a provision for a private treble-damages action; the language of that provision was virtually identical to that in [§ 1964\(c\)](#), and it likely served as the model for [§ 1964\(c\)](#). See *id.*, at 6996. Explaining this provision, Senator Hruska said:

"In addition to this criminal prohibition, the bill also creates civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman. Despite the willingness of the courts to apply the Sherman Anti-Trust Act to organized crime activities, *as a practical matter the legitimate businessman does not have adequate civil remedies available under that act. This bill fills that gap.*" *Id.*, at 6993 (emphasis added).

The Senate did not act directly on either S. 30 or S. 1623. Instead, Senators McClellan and Hruska jointly introduced S. 1861, the Corrupt Organizations Act of 1969, 91st [\*\*\*\*62] Cong., 1st Sess.; 115 Cong. Rec. 9568-9571, which combined features of the two other bills and added to them. The new bill expanded the list of offenses that would constitute "racketeering activity" and required that the proscribed conduct be committed through a pattern of "racketeering activity." It did not, however, contain a private civil remedy provision, but only authorization

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for an injunctive action brought by the Attorney General. Senator McClellan thereafter requested that the provisions of S. 1861 be incorporated by amendment into the broad Organized Crime Control Act, S. 30. See 115 Cong. Rec. 9566-9571 (1969).

In December 1969, the Senate Judiciary Committee reported on the Organized Crime Control Act, S. 30, as amended to include S. 1861 as Title IX, "Racketeer Influenced and Corrupt Organizations." Title IX, it is clear, was [\*517] aimed at precisely the same evil that Senator Hruska had targeted in 1967 -- the infiltration of legitimate business by organized crime. According to the Committee Report, the Title

"has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce. [\*\*\*\*63] It seeks to achieve this objective by the fashioning of new criminal and civil remedies and investigative procedures. [\*\*\*372] " S. Rep. No. 91-617, p. 76 (1969).

In language taken virtually verbatim from the earlier floor statements of Senator Hruska, the Report described the extraordinary range of legitimate businesses and unions that had been infiltrated by racketeers, and the means by which the racketeers sought to profit from the infiltration. It described "scams" involving bankruptcy and insurance fraud, and the use of "force or fear" to secure a monopoly in the service or product of the business, and it summed up: "When the campaign is successful, the organization begins to extract a premium price from customers." *Id.*, at 77.

Similarly, Senator Byrd spoke in favor of Title IX and gave other examples of the "awesome power" of racketeers and their methods of operation. He described, for example, how one racketeer had gained a foothold in a detergent company and then had used arson and murder to try to get the A & P Tea Co. to buy a detergent that A & P had tested and rejected. 116 Cong. Rec. 607 (1970). As another example, he explained that racketeers would corner [\*\*\*\*64] the market on a good or service and then withhold it from a businessman until he surrendered his business or made some other related economic concession. *Ibid.* In each of these cases, I note, the racketeer engaged in criminal acts in order to accomplish a commercial goal -- e. g., to destroy competition, create a monopoly, or infiltrate a legitimate business. See also *id.*, at 602 (statement of Sen. Hruska) ("[Organized crime] employs [\*518] physical brutality, fear and corruption to intimidate competitors and customers to achieve increased sales and profits") (emphasis added). In sum, "[scrutiny] of the Senate Report . . . establishes without a doubt a single dominating purpose of the Senate in proposing the RICO statute: 'Title IX represents the committee's careful efforts to fashion new remedies to deal with the infiltration of organized crime into legitimate organizations operating in interstate commerce.'" ABA Report 105.

The bill passed the Senate after a short debate by a vote of 73 to 1, without a treble-damages provision, and it was then considered by the House. In hearings before the House Judiciary Committee, it was suggested that the bill should [\*\*\*\*65] include "the additional civil remedy of authorizing private damage suits based upon the concept of Section 4 of the Clayton Act." House Hearings, at 543-544 (statement of Edward Wright, ABA president-elect); see also *id.*, at 520 (statement of Rep. Steiger) (suggesting addition of a private civil damages remedy). Before reporting the bill favorably in September 1970, the House Judiciary Committee made one change to the civil remedy provision -- it added a private treble-damages provision to the civil remedies already available to the Government; the Committee accorded this change only a single statement in the Committee Report: "The title, as amended, also authorizes civil treble damage suits on the part of private parties who are injured." H. R. Rep. No. 91-1549, p. 35 (1970). Three Congressmen dissented from the Report. Their views are particularly telling because, with language that is narrow compared to the extraordinary scope the civil provision has acquired, these three challenged the possible breadth and abuse of the private civil remedy by plaintiff-competitors:

"[\*\*\*373] Indeed, [§ 1964(c)] provides invitation for disgruntled and malicious *competitors* to [\*\*\*\*66] harass innocent businessmen [\*519] engaged in interstate commerce by authorizing private damage suits. A *competitor* need only raise the claim that his rival has derived gains from two games of poker, and, because this title prohibits even the 'indirect use' of such gains -- a provision with tremendous outreach -- litigation is begun. What a protracted, expensive trial may not succeed in doing, the adverse publicity may well accomplish -- destruction of the rival's business." *Id.*, at 187 (emphasis added).

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The bill then returned to the Senate, which passed it without a conference, apparently to assure passage during the session. Thus, the private remedy at issue here slipped quietly into the statute, and its entrance evinces absolutely no intent to revolutionize the enforcement scheme, or to give undue breadth to the broadly worded provisions -- provisions Congress fully expected Government enforcers to narrow.

Putting together these various pieces, I can only conclude that Congress intended to give to businessmen who might otherwise have had no available remedy a possible way to recover damages for competitive injury, infiltration injury, or other economic injury resulting [\*\*\*67] out of, but wholly distinct from, the predicate acts. Congress fully recognized that racketeers do not engage in predicate acts as *ends in themselves*; instead, racketeers threaten, burn, and murder in order to induce their victims to act in a way that accrues to the economic benefit of the racketeer, as by ceasing to compete, or agreeing to make certain purchases. Congress' concern was not for the direct victims of the racketeers' acts, whom state and federal laws already protected, but for the competitors and investors whose businesses and interests are harmed or destroyed by racketeers, or whose competitive positions decline because of infiltration in the relevant market. Its focus was on the victims of the extraordinary economic power that racketeers are able to acquire through a wide [\*520] range of illicit methods. Indeed, that is why Congress provided for recovery only for injury to business or property -- that is, commercial injuries -- and not for personal physical or emotional injury.

The only way to give effect to Congress' concern is to require that plaintiffs plead and prove that they suffered RICO injury -- injury to their competitive, investment, or other [\*\*\*68] business interests resulting from the defendant's conduct of a business or infiltration of a business or a market, through a pattern of racketeering activity. As I shall demonstrate, this requirement is manageable, and it puts the statute to the use to which it was addressed. In addition, this requirement is faithful to the language of the statute, which does not appear to provide recovery for injuries incurred by reason of individual predicate acts. It also avoids most of the "extraordinary uses" to which the statute has been put, in which legitimate businesses that have engaged in two criminal acts have been labeled "racketeers," have faced treble-damages judgments in favor of the direct victims, and often have settled to avoid the destructive publicity and the resulting harm to reputation. These cases take their toll; [\*\*\*374] their results distort the market by saddling legitimate businesses with uncalled-for punitive bills and undeserved labels. To allow punitive actions and significant damages for injury beyond that which the statute was intended to target is to achieve nothing the statute sought to achieve, and ironically to injure many of those lawful businesses that [\*\*\*69] the statute sought to protect. Under such circumstances, I believe this Court is derelict in its failure to interpret the statute in keeping with the language and intent of Congress.

Several lower courts have remarked, however, that a "RICO injury" requirement, while perhaps contemplated by the statute, defies definition. I disagree. The following series of examples, culled in part from the legislative history of the RICO statute, illustrates precisely what does and does not fall within this definition.

[\*521] *First.* If a "racketeer" uses "[threats], arson and assault . . . to force competitors out of business and obtain larger shares of the market," House Hearings, at 106 (statement of Sen. McClellan), the threats, arson, and assault represent the predicate acts. The pattern of those acts is designed to accomplish, and accomplishes, the goal of monopolization. Competitors thereby injured or forced out of business could allege "RICO" injury and recover damages for lost profits. So, too, purchasers of the racketeer's goods or services, who are forced to buy from the racketeer/monopolist at higher prices, and whose businesses therefore are injured, might recover damages [\*\*\*70] for the excess costs of doing business. The direct targets of the predicate acts -- whether competitors, suppliers, or others -- could recover for damages flowing from the predicate acts themselves, but under state or perhaps other federal law, not RICO.

*Second.* If a "racketeer" uses arson and threats to induce honest businessmen to pay protection money, or to purchase certain goods, or to hire certain workers, the targeted businessmen could sue to recover for injury to their business and property resulting from the added costs. This would be so if they were the direct victims of the predicate acts or if they had reacted to offenses committed against other businessmen. In each case, the predicate acts were committed in order to accomplish a certain end -- e. g., to induce the prospective plaintiffs to take action to the economic benefit of the racketeer; in each case the result would have taken a toll on the competitive position of the prospective plaintiff by increasing his costs of doing business.

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At the same time, the plaintiffs could not recover under RICO for the direct damages from the predicate acts. They could not, for example, recover for the cost of the building [\*\*\*71] burned, or for personal injury resulting from the threat. Indeed, compensation for this latter injury is barred already by RICO's exclusion of personal injury claims. As in the previous [\*522] example, these injuries are amply protected by state-law damages actions.

*Third.* If a "racketeer" infiltrates and obtains control of a legitimate business either through fraud, foreclosure on usurious loans, extortion, or acceptance of business interests in payment of gambling debts, the honest investor who is thereby displaced could bring a civil RICO action claiming infiltration injury resulting [\*\*375] from the infiltrator's pattern of predicate acts that enabled him to gain control. Thereafter, if the enterprise conducts its business through a pattern of racketeering activity to enhance its profits or perpetuate its economic power, competitors of that enterprise could bring civil RICO actions alleging injury by reason of the enhanced commercial position the enterprise has obtained from its unlawful acts, and customers forced to purchase from sponsored suppliers could recover their added costs of doing business. At the same time, the direct victims of the activity -- for example, [\*\*\*72] customers defrauded by an infiltrated bank -- could not recover under civil RICO. The bank does not, of course, thereby escape liability. The customers simply must rely on the existing causes of action, usually under state law.

Alternatively, if the infiltrated enterprise operates a legitimate business to a businessman's competitive disadvantage because of the enterprise's strong economic base derived from perpetration of predicate acts, the competitor could bring a civil RICO action alleging injury to his competitive position. The predicate acts then would have enabled the "enterprise" to gain a competitive advantage that brought harm to the plaintiff-competitor. Again, the direct victims of the predicate acts whose profits were invested in the "legitimate enterprise," would not be able to recover damages under civil RICO for injury resulting from the predicate acts alone.

These examples are not exclusive, and if this formulation were adopted, lower courts would, of course, have the opportunity [\*523] to smooth numerous rough edges. The examples are designed simply to illustrate the type of injury that civil RICO was, to my mind, designed to compensate. The construction [\*\*\*73] I describe offers a powerful remedy to the honest businessmen with whom Congress was concerned, who might have had no recourse against a "racketeer" prior to enactment of the statute. At the same time, this construction avoids both the theoretical and practical problems outlined in Part I. Under this view, traditional state-law claims are not federalized; federal remedial schemes are not inevitably displaced or superseded; and, consequently, ordinary commercial disputes are not misguidedly placed within the scope of civil RICO.<sup>2</sup>

### III

The Court today permits two civil actions for treble damages to go forward that are not authorized either by the language and legislative history of the civil RICO statute, or by the policies that underlay passage of that statute. In so doing, the Court shirks [\*\*\*74] its well-recognized responsibility to assure that Congress' intent is not thwarted by maintenance of unintended litigation, and it does so based on an unfounded and ill-considered reading of a statutory provision. Because I believe the provision at issue is susceptible of a narrower interpretation that comports both with the statutory language and the legislative history, I dissent.

JUSTICE POWELL, dissenting.

[\*\*376] I agree with JUSTICE MARSHALL that the Court today reads the civil RICO statute in a way that validates uses of the statute that were never intended by Congress, and I join his dissent. I write separately to emphasize my disagreement [\*524] with the Court's conclusion that the statute must be applied to authorize the

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<sup>2</sup>The analysis in my dissent would lead to the dismissal of the civil RICO claims at stake here. I thus do not need to decide whether a civil RICO action can proceed only after a criminal conviction. See *ante*, at 488-493.

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types of private civil actions now being brought frequently against respected businesses to redress ordinary fraud and breach-of-contract cases.<sup>1</sup>

[\*\*\*\*75] I

In *United States v. Turkette*, 452 U.S. 576 (1981), the Court noted that in construing the scope of a statute, its language, if unambiguous, must be regarded as conclusive "in the absence of 'a clearly expressed legislative intent to the contrary.'" *Id.*, at 580 (emphasis added) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Accord, *Russello v. United States*, 464 U.S. 16, 20 (1983). In both *Turkette* and *Russello*, we found that the "declared purpose" of Congress in enacting the RICO statute was "to seek the eradication of organized crime in the United States." *United States v. Turkette, supra*, at 589 (quoting the statement of findings prefacing the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 923); accord, *Russello v. United States, supra*, at 26-27. That organized crime was Congress' target is apparent from the Act's title, is made plain throughout the legislative history of the statute, see, e. g., S. Rep. No. 91-617, p. 76 (1969) (S. Rep.), and is acknowledged by [\*\*\*\*76] all parties to these two [\*\*3288] cases. Accord, Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 70-92 (1985) (ABA Report). The legislative history cited by the Court today amply supports this conclusion, see *ante*, at 487-488, and the Court concedes that "in its private civil version, RICO is evolving into something quite [\*525] different from the original conception of its enactors. See generally ABA Report 55-69." *Ante*, at 500. Yet, the Court concludes that it is compelled by the statutory language to construe § 1964(c) to reach garden-variety fraud and breach of contract cases such as those before us today. *Ibid.*

As the Court of Appeals observed in this case, "[if] Congress had intended to provide a federal forum for plaintiffs for so many common law wrongs, it would at least have discussed it."<sup>2</sup> 741 F.2d 482, 492 (1984). The Court today concludes that Congress was aware of the broad scope of the statute, relying on the fact that some Congressmen objected to the possibility of abuse of [\*\*\*377] the RICO statute by arguing that it could be used "to harass innocent businessmen." [\*\*\*77] H. R. Rep. No. 91-1549, p. 187 (1970) (dissenting views of Reps. Conyers, Mikva, and Ryan); 116 Cong. Rec. 35342 (1970) (remarks of Rep. Mikva).

In the legislative history of every statute, one may find critics of the bill who predict dire consequences in the event of its enactment. A court need not infer from such statements by opponents that Congress *intended* those consequences to occur, particularly where, as here, there is compelling evidence to the contrary. The legislative history reveals that Congress did not state explicitly that the statute would reach only members of the Mafia because it believed there were constitutional problems with establishing such a specific status offense. E. g., *id.*, at 35343-35344 (remarks of Rep. Celler); *id.*, at 35344 (remarks of Rep. Poff). Nonetheless, the legislative history makes clear that the statute was intended [\*\*\*78] to be *applied* to organized crime, and an influential sponsor of the bill emphasized that any effect it had beyond such crime was meant to be only incidental. *Id.*, at 18914 (remarks of Sen. McClellan).

[\*526] The ABA study concurs in this view. The ABA Report states:

"In an attempt to ensure the constitutionality of the statute, Congress made the central proscription of the statute the use of a 'pattern of racketeering activities' in connection with an 'enterprise,' rather than merely outlawing membership in the Mafia, La Cosa Nostra, or other organized criminal syndicates. 'Racketeering' was defined to embrace a potpourri of federal and state criminal offenses deemed to be the type of criminal activities frequently engaged in by mobsters, racketeers and other traditional members of 'organized crime.' The 'pattern' element of the statute was designed to limit its application to planned, ongoing, continuing crime as opposed to sporadic,

<sup>1</sup> The Court says these suits are not being brought against the "archetypal, intimidating mobster" because of a "defect" that is "inherent in the statute." *Ante*, at 499. If RICO must be construed as the Court holds, this is indeed a defect that Congress never intended. I do not believe that the statute *must* be construed in what in effect is an irrational manner.

<sup>2</sup> The force of this observation is accented by RICO's provision for treble damages -- an enticing invitation to litigate these claims in federal courts.

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unrelated, isolated criminal episodes. The 'enterprise' element, when coupled with the 'pattern' requirement, was intended by the Congress to keep the reach of RICO focused directly on traditional organized crime and comparable ongoing [\*\*\*79] criminal activities carried out in a structured, organized environment. The reach of the statute beyond traditional mobster and racketeer activity and comparable ongoing structured criminal enterprises, was intended to be incidental, and only to the extent necessary to maintain the constitutionality of a statute aimed primarily at organized crime." *Id.*, at 71-72 (footnote omitted).

It has turned out in this case that the naysayers' dire predictions have come true. As the Court notes, *ante*, at 499, and n. 16, RICO has been interpreted so broadly that it has been used more often against respected businesses with no ties to organized crime, than against the mobsters who were the clearly intended target of the [\*\*3289] statute. While I acknowledge that the language of the statute *may* be read as broadly as the Court interprets it today, I do not believe that it *must* [\*527] be so read. Nor do I believe that interpreting the statutory language more narrowly than the Court does will "eliminate the [civil RICO] private action," *ante*, at 499, in cases of the [\*\*\*378] kind clearly identified by the legislative history. The statute may and should be read narrowly [\*\*\*80] to confine its reach to the type of conduct Congress had in mind. It is the duty of this Court to implement the unequivocal intention of Congress.

## II

The language of this complex statute is susceptible of being read consistently with this intent. For example, the requirement in the statute of proof of a "pattern" of racketeering activity may be interpreted narrowly. [Section 1961\(5\)](#), defining "pattern of racketeering activity," states that such a pattern "requires at least two acts of racketeering activity." This contrasts with the definition of "racketeering activity" in [§ 1961\(1\)](#), stating that such activity "means" any of a number of acts. The definition of "pattern" may thus logically be interpreted as meaning that the presence of the predicate acts is only the beginning: something more is required for a "pattern" to be proved. The ABA Report concurs in this view. It argues persuasively that "[the] 'pattern' element of the statute was designed to limit its application to planned, ongoing, continuing crime as opposed to sporadic, unrelated, isolated criminal episodes," ABA Report 72, such as the criminal acts alleged in the case before us today.

The legislative history bears [\*\*\*81] out this interpretation of "pattern." Senator McClellan, a leading sponsor of the bill, stated that "proof of two acts of racketeering activity, without more, does not establish a pattern." 116 Cong. Rec. 18940 (1970). Likewise, the Senate Report considered the "concept of 'pattern' [to be] essential to the operation of the statute." S. Rep., at 158. It stated that the bill was not aimed at sporadic activity, but that the "infiltration of legitimate business normally requires more than one 'racketeering [\*528] activity' and the threat of continuing activity to be effective. It is this factor of continuity *plus* relationship which combines to produce a pattern." *Ibid.* (emphasis added). The ABA Report suggests that to effectuate this legislative intent, "pattern" should be interpreted as requiring that (i) the racketeering acts be related to each other, (ii) they be part of some common scheme, and (iii) some sort of continuity between the acts or a threat of continuing criminal activity must be shown. ABA Report, at 193-208. By construing "pattern" to focus on the manner in which the crime was perpetrated, courts could go a long way toward limiting the reach of [\*\*\*82] the statute to its intended target -- organized crime.

The Court concedes that "pattern" could be narrowly construed, *ante*, at 496, n. 14, and notes that part of the reason civil RICO has been put to such extraordinary uses is because of the "failure of Congress and the courts to develop a meaningful concept of 'pattern,'" *ante*, at 500. The Court declines to decide whether the defendants' acts constitute such a pattern in this case, however, because it concludes that that question is not before the Court. *Ibid.* I agree that the scope of the "pattern" requirement is not included in the questions on which we granted certiorari. I am concerned, however, that in the course of rejecting the Court of Appeals' ruling that the statute requires proof of a "racketeering injury" the Court has read [\*\*\*379] the entire statute so broadly that it will be difficult, if not impossible, for courts to adopt a reading of "pattern" that will conform to the intention of Congress.

The Court bases its rejection of the "racketeering injury" requirement on the general principles that the RICO statute is to be read "broadly," that it is to be "liberally construed to effectuate its remedial [\*\*\*83] purposes," *ante*, at 498 (quoting Pub. L. 91-452, § 904(a), 84 Stat. 947), and that the statute was part of "an aggressive initiative [\*\*3290] to supplement old remedies and develop new methods for fighting crime." *Ante*, at 498. Although the Court

acknowledges that few of the legislative statements supporting these principles were made [\*529] with reference to RICO's private civil action, it concludes nevertheless that all of the Act's provisions should be read in the "spirit" of these principles. *Ibid.* By constructing such a broad premise for its rejection of the "racketeering injury" requirement, the Court seems to mandate that all future courts read the entire statute broadly.

It is neither necessary to the Court's decision, nor in my view correct, to read the civil RICO provisions so expansively. We ruled in *Turkette* and *Russello* that the statute must be read broadly and construed liberally to effectuate its remedial purposes, but like the legislative history to which the Court alludes, it is clear we were referring there to RICO's *criminal* provisions. It does not necessarily follow that the same principles apply to RICO's private civil provisions. [\*\*\*84] The Senate Report recognized a difference between criminal and civil enforcement in describing proposed civil remedies that would have been available to the Government. It emphasized that although those proposed remedies were intended to place additional pressure on organized crime, they were intended to reach "essentially an economic, *not* a punitive goal." S. Rep., at 81 (emphasis added). The Report elaborated as follows:

"However remedies may be fashioned, it is necessary to free the channels of commerce from predatory activities, *but* there is no intent to visit punishment on any individual; the purpose is civil. Punishment as such is limited to the criminal remedies . . ." *Ibid.* (emphasis added; footnote omitted).

The reference in the Report to "predatory activities" was to organized crime. Only a small fraction of the scores of civil RICO cases now being brought implicate organized crime in any way.<sup>3</sup> Typically, these suits are being brought -- in the [\*530] unfettered discretion of private litigants -- in federal court against legitimate businesses seeking treble damages in ordinary fraud and contract cases. There is nothing comparable in those cases [\*\*\*85] to the restraint on the institution of criminal suits exercised by Government prosecutorial discretion. Today's opinion inevitably will encourage continued expansion of resort to RICO in cases of alleged fraud or contract violation [\*\*\*380] rather than to the traditional remedies available in state court. As the Court of Appeals emphasized, it defies rational belief, particularly in light of the legislative history, that Congress intended this far-reaching result. Accordingly, I dissent.

## References

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[Return To Full Text Opinion](#)

31 Am Jur 2d, Extortion, Blackmail, and Threats 31, 32, 37

[18 USCS 1962, 1964\(c\)](#)

US L Ed Digest, Extortion and Blackmail 1; Fraud and Deceit 4; Statutes 184

L Ed Index to Annos, Organized [\*\*\*86] Crime Control Act of 1970; Racketeering

ALR Quick Index, Racketeering

Federal Quick Index, Antiracketeering Act

Annotation References:

Civil action for damages under [18 USCS 1964\(c\)](#) of the Racketeer Influenced and Corrupt Organizations Act (RICO, [18 USCS 1961 et seq.](#)) for injuries sustained by reason of racketeering activity. 70 ALR Fed 538.

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<sup>3</sup> As noted in the ABA Report, of the 270 District Court RICO decisions prior to this year, only 3% (9 cases) were decided throughout the entire decade of the 1970's, whereas 43% (116 cases) were decided in 1984. ABA Report, at 53a (Table). See *ante*, at 481, n. 1.

I Í HÁEÜÍ JÉÍ HÉLÉÍ ÁUÉÓÄGÍ I ÉHIGJELÁÍ ÁSEÓaÉGÁÍ I ÉHÉHÉLÁJÍ I ÁNÈÉSÓYQÁFFJÉHÉI

What is an "enterprise," as defined at [18 USCS 1961\(4\)](#), for purposes of the Racketeer Influenced and Corrupt Organizations (RICO) statute ([18 USCS 1961 et seq.](#)). 52 ALR Fed 818.

Validity, construction, and application of [18 USCS 1962](#), making unlawful certain acts involving "pattern of racketeering activity" or "collection of unlawful debt." 29 ALR Fed 826.

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## Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth

Supreme Court of the United States

March 18, 1985, Argued ; July 2, 1985, Decided \*

No. 83-1569

### **Reporter**

473 U.S. 614 \*; 105 S. Ct. 3346 \*\*; 87 L. Ed. 2d 444 \*\*\*; 1985 U.S. LEXIS 129 \*\*\*\*; 53 U.S.L.W. 5069; 1985-2 Trade Cas. (CCH) P66,669

MITSUBISHI MOTORS CORP. v. SOLER CHRYSLER-PLYMOUTH, INC.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

**Disposition:** [723 F.2d 155](#), affirmed in part, reversed in part, and remanded.

## **Core Terms**

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arbitration, antitrust, Convention, disputes, parties, antitrust claim, arbitration clause, courts, agreement to arbitrate, anti trust law, Sherman Act, tribunal, rights, dealers, contractual, court of appeals, encompass, awards, district court, federal policy, manufactured, distributor, public interest, statutory claim, damages, cases, statutory right, subject matter, contracts, commerce

## **LexisNexis® Headnotes**

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Admiralty & Maritime Law > Maritime Contracts > General Overview

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

Admiralty & Maritime Law > Arbitration > General Overview

Admiralty & Maritime Law > Arbitration > Judicial Review

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

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

### **[HN1](#)[] Admiralty & Maritime Law, Maritime Contracts**

See [9 U.S.C.S. § 4](#).

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\* Together with No. 83-1733, Soler Chrysler-Plymouth, Inc. v. Mitsubishi Motors Corp., also on certiorari to the same court.

473 U.S. 614, \*614; 105 S. Ct. 3346, \*\*3346; 87 L. Ed. 2d 444, \*\*\*444; 1985 U.S. LEXIS 129, \*\*\*\*1

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Foreign Arbitral Awards

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

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

Business & Corporate Compliance > ... > International Trade Law > Dispute Resolution > International Commercial Arbitration

## **HN2** Arbitration, Foreign Arbitral Awards

See [§ 201](#) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (1970), 21 U.S.T. 2519, [9 U.S.C.S. § 201](#).

Admiralty & Maritime Law > Arbitration > Enforcement of Arbitration

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

Admiralty & Maritime Law > Arbitration > General Overview

Admiralty & Maritime Law > Arbitration > Federal Arbitration Act

Admiralty & Maritime Law > Maritime Contracts > General Overview

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

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

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

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

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

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

## **HN3** Arbitration, Enforcement of Arbitration

The Federal Arbitration Act (Act) makes a written agreement to arbitrate in any maritime transaction or a contract evidencing a transaction involving commerce valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. [9 U.S.C.S. § 2](#). The Act guarantees the enforcement of private contractual arrangements by creating a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.

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

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

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

473 U.S. 614, \*614; 105 S. Ct. 3346, \*\*3346; 87 L. Ed. 2d 444, \*\*\*444; 1985 U.S. LEXIS 129, \*\*\*\*1

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

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

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

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

#### **HN4** [down arrow] **Federal Arbitration Act, Arbitration Agreements**

The first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Federal Arbitration Act, [9 U.S.C.S. § 1 et seq.](#)

Business & Corporate Compliance > ... > Alternative Dispute Resolution > Arbitration > Arbitrability

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

Civil Procedure > ... > Responses > Defenses, Demurrsers & Objections > Waiver & Preservation of Defenses

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

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

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

#### **HN5** [down arrow] **Arbitration, Arbitrability**

The Federal Arbitration Act, [9 U.S.C.S. § 1 et seq.](#), establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

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

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

Governments > Legislation > Statutory Remedies & Rights

#### **HN6** [down arrow] **Contract Conditions & Provisions, Arbitration Clauses**

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. Having made the bargain to arbitrate, the party should be held to it unless congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Nothing prevents a party from excluding statutory claims from the scope of an agreement to arbitrate.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

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

### **HN7** [] **Alternative Dispute Resolution, Validity of ADR Methods**

A court must first determine whether the parties' agreement to arbitrate reaches any statutory issues raised, and then, upon a finding that it does, the court will consider whether legal constraints external to the parties' agreement forecloses the arbitration of those claims.

Admiralty & Maritime Law > Maritime Contracts > General Overview

Governments > Courts > Judicial Comity

International Law > Dispute Resolution > Comity Doctrine > General Overview

International Law > Dispute Resolution > General Overview

International Law > Dispute Resolution > Arbitration & Mediation > Agreements

International Law > ... > Comity Doctrine > Areas of Law > Commercial Transactions

Business & Corporate Compliance > ... > Dispute Resolution > Conflict of Law > Forum Selection

International Trade Law > Dispute Resolution > General Overview

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

### **HN8** [] **Admiralty & Maritime Law, Maritime Contracts**

Concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that the court enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

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

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

### **HN9** [] **Contract Conditions & Provisions, Arbitration Clauses**

Agreements to arbitrate before a specified tribunal as in effect a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.

International Law > Dispute Resolution > Arbitration & Mediation > Agreements

473 U.S. 614, \*614; 105 S. Ct. 3346, \*\*3346; 87 L. Ed. 2d 444, \*\*\*444; 1985 U.S. LEXIS 129, \*\*\*\*1

International Trade Law > Dispute Resolution > General Overview

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Judicial Review

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

International Law > Dispute Resolution > General Overview

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

International Law > Dispute Resolution > Arbitration & Mediation > Orders to Compel

International Trade Law > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Enforcement

#### **HN10**[] **Arbitration & Mediation, Agreements**

A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. It would damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

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

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Contracts Law > Contract Conditions & Provisions > General Overview

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

Contracts Law > ... > Affirmative Defenses > Coercion & Duress > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Enforcement

#### **HN11**[] **Alternative Dispute Resolution, Validity of ADR Methods**

The mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted. A party resisting arbitration of course may attack directly the validity of the agreement to arbitrate. Moreover, the party may attempt to make a showing that would warrant setting aside the forum-selection clause -- that the agreement was affected by fraud, undue influence, or overweening bargaining power; that enforcement would be unreasonable and unjust; or that proceedings in the contractual forum will be so gravely difficult and inconvenient that the resisting party will for all practical purposes be deprived of his day in court. But absent such a showing there is no basis for assuming the forum inadequate or its selection unfair.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Validity of ADR Methods

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

## [\*\*HN12\*\*](#) [blue icon] Alternative Dispute Resolution, Validity of ADR Methods

Potential complexity should not suffice to ward off arbitration.

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

Antitrust & Trade Law > Sherman Act > General Overview

## [\*\*HN13\*\*](#) [blue icon] Private Actions, Remedies

A claim under the antitrust laws is not merely a private matter. The Sherman Act, [15 U.S.C.S. § 1 et seq.](#), is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

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

## [\*\*HN14\*\*](#) [blue icon] Remedies, Damages

[Section 4](#) of the Clayton Act, [15 U.S.C.S. § 15](#), is in essence a remedial provision. It provides treble damages to any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing. It nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

International Law > Dispute Resolution > General Overview

International Trade Law > Dispute Resolution > General Overview

## [\*\*HN15\*\*](#) [blue icon] Antitrust & Trade Law, Sherman Act

An international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of

the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes those arising from the application of American **antitrust law**, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim. And so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.

## **Lawyers' Edition Display**

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### **Decision**

Claims arising under the Sherman Act and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction held arbitrable pursuant to the federal Arbitration Act.

### **Summary**

A Puerto Rico corporation entered into distribution and sales agreements with a Swiss corporation and a Japanese corporation which manufactures automobiles in Japan. This automobile manufacturer was the product of a joint venture between the Swiss corporation and another Japanese corporation. The sales agreement contained a clause providing for arbitration by the Japan Commercial Arbitration Association of all disputes arising out of certain articles of the agreement or for the breach thereof. Subsequently, disputes arose from a slackening of the sale of the automobiles. After attempts to work out these disputes failed, the Japanese manufacturer brought an action against the Puerto Rico corporation in the United States District Court for the District of Puerto Rico under the federal Arbitration Act ([9 USCS 1 et seq.](#)) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, seeking an order to compel arbitration of the disputes in accordance with the arbitration clause. The Puerto Rico corporation filed an answer and counterclaims, asserting, among others, causes of action under the Sherman Act ([15 USCS 1 et seq.](#)) and other statutes. The District Court ordered arbitration of all the issues raised in the complaint and most of the issues raised in the counterclaims, including the federal antitrust issues, holding that the international character of the undertaking in question required enforcement of the arbitration clause even as to the antitrust claims. The United States Court of Appeals for the First Circuit reversed insofar as the District Court ordered submission of the antitrust claims to arbitration ([723 F2d 155](#)).

On certiorari, the United States Supreme Court affirmed in part, reversed in part, and remanded. In an opinion by Blackmun, J., joined by Burger, Ch. J., and White, Rehnquist, and O'Connor, JJ., it was held that claims arising under the Sherman Act and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction are arbitrable pursuant to the federal Arbitration Act.

Stevens, J., joined by Brennan, J., and also by Marshall, J., except as to Part II, dissented on the grounds that (1) a fair construction of the language in the arbitration clause in the parties' contract does not encompass a claim that auto manufacturers entered into a conspiracy in violation of the antitrust laws; (2) an arbitration clause should not normally be construed to cover a statutory remedy that it does not expressly identify (Part II); (3) Congress did not intend Part 2 of the federal Arbitration Act ([9 USCS 2](#)) to apply to antitrust claims; and (4) Congress did not intend the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to apply to disputes that are not covered by the federal Arbitration Act.

Powell, J., did not participate.

### **Headnotes**

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473 U.S. 614, \*614; 105 S. Ct. 3346, \*\*3346; 87 L. Ed. 2d 444, \*\*\*444; 1985 U.S. LEXIS 129, \*\*\*\*1

ARBITRATION §2 > antitrust claims -- international commercial transaction -- arbitrability -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C]

Antitrust claims arising under the Sherman Act ([15 USCS 1 et seq.](#)) and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction are arbitrable pursuant to the federal Arbitration Act ([9 USCS 1 et seq.](#)); concerns of international comity, respect for the capacities of foreign and transactional tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require enforcement of such arbitration clause, even assuming that a contrary result would be forthcoming in a domestic context. (Stevens, Brennan, and Marshall, JJ., dissented from this holding.)

ARBITRATION §2 > federal Arbitration Act -- arbitrability of statutory claims -- > Headnote:

[LEdHN\[2\]](#) [2]

There is no warrant in the federal Arbitration Act ([9 USCS 1 et seq.](#)) for implying in every contract within its ken a presumption against arbitration of statutory claims.

ARBITRATION §2 > policy favoring arbitration -- statutory claims -- > Headnote:

[LEdHN\[3\]](#) [3]

There is no reason to depart from the federal policy favoring arbitration where a party bound by an arbitration agreement raises claims founded on statutory rights.

ARBITRATION §2 > statutory claims -- substantive rights afforded by statute -- > Headnote:

[LEdHN\[4\]](#) [4]

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.

## **Syllabus**

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Petitioner-cross-respondent (hereafter petitioner), a Japanese corporation that manufactures automobiles, is the product of a joint venture between Chrysler International, S.A. (CISA), a Swiss corporation, and another Japanese corporation, aimed at distributing through Chrysler dealers outside the continental United States automobiles manufactured by petitioner. Respondent-cross-petitioner (hereafter respondent), a Puerto Rico corporation, entered into distribution and sales agreements with CISA. The sales agreement (to which petitioner was also a party) contained a clause providing for arbitration by the Japan Commercial Arbitration Association of all disputes arising out of certain articles of the agreement or for the breach thereof. Thereafter, when attempts to work out disputes arising from a slackening of the sale of new automobiles failed, petitioner withheld shipment of automobiles to respondent, which disclaimed responsibility for them. Petitioner then brought an action in Federal District Court under the Federal Arbitration [\*\*\*\*2] Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, seeking an order to compel arbitration of the disputes in accordance with the arbitration clause. Respondent filed an answer and counterclaims, asserting, *inter alia*, causes of action under the Sherman

Act and other statutes. The District Court ordered arbitration of most of the issues raised in the complaint and counterclaims, including the federal antitrust issues. Despite the doctrine of *American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (CA2), uniformly followed by the Courts of Appeals, that rights conferred by the antitrust laws are inappropriate for enforcement by arbitration, the District Court, relying on *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, held that the international character of the undertaking in question required enforcement of the arbitration clause even as to the antitrust claims. The Court of Appeals reversed insofar as the District Court ordered submission of the antitrust claims to arbitration.

*Held:*

1. There is no merit to respondent's contention that because it falls within the class for whose [\*\*\*\*3] benefit the statutes specified in the counterclaims were passed, but the arbitration clause at issue does not mention these statutes or statutes in general, the clause cannot be properly read to contemplate arbitration of these statutory claims. There is no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims. Nor is there any reason to depart from the federal policy favoring arbitration where a party bound by an arbitration agreement raises claims founded on statutory rights. Pp. 624-628.
2. Respondent's antitrust claims are arbitrable pursuant to the Arbitration Act. Concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes, all require enforcement of the arbitration clause in question, even assuming that a contrary result would be forthcoming in a domestic context. See *Scherk v. Alberto-Culver Co., supra*. The strong presumption in favor of freely negotiated contractual choice-of-forum provisions is reinforced here [\*\*\*\*4] by the federal policy in favor of arbitral dispute resolution, a policy that applies with special force in the field of international commerce. The mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted. So too, the potential complexity of antitrust matters does not suffice to ward off arbitration; nor does an arbitration panel pose too great a danger of innate hostility to the constraints on business conduct that *antitrust law* imposes. And the importance of the private damages remedy in enforcing the regime of antitrust laws does not compel the conclusion that such remedy may not be sought outside an American court. Pp. 628-640.

**Counsel:** Wayne A. Cross argued the cause for petitioner in No. 83-1569 and respondent in No. 83-1733. With him on the briefs were Robert L. Sills, William I. Sussman, Samuel T. Cespedes, and Ana Matilde Nin.

Benjamin Rodriguez-Ramon argued the cause for respondent in No. 83-1569 and petitioner in No. 83-1733. With him on the briefs was Jerome Murray.

Jerrold Joseph Ganzfried argued the cause for the United States as amicus curiae supporting respondent [\*\*\*\*5] in No. 83-1569. With him on the brief were Solicitor General Lee, Assistant Attorney General McGrath, Deputy Solicitor General Wallace, Carolyn F. Corwin, Robert B. Nicholson, and Marion L. Jetton.\*

**Judges:** BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, J., joined, and in which MARSHALL, J., joined except as to Part II, post, p. 640. POWELL, J., took no part in the decision of the cases.

**Opinion by:** BLACKMUN

\* Briefs of amici curiae urging reversal were filed for the American Arbitration Association by Michael F. Hoellering, Joseph T. McLaughlin, Wayne D. Collins, Alfred Ferrer, Rosemary S. Page, Thomas Thacher, John R. Stevenson, Robert B. von Mehren, Gerald Aksen, Henry P. de Vries, Andreas F. Lowenfeld, and J. Stewart McClendon; and for the National Automobile Dealers Association by Jerry S. Cohen.

Briefs of amici curiae were filed for the International Chamber of Commerce by James S. Campbell and Andrew N. Vollmer; and for the Commonwealth of Puerto Rico by Hector Rivera Cruz, Secretary of Justice of Puerto Rico, E. Edward Bruce, and Oscar M. Garibaldi.

## Opinion

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[\*616] [\*\*\*\*6] [\*\*\*448] [\*\*3348] JUSTICE BLACKMUN delivered the opinion of the Court.

LEdHN[1A] [↑] [1A]The principal question presented by these cases is the arbitrability, pursuant to the Federal Arbitration Act, 9 U. S. C. § 1 et seq., and the Convention on the Recognition and Enforcement [\*\*\*449] of Foreign Arbitral Awards (Convention), [1970] 21 U.S.T. 2517, T.I.A.S. No. 6997, of claims arising under the Sherman Act, 15 U. S. C. § 1 et seq., and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction.

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Petitioner-cross-respondent Mitsubishi Motors Corporation (Mitsubishi) is a Japanese corporation which manufactures automobiles and has its principal place of business in Tokyo, Japan. Mitsubishi is the product of a joint venture between, on the one hand, Chrysler International, S.A. (CISA), a Swiss corporation registered in [\*\*3349] Geneva and wholly owned by Chrysler Corporation, and, on the other, Mitsubishi Heavy Industries, Inc., a Japanese corporation. The [\*617] aim of the joint venture was the distribution through Chrysler dealers outside the continental United States of vehicles manufactured by Mitsubishi and bearing Chrysler [\*\*\*\*7] and Mitsubishi trademarks. Respondent-cross-petitioner Soler Chrysler-Plymouth, Inc. (Soler), is a Puerto Rico corporation with its principal place of business in Pueblo Viejo, Guaynabo, Puerto Rico.

On October 31, 1979, Soler entered into a Distributor Agreement with CISA which provided for the sale by Soler of Mitsubishi-manufactured vehicles within a designated area, including metropolitan San Juan. App. 18. On the same date, CISA, Soler, and Mitsubishi entered into a Sales Procedure Agreement (Sales Agreement) which, referring to the Distributor Agreement, provided for the direct sale of Mitsubishi products to Soler and governed the terms and conditions of such sales. *Id.*, at 42. Paragraph VI of the Sales Agreement, labeled "Arbitration of Certain Matters," provides:

"All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." *Id.*, at 52-53.

Initially, Soler did a brisk business in Mitsubishi-manufactured [\*\*\*\*8] vehicles. As a result of its strong performance, its minimum sales volume, specified by Mitsubishi and CISA, and agreed to by Soler, for the 1981 model year was substantially increased. *Id.*, at 179. In early 1981, however, the new-car market slackened. Soler ran into serious difficulties in meeting the expected sales volume, and by the spring of 1981 it felt itself compelled to request that Mitsubishi delay or cancel shipment of several orders. 1 Record 181, 183. About the same time, Soler attempted to arrange for the [\*618] transshipment of a quantity of its vehicles for sale in the continental United States and Latin America. Mitsubishi and CISA, however, refused permission for any such diversion, citing a variety of reasons,<sup>1</sup> and no [\*\*\*450] vehicles were transshipped. Attempts to work out these difficulties failed. Mitsubishi eventually withheld shipment of 966 vehicles, apparently representing orders placed for May, June, and July 1981 production, responsibility for which Soler disclaimed in February 1982. App. 131.

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<sup>1</sup>The reasons advanced included concerns that such diversion would interfere with the Japanese trade policy of voluntarily limiting imports to the United States, App. 143, 177-178; that the Soler-ordered vehicles would be unsuitable for use in certain proposed destinations because of their manufacture, with use in Puerto Rico in mind, without heaters and defoggers, *id.*, at 182; that the vehicles would be unsuitable for use in Latin America because of the unavailability there of the unleaded, high-octane fuel they required, *id.*, at 177, 181-182; that adequate warranty service could not be ensured, *id.*, at 176, 182; and that diversion to the mainland would violate contractual obligations between CISA and Mitsubishi, *id.*, at 144, 183.

[\*\*\*\*9] The following month, Mitsubishi brought an action against Soler in the United States District Court for the District of Puerto Rico under the Federal Arbitration Act and the Convention.<sup>2</sup> [\*\*\*\*10] Mitsubishi sought an order, pursuant to [9 U. S. C. §§ 4](#) and [201](#),<sup>3</sup> [\*\*\*\*11] to [\*\*3350] compel arbitration in accord with [\*619] para. VI of the Sales Agreement. App. 15.<sup>4</sup> Shortly after filing the complaint, Mitsubishi filed a request for arbitration before the Japan Commercial Arbitration Association. *Id.*, at 70.

Soler denied the allegations and counterclaimed against both Mitsubishi and CISA. It alleged numerous breaches by Mitsubishi of the Sales Agreement,<sup>5</sup> raised a pair of defamation claims,<sup>6</sup> and asserted causes of [\*\*\*451] action under the Sherman [\*620] Act, [15 U. S. C. § 1 et seq.](#); the federal Automobile Dealers' Day in Court Act, 70 Stat. 1125, [15 U. S. C. § 1221 et seq.](#); the Puerto Rico competition statute, *P.R. Laws Ann., Tit. 10, § 257 et seq.* (1976); and the Puerto Rico Dealers' Contracts Act, *P.R. Laws Ann., Tit. 10, § 278 et seq.* (1976 and Supp. 1983). In the counterclaim premised on the Sherman Act, Soler alleged that Mitsubishi and CISA had conspired to divide markets in restraint of trade. To effectuate the plan, according to Soler, Mitsubishi had refused to permit Soler to resell to buyers in North, Central, or South America vehicles it had obligated itself to purchase from Mitsubishi; had refused to ship ordered vehicles or the parts, such as heaters and defoggers, that would be necessary [\*\*\*\*12] to permit Soler to make its vehicles suitable for resale outside Puerto Rico; and had coercively attempted to replace

<sup>2</sup>The complaint alleged that Soler had failed to pay for 966 ordered vehicles; that it had failed to pay contractual "distress unit penalties," intended to reimburse Mitsubishi for storage costs and interest charges incurred because of Soler's failure to take shipment of ordered vehicles; that Soler's failure to fulfill warranty obligations threatened Mitsubishi's reputation and goodwill; that Soler had failed to obtain required financing; and that the Distributor and Sales Agreements had expired by their terms or, alternatively, that Soler had surrendered its rights under the Sales Agreement. *Id.*, at 11-14.

<sup>3</sup>[Section 4](#) provides in pertinent part:

[HN1](#) [↑] "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."

[Section 201](#) provides: [HN2](#) [↑] "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter." Article II of the Convention, in turn, provides:

"1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

....

"3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." 21 U.S.T., at 2519.

Title [9 U. S. C. § 203](#) confers jurisdiction on the district courts of the United States over an action falling under the Convention.

<sup>4</sup>Mitsubishi also sought an order against threatened litigation. App. 15-16.

<sup>5</sup>The alleged breaches included wrongful refusal to ship ordered vehicles and necessary parts, failure to make payment for warranty work and authorized rebates, and bad faith in establishing minimum-sales volumes. *Id.*, at 97-101.

<sup>6</sup>The fourth counterclaim alleged that Mitsubishi had made statements that defamed Soler's good name and business reputation to a company with which Soler was then negotiating the sale of its plant and distributorship. *Id.*, at 96. The sixth counterclaim alleged that Mitsubishi had made a willfully false and malicious statement in an affidavit submitted in support of its application for a temporary restraining order, and that Mitsubishi had wrongfully advised Soler's customers and the public in its market area that they should no longer do business with Soler. *Id.*, at 98-99.

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Soler and its other Puerto Rico distributors with a wholly owned subsidiary which would serve as the exclusive Mitsubishi distributor in Puerto Rico. App. 91-96.

[\*\*\*\*13] After a hearing, the District Court ordered Mitsubishi and Soler to arbitrate each of the issues raised in the complaint and in all the counterclaims save two and a portion of a third.<sup>7</sup> With regard to the [\*\*3351] federal antitrust issues, it recognized that the Courts of Appeals, following *American Safety Equipment [\*621] Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (CA2 1968), uniformly had held that the rights conferred by the antitrust laws were "of a character inappropriate for enforcement by arbitration."<sup>8</sup> App. to Pet. for Cert. in No. 83-1569, p. B9, quoting *Wilko v. Swan*, 201 F.2d 439, 444 (CA2 1953), rev'd, 346 U.S. 427 (1953). The District Court held, however, that the international character of the Mitsubishi-Soler undertaking required enforcement of the agreement to arbitrate even as to the antitrust claims. It relied on *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515-520 (1974), in which this Court ordered arbitration, pursuant to a provision embodied in an international agreement, of a claim arising under the Securities Exchange Act of 1934 notwithstanding its assumption, [\*\*\*\*14] *arguendo*, that *Wilko, supra*, which held nonarbitrable claims arising under the Securities Act of 1933, [\*\*\*452] also would bar arbitration of a 1934 Act claim arising in a domestic context.

[\*\*\*\*15] The United States Court of Appeals for the First Circuit affirmed in part and reversed in part. *723 F.2d 155 (1983)*. It first rejected Soler's argument that Puerto Rico law precluded enforcement of an agreement obligating a local dealer to arbitrate controversies outside Puerto Rico.<sup>9</sup> [\*\*\*\*16] It also rejected Soler's suggestion that it could not have intended to arbitrate statutory claims not mentioned in the arbitration agreement. Assessing arbitrability "on an allegation-by-allegation basis," *id., at 159*, the court then read the arbitration [\*622] clause to encompass virtually all the claims arising under the various statutes, including all those arising under the Sherman Act.<sup>9</sup>

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<sup>7</sup>The District Court found that the arbitration clause did not cover the fourth and sixth counterclaims, which sought damages for defamation, see n. 6, *supra*, or the allegations in the seventh counterclaim concerning discriminatory treatment and the establishment of minimum-sales volumes. App. to Pet. for Cert. in No. 83-1569, pp. B10-B11. Accordingly, it retained jurisdiction over those portions of the litigation. In addition, because no arbitration agreement between Soler and CISA existed, the court retained jurisdiction, insofar as they sought relief from CISA, over the first, second, third, and ninth counterclaims, which raised claims under the Puerto Rico Dealers' Contracts Act, the federal Automobile Dealers' Day in Court Act, the Sherman Act, and the Puerto Rico competition statute, respectively. *Id.*, at B12. These aspects of the District Court's ruling were not appealed and are not before this Court.

<sup>8</sup>Soler relied on *P.R. Laws Ann., Tit. 10, § 278b-2* (Supp. 1983), which purports to render null and void "[any] stipulation that obligates a dealer to adjust, arbitrate or litigate any controversy that comes up regarding his dealer's contract outside of Puerto Rico, or under foreign law or rule of law." See *Walborg Corp. v. Superior Court*, 104 P.R.R. 258 (1975). The Court of Appeals held this provision pre-empted by *9 U. S. C. § 2*, which declares arbitration agreements valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." *723 F.2d, at 158*. See *Southland Corp. v. Keating*, 465 U.S. 1 (1984). See also *Ledee v. Ceramiche Rагno*, 684 F.2d 184 (CA1 1982). Soler does not challenge this holding in its cross-petition here.

<sup>9</sup>As the Court of Appeals saw it, "[the] question . . . is not whether the arbitration clause mentions antitrust or any other particular cause of action, but whether the factual allegations underlying Soler's counterclaims -- and Mitsubishi's bona fide defenses to those counterclaims -- are within the scope of the arbitration clause, whatever the legal labels attached to those allegations." *723 F.2d, at 159*. Because Soler's counterclaim under the Puerto Rico Dealers' Contracts Act focused on Mitsubishi's alleged failure to comply with the provisions of the Sales Agreement governing delivery of automobiles, and those provisions were found in that portion of Article I of the Agreement subject to arbitration, the Court of Appeals placed this first counterclaim within the arbitration clause. *Id., at 159-160*.

The court read the Sherman Act counterclaim to raise issues of wrongful termination of Soler's distributorship, wrongful failure to ship ordered parts and vehicles, and wrongful refusal to permit transshipment of stock to the United States and Latin America. Because the existence of just cause for termination turned on Mitsubishi's allegations that Soler had breached the Sales Agreement by, for example, failing to pay for ordered vehicles, the wrongful termination claim implicated at least three provisions within the arbitration clause: Article I-D(1), which rendered a dealer's orders "firm"; Article I-E, which provided for "distress unit penalties" where the dealer prevented timely shipment; and Article I-F, specifying payment obligations and procedures. The

[\*\*\*\*17] [\*623] [\*\*3352] Finally, [\*\*\*453] after endorsing the doctrine of *American Safety*, precluding arbitration of antitrust claims, the Court of Appeals concluded that neither this Court's decision in *Scherk* nor the Convention required abandonment of that doctrine in the face of an international transaction. [723 F.2d, at 164-168](#). Accordingly, it reversed the judgment of the District Court insofar as it had ordered submission of "Soler's antitrust claims" to arbitration.<sup>10</sup> [\*\*\*18] Affirming the remainder of the judgment,<sup>11</sup> the court directed the District Court to consider in the first instance how the parallel judicial and arbitral proceedings should go forward.<sup>12</sup>

[\*\*\*19] [\*624] We granted certiorari primarily to consider whether an American court should enforce an agreement to resolve antitrust claims by arbitration when that agreement arises from an international transaction. *469 U.S. 916 (1984)*.

## II

At the outset, we address the contention raised in Soler's cross-petition that the arbitration clause at issue may not be read to encompass the statutory counterclaims stated in its answer to the complaint. In making this argument, Soler does not question the Court of Appeals' application of para. VI of the Sales Agreement to the disputes involved here as a matter of standard contract interpretation.<sup>13</sup> Instead, it argues [\*625] [\*\*3353] that as a matter

court therefore held the arbitration clause to cover this dispute. Because the nonshipment claim implicated Soler's obligation under Article I-F to proffer acceptable credit, the court found this dispute covered as well. And because the transshipment claim prompted Mitsubishi defenses concerning the suitability of vehicles manufactured to Soler's specifications for use in different locales and Soler's inability to provide warranty service to transshipped products, it implicated Soler's obligation under Article IV, another covered provision, to make use of Mitsubishi's trademarks in a manner that would not dilute Mitsubishi's reputation and goodwill or damage its name and reputation. The court therefore found the arbitration agreement also to include this dispute, noting that such trademark concerns "are relevant to the legality of territorially based restricted distribution arrangements of the sort at issue here." [723 F.2d, at 160-161](#), citing [Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 \(1977\)](#).

The Court of Appeals read the federal Automobile Dealers' Day in Court Act claim to raise issues as to Mitsubishi's good faith in establishing minimum-sales volumes and Mitsubishi's alleged attempt to coerce Soler into accepting replacement by a Mitsubishi subsidiary. It agreed with the District Court's conclusion, in which Mitsubishi acquiesced, that the arbitration clause did not reach the first issue; it found the second, arising from Soler's payment problems, to restate claims already found to be covered. [723 F.2d, at 161](#).

Finally, the Court of Appeals found the antitrust claims under Puerto Rico law entirely to reiterate claims elsewhere stated; accordingly, it held them arbitrable to the same extent as their counterparts. *Ibid.*

<sup>10</sup> Soler suggests that the court thereby declared antitrust claims arising under Puerto Rico law nonarbitrable as well. We read the Court of Appeals' opinion to have held only the federal antitrust claims nonarbitrable. See *id., at 157* ("principal issue on this appeal is whether arbitration of federal antitrust claims may be compelled under the Federal Arbitration Act"); *id., at 161* ("major question in this appeal is whether the antitrust issues raised by Soler's third counterclaim [grounded on Sherman Act] are subject to arbitration"). In any event, any contention that the local antitrust claims are nonarbitrable would be foreclosed by this Court's decision in [Southland Corp. v. Keating, 465 U.S., at 10](#), where we held that the Federal Arbitration Act "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."

<sup>11</sup> In this Court, Soler suggests for the first time that Congress intended that claims under the federal Automobile Dealers' Day in Court Act be nonarbitrable. Brief for Respondent and Cross-Petitioner 21, n. 12. Because Soler did not raise this question in the Court of Appeals or present it in its cross-petition, we do not address it here.

<sup>12</sup> Following entry of the District Court's judgment, both it and the Court of Appeals denied motions by Soler for a stay pending appeal. The parties accordingly commenced preparation for the arbitration in Japan. Upon remand from the Court of Appeals, however, Soler withdrew the antitrust claims from the arbitration tribunal and sought a stay of arbitration pending the completion of the judicial proceedings on the ground that the antitrust claims permeated the claims that remained before that tribunal. The District Court denied the motion, instead staying its own proceedings pending the arbitration in Japan. The arbitration recommenced, but apparently came to a halt once again in September 1984 upon the filing by Soler of a petition for reorganization under Chapter 11 of the Bankruptcy Code, [11 U. S. C. § 1101 et seq.](#)

of law a court may [\*\*\*454] not construe an arbitration agreement to encompass claims arising out of statutes designed to protect a class to which the party resisting arbitration belongs "unless [that party] has expressly agreed" to arbitrate those claims, see Pet. for Cert. in No. 83-1733, pp. 8, i, by which Soler presumably means that the arbitration clause must specifically mention the statute giving rise to the claims that a party to the clause seeks to arbitrate. See [\*\*\*\*20] [723 F.2d, at 159](#). Soler reasons that, because it falls within the class for whose benefit the federal and local antitrust laws and dealers' Acts were passed, but the arbitration clause at issue does not mention these statutes or statutes in general, the clause cannot be read to contemplate arbitration of these statutory claims.

[\*\*\*\*21] [LEdHN\[2\]](#) [2] We do not agree, for we find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims. [HN3](#) The Act's centerpiece provision makes a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." [9 U. S. C. § 2](#). The "liberal federal policy favoring arbitration agreements," [Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 \(1983\)](#), manifested by this provision and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate." [Id., at 25, n. 32](#).<sup>14</sup> As this Court recently observed, "[the] preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered," [\*626] a concern which "requires that we rigorously enforce agreements to arbitrate." [\*\*\*\*22] [Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 \(1985\)](#).

Accordingly, [HN4](#) the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this [\*\*\*455] determination by applying the "federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." [Moses H. Cone Memorial Hospital, 460 U.S., at 24](#). See [Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 400-404 \(1967\); Southland Corp. v. Keating, 465 U.S. 1, 12 \(1984\)](#). [\*\*\*\*23] And that body of law counsels

"that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . [HN5](#) The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself [\*\*3354] or an allegation of waiver, delay, or a like defense to arbitrability." [Moses H. Cone Memorial Hospital, 460 U.S., at 24-25](#).

<sup>13</sup> We therefore have no reason to review the Court of Appeals' construction of the scope of the arbitration clause in the light of the allegations of Soler's counterclaims. See n. 9, *supra*; [Southland Corp. v. Keating, 465 U.S., at 15, n. 7](#).

Soler does suggest that, because the title of the clause referred only to "certain matters," App. 52, and the clause itself specifically referred only to "Articles I-B through V," *ibid.*, it should be read narrowly to exclude the statutory claims. Soler ignores the inclusion within those "certain matters" of "[all] disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] out of or in relation to [the specified provisions] or for the breach thereof." Contrary to Soler's suggestion, the exclusion of some areas of possible dispute from the scope of an arbitration clause does not serve to restrict the reach of an otherwise broad clause in the areas in which it was intended to operate. Thus, insofar as the allegations underlying the statutory claims touch matters covered by the enumerated articles, the Court of Appeals properly resolved any doubts in favor of arbitrability. See [723 F.2d, at 159](#).

<sup>14</sup> The Court previously has explained that the Act was designed to overcome an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law. See [Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-221, and n. 6 \(1985\); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510, and n. 4 \(1974\)](#).

See, e.g., [\*Steelworkers v. Warrior & Gulf Navigation Co.\*, 363 U.S. 574, 582-583 \(1960\)](#). Thus, as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability.

[LEdHN\[3\]](#) [3]There is no reason to depart from these guidelines where a party bound by an arbitration agreement raises claims founded on statutory rights. Some time ago this Court expressed "hope for [the Act's] usefulness both in controversies based on statutes or on standards otherwise created," [\*Wilko v. Swan\*, 346 U.S. 427, 432 \(1953\)](#) (footnote omitted); see [\*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware\*, 414 U.S. 117, 135, n. 15 \(1973\)](#), and we are well past the time [\*627] when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution. Just last Term in *Southland Corp.*, *supra*, where we held that § 2 of the Act declared a national policy applicable equally in state as well as federal courts, we construed an arbitration clause to encompass the disputes at issue without pausing at the source in a state statute of the rights asserted by the parties resisting arbitration. [\*465 U.S. at 15\*](#), and n. 7.<sup>15</sup> Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds "for the revocation of any contract." [\*9 U.S.C. § 2\*](#); see [\*Southland Corp.\*, 465 U.S., at 16, n. 11; \*The Bremen v. Zapata Off-Shore Co.\*, 407 U.S. 1, 15 \(1972\)](#). But, absent such compelling considerations, the Act itself provides no [\*\*\*\*25] basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.

[LEdHN\[4\]](#) [4]That [\*\*\*456] is not to say that all controversies implicating statutory rights are suitable for arbitration. There is no reason to distort the process of contract interpretation, however, in order to ferret out the inappropriate. Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the [\*\*\*\*26] courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable. [\*628] See [\*Wilko v. Swan\*, 346 U.S., at 434-435; \*Southland Corp.\*, 465 U.S., at 16, n. 11; \*Dean Witter Reynolds Inc.\*, 470 U.S., at 224-225](#) (concurring opinion). For that reason, Soler's concern for statutorily protected classes provides no reason to color the lens through which the arbitration clause is read. [HN6](#) By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. See [\*Wilko v. Swan\*, \*supra\*](#). Having made the bargain to arbitrate, the party should be held to it unless Congress [\*\*3355] itself [\*\*\*\*27] has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate. See *Prima Paint Corp.*, 388 U.S., at 406.

In sum, the Court of Appeals correctly conducted a two-step inquiry, [HN7](#) first determining whether the parties' agreement to arbitrate reached the statutory issues, and then, upon finding it did, considering whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims. We endorse its rejection of Soler's proposed rule of arbitration-clause construction.

### III

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<sup>15</sup> The claims whose arbitrability was at issue in *Southland Corp.* arose under the disclosure requirements of the California Franchise Investment Law, [\*Cal. Corp. Code Ann. § 31000 et seq.\*](#) (West 1977). While the dissent in *Southland Corp.* disputed the applicability of the Act to proceedings in the state courts, it did not object to the Court's reading of the arbitration clause under examination.

473 U.S. 614, \*628; 105 S. Ct. 3346, \*\*3355; 87 L. Ed. 2d 444, \*\*\*456; 1985 U.S. LEXIS 129, \*\*\*\*27

LEdHN[1B] [1B] We now turn to consider whether Soler's antitrust claims are nonarbitrable even though it has agreed to arbitrate them. In holding that they are not, the Court of Appeals followed the decision of the Second Circuit in *American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F.2d 821 (1968). Notwithstanding the absence of any explicit support [\*629] for such an exception in either the Sherman Act or the Federal Arbitration Act, the Second Circuit there reasoned that "the pervasive [\*\*\*28] public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make . . . antitrust claims . . . inappropriate for arbitration." *Id., at 827-828*. We find it unnecessary to assess the legitimacy of the *American Safety* doctrine as applied to agreements to arbitrate arising from domestic transactions. As in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), we conclude that HN8 [concerns of international comity, respect for the capacities of foreign [\*\*\*457] and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Even before *Scherk*, this Court had recognized the utility of forum-selection clauses in international transactions. In *The Bremen, supra*, an American oil company, seeking to evade a contractual choice of an English forum and, by implication, English law, filed a suit in admiralty in a United States District Court against the German corporation [\*\*\*29] which had contracted to tow its rig to a location in the Adriatic Sea. Notwithstanding the possibility that the English court would enforce provisions in the towage contract exculpating the German party which an American court would refuse to enforce, this Court gave effect to the choice-of-forum clause. It observed:

"The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *407 U.S., at 9*.

[\*630] Recognizing that "agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting," *id., at 13-14*, the decision in *The Bremen* clearly eschewed a provincial solicitude for the jurisdiction of domestic forums.

Identical considerations governed the Court's decision in *Scherk*, which categorized HN9 [an] agreement to arbitrate before a specified tribunal [as], [\*\*\*30] in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *417 U.S., at 519*. In *Scherk*, the American company Alberto-Culver purchased several interrelated business enterprises, organized under the laws of Germany and Liechtenstein, as well as the rights held by those enterprises in certain trademarks, from a German citizen who at the time of trial resided in Switzerland. [\*\*3356] Although the contract of sale contained a clause providing for arbitration before the International Chamber of Commerce in Paris of "any controversy or claim [arising] out of this agreement or the breach thereof," Alberto-Culver subsequently brought suit against Scherk in a Federal District Court in Illinois, alleging that Scherk had violated § 10(b) of the Securities Exchange Act of 1934 by fraudulently misrepresenting the status of the trademarks as unencumbered. The District Court denied a motion to stay the proceedings before it and enjoined the parties from going forward before the arbitral tribunal in Paris. The Court of Appeals for the Seventh Circuit affirmed, relying on this [\*\*\*31] Court's holding in *Wilko v. Swan*, 346 U.S. 427 (1953), that agreements to arbitrate disputes arising under the Securities Act of 1933 are nonarbitrable. This Court reversed, enforcing the arbitration agreement even while assuming for purposes of the [\*\*\*458] decision that the controversy would be nonarbitrable under the holding of *Wilko* had it arisen out of a domestic transaction. Again, the Court emphasized:

[\*631] "A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. . . .

473 U.S. 614, \*631; 105 S. Ct. 3346, \*\*3356; 87 L. Ed. 2d 444, \*\*\*458; 1985 U.S. LEXIS 129, \*\*\*\*31

**HN10** [↑] "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. . . . [It would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." [417 U.S., at 516-517.](#)

[\*\*\*\*32] Accordingly, the Court held Alberto-Culver to its bargain, sending it to the international arbitral tribunal before which it had agreed to seek its remedies.

*The Bremen* and *Scherk* establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions. Here, as in *Scherk*, that presumption is reinforced by the emphatic federal policy in favor of arbitral dispute resolution. And at least since this Nation's accession in 1970 to the Convention, see [1970] 21 U.S.T. 2517, T.I.A.S. 6997, and the implementation of the Convention in the same year by amendment of the Federal Arbitration Act,<sup>16</sup> that federal policy applies with special force in the field of international commerce. Thus, we must weigh the concerns of *American Safety* against a strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes and an equal commitment to the enforcement of freely negotiated choice-of-forum clauses.

[\*\*\*\*33] [\*632] At the outset, we confess to some skepticism of certain aspects of the *American Safety* doctrine. As distilled by the First Circuit, [723 F.2d, at 162](#), the doctrine comprises four ingredients. First, private parties play a pivotal role in aiding governmental enforcement of the antitrust laws by means of the private action for treble damages. Second, "the strong possibility that contracts which generate antitrust disputes may be contracts of adhesion militates against automatic forum determination by contract." Third, antitrust issues, prone to complication, require sophisticated legal and economic analysis, and thus are "ill-adapted to strengths of the arbitral process, i. e., expedition, minimal requirements of written rationale, simplicity, resort to basic concepts of common sense and simple equity." Finally, just as "issues of war and peace are too important to be vested in the generals, . . . decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community -- particularly those [\\*\\*3357](#) from a foreign community that has had [\\*\\*\\*459](#) no experience with or exposure to our law [\\*\\*\\*\\*34](#) and values." See [American Safety, 391 F.2d, at 826-827](#).

Initially, we find the second concern unjustified. **HN11** [↑] The mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted. A party resisting arbitration of course may attack directly the validity of the agreement to arbitrate. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). Moreover, the party may attempt to make a showing that would warrant setting aside the forum-selection clause -- that the agreement was "[affected] by fraud, undue influence, or overweening bargaining power"; that "enforcement would be unreasonable and unjust"; or that proceedings "in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court." [The Bremen, 407 U.S., at 12, 15, 18](#). [\*633] But absent such a showing -- and none was attempted here -- there is no basis for assuming the forum inadequate or its selection unfair.

Next, **HN12** [↑] potential complexity should not suffice [\\*\\*\\*\\*35](#) to ward off arbitration. We might well have some doubt that even the courts following *American Safety* subscribe fully to the view that antitrust matters are inherently insusceptible to resolution by arbitration, as these same courts have agreed that an undertaking to arbitrate antitrust claims entered into after the dispute arises is acceptable. See, e. g., [Coenen v. R. W. Pressprich & Co., 453 F.2d 1209, 1215](#) (CA2), cert. denied, 406 U.S. 949 (1972); [Cobb v. Lewis, 488 F.2d 41, 48 \(CA5 1974\)](#). See also, in the present cases, [723 F.2d, at 168, n. 12](#) (leaving question open). And the vertical restraints which most frequently give birth to antitrust claims covered by an arbitration agreement will not often occasion the monstrous proceedings that have given antitrust litigation an image of intractability. In any event, adaptability and access to expertise are

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<sup>16</sup> Act of July 31, 1970, Pub. L. 91-368, 84 Stat. 692, codified at [9 U. S. C. §§ 201-208](#).

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hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or [\*\*\*\*36] appointed by the tribunal.<sup>17</sup> Moreover, it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies. In sum, the factor of potential complexity [\*634] alone does not persuade us that an arbitral tribunal could not properly handle an antitrust matter.

For similar reasons, we also reject the proposition that an arbitration panel will pose too great a danger of innate hostility to the constraints [\*\*\*\*37] on business conduct that antitrust law imposes. International arbitrators [\*\*\*460] frequently are drawn from the legal as well as the business community; where the dispute has an important legal component, the parties and the arbitral body with whose assistance they have agreed to settle their dispute can be expected to select arbitrators accordingly.<sup>18</sup> We [\*\*3358] decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.

[\*\*\*\*38] We are left, then, with the core of the *American Safety* doctrine -- the fundamental importance to American democratic capitalism of the regime of the antitrust laws. See, [\*635] e. g., *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972); *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 4 (1958). Without doubt, the private cause of action plays a central role in enforcing this regime. See, e. g., *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972). As the Court of Appeals pointed out:

**HN13** [+] "A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest." *723 F.2d, at 168*, quoting *American Safety*, 391 F.2d, at 826.

The treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators. See, e. g., *Perma Life Mufflers, Inc. v. [\*\*\*\*39] International Parts Corp.*, 392 U.S. 134, 138-139 (1968).

The importance of the private damages remedy, however, does not compel the conclusion that it may not be sought outside an American court. Notwithstanding its important incidental policing function, the treble-damages cause of

<sup>17</sup> See, e. g., Japan Commercial Arbitration Association Rule 26, reprinted in App. 218-219; L. Craig, W. Park, & J. Paulsson, International Chamber of Commerce Arbitration §§ 25.03, 26.04 (1984); Art. 27, Arbitration Rules of United Nations Commission on International Trade Law (UNCITRAL) (1976), reprinted in 2 Yearbook Commercial Arbitration 167 (1977).

<sup>18</sup> See Craig, Park, & Paulsson, *supra*, § 12.03, p. 28; Sanders, Commentary on UNCITRAL Arbitration Rules § 15.1, in 2 Yearbook Commercial Arbitration, *supra*, at 203.

We are advised by Mitsubishi and *amicus* International Chamber of Commerce, without contradiction by Soler, that the arbitration panel selected to hear the parties' claims here is composed of three Japanese lawyers, one a former law school dean, another a former judge, and the third a practicing attorney with American legal training who has written on Japanese antitrust law. Brief for Petitioner in No. 83-1569, p. 26; Brief for International Chamber of Commerce as *Amicus Curiae* 16, n. 28.

The Court of Appeals was concerned that international arbitrators would lack "experience with or exposure to our law and values." *723 F.2d, at 162*. The obstacles confronted by the arbitration panel in this case, however, should be no greater than those confronted by any judicial or arbitral tribunal required to determine foreign law. See, e. g., *Fed. Rule Civ. Proc. 44.1*. Moreover, while our attachment to the antitrust laws may be stronger than most, many other countries, including Japan, have similar bodies of competition law. See, e. g., 1 Law of Transnational Business Transactions, ch. 9 (Banks, Antitrust Aspects of International Business Operations), § 9.03[7] (V. Nanda ed. 1984); H. Iyori & A. Uesugi, *The Antimonopoly Laws of Japan* (1983).

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action conferred on private parties by § 4 of the Clayton Act, 15 U. S. C. § 15, and pursued by Soler here by way of its third counterclaim, seeks primarily to enable an injured competitor to gain compensation for that injury.

HN14 [↑] "Section 4 . . . is in essence a [\*\*\*461] remedial provision. It provides treble damages to '[any] person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . .' Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing, as we also have frequently observed. . . . It nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a [\*636] multiple of the injury actually proved, is designed primarily as a remedy." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-486 (1977). [\*\*\*\*40]

After examining the respective legislative histories, the Court in *Brunswick* recognized that when first enacted in 1890 as § 7 of the Sherman Act, 26 Stat. 210, the treble-damages provision "was conceived of primarily as a remedy for '[the] people of the United States as individuals,'" 429 U.S., at 486, n. 10, quoting 21 Cong. Rec. 1767-1768 (1890) (remarks of Sen. George); when reenacted in 1914 as § 4 of the Clayton Act, 38 Stat. 731, it was still "conceived primarily as [\*\*3359] [opening] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and [giving] the injured party ample damages for the wrong suffered." 429 U.S., at 486, n. 10, quoting 51 Cong. Rec. 9073 (1914) (remarks of Rep. Webb). And, of course, the antitrust cause of action remains at all times under the control of the individual litigant: no citizen is under an obligation to bring an antitrust suit, see *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977), and the private antitrust plaintiff needs no executive or judicial approval before settling one. It follows that, at least where the international [\*\*\*\*41] cast of a transaction would otherwise add an element of uncertainty to dispute resolution, the prospective litigant may provide in advance for a mutually agreeable procedure whereby he would seek his antitrust recovery as well as settle other controversies.

There is no reason to assume at the outset of the dispute that international arbitration will not provide an adequate mechanism. To be sure, HN15 [↑] the international arbitral tribunal owes no prior allegiance to the legal norms of particular states; hence, it has no direct obligation to vindicate their statutory dictates. The tribunal, however, is bound to effectuate the intentions of the parties. Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore [\*637] should be bound to decide that dispute in accord with the national law giving rise to the claim. Cf. *Wilko v. Swan*, 346 U.S., at 433-434.<sup>19</sup> And so long as the prospective [\*\*\*462] litigant

<sup>19</sup> In addition to the clause providing for arbitration before the Japan Commercial Arbitration Association, the Sales Agreement includes a choice-of-law clause which reads: "This Agreement is made in, and will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein." App. 56. The United States raises the possibility that the arbitral panel will read this provision not simply to govern interpretation of the contract terms, but wholly to displace American law even where it otherwise would apply. Brief for United States as *Amicus Curiae* 20. The International Chamber of Commerce opines that it is "[conceivable], although we believe it unlikely, [that] the arbitrators could consider Soler's affirmative claim of anticompetitive conduct by CISA and Mitsubishi to fall within the purview of this choice-of-law provision, with the result that it would be decided under Swiss law rather than the U.S. Sherman Act." Brief for International Chamber of Commerce as *Amicus Curiae* 25. At oral argument, however, counsel for Mitsubishi conceded that American law applied to the antitrust claims and represented that the claims had been submitted to the arbitration panel in Japan on that basis. Tr. of Oral Arg. 18. The record confirms that before the decision of the Court of Appeals the arbitral panel had taken these claims under submission. See District Court Order of May 25, 1984, pp. 2-3.

We therefore have no occasion to speculate on this matter at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award. Nor need we consider now the effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinitiate suit in federal court. We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy. See, e. g., *Redel's Inc. v. General Electric Co.*, 498 F.2d 95, 98-99 (CA5 1974); *Gaines v. Carrollton Tobacco Board of Trade, Inc.*, 386 F.2d 757, 759 (CA6 1967); *Fox Midwest Theatres v. Means*, 221 F.2d 173, 180 (CA8 1955). Cf. *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329 (1955). See generally 15 S. Williston, Contracts § 1750A (3d ed. 1972).

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effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to [\*\*\*\*42] serve both its remedial and deterrent function.

[\*\*\*\*43] [\*638] Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The Convention reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country." Art. [\*\*3360] V(2)(b), 21 U.S.T., at 2520; see [Scherk, 417 U.S., at 519, n. 14](#). While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them.<sup>20</sup>

[\*\*\*\*44] As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration," [Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 \(CA2 1942\)](#), and also [\*\*\*463] their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at [\*639] least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration. See [Scherk, supra](#).<sup>21</sup>

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<sup>20</sup> See n. 19, *supra*. We note, for example, that the rules of the Japan Commercial Arbitration Association provide for the taking of a "summary record" of each hearing, Rule 28.1; for the stenographic recording of the proceedings where the tribunal so orders or a party requests one, Rule 28.2; and for a statement of reasons for the award unless the parties agree otherwise, Rule 36.1(4). See App. 219 and 221.

Needless to say, we intimate no views on the merits of Soler's antitrust claims.

<sup>21</sup> We do not quarrel with the Court of Appeals' conclusion that Art. II(1) of the Convention, which requires the recognition of agreements to arbitrate that involve "subject matter capable of settlement by arbitration," contemplates exceptions to arbitrability grounded in domestic law. See [723 F.2d, at 164-166](#); G. Gaja, International Commercial Arbitration: New York Convention I. B.2 (1984); A. van den Berg, The New York Convention of 1958: Towards a Uniform Judicial Interpretation 152-154 (1981); Contini, International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 8 Am. J. Comp. L. 283, 296 (1959). But see Van den Berg, *supra*, at 154, and n. 98 (collecting contrary authorities); Gaja, *supra*, at I.D., n. 43 (same). And it appears that before acceding to the Convention the Senate was advised by a State Department memorandum that the Convention provided for such exceptions. See S. Exec. Doc. E, 90th Cong., 2d Sess., 19 (1968).

In acceding to the Convention the Senate restricted its applicability to commercial matters, in accord with Art. I(3). See 21 U.S.T., at 2519, 2560. Yet in implementing the Convention by amendment to the Federal Arbitration Act, Congress did not specify any matters it intended to exclude from its scope. See Act of July 31, 1970, Pub. L. 91-368, 84 Stat. 692, codified at [9 U.S.C. §§ 201-208](#). In *Scherk*, this Court recited Art. II(1), including the language relied upon by the Court of Appeals, but paid heed to the Convention delegates' "frequently [voiced] concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements." [417 U.S., at 520, n. 15](#), citing G. Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of United Nations Conference, May/June 1958, pp. 24-28 (1958). There, moreover, the Court dealt, *arguendo*, with an exception to arbitrability grounded in express congressional language; here, in contrast, we face a judicially implied exception. The utility of the Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they normally would think of as their own. Doubtless, Congress may specify categories of claims it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the Convention. But we decline to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress has not expressly directed the courts to do so.

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[\*640] [LEdHN\[1C\]](#) [1C] Accordingly, we "require this representative of the American business community to honor its bargain," [Alberto-Culver Co. v. Scherk](#), 484 F.2d 611, 620 (CA7 1973) (Stevens, J., dissenting), by holding this agreement to arbitrate "[enforceable] . . . in accord with the explicit provisions of the [\*\*3361] Arbitration Act." [Scherk](#), 417 U.S., at 520.

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE POWELL took no part in the decision of these cases.

**Dissent by: STEVENS**

## Dissent

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JUSTICE **STEVENS**, with whom JUSTICE BRENNAN joins, and with whom JUSTICE **MARSHALL** joins except as to Part II, dissenting.

One element of this rather complex litigation is a claim asserted by an American dealer in Plymouth automobiles that two major automobile [\*\*\*464] companies are parties to an international cartel that has restrained competition in the American market. Pursuant to an agreement that is alleged to have violated § 1 of the Sherman Act, [15 U. S. C. § 1](#), those companies allegedly prevented the dealer from transshipping some [\*\*\*46] 966 surplus vehicles from Puerto Rico to other dealers in the American market. App. 92.

Petitioner denies the truth of the dealer's allegations and takes the position that the validity of the antitrust claim must be resolved by an arbitration tribunal in Tokyo, Japan. Largely because the auto manufacturers' defense to the antitrust allegation is based on provisions in the dealer's franchise agreement, the Court of Appeals concluded that the arbitration clause in that agreement encompassed the antitrust [\*641] claim. [723 F.2d 155, 159 \(CA1 1983\)](#). It held, however, as a matter of law, that arbitration of such a claim may not be compelled under either the Federal Arbitration Act<sup>1</sup> or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>2</sup> [Id. at 161-168](#).

This Court agrees with the Court of Appeals' interpretation of the scope of the arbitration clause, but disagrees with its conclusion [\*\*\*47] that the clause is unenforceable insofar as it purports to cover an antitrust claim against a Japanese company. This Court's holding rests almost exclusively on the federal policy favoring arbitration of commercial disputes and vague notions of international comity arising from the fact that the automobiles involved here were manufactured in Japan. Because I am convinced that the Court of Appeals' construction of the arbitration clause is erroneous, and because I strongly disagree with this Court's interpretation of the relevant federal statutes, I respectfully dissent. In my opinion, (1) a fair construction of the language in the arbitration clause in the parties' contract does not encompass a claim that auto manufacturers entered into a conspiracy in violation of the antitrust laws; (2) an arbitration clause should not normally be construed to cover a statutory remedy that it does not expressly identify; (3) Congress did not intend § 2 of the Federal Arbitration Act to apply to antitrust claims; and (4) Congress did not intend the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to apply to disputes that are not covered by the Federal Arbitration Act.

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<sup>1</sup> [9 U. S. C. §§ 4, 201](#).

<sup>2</sup> [1970] 21 U.S.T. 2517, T.I.A.S. No. 6997.

[\*\*\*\*48] I

On October 31, 1979, respondent, Soler Chrysler-Plymouth, Inc. (Soler), entered into a "distributor agreement" to govern the sale of Plymouth passenger cars to be manufactured by petitioner, Mitsubishi Motors Corporation [\*642] of Tokyo, Japan (Mitsubishi).<sup>3</sup> [\*\*\*\*49] Mitsubishi, [\*\*\*465] however, was not a [\*\*3362] party to that agreement. Rather the "purchase rights" were granted to Soler by a wholly owned subsidiary of Chrysler Corporation that is referred to as "Chrysler" in the agreement.<sup>4</sup> The distributor agreement does not contain an arbitration clause. Nor does the record contain any other agreement providing for the arbitration of disputes between Soler and Chrysler.

Paragraph 26 of the distributor agreement authorizes Chrysler to have Soler's orders filled by any company affiliated with Chrysler, that company thereby becoming the "supplier" of the products covered by the agreement with Chrysler.<sup>5</sup> Relying on paragraph 26 of their distributor [\*643] agreement,<sup>6</sup> [\*\*\*51] Soler, Chrysler, and Mitsubishi entered into a separate Sales Procedure Agreement designating Mitsubishi as the supplier of the products covered by the distributor agreement.<sup>7</sup> The arbitration clause the Court construes today is found in that agreement.<sup>8</sup> As a matter of ordinary contract interpretation, there are at least two reasons why [\*\*\*50] that clause does not apply to Soler's antitrust claim against Chrysler and Mitsubishi.

<sup>3</sup> The distributor agreement provides, in part:

"This Agreement is made by and between CHRYSLER INTERNATIONAL S.A., a corporation organized and existing under the laws of the Swiss Confederation with its principal office in Geneva, Switzerland (hereinafter sometimes called CHRYSLER), and SOLER CHRYSLER-PLYMOUTH INC., . . . (hereinafter sometimes called DISTRIBUTOR), and will govern the sale by CHRYSLER to DISTRIBUTOR of PLYMOUTH PASSENGER CARS AND CAR DERIVATIVES MANUFACTURED BY MITSUBISHI MOTORS CORPORATION OF TOKYO, JAPAN and automotive replacement parts and accessories (said motor vehicles, replacement parts and accessories hereinafter sometimes called Products)." App. 18.

<sup>4</sup> "PURCHASE RIGHTS

"Subject to the provisions of this Agreement, CHRYSLER grants to DISTRIBUTOR the non-exclusive right to purchase Products from CHRYSLER, and DISTRIBUTOR agrees to buy Products from CHRYSLER, for resale within the following described territory (hereinafter called Sales Area): METROPOLITAN SAN JUAN, PUERTO RICO. . ." *Ibid.*

This is the same company that is referred to as "CISA" in the sales purchase agreement and in the Court's opinion.

<sup>5</sup> Paragraph 26 of the distributor agreement provides:

"DIRECT SALES

"CHRYSLER and DISTRIBUTOR agree that CHRYSLER may, at its option, forward orders received from DISTRIBUTOR pursuant to this Agreement to its parent company, Chrysler Corporation, or to any subsidiary, associated or affiliated company (hereinafter called 'SUPPLIER') which will then sell the Products covered by such order directly to DISTRIBUTOR, CHRYSLER and DISTRIBUTOR hereby acknowledge and agree that, unless otherwise agreed in writing, any such direct sales between SUPPLIER and DISTRIBUTOR will be governed by the terms and conditions contained on the order form and in this Agreement and that any such sales will not constitute the basis forming a distributor relationship between SUPPLIER and DISTRIBUTOR. Further, DISTRIBUTOR acknowledges and agrees that any claim or controversy resulting from such direct sales by SUPPLIER will be handled by CHRYSLER as though such sale had been made by CHRYSLER." *Id.*, at 39-40.

<sup>6</sup> "WHEREAS, pursuant to Article 26 of the Distributor Agreement, CISA may forward orders received from BUYER to an associated company;

"WHEREAS, MMC and CISA have agreed that MMC, which is an associated company of CISA, may sell such MMC Products directly to BUYER pursuant to Article 26 of the Distributor Agreement." *Id.*, at 43.

<sup>7</sup> Mitsubishi is jointly owned by Chrysler and by Mitsubishi Heavy Industries, Ltd., a Japanese corporation. *Id.*, at 200-201.

<sup>8</sup> That clause reads as follows:

"ARBITRATION OF CERTAIN MATTERS

First, the clause only applies to two-party disputes between Soler and Mitsubishi. The antitrust violation [\*\*\*466] alleged in Soler's counterclaim is a three-party dispute. Soler has joined both Chrysler and its associated company, Mitsubishi, as counterdefendants. The pleading expressly alleges that [\*644] both of those companies are "engaged in an unlawful combination and conspiracy to restrain and divide markets in interstate and foreign commerce, in violation of the Sherman Antitrust Act and the Clayton Act." App. 91. It is further alleged that Chrysler authorized [\*\*\*\*52] and participated in several overt acts directed at Soler. At this stage of the case we must, of course, assume the truth of those allegations. Only by stretching the language of the arbitration clause far beyond its ordinary meaning [\*\*3363] could one possibly conclude that it encompasses this three-party dispute.

Second, the clause only applies to disputes "which may arise between MMC and BUYER out of or in relation to Articles I-B through V of this Agreement or for the breach thereof. . ." *Id., at 52*. Thus, disputes relating to only 5 out of a total of 15 Articles in the Sales Procedure Agreement are arbitrable. Those five Articles cover: (1) the terms and conditions of direct sales (matters such as the scheduling of orders, deliveries, and payment); (2) technical and engineering changes; (3) compliance by Mitsubishi with customs laws and regulations, and Soler's obligation to inform Mitsubishi of relevant local laws; (4) trademarks and patent rights; and (5) Mitsubishi's right to cease production of any products. It is immediately obvious that Soler's antitrust claim did not arise out of Articles I-B through V and it is not a claim "for the breach thereof." The question [\*\*\*\*53] is whether it is a dispute "in relation to" those Articles.

Because Mitsubishi relies on those Articles of the contract to explain some of the activities that Soler challenges in its antitrust claim, the Court of Appeals concluded that the relationship between the dispute and those Articles brought the arbitration clause into play. I find that construction of the clause wholly unpersuasive. The words "in relation to" appear between the references to claims that arise under the contract and claims for breach of the contract; I believe all three of the species of arbitrable claims must be predicated on contractual rights defined in Articles I-B through V.

[\*645] The federal policy favoring arbitration cannot sustain the weight that the Court assigns to it. A clause requiring arbitration of all claims "relating to" a contract surely could not encompass a claim that the arbitration clause was itself part of a contract in restraint of trade. Cf. *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930); see also *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 176 (1948). Nor in my judgment should it be read to encompass [\*\*\*\*54] a claim that relies, not on a failure to perform the contract, but on an independent violation of federal law. The matters asserted by way of defense do not control the character, or the source, of the claim that Soler has asserted.<sup>9</sup> Accordingly, simply as [\*\*\*467] a matter of ordinary contract interpretation, I would hold that Soler's antitrust claim is not arbitrable.

## II

Section 2 of the Federal Arbitration Act describes three kinds of arbitrable agreements.<sup>10</sup> [\*\*\*\*56] Two -- those including maritime transactions and those covering the submission of an existing dispute to arbitration -- are not

"All disputes, controversies or differences which may arise between MMC and BUYER out of or in relation to Articles I-B through V of this Agreement or for the breach thereof, shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." *Id., at 52-53.*

<sup>9</sup> Even if Mitsubishi can prove that it did not violate any provision of the contract, such proof would not necessarily constitute a defense to the antitrust claim. In contrast, in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), Prima Paint's claim of fraud in the inducement was asserted to rescind the contract, not as an independent basis of recovery.

<sup>10</sup> Section 2 provides:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall

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involved in this case. The language [\*\*\*\*55] of [§ 2](#) relating to the Soler-Mitsubishi arbitration clause reads as follows:

[\*646] "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law [\*\*3364] or in equity for the revocation of any contract."

The plain language of this statute encompasses Soler's claims that arise out of its contract with Mitsubishi, but does not encompass a claim arising under federal law, or indeed one that arises under its distributor agreement with Chrysler. Nothing in the text of the 1925 Act, nor its legislative history, suggests that Congress intended to authorize the arbitration of any statutory claims.<sup>11</sup>

[\*\*\*\*57] Until today all of our cases enforcing agreements to arbitrate under the Arbitration Act have involved contract claims. In one, the party claiming a breach of contractual warranties also claimed that the breach amounted to fraud actionable under [§ 10\(b\)](#) of the Securities Exchange Act of 1934. *Scherk v. Alberto-Culver Co.*, [417 U.S. 506 \(1974\)](#).<sup>12</sup> [\*\*\*\*58] [\*647] But this is the first time the Court has considered the question whether a standard arbitration clause referring to claims arising out of or relating to a contract should be construed to cover statutory claims that have only an indirect relationship to the contract.<sup>13</sup> In my opinion, neither the Congress that enacted the Arbitration Act in 1925, nor the many parties who have agreed to such standard clauses, could have anticipated the Court's answer to that question.

On several occasions we have drawn a distinction between statutory rights and contractual rights and refused to hold that an arbitration barred the assertion of a statutory right. Thus, in *Alexander v. Gardner-Denver Co.*, [415 U.S. 36 \(1974\)](#), we held that the arbitration of a claim of employment discrimination would not bar an employee's statutory right to damages under Title VII of the Civil Rights Act of 1964, [42 U. S. C. §§ 2000e -- 2000e-17](#), notwithstanding the strong federal policy favoring the arbitration of labor disputes. In that case the Court explained at some length why it would be unreasonable to assume that Congress intended to give arbitrators the final authority to implement [\*\*\*\*59] the federal statutory policy:

be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." [9 U. S. C. §2](#).

<sup>11</sup> In his dissent in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, [388 U.S., at 415](#), Justice Black quoted the following commentary written shortly after the statute was passed:

"Not all questions arising out of contracts ought to be arbitrated. It is a remedy peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact -- quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law -- the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or the questions of law which are complementary to the questions of fact which we have just mentioned." Cohen & Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 281 (1926).

In the *Prima Paint* case the Court held that the Act applied to a claim of fraud in the inducement of the contract, but did not intimate that it might also cover federal statutory claims. See n. 9, *Supra*.

<sup>12</sup> "The dispute between these parties over the alleged shortage in defendant's inventory of European trademarks, a matter covered by contract warranties and subject to pre-closing verification, is the kind of commercial dispute for which arbitration is entirely appropriate. In my opinion, the fact that the 'fraud' language of Rule 10(b)(5) has been included in the complaint is far less significant than the desirability of having the Court of Arbitration of the International Chamber of Commerce in Paris, France, decide the various questions of foreign law which should determine the rights of these parties." *Alberto-Culver Co. v. Scherk*, [484 F.2d 611, 619-620 \(CA7 1973\)](#) (Stevens, J., dissenting), rev'd, [417 U.S. 506 \(1974\)](#).

<sup>13</sup> It is interesting to note that in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, [460 U.S. 1 \(1983\)](#), the Court referred to the standard clause describing claims "arising out of, or relating to, this Contract or the breach thereof" as a provision "for resolving disputes arising out of the contract or its breach." *Id., at 4-5*.

"[We] have long recognized that 'the choice of forums inevitably affects the scope of the substantive right to be vindicated.' [U.S. Bulk Carriers v. Arguelles](#), 400 U.S. 351, 359-360 [\*\*3365] (1971) [\*648] (Harlan, J., concurring). Respondent's deferral rule is necessarily premised on the assumption that arbitral processes are commensurate with judicial processes and that Congress impliedly intended federal courts to defer to arbitral decisions on Title VII issues. We deem this supposition unlikely.

"Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. . . . But other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among [\*\*\*468] these is the fact that the specialized competence of arbitrators pertains primarily to the law of the [\*\*\*60] shop, not the law of the land. [United Steelworkers of America v. Warrior & Gulf Navigation Co.](#), 363 U.S. 574, 581-583 (1960). Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional [\*\*\*469] issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." [415 U.S., at 56-57](#) (footnote omitted).

In addition, the Court noted that the informal procedures which make arbitration so desirable in the context of contractual disputes are inadequate to develop a record for appellate review of statutory questions.<sup>14</sup> Such review is essential on [\*649] matters of statutory interpretation in order to assure consistent application of important public rights.

[\*\*\*61] In [Barrentine v. Arkansas-Best Freight System, Inc.](#), 450 U.S. 728 (1981), we reached a similar conclusion with respect to the arbitrability of an employee's claim based on the Fair Labor Standards Act, [29 U. S. C. §§ 201-219](#). We again noted that an arbitrator, unlike a federal judge, has no institutional obligation to enforce federal legislative policy:

"Because the arbitrator is required to effectuate the intent of the parties, rather than to enforce the statute, he may issue a ruling that is inimical to the public policies underlying the FLSA, thus depriving an employee of protected statutory rights.

"Finally, not only are arbitral procedures less protective of individual statutory rights than are judicial procedures, see [Gardner-Denver, supra, at 57-58](#), but arbitrators very often are powerless to grant the aggrieved employees as broad a range of relief. Under the FLSA, courts can award actual and liquidated damages, reasonable attorney's fees, and costs. [29 U. S. C. § 216\(b\)](#). An arbitrator, by contrast, can award only that [\*\*3366] compensation authorized by the wage provision of the collective-bargaining agreement. . . . It [\*\*\*62] is most unlikely that he will be authorized to award liquidated damages, costs, or attorney's fees." [450 U.S., at 744-745](#) (footnote omitted).

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<sup>14</sup> "Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. See [Bernhardt v. Polygraphic Co.](#), 350 U.S. 198, 203 (1956); [Wilko v. Swan](#), 346 U.S., at 435-437. And as this Court has recognized, '[arbitrators] have no obligation to the court to give their reasons for an award.' [United Steelworkers of America v. Enterprise Wheel & Car Corp.](#), 363 U.S. [593], at 598. Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts." [415 U.S., at 57-58](#) (footnote omitted).

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[\*650] The Court has applied the same logic in holding that federal claims asserted under the Ku Klux Act of 1871, [42 U. S. C. § 1983](#), and claims arising under § 12(2) of the Securities Act of 1933, [15 U. S. C. § 77l\(2\)](#), may not be finally resolved by an [\*\*\*470] arbitrator. [McDonald v. City of West Branch, 466 U.S. 284 \(1984\)](#); [Wilko v. Swan, 346 U.S. 427 \(1953\)](#).

The Court's opinions in *Alexander*, *Barrentine*, *McDonald*, and *Wilko* all explain why it makes good sense to draw a distinction between statutory claims and contract claims. In view of the Court's repeated recognition of the distinction between federal statutory rights and contractual rights, together with the undisputed historical fact that arbitration has functioned almost entirely in either the area of labor disputes or in "ordinary disputes between merchants as to questions of fact," see n. 11, *supra*, it is reasonable to assume that most lawyers and executives would not expect the language in the [\*\*\*\*63] standard arbitration clause to cover federal statutory claims. Thus, in my opinion, both a fair respect for the importance of the interests that Congress has identified as worthy of federal statutory protection, and a fair appraisal of the most likely understanding of the parties who sign agreements containing standard arbitration clauses, support a presumption that such clauses do not apply to federal statutory claims.

### III

The Court has repeatedly held that a decision by Congress to create a special statutory remedy renders a private agreement to arbitrate a federal statutory claim unenforceable. Thus, as I have already noted, the express statutory remedy provided in the Ku Klux Act of 1871,<sup>15</sup> the express statutory remedy in the Securities Act of 1933,<sup>16</sup> the express statutory remedy in the Fair Labor Standards Act,<sup>17</sup> and the express [\*651] statutory remedy in Title VII of the Civil Rights Act of 1964,<sup>18</sup> each provided the Court with convincing evidence that Congress did not intend the protections afforded by the statute to be administered by a private arbitrator. The reasons that motivated those decisions apply with special force to the federal policy that is protected [\*\*\*64] by the antitrust laws.

To make this point it is appropriate to recall some of our past appraisals of the importance of this federal policy and then to identify some of the specific remedies Congress has designed to implement it. It was Chief Justice Hughes who characterized the Sherman Antitrust Act as "a charter of freedom" that may fairly be compared to a constitutional provision. See [Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-360 \(1933\)](#). In [United States v. Philadelphia National Bank, 374 U.S. 321, 371 \(1963\)](#), the Court referred to the extraordinary "magnitude" of the value choices made by Congress in enacting the [\*\*\*65] Sherman Act. More recently, the Court described the weighty public interests underlying the basic philosophy of the statute:

"Antitrust laws in general, and [\*\*\*471] the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the [Bill of Rights](#) is to the protection [\*\*3367] of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete -- to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy." [United States v. Topco Associates, Inc., 405 U.S. 596, 610 \(1972\)](#).

<sup>15</sup> [McDonald v. City of West Branch, 466 U.S. 284 \(1984\)](#).

<sup>16</sup> [Wilko v. Swan, 346 U.S. 427 \(1953\)](#).

<sup>17</sup> [Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 \(1981\)](#).

<sup>18</sup> [Alexander v. Gardner-Denver Co., 415 U.S. 36 \(1974\)](#).

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[\*652] The Sherman and Clayton Acts reflect Congress' appraisal of the value of economic freedom; they guarantee the vitality of the entrepreneurial spirit. Questions arising under these Acts are among the most [\*\*\*\*66] important in public law.

The unique public interest in the enforcement of the antitrust laws is repeatedly reflected in the special remedial scheme enacted by Congress. Since its enactment in 1890, the Sherman Act has provided for public enforcement through criminal as well as civil sanctions. The pre-eminent federal interest in effective enforcement once justified a provision for special three-judge district courts to hear antitrust claims on an expedited basis, as well as for direct appeal to this Court bypassing the courts of appeals.<sup>19</sup> See, e. g., [United States v. National Assn. of Securities Dealers, Inc., 422 U.S. 694 \(1975\)](#).

The special interest in encouraging private enforcement of the Sherman Act has been reflected in the statutory scheme ever since [\*\*\*\*67] 1890. [Section 7](#) of the original Act,<sup>20</sup> used the broadest possible language to describe the class of litigants who may invoke its protection. "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." [Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 \(1948\)](#); see also [Associated \[\\*653\] General Contractors of California, Inc. v. Carpenters, 459 U.S. 519, 529 \(1983\)](#).

[\*\*\*\*68] The provision for mandatory treble damages -- unique in federal law when the statute was enacted -- provides a special incentive to the private enforcement of the statute, as well as an especially powerful deterrent [\*\*\*472] to violators.<sup>21</sup> [\*\*\*\*69] What we have described [\*\*3368] as "the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action," [Lawlor v. National Screen Service Corp., 349 U.S. 322, 329 \(1955\)](#), is buttressed by the statutory mandate that the injured party also recover costs, "including a reasonable attorney's fee." [15 U. S. C. § 15\(a\)](#). The interest in wide and effective enforcement has thus, for almost a century, been vindicated by enlisting the assistance [\*654] of "private Attorneys General";<sup>22</sup>

<sup>19</sup> See 32 Stat. 823, 88 Stat. 1708, repealed 98 Stat. 3358 (Pub. L. 98-620, § 402(11)). The Act still provides an avenue for directly appealing to this Court from a final judgment in a Government antitrust suit. [15 U. S. C. § 29\(b\)](#).

<sup>20</sup> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." 26 Stat. 210.

The current version of the private remedy is codified at [15 U. S. C. § 15\(a\)](#).

<sup>21</sup> "We have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes. It was for this reason that we held in [Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211 \(1951\)](#), that a plaintiff in an antitrust suit could not be barred from recovery by proof that he had engaged in an unrelated conspiracy to commit some other antitrust violation. Similarly, in [Simpson v. Union Oil Co., 377 U.S. 13 \(1964\)](#), we held that a dealer whose consignment agreement was canceled for failure to adhere to a fixed resale price could bring suit under the antitrust laws even though by signing the agreement he had to that extent become a participant in the illegal, competition-destroying scheme. Both *Simpson* and *Kiefer-Stewart* were premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct." [Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138-139 \(1968\)](#).

<sup>22</sup> Under the Panama Canal Act, any private shipper -- in addition to the United States -- may also bring an action seeking to bar access to the canal for any vessel owned by a company "doing business" in violation of the antitrust laws. 37 Stat. 567, [15 U. S. C. § 31](#).

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we have always attached special importance to their role because "[every] violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress." [Hawaii v. Standard Oil Co., 405 U.S. 251, 262 \(1972\)](#).

There are, in addition, several unusual features of the antitrust enforcement scheme that unequivocally require rejection of any thought that Congress would tolerate private arbitration of antitrust claims in lieu of the statutory remedies that it fashioned. As we explained in [Blumenstock Brothers Advertising Agency v. Curtis Publishing Co., 252 U.S. 436, 440 \(1920\)](#), an antitrust treble-damages case "can only be brought in a District Court of the United States." The determination that these cases are "too important to be decided otherwise than by competent tribunals" <sup>23</sup> surely cannot allow [\\*\\*\\*473](#) private arbitrators to assume a jurisdiction that is denied to courts of the sovereign States.

[\[\\*\\*\\*\\*70\] \[\\*655\]](#) The extraordinary importance of the private antitrust remedy has been emphasized in other statutes enacted by Congress. Thus, in 1913, Congress passed a special Act guaranteeing public access to depositions in Government civil proceedings to enforce the Sherman Act. 37 Stat. 731, [15 U. S. C. § 30](#).<sup>24</sup> The purpose of that Act plainly was to enable victims of antitrust violations to make evidentiary use of information developed in a public enforcement proceeding. This purpose was further implemented in the following year by the enactment of § 5 of the Clayton Act providing that a final judgment or decree in a Government case may constitute *prima facie* proof of a violation in a subsequent treble-damages case. 38 Stat. 731, [15 U. S. C. § 16\(a\)](#). These special remedial provisions attest to the importance that Congress has attached to the private remedy.

In view of the history of antitrust enforcement in the United [\[\\*\\*\\*\\*71\]](#) States, it is not surprising that all of the federal courts that have considered the question have uniformly [\\*\\*3369](#) and unhesitatingly concluded that agreements to arbitrate federal antitrust issues are not enforceable. In a landmark opinion for the Court of Appeals for the Second Circuit, Judge Feinberg wrote:

"A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest. . . . Antitrust violations can affect hundreds of thousands -- perhaps millions -- of people and inflict staggering economic damage. . . . We do not believe that Congress intended such claims to be resolved elsewhere than in the courts. We do not suggest that all antitrust litigations attain these swollen proportions; the courts, no less than the public, are thankful [\[\\*656\]](#) that they do not. But in fashioning a rule to govern the arbitrability of antitrust claims, we must consider the rule's potential effect. For the same reason, it is also proper to ask whether contracts [\[\\*\\*\\*\\*72\]](#) of adhesion between alleged monopolists and their customers should determine the forum for trying antitrust violations." [American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826-827 \(1968\)](#) (footnote omitted).

This view has been followed in later cases from that Circuit <sup>25</sup> and by the [\\*\\*\\*474](#) First, <sup>26</sup> Fifth, <sup>27</sup> Seventh, <sup>28</sup> Eighth, <sup>29</sup> [\[\\*\\*\\*\\*73\]](#) and Ninth Circuits.<sup>30</sup> It is clearly a correct statement of the law.

<sup>23</sup> In [University Life Insurance Co. v. Unimarc Ltd., 699 F.2d 846 \(CA7 1983\)](#), Judge Posner wrote:

"The suit brought by Unimarc and Huff . . . raises issues of state tort and contract law and federal **antitrust law**. The tort and contract issues may or may not be within the scope of the arbitration clauses in the coinsurance and second marketing agreements but they are arbitrable in the sense that an agreement to arbitrate them would be enforceable. Federal antitrust issues, however, are nonarbitrable in just that sense. [Applied Digital Technology, Inc. v. Continental Casualty Co., 576 F.2d 116, 117 \(7th Cir. 1978\)](#). They are considered to be at once too difficult to be decided competently by arbitrators -- who are not judges, and often not even lawyers -- and too important to be decided otherwise than by competent tribunals. See [American Safety Equipment Corp. v. J. P. Maguire & Co., 391 F.2d 821, 826-27 \(2d Cir. 1968\)](#). The root of the doctrine is in the same soil as the principle, announced in [Blumenstock Bros. Adv. Agency v. Curtis Pub. Co., 252 U.S. 436, 440-41 \(1920\)](#), that federal antitrust suits may not be brought in state courts." [Id., at 850-851](#).

<sup>24</sup> See [United States v. Procter & Gamble Co., 356 U.S. 677, 683 \(1958\)](#).

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This Court would be well advised to endorse the collective wisdom of the distinguished judges of the Courts of Appeals who have unanimously concluded that the statutory remedies fashioned by Congress for the enforcement of the antitrust laws render an agreement to arbitrate antitrust disputes unenforceable. Arbitration awards are only reviewable for manifest disregard of the law, [9 U. S. C. §§ 10, 207](#), and the rudimentary procedures which make arbitration so desirable in the context of a private dispute often mean that the record is so inadequate that the arbitrator's decision is virtually [\[\\*657\] \[\\*\\*\\*\\*74\]](#) unreviewable.<sup>31</sup> [\[\\*\\*\\*\\*75\]](#) Despotic decisionmaking of this kind is fine for parties who are willing to agree in advance to settle for a best approximation of the correct result in order to resolve quickly and inexpensively any contractual dispute that may arise in an ongoing commercial relationship. Such informality, however, is simply unacceptable when every error may have devastating consequences for important businesses in our national economy and may undermine their ability to compete in world markets.<sup>32</sup> Instead [\[\\*\\*3370\]](#) of "muffling a grievance in the cloakroom of arbitration," the public interest in free competitive markets would be better served by having the issues resolved "in the light of impartial public court adjudication." See [Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 136 \(1973\)](#).<sup>33</sup>

[\[\\*658\] \[\\*\\*\\*\\*76\]](#) IV

[\[\\*\\*\\*475\]](#) The Court assumes for the purposes of its decision that the antitrust issues would not be arbitrable if this were a purely domestic dispute, *ante*, at 629, but holds that the international character of the controversy makes it arbitrable. The holding rests on vague concerns for the international implications of its decision and a misguided application of [Scherk v. Alberto-Culver Co., 417 U.S. 506 \(1974\)](#).

#### *International Obligations of the United States*

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<sup>25</sup> [N. V. Maatschappij Voor Industriele Waarden v. A.O. Smith Corp., 532 F.2d 874, 876 \(1976\) \(per curiam\)](#).

<sup>26</sup> [723 F.2d 155, 162 \(1983\)](#) (Coffin, J., for the court) (opinion below).

<sup>27</sup> [Cobb v. Lewis, 488 F.2d 41, 47 \(1974\)](#) (Wisdom, J., for the court).

<sup>28</sup> [University Life Insurance Co. v. Unimarc Ltd., 699 F.2d, at 850-851 \(1983\)](#) (Posner, J., for the court); [Applied Digital Technology, Inc. v. Continental Casualty Co., 576 F.2d 116, 117 \(1978\)](#) (Pell, J., for the court).

<sup>29</sup> [Helfenbein v. International Industries, Inc., 438 F.2d 1068, 1070](#) (Lay, J., for the court), cert. denied, [404 U.S. 872 \(1971\)](#).

<sup>30</sup> [Lake Communications, Inc. v. ICC Corp., 738 F.2d 1473, 1477-1480 \(1984\)](#) (Browning, C. J., for the court); [Varo v. Comprehensive Designers, Inc., 504 F.2d 1103, 1104 \(1974\)](#) (Chambers, J., for the court); [Power Replacements, Inc. v. Air Preheater Co., 426 F.2d 980, 983-984 \(1970\)](#) (Jameson, J., for the court); [A. & E. Plastik Pak Co. v. Monsanto Co., 396 F.2d 710, 715-716 \(1968\)](#) (Merrill, J., for the court).

<sup>31</sup> The arbitration procedure in this case does not provide any right to evidentiary discovery or a written decision, and requires that all proceedings be closed to the public. App. 220-221. Moreover, Japanese arbitrators do not have the power of compulsory process to secure witnesses and documents, nor do witnesses who are available testify under oath. [Id., at 218-219](#). Cf. [9 U. S. C. § 7](#) (arbitrators may summon witnesses to attend proceedings and seek enforcement in a district court).

<sup>32</sup> The greatest risk, of course, is that the arbitrator will condemn business practices under the antitrust laws that are efficient in a free competitive market. Cf. [Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 \(1985\)](#), rev'd [715 F.2d 1393 \(CA9 1983\)](#). In the absence of a reviewable record, a reviewing district court would not be able to undo the damage wrought. Even a Government suit or an action by a private party might not be available to set aside the award.

<sup>33</sup> The Court notes that some courts which have held that agreements to arbitrate antitrust claims generally are unenforceable have nevertheless enforced arbitration agreements to settle an existing antitrust claim. *Ante*, at 633. These settlement agreements, made after the parties have had every opportunity to evaluate the strength of their position, are obviously less destructive of the private treble-damages remedy that Congress provided. Thus, it may well be that arbitration as a means of settling existing disputes is permissible.

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Before relying on its own notions of what international comity requires, it is surprising that the Court does not determine the specific commitments that the United States has made to enforce private agreements to arbitrate disputes arising under public law. As the Court acknowledges, the only treaty relevant here is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. [1970] 21 U.S.T. 2517, T.I.A.S. No. 6997. The Convention was adopted in 1958 at a multilateral conference sponsored by the United Nations. This Nation did not sign the proposed convention at that time; displaying its characteristic caution before entering into international compacts, the United [\*\*\*\*77] States did not accede to it until 12 years later.

As the Court acknowledged in *Scherk v. Alberto-Culver Co.*, 417 U.S., at 520, n. 15, the principal purpose of the Convention "was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." However, the United States, as *amicus curiae*, advises the Court that the Convention "clearly contemplates" that signatory nations will enforce domestic laws prohibiting the arbitration of certain subject matters. Brief for United States as *Amicus Curiae* 28. This interpretation of the Convention was adopted by the Court of Appeals, *723 F.2d*, at 162-166, and the Court [\*659] declines to reject it, *ante*, at 639-640, n. 21. The construction is beyond doubt.

Article II(3) of the Convention provides that the court of a Contracting State, "when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer [\*\*\*\*78] the parties to arbitration." This obligation does not arise, however, (i) if the agreement "is null and void, inoperative or incapable of being performed," Art. II(3), or (ii) if the dispute does not concern "a subject matter capable of settlement by arbitration," Art. II(1). The former qualification principally applies to matters of fraud, mistake, and duress in the inducement, or problems of procedural fairness and feasibility. *723 F.2d*, at 164. The latter clause plainly suggests the possibility [\*\*3371] that some subject matters are not capable of arbitration under the domestic laws of the signatory nations, and that agreements to arbitrate such disputes need not be enforced.

This construction is confirmed by [\*\*\*476] the provisions of the Convention which provide for the enforcement of international arbitration awards. Article III provides that each "Contracting State shall recognize arbitral awards as binding and enforce them." However, if an arbitration award is "contrary to the public policy of [a] country" called upon to enforce it, or if it concerns a subject matter which is "not capable of settlement by arbitration under the law of that country," the [\*\*\*\*79] Convention does not require that it be enforced. Arts. V(2)(a) and (b). Thus, reading Articles II and V together, the Convention provides that agreements to arbitrate disputes which are nonarbitrable under domestic law need not be honored, nor awards rendered under them enforced.<sup>34</sup>

[\*660] This construction is also supported by the legislative history of the Senate's advice and consent to the Convention. In presenting the Convention for the Senate's consideration the President offered the following [\*\*\*80] interpretation of Article II(1):

"The requirement that the agreement apply to a matter capable of settlement by arbitration is necessary in order to take proper account of laws in force in many countries which prohibit the submission of certain questions to arbitration. In some States of the United States, for example, disputes affecting the title to real property are not arbitrable." S. Exec. Doc. E, at 19.

The Senate's consent to the Convention presumably was made in light of this interpretation, and thus it is to be afforded considerable weight. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-185 (1982).

<sup>34</sup> Indeed, it has been argued that a state may refuse to enforce an agreement to arbitrate a subject matter which is nonarbitrable in domestic law under Article II(3) as well as under Article II(1). Since awards rendered under such agreements need not be enforced under Article V(2) the agreement is "incapable of being performed." Art. II(3). S. Exec. Doc. E, 90th Cong., 2d Sess., 19 (1968) (hereinafter S. Exec. Doc. E); G. Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards 27-28 (1958).

### *International Comity*

It is clear then that the international obligations of the United States permit us to honor Congress' commitment to the exclusive resolution of antitrust disputes in the federal courts. The Court today refuses to do so, offering only vague concerns for comity among nations. The courts of other nations, on the other hand, have applied the exception provided in the Convention, and refused to enforce agreements to arbitrate specific subject matters of concern to them.<sup>35</sup>

[\*\*\*\*81] [\*661] It may be that the subject-matter exception to the Convention ought to be reserved -- as a matter of domestic law -- for matters of the greatest public interest which involve concerns that are shared by other nations. The Sherman Act's commitment to free competitive markets is [\*\*\*477] among our most important civil policies. *Supra, at 650-657*. This commitment, shared by other nations which are signatory to the Convention,<sup>36</sup> is hardly the sort of parochial [\*\*3372] concern that we should decline to enforce in the interest of international comity. Indeed, the branch of Government entrusted with the conduct of political relations with foreign governments has informed us that the "United States' determination that federal antitrust claims are nonarbitrable under the Convention . . . is not likely to result in either surprise or recrimination on the part of other signatories to the Convention." Brief for United States as *Amicus Curiae* 30.

[\*\*\*\*82] Lacking any support for the proposition that the enforcement of our domestic laws in this context will result in international recriminations, the Court seeks refuge in an obtuse application of its own precedent, *Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974)*, in order to defend the contrary result. The *Scherk* case was an action for damages brought by an American purchaser of three European businesses in which it was claimed that the seller's fraudulent representations concerning the status of certain European trademarks constituted a violation of § 10(b) of the Securities Exchange [\*662] Act of 1934, *15 U. S. C. § 78j(b)*. The Court held that the parties' agreement to arbitrate any dispute arising out of the purchase agreement was enforceable under the Federal Arbitration Act. The legal issue was whether the Court's earlier holding in *Wilko v. Swan, 346 U.S. 427 (1953)* -- "that an agreement to arbitrate could not preclude a buyer of a security from seeking a judicial remedy under the Securities Act of 1933," see *417 U.S., at 510* -- was "controlling authority." *Ibid.*

The Court carefully identified two [\*\*\*\*83] important differences between the *Wilko* case and the *Scherk* case. First, the statute involved in *Wilko* contained an express private remedy that had "no statutory counterpart" in the statute involved in *Scherk*, see *417 U.S., at 513*. Although the Court noted that this difference provided a "colorable argument" for reaching a different result, the Court did not rely on it. *Id., at 513-514*.

Instead, it based its decision on the second distinction -- that the outcome in *Wilko* was governed entirely by American law whereas in *Scherk* foreign rules of law would control and, if the arbitration clause were not enforced, a host of international conflict-of-laws problems would arise. The Court explained:

"Alberto-Culver's contract to purchase the business entities belonging to Scherk was a truly international agreement. Alberto-Culver is an American corporation with its principal place of business and the vast bulk of its activity in this country, while Scherk is a citizen [\*\*\*478] of Germany whose companies were organized under the laws of Germany and Liechtenstein. The negotiations leading to the signing of the contract in [\*\*\*\*84] Austria and

<sup>35</sup> For example, the Cour de Cassation in Belgium has held that disputes arising under a Belgian statute limiting the unilateral termination of exclusive distributorships are not arbitrable under the Convention in that country, *Audi-NSU Auto Union A.G. v. S. A. Adelin Petit & Cie.* (1979), in 5 Yearbook Commercial Arbitration 257, 259 (1980), and the Corte di Cassazione in Italy has held that labor disputes are not arbitrable under the Convention in that country, *Compagnia Generale Construzioni v. Piersanti*, [1980] Foro Italiano I 190, in 6 Yearbook Commercial Arbitration 229, 230 (1981).

<sup>36</sup> For example, the Federal Republic of Germany has a vigorous antitrust program, and prohibits the enforcement of predispute agreements to arbitrate such claims under some circumstances. See Act Against Restraints of Competition § 91(1), in 1 Organisation for Economic Cooperation and Development, Guide to Legislation on Restrictive Business Practices, Part D, p. 49 (1980). See also 2 G. Delaume, Transnational Contracts § 13.06, p. 31, and n. 3 (1982).

to the closing in Switzerland took place in the United States, England, and Germany, and involved consultations with legal and trademark experts from each of those countries and from Liechtenstein. Finally, and most significantly, the subject matter of the contract concerned the [\*663] sale of business enterprises organized under the laws of and primarily situated in European countries, whose activities were largely, if not entirely, directed to European markets.

"Such a contract involves considerations and policies significantly different from those found controlling in *Wilko*. In *Wilko*, quite apart from the arbitration provision, there was no question but that the laws of the United States generally, and the federal securities laws in particular, would govern disputes arising out of the stock-purchase agreement. The parties, the negotiations, and the subject matter of the contract were all situated in this country, and no credible claim could have been entertained that any international conflict-of-laws problems would arise. In this case, by contrast, [\*\*3373] in the absence of the arbitration provision considerable uncertainty existed at the time of [\*\*\*\*85] the agreement, and still exists, concerning the law applicable to the resolution of disputes arising out of the contract." [417 U.S., at 515-516](#) (footnote omitted).

Thus, in its opinion in *Scherk*, the Court distinguished *Wilko* because in that case "no credible claim could have been entertained that any international conflict-of-laws problems would arise." [417 U.S., at 516](#). That distinction fits this case precisely, since I consider it perfectly clear that the rules of American **antitrust law** must govern the claim of an American automobile dealer that he has been injured by an international conspiracy to restrain trade in the American automobile market.<sup>37</sup>

The critical importance of the foreign-law [\*\*\*\*86] issues in *Scherk* was apparent to me even before the case reached this Court. See n. 12, *supra*. For that reason, it is especially distressing [\*664] to find that the Court is unable to perceive why the reasoning in *Scherk* is wholly inapplicable to Soler's antitrust claims against Chrysler and Mitsubishi. The merits of those claims are controlled entirely by American law. It is true that the automobiles are manufactured in Japan and that Mitsubishi is a Japanese corporation, but the same antitrust questions would be presented if Mitsubishi were owned by two American companies instead of by one American and one Japanese partner. When Mitsubishi enters the American market and plans to engage in business in that market over a period of years, it must recognize its obligation to comply with American law and to be subject to [\*\*\*479] the remedial provisions of American statutes.<sup>38</sup>

[\*\*\*\*87] The federal claim that was asserted in *Scherk*, unlike Soler's antitrust claim, had not been expressly authorized by Congress. Indeed, until this Court's recent decision in [Landreth Timber Co. v. Landreth, 471 U.S. 681 \(1985\)](#), the federal cause of action asserted in *Scherk* would not have been entertained in a number of Federal Circuits because it did not involve the kind of securities transaction that Congress intended to regulate when it enacted the Securities Exchange Act of 1934.<sup>39</sup> The fraud claimed in *Scherk* was virtually identical to the breach of warranty claim; arbitration of such claims arising out of an agreement between parties of equal bargaining strength does not conflict with any significant federal policy.

<sup>37</sup> Cf. *Compagnia Generale Construzioni v. Piersanti*, [1980] Foro Italiano I 190 (Corte Cass. Italy), in 6 Yearbook Commercial Arbitration, at 230; *Audi-NSU Auto Union A. G. v. S. A. Adelin Petit & Cie.* (Cour Cass. Belgium 1979), in 5 Yearbook Commercial Arbitration, at 259.

<sup>38</sup> Cf. [Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 \(1982\)](#) (Japanese general trading company's wholly owned subsidiary which is incorporated in the United States is not exempt under bilateral commercial treaty from obligations under Title VII of the Civil Rights Act of 1964).

<sup>39</sup> The Court's opinion in [Landreth Timber, 471 U.S., at 694-695, n. 7](#), does not take issue with my assertion, in dissent, that Congress never "intended to cover negotiated transactions involving the sale of control of a business whose securities have never been offered or sold in any public market." [Id., at 699](#).

473 U.S. 614, \*664; 105 S. Ct. 3346, \*\*3373; 87 L. Ed. 2d 444, \*\*\*479; 1985 U.S. LEXIS 129, \*\*\*\*87

[\*\*\*\*88] In contrast, Soler's claim not only implicates our fundamental antitrust policies, *supra, at 650-657*, but also should [\*665] be evaluated in the light of an explicit congressional finding concerning the disparity in bargaining power between automobile manufacturers and their franchised dealers. In 1956, when Congress enacted special legislation to protect dealers from bad-faith franchise terminations,<sup>40</sup> it recited its intent "to balance the power now heavily weighted in favor of automobile manufacturers." 70 Stat. 1125. The special federal interest in protecting automobile dealers from overreaching by car manufacturers, as well as the policies underlying the Sherman Act, underscore the folly of the Court's decision today.

[\*\*3374] V

The Court's repeated incantation of the high ideals of "international arbitration" creates the impression that this case involves the fate of an institution designed to implement a formula for world peace. [\*\*\*\*89]<sup>41</sup> But just as it is improper to subordinate the public interest in enforcement of antitrust policy to the private interest in resolving commercial disputes, so is it equally unwise to allow a vision of world unity to distort the importance of the selection of the proper forum for resolving this dispute. Like any other mechanism for resolving controversies, international arbitration will only succeed if it is realistically limited to tasks it is capable of performing well -- the prompt and inexpensive resolution of essentially contractual disputes between commercial partners. As for [\*\*\*480] matters involving the political passions and the fundamental interests of nations, even the multilateral convention adopted under the auspices of the United Nations recognizes that private international arbitration is incapable of achieving satisfactory results.

[\*\*\*\*90] [\*666] In my opinion, the elected representatives of the American people would not have us dispatch an American citizen to a foreign land in search of an uncertain remedy for the violation of a public right that is protected by the Sherman Act. This is especially so when there has been no genuine bargaining over the terms of the submission, and the arbitration remedy provided has not even the most elementary guarantees of fair process. Consideration of a fully developed record by a jury, instructed in the law by a federal judge, and subject to appellate review, is a surer guide to the competitive character of a commercial practice than the practically unreviewable judgment of a private arbitrator.

Unlike the Congress that enacted the Sherman Act in 1890, the Court today does not seem to appreciate the value of economic freedom. I respectfully dissent.

## References

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5 Am Jur 2d, Arbitration and Award 15, 30, 42; *55 Am Jur 2d Monopolies, Restraints of Trade, and Unfair Trade Practices* 255

3 Federal Procedure, L Ed, Arbitration 4:149-4:154, 4:158, 4:159

3 Federal Procedural Forms, L Ed, Arbitration 4:201-4:207

2 Am Jur Pl [\*\*\*\*91] & Pr Forms (Rev), Arbitration and Award, Forms 11, 12, 18, 19

2 Am Jur Legal Forms 2d Arbitration and Award 23:171-23:174

3 Am Jur Trials 681, Tactics and Strategy of Pleading 50-51

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<sup>40</sup> Automobile Dealer's Day in Court Act, *15 U. S. C. §§ 1221-1225*.

<sup>41</sup> E. g., Charter of the United Nations and Statute of the International Court of Justice, 59 Stat. 1031, T.S. No. 993 (1945); Constitution of the International Labor Organisation, 49 Stat. 2712, T.S. No. 874 (1934); Treaty of Versailles, S. Doc. 49, 66th Cong., 1st Sess., pt. 1, pp. 8-17 (1919) (Covenant of the League of Nations); Kant, Perpetual Peace, A Philosophical Sketch, in Kant's Political Writings 93 (H. Reiss ed. 1971).

9 USCS 1 et seq.; 15 USCS 1 et seq.

US L Ed Digest, Arbitration 2

L Ed Index to Annos, Arbitration and Award

ALR Quick Index, Arbitration and Award

Federal Quick Index, Arbitration and Award

Annotation References:

Arbitrability of federal antitrust claims. 3 ALR Fed 918.

Validity and enforceability of provisions for binding arbitration, and waiver thereof. 24 ALR3d 1325.

Validity and effect, and remedy in respect, of contractual stipulation to submit disputes to arbitration in another jurisdiction. 12 ALR3d 892.

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## Fisher v. Berkeley

Supreme Court of the United States

November 12, 1985, Argued ; February 26, 1986, Decided

No. 84-1538

### **Reporter**

475 U.S. 260 \*; 106 S. Ct. 1045 \*\*; 89 L. Ed. 2d 206 \*\*\*; 1986 U.S. LEXIS 12 \*\*\*\*; 54 U.S.L.W. 4222; 1986-1 Trade Cas. (CCH) P66,965

FISHER ET AL. v. CITY OF BERKELEY, CALIFORNIA, ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

**Disposition:** [37 Cal. 3d 644, 693 P. 2d 261](#), affirmed.

## **Core Terms**

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Ordinance, rent, landlords, Sherman Act, prices, anti trust law, rent control, municipal, antitrust, exemption, anticompetitive, Stabilization, wine, unilaterally, rental, articulated, pre-emption, conspiracy, pre-empted, retailers, concerted action, levels, charter amendment, rent ceiling, residential, price competition, state statute, state policy, initiative, measures

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

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

A state statute is not preempted by federal antitrust laws simply because the state scheme may have an anticompetitive effect.

Antitrust & Trade Law > Sherman Act > General Overview

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

A state statute should be struck down on preemption grounds under the Sherman Antitrust Act only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

475 U.S. 260, \*260; 106 S. Ct. 1045, \*\*1045; 89 L. Ed. 2d 206, \*\*\*206; 1986 U.S. LEXIS 12, \*\*\*\*1

Governments > State & Territorial Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

Governments > State & Territorial Governments > Legislatures

### **HN3** [blue download icon] Exemptions & Immunities, Parker State Action Doctrine

Only where state legislation is found to conflict "irreconcilably" with the antitrust laws does the level of government responsible for its enactment become important. Legislation that would otherwise be preempted under the Rice standard may nonetheless survive if it is found to be state action immune from antitrust scrutiny under the Parker State-Action Doctrine. The ultimate source of that immunity can be only the state, not its subdivisions.

Antitrust & Trade Law > Sherman Act > General Overview

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

### **HN4** [blue download icon] Antitrust & Trade Law, Sherman Act

The reach of § 1 of the Sherman Antitrust Act, § 15 U.S.C.S. § 1, is limited to unreasonable restraints of trade effected by a contract, combination, or conspiracy between separate entities.

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

Real Property Law > Landlord & Tenant > Rent Regulation > General Overview

### **HN5** [blue download icon] Exemptions & Immunities, Parker State Action Doctrine

Independent activity by a single entity is distinguished from a concerted effort by more than one entity to fix prices or otherwise restrain trade. Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under § 1 of the Sherman Act in the absence of agreement. Thus, if an ordinance stabilizes rents without this element of concerted action, the program it establishes cannot run afoul of § 1 of the Sherman Act, 15 U.S.C.S. § 1.

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

Civil Procedure > Appeals > Appellate Briefs

### **HN6** [blue download icon] Exemptions & Immunities, Parker State Action Doctrine

A restraint imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy.

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

Antitrust & Trade Law > Sherman Act > General Overview

### **[HN7](#)[ Exemptions & Immunities, Parker State Action Doctrine**

Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of [§ 1](#) of the Sherman Antitrust Act, [15 U.S.C.S. § 1](#). Certain restraints may be characterized as "hybrid," in that nonmarket mechanisms merely enforce private marketing decisions. Where private actors are thus granted a degree of private regulatory power, the regulatory scheme may be attacked under [§ 1](#).

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

### **[HN8](#)[ Exemptions & Immunities, Parker State Action Doctrine**

The mere existence of legal compulsion does not turn an ordinance into unilateral action by the state.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

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

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

Real Property Law > Landlord & Tenant > Rent Regulation > General Overview

### **[HN9](#)[ Sherman Act, Claims**

Under settled principles of [antitrust law](#), rent controls which establish a ceiling lack the element of concerted action needed before they can be characterized as a per se violation of [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#).

## **Lawyers' Edition Display**

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### **Decision**

City ordinance imposing rent ceilings on residential real property held not unconstitutional as being pre-empted by Sherman Act.

### **Summary**

The City of Berkeley, California, adopted an ordinance imposing rent ceilings on residential real property. Landlords owning rental property brought suit in the Superior Court of Alameda County, California, and sought declaratory and injunctive relief on the grounds of alleged violations of their federal constitutional rights, under the due process and [equal protection clauses of the Fourteenth Amendment](#). The Superior Court held the ordinance not unconstitutional on its face. The California Supreme Court affirmed, holding not only that the ordinance did not violate the [Fourteenth Amendment](#), but also that the ordinance was not pre-empted by the federal antitrust laws ([37 Cal 3d 644, 209 Cal Rptr 682, 693 P2d 261](#)).

On appeal, the United States Supreme Court affirmed. In an opinion by Marshall, J., joined by Burger, Ch. J., and White, Blackmun, Rehnquist, Stevens, and O'Connor, JJ., it was held that because the rent controls were unilaterally imposed by government upon landlords to the exclusion of private control and lacked concerted action, they could not be characterized as a per se violation of 1 of the Sherman Act ([15 USCS 1](#)), and the ordinance could not be held facially inconsistent with the federal antitrust laws.

Powell, J., concurred in the judgment on the grounds that because the state legislature had expressly authorized Berkeley to control rents, the rent control ordinance fell within the "state action" exemption from the federal antitrust laws.

Brennan, J., dissented on the grounds (1) that the rent control ordinance facially conflicted with the Sherman Act because the ordinance mandated price fixing, a per se violation of the Sherman Act, and involved a combination between the City of Berkeley and its officials on the one hand, and the landlords on the other hand, and (2) that the ordinance did not fall within the "state action" exemption from the antitrust laws.

## Headnotes

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MUNICIPAL CORPORATIONS §36 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES

§10 > ordinance imposing rent ceilings -- lack of concerted action or conspiracy -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D] [LEdHN\[1E\]](#) [1E] [LEdHN\[1F\]](#) [1F] [LEdHN\[1G\]](#) [1G]

A city ordinance imposing rent ceilings on residential real property is not unconstitutional as pre-empted by 1 of the Sherman Act ([15 USCS 1](#)), where such rent controls are unilaterally imposed by government upon landlords to the exclusion of private control and lack concerted action, and where the ordinance, adopted by popular initiative, cannot be viewed as a cloak for any price-fixing conspiracy among landlords or between landlords and the city; the mere fact that all competing property owners must comply with the same provisions of the ordinance does not establish a conspiracy among landlords. (Brennan, J., dissented from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §10 > concerted action -- conspiracy --

> Headnote:

[LEdHN\[2\]](#) [2]

A restraint imposed unilaterally by government does not become concerted action, within the meaning of 1 of the Sherman Act ([15 USCS 1](#)), simply because it has a coercive effect upon parties who must obey the law; the ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy. (Brennan, J., dissented from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §10 > unilateral action -- > Headnote:

[LEdHN\[3\]](#) [3]

Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of 1 of the Sherman Act ([15 USCS 1](#)); where private actors are granted a degree of private regulatory power, the regulatory scheme is subject to attack under 1.

## Syllabus

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A Berkeley, California, ordinance, enacted pursuant to popular initiative, imposes rent ceilings on residential real property in the city. The rent ceilings are under the control of a Rent Stabilization Board. Appellant landlords brought suit in California Superior Court challenging the constitutionality of the ordinance on [Fourteenth Amendment](#) grounds and seeking declaratory and injunctive relief. The Superior Court upheld the ordinance but was reversed by the California Court of Appeal. In the meantime, based on the intervening decision in [Community Communications Co. v. Boulder, 455 U.S. 40](#), the question arose as to whether the ordinance was unconstitutional because it was pre-empted by the Sherman Act. The California Supreme Court held that there was no conflict between the ordinance and the Sherman Act.

**Held:** The ordinance is not unconstitutional as being pre-empted by the Sherman Act. Pp. 264-270.

(a) The rent ceilings established by the ordinance and maintained by the Rent Stabilization Board were unilaterally imposed by the city [\*\*\*\*2] upon landlords to the exclusion of private control. Thus, the rent ceilings lack the element of concerted action needed before they can be characterized as a *per se* violation of [§ 1](#) of the Sherman Act. A restraint imposed unilaterally by government does not become concerted action within the meaning of [§ 1](#) simply because it has a coercive effect upon parties who must obey the law. And the mere fact that all competing landlords must comply with the ordinance is not enough to establish a conspiracy among landlords. Pp. 265-267.

(b) While the ordinance gives tenants some power to trigger its enforcement, it places complete control over maximum rent levels exclusively in the Rent Stabilization Board's hands. [Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384](#), and [California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97](#), distinguished. Pp. 267-270.

**Counsel:** Jon D. Smock argued the cause for appellants. On the briefs were James R. Parrinello, John E. Mueller, and Peter J. Donnici.

Laurence H. Tribe argued the cause for appellees. With him on the brief were Kathleen M. Sullivan, Myron Moskovitz, and Manuela Albuquerque. [\*\*\*\*3] \*

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**Judges:** MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, post, p. 270. BRENNAN, J., filed a dissenting opinion, post, p. 274.

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\* Briefs of amici curiae urging reversal were filed for the California Housing Council, Inc., by Carla A. Hills and William C. Kelly, Jr.; for the Mid-America Legal Foundation by John M. Cannon, Susan W. Wanat, and Ann Plunkett Sheldon; for the Pacific Legal Foundation et al. by Ronald A. Zumbrun and Robert K. Best; and for the Washington Legal Foundation by Daniel J. Popeo and Paul D. Kamenar.

Briefs of amici curiae urging affirmance were filed for the State of New Jersey Department of the Public Advocate by Richard E. Shapiro; and for the United States Conference of Mayors et al. by Benna Ruth Solomon, Joyce Holmes Benjamin, Stephen Chapple, and Cynthia M. Pols.

Briefs of amici curiae were filed for the City and County of San Francisco by George P. Agnost and Burk E. Delventhal; for the City of Santa Monica et al. by Robert M. Myers, Stephen S. Stark, Karl M. Manheim, Raymond E. Ott, and K. D. Lyders; for the Berkeley Property Owners' Association by Thomas A. Seaton; for the California Apartment Association by Jon D. Smock, Wilbur H. Haines III, and Jeffrey J. Gale; for the Coalition for Competition in Apartment Rentals by E. Barrett Prettyman, Jr., and Elwood S. Kendrick; and for the National Apartment Association et al. by Jon D. Smock.

**Opinion by:** MARSHALL

## Opinion

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[\*261] [\*\*\*209] [\*\*1046] JUSTICE MARSHALL delivered the opinion of the Court.

LEdHN[1A] [1A]The question presented here is whether a rent control ordinance enacted by a municipality pursuant to popular initiative is unconstitutional because pre-empted by the Sherman Act.

I

In June 1980, the electorate of the city of Berkeley, California, enacted an initiative entitled "Ordinance 5261-N. S., Rent Stabilization and Eviction for Good Cause Ordinance" [\*262] (hereafter Ordinance). Section 3 of the Ordinance stated the measure's purposes:<sup>1</sup>

[\*\*1047] "The purposes of this Ordinance are to regulate residential rent increases in the City of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation [\*\*\*\*5] is designed to address the City of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of the City with regard to low and fixed income persons, minorities, students, handicapped, and the aged." App. to Juris. Statement A-111.

To accomplish these goals, the Ordinance places strict rent controls on all real property that "is being rented or is available for rent for residential use in whole or in part," § 5, *id.*, at A-113. Excepted are government-owned units, transient units, cooperatives, hospitals, certain [\*\*\*210] small [\*\*\*\*6] owner-occupied buildings, and all newly constructed buildings. For the remaining units, numbering approximately 23,000, 37 Cal. 3d 644, 678, 693 P. 2d 261, 288 (1984), the Ordinance establishes a base rent ceiling reflecting the rents in effect at the end of May 1980. A landlord may raise his rents from these levels only pursuant to an annual general adjustment of rent ceilings by a Rent Stabilization Board of appointed commissioners or after he is successful in petitioning the Board for an individual adjustment. A landlord who fails to register with the Board units covered by the Ordinance or who fails to adhere [\*263] to the maximum allowable rent set under the Ordinance may be fined by the Board, sued by his tenants, or have rent legally withheld from him. If his violations are willful, he may face criminal penalties.

Shortly after the passage of the initiative, appellants, a group of landlords owning rental property in Berkeley, brought this suit in California Superior Court, claiming, *inter alia*, that the Ordinance violates their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and seeking declaratory [\*\*\*\*7] and injunctive relief. The Superior Court upheld the Ordinance on its face, but was reversed by the Court of Appeal. While that appeal was pending, however, this Court's decision in *Community Communications Co. v. Boulder*, 455 U.S. 40 (1982), led certain *amici* to raise the question whether the Ordinance was unconstitutional because pre-empted by the federal antitrust laws. When the California Supreme Court heard the appeal from the Court of Appeal's decision, it therefore chose to consider plaintiffs' pre-emption claim along with their Fourteenth Amendment challenge.

Although fully briefed on the question whether the Berkeley Ordinance constitutes state action exempt from antitrust scrutiny under the standard established in Boulder, supra, the California Supreme Court noted that consideration of this issue would become necessary only were there to be "truly a conflict between the Sherman Act and the challenged regulatory scheme," 37 Cal. 3d, at 660, 693 P. 2d, at 275 (quoting *First American Title Co. v. South*

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<sup>1</sup> In 1982, while this case was pending in the California Court of Appeal, the Berkeley electorate enacted the "Tenants' Rights Amendments Act of 1982," revising certain sections of the 1980 Ordinance. Like the California Supreme Court, we review the Ordinance as amended, see 37 Cal. 3d 644, 654, n. 2, 693 P. 2d 261, 270, n. 2 (1984); all reference herein will therefore be to the 1982 version of the Ordinance.

475 U.S. 260, \*263; 106 S. Ct. 1045, \*\*1047; 89 L. Ed. 2d 206, \*\*\*210; 1986 U.S. LEXIS 12, \*\*\*\*7

Dakota Land Title Assn., 714 F.2d 1439, 1452 (CA8 1983), cert. denied, [\*\*\*\*8] 464 U.S. 1042 (1984)). Such a conflict would exist, the Supreme Court concluded, only if the Ordinance on its face mandated conduct prohibited by either § 1 or § 2 of the Sherman Act. See Rice v. Norman Williams Co., 458 U.S. 654, 661 (1982). After reviewing the two "traditional standards" that have consistently been used to determine whether conduct violates § 1 of the Sherman Act -- the *per se* rules and the rule of reason, see [\*264] National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978) -- the court concluded that both standards, with their exclusive focus on competition and concern for the selfish motives of private actors, failed to give due deference to a municipality's legitimate [\*\*1048] interest in promoting public health, safety, and welfare. 37 Cal. 3d, at 667-673, 693 P. 2d, at 280-285. The Supreme Court therefore found both standards inappropriate and proceeded to apply a standard of its own devising, based upon this Court's Commerce Clause cases. Applying [\*\*\*211] this test, the court found no conflict between the Ordinance and either [\*\*\*\*9] § 1 or § 2 of the Sherman Act.

We noted probable jurisdiction limited to the antitrust pre-emption question, 471 U.S. 1124 (1985), and now affirm, although on grounds different from those relied on by the California Supreme Court. While that court was correct in noting that consideration of state action is not necessary unless an actual conflict with the antitrust laws is established, we find traditional antitrust analysis adequate to resolve the issue presented here.

## II

We begin by noting that appellants make no claim under either § 4 or § 16 of the Clayton Act, 15 U. S. C. §§ 15 and 26, that the process by which the Rent Stabilization Ordinance was passed renders the Ordinance the product of an illegal "contract, combination . . . , or conspiracy." Appellants instead claim that, regardless of the manner of its enactment, the regulatory scheme established by the Ordinance, on its face, conflicts with the Sherman Act and therefore is preempted.

Recognizing that the function of government may often be to tamper with free markets, correcting their failures and aiding their victims, this Court noted in Rice v. Norman Williams Co., supra, that [\*\*\*10] HN1[↑] a "state statute is not pre-empted by the federal antitrust laws simply because the state scheme may have an anticompetitive effect," *id., at 659*. See Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 133 (1978). We have therefore held that HN2[↑] a state statute should be struck down on pre-emption grounds "only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." 458 U.S., at 661.

While *Rice* involved a state statute rather than a municipal ordinance, the rule it established does not distinguish between the two. As in other pre-emption cases, the analysis is the same for the acts of both levels of government. See, e. g., White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983). HN3[↑] Only where legislation is found to conflict "irreconcilably" with the antitrust laws, Rice, supra, at 659, does the level of government responsible for its enactment become important. [\*\*\*\*11] Legislation that would otherwise be pre-empted under *Rice* may nonetheless survive if it is found to be state action immune from antitrust scrutiny under Parker v. Brown, 317 U.S. 341 (1943). The ultimate source of that immunity can be only the State, not its subdivisions. See Community Communications Co. v. Boulder, *supra*, at 50-51; Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412-413 (1978) (opinion of BRENNAN, J.).

## A

Appellants argue that Berkeley's Ordinance is pre-empted under *Rice* [\*\*\*212] because it imposes rent ceilings across the entire rental market for residential units. Such a regime, they contend, clearly falls within the *per se* rule against price fixing, a rule that has been one of the settled points of antitrust enforcement since the earliest days of the Sherman Act, see Arizona v. Maricopa County Medical Society, 457 U.S. 332, 344-348 (1982); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940). [\*\*1049] That the prices set here are ceilings rather than floors and that the public interest has been invoked [\*\*\*\*12] to justify this stabilization should not, appellants [\*266] argue, save Berkeley's regulatory scheme from condemnation under the *per se* rule.

LEdHN[1B] [1B] Certainly there is this much truth to appellants' argument: Had the owners of residential rental property in Berkeley voluntarily banded together to stabilize rents in the city, their activities would not be saved from antitrust attack by claims that they had set reasonable prices out of solicitude for the welfare of their tenants. See *National Society of Professional Engineers v. United States, supra, at 695*; *United States v. Trans-Missouri Freight Assn., 166 U.S. 290 (1897)*. Moreover, it cannot be denied that Berkeley's Ordinance will affect the residential housing rental market in much the same way as would the philanthropic activities of this hypothetical trade association. What distinguishes the operation of Berkeley's Ordinance from the activities of a benevolent landlords' cartel is not that the Ordinance will necessarily have a different economic effect, but that the rent ceilings imposed by the Ordinance and maintained by the Rent Stabilization Board have been unilaterally imposed [\*\*\*\*13] by government upon landlords to the exclusion of private control.

LEdHN[1C] [1C] The distinction between unilateral and concerted action is critical here. Adhering to the language of § 1, HN4 this Court has always limited the reach of that provision to "unreasonable restraints of trade effected by a 'contract, combination . . . , or conspiracy' between *separate* entities." *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984)* (emphasis in original). We have therefore deemed it "of considerable importance" that HN5 independent activity by a single entity be distinguished from a concerted effort by more than one entity to fix prices or otherwise restrain trade, *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 763 (1984)*. Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under § 1 in the absence of agreement. *Id. at 760-761; United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960)*. Thus, if the Berkeley Ordinance stabilizes rents without this element of concerted action, [\*\*\*\*14] the program it establishes cannot run afoul of § 1.

LEdHN[1D] [1D] LEdHN[2] [2] Recognizing this concerted-action requirement, appellants argue that the Ordinance "forms a combination between [the city of Berkeley and its officials], on the one hand, and the property owners on the other. It also creates a horizontal combination among the landlords." [\*\*213] Reply Brief for Appellants 10, n. 7. In so arguing, appellants misconstrue the concerted-action requirement of § 1. HN6 A restraint imposed unilaterally by government does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy. Similarly, the mere fact that all competing property owners must comply with the same provisions of the Ordinance is not enough to establish a conspiracy among landlords. Under Berkeley's Ordinance, control over the maximum rent levels of every affected residential unit has been unilaterally removed from the owners of those properties and given to the Rent Stabilization Board. While [\*\*\*\*15] the Board may choose to respond to an individual landlord's petition for a special adjustment of a particular rent ceiling, it may decide not to. There is no meeting of the minds here. See *American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946)*, quoted in *Monsanto, supra, at 764*. The owners of residential property in Berkeley have no more freedom to resist [\*\*1050] the city's rent controls than they do to violate any other local ordinance enforced by substantial sanctions.

B

LEdHN[3] [3] HN7 Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of § 1. Certain restraints may be characterized as [\*268] "hybrid," in that nonmarket mechanisms merely enforce private marketing decisions. See *Rice v. Norman Williams Co., 458 U.S. at 665* (STEVENS, J., concurring in judgment). Where private actors are thus granted "a degree of private regulatory power," *id. at 666, n. 1*, the regulatory scheme may be attacked under § 1. Indeed, this Court has twice found such hybrid restraints to violate the Sherman Act. See *Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951)*; [\*\*\*\*16] *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)*.

In *Schwegmann*, a Louisiana statute authorized a distributor to enforce agreements fixing minimum retail prices not only against parties to such contracts, but also against retailers who sold the distributor's products without having agreed to the price restrictions. After finding that the statute went far beyond the now-repealed Miller-Tydings Act,

which offered a limited antitrust exemption to certain "contracts or agreements prescribing minimum prices for the resale" of specified commodities, the Court held that two liquor distributors had violated [§ 1](#) when they attempted to hold a retailer to the price-fixing terms of a contract it had refused to sign. In so holding, the Court noted that "when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." [341 U.S., at 389.](#) [\*\*\*214] However, under the Louisiana statute, both the selection of minimum price levels and the exclusive power to enforce those levels were left to the discretion of distributors. While the petitioner-retailer in that [\*\*\*17] case may have been legally required to adhere to the levels so selected, the involvement of his suppliers in setting those prices made it impossible to characterize the regulation as unilateral action by the State of Louisiana.

The trade restraint condemned in *Midcal* entailed a similar degree of free participation by private economic actors. That case presented an antitrust challenge to California's requirement that all wine producers, wholesalers, and rectifiers [\*269] file fair trade contracts or price schedules with the State. If a wine producer did not set prices, wholesalers had to post a resale price schedule for that producer's brands. No state-licensed wine merchant could sell wine to a retailer at other than those prices. [445 U.S., at 99.](#) The Court found: "California's system for wine pricing plainly constitutes resale price maintainance in violation of the Sherman Act . . . . The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers." [Id., at 103.](#) Here [HN8](#)[<sup>↑</sup>] again, the mere existence of legal compulsion did not turn California's scheme into unilateral action by the State. The [\*\*\*18] Court noted: "The State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers." [Id., at 100.](#)

[LEdHN\[1E\]](#)[<sup>↑</sup>] [1E]The hybrid restraints condemned in *Schwegmann* and *Midcal* were thus quite different from the pure regulatory scheme imposed by Berkeley's Ordinance. While the Ordinance does give tenants -- certainly a group of interested private parties -- some power to trigger the enforcement of its provisions, it places complete control over maximum rent levels exclusively in the hands of the Rent Stabilization Board. Not just the controls themselves but also the rent ceilings they mandate have been unilaterally imposed on the landlords by the city.

C

[LEdHN\[1F\]](#)[<sup>↑</sup>] [1F]There may be cases in which what appears to be a state- or municipality-administered [\*\*1051] price stabilization scheme is really a private price-fixing conspiracy, concealed under a "gauzy cloak of state involvement," [Midcal, supra, at 106.](#) This might occur even where prices are ostensibly under the absolute control of government officials. However, we have been given no indication that such corruption has tainted the rent controls imposed by [\*\*\*19] Berkeley's Ordinance. Adopted by popular initiative, the Ordinance can hardly be viewed as a cloak for any conspiracy among landlords or between the landlords and the municipality. Berkeley's landlords have [\*270] simply been deprived of the power freely to raise their rents. That is why they are here. And that is why their role in the stabilization program does not alter the restraint's unilateral nature.<sup>2</sup>

III

[\*\*\*215] [\*\*\*20] [LEdHN\[1G\]](#)[<sup>↑</sup>] [1G]Because [HN9](#)[<sup>↑</sup>] under settled principles of antitrust law, the rent controls established by Berkeley's Ordinance lack the element of concerted action needed before they can be

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<sup>2</sup>Though they have not pressed the point with any vigor in this Court, appellants have suggested that Berkeley's rent controls constitute attempted monopolization because the city "is clearly engaged in the provision of housing in the public sector" and using the controls to depress the prices of residential properties as a prelude to taking them over. Tr. of Oral Arg. 14-15. As to this claim, we note only that the inquiry demanded by appellants' allegations goes beyond the scope of the facial challenge presented here. See [Rice v. Norman Williams Co., 458 U.S., at 661.](#)

characterized as a *per se* violation of § 1 of the Sherman Act, we cannot say that the Ordinance is facially inconsistent with the federal antitrust laws. See *Rice v. Norman Williams Co., supra, at 661*. We therefore need not address whether, even if the controls were to mandate § 1 violations, they would be exempt under the state-action doctrine from antitrust scrutiny. See *Hallie v. Eau Claire, 471 U.S. 34 (1985)*.

The judgment of the California Supreme Court is

*Affirmed.*

**Concur by:** POWELL

## Concur

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JUSTICE POWELL, concurring in the judgment.

The Court today reaches out to decide a difficult preemption question when a straightforward and well-settled ground for decision is available. In my view, Berkeley's Ordinance plainly falls within the "state action" exemption of *Parker v. Brown, 317 U.S. 341 (1943)*, and its progeny. I therefore concur in the judgment, but on grounds different from those discussed in the Court's opinion.

[\*271] When a municipal [\*\*\*\*21] government engages in anticompetitive activity pursuant to a clearly articulated state policy to displace competition with regulation, the "state action" exemption removes the conduct from the coverage of the antitrust laws. *Hallie v. Eau Claire, 471 U.S. 34, 38-39 (1985)*; *Community Communications Co. v. Boulder, 455 U.S. 40, 54 (1982)*. In *Hallie*, we found such a policy embodied in a state statute that "delegated to [municipalities] the express authority to take action that foreseeably will result in anti-competitive effects." *471 U.S., at 43*. See also *Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415 (1978)* (opinion of BRENNAN, J.) ("[An] adequate state mandate for anticompetitive activities . . . exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of'" (citation omitted)). Thus, the question in this case is whether California has expressly delegated to Berkeley regulatory power that foreseeably would lead to the anticompetitive effects challenged by appellants.

[\*\*\*\*22] The history of Berkeley's ordinance is illuminating. Prior to 1974, *Article XI, § 3, [\*\*1052] of the California Constitution*<sup>1</sup> [\*24] [\*\*\*216] required the state legislature to approve all changes in municipal charters. In 1972, in a citywide initiative, Berkeley's citizens approved a charter amendment authorizing rent [\*272] control. This charter amendment effectively froze rents at 1971 levels, subject to individual adjustments by a popularly elected rent control board. *Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 138, 550 P. 2d 1001, 1008 (1976)*. The California Legislature ratified the charter amendment on August 2, 1972, and the rent control plan went into effect. 1972 Cal. Stat. 3370. A group of landlords challenged the rent control plan on a number of constitutional and statutory grounds. In the ensuing litigation, the California Supreme Court invalidated the plan on the ground that it lacked procedural safeguards necessary to protect landlords from confiscatory rent ceilings.<sup>2</sup> *Birkenfeld, supra, at 170-*

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<sup>1</sup> When Berkeley's charter amendment was passed in 1972, *Article XI, § 3(a), of the California Constitution* read:

"For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question. The charter is effective when filed with the Secretary of State. A charter may be amended, revised, or repealed in the same manner. A charter, amendment, revision, or repeal thereof shall be published in the official state statutes. . . . The provisions of a charter are the law of the State and have the force and effect of legislative enactments."

This provision was construed to require that charter amendments be approved by concurrent resolution of both houses of the state legislature. *Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 137, n. 2, 550 P. 2d 1001, 1007, n. 2 (1976)*.

[172, 550 P. 2d, at 1030-1032](#). In 1980, in another initiative, Berkeley's citizens adopted [\*\*\*\*23] the ordinance at issue in this case. This Ordinance provided the procedural protections that the 1972 charter provision lacked, and it subsequently survived constitutional challenge in state court. [37 Cal. 3d 644, 679-691, 693 P. 2d 261, 289-298 \(1984\)](#).

The challenged Ordinance thus replaces a rent control plan that was expressly authorized by the state legislature. Under *Hallie*, a general grant of authority to regulate rents would have sufficed to exempt Berkeley's Ordinance from the antitrust laws. [471 U.S., at 42](#). It follows that the legislature's ratification of a particular rent control plan must also trigger the state-action exemption. See *ibid.*; [Boulder, supra, at 55-56](#). The remaining issue is whether the authority granted in 1972 remains intact.

Appellants contend that it does not. First, [\*\*\*\*25] appellants argue that the California Supreme Court's decision in *Birkenfeld*, [\*273] invalidating the 1972 charter provision, effectively canceled the legislature's ratification of that provision. *Birkenfeld* did not, however, decide that rent control was bad policy, or that it was inconsistent with state law. See [Birkenfeld, supra, at 159-164, 550 P. 2d, at 1023-1026](#) (finding that enacting a rent control plan was a permissible exercise of the city's police power); Note, 65 Calif. L. Rev. 304, 305 (1977) ("*Birkenfeld* offers California [\*\*\*217] cities . . . the judicial equivalent of a rent control enabling act"). Rather, the decision stands only for the proposition that cities must couple rent control with procedures for adjusting rent ceilings to avoid fixing rents at confiscatory levels. [17 Cal. 3d, at 167-173, 550 P. 2d, at 1028-1033](#). *Birkenfeld* thus left Berkeley's basic power to impose rent controls unaffected.

Second, appellants contend that since 1972 the state legislature has declared its neutrality respecting a city's decision to control rents. See [Boulder, supra, at 55](#) [\*\*\*\*26] [\*\*1053] (clear articulation requirement is not satisfied "when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive"). This argument rests on the passage in 1980 of a comprehensive planning and zoning law, one provision of which states:

"Nothing in this article shall be construed to be a grant of authority or a *repeal of any authority which may exist* of a local government to impose rent controls or restrictions on the sale of real property." [Cal. Govt. Code Ann. § 65589\(b\)](#) (West 1983) (emphasis added).

By its express terms this statute leaves intact cities' preexisting authority to adopt rent control provisions. For purposes of the clear articulation requirement, Berkeley's preexisting authority is defined by the legislature's ratification of the city's 1972 charter amendment.

For these reasons, I would find that Berkeley's Ordinance is exempt from the antitrust laws under our decisions in *Hallie* and *Boulder*. By ratifying Berkeley's charter amendment, the state legislature expressly authorized Berkeley to [\*274] control rents. The State has not since rescinded that authorization. That is all [\*\*\*\*27] we need decide in this case.

I therefore concur in the judgment, and express no view on the merits of the pre-emption issue decided by the Court.

**Dissent by: BRENNAN**

## **Dissent**

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<sup>2</sup>The 1972 charter provision permitted individual adjustments of the across-the-board rent ceiling only on a unit-by-unit basis, and only after a hearing on the particular unit whose rent was to be raised. The California Supreme Court found that this limitation "put the [rent control board] in a procedural strait jacket," and "unnecessarily [precluded] reasonably prompt action" on meritorious petitions by landlords. [Birkenfeld, supra, at 171, 172, 550 P. 2d, at 1031, 1032](#).

JUSTICE BRENNAN, dissenting.

Since *Parker v. Brown*, 317 U.S. 341 (1943), the Court has wrestled with the question of the degree to which federal antitrust laws prohibit state and local governments from imposing anticompetitive restraints on trade. Laws which impose such restraints have been held to be exempt from antitrust scrutiny if they constitute action of the State itself in its sovereign capacity, or state-authorized municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. See *Community Communications Co. v. Boulder*, 455 U.S. 40, 52 (1982). Today, the Court holds that a municipality's price-fixing scheme is not pre-empted by the federal antitrust laws whether or not the scheme is state-authorized, or furthers or implements a clearly articulated and affirmatively expressed state policy. Because today's decision discards over 40 years of carefully considered precedent, I respectfully dissent.

I

A

Berkeley's Rent Stabilization [\*\*\*\*28] Ordinance [\*\*218] (hereafter Ordinance) effectively fixes prices for rental units in the city of Berkeley. In *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982), we held that a state statute

"may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation."

[\*275] In this case, by declaring maximum prices landlords may charge, Berkeley's Ordinance irresistibly pressures landlords to fix prices for their rental units. Thus, the Ordinance "facially [conflicts] with the Sherman Act because it [*mandates*] [price fixing], an activity that has long been regarded as a *per se* violation of the Sherman Act." *Id.*, at 659-660 (emphasis in original).

The Court recognizes that the Ordinance imposes anticompetitive restraints on trade, and that it has the same effect on the [\*\*\*\*29] housing market as would a conspiracy by landlords to fix rental prices. *Ante*, at 266. Despite this, the Court holds that the Ordinance is not pre-empted by the Sherman Act because prices are fixed "unilaterally" [\*1054] by the city, rather than by "contract, combination, or conspiracy." I do not read our decisions necessarily to require proof of such concerted action as a prerequisite to a finding of pre-emption. Certainly, nothing we said in *Rice* supports such a narrow view of pre-emption.<sup>1</sup> Our other decisions have found statutes in conflict with the Sherman Act because they eliminated price competition in the relevant market.

[\*\*\*\*30] In *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), a wine wholesaler sought to enjoin enforcement of a California statute which effectively [\*276] required it to sell wines at prices set by producers. The Court focused on the fact that the statute eliminated price competition, and held that the wine-

<sup>1</sup> *Rice* held that a "state statute is not pre-empted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect." 458 U.S., at 659. *Rice* involved a challenge to a California statute which effectively allowed liquor distillers to control distribution of their products in the State. The Court concluded that because such vertical *nonprice* restraints are not *per se* illegal under the Sherman Act, see *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), the statute was not pre-empted. 458 U.S., at 661; see also *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). In contrast, Berkeley's Rent Stabilization Board fixes prices for rental units in the city. Unlike *nonprice* restraints, *price fixing* has traditionally been held to be *per se* illegal under the Sherman Act. See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

pricing system constituted resale price maintenance in violation of the Sherman Act. The *Midcal* decision squarely controls the result here. Just as the statute challenged in *Midcal* compelled wine wholesalers to charge prices set by wine producers, Berkeley's Ordinance compels [\*\*219] landlords to charge prices set by the city. The city "holds the power to prevent price competition by dictating the prices charged" by landlords. *Id., at 103*. "[Such] vertical control destroys horizontal competition as effectively as if [landlords] 'formed a combination and endeavored to establish the same restrictions . . . by agreement with each other.'" *Ibid.* (quoting *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911)).

*Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), [\*\*\*\*31] is also directly on point. In *Schwegmann*, a Louisiana statute authorized liquor distributors to enforce agreements fixing minimum retail prices on their products against retailers who had not agreed to the price restrictions. The Court held that the statutory scheme amounted to resale price maintenance, in violation of the Sherman Act. To paraphrase the Court in *Schwegmann*, "when [the city] compels [landlords] to follow a parallel price policy, it demands private conduct which the Sherman Act forbids." *Id., at 389*. "[When] [landlords] are forced to abandon price competition, they are driven into a compact in violation of the spirit of the proviso which forbids 'horizontal' price fixing." *Ibid.* (emphasis in original).

## B

Even if I accepted the Court's analysis of the antitrust pre-emption issue, I would find a functional "combination" in this case between the city of Berkeley and its officials, on the one hand, and the landlords on the other -- a combination that operates to fix prices for rental units in Berkeley. To reach a contrary result, the Court simply states a conclusion -- that [\*277] "[a] restraint imposed unilaterally by government [\*\*\*\*32] does not become concerted action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law." *Ante*, at 267. The Court doesn't explain why this is so -- it simply baldly asserts that "[the] ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy." *Ibid.* The best I can make of this is that the [\*\*1055] Court apparently would interpret the Sherman Act to forbid only privately arranged price-fixing schemes. See *ante*, at 267-269. That interpretation would be plainly misguided.

Section 1 of the Sherman Act declares illegal restraints of trade resulting from any "contract, combination . . . , or conspiracy." 15 U. S. C. § 1. Understandably, that wording has led the Court to draw a "basic distinction" between concerted and independent action, and to hold that "[independent] action is not proscribed" by § 1. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984). However, until today we have not held, or indeed even suggested, that government-imposed restraints on economic actions [\*\*\*\*33] cannot constitute concerted action. Rather, both *Schwegmann* and *Midcal* held that state statutes which "had a [\*\*\*220] coercive effect upon parties who must obey the law" violated § 1.<sup>2</sup>

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<sup>2</sup> The Court would distinguish *Schwegmann* and *Midcal* based on the role of private parties in setting prices. *Ante*, at 268-269. The Court characterizes the statutory restraints imposed in those cases as "hybrid, in that nonmarket mechanisms merely enforce private marketing decisions." *Ante*, at 267. In this case, the Court argues, Berkeley's landlords have no control over the prices they charge. *Ibid.*

True, in both cases private parties, rather than the State, were largely responsible for setting the prices that retailers had to adhere to. However, the lack of state supervision over price-fixing activities was only relevant to whether the challenged statutes were immune from antitrust liability under *Parker v. Brown*, 317 U.S. 341 (1943), see *Midcal*, 445 U.S., at 105; neither decision drew the distinction the Court today creates between "unilateral" and "hybrid" governmental restraints. In both cases the challenged statute was found invalid simply because it compelled private parties to charge fixed prices for their products, conduct which the Sherman Act forbids. See *Schwegmann*, 341 U.S., at 389; *Midcal*, *supra*, at 103. The Court's "distinction" ignores the fact that price fixing has the same deleterious effect upon the competitive market whether prices are set by an administrative body or by private parties. Thus, regardless of whether Berkeley's landlords have some role in setting the prices they must charge, the coercive effect of the city's Ordinance results in concerted action violative of the Sherman Act.

[\*\*\*\*34] [\*278] If the Ordinance allowed the individual landlords ultimately to set their own rental prices, I might understand the Court's conclusion that any resulting price restraints did not necessarily result from collective action. Cf. *Monsanto Co. v. Spray-Rite Service Corp., supra, at 761*. However, because the Ordinance has the force of law, the city can compel landlords to do what the Sherman Act plainly forbids -- to fix prices for rental units in Berkeley. Regardless of whether the landlords "agree" to the prices charged, the circumstances here clearly "exclude the possibility that the [city and the landlords] were acting independently." *465 U.S., at 764*. The Ordinance eliminates price competition more effectively than any private "agreement" ever could, and is therefore pre-empted by the Sherman Act. The Court's contrary conclusion does not further, as it argues, but rather distorts "traditional antitrust analysis." *Ante*, at 264.

## II

Ultimately, the Court is holding that a municipality's authority to protect the public welfare should not be constrained by the Sherman Act. That holding excludes a broad range of local government [\*\*\*\*35] anticompetitive activities from the reach of the antitrust laws. This flies in the face of the fact that Congress has not enacted such a broad antitrust exemption for municipalities. See *Community Communications Co. v. Boulder*, *455 U.S. 40 (1982)*; *Lafayette v. Louisiana Power & Light Co.*, *435 U.S. 389 (1978)*; cf. *15 U. S. C. § 35(a) (1982 ed., Supp. II)* (immunizing local governments [\*279] only from liability for damages for violations of the antitrust laws). "In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, . . . we [have been] especially unwilling to presume that [\*\*1056] Congress intended to exclude anticompetitive municipal action [\*\*\*221] from their reach." *Lafayette, supra, at 412-413* (plurality opinion). "The *Parker* state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution. But this principle contains its own limitation: Ours [\*\*\*\*36] is a 'dual system of government,' *Parker*, *317 U.S., at 351* (emphasis added), which has no place for sovereign cities." *Community Communications Co. v. Boulder, supra, at 53*. Of course, our decisions do not foreclose municipalities from enacting anticompetitive measures in the public interest, but only require that such actions be state-authorized and be implemented pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation or monopoly service. See *455 U.S., at 52*. Berkeley's Ordinance plainly is not exempt from antitrust scrutiny under this standard.

Appellees suggest that three considerations support their argument that the Ordinance implements a clearly articulated and affirmatively expressed state policy authorizing municipalities to enact rent control measures: (1) the state legislature's 1972 ratification of a city rent control charter amendment; (2) the California Supreme Court's decision in *Birkenfeld v. City of Berkeley*, *17 Cal. 3d 129, 550 P. 2d 1001 (1976)*, which ultimately invalidated that amendment; and (3) the [\*\*\*\*37] city's state-law obligation to provide affordable housing. None of these considerations support appellees' position.

First, in 1972, Berkeley adopted a rent control charter amendment, which was approved by concurrent resolution of [\*280] both houses of the state legislature.<sup>3</sup> There are serious doubts that this purely *pro forma* approval would qualify the amendment for the *Parker* exemption. See *Cantor v. Detroit Edison Co.*, *428 U.S. 579 (1976)*. In any event, that amendment was subsequently invalidated by the California Supreme Court, and the legislature's actions respecting its passage afford no support for the claimed exemption of the *current* Ordinance from antitrust scrutiny.

[\*\*\*\*38] Second, the *Birkenfeld* decision, while invalidating Berkeley's rent control amendment, found state authority for such measures in constitutional provisions conferring upon cities the power to "make and enforce . . . all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." *17 Cal. 3d, at 140, 550 P. 2d, at 1009-1010*. But we have made clear that such general grants of authority do not constitute the required mandate to engage in conduct that necessarily constitutes a violation of the antitrust laws. See *Community*

<sup>3</sup> At that time, the State Constitution required the legislature to approve city charter amendments. See *Birkenfeld v. City of Berkeley*, *17 Cal. 3d, 129, 137, n. 2, 550 P. 2d, 1001, 1007, n. 2 (1976)*. In 1974, the State Constitution was amended to eliminate this requirement.

Communications Co., 455 U.S., at 55. "Acceptance of such a proposition . . . would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." [\*\*\*222] *Id., at 56.*

Third, state law requires cities to "make adequate provision for the housing needs of all economic segments of the community." Cal. Govt. Code Ann. § 65580(d) (West 1983). But, although appellees argue that rent control measures are a "foreseeable result" of these statutory obligations, see Hallie v. Eau Claire, 471 U.S. 34 (1985), [\*\*\*\*39] those laws are expressly neutral with respect to a city's authority to impose rent controls. California Govt. Code Ann. § 65589(b) (West 1983) expressly provides that "nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls." [\*281] See also Cal. Health & Safety Code Ann. § 50202 (West Supp. 1986) ("[Nothing] in this division shall authorize the imposition of rent regulations [\*\*1057] or controls"). The requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive." Community Communications Co., supra, at 55 (emphasis in original). Plainly, by that standard the Ordinance does not qualify for the *Parker* exemption from antitrust liability.

### III

Finally, appellees suggest that a finding of pre-emption in this case will severely restrict a municipality's authority to enact a variety of measures in the public interest. "But this argument is simply an attack upon the wisdom of the longstanding congressional commitment [\*\*\*\*40] to the policy of free markets and open competition embodied in the antitrust laws." Community Communications Co., supra, at 56. Congress may ultimately agree with appellees' argument, and may choose to amend the antitrust laws to grant municipalities broad discretion to enact anticompetitive measures in the public interest. Pending such amendment, however, only a clearly articulated and affirmatively expressed state policy will exempt ordinances like this from the reach of the Sherman Act.

## References

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54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 15, 18, 20, 45

12 Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade 46:65, 48:66, 48:101

18 Am Jur PI & Pr Forms (Rev), Monopolies, Restraints of Trade, and Unfair Trade Practices, Forms 12, 21

24 Am Jur Trials 1, Defending Antitrust Lawsuits

### 15 USCS 1

US L Ed Digest, Municipal Corporations 36; Restraints of Trade, Monopolies, and Unfair Trade Practices 10, 37

Index to Annotations, Restraints of Trade and Monopolies

Annotation References:

What constitutes "state action" [\*\*\*\*41] under rule exempting state and local governmental action from antitrust laws. 70 L Ed 2d 973.

Supreme Court's views as to what constitutes per se illegal "price fixing" under the Sherman Act (15 USCS 1 et seq.). 64 L Ed 2d 997.

Valid governmental action as conferring immunity or exemption from private liability under the federal antitrust laws. 12 ALR Fed 329.



## Matsushita Elec. Indus. Co. v. Zenith Radio Corp.

Supreme Court of the United States

November 12, 1985, Argued ; March 26, 1986, Decided

No. 83-2004

### **Reporter**

475 U.S. 574 \*; 106 S. Ct. 1348 \*\*; 89 L. Ed. 2d 538 \*\*\*; 1986 U.S. LEXIS 38 \*\*\*\*; 54 U.S.L.W. 4319; 1986-1 Trade Cas. (CCH) P67,004; 4 Fed. R. Serv. 3d (Callaghan) 368

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD, ET AL. v. ZENITH RADIO CORP. ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

**Disposition:** [723 F.2d 238](#), reversed and remanded.

## **Core Terms**

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prices, conspiracy, predatory, petitioners', losses, conspirators, summary judgment, profits, respondents', antitrust, motive, factfinder, monopoly, alleged conspiracy, district court, competitors, direct evidence, genuine issue, Sherman Act, anti trust law, company rule, predator, market price, below-cost, television, products, schemes, cases, drive, summary judgment motion

## **LexisNexis® Headnotes**

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

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

### **[HN1](#) [down arrow] Summary Judgment, Supporting Materials**

See [Fed. R. Civ. P. 56\(e\)](#).

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

Civil Procedure > Judgments > Summary Judgment > General Overview

### **[HN2](#) [down arrow] Entitlement as Matter of Law, Genuine Disputes**

When a moving party has carried its burden under [Fed. R. Civ. P. 56\(c\)](#), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the nonmoving

party must come forward with specific facts showing that there is a genuine issue for trial. Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.

[Antitrust & Trade Law > Sherman Act > Remedies > Damages](#)

[Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview](#)

[Evidence > Inferences & Presumptions > Inferences](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Antitrust & Trade Law > Sherman Act > Remedies > General Overview](#)

[Evidence > Inferences & Presumptions > General Overview](#)

### [\*\*HN3\*\* \[↓\] Remedies, Damages](#)

**Antitrust law** limits the range of permissible inferences from ambiguous evidence in an antitrust case under [§ 1](#) of the Sherman Act. Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of [§ 1](#) of the Sherman Act must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements](#)

[Evidence > Inferences & Presumptions > General Overview](#)

### [\*\*HN4\*\* \[↓\] Antitrust & Trade Law, Sherman Act](#)

In an antitrust case, courts should not permit fact-finders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter pro-competitive conduct.

[Antitrust & Trade Law > Sherman Act > General Overview](#)

[Evidence > Inferences & Presumptions > General Overview](#)

### [\*\*HN5\*\* \[↓\] Antitrust & Trade Law, Sherman Act](#)

Conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy.

## **Lawyers' Edition Display**

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### **Decision**

Evidence of alleged predatory pricing conspiracy by Japanese television manufacturers held insufficient to preclude summary judgment dismissing antitrust action.

## Summary

American manufacturers of consumer electronic products, principally television sets, brought suit against a group of their Japanese competitors in the United States District Court for the Eastern District of Pennsylvania, alleging that these competitors had violated 1 and 2 of the Sherman Act ([15 USCS 1, 2](#)), 2(a) of the Robinson-Patman Act ([15 USCS 13\(a\)](#)), and other federal statutes. This lawsuit claimed that the Japanese companies had conspired since the 1950's to drive domestic firms from the American market, by maintaining artificially high prices for these products in Japan while selling them at a loss in the United States. In a series of decisions, the District Court excluded the bulk of the evidence on which the American companies had relied. Finally, the District Court granted the Japanese companies' motion for summary judgment dismissing the Sherman Act and Robinson-Patman Act claims, stating that it found no significant probative evidence that the Japanese companies had entered into an agreement or acted in concert with respect to exports in any way that could have injured the American firms (*513 F Supp 1100*). The United States Court of Appeals for the Third Circuit reversed and remanded for further proceedings, overturning the District Court's evidentiary rulings and determining that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out domestic competitors, funded by excess profits obtained in the Japanese market. Pointing in part to evidence of an agreement among the Japanese companies and their government to set minimum export prices, of the companies' common practice of undercutting the minimum prices through rebate schemes which they concealed from the governments of both countries, and of a further agreement among the companies to limit the number of their American distributors, the Court of Appeals concluded that there was direct evidence of at least some kinds of concerted action by the companies, and that precedents restricting the inference of conspiracy from purely circumstantial evidence of conscious parallel conduct were therefore not dispositive in this case ([723 F2d 238](#)).

On certiorari, the United States Supreme Court reversed and remanded the case for further proceedings. In an opinion by Powell, J., joined by Burger, Ch. J., and Marshall, Rehnquist, and O'Connor, JJ., it was held that the Court of Appeals had applied improper standards in evaluating the summary judgment, in that (1) the "direct evidence of concert of action" on which the Court of Appeals relied, consisting of evidence of other combinations among the Japanese companies, had little if any relevance to the alleged predatory pricing conspiracy, since a conspiracy to raise profits in one market did not tend to show a conspiracy to sustain losses in another and the remaining combinations showed a tendency to raise prices; and (2) the Court of Appeals had failed to consider the absence of a plausible motive for the Japanese companies to engage in such a conspiracy, which involved substantial profit losses and showed little likelihood of success.

White, J., joined by Brennan, Blackmun, and Stevens, JJ., dissented, expressing the view (1) that the Court of Appeals had relied on the evidence of combinations other than the alleged predatory pricing conspiracy not to support a finding of antitrust injury to the American companies, but simply and correctly as direct evidence of concert of action among the Japanese companies distinguishing this case from traditional "conscious parallelism" cases, and (2) that the Court of Appeals was not required to engage in academic discussions about the likelihood of predatory pricing, but properly determined that expert testimony presented by the American companies was sufficient to create a genuine factual issue regarding long-term, below-cost sales by the Japanese companies.

## Headnotes

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APPEAL §1267 > APPEAL §1750 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §10 > SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §6 > predatory pricing conspiracy -- irrelevant evidence and absence of motive -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C]

475 U.S. 574, \*574; 106 S. Ct. 1348, \*\*1348; 89 L. Ed. 2d 538, \*\*\*538; 1986 U.S. LEXIS 38, \*\*\*\*1

In an action by American manufacturers of consumer electronic products which accuse their Japanese competitors of a conspiracy to monopolize the American market through predatory pricing, in violation of 1 and 2 of the Sherman Act ([15 USCS 1, 2](#)) and 2(a) of the Robinson-Patman Act ([15 USCS 13\(a\)](#)), a federal Court of Appeals applies improper standards in overturning a summary judgment entered by a federal District Court in favor of the Japanese companies on these claims, where (1) the "direct evidence of concert of action" on which the Court of Appeals relies, consisting of evidence of other combinations among the Japanese companies to raise prices in Japan, fix minimum export prices, and limit the number of distributors of their products in the American market, has little if any relevance to the alleged predatory pricing conspiracy, since a conspiracy to raise profits in one market does not tend to show a conspiracy to sustain losses in another and the remaining combinations show a tendency to raise prices; and (2) the Court of Appeals fails to consider the absence of a plausible motive for the Japanese companies to engage in such a conspiracy, which involves substantial profit losses and shows little likelihood of success; on remand, the Court of Appeals is free to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find the existence of such a conspiracy. (White, Brennan, Blackmun, and Stevens, JJ., dissented from this holding.)

APPEAL §1087.5 > certiorari -- point not raised in petition > Headnote:

[LEdHN\[2A\]](#) [blue arrow] [2A] [LEdHN\[2B\]](#) [blue arrow] [2B]

The United States Supreme Court will not review a Court of Appeals decision, which reversed a summary judgment dismissing claims under a federal statute, where these claims are not mentioned in the questions presented in the petition for certiorari and have not been independently argued by the parties.

INTERNATIONAL LAW §6 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §21 > acts in foreign countries -- application of antitrust laws -- > Headnote:

[LEdHN\[3A\]](#) [blue arrow] [3A] [LEdHN\[3B\]](#) [blue arrow] [3B]

American manufacturers cannot recover antitrust damages from Japanese competitors based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations' economies; the Sherman Act ([15 USCS 1 et seq.](#)) reaches conduct outside the borders of the United States, but only when the conduct has an effect on American commerce.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > parties entitled to damages -- lack of injury from antitrust violation -- > Headnote:

[LEdHN\[4\]](#) [blue arrow] [4]

American manufacturers cannot recover antitrust damages from Japanese competitors for any conspiracy by the latter to charge higher than competitive prices in the American market, as by setting minimum export prices in cooperation with the Japanese government, since, although such conduct would violate the Sherman Act (15 USCS 1-7), it could not injure the American companies; similarly, the American companies cannot recover for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output, such as the agreement among the Japanese companies limiting the number of their American distributors, since such restrictions, though harmful to competition, actually benefit competitors by making supracompetitive pricing more attractive.

475 U.S. 574, \*574; 106 S. Ct. 1348, \*\*1348; 89 L. Ed. 2d 538, \*\*\*538; 1986 U.S. LEXIS 38, \*\*\*\*1

EVIDENCE §979 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §10 > antitrust conspiracy -- direct evidence -- actions not creating claim for damages -- > Headnote:

[LEdHN\[5\]](#) [5]

Since neither the alleged supracompetitive pricing by Japanese manufacturers in Japan, as conduct not affecting American commerce, nor the agreements among these manufacturers to limit the number of their distributors in the United States and to set minimum export prices, as conduct not injurious to their American competitors, can by themselves give competing American manufacturers a cognizable claim against the Japanese companies for antitrust damages, it is improper to treat evidence of these alleged conspiracies as direct evidence of a further conspiracy that injured the American companies.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > parties entitled to damages -- cognizable injury -- > Headnote:

[LEdHN\[6A\]](#) [6A] [LEdHN\[6B\]](#) [6B]

However one decides to describe the contours of an alleged conspiracy to violate the antitrust laws, parties suing for damages therefrom must show that the conspiracy caused them an injury for which the antitrust laws provide relief.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > predatory pricing -- requisites for antitrust injury -- > Headnote:

[LEdHN\[7A\]](#) [7A] [LEdHN\[7B\]](#) [7B]

In an action under 1 of the Sherman Act ([15 USCS 1](#)) by American manufacturers who allege a predatory pricing conspiracy by their Japanese competitors, the American companies have not suffered an antitrust injury unless the Japanese companies have conspired to drive them out of the relevant markets by (1) pricing below the level necessary to sell their products, or (2) pricing below some appropriate measure of cost; they may not complain of conspiracies that set maximum prices above market levels, or that set minimum prices at any level. (White, Brennan, Blackmun, and Stevens, JJ., dissented from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §10 > SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §4 > antitrust conspiracy claim -- > Headnote:

[LEdHN\[8\]](#) [8]

In order for an action by American manufacturers, charging their Japanese competitors with a conspiracy to violate 1 and 2 of the Sherman Act ([15 USCS 1, 2](#)) and 2(a) of the Robinson-Patman Act ([15 USCS 13\(a\)](#)), to survive the Japanese companies' motion for summary judgment, the American companies must establish that there is a genuine issue of material fact as to whether the Japanese companies entered into an illegal conspiracy that caused the American companies to suffer a cognizable injury.

475 U.S. 574, \*574; 106 S. Ct. 1348, \*\*1348; 89 L. Ed. 2d 538, \*\*\*538; 1986 U.S. LEXIS 38, \*\*\*\*1

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §10 > SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §4 > antitrust conspiracy claim -- showing of injury -- > Headnote:

[LEdHN\[9\]](#) [9]

In order for an action by American manufacturers, charging their Japanese competitors with various conspiracies in restraint of trade, to survive the Japanese companies' motion for summary judgment, the American companies must not only show a conspiracy in violation of the antitrust laws, but must also show an injury to them resulting from the illegal conduct; since, except for an alleged conspiracy to monopolize the American market through predatory pricing, the alleged conspiracies could not have caused the American companies to suffer an antitrust injury because they actually tended to benefit them, evidence of these "other" conspiracies cannot defeat the motion for summary judgment unless, in context, it raises a genuine issue concerning the existence of a predatory pricing conspiracy.

SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §4 > genuine issue of material fact -- > Headnote:

[LEdHN\[10\]](#) [10]

When a party moving for summary judgment has carried its burden under [\*Rule 56\(c\) of the Federal Rules of Civil Procedure\*](#) of demonstrating the absence of a genuine issue of material fact, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts; the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial; where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §10 > RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §4 > antitrust conspiracy claim -- implausibility -- > Headnote:

[LEdHN\[11A\]](#) [11A] [LEdHN\[11B\]](#) [11B]

In an action by American manufacturers charging their Japanese competitors with a conspiracy to monopolize the American market through predatory pricing, if the factual context renders the claim implausible--if the claim is one that simply makes no economic sense--then the American companies must come forward with more persuasive evidence to support their claim than would otherwise be necessary in order to defeat the Japanese companies' motion for summary judgment; the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a "genuine issue for trial" exists within the meaning of [\*Rule 56\(e\) of the Federal Rules of Civil Procedure\*](#), since, if the Japanese companies had no rational economic motive to conspire, and their conduct is consistent with other, equally plausible explanations such as competitive behavior or an attempt to raise prices, the conduct does not give rise to an inference of conspiracy. (White, Brennan, Blackmun, and Stevens, JJ., dissented from this holding.)

SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §5 > inferences in favor of nonmoving party -- > Headnote:

[LEdHN\[12\]](#) [12]

475 U.S. 574, \*574; 106 S. Ct. 1348, \*\*1348; 89 L. Ed. 2d 538, \*\*\*538; 1986 U.S. LEXIS 38, \*\*\*\*1

On summary judgment, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion.

EVIDENCE §394 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §10 > inferences as to conspiracy -- antitrust case -- > Headnote:

[LEdHN\[13\]](#) [13]

**Antitrust law** limits the range of permissible inferences from ambiguous evidence in a case under 1 of the Sherman Act ([15 USCS 1](#)); thus, conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §10 > SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §4 > TRIAL §197 > antitrust conspiracy -- possibility of independent action -- > Headnote:

[LEdHN\[14\]](#) [14]

In order to survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of 1 of the Sherman Act ([15 USCS 1](#)) must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §10 > SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §4 > antitrust conspiracy claim -- competing inferences -- > Headnote:

[LEdHN\[15\]](#) [15]

In an action by American manufacturers charging their Japanese competitors with a conspiracy to monopolize the American market through predatory pricing, the American companies, in order to defeat a motion for summary judgment, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed them.

## Syllabus

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Petitioners are 21 Japanese corporations or Japanese-controlled American corporations that manufacture and/or sell "consumer electronic products" (CEPs) (primarily television sets). Respondents are American corporations that manufacture and sell television sets. In 1974, respondents brought an action in Federal District Court, alleging that petitioners, over a 20-year period, had illegally conspired to drive American firms from the American CEP market by engaging in a scheme to fix and maintain artificially high prices for television sets sold by petitioners in Japan and, at the same time, to fix and maintain low prices for the sets exported to and sold in the United States. Respondents claim that various portions of this scheme violated, *inter alia*, §§ 1 and 2 of the Sherman Act, § 2(a) of the Robinson-Patman Act, and § 73 of the Wilson Tariff Act. After several years of discovery, petitioners moved for summary judgment on all claims. The District Court then directed the parties to file statements listing all the documentary evidence that would be [\*\*\*\*2] offered if the case went to trial. After the statements were filed, the court found the bulk of the evidence on which respondents relied was inadmissible, that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged conspiracy, and that any inference of

conspiracy was unreasonable. Summary judgment therefore was granted in petitioners' favor. The Court of Appeals reversed. After determining that much of the evidence excluded by the District Court was admissible, the Court of Appeals held that the District Court erred in granting a summary judgment and that there was both direct and circumstantial evidence of a conspiracy. Based on inferences drawn from the evidence, the Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market.

*Held:* The Court of Appeals did not apply proper standards in evaluating the District Court's decision to grant petitioners' motion for summary judgment. Pp. 582-598.

(a) The "direct evidence" on which the Court of Appeals [\*\*\*3] relied -- petitioners' alleged supracompetitive pricing in Japan, the "five company rule" by which each Japanese producer was permitted to sell only to five American distributors, and the "check prices" (minimum prices fixed by agreement with the Japanese Government for CEPs exported to the United States) insofar as they established minimum prices in the United States -- cannot by itself give respondents a cognizable claim against petitioners for antitrust damages. Pp. 582-583.

(b) To survive petitioners' motion for a summary judgment, respondents must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. If the factual context renders respondents' claims implausible, *i. e.*, claims that make no economic sense, respondents must offer more persuasive evidence to support their claims than would otherwise be necessary. To survive a motion for a summary judgment, a plaintiff seeking damages for a violation of [§ 1](#) of the Sherman Act must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. Thus, respondents [\*\*\*4] here must show that the inference of a conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. Pp. 585-588.

(c) Predatory pricing conspiracies are by nature speculative. They require the conspirators to sustain substantial losses in order to recover uncertain gains. The alleged conspiracy is therefore implausible. Moreover, the record discloses that the alleged conspiracy has not succeeded in over two decades of operation. This is strong evidence that the conspiracy does not in fact exist. The possibility that petitioners have obtained supracompetitive profits in the Japanese market does not alter this assessment. Pp. 588-593.

(d) Mistaken inferences in cases such as this one are especially costly, because they chill the very conduct that the antitrust laws are designed to protect. There is little reason to be concerned that by granting summary judgment in cases where the evidence of conspiracy is speculative or ambiguous, courts will encourage conspiracies. Pp. 593-595.

(e) The Court of Appeals erred in two respects: the "direct evidence" on which it relied had little, if any, relevance [\*\*\*5] to the alleged predatory pricing conspiracy, and the court failed to consider the absence of a plausible motive to engage in predatory pricing. In the absence of any rational motive to conspire, neither petitioners' pricing practices, their conduct in the Japanese market, nor their agreements respecting prices and distributions in the American market sufficed to create a "genuine issue for trial" under [Federal Rule of Civil Procedure 56\(e\)](#). On remand, the Court of Appeals may consider whether there is other, unambiguous evidence of the alleged conspiracy. Pp. 595-598.

**Counsel:** Donald J. Zoeller argued the cause for petitioners. With him on the briefs were John L. Altieri, Jr., Harold G. Levison, Peter J. Gartland, James S. Morris, Kevin R. Keating, Charles F. Schirmeister, Ira M. Millstein, A. Paul Victor, Jeffrey L. Kessler, Carl W. Schwarz, Michael E. Friedlander, William H. Barrett, Donald F. Turner, and Henry T. Reath.

Charles F. Rule argued the cause pro hac vice for the United States as amicus curiae urging reversal. With him on the brief were Acting Solicitor General Wallace, Charles S. Stark, Robert B. Nicholson, Edward T. Hand, Richard P. Larm, Abraham D. Sofaer, and Elizabeth [\*\*\*6] M. Teel.

Edwin P. Rome argued the cause for respondents. With him on the brief were William H. Roberts, Arnold I. Kalman, Philip J. Curtis, and John Borst, Jr.\*

**Judges:** POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and MARSHALL, REHNQUIST, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, post, p. 598.

**Opinion by:** POWELL

## Opinion

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[\*576] [\*\*\*546] [\*\*1350] JUSTICE POWELL delivered the opinion of the Court.

[LEdHN\[1A\]](#) [1A]This case requires that we again consider the standard district courts must apply [\*\*1351] when deciding whether to grant summary judgment in an antitrust conspiracy case.

I

Stating the facts of this case is a daunting task. The opinion of the Court of Appeals for the Third Circuit runs to 69 pages; the primary [\*\*\*\*7] opinion of the District Court is more than three times as long. *In re Japanese Electronic Products* [\*577] *Antitrust Litigation*, 723 F.2d 238 (CA3 1983); 513 F.Supp. 1100 (ED Pa. 1981). Two respected District Judges each have authored a number of opinions in this case; the published ones alone would fill an entire volume of the Federal Supplement. In addition, the parties have filed a 40-volume appendix in this Court that is said to contain the essence of the evidence on which the District Court and the Court of Appeals based their respective decisions.

We will not repeat what these many opinions have stated and restated, or summarize the mass of documents that constitute the record on appeal. Since we review only the standard applied by the Court of Appeals in deciding this case, and not the weight assigned to particular pieces of evidence, we find it unnecessary to state the facts in great detail. What follows is a summary of this case's long history.

A

Petitioners, defendants below, are 21 corporations that manufacture or sell "consumer electronic products" (CEPs) - - for the most part, television sets. Petitioners include both Japanese [\*\*\*\*8] manufacturers of CEPs and American firms, controlled by Japanese parents, that sell the Japanese-manufactured products. Respondents, plaintiffs below, are Zenith Radio Corporation (Zenith) and National Union Electric Corporation (NUE). Zenith is an American firm that manufactures and sells television sets. NUE is the corporate successor to Emerson Radio Company, an American firm that manufactured and sold television sets until 1970, when it withdrew from the market after sustaining substantial losses. Zenith and NUE began this lawsuit in 1974,<sup>1</sup> claiming that petitioners had illegally conspired to drive [\*578] American firms from the American CEP market. According to respondents, the gist of this conspiracy [\*\*\*547] was a "scheme to raise, fix and maintain artificially *high* prices for television receivers sold by [petitioners] in Japan and, at the same time, to fix and maintain *low* prices for television receivers exported to

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\* Briefs of amici curiae urging reversal were filed for the Government of Japan by Stephen M. Shapiro; and for the American Association of Exporters and Importers et al. by Robert Herzstein and Hadrian R. Katz.

Briefs of amici curiae were filed for the Government of Australia et al. by Mark R. Joelson and Joseph P. Griffin; and for the Semiconductor Industry Association by Joseph R. Creighton.

<sup>1</sup> NUE had filed its complaint four years earlier, in the District Court for the District of New Jersey. Zenith's complaint was filed separately in 1974, in the Eastern District of Pennsylvania. The two cases were consolidated in the Eastern District of Pennsylvania in 1974.

475 U.S. 574, \*578; 106 S. Ct. 1348, \*\*1351; 89 L. Ed. 2d 538, \*\*\*547; 1986 U.S. LEXIS 38, \*\*\*\*8

and sold in the United States."<sup>2</sup> [723 F.2d, at 251](#) (quoting respondents' preliminary pretrial memorandum). These "low prices" were allegedly at levels that produced substantial losses for petitioners. *513 F.Supp.*, at 1125. [\*\*\*\*9] The conspiracy allegedly began as early as 1953, and according to respondents was in full operation by sometime in the late 1960's. Respondents claimed that various portions of this scheme violated [§§ 1](#) and [2](#) of the Sherman Act, [§ 2\(a\)](#) of the Robinson-Patman Act, § 73 of the Wilson Tariff Act, and the Antidumping Act of 1916.

After several years of detailed discovery, petitioners filed motions for summary judgment on all claims against them. The District Court directed the parties to file, with preclusive effect, "Final Pretrial Statements" listing all the documentary evidence that would be offered if the case proceeded to trial. Respondents filed such a statement, and petitioners responded with a series of motions challenging the admissibility [\*\*\*\*10] of respondents' evidence. In three detailed opinions, the District Court found the bulk of the evidence on which Zenith and NUE relied inadmissible.<sup>2</sup>

[\*\*1352] [LEdHN\[2A\]\[↑\]](#) [2A]The District Court then turned to petitioners' motions for summary judgment. In an opinion spanning 217 pages, the court found that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged [\*579] conspiracy. At bottom, the court found, respondents' [\*\*\*\*11] claims rested on the inferences that could be drawn from petitioners' parallel conduct in the Japanese and American markets, and from the effects of that conduct on petitioners' American competitors. *513 F.Supp.*, at 1125-1127. After reviewing the evidence both by category and *in toto*, the court found that any inference of conspiracy was unreasonable, because (i) some portions of the evidence suggested that petitioners conspired in ways that did not injure respondents, and (ii) the evidence that bore directly on the alleged price-cutting conspiracy did not rebut the more plausible inference that petitioners were cutting prices to compete in the American market and not to monopolize it. Summary judgment therefore was granted on respondents' claims under [§ 1](#) of the Sherman Act and the Wilson Tariff Act. Because the Sherman Act [§ 2](#) claims, which alleged that petitioners had combined to monopolize the American CEP market, were functionally indistinguishable from the [§ 1](#) claims, the court dismissed them also. Finally, the court found that the Robinson-Patman Act claims depended on the same supposed conspiracy as the Sherman Act claims. Since the court had found [\*\*\*\*12] no genuine issue of fact as to the conspiracy, [\*\*\*548] it entered judgment in petitioners' favor on those claims as well.<sup>3</sup>

[\*\*\*\*13] [\*580] B

The Court of Appeals for the Third Circuit reversed.<sup>4</sup> The court began by examining the District Court's evidentiary rulings, and determined that much of the evidence excluded by the District Court was in fact admissible. [723 F.2d, at 260-303](#). These evidentiary rulings are not before us. See *471 U.S. 1002* (1985) (limiting grant of certiorari).

<sup>2</sup>The inadmissible evidence included various government records and reports, *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, *505 F.Supp. 1125 (ED Pa. 1980)*, business documents offered pursuant to various hearsay exceptions, *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, *505 F.Supp. 1190 (ED Pa. 1980)*, and a large portion of the expert testimony that respondents proposed to introduce. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, *505 F.Supp. 1313 (ED Pa. 1981)*.

<sup>3</sup>The District Court ruled separately that petitioners were entitled to summary judgment on respondents' claims under the Antidumping Act of 1916. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, *494 F.Supp. 1190 (ED Pa. 1980)*. Respondents appealed this ruling, and the Court of Appeals reversed in a separate opinion issued the same day as the opinion concerning respondents' other claims. *In re Japanese Electronic Products Antitrust Litigation*, *723 F.2d 319 (CA3 1983)*.

[LEdHN\[2B\]\[↑\]](#) [2B]Petitioners ask us to review the Court of Appeals' Antidumping Act decision along with its decision on the rest of this mammoth case. The Antidumping Act claims were not, however, mentioned in the questions presented in the petition for certiorari, and they have not been independently argued by the parties. See this Court's Rule 21.1(a). We therefore decline the invitation to review the Court of Appeals' decision on those claims.

On the merits, and based on the newly enlarged record, the court found that the District Court's summary judgment decision was improper. The court acknowledged that "there are legal limitations upon the inferences which may be drawn from circumstantial evidence," [723 F.2d, at 304](#), but it found that "the legal problem . . . is different" when "there is direct evidence of concert of action." *Ibid.* Here, the court concluded, "there is both direct evidence of certain [\*\*\*\*14] kinds of concert of action and circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occurred." [Id., at 304-305](#). Thus, the court reasoned, cases concerning the limitations on inferring conspiracy from ambiguous evidence were not dispositive. [Id., at 305](#). Turning to the evidence, the court determined that a factfinder reasonably could draw the following conclusions:

1. The Japanese market for CEPs was characterized by oligopolistic behavior, [\*\*1353] with a small number of producers meeting regularly and exchanging information on price and other matters. [Id., at 307](#). This created the opportunity for a stable combination to raise both prices and profits in Japan. American firms could not attack such a combination because the Japanese Government imposed significant barriers to entry. *Ibid.*
2. Petitioners had relatively higher fixed costs than their American counterparts, and therefore needed to [\*581] operate at something approaching full capacity in order to make a profit. *Ibid.*
3. Petitioners' plant capacity exceeded the needs of the Japanese market. [\*\*\*\*15] *Ibid.*
4. By formal agreements arranged in cooperation with Japan's Ministry of International Trade and Industry (MITI), petitioners fixed minimum prices for CEPs exported to the American market. [Id., at 310](#). The parties refer to these prices as the "check [\*\*\*549] prices," and to the agreements that require them as the "check price agreements."
5. Petitioners agreed to distribute their products in the United States according to a "five company rule": each Japanese producer was permitted to sell only to five American distributors. *Ibid.*
6. Petitioners undercut their own check prices by a variety of rebate schemes. [Id., at 311](#). Petitioners sought to conceal these rebate schemes both from the United States Customs Service and from MITI, the former to avoid various customs regulations as well as action under the antidumping laws, and the latter to cover up petitioners' violations of the check-price agreements.

Based on inferences from the foregoing conclusions,<sup>5</sup> the Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, [\*\*\*\*16] which conspiracy was funded by excess profits obtained in the Japanese market. The court apparently did not consider whether it was as plausible to conclude that petitioners' price-cutting behavior was independent and not conspiratorial.

[\*582] The court found it unnecessary to address petitioners' claim that they could not be held liable under the antitrust laws for conduct that was compelled by a foreign sovereign. The claim, in essence, was that because MITI required petitioners to enter into the check-price agreements, liability could not be premised on those agreements. The court concluded [\*\*\*\*17] that this case did not present any issue of sovereign compulsion, because the check-price agreements were being used as "evidence of a low export price conspiracy" and not as an independent basis for finding antitrust liability. The court also believed it was unclear that the check prices in fact were mandated by the Japanese Government, notwithstanding a statement to that effect by MITI itself. [Id., at 315](#).

<sup>4</sup> As to 3 of the 24 defendants, the Court of Appeals affirmed the entry of summary judgment. Petitioners are the 21 defendants who remain in the case.

<sup>5</sup> In addition to these inferences, the court noted that there was expert opinion evidence that petitioners' export sales "generally were at prices which produced losses, often as high as twenty-five percent on sales." [723 F.2d, at 311](#). The court did not identify any direct evidence of below-cost pricing; nor did it place particularly heavy reliance on this aspect of the expert evidence. See n. 19, *infra*.

LEdHN[1B] [1B] We granted certiorari to determine (i) whether the Court of Appeals applied the proper standards in evaluating the District Court's decision to grant petitioners' motion for summary judgment, and (ii) whether petitioners could be held liable under the antitrust laws for a conspiracy in part compelled by a foreign sovereign. 471 U.S. 1002 (1985). We reverse on the first issue, but do not reach the second.

II

LEdHN[3A] [3A] LEdHN[4] [4] LEdHN[5] [5] We begin by emphasizing what respondents' claim is *not*. Respondents cannot recover antitrust damages based solely on an alleged cartelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations' economies. [\*\*1354] United States v. Aluminum Co. of America, 148 F.2d 416, 443 (CA2 1945) [\*\*\*\*18] (L. Hand, J.); 1 P. [\*\*\*550] Areeda & D. Turner, Antitrust Law para. 236d (1978).<sup>6</sup> Nor can respondents recover damages for [\*583] any conspiracy by petitioners to charge higher than competitive prices in the American market. Such conduct would indeed violate the Sherman Act, United States v. Trenton Potteries Co., 273 U.S. 392 (1927); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940), but it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price in CEPs. Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-489 (1977). Finally, for the same reason, respondents cannot recover for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output. Such restrictions, though harmful to competition, actually *benefit* competitors by making supra-competitive pricing more attractive. Thus, neither petitioners' alleged supracompetitive pricing in Japan, nor the five company rule that limited distribution in this country, nor the check prices insofar as they [\*\*\*\*19] established minimum prices in this country, can by themselves give respondents a cognizable claim against petitioners for antitrust damages. The Court of Appeals therefore erred to the extent that it found evidence of these alleged conspiracies to be "direct evidence" of a conspiracy that injured respondents. See 723 F.2d, at 304-305.

### LEdHN[3B] [3B]

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[\*584] LEdHN[6A] [6A] Respondents nevertheless argue that these supposed conspiracies, if not themselves grounds for recovery of antitrust damages, are circumstantial evidence of another conspiracy that *is* cognizable: a conspiracy to monopolize the American market by means of pricing below the market level.<sup>7</sup> The thrust of

<sup>6</sup> The Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962) ("A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries"). The effect on which respondents rely is the artificially depressed level of prices for CEPs in the United States.

Petitioners' alleged cartelization of the Japanese market could not have caused that effect over a period of some two decades. Once petitioners decided, as respondents allege, to reduce output and raise prices in the Japanese market, they had the option of either producing fewer goods or selling more goods in other markets. The most plausible conclusion is that petitioners chose the latter option because it would be more profitable than the former. That choice does not flow from the cartelization of the Japanese market. On the contrary, were the Japanese market perfectly competitive petitioners would still have to choose whether to sell goods overseas, and would still presumably make that choice based on their profit expectations. For this reason, respondents' theory of recovery depends on proof of the asserted price-cutting conspiracy in this country.

<sup>7</sup> Respondents also argue that the check prices, the five company rule, and the price fixing in Japan are all part of one large conspiracy that includes monopolization of the American market through predatory pricing. The argument is mistaken. However one decides to describe the contours of the asserted conspiracy -- whether there is one conspiracy or several -- respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief. Associated General Contractors of California, Inc. v. Carpenters, 459 U.S. 519, 538-540 (1983); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-

respondents' [\*\*\*551] argument is that petitioners used their monopoly profits from the Japanese market to fund a concerted campaign to price predatorily and thereby drive respondents and other American manufacturers of CEPs out of business. Once successful, according to respondents, petitioners would cartelize the American CEP market, restricting output and raising prices above the level that fair competition would produce. The resulting [\*\*1355] monopoly profits, respondents contend, would more than compensate petitioners for the losses they incurred through years of pricing below market level.

### LEdHN[6B] [↑] [6B]

[\*\*\*\*21] LEdHN[7A] [↑] [7A] The Court of Appeals found that respondents' allegation of a horizontal conspiracy to engage in predatory pricing,<sup>8</sup> [\*\*\*\*22] [\*585] if proved,<sup>9</sup> would be a *per se* violation of § 1 of the Sherman Act. 723 F.2d, at 306. Petitioners did not appeal from that conclusion. The issue in this case thus becomes whether respondents adduced sufficient evidence in support of their theory to survive summary judgment. We therefore examine the principles that govern the summary judgment determination.

### III

LEdHN[8] [↑] [8] LEdHN[9] [↑] [9] To survive petitioners' motion for summary judgment,<sup>10</sup> [\*\*\*\*24] respondents must establish that there [\*\*\*552] is a genuine issue of material [\*586] fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. Fed. Rule Civ. Proc. 56(e);<sup>11</sup> First

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489 (1977); see also Note, Antitrust Standing, Antitrust Injury, and the Per Se Standard, 93 Yale L.J. 1309 (1984). That showing depends in turn on proof that petitioners conspired to price predatorily in the American market, since the other conduct involved in the alleged conspiracy cannot have caused such an injury.

<sup>8</sup> Throughout this opinion, we refer to the asserted conspiracy as one to price "predatorily." This term has been used chiefly in cases in which a single firm, having a dominant share of the relevant market, cuts its prices in order to force competitors out of the market, or perhaps to deter potential entrants from coming in. *E. g., Southern Pacific Communications Co. v. American Telephone & Telegraph Co.*, 238 U. S. App. D. C. 309, 331-336, 740 F.2d 980, 1002-1007 (1984), cert. denied, 470 U.S. 1005 (1985). In such cases, "predatory pricing" means pricing below some appropriate measure of cost. *E. g., Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232-235 (CA1 1983); see *Utah Pipe Co. v. Continental Baking Co.*, 386 U.S. 685, 698, 701, 702, n. 14 (1967).

LEdHN[7B] [↑] [7B] There is a good deal of debate, both in the cases and in the law reviews, about what "cost" is relevant in such cases. We need not resolve this debate here, because unlike the cases cited above, this is a Sherman Act § 1 case. For purposes of this case, it is enough to note that respondents have not suffered an antitrust injury unless petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost. An agreement without these features would either leave respondents in the same position as would market forces or would actually benefit respondents by raising market prices. Respondents therefore may not complain of conspiracies that, for example, set maximum prices above market levels, or that set minimum prices at any level.

<sup>9</sup> We do not consider whether recovery should ever be available on a theory such as respondents' when the pricing in question is above some measure of incremental cost. See generally Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 709-718 (1975) (discussing cost-based test for use in § 2 cases). As a practical matter, it may be that only direct evidence of below-cost pricing is sufficient to overcome the strong inference that rational businesses would not enter into conspiracies such as this one. See Part IV-A, *infra*.

<sup>10</sup> Respondents argued before the District Court that petitioners had failed to carry their initial burden under Federal Rule of Civil Procedure 56(c) of demonstrating the absence of a genuine issue of material fact. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Cf. Catrett v. Johns-Manville Sales Corp., 244 U. S. App. D. C. 160, 756 F.2d 181, cert. granted, 474 U.S. 944 (1985). That issue was resolved in petitioners' favor, and is not before us.

<sup>11</sup> Rule 56(e) provides, in relevant part:

HN1 [↑] "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must

National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-289 (1968). This showing has two components. First, respondents must show more than a conspiracy [\*\*\*\*23] in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct. Respondents charge petitioners with a whole host of conspiracies in restraint of trade. Supra, at 582-583. Except for the alleged conspiracy to monopolize the American market through predatory pricing, these alleged conspiracies could not have caused respondents to suffer an "antitrust injury," [\*\*1356] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S., at 489, because they actually tended to benefit respondents. Supra, at 582-583. Therefore, unless, in context, evidence of these "other" conspiracies raises a genuine issue concerning the existence of a predatory pricing conspiracy, that evidence cannot defeat petitioners' summary judgment motion.

LEdHN[10] [10]Second, the issue of fact must be "genuine." Fed. Rules Civ. Proc. 56(c), (e). HN2 When the moving party has carried its burden under Rule 56(c),<sup>12</sup> its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. See DeLuca v. Atlantic Refining Co., 176 F.2d 421, 423 (CA2 1949) (L. Hand, J.), cert. denied, 338 U.S. 943 (1950); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (1983); Clark, Special Problems [\*587] in Drafting and Interpreting Procedural Codes and Rules, 3 Vand. L. Rev. 493, 504-505 (1950). Cf. Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944). [\*\*\*25] In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a *genuine issue for trial*." Fed. Rule Civ. Proc. 56(e) (emphasis added). See also Advisory Committee Note to 1963 Amendment of Fed. Rule Civ. Proc. 56(e), 28 U. S. C. App., p. 626 (purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial"). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." Cities Service, supra, at 289.

LEdHN[11A] [11A]It follows from these settled principles that if the factual context renders respondents' claim implausible -- if the claim is one that simply makes no economic sense -- respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary. *Cities Service* is instructive. [\*\*\*553] The issue in that case was whether [\*\*\*26] proof of the defendant's refusal to deal with the plaintiff supported an inference that the defendant willingly had joined an illegal boycott. Economic factors strongly suggested that the defendant had no motive to join the alleged conspiracy. 391 U.S., at 278-279. The Court acknowledged that, in isolation, the defendant's refusal to deal might well have sufficed to create a triable issue. Id., at 277. But the refusal to deal had to be evaluated in its factual context. Since the defendant lacked any rational motive to join the alleged boycott, and since its refusal to deal was consistent with the defendant's independent interest, the refusal to deal could not by itself support a finding of antitrust liability. Id., at 280.

LEdHN[12] [12]LEdHN[13] [13]LEdHN[14] [14]LEdHN[15] [15]Respondents correctly note that "[on] summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 [\*588] U.S. 654, 655 (1962). But HN3 limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto* [\*\*\*27] Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. Id., at 764. See also Cities Service, supra, at 280. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U.S., at 764. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that [\*\*1357] could not have harmed respondents. See Cities Service, supra, at 280.

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set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

<sup>12</sup> See n. 10, *supra*.

Petitioners argue that these principles apply fully to this case. According to petitioners, the alleged conspiracy is one that is economically irrational and practically infeasible. Consequently, petitioners contend, they had no motive to engage in the alleged predatory pricing conspiracy; indeed, they had a strong motive [\*\*\*\*28] *not* to conspire in the manner respondents allege. Petitioners argue that, in light of the absence of any apparent motive and the ambiguous nature of the evidence of conspiracy, no trier of fact reasonably could find that the conspiracy with which petitioners are charged actually existed. This argument requires us to consider the nature of the alleged conspiracy and the practical obstacles to its implementation.

#### IV

##### A

A predatory pricing conspiracy is by nature speculative. Any agreement to price below the competitive level requires the conspirators to forgo profits that free competition would offer them. The forgone profits may be considered an investment in the future. For the investment [\*\*\*554] to be rational, [\*589] the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered. As then-Professor Bork, discussing predatory pricing by a single firm, explained:

"Any realistic theory of predation recognizes that the predator as well as his victims will incur losses during the fighting, but such a theory supposes it may be a rational calculation for the predator to view the losses as an investment [\*\*\*\*29] in future monopoly profits (where rivals are to be killed) or in future undisturbed profits (where rivals are to be disciplined). The future flow of profits, appropriately discounted, must then exceed the present size of the losses." R. Bork, *The Antitrust Paradox* 145 (1978).

See also McGee, *Predatory Pricing Revisited*, 23 J. Law & Econ. 289, 295-297 (1980). As this explanation shows, the success of such schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits. The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain. Absent some assurance that the hoped-for monopoly will materialize, *and* that it can be sustained for a significant period of time, "[the] predator must make a substantial investment with no assurance that it will pay off." Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 268 (1981). [\*\*\*\*30] For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful. See, e. g., Bork, *supra*, at 149-155; Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2* of the Sherman Act, 88 Harv. L. Rev. 697, 699 (1975); Easterbrook, *supra*; Koller, *The Myth of Predatory Pricing -- An Empirical Study*, [\*590] 4 *Antitrust Law* & Econ. Rev. 105 (1971); McGee, *Predatory Price Cutting: The Standard Oil (N. J.) Case*, 1 J. Law & Econ. 137 (1958); McGee, *Predatory Pricing Revisited*, 23 J. Law & Econ., at 292-294. See also *Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d 76, 88 (CA2 1981) ("[Nowhere] in the recent outpouring of literature on the subject do commentators suggest that [predatory] pricing is either common or likely to increase"), cert. denied, 455 U.S. 943 (1982).

These observations apply even to predatory pricing by a *single firm* seeking monopoly power. In this case, respondents allege that a large number of firms have conspired over a period of many years to [\*\*\*\*31] [\*\*1358] charge below-market prices in order to stifle competition. Such a conspiracy is incalculably more difficult to execute than an analogous plan undertaken by a single predator. The conspirators must allocate the losses to be sustained during the conspiracy's operation, and must also allocate any gains to be realized from its success. Precisely because success is speculative and depends on a willingness to endure losses for an indefinite period, each conspirator has a strong incentive to cheat, letting its partners suffer the losses necessary to [\*\*\*555] destroy the competition while sharing in any gains if the conspiracy succeeds. The necessary allocation is therefore difficult to accomplish. Yet if conspirators cheat to any substantial extent, the conspiracy must fail, because its success depends on depressing the market price for *all* buyers of CEPs. If there are too few goods at the artificially low price to satisfy demand, the would-be victims of the conspiracy can continue to sell at the "real" market price, and the conspirators suffer losses to little purpose.

Finally, if predatory pricing conspiracies are generally unlikely to occur, they are especially [\*\*\*\*32] so where, as here, the prospects of attaining monopoly power seem slight. In order to recoup their losses, petitioners must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits [\*591] what they earlier gave up in below-cost prices. See *Northeastern Telephone Co. v. American Telephone & Telegraph Co., supra, at 89*; Areeda & Turner, 88 Harv. L. Rev., at 698. Two decades after their conspiracy is alleged to have commenced,<sup>13</sup> petitioners appear to be far from achieving this goal: the two largest shares of the retail market in television sets are held by RCA and respondent Zenith, not by any of petitioners. 6 App. to Brief for Appellant in No. 81-2331 (CA3), pp. 2575a-2576a. Moreover, those shares, which together approximate 40% of sales, did not decline appreciably during the 1970's. *Ibid.* Petitioners' collective share rose rapidly during this period, from one-fifth or less of the relevant markets to close to 50%. 723 F.2d. at 316.<sup>14</sup> Neither the District Court nor the Court of Appeals found, however, that petitioners' share presently [\*\*\*\*33] allows them to charge monopoly prices; to the contrary, respondents contend that the conspiracy is ongoing -- that petitioners are still artificially *depressing* the market price in order to drive Zenith out of the market. The data in the record strongly suggest that that goal is yet far distant.<sup>15</sup>

[\*\*\*\*34] [\*592] [\*\*1359] The [\*\*\*556] alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist. Since the losses in such a conspiracy accrue before the gains, they must be "repaid" with interest. And because the alleged losses have accrued over the course of two decades, the conspirators could well require a correspondingly long time to recoup. Maintaining supracompetitive prices in turn depends on the continued cooperation of the conspirators, on the inability of other would-be competitors to enter the market, and (not incidentally) on the conspirators' ability to escape antitrust liability for their *minimum* price-fixing cartel.<sup>16</sup> [\*\*\*35] Each of these factors weighs more heavily as the time needed to recoup losses grows. If the losses have been substantial -- as would likely be necessary

<sup>13</sup> NUE's complaint alleges that petitioners' conspiracy began as early as 1960; the starting date used in Zenith's complaint is 1953. NUE Complaint para. 52; Zenith Complaint para. 39.

<sup>14</sup> During the same period, the number of American firms manufacturing television sets declined from 19 to 13. 5 App. to Brief for Appellant in No. 81-2331 (CA3), p. 1961a. This decline continued a trend that began at least by 1960, when petitioners' sales in the United States market were negligible. *Ibid.* See Zenith Complaint paras. 35, 37.

<sup>15</sup> Respondents offer no reason to suppose that entry into the relevant market is especially difficult, yet without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time. Judge Easterbrook, commenting on this case in a law review article, offers the following sensible assessment:

"The plaintiffs [in this case] maintain that for the last fifteen years or more at least ten Japanese manufacturers have sold TV sets at less than cost in order to drive United States firms out of business. Such conduct cannot possibly produce profits by harming competition, however. If the Japanese firms drive some United States firms out of business, they could not recoup. Fifteen years of losses could be made up only by very high prices for the indefinite future. (The losses are like investments, which must be recovered with compound interest.) If the defendants should try to raise prices to such a level, they would attract new competition. There are no barriers to entry into electronics, as the proliferation of computer and audio firms shows. The competition would come from resurgent United States firms, from other foreign firms (Korea and many other nations make TV sets), and from defendants themselves. In order to recoup, the Japanese firms would need to suppress competition among themselves. On plaintiffs' theory, the cartel would need to last at least thirty years, far longer than any in history, even when cartels were not illegal. None should be sanguine about the prospects of such a cartel, given each firm's incentive to shave price and expand its share of sales. The predation recoupment story therefore does not make sense, and we are left with the more plausible inference that the Japanese firms did not sell below cost in the first place. They were just engaged in hard competition." Easterbrook, *The Limits of Antitrust*, 63 Texas L. Rev. 1, 26-27 (1984) (footnotes omitted).

<sup>16</sup> The alleged predatory scheme makes sense only if petitioners can recoup their losses. In light of the large number of firms involved here, petitioners can achieve this only by engaging in some form of price fixing *after* they have succeeded in driving competitors from the market. Such price fixing would, of course, be an independent violation of § 1 of the Sherman Act. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[\*593] in order to drive out the competition <sup>17</sup> -- petitioners would most likely have to sustain their cartel for years simply to break even.

Nor does the possibility that petitioners have obtained supracompetitive profits in the Japanese market change this calculation. Whether or not petitioners have the *means* to sustain substantial losses in this country over a long period of time, they have no *motive* to sustain such losses absent some strong likelihood that the alleged conspiracy in this country will eventually pay off. The courts below found no evidence of any such success, and -- as indicated above -- the facts actually are to the contrary: RCA and Zenith, not any of the petitioners, continue to hold the largest share of the American retail market in color television sets. More important, there is nothing to suggest any relationship between petitioners' profits in Japan and the amount petitioners could expect to gain from a conspiracy to [\*\*\*\*36] monopolize the American market. In the absence of any such evidence, the possible existence of supracompetitive profits in Japan simply cannot overcome the economic obstacles to the ultimate success of this alleged predatory conspiracy.<sup>18</sup>

B

[\*\*\*557] In *Monsanto*, we emphasized that [HN4](#)<sup>19</sup> courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct. *Monsanto*, 465 U.S., at 762-764. [\*594] Respondents, petitioners' [\*\*\*\*37] competitors, seek to hold petitioners liable for [\*\*1360] damages caused by the alleged conspiracy to cut prices. Moreover, they seek to establish this conspiracy indirectly, through evidence of other combinations (such as the check-price agreements and the five company rule) whose natural tendency is to raise prices, and through evidence of rebates and other price-cutting activities that respondents argue tend to prove a combination to suppress prices.<sup>19</sup> But cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect. See *Monsanto*, *supra*, at 763-764. "[We] must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (CA1 1983).

[\*\*\*\*38] In most cases, this concern must be balanced against the desire that illegal conspiracies be identified and punished. That balance is, however, unusually one-sided in cases such as this one. As we earlier explained, *supra, at 588-593*, predatory pricing schemes require conspirators to suffer losses in order eventually to realize their illegal gains; moreover, the [\*595] gains depend on a host of uncertainties, making such schemes more likely to fail than to succeed. These economic realities tend to make predatory pricing conspiracies self-deterring: unlike most other conduct that violates the antitrust laws, failed predatory pricing schemes are costly to the conspirators.

<sup>17</sup> The predators' losses must actually *increase* as the conspiracy nears its objective: the greater the predators' market share, the more products the predators sell; but since every sale brings with it a loss, an increase in market share also means an increase in predatory losses.

<sup>18</sup> The same is true of any supposed excess production capacity that petitioners may have possessed. The existence of plant capacity that exceeds domestic demand does tend to establish the ability to sell products abroad. It does not, however, provide a motive for selling at prices lower than necessary to obtain sales; nor does it explain why petitioners would be willing to *lose* money in the United States market without some reasonable prospect of recouping their investment.

<sup>19</sup> Respondents also rely on an expert study suggesting that petitioners have sold their products in the American market at substantial losses. The relevant study is not based on actual cost data; rather, it consists of expert opinion based on a mathematical construction that in turn rests on assumptions about petitioners' costs. The District Court analyzed those assumptions in some detail and found them both implausible and inconsistent with record evidence. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F.Supp., at 1356-1363. Although the Court of Appeals reversed the District Court's finding that the expert report was inadmissible, the court did not disturb the District Court's analysis of the factors that substantially undermine the probative value of that evidence. See [723 F.2d, at 277-282](#). We find the District Court's analysis persuasive. Accordingly, in our view the expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors, discussed in Part IV-A, *supra*, that suggest that such conduct is irrational.

See Easterbrook, *The Limits of Antitrust*, [63 Texas L. Rev. 1, 26 \(1984\)](#). Finally, unlike predatory pricing by a single firm, *successful* predatory pricing conspiracies involving a large number of firms can be identified and punished once they succeed, since some form of minimum price-fixing agreement would be necessary in order to reap the benefits of predation. Thus, there is little reason to be concerned that by granting summary judgment in cases where the [\*\*\*558] evidence of conspiracy [\*\*\*\*39] is speculative or ambiguous, courts will encourage such conspiracies.

V

[LEdHN\[1C\]](#) [↑] [1C]As our discussion in Part IV-A shows, petitioners had no motive to enter into the alleged conspiracy. To the contrary, as presumably rational businesses, petitioners had every incentive *not* to engage in the conduct with which they are charged, for its likely effect would be to generate losses for petitioners with no corresponding gains. Cf. [Cities Service, 391 U.S., at 279](#). The Court of Appeals did not take account of the absence of a plausible motive to enter into the alleged predatory pricing conspiracy. It focused instead on whether there was "direct evidence of concert of action." [723 F.2d, at 304](#). The Court of Appeals erred in two respects: (i) the "direct evidence" on which the court relied had little, if any, relevance to the alleged predatory pricing conspiracy; and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing.

[\*\*1361] The "direct evidence" on which the court relied was evidence of *other* combinations, not of a predatory pricing conspiracy. Evidence that petitioners conspired to raise prices in Japan [\*\*\*\*40] provides little, if any, support for respondents' [\*596] claims: a conspiracy to increase profits in one market does not tend to show a conspiracy to sustain losses in another. Evidence that petitioners agreed to fix *minimum* prices (through the check-price agreements) for the American market actually works in petitioners' favor, because it suggests that petitioners were seeking to place a floor under prices rather than to lower them. The same is true of evidence that petitioners agreed to limit the number of distributors of their products in the American market -- the so-called five company rule. That practice may have facilitated a horizontal territorial allocation, see [United States v. Topco Associates, Inc., 405 U.S. 596 \(1972\)](#), but its natural effect would be to raise market prices rather than reduce them.<sup>20</sup> Evidence that tends to support any of these collateral conspiracies thus says little, if anything, about the existence of a conspiracy to charge below-market prices in the American market over a period of two decades.

[\*\*\*\*41] [LEdHN\[11B\]](#) [↑] [11B]That being the case, the absence of any plausible motive to engage in the conduct charged is highly relevant to whether a "genuine issue for trial" exists within the meaning of [Rule 56\(e\)](#). Lack of motive bears on the range of permissible conclusions that might be drawn [\*\*\*559] from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, [\*597] the conduct does not give rise to an inference of conspiracy. See [Cities Service, supra, at 278-280](#). Here, the conduct in question consists largely of (i) pricing at levels that succeeded in taking business away from respondents, and (ii) arrangements that may have limited petitioners' ability to compete with each other (and thus kept prices from going even lower). This conduct suggests either that petitioners behaved competitively, or that petitioners conspired to *raise* prices. Neither possibility is consistent with an agreement among 21 companies to price below market levels. Moreover, the predatory pricing scheme that this conduct is

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<sup>20</sup> The Court of Appeals correctly reasoned that the five company rule might tend to insulate petitioners from competition with each other. [723 F.2d, at 306](#). But this effect is irrelevant to a conspiracy to price predatorily. Petitioners have no incentive to underprice each other if they already are pricing *below* the level at which they could sell their goods. The far more plausible inference from a customer allocation agreement such as the five company rule is that petitioners were conspiring to *raise* prices, by limiting their ability to take sales away from each other. Respondents -- petitioners' competitors -- suffer no harm from a conspiracy to raise prices. [Supra, at 582-583](#). Moreover, it seems very unlikely that the five company rule had any significant effect of any kind, since the "rule" permitted petitioners to sell to their American subsidiaries, and did not limit the number of distributors to which the subsidiaries could resell. [513 F.Supp., at 1190](#).

said to prove is one that makes no practical sense: it calls for petitioners [\*\*\*\*42] to destroy companies larger and better established than themselves, a goal that remains far distant more than two decades after the conspiracy's birth. Even had they succeeded in obtaining their monopoly, there is nothing in the record to suggest that they could recover the losses they would need to sustain along the way. In sum, in light of the absence of any rational motive to conspire, neither petitioners' pricing practices, nor their conduct in the Japanese market, nor their agreements respecting prices and distribution in the American market, suffice to create a "genuine issue for trial." *Fed. Rule Civ. Proc. 56(e)*.<sup>21</sup>

[\*\*\*\*43] [\*\*1362] On remand, the Court of Appeals is free to consider whether there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so. The evidence must "[tend] to exclude the possibility" that petitioners underpriced respondents to compete for business rather than to implement an economically [\*598] senseless conspiracy. *Monsanto*, 465 U.S., at 764. In the absence of such evidence, there is no "genuine issue for trial" under *Rule 56(e)*, and petitioners are entitled to have summary judgment reinstated.

## VI

Our decision makes it unnecessary to reach the sovereign compulsion issue. The heart of petitioners' argument on that issue is that MITI, an agency of the Government of Japan, required petitioners to fix minimum prices for export to the United States, and that petitioners are therefore immune from antitrust liability for any scheme of which those minimum prices were an integral part. As we discussed in *Part II, supra*, respondents could not have suffered a cognizable injury from any action that *raised* prices [\*\*\*\*44] in the American CEP market. If liable at all, petitioners are liable for conduct that is distinct from the check-price agreements. The sovereign compulsion [\*\*\*560] question that both petitioners and the Solicitor General urge us to decide thus is not presented here.

The decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

**Dissent by:** WHITE

## Dissent

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JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

It is indeed remarkable that the Court, in the face of the long and careful opinion of the Court of Appeals, reaches the result it does. The Court of Appeals faithfully followed the relevant precedents, including *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and it kept firmly in mind the principle that proof of a conspiracy should not be fragmented, see *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). After surveying the massive record, including very [\*599] significant [\*\*\*\*45] evidence that the District Court erroneously had excluded, the Court of Appeals concluded that the evidence taken as a whole creates a genuine issue of fact whether petitioners engaged in a conspiracy in violation of §§ 1 and 2 of the Sherman Act and § 2(a) of the Robinson-Patman Act. In my view, the Court of Appeals' opinion more than adequately supports this judgment.

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<sup>21</sup> We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), establishes that HNS↑ conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy. *Id.*, at 763-764. See *supra*, at 588.

The Court's opinion today, far from identifying reversible error, only muddies the waters. In the first place, the Court makes confusing and inconsistent statements about the appropriate standard for granting summary judgment. Second, the Court makes a number of assumptions that invade the factfinder's province. Third, the Court faults the Third Circuit for nonexistent errors and remands the case although it is plain that respondents' evidence raises genuine issues of material fact.

I

The Court's initial discussion of summary judgment standards appears consistent with settled doctrine. I agree that [\*\*1363] "[where] the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Ante*, at 587 (quoting *Cities Service, supra, at 289*). [\*\*\*46] I also agree that "[on] summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Ante*, at 587 (quoting *United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)*). But other language in the Court's opinion suggests a departure from traditional summary judgment doctrine. Thus, the Court gives the following critique of the Third Circuit's opinion:

"[The] Court of Appeals concluded that a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, [\*\*561] which conspiracy was funded by excess profits obtained in the Japanese market. The court apparently did not consider whether it was as plausible to conclude [\*600] that petitioners' price-cutting behavior was independent and not conspiratorial." *Ante*, at 581.

In a similar vein, the Court summarizes *Monsanto Co. v. Spray-Rite Service Corp., supra*, as holding that "courts should not permit factfinders to infer conspiracies when such inferences are implausible . . ." *Ante*, at 593. Such language [\*\*\*47] suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. *Cities Service* and *Monsanto* do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence standing alone was insufficiently probative to justify sending a case to the jury.<sup>1</sup> These holdings in no way undermine [\*601] the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.

[\*\*\*48] If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled

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<sup>1</sup> The Court adequately summarizes the quite fact-specific holding in *Cities Service*. *Ante*, at 587.

In *Monsanto*, the Court held that a manufacturer's termination of a price-cutting distributor after receiving a complaint from another distributor is not, *standing alone*, sufficient to create a jury question. *465 U.S., at 763-764*. To understand this holding, it is important to realize that under *United States v. Colgate & Co., 250 U.S. 300 (1919)*, it is permissible for a manufacturer to announce retail prices in advance and terminate those who fail to comply, but that under *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)*, it is impermissible for the manufacturer and its distributors to agree on the price at which the distributors will sell the goods. Thus, a manufacturer's termination of a price-cutting distributor after receiving a complaint from another distributor is lawful under *Colgate*, *unless* the termination is pursuant to a shared understanding between the manufacturer and its distributors respecting enforcement of a resale price maintenance scheme. *Monsanto* holds that to establish liability under *Dr. Miles*, more is needed than evidence of behavior that is consistent with a distributor's exercise of its prerogatives under *Colgate*. Thus, "[there] must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *465 U.S., at 764*. *Monsanto* does *not* hold that if a terminated dealer produces some further evidence of conspiracy beyond the bare fact of postcomplaint termination, the judge hearing a motion for summary judgment should balance all the evidence pointing toward conspiracy against all the evidence pointing toward independent action.

law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language.

## II

In defining what respondents must show in order to recover, the Court makes assumptions **[\*\*1364]** that invade the factfinder's province. The Court states with very little discussion that respondents can recover under **§ 1** of the Sherman Act only if they prove that "petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or **[\*\*\*562]** (ii) pricing below some appropriate measure of cost." *Ante*, at 585, n. 8. This statement is premised on the assumption that "[an] agreement without these features would either leave respondents in the same position as would market forces or would actually benefit respondents by raising market prices." *Ibid.* In making this assumption, the Court ignores the contrary conclusions of respondents' expert DePodwin, whose **[\*\*\*\*49]** report in very relevant part was erroneously excluded by the District Court.

The DePodwin Report, on which the Court of Appeals relied along with other material, indicates that respondents were harmed in two ways that are independent of whether petitioners priced their products below "the level necessary to sell their products or . . . some appropriate measure of cost." *Ibid.* First, the Report explains that the price-raising scheme in Japan resulted in lower consumption of petitioners' goods in that country and the exporting of more of petitioners' goods to this country than would have occurred had prices in Japan been at the competitive level. Increasing **[\*602]** exports to this country resulted in depressed prices here, which harmed respondents.<sup>2</sup> **[\*\*\*\*50]** Second, the DePodwin Report indicates that petitioners exchanged confidential proprietary information and entered into agreements such as the five company rule with the goal of avoiding intragroup competition in the United States market. The Report explains that petitioners' restrictions on intragroup competition caused respondents to lose business that they would not have lost had petitioners competed with one another.<sup>3</sup>

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<sup>2</sup> Dr. DePodwin summarizes his view of the harm caused by Japanese cartelization as follows:

"When we consider the injuries inflicted on United States producers, we must again look at the Japanese television manufacturers' export agreement as part of a generally collusive scheme embracing the Japanese domestic market as well. This scheme increased the supply of television receivers to the United States market while restricting supply in the Japanese market. If Japanese manufacturers had competed in both domestic and export markets, they would have sold more in the domestic market and less in the United States. A greater proportion of Japanese production capacity would have been devoted to domestic sales. Domestic prices would have been lower and export prices would have been higher. The size of the price differential between domestic and export markets would have diminished practically to the vanishing point. Consequently, competition among Japanese producers in both markets would have resulted in reducing exports to the United States and United States prices would have risen. In addition, investment by the United States industry would have increased. As it was, however, the influx of sets at depressed prices cut the rates of return on television receiver production facilities in the United States to so low a level as to make such investment uneconomic."

"We can therefore conclude that the American manufacturers of television receivers would have made larger sales at higher prices in the absence of the Japanese cartel agreements. Thus, the collusive behavior of Japanese television manufacturers resulted in a very severe injury to those American television manufacturers, particularly to National Union Electric Corporation, which produced a preponderance of television sets with screen sizes of nineteen inches and lower, especially those in the lower range of prices." 5 App. to Brief for Appellants in No. 81-2331 (CA3), pp. 1629a-1630a.

<sup>3</sup> The DePodwin Report has this, among other things, to say in summarizing the harm to respondents caused by the five company rule, exchange of production data, price coordination, and other allegedly anti-competitive practices of petitioners:

"The impact of Japanese anti-competitive practices on United States manufacturers is evident when one considers the nature of competition. When a market is fully competitive, firms pit their resources against one another in an attempt to secure the business of individual customers. However, when firms collude, they violate a basic tenet of competitive behavior, i. e., that they act independently. United States firms were confronted with Japanese competitors who collusively were seeking to destroy their established customer relationships. Each Japanese company had targeted customers which it could service with reasonable assurance that its fellow Japanese cartel members would not become involved. But just as importantly, each Japanese firm would be assured that what was already a low price level for Japanese television receivers in the United States market would not be further depressed by the actions of its Japanese associates."

[\*\*\*\*51] [\*603] [\*\*1365] The [\*\*\*563] DePodwin Report alone creates a genuine factual issue regarding the harm to respondents caused by Japanese cartelization and by agreements restricting competition among petitioners in this country. No doubt the Court prefers its own economic theorizing to Dr. DePodwin's, but that is not a reason to deny the factfinder an opportunity to consider Dr. DePodwin's views on how petitioners' alleged collusion harmed respondents.<sup>4</sup>

[\*\*\*\*52] [\*604] The Court, in discussing the unlikelihood of a predatory conspiracy, also consistently assumes that petitioners valued profit-maximization over growth. See, e. g., *ante*, at 595. In light of the evidence that petitioners sold their goods in this country at substantial losses over a long period of time, see Part III-B, *infra*, I believe that this is an assumption that should be argued to the factfinder, not decided by the Court.

### III

In reversing the Third Circuit's judgment, the Court identifies two alleged errors: "(i) [The] 'direct evidence' on which the [Court of Appeals] relied had little, if any, relevance to the alleged predatory pricing conspiracy; and (ii) the court failed to consider the absence of a plausible motive to engage in predatory [\*\*\*564] pricing." *Ante*, at 595. The Court's position is without substance.

#### A

The first claim of error is that the Third Circuit treated evidence regarding price fixing in Japan and the so-called five company rule and check prices as "direct evidence" of a conspiracy that injured respondents." *Ante*, at 583 (citing *In re Japanese Electronics Products Antitrust Litigation*, 723 F.2d 238, 304-305 (1983)). [\*\*\*\*53] The passage from the Third [\*605] Circuit's opinion in which the Court locates this alleged error makes what I consider to be a quite simple and correct observation, namely, that this case is distinguishable from traditional "conscious parallelism" cases, in that there is direct evidence of concert of action among petitioners. *Ibid.* The Third Circuit did not, as the Court implies, jump unthinkingly from this observation to the conclusion that evidence regarding the five company rule could support a finding of antitrust injury to respondents.<sup>5</sup> The Third [\*\*1366] Circuit twice specifically noted

"The result was a phenomenal growth in exports, particularly to the United States. Concurrently, Japanese manufacturers, and the defendants in particular, made large investments in new plant and equipment and expanded production capacity. It is obvious, therefore, that the effect of the Japanese cartel's concerted actions was to generate a larger volume of investment in the Japanese television industry than would otherwise have been the case. This added capacity both enabled and encouraged the Japanese to penetrate the United States market more deeply than they would have had they competed lawfully." *Id.*, at 1628a-1629a.

For a more complete statement of DePodwin's explanation of how the alleged cartel operated, and the harms it caused respondents, see *id.*, at 1609a-1642a. This material is summarized in a chart found *id.*, at 1633a.

<sup>4</sup> In holding that Parts IV and V of the Report had been improperly excluded, the Court of Appeals said:

"The trial court found that DePodwin did not use economic expertise in reaching the opinion that the defendants participated in a Japanese television cartel. *505 F.Supp. at 1342-46*. We have examined the excluded portions of Parts IV and V in light of the admitted portions, and we conclude that this finding is clearly erroneous. As a result, the court also held the opinions to be unhelpful to the factfinder. What the court in effect did was to eliminate all parts of the report in which the expert economist, after describing the conditions in the respective markets, the opportunities for collusion, the evidence pointing to collusion, the terms of certain undisputed agreements, and the market behavior, expressed the opinion that there was concert of action consistent with plaintiffs' conspiracy theory. Considering the complexity of the economic issues involved, it simply cannot be said that such an opinion would not help the trier of fact to understand the evidence or determine that fact in issue." *In re Japanese Electronics Products Antitrust Litigation*, 723 F.2d 238, 280 (1983).

The Court of Appeals had similar views about Parts VI and VII.

<sup>5</sup> I use the Third Circuit's analysis of the five company rule by way of example; the court did an equally careful analysis of the parts the cartel activity in Japan and the check prices could have played in an actionable conspiracy. See generally *id.*, at 303-311.

that horizontal agreements allocating customers, though illegal, do not ordinarily injure competitors of the agreeing parties. *Id., at 306, 310-311*. However, after reviewing evidence of cartel activity in Japan, collusive establishment of dumping prices in this country, and long-term, below-cost sales, the Third Circuit held that a factfinder could reasonably conclude that the five company rule was not a simple price-raising device:

"[A] factfinder might reasonably infer that the allocation of customers in the United States, combined with price-fixing [\*\*\*\*54] in Japan, was intended to permit concentration of the effects of dumping upon American competitors while eliminating competition among the Japanese manufacturers in either market." *Id., at 311*.

I see nothing erroneous in this reasoning.

## B

The Court's second charge of error is that the Third Circuit was not sufficiently skeptical of respondents' allegation that petitioners engaged in predatory pricing conspiracy. But [\*606] the Third Circuit is not required to engage in academic discussions about predation; [\*\*\*\*55] it is required to decide whether respondents' evidence creates a genuine issue of material fact. The Third Circuit did its job, and remanding the case so that it can do the same job again is simply pointless.

The Third Circuit indicated that it considers respondents' evidence sufficient to create a genuine factual issue regarding long-term, below-cost sales by petitioners. *Ibid.* The Court tries to whittle away at this conclusion by suggesting that the "expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors . . . that suggest that such conduct [\*\*\*565] is irrational." *Ante*, at 594, n. 19. But the question is not whether the Court finds respondents' experts persuasive, or prefers the District Court's analysis; it is whether, viewing the evidence in the light most favorable to respondents, a jury or other factfinder could reasonably conclude that petitioners engaged in long-term, below-cost sales. I agree with the Third Circuit that the answer to this question is "yes."

It is misleading for the Court to state that the Court of Appeals "did not disturb the District Court's analysis of the factors that substantially [\*\*\*\*56] undermine the probative value of [evidence in the DePodwin Report respecting below-cost sales]." *Ibid.* The Third Circuit held that the exclusion of the portion of the DePodwin Report regarding below-cost pricing was erroneous because "the trial court ignored DePodwin's uncontradicted affidavit that all data relied on in his report were of the type on which experts in his field would reasonably rely." *723 F.2d, at 282*. In short, the Third Circuit found DePodwin's affidavit sufficient to create a genuine factual issue regarding the correctness of his conclusion that petitioners sold below cost over a long period of time. Having made this determination, the court saw no need -- nor do I -- to address the District Court's analysis point by point. The District Court's criticisms of DePodwin's [\*607] methods are arguments that a factfinder should consider.

## IV

Because I believe that the Third Circuit was correct in holding that respondents have demonstrated the existence of genuine issues of material fact, I would affirm [\*\*1367] the judgment below and remand this case for trial.

## References

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Go [\*\*\*\*57] To Supreme Court Brief(s) [54 Am Jur 2d, Monopolies, Restraints of Trade and Unfair Trade Practices](#)  
[44, 105, 186-189, 284](#)

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In discussing the five-company rule, I do not mean to imply any conclusion on the validity of petitioners' sovereign compulsion defense. Since the Court does not reach this issue, I see no need of my addressing it.

475 U.S. 574, \*607; 106 S. Ct. 1348, \*\*1367; 89 L. Ed. 2d 538, \*\*\*565; 1986 U.S. LEXIS 38, \*\*\*\*57

24 Federal Procedure, L Ed, Monopolies and Restraints of Trade 54:254, 54:255

24 Am Jur Trials 1, Defending Antitrust Lawsuits

[15 USCS 1, 2, 13\(a\);](#) USCS, [Federal Rules of Civil Procedure, Rule 56](#)

US L Ed Digest, Appeal 1087.5(1), 1267, 1750; Evidence 394, 979; International Law 6; Restraints of Trade, Monopolies, and Unfair Trade Practices 10, 21, 36, 67; Summary Judgment and Judgment on Pleadings 4-6; Trial 197

Index to Annotations, Restraints of Trade and Monopolies; Summary Judgment

Annotation References:

Reviewability of federal court's denial of motion for summary judgment. [17 L Ed 2d 886](#).

Extraterritorial application of federal antitrust [\*\*\*\*58] laws to acts occurring in foreign commerce. 40 ALR Fed 343.

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End of Document

## **FTC v. Indiana Federation of Dentists**

Supreme Court of the United States

March 25, 1986, Argued ; June 2, 1986, Decided

No. 84-1809

**Reporter**

476 U.S. 447 \*; 106 S. Ct. 2009 \*\*; 90 L. Ed. 2d 445 \*\*\*; 1986 U.S. LEXIS 79 \*\*\*\*; 54 U.S.L.W. 4531; 1986-1 Trade Cas. (CCH) P67,117

FEDERAL TRADE COMMISSION v. INDIANA FEDERATION OF DENTISTS

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**Disposition:** [745 F.2d 1124](#), reversed.

### **Core Terms**

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x ray, dentists, insurers, patients, dental, requests, withhold, insurance company, cooperation, customers, benefits, claim form, Sherman Act, determinations, consumers, costly, unfair, conjunction, antitrust, practices, compete, restraint of trade, dental services, conspiracy, costs, dental treatment, refuse to submit, anticompetitive, diagnostic, boycotts

### **LexisNexis® Headnotes**

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Administrative Law > Judicial Review > Reviewability > Factual Determinations

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

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

#### **HN1 Reviewability, Factual Determinations**

[15 U.S.C.S. § 45\(c\)](#) forbids a court to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Rather, as under the essentially identical substantial evidence standard for review of agency factfinding, the court must accept the Federal Trade Commission's findings of fact if they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

476 U.S. 447, \*447; 106 S. Ct. 2009, \*\*2009; 90 L. Ed. 2d 445, \*\*\*445; 1986 U.S. LEXIS 79, \*\*\*\*1

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

## **HN2** **Trade Practices & Unfair Competition, Federal Trade Commission Act**

The standard of unfairness under the Federal Trade Commission Act, [15 U.S.C.S. § 45](#), is by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons. Once the Commission has chosen a particular legal rationale for holding a practice to be unfair, however, familiar principles of administrative law dictate that its decision must stand or fall on that basis, and a reviewing court may not consider other reasons why the practice might be deemed unfair.

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

Governments > Courts > Judicial Precedent

## **HN3** **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Under U.S. Supreme Court precedents, a restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be "per se" unreasonable, or because it violates what has come to be known as the "Rule of Reason," under which the test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

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

## **HN4** **Practices Governed by Per Se Rule, Boycotts**

Courts have been slow to condemn rules adopted by professional associations as unreasonable per se and, in general, to extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.

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

## **HN5** **Regulated Practices, Market Definition**

As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output, and such a restriction requires some competitive justification even in the absence of a detailed market analysis.

## **Lawyers' Edition Display**

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## Decision

Federal Trade Commission ruling that dentists' refusal to submit X-rays to insurers violates 1 of Sherman Act ([15 USCS 1](#)) held supported by evidence and law.

## Summary

A group of Indiana dentists, comprising a substantial majority of their profession in two cities, formed a supposed union for the purpose of promulgating a "work rule" which required members to withhold X-rays requested by dental insurers for use in evaluating claims; the state dental association had dropped a similar policy pursuant to a consent decree with the Federal Trade Commission (FTC). The FTC, after a full evidentiary hearing, issued a cease and desist order ([101 FTC 57](#)) against further union organizing efforts, (1) finding that union members had conspired to withhold such X-rays, and that this had the effect of suppressing competition in this matter in areas where union members predominated, and (2) ruling that these findings showed an unreasonable restraint of trade in violation of 1 of the Sherman Act ([15 USCS 1](#)) and thus an unfair method of competition in violation of 5 of the Federal Trade Commission Act ([15 USCS 45](#)). The United States Court of Appeals for the Seventh Circuit vacated the FTC's order on the ground that it was not supported by substantial evidence, finding no proof that dentists would compete in this matter in the absence of restraint or that the rule had prevented such competition, and noting the FTC's failure to define the relevant market, to determine the union's power therein, or to find that the work rule had increased dental costs ([745 F2d 1124](#)).

On certiorari, the United States Supreme Court reversed. In an opinion by White, J., expressing the unanimous view of the court, it was held that the findings of the FTC were substantially supported by the record, and were sufficient as a matter of law to establish a violation of 1 of the Sherman Act and, hence, of 5 of the FTC Act, without extensive market analysis or a specific finding that the rule increased costs.

## Headnotes

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §42 > conspiracy -- dental services -- review of FTC findings -- cease and desist order -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C]

Findings by the Federal Trade Commission (FTC) that certain dentists, in forming a supposed union which promulgated a "work rule" requiring members to withhold X-rays requested by dental insurers for use in evaluating claims, have conspired to withhold such X-rays, and that this conspiracy has the tendency and effect of suppressing competition among dentists in this matter, are supported by substantial evidence, and are sufficient as a matter of law to establish an unreasonable restraint of trade violating 1 of the Sherman Act ([15 USCS 1](#)) and, hence, an unfair method of competition violating 5 of the FTC Act ([15 USCS 45](#)); the finding of conspiracy is incontestably supported by evidence that promulgation of the work rule was a principal reason for the formation of the union, the finding that individual dentists would provide X-rays but for the work rule is adequately supported by common sense and economic theory as well as by evidence of practices in other states, and the finding of actual diminished competition is adequately supported by evidence that insurers have been unable to obtain X-rays in cities where union members comprise a substantial majority of the profession; thus, the FTC's order requiring the union to cease and desist from further efforts to organize dentists in support of such a practice, on the ground that this practice violates the aforementioned statutes, must be sustained.

476 U.S. 447, \*447; 106 S. Ct. 2009, \*\*2009; 90 L. Ed. 2d 445, \*\*\*445; 1986 U.S. LEXIS 79, \*\*\*\*1

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §115 > review of FTC findings -- substantial evidence -- > Headnote:

[LEdHN\[2\]](#) [2]

In reviewing factual findings by the Federal Trade Commission (FTC) with regard to an alleged violation of 5 of the FTC Act ([15 USCS 45](#)), a court is prohibited under the "substantial evidence" rule of 45(c) from making its own appraisal of the testimony, and picking and choosing for itself among uncertain and conflicting inferences; rather, the court must accept the FTC's findings of fact if they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §114 > review of FTC decisions -- legal issues -- > Headnote:

[LEdHN\[3\]](#) [3]

On judicial review of a Federal Trade Commission (FTC) decision regarding an alleged violation of 5 of the FTC Act ([15 USCS 45](#)), the legal issues presented--that is, the identification of governing legal standards and their application to the facts found--are for the courts to resolve, although the courts are to give some deference to the FTC's informed judgment that a particular commercial practice is to be condemned as unfair.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §102 > unfair practices -- > Headnote:

[LEdHN\[4\]](#) [4]

The standard of "unfairness" under 5 of the Federal Trade Commission Act ([15 USCS 45](#)) encompasses not only practices that violate the Sherman Act (15 USCS 1-7) and the other antitrust laws, but also practices which the Commission determines are against public policy for other reasons.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §114 > review of agency decisions -- unfair practices -- > Headnote:

[LEdHN\[5\]](#) [5]

Once the Federal Trade Commission (FTC) has chosen a particular legal rationale for holding a practice to be unfair, and thus subject to condemnation under 5 of the FTC Act ([15 USCS 45](#)), its decision must stand or fall on that basis, and a reviewing court may not consider other reasons why the practice might be deemed unfair.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > unreasonable restraint of trade -- > Headnote:

[LEdHN\[6\]](#) [6]

A restraint of trade may be adjudged unreasonable, and thus a violation of 1 of the Sherman Act ([15 USCS 1](#)), either because it fits within a class of restraints that has been held to be "per se" unreasonable, or because it violates what has come to be known as the "Rule of Reason," under which the test of legality is whether the

476 U.S. 447, \*447; 106 S. Ct. 2009, \*\*2009; 90 L. Ed. 2d 445, \*\*\*445; 1986 U.S. LEXIS 79, \*\*\*\*1

restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > group boycotts -- per se rule --

> Headnote:

[LEdHN\[7\]](#) [7]

The category of restraints of trade classified as group boycotts, which are regarded as per se violations of 1 of the Sherman Act ([15 USCS 1](#)), is not to be expanded indiscriminately; the per se approach is generally limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §42 > services -- refusal to compete --

> Headnote:

[LEdHN\[8\]](#) [8]

A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by insuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them, and absent some competing procompetitive virtue--such as the creation of efficiencies in the operation of the market or the provision of goods and service--such an agreement cannot be sustained under the Rule of Reason.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §19 > market power -- > Headnote:

[LEdHN\[9\]](#) [9]

The absence of proof of market power does not justify a naked restriction on price or output; such a restriction requires some competitive justification even in the absence of a detailed market analysis.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §19 > dental services -- market power --

> Headnote:

[LEdHN\[10\]](#) [10]

In the case of dentists who are alleged to have violated 1 of the Sherman Act ([15 USCS 1](#)) by forming a supposed union and promulgating a "work rule" which requires members to withhold X-rays requested by dental insurers for use in evaluating claims, a finding of actual, sustained adverse effects on competition in this regard in two cities where union dentists predominate, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint is unreasonable even in the absence of elaborate market analysis.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > withholding information -- dental services -  
- > Headnote:

[LEdHN\[11\]](#) [11]

A concerted and effective effort to withhold, or make more costly, information desired by consumers for the purpose of determining whether a particular purchase is cost-justified, is likely enough to disrupt the price-setting mechanism of the market that it may be condemned without proof that it caused higher prices, or the purchase of higher-priced services, than would otherwise have occurred; thus, a holding that a supposed dentist union's policy of withholding X-rays requested by dental insurers for use in evaluating claims constitutes an unreasonable restraint of trade is not precluded by the lack of any finding that the policy resulted in dental services that were more costly than those that patients and their insurers would otherwise have chosen; even if X-rays would in fact be completely useless to the insurers and patients in making an informed choice as to the least costly adequate treatment, the union would not be justified in deciding for them that they did not need that information.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > state action exemption -- dental services -  
- > Headnote:

[LEdHN\[12\]](#) [12]

That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it; anticompetitive collusion among private actors, even when its goal is consistent with state policy, acquires antitrust immunity only when it is actively supervised by the state; thus, a supposed dentist union's policy of withholding X-rays requested by dental insurers for use in evaluating claims is subject to condemnation under the Sherman Act (15 USCS 1-5) regardless of whether that policy is consistent with state policy.

## Syllabus

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Respondent organization of dentists in Indiana promulgated a policy requiring its members to withhold x rays from dental insurers in connection with evaluating patients' claims for benefits. The Federal Trade Commission (FTC) issued a cease-and-desist order, ruling that the policy constituted an unfair method of competition in violation of § 5 of the Federal Trade Commission Act, since it amounted to a conspiratorial restraint of trade in violation of [§ 1](#) of the Sherman Act. The Court of Appeals vacated the FTC's order on the ground that it was not supported by substantial evidence, holding that the FTC's findings that respondent's x-ray policy was anticompetitive were erroneous; that the findings were inadequate because of the FTC's failure to define the market in which respondent allegedly restrained competition and to establish that respondent had the power to restrain competition in that market; and that the FTC erred in not determining whether the alleged restraint on competition among dentists had actually resulted in higher dental costs to patients and insurers.

\*\*\*\*2] Held:

1. The FTC's factual findings regarding respondent's x-ray policy are supported by substantial evidence. There is no dispute that respondent's members conspired among themselves to withhold x rays, and the FTC's finding that competition among dentists with respect to cooperation with insurers' requests for x rays was diminished where respondent held sway also finds adequate support in the record. Pp. 455-457.
2. Evaluated under the Rule of Reason, the FTC's factual findings are sufficient as a matter of law to establish a violation of [§ 1](#) of the Sherman Act, *i. e.*, an unreasonable restraint of trade, and hence a violation of § 5 of the FTC

Act. Respondent's x-ray policy takes the form of a horizontal agreement among its members to withhold from their customers a particular service that they desire. Absent some countervailing procompetitive virtue, such an agreement cannot be sustained under the Rule of Reason. This conclusion is not precluded by the absence of specific findings as to the market in which respondent allegedly restrained competition or as to the power of respondent's members in that market or by the FTC's failure to find that respondent's x-ray policy [\*\*\*\*3] resulted in more costly dental services than the patients and insurers would have chosen if they were able to evaluate x rays in conjunction with claim forms. Nor do alleged noncompetitive "quality of care" considerations justify respondent's x-ray policy. And whether or not respondent's policy is consistent with Indiana's supposed policy against submission of x rays to insurers, it is not immunized from antitrust scrutiny. Anticompetitive collusion among private actors, even when consistent with state policy, acquires antitrust immunity only when it is actually supervised by the State, and there is no suggestion of such supervision here. Pp. 457-465.

**Counsel:** Marcy J. K. Tiffany argued the cause for petitioner. With her on the briefs were Solicitor General Fried, Assistant Attorney General Ginsburg, Ernest J. Isenstadt, David C. Shonka, and L. Barry Costilo.

Bruce W. Graham argued the cause for respondent. With him on the brief was Ronald K. Fowler.\*

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**Judges:** WHITE, J., delivered the opinion for a unanimous Court.

**Opinion by:** WHITE

## Opinion

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[\*448] [\*\*\*450] [\*\*2013] JUSTICE WHITE delivered the opinion of the Court.

LEdHN[1A] [1A] This case concerns commercial relations among certain Indiana dentists, their patients, and the patients' dental health care insurers. The question presented is whether the Federal Trade Commission correctly concluded that a conspiracy among dentists to refuse to submit x rays to dental insurers for use in benefits determinations constituted an [\*449] "unfair method of competition" in violation of § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45 (1982 ed. and Supp. II).

I

Since the 1970's, dental health insurers, responding to the demands of their policyholders, have attempted to contain the cost of dental treatment by, among other devices, limiting payment of benefits to the cost of the "least expensive yet adequate treatment" suitable to the needs of individual patients. Implementation of such cost-containment measures, known as "alternative benefits" [\*\*\*451] plans, requires evaluation by the insurer of the diagnosis and recommendation of the treating dentist, either in advance of or following the [\*\*\*\*5] provision of care. In order to carry out such evaluation, insurers frequently request dentists to submit, along with insurance claim forms requesting payment of benefits, any dental x rays that have been used by the dentist in examining the patient as well as other information concerning their diagnoses and treatment recommendations. Typically, claim forms and

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\* Briefs of amici curiae urging reversal were filed for the American Association of Retired Persons by Alfred Miller and Steven S. Honigman; for the Health Insurance Association of America by Joe Sims and Edwin R. Soeffing; and for the Washington Business Group on Health by Stephan E. Lawton.

Briefs of amici curiae urging affirmance were filed for the American College of Radiology by Reuben L. Hedlund and James A. Cherney; for the American Dental Association by Peter M. Sfikas; for the American Medical Association by Benjamin W. Heineman, Jr., Carter G. Phillips, Newton N. Minow, and Jack R. Bierig; and for the Physicians and Surgeons Association of Massachusetts, Inc., by Robert D. Paul and Donald B. Gould.

accompanying x rays are reviewed by lay claims examiners, who either approve payment of claims or, if the materials submitted raise a question whether the recommended course of treatment is in fact necessary, refer claims to dental consultants, who are licensed dentists, for further review. On the basis of the materials available, supplemented where appropriate by further diagnostic aids, the dental consultant may recommend that the insurer approve a claim, deny it, or pay only for a less expensive course of treatment.

Such review of diagnostic and treatment decisions has been viewed by some dentists as a threat to their professional independence and economic well-being. In the early 1970's, the Indiana Dental Association, a professional organization comprising some 85% of practicing dentists in the State of Indiana, initiated [\*\*\*\*6] an aggressive effort to hinder insurers' [\*450] efforts to implement alternative benefits plans by enlisting member dentists to pledge not to submit x rays in conjunction with claim forms.<sup>1</sup> The Association's efforts met considerable success: [\*\*2014] large numbers of dentists signed the pledge, and insurers operating in Indiana found it difficult to obtain compliance with their requests for x rays and accordingly had to choose either to employ more expensive means of making alternative benefits determinations (for example, visiting the office of the treating dentist or conducting an independent oral examination) or to abandon such efforts altogether.

[\*\*\*\*7] By the mid-1970's, fears of possible antitrust liability had dampened the Association's enthusiasm for opposing the submission of x rays to insurers. In 1979, the Association and a number of its constituent societies [\*\*\*452] consented to a Federal Trade Commission order requiring them to cease and desist from further efforts to prevent member dentists from submitting [\*451] x rays. *In re Indiana Dental Assn.*, 93 F. T. C. 392. Not all Indiana dentists were content to leave the matter of submitting x rays to the individual dentist. In 1976, a group of such dentists formed the Indiana Federation of Dentists, respondent in this case, in order to continue to pursue the Association's policy of resisting insurers' requests for x rays. The Federation, which styled itself a "union" in the belief that this label would stave off antitrust liability,<sup>2</sup> immediately promulgated a "work rule" forbidding its members to submit x rays to dental insurers in conjunction with claim forms. Although the Federation's membership was small, numbering less than 100, its members were highly concentrated in and around three Indiana communities: Anderson, Lafayette, and Fort Wayne. [\*\*\*\*8] The Federation succeeded in enlisting nearly 100% of the dental specialists in the Anderson area, and approximately 67% of the dentists in and around Lafayette. In the areas of its strength, the Federation was successful in continuing to enforce the Association's prior policy of refusal to submit x rays to dental insurers.

In 1978, the Federal Trade Commission issued a complaint against the Federation, alleging in substance that its efforts to prevent its members from complying with insurers' requests for x rays constituted an unfair method of competition in violation of § 5 of the Federal Trade Commission Act. Following lengthy proceedings including a full

<sup>1</sup> A presentation made in 1974 by Dr. David McClure, an Association official and later one of the founders of respondent Indiana Federation of Dentists, is revealing as to the motives underlying the dentists' resistance to the provision of x rays for use by insurers in making alternative benefits determinations:

"The problems associated with third party programs are many, but I believe the 'Indiana Plan' [*i. e.*, the policy of refusing to submit x rays] to be sound and if we work together, we can win this battle. We are fighting an economic war where the very survival of our profession is at stake."

"How long can some of the leaders of dentistry in other states be so complacent and willing to fall into the trap that is being set for us. If only they would take the time, to see from whence come the arrows that are heading in our direction. The Delta Dental Plans have bedded down with the unions and have been a party to setting up the greatest controls that any profession has ever known in a free society. . . .

"The name of the game is money. The government and labor are determined to reduce the cost of the dental health dollar at the expense of the dentist. There is no way a dental service can be rendered cheaper when the third party has to have its share of the dollar."

"Already we are locked into a fee freeze that could completely control the quality of dental care, if left on long enough." FTC Complaint Counsel's Trial Exhibit CX 372A, F, App. 104.

<sup>2</sup> Respondent no longer makes any pretense of arguing that it is immune from antitrust liability as a labor organization.

evidentiary hearing before an Administrative Law Judge, the Commission ruled that the Federation's policy constituted a violation of § 5 and issued an order requiring the Federation to cease and desist from further efforts to organize dentists [\*\*\*\*9] to refuse to submit x rays to insurers. *In re Indiana Federation of Dentists*, 101 F. T. C. 57 (1983). The Commission based its ruling on the conclusion that the Federation's policy of requiring its members to withhold x rays amounted to a conspiracy in restraint of trade that was unreasonable and hence [\*452] unlawful under the standards for judging such restraints developed in this Court's precedents interpreting § 1 of the Sherman Act. E. g., *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). The Commission found that the Federation had conspired both with the Indiana Dental Association and with its own members to withhold cooperation with dental insurers' requests for x rays; that absent such a restraint, competition among dentists for patients would have tended to lead dentists to compete with respect to their policies in dealing with patients' insurers; and that in those areas where the Federation's membership was strong, the Federation's policy had had the actual effect of eliminating such competition among dentists [\*\*\*\*10] and preventing insurers from obtaining access to x rays in the desired manner. These findings of anticompetitive effect, the Commission concluded, were sufficient to [\*\*\*453] establish that the restraint was unreasonable even absent [\*\*2015] proof that the Federation's policy had resulted in higher costs to the insurers and patients than would have occurred had the x rays been provided. Further, the Commission rejected the Federation's argument that its policy of withholding x rays was reasonable because the provision of x rays might lead the insurers to make inaccurate determinations of the proper level of care and thus injure the health of the insured patients: the Commission found no evidence that use of x rays by insurance companies in evaluating claims would result in inadequate dental care. Finally, the Commission rejected the Federation's contention that its actions were exempt from antitrust scrutiny because the withholding of x rays was consistent with the law and policy of the State of Indiana against the use of x rays in benefit determination by insurance companies. The Commission concluded that no such policy existed, and that in any event the existence of such [\*\*\*\*11] a policy would not have justified the dentists' private and unsupervised conspiracy in restraint of trade.

[\*453] The Federation sought judicial review of the Commission's order in the United States Court of Appeals for the Seventh Circuit, which vacated the order on the ground that it was not supported by substantial evidence. *745 F.2d 1124 (1984)*. Accepting the Federation's characterization of its rule against submission of x rays as merely an ethical and moral policy designed to enhance the welfare of dental patients, the majority concluded that the Commission's findings that the policy was anticompetitive were erroneous. According to the majority, the evidence did not support the finding that in the absence of restraint dentists would compete for patients by offering cooperation with the requests of the patients' insurers, nor, even accepting that finding, was there evidence that the Federation's efforts had prevented such competition. Further, the court held that the Commission's findings were inadequate because of its failure both to offer a precise definition of the market in which the Federation was alleged to have restrained competition and to establish [\*\*\*\*12] that the Federation had the power to restrain competition in that market. Finally, the majority faulted the Commission for not finding that the alleged restraint on competition among dentists had actually resulted in higher dental costs to patients and insurers. The third member of the Court of Appeals panel concurred in the judgment solely on the ground that there was insufficient proof that cooperation with insurers was an element of dental services as to which dentists would tend to compete.

We granted certiorari, 474 U.S. 900 (1985), in order to consider the Commission's claim that in vacating the Commission's order the Court of Appeals misconstrued applicable principles of antitrust law and "'misapprehended or grossly misapplied' the substantial evidence test," *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 523 (1981) (citation omitted). We now reverse.

[\*454] II

LEdHN/21 [2]The issue is whether the Commission erred in holding that the Federation's policy of refusal to submit [\*\*\*454] x rays to dental insurers for use in benefits determinations constituted an "unfair method of competition," unlawful under § 5 of the [\*\*\*\*13] Federal Trade Commission Act. The question involves review of both factual and legal determinations. As to the former, our review is governed by 15 U. S. C. § 45(c), which provides that "[the] findings of the Commission as to the facts, if supported by evidence, shall be conclusive." HN1

↑] The statute forbids a court to "make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences." [FTC v. Algoma Lumber Co., 291 U.S. 67, 73 \(1934\)](#). Rather, as under the essentially identical "substantial evidence" standard for review of agency factfinding, the court must accept the Commission's findings of fact if they are supported by "such relevant [\*\*2016] evidence as a reasonable mind might accept as adequate to support a conclusion." [Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 \(1951\)](#); see also [Beneficial Corp. v. FTC, 542 F.2d 611, 616 \(CA3 1976\)](#), cert. denied, 430 U.S. 983 (1977).

[LEdHN\[3\]](#)↑ [3][LEdHN\[4\]](#)↑ [4][LEdHN\[5\]](#)↑ [5]The legal issues presented -- that is, the identification of governing legal standards and their application to the facts found -- are, by contrast, for the courts to resolve, [\*\*\*\*14] although even in considering such issues the courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as "unfair." See [FTC v. Sperry & Hutchinson Co., 405 U.S. 233 \(1972\)](#); [Atlantic Refining Co. v. FTC, 381 U.S. 357, 367-368 \(1965\)](#); [FTC v. Cement Institute, 333 U.S. 683, 720 \(1948\)](#).[HN2](#)↑ The standard of "unfairness" under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, see [FTC v. Cement Institute, supra, at 689-695](#), but also practices that the Commission determines are against public policy for other reasons, see [FTC v. Sperry & Hutchinson Co., 405 U.S., at 244](#). [\*455] Once the Commission has chosen a particular legal rationale for holding a practice to be unfair, however, familiar principles of administrative law dictate that its decision must stand or fall on that basis, and a reviewing court may not consider other reasons why the practice might be deemed unfair. See [id., at 245-250](#); [\*\*\*\*15] cf. [SEC v. Chenery Corp., 318 U.S. 80 \(1943\)](#). In the case now before us, the sole basis of the FTC's finding of an unfair method of competition was the Commission's conclusion that the Federation's collective decision to withhold x rays from insurers was an unreasonable and conspiratorial restraint of trade in violation of [§ 1](#) of the Sherman Act, 26 Stat. 209, as amended, [15 U. S. C. § 1](#). Accordingly, the legal question before us is whether the Commission's factual findings, if supported by evidence, make out a violation of Sherman Act [§ 1](#).

### III

[LEdHN\[1B\]](#)↑ [1B]The relevant factual findings are that the members of the Federation conspired among themselves to withhold x rays requested by dental insurers for use in evaluating claims [\*\*\*455] for benefits, and that this conspiracy had the effect of suppressing competition among dentists with respect to cooperation with the requests of the insurance companies. As to the first of these findings there can be no serious dispute: abundant evidence in the record reveals that one of the primary reasons -- if not *the* primary reason -- for the Federation's existence was the promulgation and enforcement of the so-called "work rule" [\*\*\*\*16] against submission of x rays in conjunction with insurance claim forms.

As for the second crucial finding -- that competition was actually suppressed -- the Seventh Circuit held it to be unsupported by the evidence, on two theories. First, the court stated that the evidence did not establish that cooperation with requests for information by patients' insurance companies was an aspect of the provision of dental services with respect to which dentists would, in the absence of some [\*456] restraint, compete. Second, the court found that even assuming that dentists would otherwise compete with respect to policies of cooperating or not cooperating with insurance companies, the Federation's policy did not impair that competition, for the member dentists continued to allow insurance companies to use other means of evaluating their diagnoses when reviewing claims for benefits: specifically, "the IFD member dentists allowed insurers to visit the dental office to review and examine the patient's x rays along with all of the other diagnostic and clinical aids [\*\*2017] used in formulating a proper course of dental treatment." [745 F.2d, at 1143](#).

Neither of these criticisms [\*\*\*\*17] of the Commission's findings is well founded. The Commission's finding that "[in] the absence of . . . concerted behavior, individual dentists would have been subject to market forces of competition, creating incentives for them to . . . comply with the requests of patients' third-party insurers," 101 F. T. C., at 173, finds support not only in common sense and economic theory, upon both of which the FTC may reasonably rely, but also in record documents, including newsletters circulated among Indiana dentists, revealing that Indiana dentists themselves perceived that unrestrained competition tended to lead their colleagues to comply

with insurers' requests for x rays. See App. to Pet. for Cert. 289a, 306a-308a. Moreover, there was evidence that outside of Indiana, in States where dentists had not collectively refused to submit x rays, insurance companies found little difficulty in obtaining compliance by dentists with their requests. 101 F. T. C., at 172. A "reasonable mind" could conclude on the basis of this evidence that competition for patients, who have obvious incentives for seeking dentists who will cooperate with their insurers, would [\*\*\*\*18] tend to lead dentists in Indiana (and elsewhere) to cooperate with requests for information by their patients' insurers.

[\*457] The Commission's finding that such competition was actually diminished where the Federation held sway also finds adequate support in the record. The Commission found that in the areas where Federation membership among dentists was most significant (that is, in the vicinity of Anderson and Lafayette) insurance companies were unable to obtain compliance with their requests for submission of x rays in [\*\*\*456] conjunction with claim forms and were forced to resort to other, more costly, means of reviewing diagnoses for the purpose of benefit determination. Neither the opinion of the Court of Appeals nor the brief of respondent identifies any evidence suggesting that the Commission's finding that the Federation's policy had an actual impact on the ability of insurers to obtain the x rays they requested was incorrect. The lower court's conclusion that this evidence is to be discounted because Federation members continued to cooperate with insurers by allowing them to use more costly -- indeed, prohibitively costly -- methods of reviewing treatment decisions [\*\*\*\*19] is unpersuasive. The fact remains that the dentists' customers (that is, the patients and their insurers) sought a particular service: cooperation with the insurers' pretreatment review through the forwarding of x rays in conjunction with claim forms. The Federation's collective activities resulted in the denial of the information the customers requested in the form that they requested it, and forced them to choose between acquiring that information in a more costly manner or forgoing it altogether. To this extent, at least, competition among dentists with respect to cooperation with the requests of insurers was restrained.

#### IV

LEdHN[6] [6]The question remains whether these findings are legally sufficient to establish a violation of § 1 of the Sherman Act -- that is, whether the Federation's collective refusal to cooperate with insurers' requests for x rays constitutes an "unreasonable" restraint of trade. HN3 [7] Under our precedents, a [\*458] restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be "per se" unreasonable, or because it violates what has come to be known as the "Rule of Reason," under which the "test of legality is [\*\*\*\*20] whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." Chicago Board of Trade v. United States, 246 U.S., at 238.

LEdHN[7] [7]The policy of the Federation with respect to its members' dealings with third-party insurers resembles practices [\*\*2018] that have been labeled "group boycotts": the policy constitutes a concerted refusal to deal on particular terms with patients covered by group dental insurance. Cf. *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930). Although this Court has in the past stated that group boycotts are unlawful per se, see United States v. General Motors Corp., 384 U.S. 127 (1966); Klor's, Inc. v. Broadway-Hale Stores, Inc. 359 U.S. 207 (1959), we decline to resolve this case by forcing the Federation's policy into the "boycott" pigeonhole and invoking the per se rule. As we observed last Term in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), [\*\*\*\*21] the category of restraints classed as group boycotts is not to be expanded indiscriminately, and the per se approach has generally been limited to cases in which firms with [\*\*\*457] market power boycott suppliers or customers in order to discourage them from doing business with a competitor -- a situation obviously not present here. Moreover, HN4 [7] we have been slow to condemn rules adopted by professional associations as unreasonable per se, see National Society of Professional Engineers v. United States, 435 U.S. 679 (1978), and, in general, to extend per se analysis to restraints imposed in the context [\*459] of business relationships where the economic impact of certain practices is not immediately obvious, see *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441

U.S. 1 (1979). Thus, as did the FTC, we evaluate the restraint at issue in this case under the Rule of Reason rather than a rule of *per se* illegality.

LEdHN[8] [8]Application of the Rule of Reason to these facts is not a matter of any great difficulty. The Federation's policy takes the form of a horizontal agreement among the participating dentists to withhold [\*\*\*\*22] from their customers a particular service that they desire -- the forwarding of x rays to insurance companies along with claim forms. "While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." National Society of Professional Engineers, supra, at 692. A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them. Absent some countervailing procompetitive virtue -- such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services, see *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., supra*; *Chicago Board of Trade, supra*; cf. *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984)* -- such an agreement limiting consumer [\*\*\*\*23] choice by impeding the "ordinary give and take of the market place," National Society of Professional Engineers, supra, at 692, cannot be sustained under the Rule of Reason. No credible argument has been advanced for the proposition that making it more costly for the insurers and patients who are the dentists' customers to obtain information needed for evaluating the dentists' diagnoses has any such procompetitive effect.

[\*460] LEdHN[9] [9]LEdHN[10] [10]The Federation advances three principal arguments for the proposition that, notwithstanding its lack of competitive virtue, the Federation's policy of withholding x rays should not be deemed an unreasonable restraint of trade. First, as did the Court of Appeals, the Federation suggests that in the absence of specific findings by the Commission concerning the [\*\*2019] definition of the market in which the Federation allegedly restrained trade and the power of the Federation's members in that market, the conclusion that the Federation unreasonably restrained trade is erroneous as a matter of law, regardless of whether the challenged practices might be impermissibly anticompetitive if engaged in by persons who together possessed power [\*\*\*\*24] in a specifically defined market. This contention, however, runs counter to the Court's holding in *National Collegiate Athletic Assn. v. [\*\*\*458] Board of Regents of Univ. of Okla., supra*, that HN5 [as] a matter of law, the absence of proof of market power does not justify a naked restriction on price or output," and that such a restriction "requires some competitive justification even in the absence of a detailed market analysis." Id., at 109-110. Moreover, even if the restriction imposed by the Federation is not sufficiently "naked" to call this principle into play, the Commission's failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason. The Commission found that in two localities in the State of Indiana (the Anderson and Lafayette areas), Federation dentists constituted heavy majorities of the practicing dentists and that as a result of the efforts of the Federation, insurers in those areas were, over a period of years, actually unable to obtain compliance with their requests for submission of x rays. Since the purpose of the inquiries into market definition and market power is [\*\*\*\*25] to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output," can [\*461] obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects." 7 P. Areeda, Antitrust Law para. 1511, p. 429 (1986). In this case, we conclude that the finding of actual, sustained adverse effects on competition in those areas where IFD dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.<sup>3</sup>

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<sup>3</sup>Because we find that the Commission's findings can be sustained on this basis, we do not address the Commission's contention that the Federation's activities can be condemned regardless of market power or actual effect merely because they constitute a continuation of the restraints formerly imposed by the Indiana Dental Association, which allegedly had market power throughout the State of Indiana.

[\*\*\*\*26] [LEdHN\[11\]](#) [11]Second, the Federation, again following the lead of the Court of Appeals, argues that a holding that its policy of withholding x rays constituted an unreasonable restraint of trade is precluded by the Commission's failure to make any finding that the policy resulted in the provision of dental services that were more costly than those that the patients and their insurers would have chosen were they able to evaluate x rays in conjunction with claim forms. This argument, too, is unpersuasive. Although it is true that the goal of the insurers in seeking submission of x rays for use in their review of benefits claims was to minimize costs by choosing the least expensive adequate course of dental treatment, a showing that this goal was actually achieved through the means chosen is not an essential step in establishing that the dentists' attempt to thwart its achievement by collectively refusing to supply the requested information was an unreasonable restraint of trade. A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper [\*\*\*\*27] functioning of the price-setting mechanism of the [\*462] market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of [\*\*\*\*459] higher priced services, than would occur in its absence. [National Society of Professional Engineers v. United States, 435 U.S. 679 \(1978\)](#). [\*\*2020] Moreover, even if the desired information were in fact completely useless to the insurers and their patients in making an informed choice regarding the least costly adequate course of treatment -- or, to put it another way, if the costs of evaluating the information were far greater than the cost savings resulting from its use -- the Federation would still not be justified in deciding on behalf of its members' customers that they did not need the information: presumably, if that were the case, the discipline of the market would itself soon result in the insurers' abandoning their requests for x rays. The Federation is not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand.

Third, the Federation complains that the Commission erred in failing to consider, as [\*\*\*\*28] relevant to its Rule of Reason analysis, noncompetitive "quality of care" justifications for the prohibition on provision of x rays to insurers in conjunction with claim forms. This claim reflects the Court of Appeals' repeated characterization of the Federation's policy as a "legal, moral, and ethical policy of quality dental care, requiring that insurers examine and review all diagnostic and clinical aids before formulating a proper course of dental treatment." [745 F.2d, at 1144](#). The gist of the claim is that x rays, standing alone, are not adequate bases for diagnosis of dental problems or for the formulation of an acceptable course of treatment. Accordingly, if insurance companies are permitted to determine whether they will pay a claim for dental treatment on the basis of x rays as opposed to a full examination of all the diagnostic aids available to the examining dentist, there is a danger that they will erroneously decline to pay for treatment that is in fact in the interest of [\*463] the patient, and that the patient will as a result be deprived of fully adequate care.

The Federation's argument is flawed both legally and factually. The premise of the [\*\*\*\*29] argument is that, far from having no effect on the cost of dental services chosen by patients and their insurers, the provision of x rays will have too great an impact: it will lead to the reduction of costs through the selection of inadequate treatment. Precisely such a justification for withholding information from customers was rejected as illegitimate in the *National Society of Professional Engineers* case. The argument is, in essence, that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices. Such an argument amounts to "nothing less than a frontal assault on the basic policy of the Sherman Act." [National Society of Professional Engineers, supra, at 695](#). Moreover, there is no particular reason to believe that the provision of information will be more harmful to consumers in the market for dental services than in other markets. Insurers deciding what level of care to pay for are not themselves the recipients of those services, but it is by no means clear that they lack incentives to consider the welfare of the patient as well [\*\*\*\*30] as the minimization of costs. They are themselves in competition [\*\*\*460] for the patronage of the patients -- or, in most cases, the unions or businesses that contract on their behalf for group insurance coverage -- and must satisfy their potential customers not only that they will provide coverage at a reasonable cost, but also that that coverage will be adequate to meet their customers' dental needs. There is thus no more reason to expect dental insurance companies to sacrifice quality in return for cost savings than to believe this of consumers in, say, the market for engineering services. Accordingly, if noncompetitive quality-of-service justifications are inadmissible to justify the denial of information to consumers [\*464] in the latter market, there is little reason to credit such justifications here.

In any event, the Commission did not, as the Federation suggests, refuse even to consider the quality-of-care justification for the withholding of x rays. Rather, the [\*\*2021] Commission held that the Federation had failed to introduce sufficient evidence to establish such a justification: "IFD has not pointed to any evidence -- or even argued -- that any consumers [\*\*\*\*31] have in fact been harmed by alternative benefits determinations, or that actual determinations have been medically erroneous." 101 F. T. C., at 177. The evidence before the Administrative Law Judge on this issue appears to have consisted entirely of expert opinion testimony, with the Federation's experts arguing that x rays generally provide an insufficient basis, standing alone, for dental diagnosis, and the Commission's experts testifying that x rays may be useful in assessing diagnosis of and appropriate treatment for a variety of dental complaints. *Id.*, at 128-132. The Commission was amply justified in concluding on the basis of this conflicting evidence that even if concern for the quality of patient care could under some circumstances serve as a justification for a restraint of the sort imposed here, the evidence did not support a finding that the careful use of x rays as a basis for evaluating insurance claims is in fact destructive of proper standards of dental care.<sup>4</sup>

[\*\*\*\*32]

[\*465] **LEdHN/12** [12] In addition to arguing that its conspiracy did not effect an unreasonable restraint of trade, the Federation appears to renew its argument, pressed before both the Commission and the Court of Appeals, that the conspiracy to withhold x rays is immunized from antitrust scrutiny by virtue of a supposed policy of the State of Indiana against the evaluation of dental x rays by lay employees of insurance companies. See Brief for Respondent 25-26, and n. 10. Allegedly, such use of x rays by insurance companies -- even where no claim was actually denied without examination of an x ray by a [\*\*\*461] licensed dentist -- would constitute unauthorized practice of dentistry by the insurance company and its employees. The Commission found that this claim had no basis in any authoritative source of Indiana law, see 101 F. T. C., at 181-183, and the Federation has not identified any adequate reason for rejecting the Commission's conclusion. Even if the Commission were incorrect in its reading of the law, however, the Federation's claim of immunity would fail. That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among [\*\*\*\*33] competitors to prevent it. See *Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 468 (1941)*. Anticompetitive collusion among private actors, even when its goal is consistent with state policy, acquires antitrust immunity only when it is actively supervised by the State. See *Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 57 (1985)*. There is no suggestion of any such active supervision here; accordingly, whether or not the policy the Federation has taken upon itself to advance is consistent with the policy of the State of Indiana, the Federation's activities are subject to Sherman Act condemnation.

V

**LEdHN/1C** [1C] [1C] The factual findings of the Commission regarding the effect of the Federation's policy of withholding x rays are supported [\*466] by substantial evidence, and those [\*\*2022] findings are sufficient as a matter of law to establish a violation of **§ 1** of the Sherman Act, and, hence, § 5 of the Federal Trade Commission Act. Since there has been no suggestion that the cease-and-desist order entered by the Commission to remedy this violation is itself improper for any reason distinct from [\*\*\*\*34] the claimed impropriety of the finding of a violation, the Commission's order must be sustained. The judgment of the Court of Appeals is accordingly

Reversed.

<sup>4</sup> It is undisputed that lay claims examiners employed by insurance companies have no authority to deny claims on the basis of examination of x rays; rather, initial screening of x rays serves only as a means of identifying cases that merit further scrutiny by the licensed dentists serving as consultants to the insurers. Any recommendation that benefits be denied or a less expensive course of treatment be pursued is based on the professional judgment of a licensed dentist that the materials available to him -- x rays, claim forms, and whatever further diagnostic aids he chooses to consult -- are sufficient to indicate that the treating dentist's recommendation is not necessary to the health of the patient. There is little basis for concluding that, where such a divergence of professional judgment exists, the treatment recommendation made by the patient's dentist should be assumed to be the one that in fact represents the best interests of the patient.

## References

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54/[55 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices](#) 30-33, [340](#), [392](#), [396](#), [414](#), [738](#), [739](#), [745](#), [850](#), [863-868](#)

24 Federal Procedure, L Ed, Monopolies and Restraints of Trade 54:336-54:342, 54:345

24 Am Jur Trials 1, Defending Antitrust Lawsuits

[15 USCS 1, 45](#)

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 42, 90, 93, 107, 114, 115

Index to Annotations, Administrative Law; Federal Trade Commission; Restraints of Trade and Monopolies

Annotation References:

What constitutes "state action" under rule exempting state and local governmental action from antitrust laws. [70 L Ed 2d 973](#).

Refusals to deal as violations of the federal antitrust laws ([15 USCS 1](#), [\*\*\*\*35] [2](#), [13](#)). 41 ALR Fed 175.

"Learned profession" exemption in federal antitrust laws. 39 ALR Fed 774.

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## **Anderson v. Liberty Lobby, Inc.**

Supreme Court of the United States

December 3, 1985, Argued ; June 25, 1986, Decided

No. 84-1602

### **Reporter**

477 U.S. 242 \*; 106 S. Ct. 2505 \*\*; 91 L. Ed. 2d 202 \*\*\*; 1986 U.S. LEXIS 115 \*\*\*\*; 54 U.S.L.W. 4755; 4 Fed. R. Serv. 3d (Callaghan) 1041; 12 Media L. Rep. 2297

ANDERSON ET AL. v. LIBERTY LOBBY, INC., ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

**Disposition:** [241 U.S. App. D.C. 246, 746 F.2d 1563](#), vacated and remanded.

## **Core Terms**

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summary judgment, summary judgment motion, actual malice, conspiracy, genuine issue, directed verdict, present evidence, trial court, trial judge, convincing, genuine, cases, clear and convincing evidence, weight of the evidence, evidentiary standard, return a verdict, material fact, articles, factual dispute, matter of law, one-sided, court of appeals, reasonably find, fact finder, preponderance of evidence, supported motion, district court, criminal case, credibility, asserting

## **LexisNexis® Headnotes**

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Torts > ... > Defamation > Public Figures > Actual Malice

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

Constitutional Law > ... > Freedom of Speech > Defamation > Public Figures

Torts > Intentional Torts > Defamation > Libel

Torts > ... > Defamation > Public Figures > Clear & Convincing Evidence

Torts > ... > Defamation > Public Figures > Voluntary Public Figures

### **HN1[] Public Figures, Actual Malice**

In a libel suit brought by a public official, the [First Amendment](#) requires the plaintiff to show that in publishing the defamatory statement the defendant acted with actual malice, with knowledge that it was false or with reckless disregard of whether it was false or not. Such actual malice must be shown with "convincing clarity." These requirements extend to libel suits brought by public figures as well.

Torts > Intentional Torts > Defamation > Libel

Torts > ... > Defamation > Public Figures > Limited Purpose Public Figure

Torts > ... > Defamation > Public Figures > Voluntary Public Figures

## **HN2**[ **Defamation, Libel**

In a libel action, the public figure designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case, such persons assume special prominence in the resolution of public questions.

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

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

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

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

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

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

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

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

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

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

Fed. R. Civ. P 56(c) provides that summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.

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

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

## **HN4**[ **Entitlement as Matter of Law, Materiality of Facts**

Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination.

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

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

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

#### **HN5** Entitlement as Matter of Law, Genuine Disputes

Summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

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

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

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

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

#### **HN6** Summary Judgment, Opposing Materials

Fed. R. Civ. P. 56(e) provides that a party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.

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

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

#### **HN7** Summary Judgment, Burdens of Proof

The issue of material fact required by Fed. R. Civ. P. 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.

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

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

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

#### **HN8** [blue icon] **Entitlement as Matter of Law, Appropriateness**

At the summary judgment stage, the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted.

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

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

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

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

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

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

#### **HN9** [blue icon] **Judicial Officers, Judges**

Fed. R. Civ. P. 56(e) provides that, when a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(c) provides that the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. There is no requirement that the trial judge make findings of fact. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

#### **HN10** [blue icon] **Judgment as Matter of Law, Directed Verdicts**

Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

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

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

## **HN11**[ **Summary Judgment, Entitlement as Matter of Law**

A determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages.

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

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

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

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

Torts > Intentional Torts > Defamation > Libel

Torts > Intentional Torts > Defamation > Procedural Matters

## **HN12**[ **Entitlement as Matter of Law, Appropriateness**

Where the "clear and convincing" evidence requirement applies in libel case, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

## **Lawyers' Edition Display**

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### **Decision**

Court, in ruling on motion for summary judgment in public-figure libel action, held required to consider clear and convincing evidence standard in determining whether there is genuine issue of actual malice.

### **Summary**

Plaintiffs, a lobbying corporation and its founder, filed a diversity libel action in the United States District Court for the District of Columbia against the publishers of a magazine which had allegedly libelled the plaintiffs by printing three articles which portrayed them as neo-Nazi, anti-Semitic, racist, and fascist. The author of two of the articles, on which the third had been based, stated in an affidavit that he had engaged in extensive research and had

derived his facts from several sources. Relying on that affidavit, the publishers moved for summary judgment, asserting that the plaintiffs were required under the [First Amendment](#) to show that the publishers had acted with "actual malice," that is, with deliberate or reckless disregard for the truth, and that such malice was absent in this case as a matter of law; but the plaintiffs contended that several of the author's sources were patently unreliable, and that this raised an issue as to actual malice. The District Court granted summary judgment in favor of the publishers, holding (1) that the plaintiffs were limited-purpose public figures; (2) that the actual malice rule was therefore applicable; and (3) that the author's stated conduct precluded a finding of such malice. The United States Court of Appeals for the District of Columbia Circuit affirmed as to some of the allegedly libellous statements and reversed and remanded as to others, holding that, in such actions, the constitutional requirements of "clear and convincing" proof and independent judicial determination of the ultimate issue of actual malice are not to be applied on a motion for summary judgment, but only after the plaintiff has had an opportunity to present his evidence ([746 F2d 1563](#)).

On certiorari, the United States Supreme Court vacated the decision of the Court of Appeals and remanded for further proceedings. In an opinion by White, J., joined by Marshall, Blackmun, Powell, Stevens, and O'Connor, JJ., it was held (1) that on a motion for summary judgment under [Rule 56 of the Federal Rules of Civil Procedure](#), or on a motion for a directed verdict under [Rule 50\(a\)](#) of those Rules, the determination whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case; and, in particular, (2) that in ruling on a motion for summary judgment, in a libel action to which the actual malice rule applies, the appropriate question for the trial judge is whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

Brennan, J., dissented, expressing the view that if a plaintiff presents evidence which, either directly or by permissible inference, supports all of the elements he needs to prove in order to prevail on his legal claim, that plaintiff has made out a prima facie case, and a defendant's motion for summary judgment must fail regardless of the burden of proof that the plaintiff must meet.

Rehnquist, J., joined by Burger, Ch. J., dissented, expressing the view that trial courts should not be required to apply the "clear and convincing evidence" standard in deciding motions for summary judgment in libel cases, and that the court's opinion was deficient in that it failed to provide any guidance as to how such a requirement would be applied.

## Headnotes

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CONSTITUTIONAL LAW §948 > EVIDENCE §176 > SUMMARY JUDGMENT AND JUDGMENT ON THE PLEADINGS

§5 > libel action -- malice -- application of evidentiary standard -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D]

In a libel action brought by a "public figure," who is required under the [First Amendment](#) to prove by clear and convincing evidence that the defendant acted with "actual malice," that is, with knowing or reckless disregard of the truth, a trial judge ruling on a motion for summary judgment under [Rule 56 of the Federal Rules of Civil Procedure](#) must be guided by the "clear and convincing evidence" standard in determining whether a genuine issue of actual malice exists; thus, the appropriate summary judgment question for the judge will be whether the evidence in the record would allow a reasonable finder of fact to determine either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not. (Brennan and Rehnquist, JJ., and Burger, Ch. J., dissented from this holding.)

477 U.S. 242, \*242; 106 S. Ct. 2505, \*\*2505; 91 L. Ed. 2d 202, \*\*\*202; 1986 U.S. LEXIS 115, \*\*\*\*1

CONSTITUTIONAL LAW §948 > free speech and press -- defamation -- public figure -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B] [2B]

The designation of a "public figure," who, as the plaintiff in a libel action, will be required under the [\*First Amendment\*](#) to prove that the defendant acted with "actual malice," may rest on either of two alternative bases: in some instances, individuals may achieve such pervasive fame or notoriety that they become public figures for all purposes and in all contexts; more commonly, individuals voluntarily inject themselves or are drawn into a particular public controversy and thereby become public figures for a limited range of issues; in either case, such persons assume special prominence in the resolution of public questions.

SUMMARY JUDGMENT AND JUDGMENT ON THE PLEADINGS §5 > genuine issue of material fact -- > Headnote:

[LEdHN\[3\]](#) [3]

Under [\*Rule 56\(c\) of the Federal Rules of Civil Procedure\*](#), the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no "genuine" issue of "material" fact.

SUMMARY JUDGMENT AND JUDGMENT ON THE PLEADINGS §5 > materiality -- > Headnote:

[LEdHN\[4\]](#) [4]

Only disputes over facts that might affect the outcome of the suit under the governing substantive law will properly preclude the entry of summary judgment under [\*Rule 56\(c\) of the Federal Rules of Civil Procedure\*](#); it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs the materiality determination, and any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes.

SUMMARY JUDGMENT AND JUDGMENT ON THE PLEADINGS §5 > genuine issues -- > Headnote:

[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B] [LEdHN\[5C\]](#) [5C] [5C]

Summary judgment will not lie under [\*Rule 56\(c\) of the Federal Rules of Civil Procedure\*](#) if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party; if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted; the inquiry performed is the threshold inquiry of determining whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

SUMMARY JUDGMENT AND JUDGMENT ON THE PLEADINGS §5 > determination -- judge's function -- > Headnote:

[LEdHN\[6\]](#) [6]

477 U.S. 242, \*242; 106 S. Ct. 2505, \*\*2505; 91 L. Ed. 2d 202, \*\*\*202; 1986 U.S. LEXIS 115, \*\*\*\*1

Under [Rule 56\(c\) of the Federal Rules of Civil Procedure](#), the judge's function at the summary judgment stage is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial.

SUMMARY JUDGMENT AND JUDGMENT ON THE PLEADINGS §5 > findings of fact -- > Headnote:

[LEdHN\[7\]](#) [7]

There is no requirement that the trial judge make findings of fact in ruling on a motion for summary judgment under [Rule 56\(c\) of the Federal Rules of Civil Procedure](#).

TRIAL §194 > directed verdict -- reasonable disagreement -- > Headnote:

[LEdHN\[8\]](#) [8]

Under [Rule 50\(a\) of the Federal Rules of Civil Procedure](#), a trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict; if reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed.

SUMMARY JUDGMENT AND JUDGMENT ON THE PLEADINGS §5 > TRIAL §194 > similarity of summary judgment and directed verdict -- > Headnote:

[LEdHN\[9\]](#) [9]

The inquiries on a motion for summary judgment and on a motion for a directed verdict are essentially the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

SUMMARY JUDGMENT AND JUDGMENT ON THE PLEADINGS §5 > TRIAL §194 > application of evidentiary standards --

> Headnote:

[LEdHN\[10A\]](#) [10A] [LEdHN\[10B\]](#) [10B]

The inquiry involved in a ruling on a motion for summary judgment, or on a motion for a directed verdict, as to whether a given factual dispute requires submission to a jury, must be guided by the substantive evidentiary standards that apply to the case. (Brennan, J., dissented from this holding.)

EVIDENCE §176 > TRIAL §194 > libel action -- malice -- application of evidentiary standard -- > Headnote:

[LEdHN\[11\]](#) [11]

477 U.S. 242, \*242; 106 S. Ct. 2505, \*\*2505; 91 L. Ed. 2d 202, \*\*\*202; 1986 U.S. LEXIS 115, \*\*\*\*1

Where the *First Amendment* mandates a "clear and convincing" evidence standard, the trial judge, in disposing of a motion for a directed verdict, should consider whether a reasonable factfinder could conclude, for example, that the plaintiff has shown actual malice with convincing clarity.

SUMMARY JUDGMENT AND JUDGMENT ON THE PLEADINGS §5 > TRIAL §46 > summary judgment and directed verdict - jury determinations -- > Headnote:

[LEdHN\[12\]](#) [12]

Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether the judge is ruling on a motion for summary judgment or on a motion for a directed verdict.

SUMMARY JUDGMENT AND JUDGMENT ON THE PLEADINGS §5 > inferences -- > Headnote:

[LEdHN\[13\]](#) [13]

On a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in the nonmovant's favor.

SUMMARY JUDGMENT AND JUDGMENT ON THE PLEADINGS §5 > judicial caution -- > Headnote:

[LEdHN\[14\]](#) [14]

Trial courts should act with caution in granting summary judgment, and may deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

EVIDENCE §88 > SUMMARY JUDGMENT AND JUDGMENT ON THE PLEADINGS §5 > burdens of proof -- > Headnote:

[LEdHN\[15\]](#) [15]

A defendant moving for summary judgment has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn affirmative evidence that would support a jury verdict in his favor.

EVIDENCE §872 > discredited testimony -- opposite conclusion -- > Headnote:

[LEdHN\[16\]](#) [16]

Discredited testimony is not normally considered a sufficient basis for drawing a contrary conclusion.

APPEAL §1692.3 > remand -- improper standard for summary judgment -- > Headnote:

[LEdHN\[17\]](#) [] [17]

Where a Federal Court of Appeals does not apply the correct standard in reviewing a Federal District Court's grant of summary judgment in a libel action, the decision of the Court of Appeals, affirming summary judgment as to some of the allegedly defamatory statements and reversing as to others, will be vacated, and the case will be remanded for further proceedings.

## Syllabus

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In [\*New York Times Co. v. Sullivan, 376 U.S. 254\*](#), it was held that, in a libel suit brought by a public official (extended by later cases to public figures), the [\*First Amendment\*](#) requires the plaintiff to show that in publishing the alleged defamatory statement the defendant acted with actual malice. It was further held that such actual malice must be shown with "convincing clarity." Respondents, a nonprofit corporation described as a "citizen's lobby" and its founder, filed a libel action in Federal District Court against petitioners, alleging that certain statements in a magazine published by petitioners were false and derogatory. Following discovery, petitioners moved for summary judgment pursuant to [\*Federal Rule of Civil Procedure 56\*](#), asserting that because respondents were public figures they were required to prove their case under the *New York Times* standards and that summary judgment was proper because actual malice was absent as a matter of law in view of an affidavit [\*\*\*\*2] by the author of the articles in question that they had been thoroughly researched and that the facts were obtained from numerous sources. Opposing the motion, respondents claimed that an issue of actual malice was presented because the author had relied on patently unreliable sources in preparing the articles. After holding that *New York Times* applied because respondents were limited-purpose public figures, the District Court entered summary judgment for petitioners on the ground that the author's investigation and research and his reliance on numerous sources precluded a finding of actual malice. Reversing as to certain of the allegedly defamatory statements, the Court of Appeals held that the requirement that actual malice be proved by clear and convincing evidence need not be considered at the summary judgment stage, and that with respect to those statements summary judgment had been improperly granted because a jury could reasonably have concluded that the allegations were defamatory, false, and made with actual malice.

*Held:* The Court of Appeals did not apply the correct standard in reviewing the District Court's grant of summary judgment. Pp. 247-257.

(a) Summary [\*\*\*\*3] judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. At the summary judgment stage, the trial judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. There is no such issue unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. In essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Pp. 247-252.

(b) A trial court ruling on a motion for summary judgment in a case such as this must be guided by the *New York Times* "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists, that is, whether the evidence is such that a reasonable jury might find that actual malice had been shown with convincing clarity. Pp. 252-256.

(c) A plaintiff may not defeat a defendant's properly supported motion for summary judgment in a libel case [\*\*\*\*4] such as this one without offering any concrete evidence from which a reasonable jury could return a verdict in his favor and by merely asserting that the jury might disbelieve the defendant's denial of actual malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. Pp. 256-257.

**Counsel:** David J. Branson argued the cause for petitioners. With him on the briefs was David O. Bickart. Mark Lane argued the cause for respondents. With him on the brief were Linda Huber and Fleming Lee. \*

[\*\*\*\*5]

**Judges:** WHITE, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, post, p. 257. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, post, p. 268.

**Opinion by:** WHITE

## Opinion

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[\*244] [\*\*\*209] [\*\*2508] JUSTICE WHITE delivered the opinion of the Court.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964), we held that, [HN1](#) in a libel suit brought by a public official, the [First Amendment](#) requires the plaintiff to show that in publishing the defamatory statement the defendant acted with actual malice -- "with knowledge that it was false or with reckless disregard of whether it was false or not." We held further that such actual malice must be shown with "convincing clarity." *Id.*, at 285-286. See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). These *New York Times* requirements we have since extended to libel suits brought by public figures as well. See, e. g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

[LEdHN\[1A\]](#) [1A] This case presents the question whether the clear-and-convincing-evidence [\*\*\*\*6] requirement must be considered by a court ruling on a motion for summary judgment under [Rule 56 of the Federal Rules of Civil Procedure](#) in a case to which *New York Times* applies. The United States Court of Appeals for the District of Columbia Circuit held that that requirement need not be considered at the summary judgment stage. [241 U. S. App. D. C. 246, 746 F. 2d 1563 \(1984\)](#). We granted certiorari, 471 U.S. 1134 (1985), because that holding was in conflict with decisions of several other Courts of Appeals, which had held that the *New York Times* requirement of clear and convincing evidence must be considered on a motion for summary judgment.<sup>1</sup> We now reverse.

[\*\*\*\*7] I

Respondent Liberty Lobby, Inc., is a not-for-profit corporation and self-described "citizens' lobby." Respondent Willis Carto is its founder and treasurer. In October 1981, [\*245] The Investigator magazine published two articles: "The Private World of Willis Carto" and "Yockey: Profile of an American Hitler." These articles were introduced by a third, shorter article entitled "America's Neo-Nazi Underground: Did *Mein Kampf* Spawn Yockey's *Imperium*, a Book Revived by Carto's Liberty Lobby?" These articles portrayed respondents as neo-Nazi, anti-Semitic, racist, and Fascist.

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\* Briefs of amici curiae urging reversal were filed for the American Newspaper Publishers Association et al. by Robert D. Sack, Robert S. Warren, W. Terry Maguire, Richard M. Schmidt, Jr., R. Bruce Rich, Lawrence Gunnels, Harvey L. Lipton, Peter C. Gould, and Jane E. Kirtley; and for the Reader's Digest Association, Inc., by Walter R. Allan and Karen J. Wegner.

Briefs of amici curiae urging affirmance were filed for the American Legal Foundation by Daniel J. Popeo; and for the Synanon Church et al. by Jonathan W. Lubell, Philip C. Bourdette, David R. Benjamin, and Andrew J. Weill.

<sup>1</sup> See, e. g., *Rebozo v. Washington Post Co.*, 637 F.2d 375, 381 (CA5), cert. denied, 454 U.S. 964 (1981); *Yiamouyiannis v. Consumers Union of United States, Inc.*, 619 F.2d 932, 940 (CA2), cert. denied, 449 U.S. 839 (1980); *Carson v. Allied News Co.*, 529 F.2d 206, 210 (CA7 1976).

Respondents filed this diversity libel action in the United States District Court for the District of Columbia, alleging that some 28 statements and 2 illustrations in the 3 articles were false and derogatory. Named as defendants in the action were petitioner Jack Anderson, the publisher of *The Investigator*, petitioner Bill Adkins, president and chief executive officer of the *Investigator Publishing Co.*, and petitioner *Investigator Publishing Co.* itself.

Following discovery, petitioners [\*\*\*210] moved for summary judgment pursuant to [Rule 56](#). In their motion, petitioners asserted that because respondents [\*\*\*\*8] are public figures they were required to prove their case under the standards set forth in *New York Times*. Petitioners also asserted that summary judgment was proper because actual malice was absent as a matter of law. In support of this latter assertion, petitioners submitted the affidavit of Charles Bermant, an employee of petitioners and the author of the two longer articles.<sup>2</sup> In this affidavit, Bermant stated that he had spent a substantial amount of time researching [\*\*2509] and writing the articles and that his facts were obtained from a wide variety of sources. He also stated that he had at all times believed and still believed that the facts contained in the articles were truthful and accurate. Attached to this affidavit was an appendix in which Bermant detailed the sources for each of the statements alleged by respondents to be libelous.

[\*246] Respondents opposed [\*\*\*\*9] the motion for summary judgment, asserting that there were numerous inaccuracies in the articles and claiming that an issue of actual malice was presented by virtue of the fact that in preparing the articles Bermant had relied on several sources that respondents asserted were patently unreliable. Generally, respondents charged that petitioners had failed adequately to verify their information before publishing. Respondents also presented evidence that William McGaw, an editor of *The Investigator*, had told petitioner Adkins before publication that the articles were "terrible" and "ridiculous."

[LEdHN\[2A\]](#) [↑] [2A] In ruling on the motion for summary judgment, the District Court first held that respondents were limited-purpose public figures and that *New York Times* therefore applied.<sup>3</sup> The District Court then held that Bermant's thorough investigation and research and his reliance on numerous sources precluded a finding of actual malice. Thus, the District Court granted the motion and entered judgment in favor of petitioners.

[LEdHN\[2B\]](#) [↑] [2B]

[\*\*\*\*10] On appeal, the Court of Appeals affirmed as to 21 and reversed as to 9 of the allegedly defamatory statements. Although it noted that respondents did not challenge the District Court's ruling that they were limited-purpose public [\*247] figures and that they were thus required to prove their case under *New York* [\*\*\*211] *Times*, the Court of Appeals nevertheless held that for the purposes of summary judgment the requirement that actual malice be proved by clear and convincing evidence, rather than by a preponderance of the evidence, was irrelevant: To defeat summary judgment respondents did not have to show that a jury could find actual malice with "convincing clarity." The court based this conclusion on a perception that to impose the greater evidentiary burden at summary judgment "would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontested facts as well." [241 U. S. App. D. C., at 253, 746 F.2d, at 1570](#). The court then

<sup>2</sup>The short, introductory article was written by petitioner Anderson and relied exclusively on the information obtained by Bermant.

<sup>3</sup>In [Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 \(1974\)](#), this Court summarized who will be considered to be a public figure to whom the *New York Times* standards will apply:

[HN2](#) [↑] "[The public figure] designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions."

The District Court found that respondents, as political lobbyists, are the second type of political figure described by the Gertz court -- a limited-purpose public figure. See also [Waldbaum v. Fairchild Publications, Inc., 201 U. S. App. D. C. 301, 306, 627 F.2d 1287, 1292](#), cert. denied, [449 U.S. 898 \(1980\)](#).

held, with respect to nine of the statements, [\*\*\*\*11] that summary judgment had been improperly granted because "a jury could reasonably conclude that the . . . allegations were defamatory, false, and made with actual malice." *Id., at 260, 746 F.2d, at 1577.*

II

A

LEdHN[3] [3]Our inquiry is whether the Court of Appeals erred in holding that the heightened evidentiary requirements that apply to proof of actual malice in this *New York Times* case need not be considered for the purposes of a motion for summary judgment. HN3 [Rule 56\(c\) of the Federal Rules of Civil Procedure](#) provides that summary judgment "shall be rendered forthwith if [\*\*2510] the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported [\*248] motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.

LEdHN[4] [4]As to materiality, the substantive law will identify [\*\*\*\*12] which facts are material. HN4 Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. See generally 10A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2725, pp. 93-95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes.

LEdHN[5A] [5A]More important for present purposes, HN5 summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the [\*\*\*212] evidence is such that a reasonable [\*\*\*\*13] jury could return a verdict for the nonmoving party. In *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), we affirmed a grant of summary judgment for an antitrust defendant where the issue was whether there was a genuine factual dispute as to the existence of a conspiracy. We noted [Rule 56\(e\)](#)'s HN6 provision that a party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." We observed further that

"[it] is true that HN7 the issue of material fact required by [Rule 56\(c\)](#) to be present to entitle a party to proceed to [\*249] trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." [391 U.S., at 288-289.](#)

We went on to hold that, in the face of the defendant's properly supported motion for summary judgment, the plaintiff could [\*\*\*\*14] not rest on his allegations of a conspiracy to get to a jury without "any significant probative evidence tending to support the complaint." *Id., at 290.*

Again, in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), the Court emphasized that the availability of summary judgment turned on whether a proper jury question was presented. There, one of the issues was whether there was a conspiracy between private persons and law enforcement officers. The District Court granted summary judgment for the defendants, stating that there was no evidence from which reasonably minded jurors might draw an inference of conspiracy. We reversed, pointing out that the moving parties' submissions had not foreclosed the

possibility of the existence of certain facts from which "it would be open to a jury . . . to infer from the circumstances" that there had been a meeting of the minds. *Id., at 158-159.*

[LEdHN\[5B\]](#) [5B] [LEdHN\[6\]](#) [6] Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under [Rule 1\\*\\*2511 56](#), but it is clear enough from our recent cases that [HN8](#) at the summary judgment stage the judge's function is not [\\*\\*\\*\\*15](#) himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As [Adickes, supra](#), and [Cities Service, supra](#), indicate, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. [Cities Service, supra, at 288-289](#). If the evidence is merely colorable, [Dombrowski v. Eastland, 387 U.S. 82 \(1967\)](#) (per curiam), or is not significantly probative, [\[\\*250\] Cities Service, supra, at 290](#), summary judgment may be granted.

[LEdHN\[5C\]](#) [5C] [LEdHN\[7\]](#) [7] That this is the proper focus of the inquiry is strongly suggested by the Rule itself. [Rule 56\(e\) HN9](#) provides that, when a properly supported motion for summary judgment [\\*\\*\\*213](#) is made,<sup>4</sup> the adverse party "must set forth specific facts showing that there is a genuine issue for trial."<sup>5</sup> And, as we noted above, [Rule 56\(c\)](#) provides that the trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law. There is no [\\*\\*\\*\\*16](#) requirement that the trial judge make findings of fact.<sup>6</sup> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

[\\*\\*\\*\\*17](#) [LEdHN\[8\]](#) [8] Petitioners suggest, and we agree, that this standard mirrors the standard for a directed verdict under [Federal Rule of Civil Procedure 50\(a\)](#), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. [Brady v. Southern R. Co., 320 U.S. 476, 479-480 \(1943\)](#). If reasonable minds could differ as to the import of the evidence, however, [\[\\*251\]](#) a verdict should not be directed. [Wilkerson v. McCarthy, 336 U.S. 53, 62 \(1949\)](#). As the Court long ago said in *Improvement Co. v. Munson, 14 Wall. 442, 448 (1872)*, and has several times repeated:

"Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable [\\*\\*\\*\\*18](#) rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a

<sup>4</sup> Our analysis here does not address the question of the initial burden of production of evidence placed by [Rule 56](#) on the party moving for summary judgment. See *Celotex Corp. v. Catrett, post*, p. 317. Respondents have not raised this issue here, and for the purposes of our discussion we assume that the moving party has met initially the requisite evidentiary burden.

<sup>5</sup> This requirement in turn is qualified by [Rule 56\(f\)](#)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. In our analysis here, we assume that both parties have had ample opportunity for discovery.

<sup>6</sup> In many cases, however, findings are extremely helpful to a reviewing court.

477 U.S. 242, \*251; 106 S. Ct. 2505, \*\*2511; 91 L. Ed. 2d 202, \*\*\*213; 1986 U.S. LEXIS 115, \*\*\*\*18

jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." (Footnotes omitted.)

See also [\*Pleasants v. Fant\*, 22 Wall. 116, 120-121 \(1875\)](#); [\*Coughran v. Bigelow\*, 164 U.S. 301, 307 \(1896\)](#); [\*Pennsylvania R. Co. v. Chamberlain\*, 288 U.S. 333, 343 \(1933\)](#).

[\*\*2512] [LEdHN/9](#) [9]The Court has said that summary judgment should be granted where the evidence is such that it [\*\*\*214] "would require a directed verdict for the moving party." [\*Sartor v. Arkansas Gas Corp.\*, 321 U.S. 620, 624 \(1944\)](#). And we have noted that the "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard: "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence [\*\*\*\*19] that has been admitted." [\*Bill Johnson's Restaurants, Inc. v. NLRB\*, 461 U.S. 731, 745, n. 11 \(1983\)](#). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission [\*252] to a jury or whether it is so one-sided that one party must prevail as a matter of law.

B

[LEdHN/10A](#) [10A]Progressing to the specific issue in this case, we are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, [\*\*\*\*20] therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict -- "whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." [\*Munson, supra, at 448\*](#).

[LEdHN/11](#) [11]In terms of the nature of the inquiry, this is no different from the consideration of a motion for acquittal in a criminal case, where the beyond-a-reasonable-doubt standard applies and where the trial judge asks whether a reasonable jury could find guilt beyond a reasonable doubt. See [\*Jackson v. Virginia\*, 443 U.S. 307, 318-319 \(1979\)](#). Similarly, where the [First Amendment](#) mandates a "clear and convincing" standard, the trial judge in disposing of a directed verdict motion should consider whether a reasonable factfinder could conclude, for example, that the plaintiff had shown actual malice with convincing clarity.

[\*253] The case for the proposition that a higher burden of proof should have a corresponding effect on the judge when deciding whether to send the case to the jury was well made by the Court of Appeals [\*\*\*\*21] for the Second Circuit in [\*United States v. Taylor\*, 464 F.2d 240 \(1972\)](#), which overruled [\*United States v. Feinberg\*, 140 F.2d 592 \(1944\)](#), a case holding that the standard of evidence necessary for a judge to send a case to the jury is the same in both civil and criminal cases even though the standard that the jury must apply in a criminal case is more demanding than in civil [\*\*\*215] proceedings. Speaking through Judge Friendly, the Second Circuit said: "It would seem at first blush -- and we think also at second -- that more 'facts in evidence' are needed for the judge to allow [reasonable jurors to pass on a claim] when the proponent is required to establish [the claim] not merely by a preponderance of the evidence but . . . beyond a reasonable doubt." [\*464 F.2d, at 242\*](#). The court could not find a "satisfying explanation in the *Feinberg* opinion why the judge should not place this higher burden on the prosecution in criminal proceedings before sending the case to the jury." *Ibid.* The *Taylor* court [\*\*2513] also pointed out that

477 U.S. 242, \*253; 106 S. Ct. 2505, \*\*2513; 91 L. Ed. 2d 202, \*\*\*215; 1986 U.S. LEXIS 115, \*\*\*\*21

almost all the Circuits had adopted something like Judge Prettyman's formulation [\*\*\*\*22] in [Curley v. United States, 160 F.2d 229, 232-233 \(1947\)](#):

"The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the [\*254] two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter."

This view is equally applicable to a civil case to which the "clear and convincing" standard applies. Indeed, the *Taylor* court thought that it was implicit in this Court's adoption of the clear-and-convincing-evidence standard for certain kinds of cases that there was a "concomitant duty on the judge to consider [\*\*\*\*23] the applicable burden when deciding whether to send a case to the jury." [464 F.2d, at 243](#). Although the court thought that this higher standard would not produce different results in many cases, it could not say that it would never do so.

[LEdHN\[1B\]](#) [↑] [1B] Just as the "convincing clarity" requirement is relevant in ruling on a motion for directed verdict, it is relevant in ruling on a motion for summary judgment. When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.

Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination. The question here is whether a jury could reasonably find either that the plaintiff proved his [\*\*\*\*24] case by the quality and quantity of evidence required by the governing law or that he did not. Whether a jury could reasonably find for either party, however, cannot be defined [\*\*\*216] except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some [\*255] benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.

[LEdHN\[12\]](#) [↑] [12] [LEdHN\[13\]](#) [↑] [13] [LEdHN\[14\]](#) [↑] [14] Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. [HN10](#) [↑] Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. [Adickes, 398 U.S., at 158-159.](#) [\*\*\*\*25] Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. [Kennedy v. Silas Mason Co., 334 U.S. 249](#) [\*2514] (1948).

[LEdHN\[1C\]](#) [↑] [1C] [LEdHN\[10B\]](#) [↑] [10B] In sum, we conclude that [HN11](#) [↑] the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages. Consequently, [HN12](#) [↑] where the *New York Times* "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding [\*256]

either [\*\*\*\*26] that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.<sup>7</sup>

### III

[LEdHN\[15\]](#) [15] [LEdHN\[16\]](#) [16] Respondents argue, however, that whatever may be true of the applicability of the "clear and convincing" standard at the summary judgment or directed verdict stage, the defendant should seldom if ever be granted summary judgment where his state of mind is at issue and the jury might disbelieve him or his witnesses as to this issue. They rely on [\*Poller v. Columbia Broadcasting Co., 368 U.S. 464 \(1962\)\*](#), for this proposition. [\*\*\*\*27] We do not understand [\*\*\*217] *Poller*, however, to hold that a plaintiff may defeat a defendant's properly supported motion for summary judgment in a conspiracy or libel case, for example, without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict. [\*Rule 56\(e\)\*](#) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Based on that Rule, [\*Cities Service, 391 U.S., at 290\*](#), held that the plaintiff could not defeat the properly supported summary judgment motion of a defendant charged with a conspiracy without offering "any significant probative evidence tending to support the complaint." As we have recently said, [\*\*\*\*28] "discredited testimony [\*257] is not [normally] considered a sufficient basis for drawing a contrary conclusion." [\*Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 512 \(1984\)\*](#). Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery. We repeat, however, that the plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial.

### IV

[LEdHN\[1D\]](#) [1D] [LEdHN\[17\]](#) [17] In sum, a court ruling on a motion for summary judgment must be guided by the *New York Times* "clear and convincing" [\*\*2515] evidentiary standard in determining whether a genuine issue of actual malice exists -- that is, whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity. Because the Court of Appeals did not apply the correct standard in reviewing the District [\*\*\*\*29] Court's grant of summary judgment, we vacate its decision and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

**Dissent by:** BRENNAN; REHNQUIST

### Dissent

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JUSTICE BRENNAN, dissenting.

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<sup>7</sup> Our statement in [\*Hutchinson v. Proxmire, 443 U.S. 111, 120, n. 9 \(1979\)\*](#), that proof of actual malice "does not readily lend itself to summary disposition" was simply an acknowledgment of our general reluctance "to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws." [\*Calder v. Jones, 465 U.S. 783, 790-791 \(1984\)\*](#).

The Court today holds that "whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case," *ante*, at 255.<sup>1</sup> In my view, the Court's analysis [\*\*\*218] is deeply flawed, [\*258] and rests on a shaky foundation of unconnected and unsupported observations, assertions, and conclusions. Moreover, I am unable to divine from the Court's opinion *how* these evidentiary standards are to be considered, or what a trial judge is actually supposed to do in ruling on a motion for summary judgment. Accordingly, I respectfully dissent.

[\*\*\*30] To support its holding that in ruling on a motion for summary judgment a trial court must consider substantive evidentiary burdens, the Court appropriately begins with the language of [Rule 56\(c\)](#), which states that summary judgment shall be granted if it appears that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Court then purports to restate this Rule, and asserts that "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Ante*, at 248. No direct authority is cited for the proposition that in order to determine whether a dispute is "genuine" for [Rule 56](#) purposes a judge must ask if a "reasonable" jury could find for the nonmoving party. Instead, the Court quotes from [First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-289 \(\\*2591\) \(1968\)](#), to the effect that a summary judgment motion will be defeated if "sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' [\*\*\*31] differing versions of the truth at trial," *ante*, at 249, and that a plaintiff may not, in defending against a motion for summary judgment, rest on mere allegations or denials of his pleadings. After citing [Adickes v. S.H. Kress & Co., 398 U.S. 144 \(1970\)](#), for the startling proposition that "the availability of summary judgment [turns] on whether a proper jury question [is] presented," *ante*, at 249, the Court then reasserts, again with no direct authority, that in determining whether [\*\*2516] a jury question is presented, the inquiry is whether there are factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Ante*, at 250. The Court maintains that this summary judgment inquiry [\*\*\*219] "mirrors" that which applies in the context of a motion for directed verdict under [Federal Rule of Civil Procedure 50\(a\)](#): "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Ante*, at 251-252.

Having thus decided that a "genuine" dispute is one which is not "one-sided," [\*\*\*32] and one which could "reasonably" be resolved by a "fair-minded" jury in favor of either party, *ibid.*, the Court then concludes:

"Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards." *Ante*, at 254-255.

<sup>1</sup> The Court's holding today is not, of course, confined in its application to [First Amendment](#) cases. Although this case arises in the context of litigation involving libel and the press, the Court's holding is that "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Ante*, at 254. Accordingly, I simply do not understand why JUSTICE REHNQUIST, dissenting, feels it appropriate to cite [Calder v. Jones, 465 U.S. 783 \(1984\)](#), and to remind the Court that we have consistently refused to extend special procedural protections to defendants in libel and defamation suits. The Court today does nothing of the kind. It changes summary judgment procedure for *all* litigants, regardless of the substantive nature of the underlying litigation.

Moreover, the Court's holding is not limited to those cases in which the evidentiary standard is "heightened," *i. e.*, those in which a plaintiff must prove his case by more than a mere preponderance of the evidence. Presumably, if a district court ruling on a motion for summary judgment in a libel case is to consider the "quantum and quality" of proof necessary to support liability under [New York Times, ante, at 254](#), and then ask whether the evidence presented is of "sufficient caliber or quantity" to support that quantum and quality, the court must ask the same questions in a garden-variety action where the plaintiff need prevail only by a mere preponderance of the evidence. In other words, today's decision by its terms applies to all summary judgment motions, irrespective of the burden of proof required and the subject matter of the suit.

[\*260] As far as I can discern, this conclusion, which is at the heart of the case, has been reached without the benefit of any support in the case law. Although, as noted above, the Court cites *Adickes* and *Cities Service*, those cases simply do not stand for the proposition that in ruling on a summary judgment motion, the trial court is to inquire into the "one-sidedness" of the evidence presented by the parties. *Cities Service* involved the propriety of a grant of summary judgment in favor of a defendant alleged [\*\*\*\*33] to have conspired to violate the antitrust laws. The issue in the case was whether, on the basis of the facts in the record, a jury could *infer* that the defendant had entered into a conspiracy to boycott. No direct evidence of the conspiracy was produced. In agreeing with the lower courts that the *circumstantial* evidence presented by the plaintiff was insufficient to take the case to the jury, we observed that there was "one fact" that petitioner had produced to support the existence of the illegal agreement, and that that single fact could not support petitioner's *theory* of liability. Critically, we observed that "[the] case at hand presents peculiar difficulties because the issue of fact crucial to petitioner's case is also an issue of law, namely the existence of a conspiracy." [391 U.S., at 289](#) In other words, *Cities Service* is at heart about whether certain facts can support inferences that are, as a matter of **antitrust law**, sufficient to support a particular theory of liability under the Sherman Act. Just this Term, in discussing summary judgment in the context of suits brought under the antitrust laws, we characterized both *Cities Service* [\*\*\*\*34] and *Monsanto Co. v. Spray-Rite Service Corp.*, [465 U.S. 752 \(1984\)](#), as cases in which "**antitrust law** [limited] the range of permissible inferences from ambiguous evidence. . . ." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, [475 U.S. 574, 588 \(1986\)](#) (emphasis added). *Cities Service* thus provides no authority for the conclusion that [Rule 56](#) requires a trial court to consider whether direct evidence produced by the parties is "one-sided." To the contrary, in *Matsushita*, the most [\*220] recent [\*261] case to cite and discuss *Cities Service*, we stated that the requirement that a dispute be "genuine" means simply that there must be more than "some metaphysical doubt as to the material facts." [475 U.S., at 586](#).<sup>2</sup>

[\*\*\*\*35] [\*2517] Nor does *Adickes*, also relied on by the Court, suggest in any way that the appropriate summary judgment inquiry is whether the evidence overwhelmingly supports one party. *Adickes*, like *Cities Service*, presented the question of whether a grant of summary judgment in favor of a defendant on a conspiracy count was appropriate. The plaintiff, a [\*262] white schoolteacher, maintained that employees of defendant Kress conspired with the police to deny her rights protected by the [Fourteenth Amendment](#) by refusing to serve her in one of its lunchrooms simply because she was white and accompanied by a number of black schoolchildren. She maintained, among other things, that Kress arranged with the police to have her arrested for vagrancy when she left the defendant's premises. In support of its motion for summary judgment, Kress submitted statements from a deposition of one of its employees asserting that he had not communicated or agreed with the police to deny

<sup>2</sup> Writing in dissent in *Matsushita*, JUSTICE WHITE stated that he agreed with the summary judgment test employed by the Court, namely, that "[where] the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" [475 U.S., at 599](#). Whether the shift, announced today, from looking to a "reasonable" rather than a "rational" jury is intended to be of any significance, there are other aspects of the *Matsushita* dissent which I find difficult to square with the Court's holding in the present case. The *Matsushita* dissenters argued:

". . . [The] Court summarizes *Monsanto Co. v. Spray-Rite Service Corp., supra*, as holding that 'courts should not permit factfinders to infer conspiracies when such inferences are implausible. . . .' *Ante*, at 593. Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. *Cities Service* and *Monsanto* do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence standing alone was insufficiently probative to justify sending a case to the jury. These holdings in no way undermine the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.

"If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language." [Id., at 600-601](#) (footnote omitted).

In my view, these words are as applicable and relevant to the Court's opinion today as they were to the opinion of the Court in *Matsushita*.

plaintiff service or to have her arrested, and explaining that the store had taken the challenged action not because of the race of the plaintiff, but because it was fearful of the reaction of some of its [\*\*\*\*36] customers if it served a racially mixed group. Kress also submitted affidavits from the Chief of Police and the arresting officers denying that the store manager had requested that petitioner be arrested, and noted that in the plaintiff's own deposition, she conceded that she had no knowledge of any communication between the police and any Kress employee and was relying on circumstantial evidence to support her allegations. In opposing defendant's motion for [\*\*\*221] summary judgment, plaintiff stated that defendant in its moving papers failed to dispute an allegation in the complaint, a statement at her deposition, and an unsworn statement by a Kress employee all to the effect that there was a policeman in the store at the time of the refusal to serve, and that it was this policeman who subsequently made the arrest. Plaintiff argued that this sequence of events "created a substantial enough possibility of a conspiracy to allow her to proceed to trial. . ." [398 U.S., at 157.](#)

We agreed, and therefore reversed the lower courts, reasoning that Kress "did not carry its burden because of its failure to foreclose the possibility that there was a policeman in the Kress [\*\*\*\*37] store while petitioner was awaiting service, and that this policeman reached an understanding with some [\*263] Kress employee that petitioner not be served." *Ibid.* Despite the fact that *none of the materials relied on by plaintiff* met the requirements of [Rule 56\(e\)](#), we stated nonetheless that Kress failed to meet its initial burden of showing that there was no genuine dispute of a material fact. Specifically, we held that because Kress failed to negate plaintiff's materials suggesting that a [\*\*2518] policeman was in fact in the store at the time of the refusal to serve, "it would be open to a jury . . . to infer from the circumstances that the policeman and a Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service." [Id., at 158.](#)

In *Adickes* we held that a jury might permissibly infer a conspiracy from the mere presence of a policeman in a restaurant. We never reached and did not consider whether the evidence was "one-sided," and had we done so, we clearly would have had to affirm, rather than reverse, the lower courts, since in that case there was no admissible evidence submitted [\*\*\*\*38] by petitioner, and a significant amount of evidence presented by the defendant tending to rebut the existence of a conspiracy. The question we did reach was simply whether, as a matter of conspiracy law, a jury would be entitled, again, as a matter of law, to infer from the presence of a policeman in a restaurant the making of an agreement between that policeman and an employee. Because we held that a jury was entitled so to infer, and because the defendant had not carried its initial burden of production of demonstrating that there was no evidence that there was not a policeman in the lunchroom, we concluded that summary judgment was inappropriate.

Accordingly, it is surprising to find the case cited by the majority for the proposition that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Ante*, at 249. There was, of course, *no* admissible evidence in *Adickes* favoring the nonmoving plaintiff; there was only an [\*264] unrebutted assertion that a Kress employee and a policeman were in the same room at the time of the alleged constitutional violation. Like *Cities Service*, [\*\*\*\*39] *Adickes* suggests that on a defendant's motion for summary judgment, a trial court must consider whether, as a matter of the substantive law of the plaintiff's cause of action, a jury will be permitted to draw inferences supporting the [\*\*\*222] plaintiff's legal theory. In *Cities Service* we found, in effect, that the plaintiff had failed to make out a *prima facie* case; in *Adickes* we held that the moving defendant had failed to rebut the plaintiff's *prima facie* case. In neither case is there any intimation that a trial court should inquire whether plaintiff's evidence is "significantly probative," as opposed to "merely colorable," or, again, "one-sided." Nor is there in either case any suggestion that once a nonmoving plaintiff has made out a *prima facie* case based on evidence satisfying [Rule 56\(e\)](#) that there is any showing that a defendant can make to prevail on a motion for summary judgment. Yet this is what the Court appears to hold, relying, in part, on these two cases.<sup>3</sup>

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<sup>3</sup>I am also baffled by the other cases cited by the majority to support its holding. For example, the Court asserts that "[if] . . . evidence is merely colorable, [Dombrowski v. Eastland](#), 387 U.S. 82 (1967) (per curiam), . . . summary judgment may be granted." *Ante*, at 249-250. In *Dombrowski*, we reversed a judgment granting summary judgment to the counsel to the Internal Security Subcommittee of the Judiciary Committee of the United States Senate because there was "controversied evidence in the record . . . which affords more than merely colorable substance" to the petitioners' allegations. [387 U.S., at 84.](#) *Dombrowski* simply cannot be read to mean that summary judgment may be granted if evidence is merely colorable; what the case actually

[\*\*\*\*40] As explained above, and as explained also by JUSTICE REHNQUIST in his dissent, see *post*, at 271, I cannot agree that the authority cited by the Court supports its position. In my view, the Court's result is the product of an exercise [\*265] akin to the child's game of "telephone," in which a message is repeated from one person to another and then another; after some time, the message bears little resemblance to what was originally spoken. In the present case, the Court purports to restate the summary judgment test, but with each repetition, the original understanding is increasingly distorted.

[\*\*2519] But my concern is not only that the Court's decision is unsupported; after all, unsupported views may nonetheless be supportable. I am more troubled by the fact that the Court's opinion sends conflicting signals to trial courts and reviewing courts which must deal with summary judgment motions on a day-to-day basis. This case is about a trial court's responsibility when considering a motion for summary judgment, but in my view, the Court, while instructing the trial judge to "consider" heightened evidentiary standards, fails to explain what that means. In other words, [\*\*\*\*41] how does a judge assess how one-sided evidence is, or what a "fair-minded" jury could "reasonably" decide? The Court provides conflicting clues to these mysteries, which I fear can lead only to increased confusion in the district and appellate courts.

The Court's opinion is replete with boilerplate language to the effect that trial courts are not to weigh evidence when deciding summary judgment motions:

"[It] is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter . . ." *Ante*, at 249.

"Our holding . . . does not denigrate [\*\*\*223] the role of the jury. . . . Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Ante*, at 255.

[\*266] But the Court's opinion is also full of language which could surely be understood as an invitation -- if not an instruction -- to trial [\*\*\*\*42] courts to assess and weigh evidence much as a juror would:

"When determining if a genuine factual issue . . . exists . . . , a trial judge must *bear in mind the actual quantum and quality* of proof necessary to support liability . . . . For example, *there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity* to allow a rational finder of fact to find actual malice by clear and convincing evidence." *Ante*, at 254 (emphasis added).

"[The] inquiry . . . [is] whether the evidence presents a *sufficient* disagreement to require submission to a jury or whether *it is so one-sided* that one party must prevail as a matter of law." *Ante*, at 251-252 (emphasis added).

"[The] judge must ask himself . . . whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Ante*, at 252.

I simply cannot square the direction that the judge "is not himself to weigh the evidence" with the direction that [\*\*\*\*43] the judge also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quantity" to meet that "quantum." I would have thought that a determination of the "caliber and quantity," *i. e.*, the importance and value, of the evidence in light of the "quantum," *i. e.*, amount "required," could *only* be performed by weighing the evidence.

If in fact, this is what the Court would, under today's decision, require of district courts, then I am fearful that this new rule -- for this surely would be a brand new procedure -- will transform what is meant to provide an expedited "summary" [\*267] procedure into a full-blown paper trial on the merits. It is hard for me to imagine that a responsible counsel, aware that the judge will be assessing the "quantum" of the evidence he is presenting, will risk

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says is that summary judgment will be *denied* if evidence is "controverted," because when evidence is controverted, assertions become colorable for purposes of motions for summary judgment law.

either moving for or responding to a summary judgment motion without coming forth with *all* of the evidence he can muster in support of his client's case. Moreover, if the judge on motion for summary judgment really is to weigh the evidence, then [\*\*2520] in my view grave concerns are raised concerning the constitutional right of [\*\*\*\*44] civil litigants to a jury trial.

It may well be, as JUSTICE REHNQUIST suggests, see *post*, at 270-271, that the Court's decision today will be of little practical [\*\*\*224] effect. I, for one, cannot imagine a case in which a judge might plausibly hold that the evidence on motion for summary judgment was sufficient to enable a plaintiff bearing a mere preponderance burden to get to the jury -- *i. e.*, that a *prima facie* case had been made out -- but insufficient for a plaintiff bearing a clear-and-convincing burden to withstand a defendant's summary judgment motion. Imagine a suit for breach of contract. If, for example, the defendant moves for summary judgment and produces one purported eyewitness who states that he was present at the time the parties discussed the possibility of an agreement, and unequivocally denies that the parties ever agreed to enter into a contract, while the plaintiff produces one purported eyewitness who asserts that the parties did in fact come to terms, presumably that case would go to the jury. But if the defendant produced not one, but 100 eyewitnesses, while the plaintiff stuck with his single witness, would that case, under the Court's holding, [\*\*\*\*45] still go to the jury? After all, although the plaintiff's burden in this hypothetical contract action is to prove his case by a mere preponderance of the evidence, the judge, so the Court tells us, is to "ask himself . . . whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Ante*, at 252. Is there, in this hypothetical example, "a sufficient disagreement to require submission [\*268] to a jury," or is the evidence "so one-sided that one party must prevail as a matter of law"? *Ante*, at 251-252. Would the result change if the plaintiff's one witness were now shown to be a convicted perjurer? Would the result change if, instead of a garden-variety contract claim, the plaintiff sued on a fraud theory, thus requiring him to prove his case by clear and convincing evidence?

It seems to me that the Court's decision today unpersuasively answers the question presented, and in doing so raises a host of difficult and troubling questions for which there may well be no adequate solutions. What is particularly unfair is that the mess we make is not, at least in the first instance, our own to deal with; it is the district courts and courts [\*\*\*\*46] of appeals that must struggle to clean up after us.

In my view, if a plaintiff presents evidence which either directly or by permissible inference (and these inferences are a product of the substantive law of the underlying claim) supports all of the elements he needs to prove in order to prevail on his legal claim, the plaintiff has made out a *prima facie* case and a defendant's motion for summary judgment must fail regardless of the burden of proof that the plaintiff must meet. In other words, whether evidence is "clear and convincing," or proves a point by a mere preponderance, is for the factfinder to determine. As I read the case law, this is how it has been, and because of my concern that today's decision may erode the constitutionally enshrined role of the jury, and also undermine the usefulness of summary judgment procedure, this is how I believe it should remain.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE joins, dissenting.

The Court, apparently moved by concerns for intellectual tidiness, mistakenly decides that the "clear and convincing evidence" standard governing finders of fact in libel [\*\*\*225] cases must be applied by trial courts in deciding a motion for summary [\*\*\*\*47] judgment in such a case. The Court refers to this as a "substantive standard," but I think it is actually a procedural [\*269] requirement engrafted onto [Rule 56](#), contrary to our statement in [\*Calder v. Jones\*, 465 U.S. 783 \(1984\)](#), that

"[we] have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional [\*\*2521] protections embodied in the substantive laws." [\*Id.\* at 790-791](#).

The Court, I believe, makes an even greater mistake in failing to apply its newly announced rule to the facts of this case. Instead of thus illustrating how the rule works, it contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before and has no intention of starting now.

There is a large class of cases in which the higher standard imposed by the Court today would seem to have no effect at all. Suppose, for example, on motion for summary judgment in a hypothetical libel case, the plaintiff concedes that his only proof of malice is the testimony of witness [\*\*\*\*48] A. Witness A testifies at his deposition that the reporter who wrote the story in question told him that she, the reporter, had done absolutely no checking on the story and had real doubts about whether or not it was correct as to the plaintiff. The defendant's examination of witness A brings out that he has a prior conviction for perjury.

May the Court grant the defendant's motion for summary judgment on the ground that the plaintiff has failed to produce sufficient proof of malice? Surely not, if the Court means what it says, when it states: "Credibility determinations . . . are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Ante*, at 255.

The case proceeds to trial, and at the close of the plaintiff's evidence the defendant moves for a directed verdict on the [\*270] ground that the plaintiff has failed to produce sufficient evidence of malice. The only evidence of malice produced by the plaintiff is the same testimony of witness A, who is duly impeached by the defendant for the prior perjury [\*\*\*\*49] conviction. In addition, the trial judge has now had an opportunity to observe the demeanor of witness A, and has noticed that he fidgets when answering critical questions, his eyes shift from the floor to the ceiling, and he manifests all other indicia traditionally attributed to perjurers.

May the trial court at this stage grant a directed verdict? Again, surely not; we are still dealing with "credibility determinations."

The defendant now puts on its testimony, and produces three witnesses who were present at the time when witness A alleges that the reporter said she had not checked the story and had grave doubts about its accuracy as to plaintiff. Witness A concedes that these three people were present at the meeting, and that the statement of the reporter [\*\*\*226] took place in the presence of all these witnesses. Each witness categorically denies that the reporter made the claimed statement to witness A.

May the trial court now grant a directed verdict at the close of all the evidence? Certainly the plaintiff's case is appreciably weakened by the testimony of three disinterested witnesses, and one would hope that a properly charged jury would quickly return a verdict [\*\*\*\*50] for the defendant. But as long as credibility is exclusively for the jury, it seems the Court's analysis would still require this case to be decided by that body.

Thus, in the case that I have posed, it would seem to make no difference whether the standard of proof which the plaintiff had to meet in order to prevail was the preponderance of the evidence, clear and convincing evidence, or proof beyond a reasonable doubt. But if the application of the standards makes no difference in the case that I hypothesize, one may fairly ask in what sort of case does the difference in standards [\*271] make a difference in outcome? Cases may be posed dealing with evidence that is essentially documentary, rather than testimonial; but the Court has held in a related context involving Federal Rule of Civil Procedure 52(a) that inferences from documentary evidence are as much the prerogative [\*\*2522] of the finder of fact as inferences as to the credibility of witnesses. Anderson v. Bessemer City, 470 U.S. 564, 574 (1985). The Court affords the lower courts no guidance whatsoever as to what, if any, difference the abstract standards that it propounds would make [\*\*\*\*51] in a particular case.

There may be more merit than the Court is willing to admit to Judge Learned Hand's observation in United States v. Feinberg, 140 F.2d 592, 594 (CA2), cert. denied, 322 U.S. 726 (1944), that "[while] at times it may be practicable" to "distinguish between the evidence which should satisfy reasonable men, and the evidence which should satisfy reasonable men beyond a reasonable doubt[,] . . . in the long run the line between them is too thin for day to day

use." The Court apparently approves the overruling of the *Feinberg* case in the Court of Appeals by Judge Friendly's opinion in [United States v. Taylor, 464 F.2d 240 \(1972\)](#). But even if the Court is entirely correct in its judgment on this point, Judge Hand's statement seems applicable to this case because the criminal case differs from the libel case in that the standard in the former is proof "beyond a reasonable doubt," which is presumably easier to distinguish from the normal "preponderance of the evidence" standard than is the intermediate standard of "clear and convincing evidence."

More important for purposes of analyzing the present case, [\*\*\*\*52] there is no exact analog in the criminal process to the motion for summary judgment in a civil case. Perhaps the closest comparable device for screening out unmeritorious cases in the criminal area is the grand jury proceeding, though the comparison is obviously not on all fours. The standard for allowing a criminal case to proceed to trial is not whether the government has produced *prima facie* evidence of guilt beyond [\*272] a reasonable doubt for every element of the offense, but only whether it has established probable cause. See [United \\*\\*\\*227 States v. Mechanik, 475 U.S. 66, 70 \(1986\)](#). Thus, in a criminal case the standard used prior to trial is much more lenient than the "clear beyond a reasonable doubt" standard which must be employed by the finder of fact.

The three differentiated burdens of proof in civil and criminal cases, vague and impressionistic though they necessarily are, probably do make some difference when considered by the finder of fact, whether it be a jury or a judge in a bench trial. Yet it is not a logical or analytical message that the terms convey, but instead almost a state of mind; we have previously said:

"Candor [\*\*\*\*53] suggests that, to a degree, efforts to analyze what lay jurors understand concerning the differences among these three tests . . . may well be largely an academic exercise. . . . Indeed, the ultimate truth as to how the standards of proof affect decisionmaking may well be *unknowable*, given that factfinding is a process shared by countless thousands of individuals throughout the country. We probably can assume no more than that the difference between a preponderance of the evidence and proof beyond a reasonable doubt probably is better understood than either of them in relation to the intermediate standard of clear and convincing evidence." [Addington v. Texas, 441 U.S. 418, 424-425 \(1979\)](#) (emphasis added).

The Court's decision to engraft the standard of proof applicable to a factfinder onto the law governing the procedural motion for a summary judgment (a motion that has always been regarded as raising a question of law rather than a question of fact, see, e. g., [La Riviere v. EEOC, 682 F.2d 1275, 1277-1278 \(CA9 1982\)](#) (Wallace, J.)), will do great mischief with little corresponding benefit. The primary effect of the Court's opinion [\*\*\*\*54] today will likely be to cause the decisions of trial judges on summary judgment motions in libel cases to be [\*273] more erratic and inconsistent than before. This is largely because the Court has [\*\*2523] created a standard that is different from the standard traditionally applied in summary judgment motions without even hinting as to how its new standard will be applied to particular cases.

## References

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[50 Am Jur 2d, Libel and Slander 125- 136, 174, 175, 441, 442, 454- 462; 73 Am Jur 2d, Summary Judgment 26- 32](#)

28 Federal Procedure, L Ed, Pleadings and Motions 62:535-62:556, 62:632

1 Federal [\*\*\*\*55] Procedural Forms, L Ed, Actions in District Court 1:1731-1:1812

14 Am Jur Proof of Facts 2d 649; Defamation with Actual Malice

7 Am Jur Trials 223, Libel Actions by Public Officials; 19 Am Jur Trials 499, Defamation

USCS [Constitution, 1st Amend.](#); USCS [Federal Rules of Civil Procedure, Rule 56](#)

477 U.S. 242, \*273; 106 S. Ct. 2505, \*\*2523; 91 L. Ed. 2d 202, \*\*\*227; 1986 U.S. LEXIS 115, \*\*\*\*55

US L Ed Digest, Constitutional Law 948; Evidence 176; Summary Judgment and Judgment on the Pleadings 5  
Index to Annotations, Freedom of Speech and Press; Libel and Slander; Malice; New York Times Rule; Summary Judgment

Annotation References :

Progeny of New York Times v Sullivan in the Supreme Court. [61 L Ed 2d 975.](#)

Reviewability of federal court's denial of motion for summary judgment. [17 L Ed 2d 886.](#)

Defamation: application of New York Times and related standards to nonmedia defendants. 38 ALR4th 1114.

Libel and slander: who is "public figure" in the light of [Gertz v Robert Welch, Inc. \(1974\) 418 US 323, 41 L Ed 2d 789, 94 S Ct 2997.](#) 75 ALR3d 616.

Libel and slander: what constitutes actual malice, within federal [\*\*\*\*56] constitutional rule requiring public officials to show actual malice. 20 ALR3d 988.

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## Cargill, Inc. v. Monfort of Colorado, Inc.

Supreme Court of the United States

October 6, 1986, Argued ; December 9, 1986, Decided

No. 85-473

**Reporter**

479 U.S. 104 \*; 107 S. Ct. 484 \*\*; 93 L. Ed. 2d 427 \*\*\*; 1986 U.S. LEXIS 21 \*\*\*\*; 55 U.S.L.W. 4027; 1986-2 Trade Cas. (CCH) P67,366

CARGILL, INC., ET AL. v. MONFORT OF COLORADO, INC.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

**Disposition:** [761 F.2d 570](#), reversed and remanded.

## Core Terms

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merger, antitrust, pricing, predatory, anti trust law, competitors, Clayton Act, acquisition, injunctive relief, beef, damages, district court, packer, loss of profits, concentration, squeeze, plants, threatened loss, losses, violation of antitrust laws, market share, probability, injunction, price-cost, compete, markets, profits, cattle, harmed, actual injury

## LexisNexis® Headnotes

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Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

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

### [\*\*HN1\*\*](#) Remedies, Damages

Under § 16 of the Clayton Act, 38 Stat. 737, [15 U.S.C.S. § 26](#), private parties threatened with loss or damage by a violation of the antitrust laws may seek injunctive relief.

Antitrust & Trade Law > Clayton Act > General Overview

### [\*\*HN2\*\*](#) Antitrust & Trade Law, Clayton Act

See [15 U.S.C.S. § 26](#).

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

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

Section 7 of the Clayton Act prohibits mergers when the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. [15 U.S.C.S. § 18](#).

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

Transportation Law > Commercial Vehicles > Traffic Regulation

Antitrust & Trade Law > Clayton Act > General Overview

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

**[HN4](#)** Costs & Attorney Fees, Clayton Act

Under § 4 of the Clayton Act, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [15 U.S.C.S. § 15](#).

## Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

**HN5** [] Clayton Act, Claims

Plaintiffs seeking treble damages under § 4 of the Clayton Act must show more than simply an injury causally linked to a particular merger; instead, plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.

Antitrust & Trade Law > Clayton Act > Claims

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Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

[HN6](#) [] [Clayton Act, Claims](#)

A showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4 of the Clayton Act, because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

**HN7** Remedies, Damages

Section 16 of the Clayton Act provides in part that any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief against threatened loss or damage by a violation of the antitrust laws. [15 U.S.C.S. § 26](#).

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

**HN8** [] Clayton Act, Claims

Section 16 and § 4 of the Clayton Act do differ in various ways. For example, § 4 requires a plaintiff to show actual injury, but § 16 requires a showing only of "threatened" loss or damage; similarly, § 4 requires a showing of injury to business or property, while § 16 contains no such limitation. Although these differences do affect the nature of the injury cognizable under each section, under both § 16 and § 4 the plaintiff must still allege an injury of the type the antitrust laws were designed to prevent.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

[HN9](#) [] Clayton Act, Claims

Standing analysis under § 16 of the Clayton Act will not always be identical to standing analysis under § 4 of the Clayton Act. For example, the difference in the remedy each section provides means that certain considerations relevant to a determination of standing under § 4 are not relevant under § 16. The treble-damages remedy, if

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afforded to every person tangentially affected by an antitrust violation, or for all injuries that might conceivably be traced to an antitrust violation would open the door to duplicative recoveries, and to multiple lawsuits. In order to protect against multiple lawsuits and duplicative recoveries, courts should examine other factors in addition to antitrust injury, such as the potential for duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed, to determine whether a party is a proper plaintiff under § 4.

[Antitrust & Trade Law > Clayton Act > Claims](#)

[Civil Procedure > ... > Justiciability > Standing > General Overview](#)

[Antitrust & Trade Law > Clayton Act > General Overview](#)

[Antitrust & Trade Law > Clayton Act > Remedies > General Overview](#)

[Antitrust & Trade Law > Clayton Act > Remedies > Injunctions](#)

## [\*\*HN10\*\* \[💡\] \*\*Clayton Act, Claims\*\*](#)

Under § 16 of the Clayton Act, the only remedy available is equitable in nature, and the fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one. Thus, because standing under § 16 raises no threat of multiple lawsuits or duplicative recoveries, some of the factors other than antitrust injury that are appropriate to a determination of standing under § 4 of the Clayton Act are not relevant under § 16.

[Antitrust & Trade Law > Clayton Act > Remedies > Injunctions](#)

[Antitrust & Trade Law > Clayton Act > General Overview](#)

[Antitrust & Trade Law > Clayton Act > Remedies > General Overview](#)

[Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview](#)

[Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act](#)

## [\*\*HN11\*\* \[💡\] \*\*Remedies, Injunctions\*\*](#)

Sections 4 and 16 of the Clayton Act are best understood as providing complementary remedies for a single set of injuries. In order to seek injunctive relief under § 16, a private plaintiff must allege threatened loss or damage of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.

[Antitrust & Trade Law > Clayton Act > Remedies > Injunctions](#)

[Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers](#)

[Antitrust & Trade Law > Clayton Act > General Overview](#)

[Antitrust & Trade Law > Clayton Act > Remedies > General Overview](#)

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Mergers & Acquisitions Law > Antitrust > General Overview

**HN12** [] Remedies, Injunctions

Section 16 of the Clayton Act gives any individual, company, or corporation or combination the right to go into court and enjoin the doing of these unlawful acts, instead of having to wait until the act is done and the business destroyed and then sue for damages. So that if a man is injured by a discriminatory contract, by a tying contract, by the unlawful acquisition of stock of competing corporations, or by reason of someone acting unlawfully as a director in two banks or other corporations, he can go into court and enjoin and restrain the party from committing such unlawful acts.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

[HN13](#) [  ] Regulated Practices, Price Fixing & Restraints of Trade

Predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run. It is a practice that harms both competitors and competition. In contrast to price-cutting aimed simply at increasing market share, predatory pricing has as its aim the elimination of competition. Predatory pricing is thus a practice inimical to the purposes of the antitrust laws, and one capable of inflicting antitrust injury.

# Lawyers' Edition Display

## Decision

In action for injunction under 16 of Clayton Act ([15 USCS 26](#)), (1) plaintiff held required to show threat of antitrust injury, and (2) loss or damage due merely to increased competition held not to constitute such injury.

## Summary

The fifth largest beef packing company in the United States, seeking to prevent the planned acquisition of the third largest beef packer by the second largest, brought an action for injunctive relief under 16 of the Clayton Act ([15 USCS 26](#)) in the United States District Court for the District of Colorado. The plaintiff company alleged that this merger (1) would violate 7 of the Clayton Act ([15 USCS 18](#)) by substantially lessening competition in the relevant market, and (2) would injure the plaintiff company, because the resulting firm could afford to reduce its prices to a level at or just above its costs and force its competitors to follow suit, which would squeeze the plaintiff company's profits but would not put it out of business. The District Court enjoined the merger, holding (1) that a plaintiff must show that it will suffer an "antitrust injury"--that is, an injury of the type the antitrust laws were intended to prevent--in order to have standing to seek an injunction under 16, but (2) that the alleged price-cost squeeze satisfied that rule ([591 F Supp 683](#)). The United States Court of Appeals for the Tenth Circuit affirmed, holding that the alleged squeeze was a form of predatory pricing and was sufficient to give the plaintiff company standing to sue under 16 ([761 F2d 570](#)).

On certiorari, the United States Supreme Court reversed and remanded for further proceedings. In an opinion by Brennan, J., joined by Rehnquist, Ch. J., and Marshall, Powell, O'Connor, and Scalia, JJ., it was held (1) that a plaintiff seeking injunctive relief under 16 must show a threat of the type of injury which the antitrust laws were designed to prevent, and (2) that loss or damage due merely to increased competition, such as a threatened loss of profits due to possible price competition following a merger by competitors, does not constitute such an injury.

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Stevens, J., joined by White, J., dissented, expressing the view (1) that the concept of "antitrust injury," which is at the heart of a treble damages action, is not an element of a cause of action for injunctive relief that depends on finding a reasonable threat that an incipient disease will poison an entire market; and (2) that 16 provides a remedy for a private party which challenges a horizontal merger between two of its largest competitors, if there is a significant probability that the merger will adversely affect competition in the relevant market.

Blackmun, J., did not participate.

## Headnotes

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RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §70 > Clayton Act -- injunctive relief -- threat of antitrust injury -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D]

Plaintiffs seeking injunctive relief under 16 of the Clayton Act ([15 USCS 26](#)) must show a threat of antitrust injury; that is, they must allege a threatened loss or damage of the type that the antitrust laws were designed to prevent, and which flows from that which makes the defendants' acts unlawful. (Stevens and White, JJ., dissented from this holding.)

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §70 > Clayton Act -- injunctive relief -- threat of antitrust injury -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B] [LEdHN\[2C\]](#) [2C]

A showing of loss or damage due merely to increased competition does not constitute an antitrust injury which will give the injured party standing to seek injunctive relief under 16 of the Clayton Act ([15 USCS 26](#)); in particular, a threat of loss of profits due to possible price competition following a merger of one's competitors does not constitute a threat of antitrust injury; thus, a beef-packing plant owner which seeks to enjoin the pending merger of two of its largest competitors does not make the showing required under 16 by raising the possibility that the firm resulting from the merger would lower its prices to a level at or only slightly above its costs, forcing the plant owner to lower its own prices, which would cause it to suffer a loss in profitability but would not drive it out of business.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > Clayton Act -- treble damages -- injunctive relief -- standing -- > Headnote:

[LEdHN\[3A\]](#) [3A] [LEdHN\[3B\]](#) [3B] [LEdHN\[3C\]](#) [3C] [LEdHN\[3D\]](#) [3D]

A showing of the type of injury the antitrust laws were designed to prevent is necessary, but not always sufficient, to establish a party's standing to seek treble damages under 4 of the Clayton Act ([15 USCS 15](#)); in order to protect against multiple lawsuits and duplicative recoveries, courts should examine other factors, such as the potential for duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed, to determine whether a party is a proper plaintiff under 4; however, standing under the injunctive relief provision of 16 of the Act ([15 USCS 26](#)) raises no threat of multiple lawsuits or duplicative recoveries, and some of the factors other than antitrust injury that are appropriate to a determination of standing under 4 are thus not relevant under 16.

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APPEAL §1119 > issue not raised below -- new theory -- antitrust injury -- > Headnote:

[LEdHN\[4A\]](#) [4A] [LEdHN\[4B\]](#) [4B]

Because there is no indication in the record that a beef-packing plant owner, which sought injunctive relief under 16 of the Clayton Act ([15 USCS 26](#)) against the pending merger of two of its largest competitors and was thus required to show a threat of antitrust injury, had raised in the courts below its claim that it would be injured by the trend toward oligopoly pricing that could conceivably follow the merger, the United States Supreme Court will not address that claim on certiorari.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > predatory pricing -- injunctive relief --

> Headnote:

[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B]

Predatory pricing, which may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run, is an anticompetitive practice forbidden by the antitrust laws, and one capable of inflicting an antitrust injury which will give the injured party standing to seek injunctive relief under 16 of the Clayton Act ([15 USCS 26](#)); there is no per se rule denying competitors standing to challenge acquisitions on the basis of theories about postacquisition predatory pricing.

APPEAL §1477 > RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > review of facts -- predatory pricing -- > Headnote:

[LEdHN\[6\]](#) [6]

If the decision of a Federal Court of Appeals, which finds that a beef-packing plant owner seeking to enjoin the merger of two of its largest competitors under 16 of the Clayton Act ([15 USCS 26](#)) has alleged what amounts to a form of predatory pricing and thus satisfied the requirement that it show a threat of antitrust injury, is properly interpreted as referring to the plant owner's allegation that the firm resulting from the merger would lower its prices to a level at or only slightly above its costs and thus force the plant owner to lower its prices and lose profits, then the Court of Appeals' judgment is clearly erroneous, since (1) the plant owner made no allegation that the new firm would act with predatory intent, and (2) price competition is not predatory activity.

APPEAL §1094 > RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > new theory -- antitrust injury -- raising issue in lower court -- > Headnote:

[LEdHN\[7\]](#) [7]

If the decision of a Federal Court of Appeals, which finds that a beef-packing plant owner seeking to enjoin the merger of two of its largest competitors under 16 of the Clayton Act ([15 USCS 26](#)) has alleged what amounts to a form of predatory pricing and thus satisfied the requirement that it show a threat of antitrust injury, is understood to mean that the plant owner has shown a credible threat of injury from below-cost "predatory" pricing by the firm that would result from the merger, then that judgment must be reversed since the plant owner neither raised nor proved any claim of below-cost pricing before the Federal District Court in which the action originated; four passing

references, three in deposition testimony, to the possibility that the new firm's prices might dip below costs do not establish an allegation of injury from predatory pricing.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > predatory pricing -- factors considered --

> Headnote:

[LEdHN\[8A\]](#) [8A] [LEdHN\[8B\]](#) [8B] [LEdHN\[8C\]](#) [8C] [LEdHN\[8D\]](#) [8D]

Claims of threatened injury from predatory pricing must be evaluated with care; courts should not find allegations of predatory pricing credible when the alleged predator is incapable of successfully pursuing a predatory scheme; in order to succeed in a sustained scheme of predatory pricing, a predator must be able to absorb the market shares of its rivals once prices have been cut; it is also important to examine the barriers to entry into the market, focusing on whether significant entry barriers would exist after the predator firm had eliminated some of its rivals and the remaining firms began to charge supracompetitive prices.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > Clayton Act -- merger -- injunctive relief

-- > Headnote:

[LEdHN\[9\]](#) [9]

Because a beef-packing plant owner which seeks to enjoin the pending merger of two of its largest competitors has failed to make the showing of a threat of antitrust injury which plaintiffs are required to make in order to obtain injunctive relief under 16 of the Clayton Act ([15 USCS 26](#)), the question whether the proposed merger violates 7 of that Act ([15 USCS 18](#)) need not be reached.

## Syllabus

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Section 16 of the Clayton Act entitles a private party to sue for injunctive relief against "threatened loss or damage by a violation of the antitrust laws." Respondent, the country's fifth-largest beef packer, brought an action in Federal District Court under § 16 to enjoin the proposed merger of petitioner Excel Corporation, the second-largest packer, and Spencer Beef, the third-largest packer. Respondent alleged that it was threatened with a loss of profits by the possibility that Excel, after the merger, would lower its prices to a level at or above its costs in an attempt to increase its market share. During trial, Excel moved for dismissal on the ground that respondent had failed to allege or show that it would suffer antitrust injury, but the District Court denied the motion. After trial, the District Court held that respondent's allegation of a "price-cost squeeze" that would severely narrow its profit margins constituted an allegation of antitrust injury. The Court of Appeals affirmed, holding that respondent's allegation of a "price-cost squeeze" [\*\*\*\*2] was not simply one of injury from competition but was a claim of injury by a form of predatory pricing in which Excel would drive other companies out of the market.

*Held:*

1. A private plaintiff seeking injunctive relief under § 16 must show a threat of injury "of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489](#). Pp. 109-113.
2. The proposed merger does not constitute a threat of antitrust injury. A showing, as in this case, of loss or damage due merely to increased competition does not constitute such injury. And while predatory pricing is capable of inflicting antitrust injury, here respondent neither raised nor proved any claim of predatory pricing before

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the District Court, and thus the Court of Appeals erred in interpreting respondent's allegations as equivalent to allegations of injury from predatory conduct. Pp. 113-119.

3. This Court, however, will not adopt in effect a *per se* rule denying competitors standing to challenge acquisitions on the basis of predatory pricing theories. Nothing in the Clayton Act's [\*\*\*\*3] language or legislative history suggests that Congress intended this Court to ignore injuries caused by such anticompetitive practices as predatory pricing. Pp. 120-122.

**Counsel:** Ronald G. Carr argued the cause for petitioners. With him on the briefs were Robert F. Hanley, Alan K. Palmer, and Phillip Areeda.

Deputy Solicitor General Cohen argued the cause for the United States et al. as amici curiae urging reversal. With him on the brief were Solicitor General Fried, Assistant Attorney General Ginsburg, Deputy Assistant Attorney General Cannon, Jerrold J. Ganzfried, Catherine G. O'Sullivan, Andrea Limmer, and Marcy J. K. Tiffany.

<sup>\*</sup>William C. McClearn argued the cause for respondent. With him on the brief were James E. Hartley, Elizabeth A. Phelan, and Marcy G. Glenn.

**Judges:** BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and MARSHALL, POWELL, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE, J., joined, post, p. 122. BLACKMUN, J., took [\*\*\*\*4] no part in the consideration or decision of the case.

**Opinion by: BRENNAN**

## Opinion

[\*105] [\*\*\*433] [\*\*487] JUSTICE BRENNAN delivered the opinion of the Court.

[LEdHN\[1A\]](#) [↑] [1A] [LEdHN\[2A\]](#) [↑] [2A] [HN1](#) [↑] Under § 16 of the Clayton Act, 38 Stat. 737, as amended, [15 U. S. C. § 26](#), private parties "threatened [with] loss or damage by a violation of the antitrust laws" may seek injunctive relief. This case presents two questions: whether a plaintiff seeking relief under § 16 must prove a threat of antitrust injury, and, if so, whether loss or damage due to increased competition constitutes such injury.

[\*106] |

Respondent Monfort of Colorado, Inc. (Monfort), the plaintiff below, owns and operates three integrated beef-packing plants, that is, plants for both the slaughter of cattle and the fabrication of beef.<sup>1</sup> Monfort operates in both the market for fed cattle (the input market) and the market for fabricated beef (the output market). These markets are highly competitive, and the profit margins of the major beef packers are low. The current markets are a product of two decades of intense competition, during which time packers with modern integrated plants have gradually displaced packers with separate slaughter and fabrication plants.

[\*\*\*5] Monfort is the country's fifth-largest beef packer. Petitioner Excel Corporation (Excel), one of the two defendants below, is the second-largest packer. Excel operates five integrated plants and one fabrication plant. It is

\* Thomas B. Leary filed a brief for the Business Roundtable as amicus curiae urging reversal.

David L. Foster and Kim Sperduto filed a brief for Royal Crown Cola Co. as amicus curiae.

<sup>1</sup> As the District Court explained, "[fabrication]" is the process whereby the carcass is broken down into either whole cuts (referred to as 'primals', 'subprimals' and 'portions') or ground beef." *591 F.Supp. 683, 690 (Colo. 1983)*. Whole cuts that are then vacuum packed before shipment are called "boxed beef"; the District Court found that "80% of all beef received at the retail supermarket level and at the hotel, restaurant, and institutional ('HRI') level" is boxed beef. *Ibid.*

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a wholly owned subsidiary of Cargill, Inc., the other defendant below, a large privately owned corporation with more than 150 subsidiaries in at least 35 countries.

On June 17, 1983, Excel signed an agreement to acquire the third-largest packer in the market, Spencer Beef, a division of the Land O'Lakes agricultural cooperative. Spencer Beef owned two integrated plants and one slaughtering plant. After the acquisition, Excel would still be the second-largest packer, but would command a market share almost equal to that of the largest packer, IBP, Inc. (IBP).<sup>2</sup>

[\*\*\*\*6] [\*107] Monfort brought an action under § 16 of the Clayton Act, [15 U. S. C. § 26](#), to enjoin the prospective [\*\*\*434] merger.<sup>3</sup> Its complaint [\*488] alleged that the acquisition would "[violate] Section 7 of the Clayton Act because the effect of the proposed acquisition may be substantially to lessen competition or tend to create a monopoly in several different ways. . . ." 1 App. 19. Monfort described the injury that it allegedly would suffer in this way:

"(f) *Impairment of plaintiff's ability to compete.* The proposed acquisition will result in a concentration of economic power in the relevant markets which threatens Monfort's supply of fed cattle and its ability to compete in the boxed beef market." *Id.*, at 20.

[\*\*\*\*7] Upon agreement of the parties, the District Court consolidated the motion for a preliminary injunction with a full trial [\*108] on the merits. On the second day of trial, Excel moved for involuntary dismissal on the ground, *inter alia*, that Monfort had failed to allege or show that it would suffer antitrust injury as defined in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, [429 U.S. 477 \(1977\)](#). The District Court denied the motion. After the trial, the court entered a memorandum opinion and order enjoining the proposed merger. The court held that Monfort's allegation of "price-cost 'squeeze'" that would "severely [narrow]" Monfort's profit margins constituted an allegation of antitrust injury. [591 F.Supp. 683, 691-692 \(Colo. 1983\)](#). It also held that Monfort had shown that the proposed merger would cause this profit squeeze to occur, and that the merger violated § 7 of the Clayton Act.<sup>4</sup> *Id.*, at 709-710.

[\*\*\*\*8] On appeal, Excel argued that an allegation of lost profits due to a "price-cost squeeze" was nothing more than an allegation of losses due to vigorous competition, and that losses from competition do not constitute antitrust injury. It also argued that the District Court erred in analyzing the facts relevant to the § 7 inquiry. The Court of Appeals affirmed the judgment in all respects. It held that Monfort's allegation of a "price-cost squeeze" was not simply an allegation of injury from competition; in its view, the alleged "price-cost squeeze" was a claim that Monfort

<sup>2</sup>The District Court relied on the testimony of one of Monfort's witnesses in determining market share. *Id.*, at 706-707. According to this testimony, Monfort's share of the cattle slaughter market was 5.5%, Excel's share was 13.3%, and IBP's was 24.4%. 1 App. 69. Monfort's share of the production market was 5.7%, Excel's share was 14.1%, and IBP's share was 27.3%. *Id.*, at 64. After the merger, Excel's share of each market would increase to 20.4%. *Id.*, at 64, 69; [761 F.2d 570, 577 \(CA10 1985\)](#).

<sup>3</sup>Section 16 states:

[HN2\[↑\]](#) "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff."  
[15 U. S. C. § 26](#).

<sup>4</sup>Section 7 [HN3\[↑\]](#) prohibits mergers when the "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly," [15 U. S. C. § 18](#).

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would be injured by what the Court of Appeals "[considered] to be a form of predatory pricing in which Excel will drive [\*\*\*435] other companies out of the market by paying more to its cattle suppliers and charging less for boxed beef that it sells to institutional buyers and consumers." [761 F.2d 570, 575 \(CA10 1985\)](#). On the § 7 issue, the Court of Appeals held that the District Court's decision was not clearly erroneous. We granted certiorari, [474 U.S. 1049 \(1985\)](#).

[\*109] II

This case requires us to decide, at the outset, a question we have not previously addressed: whether [\*\*\*\*9] a private plaintiff seeking an injunction under § 16 of the Clayton Act must show a threat of antitrust injury. To decide the question, we must look first to the source of the antitrust injury requirement, which lies in a related provision of the Clayton Act, § 4, [15 U. S. C. § 15](#).

Like § 16, § 4 provides a vehicle for private enforcement of the antitrust laws. [HN4](#)<sup>↑</sup> Under § 4, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . , and shall recover threefold the damages by him sustained, [\*\*489] and the cost of suit, including a reasonable attorney's fee." [15 U. S. C. § 15](#). In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra*, we held that [HN5](#)<sup>↑</sup> plaintiffs seeking treble damages under § 4 must show more than simply an "injury causally linked" to a particular merger; instead, "plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." [Id., at 489](#) (emphasis in original). The plaintiffs in [\*\*\*\*10] *Brunswick* did not prove such injury. The plaintiffs were 3 of the 10 bowling centers owned by a relatively small bowling chain. The defendant, one of the two largest bowling chains in the country, acquired several bowling centers located in the plaintiffs' market that would have gone out of business but for the acquisition. The plaintiffs sought treble damages under § 4, alleging as injury "the loss of income that would have accrued had the acquired centers gone bankrupt" and had competition in their markets consequently been reduced. [Id., at 487](#). We held that this injury, although causally related to a merger alleged to violate § 7, was not an antitrust injury, since "[it] is inimical to [the antitrust] laws to award damages" for losses stemming [\*110] from continued competition. [Id., at 488](#). This reasoning in *Brunswick* was consistent with the principle that "the antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'" *Ibid.*, quoting *Brown Shoe Co. v. United States*, [370 U.S. 294, 320 \(1962\)](#) (emphasis in original).

[LEdHN\[3A\]](#)<sup>↑</sup> [3A] Subsequent decisions confirmed the importance [\*\*\*\*11] of showing antitrust injury under § 4. In *Blue Shield of Virginia v. McCready*, [457 U.S. 465 \(1982\)](#), we found that a health-plan subscriber suffered antitrust injury as a result of the plan's "purposefully *anticompetitive scheme*" to reduce competition for psychotherapeutic services by reimbursing subscribers for services provided by psychiatrists but not for services provided by psychologists. [Id., at 483](#). [\*\*\*436] We noted that antitrust injury, "as analyzed in *Brunswick*, is one factor to be considered in determining the redressability of a particular form of injury under § 4," [id., at 483, n. 19](#), and found it "plain that McCready's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws." [Id., at 483](#). Similarly, in *Associated General Contractors of California, Inc. v. Carpenters*, [459 U.S. 519 \(1983\)](#), we applied "the *Brunswick* test," and found that the petitioner had failed to allege antitrust injury. [Id., at 539-540](#).<sup>5</sup>

[LEdHN\[3B\]](#)<sup>↑</sup> [3B]

<sup>5</sup> [HN6](#)<sup>↑</sup> A showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4, because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons. See generally Page, The Scope of Liability for Antitrust Violations, [37 Stan. L. Rev. 1445, 1483-1485 \(1985\)](#) (distinguishing concepts of antitrust injury and antitrust standing). Thus, in *Associated General Contractors* we considered other factors in addition to antitrust injury to determine whether the petitioner was a proper plaintiff under § 4. [459 U.S., at 540](#). As we explain, n. 6, *infra*, however, many of these other factors are not relevant to the standing inquiry under § 16.

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[\*\*\*\*12] [LEdHN\[1B\]](#)<sup>↑</sup> [1B][LEdHN\[3C\]](#)<sup>↑</sup> [3C]Section 16 [HN7](#)<sup>↑</sup> of the Clayton Act provides in part that "[any] person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss [\[\\*111\]](#) or damage by a violation of the antitrust laws. . . ." [15 U. S. C. § 26](#). It is plain that § 16 and § 4 [HN8](#)<sup>↑</sup> do differ in various ways. For example, § 4 requires a plaintiff to show actual injury, but § 16 requires a showing only of "threatened" loss or damage; similarly, § 4 requires a showing of injury to "business or property," cf. [Hawaii v. Standard Oil Co., 405 U.S. 251 \(1972\)](#), while § 16 contains no [\\*\\*490](#) such limitation.<sup>6</sup> [\*\*\*\*13] Although these differences do affect the nature of the injury cognizable under each section, the lower courts, including the courts below, have found that under both § 16 and § 4 the plaintiff must still allege an injury of the type the [\\*\\*\\*437](#) antitrust laws were designed to prevent.<sup>7</sup> We agree.

### [LEdHN\[3D\]](#)<sup>↑</sup> [3D]

[\*112] The wording concerning the relationship of the injury to the violation of the antitrust laws in each section is comparable. Section 4 requires proof of injury "by reason of anything forbidden in the antitrust laws"; § 16 requires proof of "threatened loss or damage by a violation of the antitrust laws." It would be anomalous, we think, to read the Clayton Act to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred.

[LEdHN\[1C\]](#)<sup>↑</sup> [1C]There is no [\\*\\*\\*\\*14](#) indication that Congress intended such a result. Indeed, the legislative history of § 16 is consistent with the view that § 16 affords private plaintiffs injunctive relief only for those injuries cognizable under § 4. According to the House Report:

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"Under section 7 of the act of July 2, 1890 [revised and incorporated into Clayton Act as § 4], a person injured in his business and property by corporations or combinations acting in violation of the Sherman [antitrust law](#), may recover loss and damage for such wrongful act. There is, however, no provision in the existing law authorizing a person, firm, corporation, or association to enjoin threatened loss or damage to his business or property by the

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<sup>6</sup> [HN9](#)<sup>↑</sup> Standing analysis under § 16 will not always be identical to standing analysis under § 4. For example, the difference in the remedy each section provides means that certain considerations relevant to a determination of standing under § 4 are not relevant under § 16. The treble-damages remedy, if afforded to "every person tangentially affected by an antitrust violation," [Blue Shield of Virginia v. McCready, 457 U.S. 465, 476-477 \(1982\)](#), or for "all injuries that might conceivably be traced to an antitrust violation," [Hawaii v. Standard Oil Co., 405 U.S. at 263, n. 14](#), would "open the door to duplicative recoveries," [id. at 264](#), and to multiple lawsuits. In order to protect against multiple lawsuits and duplicative recoveries, courts should examine other factors in addition to antitrust injury, such as the potential for duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed, to determine whether a party is a proper plaintiff under § 4. See [Associated General Contractors, 459 U.S., at 544-545; Illinois Brick Co. v. Illinois, 431 U.S. 720 \(1977\)](#). Conversely, [HN10](#)<sup>↑</sup> under § 16, the only remedy available is equitable in nature, and, as we recognized in [Hawaii v. Standard Oil Co.](#), "the fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one." [405 U.S., at 261](#). Thus, because standing under § 16 raises no threat of multiple lawsuits or duplicative recoveries, some of the factors other than antitrust injury that are appropriate to a determination of standing under § 4 are not relevant under § 16.

<sup>7</sup> See [Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325, 1334 \(CA7 1986\)](#); [Midwest Communications, Inc. v. Minnesota Twins, Inc., 779 F.2d 444, 452-453 \(CA8 1985\)](#), cert. denied, [476 U.S. 1163 \(1986\)](#); [Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., 753 F.2d 1354, 1358 \(CA6, 1986\)](#), cert. dism'd, [469 U.S. 1200 \(1985\)](#); [Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210-211 \(CA3 1980\)](#).

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commission of such unlawful acts, and the purpose of this section is to remedy such defect in the law." H. R. Rep. No. 627, 63d Cong., 2d Sess., pt. 1, p. 21 (1914) (emphasis added).<sup>8</sup>

[\*113] [\*\*\*438] [\*\*491] Sections 4 and 16 [HN11](#)[] are thus best understood as providing complementary remedies for a single set of injuries. Accordingly, we conclude that in order to seek injunctive relief under § 16, a private plaintiff must allege threatened loss or damage "of the type the antitrust [\*\*\*\*15] laws were designed to prevent and that flows from that which makes defendants' acts unlawful." [Brunswick, 429 U.S., at 489](#). We therefore turn to the question of whether the proposed merger in this case threatened respondent with antitrust injury.

#### [\*\*\*\*16] III

Initially, we confront the problem of determining what Monfort alleged the source of its injury to be. Monfort's complaint is of little assistance in this regard, since the injury [\*114] alleged therein -- "an impairment of plaintiff's ability to compete" -- is alleged to result from "a concentration of economic power." 1 App. 19. The pretrial order largely restates these general allegations. Record 37. At trial, however, Monfort did present testimony and other evidence that helped define the threatened loss. Monfort alleged that after the merger, Excel would attempt to increase its market share at the expense of smaller rivals, such as Monfort. To that end, Monfort claimed, Excel would bid up the price it would pay for cattle, and reduce the price at which it sold boxed beef. Although such a strategy, which Monfort labeled a "price-cost squeeze," would reduce Excel's profits, Excel's parent corporation had the financial reserves to enable Excel to pursue such a strategy. Eventually, according to Monfort, smaller competitors lacking significant reserves and unable to match Excel's prices would be driven from the market; at this point Excel would raise the price of [\*\*\*\*17] its boxed beef to supracompetitive levels, and would more than recoup the profits it lost during the initial phase. [591 F.Supp., at 691-692](#).

<sup>8</sup> See also S. Rep. No. 698, 63d Cong., 2d Sess., pt. 2, pp. 17-18, 50 (1914). Although the references to § 16 in the debates on the passage of the Clayton Act are scarce, those that were made are consistent with the House and Senate Reports. For example, in this excerpt from a provision-by-provision description of the bill, Representative McGillicuddy (a member of the House Judiciary Committee) stated:

"Under the present law any person injured in his business or property by acts in violation of the Sherman [antitrust law](#) may recover his damage. In fact, under the provisions of the law he is entitled to recover threefold damage whenever he is able to prove his case. There is no provision under the present law, however, to prevent threatened loss or damage even though it be irreparable. The practical effect of this is that a man would have to sit by and see his business ruined before he could take advantage of his remedy. In what condition is such a man to take up a long and costly lawsuit to defend his rights?

"The proposed bill solves this problem for the person, firm, or corporation threatened with loss or damage to property by *providing injunctive relief against the threatened act that will cause such loss or damage*. Under this most excellent provision a man does not have to wait until he is ruined in his business before he has his remedy. Thus the bill not only protects the individual from loss or damage, but it relieves him of the tremendous burden of long and expensive litigation, often intolerable." 51 Cong. Rec. 9261 (1914) (emphasis added).

Representative Floyd described the nature of the § 16 remedy in these terms:

"In section 16 . . . is a provision that gives the litigant injured in his business an entirely new remedy.

.....

[HN12](#)[] ". . . [Section] 16 gives any individual, company, or corporation . . . or combination the right to go into court and enjoin the doing of these unlawful acts, instead of having to wait until the act is done and the business destroyed and then sue for damages. . . . [So] that if a man is injured by a discriminatory contract, by a tying contract, by the unlawful acquisition of stock of competing corporations, or by reason of someone acting unlawfully as a director in two banks or other corporations, he can go into court and enjoin and restrain the party from committing such unlawful acts." *Id.*, at 16319.

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LEdHN[4A] [4A] From this scenario two theories of injury to Monfort emerge: (1) a threat of a loss of profits stemming from the possibility that Excel, after the merger, would lower its prices to a level at or only slightly above its costs; (2) a threat of being driven out of business by the possibility that Excel, after the merger, would lower its prices to a level below its costs.<sup>9</sup> We discuss each theory in turn.

#### LEdHN[4B] [4B]

A

Monfort's first claim is that after the merger, Excel would lower its prices to some level at or slightly above its costs in order to compete with other packers for market share. [\*\*\*\*18] [\*115] Excel would be in a position to do this because of the multiplant [\*\*492] efficiencies its acquisition of Spencer would provide, 1 App. 74-75, 369-370. To remain competitive, Monfort [\*\*\*439] would have to lower its prices; as a result, Monfort would suffer a loss in profitability, but would not be driven out of business.<sup>10</sup> The question is whether Monfort's loss of profits in such circumstances constitutes antitrust injury.

LEdHN[2B] [2B] To resolve the question, we look again to *Brunswick v. Pueblo Bowl-O-Mat, supra*. In *Brunswick*, we evaluated [\*\*\*\*19] the antitrust significance of several competitors' loss of profits resulting from the entry of a large firm into its market. We concluded:

"[The] antitrust laws are not merely indifferent to the injury claimed here. At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for 'the protection of *competition*, not *competitors*,' *Brown Shoe Co. v. United States, 370 U.S., at 320*. It is inimical to the purposes of these laws to award damages for the type of injury claimed here." *Id., at 488*.

The loss of profits to the competitors in *Brunswick* was not of concern under the antitrust laws, since it resulted only from continued competition. Respondent argues that the losses in *Brunswick* can be distinguished from the losses alleged here, since the latter will result from an increase, rather than from a mere continuation, of competition. The range of [\*\*\*\*20] actions [\*116] unlawful under § 7 of the Clayton Act is broad enough, respondent claims, to support a finding of antitrust injury whenever a competitor is faced with a threat of losses from increased competition.<sup>11</sup> We find respondent's proposed construction of § 7 too broad, for reasons that *Brunswick* illustrates.

<sup>9</sup> In its brief, Monfort also argues that it would be injured by "the trend toward oligopoly pricing" that could conceivably follow the merger. Brief for Respondent 18-20. There is no indication in the record that this claim was raised below, however, and so we do not address it here.

<sup>10</sup> In this case, Monfort has conceded that its viability would not be threatened by Excel's decision to lower prices: "Because Monfort's operations were as efficient as those of Excel, only below-cost pricing could remove Monfort as an obstacle." *Id.*, at 11-12; see also *id.*, at 5, and n. 6 ("Monfort proved it was just as efficient as Excel"); *id.*, at 18; *761 F.2d, at 576* ("Monfort would only be harmed by sustained predatory pricing").

<sup>11</sup> Respondent finds support in the legislative history of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 for the view that Congress intends the courts to apply § 7 so as to protect the viability of small competitors. The Senate Report, for example, cites with approval this Court's statement in *United States v. Von's Grocery Co., 384 U.S. 270, 275 (1966)*, that "the basic purpose of the 1950 Celler-Kefauver Act [amending § 7 of the Clayton Act] was to prevent economic concentration in the American economy by keeping a large number of small competitors in business." S. Rep. No. 94-803, p. 63 (1976). Even if respondent is correct that Congress intended the courts to apply § 7 so as to keep small competitors in business at the expense of efficiency, a proposition about which there is considerable disagreement, such congressional intent is of no use to Monfort,

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*Brunswick* holds that the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. The kind of competition that Monfort alleges here, competition for increased market [\*\*\*440] share, is not activity forbidden by the antitrust laws. It is simply, as petitioners claim, vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for "[it] is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *Arthur S. Langenderfer, Inc. v. S. E. Johnson Co.*, 729 F.2d 1050, 1057 (CA6), cert. denied, 469 U.S. 1036 [\*\*493] (1984). The logic of [\*117] *Brunswick* compels the conclusion that the threat of loss of profits due to possible price competition following a merger does not constitute a threat of antitrust injury.

[\*\*\*22] B

[LEdHN\[5A\]](#) [5A] The second theory of injury argued here is that after the merger Excel would attempt to drive Monfort out of business by engaging in sustained predatory pricing. [HN13](#) Predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run.<sup>12</sup> [\*\*\*23] It is a practice [\*118] that harms both competitors and competition. In contrast to price cutting aimed simply at increasing market share, predatory pricing has as its aim the elimination of competition. Predatory pricing is thus a practice "inimical to the purposes of [the antitrust] laws," *Brunswick*, 429 U.S., at 488, and one capable of inflicting antitrust injury.<sup>13</sup>

The Court of Appeals held that [\*\*\*441] Monfort had alleged "what we consider to be a form of predatory pricing. . . ." [761 F.2d, at 575](#). The court also found that Monfort "could only be harmed by sustained predatory pricing," and that "it is impossible to tell in advance of the acquisition" whether Excel would in fact engage in such a course of conduct; because it could not rule out the possibility that Excel would engage in predatory pricing, it found that Monfort was threatened with antitrust injury. [Id., at 576](#).

which has conceded that it will suffer only a loss of profits, and not be driven from the market, should Excel engage in a cost-price squeeze. See n. 10, *supra*.

<sup>12</sup> Most commentators reserve the term predatory pricing for pricing below some measure of cost, although they differ on the appropriate measure. See, e. g., Areeda & Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975); McGee, *Predatory Pricing Revisited*, 23 J. Law & Econ. 289 (1980) (reviewing various proposed definitions). No consensus has yet been reached on the proper definition of predatory pricing in the antitrust context, however. For purposes of decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), for example, we defined predatory pricing as either "(i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." [Id., at 585, n. 8](#). Definitions of predatory pricing also vary among the Circuits. Compare *Arthur S. Langenderfer, Inc. v. S. E. Johnson Co.*, 729 F.2d 1050, 1056-1057 (CA6) (pricing below marginal or average variable cost presumptively illegal, pricing above such cost presumptively legal), cert. denied, 469 U.S. 1036 (1984), with *Transamerica Computer Co. v. International Business Machines Corp.*, 698 F.2d 1377 (CA9) (pricing above average total costs may be deemed predatory upon showing of predatory intent), cert. denied, 464 U.S. 955 (1983).

Although neither the District Court nor the Court of Appeals explicitly defined the term predatory pricing, their use of the term is consistent with a definition of pricing below cost. Such a definition is sufficient for purposes of this decision, because only below-cost pricing would threaten to drive Monfort from the market, see n. 9, *supra*, and because Monfort made no allegation that Excel would act with predatory intent. Thus, in this case, as in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, *supra*, we find it unnecessary to "consider whether recovery should ever be available . . . when the pricing in question is above some measure of incremental cost," [475 U.S., at 585, n. 9](#), or whether above-cost pricing coupled with predatory intent is ever sufficient to state a claim of predation. See n. 11, *supra*.

<sup>13</sup> See also *Brunswick*, 429 U.S., at 489, n. 14 ("The short-term effect of certain anticompetitive behavior -- predatory below-cost pricing, for example -- may be to stimulate price competition. But competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened").

[LEdHN\[6\]](#) [6]Although the Court of Appeals did not explicitly define what it meant by predatory pricing, two interpretations are plausible. First, the court can be understood to mean that Monfort's allegation [\*\*\*\*24] of losses from the above-cost "price-cost squeeze" was equivalent to an allegation of injury from predatory conduct. If this is the proper interpretation, then the court's judgment is clearly erroneous because (a) Monfort made no allegation that Excel would act with predatory intent after the merger, and (b) price competition is not predatory activity, for the reasons discussed in Part III-A, *supra*.

[\*\*494] [LEdHN\[7\]](#) [7] [LEdHN\[8A\]](#) [8A]Second, the Court of Appeals can be understood to mean that Monfort had shown a credible threat of injury from below-cost pricing. To the extent the judgment rests on this ground, however, it must also be reversed, because Monfort [\*119] did not allege injury from below-cost pricing before the District Court. The District Court twice noted that Monfort had made no assertion that Excel would engage in predatory pricing. See [591 F.Supp., at 691](#) ("Plaintiff does not contend that predatory practices would be engaged in by Excel or IBP"); [id., at 710](#) ("Monfort does not allege that IBP and Excel will in fact engage in predatory activities as part of the cost-price squeeze").<sup>14</sup> Monfort argues that there is evidence in the record to support [\*\*\*\*25] its view that it did raise a claim of predatory pricing below. This evidence, however, consists only of four passing references, three in deposition testimony, to the possibility that Excel's prices might dip below costs. See 1 App. 276; 2 App. 626, 666, 669. Such references fall far short of establishing an allegation of injury from predatory pricing. We conclude that Monfort neither raised nor proved any claim of predatory pricing before the District Court.<sup>15</sup>

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<sup>14</sup> The Court of Appeals may have relied on the District Court's speculation that the merger raised "a distinct possibility . . . of predatory pricing." [591 F.Supp., at 710](#). This statement directly followed the District Court's second observation that Monfort did not raise such a claim, however, and thus was clearly dicta.

<sup>15</sup> Even had Monfort actually advanced a claim of predatory pricing, we doubt whether the facts as found by the District Court would have supported it. Although Excel may have had the financial resources to absorb losses over an extended period, other factors, such as Excel's share of market capacity and the barriers to entry after competitors have been driven from the market, must also be considered. In order to succeed in a sustained campaign of predatory pricing, a predator must be able to absorb the market shares of its rivals once prices have been cut. If it cannot do so, its attempt at predation will presumably fail, because there will remain in the market sufficient demand for the competitors' goods at a higher price, and the competitors will not be driven out of business. In this case, Excel's 20.4% market share after the merger suggests it would lack sufficient market power to engage in predatory pricing. See Williamson, Predatory Pricing: A Strategic and Welfare Analysis, 87 Yale L. J. 284, 292 (1977) (60% share necessary); Areeda & Turner, Williamson on Predatory Pricing, 87 Yale L. J. 1337, 1348 (1978) (60% share not enough). It is possible that a firm with a low market share might nevertheless have sufficient excess capacity to enable it rapidly to expand its output and absorb the market shares of its rivals. According to Monfort's expert witness, however, Excel's postmerger share of market capacity would be only 28.4%. 1 App. 66. Moreover, it appears that Excel, like the other large beef packers, operates at over 85% of capacity. *Id.*, at 135-136. Thus Excel acting alone would clearly lack sufficient capacity after the merger to satisfy all or most of the demand for boxed beef. Although it is conceivable that Excel could act collusively with other large packers, such as IBP, in order to make the scheme work, the District Court found that Monfort did not "assert that Excel and IBP would act in collusion with each other in an effort to drive others out of the market," [591 F.Supp., at 692](#). With only a 28.4% share of market capacity and lacking a plan to collude, Excel would harm only itself by embarking on a sustained campaign of predatory pricing. Courts should not find allegations of predatory pricing credible when the alleged predator is incapable of successfully pursuing a predatory scheme. See n. 17, *infra*.

It is also important to examine the barriers to entry into the market, because "without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time." *Matsushita*, 475 U.S., at 591, n. 15. In discussing the potential for oligopoly pricing in the beef-packing business following the merger, the District Court found significant barriers to entry due to the "costs and delays" of building new plants, and "the lack of [available] facilities and the cost [\$ 20-40 million] associated with refurbishing old facilities." [591 F.Supp., at 707-708](#). Although the District Court concluded that these barriers would restrict entry following the merger, the court's analysis was premised on market conditions during the premerger period of competitive pricing. *Ibid.* In evaluating entry barriers in the context of a predatory pricing claim, however, a court should focus on whether significant entry barriers would exist *after* the merged firm had eliminated some of its rivals, because at that point the remaining firms would begin to charge supracompetitive prices, and the barriers that existed during competitive conditions might well prove insignificant. In this case, for example, although costs of entry into the current competitive market may be high, if Excel and others in fact succeeded in driving competitors out of the market, the facilities of the bankrupt competitors would then

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## LEdHN[8B] [↑] [8B]

[\*\*\*26] [\*120] [\*\*495] IV

[\*\*\*442] In its *amicus* brief, the United States argues that the "danger of allowing a competitor to challenge an acquisition [\*121] on the basis of necessarily speculative claims of post-acquisition predatory pricing far outweighs the danger that any anticompetitive merger will go unchallenged." Brief for United States as *Amicus Curiae* 25. On this basis, the United States invites the Court to adopt in effect a *per se* rule "denying competitors standing to challenge acquisitions on the basis of predatory pricing theories." *Id.*, at 10.

LEdHN[5B] [↑] [5B] LEdHN[8C] [↑] [8C] We decline the invitation. As the foregoing discussion makes plain, *supra*, at 117-118, predatory pricing is an anticompetitive practice forbidden by the antitrust laws. While firms may engage in the practice only infrequently, [\*\*\*443] there is ample evidence suggesting that the practice does occur.<sup>16</sup> It would be novel indeed for a court to deny standing to a party seeking an injunction against threatened injury merely because such injuries rarely occur.<sup>17</sup> In any case, nothing in [\*122] the language or legislative history of the Clayton Act suggests that Congress intended this Court to ignore injuries [\*\*\*27] caused by such anticompetitive practices as predatory pricing.

## LEdHN[8D] [↑] [8D]

[\*\*\*28] V

LEdHN[1D] [↑] [1D] LEdHN[2C] [↑] [2C] LEdHN[9] [↑] [9] We hold that a plaintiff seeking injunctive relief under § 16 of the Clayton Act must show a threat of antitrust injury, and that a showing of loss or damage due merely to increased competition does not constitute such injury. The record below does not support a finding of antitrust injury, but only of threatened loss from increased competition. Because respondent has therefore failed to make the showing § 16 requires, we need not reach the question whether the proposed merger violates § 7. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

be available, and the record shows, without apparent contradiction, that shut-down plants could be producing efficiently in a matter of months and that equipment and a labor force could readily be obtained, 1 App. 95-96. Similarly, although the District Court determined that the high costs of building new plants and refurbishing old plants created a "formidable" barrier to entry given "the low profit margins in the beef industry," *591 F.Supp., at 707*, this finding speaks neither to the likelihood of entry during a period of supracompetitive profitability nor to the potential return on investment in such a period.

<sup>16</sup> See Koller, The Myth of Predatory Pricing: An Empirical Study, 4 *Antitrust Law & Econ.* Rev. 105 (1971); Miller, Comments on Baumol and Ordover, 28 J. Law & Econ. 267 (1985).

<sup>17</sup> Claims of threatened injury from predatory pricing must, of course, be evaluated with care. As we discussed in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the likelihood that predatory pricing will benefit the predator is "inherently uncertain: the short-run loss [from pricing below cost] is definite, but the long-run gain depends on successfully neutralizing the competition. . . . [and] on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." *475 U.S., at 589*. Although the commentators disagree as to whether it is ever rational for a firm to engage in such conduct, it is plain that the obstacles to the successful execution of a strategy of predation are manifold, and that the disincentives to engage in such a strategy are accordingly numerous. See, e. g., *id., at 588-593* (discussing obstacles to successful predatory pricing conspiracy); R. Bork, The Antitrust Paradox 144-159 (1978); McGee, Predatory Pricing Revisited, 23 J. Law & Econ., at 291-300; Posner, The Chicago School of Antitrust Analysis, 127 U. Pa. L. Rev. 925, 939-940 (1979). As we stated in *Matsushita*, "predatory pricing schemes are rarely tried, and even more rarely successful." *475 U.S., at 589*. Moreover, the mechanism by which a firm engages in predatory pricing -- lowering prices -- is the same mechanism by which a firm stimulates competition; because "cutting prices in order to increase business often is the very essence of competition . . . [;] mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id., at 594*.

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JUSTICE BLACKMUN took no part in the consideration or decision of this case.

**Dissent by:** STEVENS

## Dissent

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JUSTICE STEVENS, with whom JUSTICE WHITE joins, dissenting.

This case presents the question whether the antitrust laws provide a remedy for a [\*\*496] private party that challenges a horizontal merger between two of its largest competitors. The issue may be approached along two fundamentally different paths. First, the Court might focus its attention entirely on the postmerger conduct of the merging firms and deny relief [\*123] unless the plaintiff can [\*\*\*29] prove a violation of the Sherman Act. Second, the Court might concentrate on the [\*\*\*444] merger itself and grant relief if there is a significant probability that the merger will adversely affect competition in the market in which the plaintiff must compete. Today the Court takes a step down the former path;<sup>1</sup> I believe that Congress has directed us to follow the latter path.

[\*\*\*30] In this case, one of the major firms in the beef-packing market has proved to the satisfaction of the District Court, [591 F.Supp. 683, 709-710 \(Colo. 1983\)](#), and the Court of [Appeals, 761 F.2d 570, 578-582 \(CA10 1985\)](#), that the merger between Excel and Spencer Beef is illegal. This Court holds, however, that the merger should not be set aside because the adverse impact of the merger on respondent's profit margins does not constitute the kind of "antitrust injury" that the Court described in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)*. As I shall demonstrate, *Brunswick* merely rejected a "novel damages theory," *id. at 490*; the Court's implicit determination that *Brunswick* forecloses the appropriate line of inquiry in this quite different case is therefore misguided. In my view, a [\*124] competitor in Monfort's position has standing to seek an injunction against the merger. Because Monfort must compete in the relevant market, proof establishing that the merger will have a sufficient probability of an adverse effect on competition to violate § 7 is also sufficient to authorize [\*\*\*31] equitable relief.

I

Section 7 of the Clayton Act was enacted in 1914, 38 Stat. 731, and expanded in 1950, 64 Stat. 1125, because Congress concluded that the Sherman Act's prohibition against mergers was not adequate.<sup>2</sup> The Clayton Act, unlike the Sherman Act, proscribes certain combinations of competitors that do not produce any actual injury, either to competitors or to competition. An acquisition is prohibited by § 7 if "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." [15 U. S. C. § 18](#). The legislative history teaches us that this delphic language was designed "to cope with [\*\*\*445] monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding." S. Rep. No.

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<sup>1</sup> Whether or not it so intends, the Court in practical effect concludes that a private party may not obtain injunctive relief against a horizontal merger unless the actual or probable conduct of the merged firms would establish a violation of the Sherman Act. The Court suggests that, to support a claim of predatory pricing, a competitor must demonstrate that the merged entity is "able to absorb the market shares of its rivals once prices have been cut," either because it has a high market share or because it has "sufficient excess capacity to enable it rapidly to expand its output and absorb the market shares of its rivals." *Ante*, at 119-120, n. 15. The Court would also require a competitor to demonstrate that significant barriers to entry would exist after "the merged firm had eliminated some of its rivals. . ." *Ante*, at 120, n. 15. Indeed, the Court expressly states that the antitrust laws "require the courts to protect small businesses . . . only against the loss of profits from *practices* forbidden by the antitrust laws." *Ante*, at 116 (emphasis added). By emphasizing postmerger conduct, the Court reduces to virtual irrelevance the related but distinct issue of the legality of the merger itself.

<sup>2</sup> "Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890 [the Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." S. Rep. No. 698, 63d Cong., 2d Sess. 1 (1914).

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1775, 81st Cong., 2d Sess., 4-5 (1950).<sup>3</sup> In *Brunswick*, [\*125] [\*497] *supra*, this Court recognized that § 7 is "a prophylactic measure, intended 'primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil. . . .'" *429 U.S., at 485* (quoting *United States v. E. I. du Pont de Nemours & Co.*, *353 U.S. 586, 597 (1957)*). [\*\*\*32]

[\*\*\*33] The 1950 amendment to § 7 was particularly concerned with the problem created by a merger which, when viewed by itself, would appear completely harmless, but when considered in its historical setting might be dangerous to competition. As Justice Stewart explained:

"The principal danger against which the 1950 amendment was addressed was the erosion of competition through the cumulative centripetal effect of acquisitions by large corporations, none of which by itself might be sufficient to constitute a violation of the Sherman Act. Congress' immediate fear was that of large corporations buying out small companies. A major aspect of that fear was the perceived trend toward absentee ownership of local business. Another, more generalized, congressional purpose revealed by the legislative history was to protect small businessmen and to stem the rising tide of concentration in the economy. These goals, Congress thought, could be achieved by 'arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency.' *Brown Shoe Co. v. United States*, [370 U.S.,] at 317." *United States v. Von's Grocery Co.*, *384 U.S. 270, 283-284 (1966)* [\*\*\*34] (dissenting).

Thus, a merger may violate § 7 of the Clayton Act merely because it poses a serious threat to competition and even though the evidence falls short of proving the kind of actual restraint that violates the Sherman Act, *15 U. S. C. § 1*. The language of § 16 of the Clayton Act also reflects Congress' emphasis on probable harm rather than actual harm. Section 16 authorizes private parties to obtain injunctive relief [\*126] "against threatened loss or damage" by a violation of § 7.<sup>4</sup> The broad [\*\*\*446] scope of the language in both § 7 and § 16 identifies the appropriate standing requirements for injunctive relief. As the Court has squarely held, it is the threat of harm, not actual injury, that justifies equitable relief:

"The evident premise for striking [the injunction at issue] was that Zenith's failure to prove the fact of injury barred injunctive relief as well as treble damages. This was unsound, for § 16 of the Clayton Act, *15 U. S. C. § 26*, which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of 'threatened' [\*\*\*35] injury. That remedy is characteristically available even though the plaintiff has not yet suffered actual injury; . . . he need only demonstrate a significant threat of injury from an impending [\*\*498] violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, *395 U.S. 100, 130 (1969)* (citations omitted).

<sup>3</sup> This Court has described the legislative purpose of § 7 as follows:

"[It] is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum." *Brown Shoe Co. v. United States*, *370 U.S. 294, 317-318 (1962)* (footnote omitted).

<sup>4</sup> Section § 16 states, in relevant part:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue . . ." *15 U. S. C. § 26*.

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[\*\*\*36] Judged by these standards, respondent's showing that it faced the threat of loss from an impending antitrust violation clearly conferred standing to obtain injunctive relief. Respondent [\*127] alleged, and in the opinion of the courts below proved, the injuries it would suffer from a violation of § 7:

"Competition in the markets for the procurement of fed cattle and the sale of boxed beef will be substantially lessened and a monopoly may tend to be created in violation of Section 7 of the Clayton Act;

"Concentration in those lines of commerce will be increased and the tendency towards concentration will be accelerated." 1 App. 21.

More generally, given the statutory purposes to protect small businesses and to stem the rising tide of concentration in particular markets, a competitor trying to stay in business in a changing market must have standing to ask a court to set aside a merger that has changed the character of the market in an illegal way. Certainly the businesses -- small or large -- that must face competition in a market altered by an illegal merger are directly affected by that transaction. Their inability to prove exactly how or why they may be harmed does [\*\*\*37] not place them outside the circle of interested parties whom the statute was enacted to protect.

## II

Virtually ignoring the language and history of § 7 of the Clayton Act and the broad scope of the Act's provision for injunctive relief, the Court bases its decision entirely on a case construing the "private damages action provisions" of the Act. *Brunswick*, 429 U.S., at 478. In *Brunswick*, we began our analysis by acknowledging the difficulty of meshing § 7, "[\*\*447] a statutory prohibition against acts that have a potential to cause certain harms," with § 4, a "damages action intended to remedy those harms." *Id.*, at 486. We concluded that a plaintiff must prove more than a violation of § 7 to recover damages, "since such proof establishes only that injury may result." *Ibid.* Beyond the special nature of an action for treble damages, § 16 differs from § 4 because by its terms it requires only that the antitrust violation threaten [\*128] the plaintiff with loss or damage, not that the violation cause the plaintiff actual "[injury] in his business or property." *15 U. S. C. § 15*.

In the *Brunswick* case, the Court set aside a damages [\*\*\*38] award that was based on the estimated additional profits that the plaintiff would have earned if competing bowling alleys had gone out of business instead of being acquired by the defendant. We concluded "that the loss of windfall profits that would have accrued had the acquired centers failed" was not the kind of actual injury for which damages could be recovered under § 4. *429 U.S., at 488*. That injury "did not occur 'by reason of' that which made the acquisitions unlawful." *Ibid.*

In contrast, in this case it is the threatened harm -- to both competition and to the competitors in the relevant market -- that makes the acquisition unlawful under § 7. The Court's construction of the language of § 4 in *Brunswick* is plainly not controlling in this case.<sup>5</sup> The concept of "antitrust injury," which is at the heart of the [\*\*499] treble-damages action, is simply not an element of a cause of action for injunctive relief that depends on finding a reasonable threat that an incipient disease will poison an entire market.

[\*\*\*39] A competitor plaintiff who has proved a violation of § 7, as the *Brunswick* Court recognized, has established that injury may result. This showing satisfies the language of § 16 provided that the plaintiff can show that injury may result to him. When the proof discloses a reasonable probability that competition will be harmed as a result of a merger, I would also conclude that there is a reasonable probability that [\*129] a competitor of the merging firms will suffer some corresponding harm in due course. In my opinion, that reasonable probability gives the competitor an interest in the proceeding adequate to confer standing to challenge the merger. To hold otherwise is to frustrate § 7 and to read § 16 far too restrictively.

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<sup>5</sup> In *Brunswick*, we reserved this question, stating: "The issue for decision is a narrow one. . . . Petitioner questions only whether antitrust damages are available where the sole injury alleged is that competitors were continued in business, thereby denying respondents an anticipated increase in market shares." *429 U.S., at 484* (footnote omitted). Nor did we reach the issue of a competitor's standing to seek relief from a merger under § 16 in *Associated General Contractors of California, Inc. v. Carpenters*, *459 U.S. 519 (1983)*. *Id.*, at 524, n. 5.

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It would be a strange antitrust statute indeed which defined a violation enforceable by no private party. Effective enforcement of the antitrust laws has always depended largely on the work of private attorney generals, for whom Congress made special provision in the Clayton [\*\*\*448] Act itself.<sup>6</sup> As recently as 1976, Congress specifically indicated its intent to encourage private enforcement of § 16 by authorizing recovery of a reasonable attorney's [\*\*\*40] fee by a plaintiff in an action for injunctive relief. The Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1396 (amending 15 U. S. C. § 26).

The Court misunderstands the message that Congress conveyed in [\*\*\*\*41] 1914 and emphasized in 1950. If, as the District Court and the Court of Appeals held, the merger is illegal, it should be set aside. I respectfully dissent.

## References

**54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 285, 367**

24 Federal Procedure, L Ed, Monopolies and Restraints of Trade 54:167, 54:168, 54:175

## 12 Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade 48:69, 48:84, 48:147

18 Am Jur PI & Pr Forms (Rev), Monopolies, Restraints of Trade, and Unfair Trade Practices, Form 17

24 Am Jur Trials 1, Defending Antitrust Lawsuits

15 USCS 26

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## Index to Annotations, Competition; Consolidation and Merger; Injunctions; Parties; Restraints of Trade and Monopolies

## Annotation References:

Propriety and scope of [\*\*\*\*42] injunctive relief in federal antitrust case- Supreme Court cases. [55 L Ed 2d 892](#).

What issues will the Supreme Court consider, though not, or not properly, raised by the parties. [42 L Ed 2d 946](#).

Standing of private party under 16 of Clayton Act ([15 USCS 26](#)) to seek injunction to prevent merger or acquisition allegedly prohibited under 7 of the Act ([15 USCS 18](#)). 78 ALR Fed 159.

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<sup>6</sup> 15 U. S. C. § 15. This Court has emphasized the importance of the statutory award of fees to private antitrust plaintiffs as part of the effective enforcement of the antitrust laws. In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-131 (1969), the Court observed:

"[The] purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."

See also *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972).



## 324 Liquor Corp. v. Duffy

Supreme Court of the United States

November 3, 1986, Argued ; January 13, 1987, Decided

No. 84-2022

**Reporter**

479 U.S. 335 \*; 107 S. Ct. 720 \*\*; 93 L. Ed. 2d 667 \*\*\*; 1987 U.S. LEXIS 281 \*\*\*\*; 55 U.S.L.W. 4094; 1986-2 Trade Cas. (CCH) P67,391

324 LIQUOR CORP., DBA YORKSHIRE WINE & SPIRITS v. DUFFY ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

**Disposition:** [64 N. Y. 2d 504, 479 N. E. 2d 779](#), reversed and remanded.

### **Core Terms**

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liquor, retailers, wholesalers, bottle, posted, prices, regulation, resale price, Sherman Act, powers, intoxicating liquor, retail price, ABC Law, commerce, conferred, liquor store, manufacturer, markup, anti trust law, importation, schedules, percent, repeal, enact, propose an amendment, pricing system, fair trade, price-fixing, consumption, supervised

### **LexisNexis® Headnotes**

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Governments > State & Territorial Governments > Licenses

**[HN1](#)[]** **State & Territorial Governments, Licenses**

See *N.Y. Alco. Bev. Cont. Law* § 101-b(3)(b).

Governments > State & Territorial Governments > Licenses

**[HN2](#)[]** **State & Territorial Governments, Licenses**

See N.Y. Comp. Codes R. and Regs. tit. 9, § 65.4(e) (1980).

Governments > State & Territorial Governments > Licenses

**[HN3](#)[]** **State & Territorial Governments, Licenses**

Retailers of liquor may not sell below "cost." [N.Y. Alco. Bev. Cont. Law § 101-bb\(2\)](#). The statute defines "cost" as the price of such item of liquor to the retailer plus twelve percentum of such price. "Price," in turn, is defined as the posted bottle price in effect at the time the retailer sells or offers to sell the item.

Governments > State & Territorial Governments > Licenses

#### [HN4](#) State & Territorial Governments, Licenses

See [N.Y. Alco. Bev. Cont. Law § 101-bb\(2\)](#).

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

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

#### [HN5](#) Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Resale price maintenance has been a per se violation of [§ 1](#) of the Sherman Act since the early years of national antitrust enforcement.

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

#### [HN6](#) Price Fixing & Restraints of Trade, Vertical Restraints

A vertical restraint imposed by a single manufacturer or wholesaler may stimulate interbrand competition even as it reduces intrabrand competition.

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

Antitrust & Trade Law > Sherman Act > General Overview

#### [HN7](#) Per Se Rule & Rule of Reason, Per Se Violations

The United States Supreme Court held that [N.Y. Alco. Bev. Cont. Law § 101-bb](#) is inconsistent with [§ 1](#) of the Sherman Act.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

#### [HN8](#) Sherman Act, Claims

A state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. The U.S. Supreme Court decisions have established a two-part test for determining immunity. First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the state itself.

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

### **HN9** [blue download icon] Exemptions & Immunities, Parker State Action Doctrine

The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.

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

Antitrust & Trade Law > Sherman Act > General Overview

### **HN10** [blue download icon] Exemptions & Immunities, Parker State Action Doctrine

Where private actors are granted a degree of private regulatory power the regulatory scheme may be attacked under § 1 of the Sherman Act as a "hybrid" restraint. The federal antitrust laws pre-empt state laws authorizing or compelling private parties to engage in anticompetitive behavior.

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

Constitutional Law > Prohibition

### **HN11** [blue download icon] Exemptions & Immunities, Parker State Action Doctrine

The court must ask whether the interests implicated by a state regulation are so closely related to the powers reserved by the U.S. Const. Amend. XXI, that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.

Constitutional Law > Prohibition

### **HN12** [blue download icon] Constitutional Law, Prohibition

See U.S. Const. amend. XXI, § 2.

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

Antitrust & Trade Law > Sherman Act > General Overview

### **HN13** [blue download icon] Exemptions & Immunities, Parker State Action Doctrine

A state's unsubstantiated interest in protecting small retailers simply is not of the same stature as the goals of the Sherman Act.

## Lawyers' Edition Display

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### Decision

New York law requiring liquor retailers to charge at least 112 percent of wholesaler's posted bottle price held violative of Sherman Act ([15 USCS 1](#)) and not valid under [21st Amendment](#).

### Summary

A New York statute and implementing regulations required liquor retailers to charge at least 112 percent of the wholesaler's posted bottle price in effect at the time the retailer sells or offers to sell the item. Wholesalers are required to file monthly "posted" bottle prices and case prices for an item with the state liquor authority, and may reduce the posted case price for an item without reducing its bottle price. Thus, wholesalers can compel retailers to charge more than 112 percent of the actual wholesale cost. A liquor retailer sold two bottles of liquor to state liquor authority investigators for less than 112 percent of the posted bottle price, and as a result, its liquor license was suspended for 10 days and it forfeited a \$ 1,000 bond. The retailer sought relief from the penalties on the ground that the statute violated 1 of the Sherman Act ([15 USCS 1](#)). The New York Supreme Court, New York County, denied the petition ([119 Misc 2d 746, 464 NYS2d 355](#)). The Appellate Division, First Department, reversed ([102 AD2d 607, 478 NYS2d 615](#)). The New York Court of Appeals upheld the validity of the statute and reinstated the penalties, holding that while the statute was not immune under the state action exemption to the Sherman Act because New York did not actively supervise the resale price maintenance system, the statute was a proper exercise of the powers reserved to New York by the [Twenty-first Amendment to the Federal Constitution](#) because the state interest in protecting retailers which underlies the statute was of sufficient magnitude to override the federal policy expressed in the antitrust laws ([64 NY2d 504, 479 NE2d 779](#)).

On appeal, the United States Supreme Court reversed and remanded the case for further proceedings. In an opinion by Powell, J., joined by Brennan, White, Marshall, Blackmun, Stevens, and Scalia, JJ., it was held that (1) the New York statute (a) imposed a regime of resale price maintenance on all New York retailers, which was a per se violation of 1 of the Sherman Act and with respect to which the qualifications to the per se rule were not applicable, and (b) was not valid under the state action exemption to the Sherman Act; and (2) the statute was not valid under the [Twenty-first Amendment](#), since the state's asserted interest in protecting small retailers did not suffice to afford immunity from the Sherman Act, in the absence of legislative or other findings that either the minimum markup requirement or the "bottle price" definition of cost has been effective in preserving small retailers.

O'Connor, J., joined by Rehnquist, Ch. J., dissented, expressing the view that the [Twenty-first Amendment](#) clearly authorized New York to regulate the liquor trade within its borders free of federal interference, since the legislative history of the Amendment (1) revealed the intent of the Senate to prevent any federal interference with state attempts to regulate the liquor trade and to return absolute control of the liquor trade to the states, and (2) showed that the Federal Government could not use its [commerce clause](#) powers to interfere in any manner with the states' exercise of the power conferred by the [Twenty-first Amendment](#).

### Headnotes

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RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §9 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > liquor retail sale prices -- state control -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C]

A state statute and implementing regulations requiring liquor retailers to charge not less than 112 percent of the wholesaler's posted bottle price in effect at the time retailers sell or offer to sell the items is not valid under the state

action exemption to the Sherman Act, because, while the state's liquor pricing system meets the first requirement for the application of the exemption--that the challenged restraint must be one clearly articulated and affirmatively expressed as state policy--in that the state legislature clearly has adopted a policy of resale price maintenance, it does not satisfy the second requirement--that the policy must be actively supervised by the state itself--in that the state (1) simply authorizes price setting and enforces the prices established by private parties, (2) neither establishes prices nor reviews the reasonableness of the price schedules, and (3) does not monitor market conditions or engage in any pointed reexamination of the program; neither the monitoring by the state liquor authority, consisting of permitting wholesalers to depart from their posted prices and permitting individual retailers to sell below the statutory definition of cost for good cause shown, nor periodic reexamination by the state legislature exerts any significant control over retail liquor prices or markups, and thus the requirement of state involvement is not satisfied.

#### INTOXICATING LIQUORS §13 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41

> liquor retail sale prices -- state control -- Twenty-first Amendment -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B] [LEdHN\[2C\]](#) [2C] [LEdHN\[2D\]](#) [2D] [LEdHN\[2E\]](#) [2E]

A state statute and implementing regulations requiring liquor retailers to charge not less than 112 percent of the wholesaler's posted bottle price in effect at the time retailers sell or offer to sell the items is not valid under the [Twenty-first Amendment to the Federal Constitution](#), because, while the purpose of the minimum markup is to protect small retailers, the markup is imposed on the "posted bottle price," which may differ from the actual wholesale price, and there are no legislative or other findings that either the minimum markup requirement or the "bottle price" definition of cost has been effective in preserving small retail establishments; hence, the state's asserted interest in protecting small retailers does not suffice to afford immunity from the provisions of 1 of the Sherman Act ([15 USCS 1](#)).

#### RESTRAINTS OF TRADE, MONOPOLIES AND UNFAIR TRADE PRACTICES §41 > liquor retail sale prices -- state control --

> Headnote:

[LEdHN\[3A\]](#) [3A] [LEdHN\[3B\]](#) [3B] [LEdHN\[3C\]](#) [3C]

A state statute and implementing regulations requiring liquor retailers to charge not less than 112 percent of the wholesaler's posted bottle price in effect at the time retailers sell or offer to sell the items imposes a regime of resale price maintenance on all retailers in the state and is a per se violation of 1 of the Sherman Act ([15 USCS 1](#)); the qualifications to the per se rule--that concerted nonprice restrictions imposed by a single manufacturer are to be judged under the rule of reason, and that a single manufacturer may announce resale prices in advance and refuse to deal with those who fail to comply--do not apply, because (1) the statute directly restricts retail prices, (2) retailers are specifically forbidden by the statute from reducing the minimum prices set by wholesalers and are subject to penalties for failure to adhere to the resale price schedules, and (3) the statute applies to all wholesalers and retailers of liquor; in the pricing system established by the statute, there is a contract, combination, or conspiracy in restraint of trade within the terms of 1 of the Sherman Act, because where private actors are granted a degree of private regulatory power, the regulatory scheme may be attacked under 1 as a hybrid restraint.

#### RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > state action exemption -- Sherman Act --

test -- > Headnote:

[LEdHN\[4\]](#) [4]

479 U.S. 335, \*335; 107 S. Ct. 720, \*\*720; 93 L. Ed. 2d 667, \*\*\*667; 1987 U.S. LEXIS 281, \*\*\*\*1

In order for the anticompetitive conduct of a state acting through its legislature to be exempt from the provisions of the Sherman Act ([15 USCS 1 et seq.](#)), under the state action doctrine of [Parker v Brown \(1943\) 317 US 341, 87 L Ed 315, 63 S Ct 307](#), the challenged restraint must be one clearly articulated and affirmatively expressed as state policy, and the policy must be actively supervised by the state itself.

APPEAL §709 > Supreme Court -- construction of state statute -- > Headnote:

[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B]

On appeal from a decision of the highest court of a state, the United States Supreme Court may not construe a state statute contrary to the construction given it by the highest court of the state.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > state action exemption -- state control of liquor distribution -- > Headnote:

[LEdHN\[6A\]](#) [6A] [LEdHN\[6B\]](#) [6B]

The complete control by some states of the distribution of liquor within their boundaries is immune from the federal antitrust laws under the state action doctrine of [Parker v Brown \(1943\) 317 US 341, 87 L Ed 315, 63 S Ct 307](#), because the state substitutes its own power for unfettered business freedom.

COMMERCE §113 > pre-emption -- federal antitrust laws -- state laws -- > Headnote:

[LEdHN\[7A\]](#) [7A] [LEdHN\[7B\]](#) [7B]

The federal antitrust laws pre-empt state laws authorizing or compelling private parties to engage in anticompetitive behavior.

LIQUORS §7.2 > LIQUORS §9.4 > Twenty-first Amendment -- commerce clause -- > Headnote:

[LEdHN\[8\]](#) [8]

Although the [Twenty-first Amendment to the Federal Constitution](#) grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system, the states' powers under the Amendment are circumscribed by other provisions of the Constitution, such as the [commerce clause](#); in harmonizing state and federal powers, the question in each case is whether the interests implicated by a state regulation are so closely related to the powers reserved by the Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.

APPEAL §709 > APPEAL §745 > COURTS §802 > Supreme Court review -- state court decision findings and conclusions -- binding effect -- > Headnote:

[LEdHN\[9\]](#) [9]

Although the Supreme Court, in reviewing the decision of a state court, is not bound by the findings of the state court that undercut powers reserved to the states by the Federal Constitution, nevertheless, the Supreme Court accords great weight to the views of the state's highest court on state law matters and customarily accepts the factual findings of state courts in the absence of exceptional circumstances.

## Syllabus

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Under [§ 101-bb of New York's Alcoholic Beverage Control Law](#) and implementing regulations of the State Liquor Authority (SLA), liquor retailers must charge at least 112 percent of the wholesaler's "posted" bottle price in effect at the time the retailer sells or offers to sell the item. Wholesalers must file monthly "posted" bottle prices and case prices for an item with the SLA, and may reduce the posted case price for an item without reducing its bottle price. Since retailers generally purchase liquor by the case, wholesalers thus can compel retailers to charge more than 112 percent of the actual wholesale cost to the retailer. As a result of appellant retailer's selling certain bottles [\*\*\*\*2] of liquor for less than 112 percent of the posted bottle price, its license was suspended for 10 days and it forfeited a bond. Appellant sought relief from the penalties on the ground that [§ 101-bb](#) violated [§ 1](#) of the Sherman Act. A New York Supreme Court denied relief, but the Appellate Division reversed. The New York Court of Appeals upheld the validity of [§ 101-bb](#) and reinstated the penalties. It held that [§ 101-bb](#) was not immune under the state-action exemption from the antitrust laws set forth in [Parker v. Brown, 317 U.S. 341](#). The Court of Appeals nevertheless concluded that the statute was a proper exercise of powers reserved to the State by the [Twenty-first Amendment](#).

*Held:*

1. [Section 101-bb](#) is inconsistent with [§ 1](#) of the Sherman Act. Resale price maintenance has long been regarded as a *per se* antitrust violation. The New York statute, which applies to all liquor wholesalers and retailers, allows "vertical control" by wholesalers of retail prices. Such industrywide resale price fixing is virtually certain to reduce both interbrand and intrabrand competition, because it prevents wholesalers from allowing or requiring retail price competition. [\*\*\*\*3] Cf. [California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97](#). Pp. 341-343.
2. New York's pricing system is not valid under the state-action exemption from the antitrust laws. The State's system does meet the first requirement of the two-part test for determining immunity under [Parker v. Brown, supra](#), that the challenged restraint be "one clearly articulated and affirmatively expressed as state policy." However, New York's liquor pricing system does not meet the second requirement that the State's policy be "actively supervised" by the State itself. New York simply authorizes price setting and enforces the prices established by private parties. The State has displaced competition among liquor retailers without substituting an adequate system of regulation. Cf. [California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., supra](#). Pp. 343-345.
3. New York's pricing system is not valid under the [Twenty-first Amendment](#). Although § 2 of the Amendment qualifies the federal commerce power, the Amendment does not operate to "repeal" the [Commerce Clause](#) wherever state regulation of intoxicating liquors [\*\*\*\*4] is concerned. The question in each case is whether the interests implicated by a state regulation are so closely related to the powers preserved by the [Twenty-first Amendment](#) that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies. Pp. 346-352.
  - (a) The State's asserted interest in protecting small retailers does not suffice to afford immunity from the Sherman Act. Although the New York Court of Appeals correctly concluded that the purpose of the 12 percent minimum markup was to protect those retailers, the court made no findings that the purpose of the "bottle price" definition of cost was to protect small retailers, and cited no legislative or other findings that either the markup or the "bottle price" definition of cost has been effective in preserving the retailers. The State's resale price maintenance system directly conflicts with the "familiar and substantial" federal interest in enforcing the antitrust laws. Pp. 348-351.

(b) It is not necessary to consider whether New York's pricing system can be upheld as an exercise of the State's power to promote temperance. The Court of Appeals did not find that the statute [\*\*\*\*5] was intended to promote temperance, or that it does so. This Court accords great weight to the views of the State's highest court on state-law matters, and customarily accepts the factual findings of state courts in the absence of exceptional circumstances. No such exceptional circumstances appear in this case. Pp. 351-352.

**Counsel:** Bertram M. Kantor argued the cause for appellant. With him on the briefs were Michael H. Byowitz and Seymour Howard.

Deputy Assistant Attorney General Cannon argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Solicitor General Fried, Assistant Attorney General Ginsburg, Deputy Solicitor General Cohen, Harriet S. Shapiro, Catherine G. O'Sullivan, and Andrea Limmer.

Christopher Keith Hall, Assistant Attorney General of New York, argued the cause for appellees. With him on the brief were Robert Abrams, Attorney General, O. Peter Sherwood, Solicitor General, and Richard G. Liskov, Lloyd Constantine, and August L. Fietkau, Assistant Attorneys General.\*

[\*\*\*\*6]

**Judges:** POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and SCALIA, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, post, p. 352.

**Opinion by:** POWELL

## Opinion

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[\*337] [\*\*\*673] [\*\*722] JUSTICE POWELL delivered the opinion of the Court.

LEdHN[1A] [↑] [1A] LEdHN[2A] [↑] [2A] The State of New York requires retailers to charge at least 112 percent of the "posted" wholesale price for liquor, but permits wholesalers to sell to retailers at less than the "posted" price. The question presented is whether this pricing system is valid under either the state-action exemption from the antitrust laws or the Twenty-first Amendment.

I

A

Wholesalers of liquor in the State of New York must file, or "post," monthly price schedules with the State Liquor Authority (SLA). N. Y. Alco. Bev. Cont. Law (ABC Law) [\*338] § 101-b (McKinney 1970 and Supp. 1986).<sup>1</sup> [\*\*\*\*8] The schedules must report, "with [\*\*\*674] respect to each item," "the bottle and case price to

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\* Briefs of amici curiae urging affirmance were filed for Peerless Importers, Inc., et al. by Lawrence Kill, Steven M. Pesner, Anthony A. Dean, Ralph S. Spritzer, Michael Whiteman, and Jonathan P. Nye; and for Wine, Liquor & Distillery Workers Union Local 1, AFL-CIO, et al. by Victor Feingold.

Martin P. Mehler filed a brief for Metropolitan Package Store Association, Inc., et al. as amici curiae.

<sup>1</sup> **Section 101-b(3)(b)** provides, in part:

HN1 [↑] "No brand of liquor or wine shall be sold to or purchased by a retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name,

retailers. [\*\*\*\*7] " § 101-b(3)(b). The ABC Law itself does not require that the posted case price of an item bear any relation to its posted bottle price. The SLA, however, has promulgated a rule stating that for cases containing 48 or fewer bottles, the posted bottle price multiplied by the number of bottles in a case must exceed the posted case price by a "breakage" surcharge of \$ 1.92. SLA Rule 16.4(e), 9 NYCRR § 65.4(e) (1980).<sup>2</sup>

**HN3[]** Retailers of liquor may not sell below "cost." ABC Law, [§ 101-bb\(2\)](#).<sup>3</sup> [\*\*\*\*11] The statute [\*\*723] defines "cost" as "the price of such [\*339] item of liquor to [\*\*\*\*9] the retailer plus twelve percentum of such price." [§ 101-bb\(2\)\(b\)](#). "Price," in turn, is defined as the posted bottle price in effect at the time the retailer sells or offers to sell the item. *Ibid.* Although the statute defines retail cost in terms of the wholesaler's posted bottle price, retailers generally purchase liquor by the case. The SLA expressly has authorized wholesalers to reduce, or "post off," the case price of an item without reducing the posted bottle price of the item. SLA Bulletin 471 (June 29, 1973).<sup>4</sup> By reducing the [\*\*\*675] case price without reducing the bottle price, [\*340] wholesalers can compel retailers to

capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to retailers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in 'combination' with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. Such brand of liquor or wine shall not be sold to retailers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. Such schedule shall be filed by each manufacturer selling such brand to retailers and by each wholesaler selling such brand to retailers."

<sup>2</sup> Rule 16.4(e), 9 NYCRR § 65.4(e) (1980), provides:

**HN2[]** "For each item of liquor listed in the schedule of liquor prices to retailers there shall be posted a bottle and a case price. The bottle price multiplied by number of containers in the case must exceed the case price by approximately \$ 1.92 for any case of 48 or fewer containers. The figure is to be reached by adding \$ 1.92 to the case price, dividing by the number of containers in the case, and rounding to the nearest cent. Where more than 48 containers are packed in a case, bottle price shall be computed by dividing the case price by the number of containers in the case, rounding to the nearest cent, and adding one cent. Variations will not be permitted without approval of the authority."

<sup>3</sup> [Section 101-bb\(2\)](#) provides, in part:

**HN4[]** "No licensee authorized to sell liquor at retail for off-premises consumption shall sell, offer to sell, solicit an order for or advertise any item of liquor at a price which is less than cost. As used in this section, the term:

....

"(b) 'cost' shall mean the price of such item of liquor to the retailer plus twelve percentum of such price, which is declared as a matter of legislative determination to represent the average minimum overhead necessarily incurred in connection with the sale by the retailer of such item of liquor. As used in this paragraph (b) the term "price" shall mean the bottle price to retailers, before any discounts, contained in the applicable schedule filed with the liquor authority pursuant to section one hundred one-b of this chapter by a manufacturer or wholesaler from whom the retailer purchases liquor and which is in effect at the time the retailer sells or offers to sell such item of liquor; except, that where no applicable schedule is in effect the bottle price of the item of liquor shall be computed as the appropriate fraction of the case price of such item, before any discounts, most recently invoiced to the retailer."

<sup>4</sup> Bulletin 471 provides, in part:

"Case prices may be posted off for any given month, or months, without an accompanying reduction in bottle prices. The wholesaler is given these choices during the period of a post-off:

"1. May elect not to reduce the bottle price, in which case the legal bottle price will be the base for the 12% retail mark-up.

"2. May reduce the bottle price to conform with the post-off case price, consistent with Rule 16.4(e), in which case the reduced bottle price will be the base for the 12% mark-up.

"3. May adopt a bottle price anywhere between the extremes authorized under '1' and '2' above, in which case the reduced bottle price will be the base for the 12% mark-up.

"Wholesalers of liquor will note that pursuant to these changes no control is placed on the number of consecutive months during which post-offs may be scheduled."

charge more than 112 percent of the actual wholesale cost. Similarly, because [§ 101-bb\(2\)\(b\)](#) defines "cost" in terms of the posted bottle price in effect when the retailer sells or offers to sell the item, wholesalers can sell retailers large quantities in a month when prices are low and then require the retailers to sell at an abnormally high markup by raising the bottle price in succeeding months. The New York retail pricing system thus permits wholesalers to set retail prices, and retail markups, without regard to actual retail costs. [\*\*\*\*10] New York wholesalers advertise in trade publications that their "post offs" will guarantee retailers large markups, sometimes in excess of 30 percent. App. 32-35. Wholesalers also advertise that buying large quantities while wholesale prices are low will result in extra retail profits after wholesale prices are raised. App. to Juris. Statement 101A. The effect of this complex of statutory provisions and regulations is to permit wholesalers to maintain retail prices at artificially high levels.

## B

Appellant 324 Liquor Corporation sold two bottles of liquor to SLA investigators in June 1981 for less than 112 percent of the posted bottle price. Because the wholesalers had "posted off" their June 1981 case prices [\*\*\*\*12] without reducing the posted bottle prices, appellant's retail prices represented an 18 percent markup over its actual wholesale cost. As a result of this violation, appellant's license was suspended for 10 days and it forfeited a \$1,000 bond. Appellant sought relief from the penalties on the ground that [§ 101-bb](#) violates [§ 1](#) of the Sherman Act, [15 U. S. C. § 1](#). A New York Supreme Court denied the petition. *324 Liquor Corp. v. McLaughlin*, [119 Misc. 2d 746, 464 N. Y. S. 2d 355 \(1983\)](#). The Appellate Division reversed. *324 Liquor Corp. v. McLaughlin*, [102 \[\\*341\] App. Div. 2d 607, 478 N. Y. S. 2d 615 \(1984\)](#). The New York Court of Appeals upheld the validity of [§ 101-bb](#) and reinstated the penalties. *J. A. J. Liquor Store, Inc. v. New York State Liquor Authority*, [64 N. Y. 2d 504, 479 N. E. 2d 779 \(1985\)](#). The Court of Appeals held that [§ 101-bb](#) is not immune under the state-action doctrine of [Parker v. Brown](#), [317 U.S. 341 \(1943\)](#), because the State does not actively supervise the resale price maintenance [\*\*724] system. The court nevertheless concluded that the statute [\*\*\*\*13] is a proper exercise of powers reserved to the State by the [Twenty-first Amendment](#), because "the State interest in protecting retailers which underlies [the statute] is of sufficient magnitude to override the Federal policy expressed in the antitrust laws." *J. A. J. Liquor Store, Inc. v. New York State Liquor Authority*, [supra, at 522, 479 N. E. 2d, at 789](#). We noted probable jurisdiction, [475 U.S. 1080 \(1986\)](#), and we now reverse.

## [\*\*\*676] II

In *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, [445 U.S. 97 \(1980\)](#), we invalidated a California statute requiring all producers, wholesalers, and rectifiers of wine to file fair trade contracts or price schedules with the State. *Midcal* establishes the framework for our analysis of New York's liquor pricing system.

## A

[LEdHN\[3A\]](#) [3A] The "threshold question," in this case as in *Midcal*, is whether the State's pricing system is inconsistent with the antitrust laws. *Id. at 102*. [Section 101-bb](#) imposes a regime of resale price maintenance on all New York liquor retailers. [\*\*\*\*14] [HN5](#) Resale price maintenance has been a *per se* violation of [§ 1](#) of the Sherman Act "since the early years of national antitrust enforcement." *Monsanto Co. v. Spray-Rite Service Corp.*, [465 U.S. 752, 761 \(1984\)](#). See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, [220 U.S. 373, 404-409 \(1911\)](#). Our recent decisions recognize the possibility that [HN6](#) a vertical restraint imposed by a *single* manufacturer or wholesaler [\*342] may stimulate interbrand competition even as it reduces intrabrand competition. *Continental T. V., Inc. v. GTE Sylvania Inc.*, [433 U.S. 36, 51-52 \(1977\)](#). Accordingly, we have held that concerted nonprice restrictions imposed by a single manufacturer are to be judged under the rule of reason. *Id. at 59*. We also have held that a single manufacturer may announce resale prices in advance and refuse to deal with those who fail to comply. *Monsanto Co. v. Spray-Rite Service Corp.*, [supra, at 761](#); *United States v. Colgate & Co.*, [250 U.S. 300, 307 \(1919\)](#). [\*\*\*\*15] Neither of these qualifications to the *per se* rule applies in this case. [Section 101-bb](#) directly restricts retail prices, and retailers are subject to penalties for failure to adhere to the resale price schedules. The New York statute, moreover, applies to *all* wholesalers and retailers of liquor. We have noted that industrywide resale price maintenance also may facilitate cartelization. *Continental T. V., Inc. v. GTE Sylvania Inc.*, [supra, at 51, n. 18](#). Mandatory industrywide resale price fixing is virtually certain to reduce interbrand competition as well as

intrabrand competition, because it prevents manufacturers and wholesalers from allowing or requiring retail price competition. The New York statute specifically forbids retailers from reducing the minimum prices set by wholesalers.

The antitrust violation in this case is essentially similar to the violation in *Midcal*. It is true that the wholesalers in *Midcal* were required to adhere to a single fair trade contract or price schedule for each geographical area. [445 U.S., at 99-100](#). *Midcal* therefore involved horizontal as well as vertical price fixing. Although the horizontal [\*\*\*\*16] restraint in *Midcal* may have provided an additional reason for invalidating the statute, our decision in *Midcal* rested on the "vertical control" of wine producers, who held "the power to prevent price competition by dictating the prices charged by wholesalers." [Id., at 103](#). [\*\*\*677] As we explained in [Rice v. Norman Williams Co., 458 U.S. 654 \(1982\)](#), the California statute [\*343] was invalidated because "it mandated [\*\*725] resale price maintenance, an activity that has long been regarded as a *per se* violation of the Sherman Act." [Id., at 659-660](#) (emphasis in original; footnote omitted). [HN7](#)<sup>5</sup> We hold that ABC Law [§ 101-bb](#) is inconsistent with [§ 1](#) of the Sherman Act.<sup>5</sup>

[\*\*\*\*17] B

[LEdHN\[1B\]](#)<sup>5</sup> [1B] [LEdHN\[3B\]](#)<sup>5</sup> [3B] [LEdHN\[4\]](#)<sup>5</sup> [4] [LEdHN\[5A\]](#)<sup>5</sup> [5A] [LEdHN\[6A\]](#)<sup>5</sup> [6A] [LEdHN\[7A\]](#)<sup>5</sup> [7A] In [Parker v. Brown, 317 U.S. 341 \(1943\)](#), the Court held that the Sherman Act does not apply "to the anticompetitive conduct of a State acting through its legislature." [Hallie v. Eau Claire, 471 U.S. 34, 38 \(1985\)](#). *Parker v. Brown* rests on principles of federalism and state sovereignty. Under those principles, "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." [Parker v. Brown, 317 U.S., at 351](#). At the same time, [HN8](#)<sup>5</sup> "a state does not give immunity to those who violate the Sherman Act by [\*\*\*\*18] authorizing them to violate it, or by declaring that their action is lawful." *Ibid.* Our decisions have established a two-part test for determining immunity under *Parker v. Brown*. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." [California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., supra, at 105](#) (quoting [Lafayette v. Louisiana Power & Light Co., \[\\*344\] 435 U.S. 389, 410 \(1978\)](#) (plurality opinion)). New York's liquor-pricing system meets the first requirement. The state legislature clearly has adopted a policy of resale price maintenance. Just as clearly, however, New York's liquor-pricing system is not actively supervised by the State. As in *Midcal*, the State "simply authorizes price setting" [\*\*\*678] and enforces the prices established by private parties.<sup>6</sup> [\[\\*\\*726\]](#)

<sup>5</sup> The Court of Appeals suggested that the liquor-pricing system prevents "temporary price reductions . . . threatening to drive small retailers out of business and consolidating control of the market in the hands of a relatively few mass distributors who could then dictate prices to the ultimate injury of consumers. . . ." [J. A. J. Liquor Store, Inc. v. New York State Liquor Authority, 64 N. Y. 2d 504, 520, 479 N. E. 2d 779, 788 \(1985\)](#). In [Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 \(1986\)](#), we recognized that predatory pricing schemes are "rarely tried, and even more rarely successful." [Id., at 589](#). In this case, the possibility of success is practically nonexistent, because liquor retailers are limited to a single outlet. ABC Law § 63.5 (McKinney 1970). In any event, [§ 101-bb](#) forbids not only predatory pricing, but all price competition among retailers.

<sup>6</sup> A simple "minimum markup" statute requiring retailers to charge 112 percent of their actual wholesale cost may satisfy the "active supervision" requirement, and so be exempt from the antitrust laws under [Parker v. Brown, 317 U.S. 341 \(1943\)](#). See [Morgan v. Division of Liquor Control, Conn. Dept. of Business Regulation, 664 F.2d 353 \(CA2 1981\)](#) (upholding a simple markup statute). [Section 101-bb](#), however, is not a simple minimum markup statute because it imposes a markup on the "posted bottle price," a price that may greatly exceed what the retailer actually paid for the liquor. As we have explained, [supra, at 339-340](#), Bulletin 471 permits wholesalers to reduce the case price -- the price actually paid by most retailers -- without reducing the bottle price. The New York Court of Appeals expressly held that Bulletin 471 "is consistent with Alcoholic Beverage Control Law § 101-b(3) which does not mandate any price ratio between scheduled case and bottle prices." [J. A. J. Liquor Store, Inc. v. New York State Liquor Authority, supra, at 523, 479 N. E. 2d, at 790](#). We may not "construe a state statute contrary to the construction given it by the highest court of a State." [O'Brien v. Skinner, 414 U.S. 524, 531 \(1974\)](#). Appellees nevertheless argue that invalidation of Bulletin 471 does not require invalidation of [§ 101-bb](#). Appellees contend that [§ 101-bb](#) does not prevent the SLA from establishing a relationship between case price and bottle price; indeed, Rule 16.4(e) establishes such a relationship. Brief for Appellees 24-25, n. 37. Invalidation of Bulletin 471 alone, however, would not prevent wholesalers from selling large quantities at low prices in one month, and then requiring retailers to charge abnormally high markups by raising bottle prices in subsequent months. See [supra, at 340](#). We cannot accept appellees' suggestion that such unsupervised price fixing should be

479 U.S. 335, \*344; 107 S. Ct. 720, \*\*726; 93 L. Ed. 2d 667, \*\*\*678; 1987 U.S. LEXIS 281, \*\*\*\*18

445 [<sup>\*345</sup> U.S., at 105]. New York "neither establishes prices nor reviews the reasonableness of the price schedules." *Ibid.* New York "does not monitor market conditions or engage [\*\*\*\*19] in any 'pointed reexamination' of the program." *Id., at 106* (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350, 362 (1977)).<sup>7</sup> Each wholesaler sets its own "posted" prices; the State does not control month-to-month variations in posted prices. Nor does the State supervise the wholesaler's decision to "post off," the amount of the "post off," the corresponding decrease, if any, in the bottle price, or the frequency with which a wholesaler posts off. The State has displaced competition among liquor retailers without substituting an adequate system of regulation. HN9[<sup>↑</sup>] "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." 445 U.S., at 106.<sup>8</sup>

LEdHN[5B][<sup>↑</sup>] [5B]

[\*\*\*\*20] LEdHN[1C][<sup>↑</sup>] [1C]

LEdHN[3C][<sup>↑</sup>] [3C] LEdHN[7B][<sup>↑</sup>] [7B] [\*\*\*\*21]

[\*\*\*\*22] [\*346] III

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[\*\*\*679] LEdHN[8][<sup>↑</sup>] [8]Section 2 of the Twenty-first Amendment reserves to the States the power to regulate, or prohibit entirely, the transportation or importation of intoxicating liquor within their borders.<sup>9</sup> [\*\*\*\*24] Section 2 "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Midcal*, 445 U.S., at 110. The States' *Twenty-first Amendment* powers, though broad, are circumscribed by other provisions of the Constitution. See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122, n.

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tolerated as a reasonable accounting method or as a hedge against inflation. See App. to Juris. Statement 101A (advertising a guaranteed 31.3 percent markup on liquor purchased in August 1984 and sold in September 1984). We thus have no occasion to consider whether a simple minimum markup statute would be entitled to antitrust immunity under *Parker v. Brown*.

LEdHN[6B][<sup>↑</sup>] [6B]Some States completely control the distribution of liquor within their boundaries. *E. g.*, Va. Code §§ 4-15, 4-28 (1983). Such comprehensive regulation is immune under *Parker v. Brown* because the State substitutes its own power for "unfettered business freedom." See *New Motor Vehicle Bd. of Cal. v. Orin W. Fox Co.*, 439 U.S. 96, 109 (1978).

<sup>7</sup> In a concurring opinion, Judge Jasen argued that the State actively supervises the liquor-pricing system. *J. A. J. Liquor Store, Inc. v. New York State Liquor Authority*, *supra*, at 526-529, 479 N. E. 2d, at 792-794. Judge Jasen noted that the SLA can respond to market conditions by permitting individual wholesalers to depart from their posted prices, ABC Law § 101-b(3)(b), and by permitting individual retailers to sell below the statutory definition of "cost," § 101-bb(3), "for good cause shown." Bulletin 471 itself was issued by the SLA in response to market conditions. Moreover, the state legislature frequently considers proposals to alter the liquor-pricing system. Neither the "monitoring" by the SLA, nor the periodic reexaminations by the state legislature, exerts any significant control over retail liquor prices or markups. Thus, the State's involvement does not satisfy the second requirement of *Midcal*.

<sup>8</sup> The same considerations lead us to reject appellees' contention that there is no "contract, combination . . . , or conspiracy, in restraint of trade." 15 U. S. C. § 1. HN10[<sup>↑</sup>] Where "private actors are . . . granted 'a degree of private regulatory power' . . . the regulatory scheme may be attacked under § 1" as a "hybrid" restraint. *Fisher v. Berkeley*, 475 U.S. 260, 268 (1986) (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 666, n. 1 (1982) (STEVENS, J., concurring in judgment)). See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). Our decisions reflect the principle that the federal antitrust laws pre-empt state laws authorizing or compelling private parties to engage in anticompetitive behavior. See also *Northern Securities Co. v. United States*, 193 U.S. 197, 345-346 (1904) (plurality opinion); 1 P. Areeda & D. Turner, Antitrust Law para. 209, pp. 60-62 (1978). That principle squarely governs this case.

<sup>9</sup> Section 2 of the Twenty-first Amendment provides: HN12[<sup>↑</sup>] "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

[5 \(1982\) \(Establishment Clause\); Craig v. Boren, 429 U.S. 190, 204-209 \(1976\) \(Equal Protection Clause\); Wisconsin v. Constantineau, 400 U.S. 433, 436 \[\\*\\*727\] \(1971\) \(procedural due process\); Department of Revenue v. James Beam Co., 377 U.S. 341, 345-346 \(1964\) \(Export-Import Clause\).](#) Although § 2 directly qualifies the federal commerce power, the Court has rejected the view "that the [Twenty-first Amendment](#) has somehow [\*\*\*\*23] operated to 'repeal' the [Commerce Clause](#) wherever regulation of intoxicating liquors is concerned." [Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 331-332 \(1964\)](#).<sup>10</sup> Instead, the Court has [\*\*\*680] engaged [\*347] in a "pragmatic effort to harmonize state and federal powers." [Midcal, supra, at 109. HN11](#) [↑] The question in each case is "whether the interests implicated by a state regulation are so closely related to the powers reserved by the [Twenty-first Amendment](#) that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." [Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 \(1984\)](#).

[\*\*\*\*25] [\*348] A

The New York Court of Appeals concluded that [§ 101-bb](#) "was expressly designed to preserve competition in New York's retail liquor industry by stabilizing the retail market and protecting the economic position of small liquor retailers." [J. A. J. Liquor Store, Inc. v. New York State Liquor Authority, 64 N. Y. 2d, at 520, 479 N. E. 2d, at 788](#). The Court of Appeals traced the recent history of the State's regulation of retail liquor prices. In early 1964, the Moreland Commission completed an extensive study of the state laws governing the sale and distribution of alcoholic beverages. New York State Moreland Comm'n on the Alcoholic Beverage Control Law, Report and Recommendations Nos. 1-3 (1964). "The Commission's major findings were that New York consumers suffered from serious price discrimination when compared to liquor consumers in other States and that a severe lack of competition existed in the New York retail market." [J. A. J. Liquor Store, Inc. v. New York State Liquor Authority, supra, at 519, 479 N. E. 2d, at 787](#). The New York Legislature responded in 1964 by enacting sweeping changes in the ABC [\*\*\*\*26] Law primarily intended to promote price competition among liquor retailers. *Ibid.* The 1964 version of [§ 101-bb](#) prohibited retail sales below cost and defined cost as the bottle price in effect when the retailer sells or offers to sell the item. ABC Law [§ 101-bb](#) (McKinney 1970). During the years between 1964 and 1971, the number of liquor stores in New York declined. The State Senate Excise Committee investigated the decline and concluded that "the mass of small retailers are unable to compete with the large volume outlets that have emerged." New York State Legislature, Senate Excise Committee, Final Report 29-30 (Mar. 5, 1971). In 1971

<sup>10</sup> The dissenting opinion concedes that "neither the House of Representatives nor the state ratifying conventions deliberated long on the powers conferred on the States by § 2." *Post*, at 353. It nevertheless maintains that the Senate debates "clearly demonstrate an intent to confer on States complete and exclusive control over the commerce of liquor." *Post*, at 354. We find no such clear demonstration of congressional intent. It is true that Senator Blaine, the Senate sponsor of the Amendment, at one point stated that the purpose of § 2 was "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors. . . ." 76 Cong. Rec. 4143 (1933). At another point, however, Senator Blaine appeared to advance a narrower interpretation: "So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line." *Id.*, at 4141.

The dissent also maintains that the behavior of the States following ratification supports the view that States have power to enact laws governing the pricing of liquor free of the strictures of federal antitrust policy. One commentator is quoted as saying that the States adopted "bold and drastic experiments" in price control. *Post*, at 357, quoting De Ganahl, Trade Practice and Price Control in the Alcoholic Beverage Industry, 7 Law & Contemp. Prob. 665, 680 (1940). In the next paragraph, however, this writer states that "[because] the experiments came at a time when neither the fair-trade law nor the constitutional law on liquor was settled . . . there is uncertainty as to the validity of much of this legislation." *Ibid.* When the [Twenty-first Amendment](#) was adopted, it was far from clear that the federal commerce power extended to intrastate retail sales of liquor. See [A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542-548 \(1935\)](#) (holding that the commerce power does not extend to intrastate sales of poultry, even when the poultry has been shipped across state lines). The Miller-Tydings Fair Trade Act of 1937, 50 Stat. 693, moreover, permitted States to authorize agreements prescribing prices for the resale of specified commodities, including liquor. Even after the passage of the Miller-Tydings Act, price control laws were not as universally popular as the dissent implies. In 1940, for example, only 18 of the 45 "wet" States had price stabilization provisions written into their alcoholic beverage statutes, De Ganahl, *supra*, at 680, while in 17 States the State itself monopolized sales of liquor, Shipman, State Administrative Machinery for Liquor Control, 7 Law & Contemp. Prob. 600, 601, n. 5 (1940).

the legislature enacted the current version of ABC Law § 101-bb to "[protect] the economic position of small liquor retailers." *J. A. J. Liquor Store, Inc. v. New York State Liquor Authority, supra, at 520, 479 N. E. 2d, at 788.*

[\*349] LEdHN[2B] [2B] We agree with the New York Court of Appeals that the purpose of the 12-percent minimum markup is to protect small retailers. We have noted that the 12-percent markup is imposed on the "posted bottle" [\*\*\*27] price," a price that may differ from the actual wholesale price paid by the [\*\*\*681] retailer. See supra, at 339-340. There is no indication in the statute or its legislative history, however, that the purpose of defining cost as "posted bottle price" was to protect small retailers. The New York Legislature first defined cost in terms of posted bottle price in the 1964 amendments to the ABC Law. The purpose of those amendments, as the New York Court of Appeals found, was to increase price competition among liquor retailers. The 1971 amendments simply retained bottle price as the basis of the statutory definition of cost and added 12 percent to reflect the retailer's overhead and operating expenses. Indeed, the legislative Committee that considered the 1971 amendments concluded that the bottle price definition of cost put small retailers at a slight disadvantage. The Committee noted that "[the] present definition of 'cost' [as] scheduled bottle cost to the retailer does afford some margin of profit to large retailers in particular, and, to a lesser extent, to all retailers who can afford to buy by the case." New York State Senate Excise Committee, Final Report, supra [\*\*\*28] , at 8-9. The Committee suggested that "consideration be accorded to . . . [revision] or elimination of . . . 'post offs' practices that appear to afford discriminatory advantages to possession of great purchasing power." Id., at 41. The Committee did not recommend an amendment to this effect because it considered the matter "outside the scope of the directive given to this Committee." *Ibid.*<sup>11</sup>

[\*\*\*29]

[\*350] LEdHN[2C] [2C] In *Midcal*, we found nothing in the record to suggest that California's wine-pricing system actually helped sustain small retailers. 445 U.S., at 113. Similarly, in this case the New York Court of Appeals cited no legislative or other findings that either the minimum markup requirement or the "bottle price" definition of cost has been effective in preserving small retail establishments, and made no findings of its own. Our *Midcal* opinion cites evidence that States with "fair trade laws" not unlike ABC Law § 101-bb actually had higher rates of firm failure, and slower rates of growth of small retail stores, than free trade States in the years between 1956 and 1972. 445 U.S., at 113 (citing S. Rep. No. 94-466, [\*729] p. 3 (1975)). The only relevant evidence in the record indicates that the number of retail liquor outlets in New York continued to decline between 1970 and 1979. App. to Juris Statement 99A. We are unwilling to assume on the basis of this record that § 101-bb has the effect of protecting small retailers.

LEdHN[2D] [2D] [\*\*\*30] In this case, as in *Midcal*, HN13 [2D] the State's unsubstantiated interest in protecting small retailers "simply [is] not of the same stature as the goals of the Sherman Act." 445 U.S., at 114. [\*\*\*682] New York's resale price maintenance system directly conflicts with the "familiar and substantial" federal interest in enforcement of the antitrust laws. Id., at 110. "Antitrust laws in general, and the Sherman Act in particular . . . are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." United States v. Topco Associates, Inc., 405 U.S. 596, 610

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<sup>11</sup> There is no indication that the purpose of Bulletin 471 is to protect small retailers. The Bulletin states that its purpose is to prevent "a situation during post-off periods which resulted in what became known as a 'two bottle' price." App. to Juris. Statement 71A. Although there is no precise explanation of "two bottle pricing" in the record, the caption of Bulletin 471 is "Unlawful Discrimination and Price Scheduling -- Bottle Price During Post-Down." *Ibid.* This suggests that the SLA was concerned with ensuring that wholesalers charge the same price to all retailers, and not with the relationship between the retailer's actual cost and the required markup.

(1972). We therefore conclude that the State's asserted interest in [\*351] protecting small retailers does not suffice to afford immunity from the Sherman Act.<sup>12</sup>

[\*\*\*\*31] B

LEdHN[9] [9]Appellees finally argue that § 101-bb furthers the State's interest in promoting temperance. Brief for Appellees 39-44. One would hardly suggest that the New York Legislature set out to promote temperance by increasing the number of retail outlets for liquor. Rather, appellees argue that New York's pricing system has the effect of raising retail prices, and that higher prices decrease consumption of liquor. The New York Court of Appeals did not find that the statute was intended to promote temperance, or that it does so. On the contrary, that court cited the conclusion of the Moreland Commission that higher prices do not decrease consumption of liquor. *J. A. J. Liquor Store, Inc. v. New York State Liquor Authority*, 64 N. Y. 2d, at 521, n. 2, 479 N. E. 2d, at 788, n. 2 (citing Moreland Comm'n Report No. 1, at 3, 17). Of course, we are not bound by findings of the Court of Appeals that undercut powers reserved by the Twenty-first Amendment. *Midcal, supra, at 111*; *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 659 (1945). We nevertheless accord [\*\*\*\*32] "great weight to the views of the State's highest court" on state-law matters, *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938), and customarily accept the factual findings of state courts in the absence of exceptional circumstances. *Midcal, supra, at 111-112*. Our review of the record discloses no such exceptional circumstances in this case.<sup>13</sup> We therefore do [\*\*\*683] not reach the question whether New [\*352] [\*730] York's liquor-pricing system could be upheld as an exercise of the State's power to promote temperance.

[\*\*\*\*33] IV

LEdHN[2E] [2E]We conclude that the Twenty-first Amendment provides no immunity for New York's authorization of private, unsupervised price fixing by liquor wholesalers. We therefore reverse the judgment of the New York Court of Appeals and remand the case for further proceedings not inconsistent with this opinion.

*It is so ordered.*

**Dissent by:** O'CONNOR

## Dissent

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JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE joins, dissenting.

Immediately after the ratification of the Twenty-first Amendment, this Court recognized that the broad language of § 2 of the Amendment conferred plenary power on the States to regulate the liquor trade within their boundaries.

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<sup>12</sup> We have no occasion in this case to consider whether the State's interest in protecting small retailers ever could prevail against the federal interest in enforcement of the antitrust laws.

<sup>13</sup> It is far from certain that the New York Legislature intended to promote temperance, or that the retail price maintenance system actually decreases consumption. Section 101-bb, like other sections of the ABC Law, recites that it is enacted "for the purpose of fostering and promoting temperance." ABC Law § 101-bb(1) (McKinney 1970). This statement is not supported by specific findings, or by evidence in the record. In *Midcal*, we accepted the California Supreme Court's rejection of a similar declaration of legislative purpose. *445 U.S. at 112-114* (discussing *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 457-459, 579 P. 2d 476, 493-494 (1978)). The legislative Report accompanying § 101-bb does not suggest that the amendment was aimed at decreasing consumption. Rather, the Report focuses on the need to protect small retailers. New York State Legislature, Senate Excise Committee, Final Report 30, 37 (Mar. 1971). The Report does express concern over the increase in liquor consumption during the years between 1964 and 1971. *Id.*, at 16. But the Report recognizes the Moreland Commission's finding that higher prices do not reduce consumption, and states that "because of the multiplicity of factors involved and lack of data on specifics, the Committee is unable to determine what portion of such increase is attributable to any particular factors." *Id.*, at 14.

Ziffrin, Inc. v. *Reeves*, 308 U.S. 132 (1939); Finch & Co. v. *McKittrick*, 305 U.S. 395 (1939); Indianapolis Brewing Co. v. *Liquor Control Comm'n*, 305 U.S. 391 (1939); *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936). As JUSTICE STEVENS recently observed, however, the Court has, over the years, so "completely distorted the *Twenty-first* [\*353] [\*\*\*\*34] Amendment" that "[it] now has a barely discernible effect in *Commerce Clause* cases." *Newport v. Iacobucci*, ante, at 98 (dissenting). Because I believe that the *Twenty-first Amendment* clearly authorized the State of New York to regulate the liquor trade within its borders free of federal interference, I dissent from Part III of the Court's opinion, and would affirm the judgment of the New York Court of Appeals.

I

In *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324 (1964), this Court took a first step toward eviscerating the authority of States to regulate the commerce of liquor. The Court held that the State of New York could not regulate the importation of liquor into that State when the liquor was sold in duty-free shops at the Kennedy Airport. The basis for this decision was the fact that the United States Customs Service already supervised the liquor sold at the airport. Justice Black, who as a Senator was present at the creation of the *Twenty-first Amendment*, wrote a thoughtful and powerful dissent. After reviewing the legislative history of the *Twenty-first Amendment*, Justice Black concluded that the Senators who approved the *Twenty-first* [\*351] Amendment thought they were returning absolute control over the liquor industry to the States, and "were seeing to it that the Federal Government could not interfere with or restrict the State's exercise of the power conferred by the Amendment." *Id.* at 338 (dissenting). Because the [\*\*\*684] Court has seen fit in recent years to dismiss this legislative history without analysis as "obscure," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274 (1984); ante, at 346-347, n. 10, a fresh examination of the origins of the *Twenty-first Amendment* is in order and long overdue.

Although neither the House of Representatives nor the state ratifying conventions deliberated long on the powers conferred on the States by § 2, but see 76 Cong. Rec. 2776 (1933) (statement of Rep. Lea of California that the section was "the [\*354] extreme of State rights" because it obligated the Federal Government to assist the enforcement of state laws "however unwise or improvident"), the Senate considered the section in great detail. Those Senate discussions clearly demonstrate an intent to confer on States complete and exclusive control over the commerce of liquor.

[\*\*\*\*36] When the Senate began its deliberations on the *Twenty-first Amendment*, the proposed Amendment included a § 3 not present in the adopted Amendment. This section granted the Federal Government [\*731] concurrent authority over some limited aspects of the commerce of liquor. It provided that "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." *Id.*, at 4138. As Justice Black observed, the proposal "to leave even this remnant of federal control over liquor traffic gave rise to the only real controversy over the language of the proposed Amendment." *377 U.S., at 337*. Even Senator Blaine, the Chairman of the Senate Subcommittee that had held hearings on the proposed Amendment, opposed the limited grant of authority to the Federal Government in § 3. According to Senator Blaine, when the Federal Government was organized by the Constitution the States had "surrendered control over and regulation of interstate commerce." 76 Cong. Rec. 4141 (1933). He viewed § 2 of the Amendment as a restoration of the power surrendered by the States when they joined the Union. Section 2 "[restored] [\*\*\*\*37] to the States, in effect, the right to regulate commerce respecting a single commodity -- namely, intoxicating liquor." *Ibid.* In his view, the grant of authority to Congress in § 3 undercut the import of § 2:

"Mr. President, my own personal viewpoint upon section 3 is that it is contrary to section 2 of the resolution. I am now endeavoring to give my personal views. The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which [\*355] enter the confines of the States. The State under section 2 may enact certain laws on intoxicating liquors, and section 2 at once gives such laws effect. Thus the States are granted larger power in effect and are given greater protection, while under section 3 the proposal is to take away from the States the powers that the States would have in the absence of the *eighteenth amendment*." *Id.*, at 4143.

Senator Wagner was an especially vigorous opponent of the proposed § 3. In his view, it failed to "correct the central error of national prohibition. It does not restore to the States responsibility for their local liquor [\*\*\*\*38]

problems. It does not withdraw the [\*\*\*685] Federal Government from the field of local police regulation into which it has trespassed." *Id.*, at 4144. In Senator Wagner's view, the danger of § 3 was that even this limited grant of authority to the Federal Government would result in federal control of the liquor trade:

"If Congress may regulate the sale of intoxicating liquors where they are to be drunk on premises where sold, then we shall probably see Congress attempt to declare during what hours such premises may be open, where they shall be located, how they shall be operated, the sex and age of the purchasers, the price at which the beverages are to be sold. . . .

....

"It is entirely conceivable that in order to protect such a prohibition the courts might sustain the prohibition or regulation of all sales of beverages whether intended to be drunk on the premises or not. And if sales may be regulated, so may transportation and manufacture. . . . If that is to be the history of the proposed amendment -- and there is every reason to expect it -- then obviously we have expelled the system of national control through the front door of [section 1](#) and readmitted [\*\*\*\*39] it forthwith through the back door of section 3." *Id.*, at 4147.

[\*356] Other Senators also expressed the fear that "any grant of power to the Federal Government, even a seemingly narrow one, could be used to whittle away the exclusive control over liquor traffic given the States by Section 2." [Hostetter, 377 U.S., at 337](#) (Black, J., dissenting); see 76 Cong. Rec. 4143 (1933) (Sen. Blaine); *id.*, at 4177-4178 (Sen. Black). Still others emphasized the plenary power granted the States by § 2. Senator Walsh, a member of the Subcommittee that had held hearings on the Amendment, said: "The purpose of the provision in the resolution reported by the committee was to [\*\*732] make the intoxicating liquor subject to the laws of the State once it passed the State line and before it gets into the hands of the consignee as well as thereafter." *Id.*, at 4219. In response to a question from Senator Swanson, Senator Robinson of Arkansas affirmed that "it is left entirely to the States to determine in what manner intoxicating liquors shall be sold or used and to what places such liquors may be transported." *Id.*, at 4225. Thus, upon the motion of Senator [\*\*\*\*40] Robinson, the Senate voted to strike § 3 from the proposed Amendment. *Id.*, at 4179.

By emphasizing the importance of the plenary powers granted the States in § 2, and more importantly by removing even the limited grant of authority to Congress contained in § 3, the Senate made manifest its intent to prevent any federal interference with state attempts to regulate the liquor trade. It is difficult to believe that the Senators would have anticipated that a federal statute enacted under the commerce power could ever override the State's power to regulate the liquor trade.

## II

The history of the Amendment strongly supports Justice Black's view that the [Twenty-first Amendment](#) was intended to return absolute control of the liquor trade to the States, and that the Federal [\*\*\*686] Government could not use its [Commerce Clause](#) powers to interfere in any manner with the States' exercise of the power conferred by the Amendment. [\*357] Given its desire to confer broad freedom on the States to regulate commerce in intoxicating liquors without federal interference, Congress certainly intended that the States have the power to enact economic regulations governing the pricing of [\*\*\*41] liquor free of federal antitrust policy.

The behavior of the States upon the ratification of the [Twenty-first Amendment](#) also supports this view. Contemporaneously with the enactment of the [Twenty-first Amendment](#), a report sponsored by John D. Rockefeller, Jr., recommended that those States that could not muster the political support for state monopolies in the liquor industry should adopt the equivalent solution of price-control laws designed to keep the price of liquor at high levels. R. Fosdick & A. Scott, *Toward Liquor Control* 52 (1933). According to this report, the "profit motive is the core of the problem." *Id. at 61*. This profit motive encouraged low prices that stimulated liquor consumption. *Id. at 149*. Retail prices had a "direct bearing on the amount of consumption," *id. at 81*, and thus a State could use price-fixing powers "as one of its most effective instruments of control." *Id. at 82*. The ideas expressed by the Rockefeller Report "were the dominant ideas which took flesh in the post-repeal legislation of the states." Dunsford, *State Monopoly and Price-Fixing in Retail Liquor Distribution*, 1962 Wis. L. Rev. 454, 464. It is not surprising, [\*\*\*\*42]

therefore, that even before the enactment of the Miller-Tydings Fair Trade Act of 1937, 50 Stat. 693, States exercised their [Twenty-first Amendment](#) powers to adopt "bold and drastic experiments in price control," including price posting, regulation by private associations, and mandatory resale price maintenance contracts. De Ganahl, *Trade Practice and Price Control in the Alcoholic Beverage Industry*, 7 Law & Contemp. Prob. 665, 680 (1940). Thus, the States that ratified the [Twenty-first Amendment](#) immediately exercised the authority granted them by § 2 of that Amendment to enact the very type of statute that this Court strikes down today.

[\*358] With the clear legislative intent to free state regulation of liquor from federal interference, and the immediate enactment of price-control laws by the ratifying States, the better view of the proper resolution of any apparent conflict between the Sherman Act and a state regulation of the liquor trade was expressed by Justice Frankfurter in [United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 300-302 \(1945\)](#) (concurring). In Justice Frankfurter's view, the [Twenty-first Amendment](#) accorded States [\*\*\*\*43] the power to control the liquor traffic [\*\*733] "according to their notions of policy freed from the restrictions upon state power which the [Commerce Clause](#) implies as to ordinary articles of commerce." [Id., at 300](#). Because Congress enacted the Sherman Act pursuant to its authority in the [Commerce Clause](#), the Sherman Act must yield to state power drawn from the [Twenty-first Amendment](#). [Id., at 301](#). Thus, Justice Frankfurter concluded:

"If a State for its own sufficient reasons deems it a desirable policy [\*\*\*687] to standardize the price of liquor within its borders either by a direct price-fixing statute or by permissive sanction of such price-fixing in order to discourage the temptations of cheap liquor due to cutthroat competition, the [Twenty-first Amendment](#) gives it that power and the [Commerce Clause](#) does not gainsay it. Such state policy can not offend the Sherman Law even though distillers or middlemen agree with local dealers to respect this policy." *Ibid.*

Justice Frankfurter believed that in the absence of a conflict between the state regulatory scheme and the federal antitrust laws, federal antitrust policy was fully applicable [\*\*\*\*44] even to the intrastate liquor trade. In *Frankfort Distilleries* itself, the State had not authorized the anticompetitive conduct of the respondents. Once a State has exercised its § 2 power, however, "the Sherman Law could not override such exercise of state power." [Id., at 302](#).

[\*359] Justice Frankfurter was not alone in this view. In repealing the Miller-Tydings Act -- which had authorized States to enact fair trade laws -- the Senate believed that the States could continue to impose retail price maintenance on liquor retailers. The Report from the Senate Judiciary Committee on the proposal to repeal the Miller-Tydings Act explicitly assured the Senate that the repeal would not change the power of States to impose retail price maintenance on liquor retailers pursuant to the authority granted the States by the [Twenty-first Amendment](#).

"Liquor will not be affected by the repeal of the fair trade laws in the same manner as other products because the [Twenty-First Amendment to the Constitution](#) gives the States broad powers over the sale of alcoholic beverages. Thus, while repeal of the fair trade laws generally will prohibit manufacturers from enforcing [\*\*\*\*45] resale prices, alcohol manufacturers may do such in States which pass price fixing statutes pursuant to the [Twenty-First Amendment](#)." S. Rep. No. 94-466, p. 2 (1975).

The history and purpose of the [Twenty-first Amendment](#) are a compelling indication of an intent to confer on States the power to regulate trade in liquor. Despite this clear intent, the Court in recent years has used a balancing test to resolve conflicts between federal statutes and state laws enacted pursuant to § 2. In *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980)*, and once again today, the Court ventured still further from the intent of the [Twenty-first Amendment](#) by adopting an unprecedented test that focuses on the wisdom of the State's exercise of its § 2 powers. For the Court today does not invalidate the ABC Law because it involves an exercise of power outside the scope of the [Twenty-first Amendment](#) -- indeed, the Court could not do so given the long history of the use of price controls by state liquor authorities. Instead, in a manner reminiscent of the long-repudiated [Lochner v. New York, 198 U.S. 45 \(1905\)](#), the Court strikes [\*\*\*\*46] down the ABC Law because [\*360] it concludes that the law was not "effective" in preserving small retail establishments or in decreasing alcohol consumption. The proper inquiry, however, is not whether the State of [\*\*\*688] New York chose wisely in enacting a retail price maintenance law, nor whether the State of New York's motivation in doing so was linked to a

"central [purpose]" of the [Twenty-first \[\*\*\\*\\*734\*\*\] Amendment](#). The sole "question is whether the provision in this case is an exercise of a power expressly conferred upon the States by the Constitution." *Bacchus Imports, Ltd. v. Dias*, [468 U.S., at 287](#) (STEVENS, J., dissenting).

Because the State of New York was plainly exercising its § 2 power to regulate liquor trade, I respectfully dissent.

## References

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[45 Am Jur 2d, Intoxicating Liquors 28, 42, 43](#); 54 Am Jur 2d, Monopolies,

24 Am Jur Trials 1, Defending Antitrust Lawsuits

USCS, [Constitution, 21st Amendment, 15 USCS 1](#)

US L Ed Digest, Intoxicating Liquors 7(2), 9.4; Restraints of Trade, Monopolies, and Unfair Trade Practices 9, 41

Index to Annotations, Intoxicating [**\*\*\*\*47**] Liquors; Restraints of Trade and Monopolies; State Action

Annotation References:

What constitutes "state action" under rule exempting state and local governmental action from [antitrust law](#)-- federal cases. [70 L Ed 2d 973](#).

Extent of state regulatory power under [Twenty-first Amendment. 34 L Ed 2d 805](#).

[Commerce clause of Federal Constitution](#) as violated by state or local regulation or prohibition affecting business of selling, distributing, packaging, labeling ,or processing food intended for human consumption-- Supreme Court cases. [25 L Ed 2d 846](#).

Federal regulation of competitive practices in liquor industry under 5 of Federal Alcohol Administration Act ([27 USCS 205](#)). 58 ALR Fed 797.

Validity of state statute or regulation fixing minimum prices at which alcoholic beverages may be sold at retail. 96 ALR3d 639.

State power to regulate price of intoxicating liquors. 14 ALR2d 699.

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## **Business Electronics Corp. v. Sharp Electronics Corp.**

Supreme Court of the United States

January 19, 1988, Argued ; May 2, 1988, Decided

No. 85-1910

### **Reporter**

485 U.S. 717 \*; 108 S. Ct. 1515 \*\*; 99 L. Ed. 2d 808 \*\*\*; 1988 U.S. LEXIS 2033 \*\*\*\*; 56 U.S.L.W. 4387; 1988-1 Trade Cas. (CCH) P67,982

BUSINESS ELECTRONICS CORP. v. SHARP ELECTRONICS CORP.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

**Disposition:** [780 F.2d 1212](#), affirmed.

## **Core Terms**

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dealer, manufacturer, vertical, terminate, retailers, nonprice, prices, restraint of trade, price cutting, price competition, illegality, Sherman Act, antitrust, horizontal, cases, Electronics, common law, ancillary, naked, cartel, retail price, price level, anticompetitive, per se rule, ultimatum, exclusive territory, resale price, intrabrand, products, franchise agreement

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

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

**[HN1](#)[] Antitrust & Trade Law, Sherman Act**

[Section 1](#) of the Sherman Act provides that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . [15 U.S.C.S. § 1](#).

485 U.S. 717, \*717; 108 S. Ct. 1515, \*\*1515; 99 L. Ed. 2d 808, \*\*\*808; 1988 U.S. LEXIS 2033, \*\*\*\*1

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

## **HN2** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Whether particular concerted action violates [§ 1](#) of the Sherman Act, [15 U.S.C.S. § 1](#), is determined through case-by-case application of the so-called rule of reason -- that is, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

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

## **HN3** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Certain categories of agreements have been held to be per se illegal, dispensing with the need for case-by-case evaluation.

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

## **HN4** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Per se rules are appropriate only for conduct that is manifestly anticompetitive, that is, conduct that would always or almost always tend to restrict competition and decrease output.

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

## **HN5** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.

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

## **HN6** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Agreements are per se illegal only if their nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.

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

## **HN7** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The premises of GTE Sylvania and Monsanto are: that there is a presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view towards protecting the doctrine of GTE Sylvania.

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

### **HN8** **Price Fixing & Restraints of Trade, Vertical Restraints**

The notion of equivalence between the scope of horizontal per se illegality and that of vertical per se illegality was explicitly rejected in GTE Sylvania, as it had to be, since a horizontal agreement to divide territories is per se illegal, while GTE Sylvania held that a vertical agreement to do so is not.

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

### **HN9** **Price Fixing & Restraints of Trade, Vertical Restraints**

A vertical restraint is not illegal per se unless it includes some agreement on price or price levels.

## **Lawyers' Edition Display**

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### **Decision**

Agreement between manufacturer and dealer to terminate another dealer for price cutting held not per se illegal under 1 of Sherman Act ([15 USCS 1](#)) absent agreement on price or price levels.

### **Summary**

A manufacturer of electronic calculators appointed a retailer as its sole dealer in a metropolitan area, but subsequently became dissatisfied with that dealer's performance and appointed a second dealer. Neither dealer was obligated to adhere to the manufacturer's suggested retail price list, but the second dealer usually did so, while the first dealer commonly sold the calculators for below list price. The second dealer, allegedly concerned about the first dealer's "free riding" on the second dealer's investment in product promotion and educational services as well as about the price cutting, demanded that the manufacturer terminate the first dealer and threatened to terminate its own dealership if this were not done. The manufacturer terminated the first dealer, who then brought suit against the manufacturer in the United States District Court for the Southern District of Texas, in which action it was alleged (1) that the manufacturer and the second dealer had conspired to terminate the first dealer, and (2) that such conspiracy was illegal per se under 1 of the Sherman Act ([15 USCS 1](#)). The District Court instructed the jury that an agreement to terminate a dealer because of its price cutting unreasonably restrains trade and cannot be justified for any reason, and the jury, having found that there was such an agreement in this case, rendered judgment in favor of the first dealer. In reversing that judgment and remanding the case for further proceedings, the United States Court of Appeals for the Fifth Circuit held that the District Court's jury instructions were erroneous, because in order for a vertical agreement between a manufacturer and a dealer terminating another dealer to be illegal per se under

1, the agreeing dealer must expressly or impliedly agree to set its prices at some level, though not a specific one ([780 F2d 1212](#)).

On certiorari, the United States Supreme Court affirmed. In an opinion by Scalia, J., joined by Rehnquist, Ch. J., and Brennan, Marshall, Blackmun, and O'Connor, JJ., it was held (1) that a vertical restraint of trade is not illegal per se under 1 unless it includes some agreement on price or price levels, and specifically (2) that an agreement between a manufacturer and one of its dealers to terminate another dealer because of that dealer's price cutting, as in the present case, is not per se illegal unless the first dealer expressly or impliedly agrees to set its prices at some level.

Stevens, J., joined by White, J., dissented, expressing the view that the agreement between the manufacturer and the second dealer was a naked agreement to restrain the trade of a third party, with the goal of eliminating price competition at the dealer level, and as such was illegal per se under 1.

Kennedy, J., did not participate.

## Headnotes

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PRACTICES §9 > per se rule -- vertical nonprice restraints -- termination of dealership -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D] [LEdHN\[1E\]](#) [1E] [LEdHN\[1F\]](#) [1F] [LEdHN\[1G\]](#) [1G]

A vertical restraint of trade--that is, a restraint imposed by agreement between firms at different levels of distribution--is not illegal per se under 1 of the Sherman Act ([15 USCS 1](#)) unless it includes some agreement on price and price levels; thus, an agreement between a manufacturer and one of its dealers to terminate another dealer because of the latter's price cutting is not per se illegal unless the first dealer expressly or impliedly agrees to set its prices at some level, and a Federal District Court errs in instructing the jury in such a case that such an agreement is necessarily illegal if the manufacturer's purpose is to eliminate the price cutting, where there has been no showing that an agreement between a manufacturer and a dealer to terminate a price cutter, without a further agreement on the price or price levels to be charged by the remaining dealer, almost always tends to restrict competition and reduce output; fear of the remaining dealer's possible assertion of dominant retail power cannot justify adopting a rule of per se illegality, given that such power is rare and was not found to exist in this case; nor can such a rule be justified as a prophylactic measure on the theory that vertical price agreements generally underlie agreements to terminate a price cutter, as this proposition has not been supported in the present case and is incompatible with the recognition, in previous decisions, that manufacturers are often motivated by a desire to have dealers provide services and that price cutting is frequently made possible by "free riding" on the services provided by other dealers. (Stevens and White, JJ., dissented from this holding.)

PRACTICES §16 > rule of reason -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

Ordinarily, whether particular concerted action violates 1 of the Sherman Act ([15 USCS 1](#)) is determined through case-by-case application of the so-called rule of reason--that is, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition; there is a presumption in favor of this rule-of-reason standard, and any departure from this standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than by formalistic distinctions.

485 U.S. 717, \*717; 108 S. Ct. 1515, \*\*1515; 99 L. Ed. 2d 808, \*\*\*808; 1988 U.S. LEXIS 2033, \*\*\*\*1

PRACTICES §36 > vertical price restraints -- > Headnote:

[LEdHN\[3\]](#) [3]

Vertical agreements on retail prices are illegal per se under 1 of the Sherman Act ([15 USCS 1](#)).

PRACTICES §6 > purpose of antitrust laws -- > Headnote:

[LEdHN\[4\]](#) [4]

Interbrand competition is the primary concern of the antitrust laws.

EVIDENCE §383 > presumption -- retail market power -- > Headnote:

[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B]

For purposes of applying the federal antitrust laws, retail market power should not be assumed but rather must be proved.

PRACTICES §9 > ancillary agreement -- > Headnote:

[LEdHN\[6A\]](#) [6A] [LEdHN\[6B\]](#) [6B]

An agreement may be "ancillary," for purposes of determining whether it violates the federal antitrust laws, even though it is not designed to enforce a contractual obligation of one of the parties to the contract.

PRACTICES §9 > horizontal restraints -- > Headnote:

[LEdHN\[7A\]](#) [7A] [LEdHN\[7B\]](#) [7B]

For purposes of determining whether a restraint of trade violates the federal antitrust laws, a restraint is horizontal if it is imposed by agreement among competitors; a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement.

PRACTICES §4 > statutory phrases -- "restraint of trade" -- relation to common law -- > Headnote:

[LEdHN\[8\]](#) [8]

The term "restraint of trade" in 1 of the Sherman Act ([15 USCS 1](#)), like the term at common law, refers not to a particular list of agreements but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances; thus, common-law precedent as to what constituted

"restraint of trade" at the time the Sherman Act was adopted is not dispositive of the present-day application of the Act; however, in determining whether an agreement between a manufacturer and a dealer whereby the former terminates another dealer for price cutting is illegal per se under 1 of the Sherman Act, it is relevant (1) whether the common law of restraint of trade ever prohibited such an agreement as illegal per se and (2) whether the United States Supreme Court's decisions under 1 have ever expressed or necessarily implied such a prohibition, since the common law--both in general and as embodied in the Sherman Act--does not lightly assume that the economic realities underlying earlier decisions have changed or that earlier judicial perceptions of those realities were in error.

PRACTICES §31 > resale price control rule -- application to dealer termination -- > Headnote:

[LEdHN\[9\]](#) [9]

The rule that a resale price maintenance agreement is per se illegal under 1 of the Sherman Act ([15 USCS 1](#)), which is based on the common-law judgment that such a resale restriction is an unlawful restraint on alienation, is not applicable to a case considering whether an agreement between a manufacturer and a dealer whereby the manufacturer terminates another dealer for price cutting is illegal per se under 1 where no agreement on resale price or price level, and hence no restraint on alienation, was found by the jury and the common-law rationale thus does not apply.

PRACTICES §9 > per se rule -- vertical and horizontal restraints -- > Headnote:

[LEdHN\[10\]](#) [10]

Under 1 of the Sherman Act ([15 USCS 1](#)), the scope of per se illegality of horizontal restraints of trade is not equivalent to the scope of per se illegality of vertical restraints of trade.

PRACTICES §53 > agreements not to compete -- market territories -- > Headnote:

[LEdHN\[11\]](#) [11]

A horizontal agreement to divide territories is per se illegal under 1 of the Sherman Act ([15 USCS 1](#)).

## Syllabus

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Petitioner and another retailer (Hartwell) were authorized by respondent manufacturer to sell its electronic calculators in the Houston area. In response to Hartwell's complaints about petitioner's prices, respondent terminated petitioner's dealership. Petitioner brought suit in Federal District Court, alleging that respondent and Hartwell had conspired to terminate petitioner and that such conspiracy was illegal per se under [§ 1](#) of the Sherman Act. The court submitted a liability interrogatory to the jury asking whether there was an agreement or understanding between respondent and Hartwell to terminate petitioner's dealership because of its price cutting, and instructed the jury that the Sherman Act is violated [\*\*\*\*2] when a seller enters into such an agreement or understanding with one of its dealers. The jury answered the interrogatory affirmatively, awarding damages, and the court entered judgment for petitioner for treble damages. The Court of Appeals reversed and remanded for a new trial, holding that, to render illegal per se a vertical agreement between a manufacturer and a dealer to terminate a second dealer, the first dealer must expressly or impliedly agree to set its prices at some level.

*Held:* A vertical restraint of trade is not *per se* illegal under § 1 of the Sherman Act unless it includes some agreement on price or price levels. Pp. 723-736.

(a) Ordinarily, whether particular concerted action violates § 1 is determined through case-by-case application of the rule of reason. *Per se* rules are appropriate only for conduct that is manifestly anticompetitive. Although vertical agreements on resale prices are illegal *per se*, extension of that treatment to other vertical restraints must be based on demonstrable economic effect rather than upon formalistic line drawing. *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, which held that [\*\*\*\*3] vertical nonprice restraints are not *per se* illegal, recognized that such restraints have real potential to stimulate interbrand competition; that a rule of *per se* illegality for such restraints is not needed or effective to protect intrabrand competition; and that such restraints do not significantly facilitate cartelizing. There has been no showing here that different characteristics attend an agreement between a manufacturer and a dealer to terminate a "price cutter," without a further agreement on the price or price levels to be charged by the remaining dealer. A quite plausible purpose of the vertical restriction here was to enable Hartwell to provide better services under its sales franchise agreement with respondent. There is also no merit to petitioner's contention that an agreement on the remaining dealer's price or price levels will so often follow from terminating another dealer because of its price cutting that prophylaxis against resale price maintenance warrants the District Court's *per se* rule. Pp. 723-731.

(b) The term "restraint of trade" in the Sherman Act, like the term at common law before the statute was adopted, refers not to a particular list [\*\*\*\*4] of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances. Moreover, this Court's precedents do not indicate that the pre-Sherman Act common law prohibited as illegal *per se* an agreement of the sort made here. Nor is the District Court's rule of *per se* illegality compelled by precedents under the Sherman Act holding certain horizontal agreements to constitute price fixing and thus to be *per se* illegal even though they did not set prices or price levels. The notion of equivalence between the scope of horizontal *per se* illegality and that of vertical *per se* illegality was explicitly rejected in *GTE Sylvania*. Finally, earlier vertical price-fixing cases are consistent with the proposition that vertical *per se* illegality requires an agreement setting a price or a price level. Pp. 731-735.

**Counsel:** Gary V. McGowan argued the cause and filed briefs for petitioner.

Harold R. Tyler, Jr. argued the cause for respondent. With him on the brief was Lance Gotthoffer. \*

\* Briefs of amici curiae urging reversal were filed for Forty-two States by J. Joseph Curran, Jr., Attorney General of Maryland, and Michael F. Brockmeyer and Craig J. Hornig, Assistant Attorneys General, by Anthony J. Celebrezze, Jr., Attorney General of Ohio, and Gregory E. Young and Matthew C. Lawry, Assistant Attorneys General, by Don Siegelman, Attorney General of Alabama, and James Prude, Assistant Attorney General, by Grace Berg Schaible, Attorney General of Alaska, and Richard D. Monkman, Assistant Attorney General, by Robert K. Corbin, Attorney General of Arizona, and Alison B. Swan, Assistant Attorney General, by John Steven Clark, Attorney General of Arkansas, and Jeffrey A. Bell, Deputy Attorney General, by Duane Woodard, Attorney General of Colorado, Thomas P. McMahon, First Assistant Attorney General, and David S. Harmon and James R. Lewis, Assistant Attorneys General, by Joseph Lieberman, Attorney General of Connecticut, and Robert M. Langer, Assistant Attorney General, by Robert A. Butterworth, Attorney General of Florida, by James T. Jones, Attorney General of Idaho, by Neil F. Hartigan, Attorney General of Illinois, and Robert E. Davy, Jr., Assistant Attorney General, by Linley E. Pearson, Attorney General of Indiana, and Frank A. Baldwin, Deputy Attorney General, by Thomas J. Miller, Attorney General of Iowa, and John R. Perkins, Deputy Attorney General, by Robert T. Stephan, Attorney General of Kansas, and Carl M. Anderson, Assistant Attorney General, by DAvid L. Armstrong, Attorney General of Kentucky, by William J. Guste, Jr., Attorney General of Louisiana, by James M. Shannon, Attorney General of Massachusetts, and Barbara Anthony, Assistant Attorney General, by Frank J. Kelley, Attorney General of Michigan, Louis J. Caruso, Solicitor General, and Frederick H. Hoffecker and Robert C. Ward, Assistant Attorneys General, by Hubert H. Humphrey III, Attorney General of Minnesota, by Edwin L. Pittman, Attorney General of Mississippi, and Robert E. Sanders, Special Assistant Attorney General, by William L. Webster, Attorney General of Missouri, by Mike Greely, Attorney General of Montana, and Joe Roberts, Assistant Attorney General, by Robert M. Spire, Attorney General of Nebraska, and Dale A. Comer, Assistant Attorney General, by Brian McKay, Attorney General of Nevada, and P. Gregory Giordano, Deputy Attorney General, by Stephen E. Merrill, Attorney General of New Hampshire, and Amy L. Ignatius, Senior Assistant Attorney General, by W. Cary Edwards, Attorney General of New Jersey, and Laurel A. Price, Deputy Attorney General, by Robert Abrams, Attorney General of New York, O. Peter Sherwood, Solicitor General, and Lloyd E.

[\*\*\*\*5]

**Judges:** SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE, J., joined, post, p. 736. KENNEDY, J., took no part in the consideration or decision of the case.

**Opinion by:** SCALIA

## Opinion

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[\*\*\*814] [\*719] [\*\*1517] JUSTICE SCALIA delivered the opinion of the Court.

[LEdHN\[1A\]](#) [1A] Petitioner Business Electronics Corporation seeks review of a decision of the United States Court of Appeals for the [\*720] Fifth Circuit holding that a vertical restraint is *per se* illegal under [§ 1](#) of the Sherman Act, 26 Stat. 209, as amended, [15 U. S. C. § 1](#), only if there is an express or implied agreement to set resale prices at some level. [780 F.2d 1212, 1215-1218 \(1986\)](#). We granted certiorari, 482 U.S. 912 (1987), to resolve a conflict in the Courts of Appeals regarding the proper dividing line between the rule that vertical price restraints are illegal *per se* and the rule that vertical nonprice restraints are to be judged under the [\*\*\*\*6] rule of reason.<sup>1</sup>

[\*721] I

In 1968, petitioner became the exclusive retailer in the Houston, Texas, area of electronic calculators manufactured by respondent Sharp Electronics Corporation. In 1972, respondent appointed Gilbert Hartwell as a second retailer in the Houston [\*\*1518] area. During the relevant period, [\*\*\*\*7] electronic calculators were primarily sold to business customers for prices up to \$ 1,000. While much of the evidence in this case was conflicting -- in particular, concerning whether petitioner was "free riding" on Hartwell's provision of presale educational and promotional services by providing inadequate services itself -- a few facts are undisputed. Respondent published a list of suggested minimum retail prices, but its written dealership agreements with petitioner and Hartwell did not obligate either to observe them, or to charge any other specific price. Petitioner's [\*\*\*815] retail prices were often below

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Constantine, Assistant Attorney General, by Leroy S. Zimmerman, Attorney General of Pennsylvania, and Eugene F. Waye, Deputy Attorney General, by James E. O'Neil, Attorney General of Rhode Island, by Roger A. Tellinghuisen, Attorney General of South Dakota, and Jeffrey P. Hallem, Assistant Attorney General, by W. J. Michael Cody, Attorney General of Tennessee, and Perry A. Craft, Deputy Attorney General, by Jim Mattox, Attorney General of Texas, Mary F. Keller, Executive Assistant Attorney General, and J. L. Covington and Allene D. Evans, Assistant Attorneys General, by David L. Wilkinson, Attorney General of Utah, and Rihard M. Hagstrom, Assistant Attorney General, by Jeffrey L. Amestoy, Attorney General of Vermont, and Glenn A. Jarrett, Assistant Attorney General, by Mary Sue Terry, Attorney General of Virginia, and Allen L. Jackson, Assistant Attorney General, by Kenneth O. Eikenberry, Attorney General of Washington, and John R. Ellis, Deputy Attorney General, by Charles G. Brown, Attorney General of West Virginia, C. William Ullrich, First Deputy Attorney General, and Mark D. Kindt, Deputy Attorney General, by Donald J. Hanaway, Attorney General of Wisconsin, and Kevin J. O'Connor, Assistant Attorney General, and by Joseph B. Meyer, Attorney General of Wyoming; for K mart Corporation by Robert W. Steele, Robert E. Hebda, and James C. Tuttle; and for the National Mass Retailing Institute by William D. Coston and Robert J. Verdisco.

Briefs of amici curiae urging affirmance were filed for the Consumer Electronics Group of the Electronic Industries Association by Gary J. Shapiro; for the National Association of Manufacturers by Jan S. Amundson, Quentin Riegel, and Donald I. Baker; and for the National Office Machine Dealers Association by Samuel Schoenberg.

<sup>1</sup> The Seventh, Eighth, and Tenth Circuits have agreed with the analysis of the Fifth. See [Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1440 \(CA7 1986\)](#); [McCabe's Furniture, Inc. v. La-Z-Boy Chair Co., 798 F.2d 323, 329 \(CA8 1986\)](#), cert. pending, No. 86-1101; [Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1223-1224 \(CA10 1986\)](#), cert. pending, No. 86-484. Decisions of the Third and Ninth Circuits have disagreed. See [Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 168-170 \(CA3 1979\)](#); [Zidell Explorations, Inc. v. Conval Int'l, Ltd., 719 F.2d 1465, 1469-1470 \(CA9 1983\)](#).

485 U.S. 717, \*721; 108 S. Ct. 1515, \*\*1518; 99 L. Ed. 2d 808, \*\*\*815; 1988 U.S. LEXIS 2033, \*\*\*\*7

respondent's suggested retail prices and generally below Hartwell's retail prices, even though Hartwell too sometimes priced below respondent's suggested retail prices. Hartwell complained to respondent on a number of occasions about petitioner's prices. In June 1973, Hartwell gave respondent the ultimatum that Hartwell would terminate his dealership unless respondent ended its relationship with petitioner within 30 days. Respondent terminated petitioner's dealership in July 1973.

Petitioner brought suit in the United States District Court for the Southern District [\*\*\*\*8] of Texas, alleging that respondent and Hartwell had conspired to terminate petitioner and that such conspiracy was illegal *per se* under [§ 1](#) of the Sherman Act. The case was tried to a jury. The District Court submitted a liability interrogatory to the jury that asked whether "there was an agreement or understanding between Sharp Electronics Corporation and Hartwell to terminate Business Electronics as a Sharp dealer because of Business Electronics' price cutting." Record, Doc. No. 241. The District Court instructed the jury at length about this question:

[\*722] "The Sherman Act is violated when a seller enters into an agreement or understanding with one of its dealers to terminate another dealer because of the other dealer's price cutting. Plaintiff contends that Sharp terminated Business Electronics in furtherance of Hartwell's desire to eliminate Business Electronics as a price-cutting rival.

"If you find that there was an agreement between Sharp and Hartwell to terminate Business Electronics because of Business Electronics' price cutting, you should answer yes to Question Number 1.

....

"A combination, agreement or understanding to terminate a dealer because [\*\*\*\*9] of his price cutting unreasonably restrains trade and cannot be justified for any reason. Therefore, even though the combination, agreement or understanding may have been formed or engaged in . . . to eliminate any alleged evils of price cutting, it is still unlawful. . . .

"If a dealer demands that a manufacturer terminate a price cutting dealer, and the manufacturer agrees to do so, the agreement is illegal if the manufacturer's purpose is to eliminate the price cutting." App. 18-19.

The jury answered Question 1 affirmatively and awarded \$ 600,000 in damages. The District Court rejected respondent's motion for judgment notwithstanding the verdict or a new trial, holding that the jury interrogatory and instructions had properly stated the law. It entered judgment for petitioner for treble damages plus attorney's fees.

The Fifth Circuit reversed, holding that the jury interrogatory and instructions were erroneous, and remanded for a new trial. It held that, to render illegal *per se* a vertical agreement between a manufacturer and a dealer to terminate a second dealer, the first dealer "must expressly or impliedly agree to set its prices at some level, though not a [\*\*\*816] [\*\*\*10] specific one. [\*723] The distributor cannot retain complete freedom to set whatever price it chooses." [780 F.2d, at 1218](#).

[\*\*1519] //

A

[LEdHN\[2A\]](#) [2A] [2A][Section 1](#) of the Sherman Act [HN1](#) provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." [15 U. S. C. § 1](#). Since the earliest decisions of this Court interpreting this provision, we have recognized that it was intended to prohibit only unreasonable restraints of trade. [National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma, 468 U.S. 85, 98 \(1984\)](#); see, e. g., [Standard Oil Co. v. United States, 221 U.S. 1, 60 \(1911\)](#). [HN2](#) Ordinarily, whether particular concerted action violates [§ 1](#) of the Sherman Act is determined through case-by-case [\*\*\*\*11] application of the so-called rule of reason -- that is, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." [Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 \(1977\)](#). [HN3](#) Certain categories of agreements, however, have been held to be *per se*

illegal, dispensing with the need for case-by-case evaluation. We have said [HN4](#) that *per se* rules are appropriate only for "conduct that is manifestly anticompetitive," *id., at 50*, that is, conduct "that would always or almost always tend to restrict competition and decrease output," [Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.](#), 472 U.S. 284, 289-290 (1985), quoting [Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.](#), 441 U.S. 1, 19-20 (1979). See also [FTC v. Indiana Federation of Dentists](#), 476 U.S. 447, 458-459 (1986) [\*\*\*\*12] ("We have been slow . . . to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious"); [National Collegiate I\\*724J Athletic Assn. v. Board of Regents of University of Oklahoma](#), *supra*, at 103-104 ("[HN5](#) *per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct"); [National Society of Professional Engineers v. United States](#), 435 U.S. 679, 692 (1978) ([HN6](#)) agreements are *per se* illegal only if their "nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality").

[LEdHN\[3\]](#) [3]Although vertical agreements on resale prices have been illegal *per se* since [Dr. Miles Medical Co. \[\\*\\*\\*\\*13\] . v. John D. Park & Sons Co.](#), 220 U.S. 373 (1911), we have recognized that the scope of *per se* illegality should be narrow in the context of vertical restraints. In [Continental T. V., Inc. v. GTE Sylvania Inc.](#), *supra*, we refused to extend *per se* illegality to vertical nonprice restraints, specifically to a manufacturer's termination of one dealer pursuant to an exclusive territory agreement with [\*\*\*817] another. We noted that especially in the vertical restraint context "departure from the rule-of-reason standard must be based on demonstrable economic effect rather than . . . upon formalistic line drawing." *Id., at 58-59*. We concluded that vertical nonprice restraints had not been shown to have such a "pernicious effect on competition" and to be so "lacking [in] . . . redeeming value" as to justify *per se* illegality. *Id., at 58*, quoting [Northern Pacific R. Co. v. United States](#), 356 U.S. 1, 5 (1958). Rather, we found, they had real potential to stimulate interbrand competition, "the primary concern of antitrust law," [433 U.S., at 52, n. 19](#):

[\*\*1520] [\*\*\*\*14] "New manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers [\*725] to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products. . . . The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called 'free-rider' effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did." *Id., at 55*.

Moreover, we observed that a rule of *per se* illegality for vertical nonprice restraints was not needed or effective to protect *intrabrand* competition. First, so long as interbrand competition existed, that would provide a "significant check" [\*\*\*\*15] on any attempt to exploit intrabrand market power. *Id., at 52, n. 19*; see also *id., at 54*. In fact, in order to meet that interbrand competition, a manufacturer's dominant incentive is to lower resale prices. *Id., at 56*, and n. 24. Second, the *per se* illegality of vertical restraints would create a perverse incentive for manufacturers to integrate vertically into distribution, an outcome hardly conducive to fostering the creation and maintenance of small businesses. *Id., at 57, n. 26*.

Finally, our opinion in *GTE Sylvania* noted a significant distinction between vertical nonprice and vertical price restraints. That is, there was support for the proposition that vertical price restraints reduce *interbrand* price competition because they "facilitate cartelizing." *Id., at 51, n. 18*, quoting Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 Colum. L. Rev. 282, 294 (1975). The authorities cited by the Court suggested how vertical price agreements might assist horizontal [\*\*\*\*16] price fixing at the manufacturer level (by reducing the manufacturer's incentive to cheat on a cartel, since its retailers could not [\*\*\*818] pass on lower prices to consumers) or might be used to [\*726] organize cartels at the retailer level. See R. Posner, Antitrust: Cases, Economic Notes and Other Materials 134 (1974); E. Gellhorn, Antitrust Law and Economics 252, 256 (1976); Note, Vertical Territorial and Customer

Restrictions in the Franchising Industry, 10 Colum. J. L. & Soc. Prob. 497, 498, n. 12 (1974). Similar support for the cartel-facilitating effect of vertical nonprice restraints was and remains lacking.

We have been solicitous to assure that the market-freeing effect of our decision in *GTE Sylvania* is not frustrated by related legal rules. In [\*Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 763 \(1984\)\*](#), which addressed the evidentiary showing necessary to establish vertical concerted action, we expressed concern that "if an inference of such an agreement may be drawn from highly ambiguous evidence, there is considerable danger that the doctrine enunciated in *Sylvania* . . . will be seriously eroded." See also *id., at 761, n. 6*. [\*\*\*\*17] We eschewed adoption of an evidentiary standard that "could deter or penalize perfectly legitimate conduct" or "would create an irrational dislocation in the market" by preventing legitimate communication between a manufacturer and its distributors. *Id., at 763, 764*.

[LEdHN\[1B\]](#) [↑] [1B] [LEdHN\[2B\]](#) [↑] [2B] [LEdHN\[4\]](#) [↑] [4] Our approach to the question presented in the present case is guided by [HN7](#) [↑] the premises of *GTE Sylvania* and *Monsanto*: that there is a presumption in favor of a rule-of-reason standard; that departure [\*\*1521] from that standard must be justified by demonstrable economic effect, such as the facilitation of cartelizing, rather than formalistic distinctions; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view towards protecting the doctrine of *GTE Sylvania*. These premises lead us to conclude [\*\*\*\*18] that the line drawn by the Fifth Circuit is the most appropriate one.

[LEdHN\[1C\]](#) [↑] [1C] [LEdHN\[5A\]](#) [↑] [5A] There has been no showing here that an agreement between a manufacturer and a dealer to terminate a "price cutter," without a further agreement on the price or price levels to be charged by the remaining dealer, almost always tends [\*727] to restrict competition and reduce output. Any assistance to cartelizing that such an agreement might provide cannot be distinguished from the sort of minimal assistance that might be provided by vertical nonprice agreements like the exclusive territory agreement in *GTE Sylvania*, and is insufficient to justify a *per se* rule. Cartels are neither easy to form nor easy to maintain. Uncertainty over the terms of the cartel, particularly the prices to be charged in the future, obstructs both formation and adherence by making cheating easier. Cf. [\*Maple Flooring Mfrs. Assn. v. United States, 268 U.S. 563 \(1925\)\*](#); [\*Cement Mfrs. Protective Assn. v. United States, 268 U.S. 588 \(1925\)\*](#); [\*\*\*\*19] see generally [\*Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 590 \(1986\)\*](#). Without an agreement with the remaining dealer on price, the manufacturer both retains its incentive to cheat on any manufacturer-level cartel (since lower prices can still be passed on to consumers) [\*\*\*819] and cannot as easily be used to organize and hold together a retailer-level cartel.<sup>2</sup>

[\*\*\*\*20] The District Court's rule on the scope of *per se* illegality for vertical restraints would threaten to dismantle the doctrine of *GTE Sylvania*. Any agreement between a manufacturer and a dealer to terminate another dealer who happens to have charged lower prices can be alleged to have been directed against the terminated dealer's "price cutting." In the vast majority of cases, it will be extremely difficult for the manufacturer to convince a jury that its motivation was to ensure adequate services, since price cutting and [\*728] some measure of service cutting usually go hand in hand. Accordingly, a manufacturer that agrees to give one dealer an exclusive territory and terminates another dealer pursuant to that agreement, or even a manufacturer that agrees with one dealer to terminate another for failure to provide contractually obligated services, exposes itself to the highly plausible claim that its real motivation was to terminate a price cutter. Moreover, even vertical restraints that do not result in dealer termination, such as the initial granting of an exclusive territory or the requirement that certain services be provided,

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<sup>2</sup> [LEdHN\[1D\]](#) [↑] [1D] [LEdHN\[5B\]](#) [↑] [5B]

The dissent's principal fear appears to be not cartelization at either level, but Hartwell's assertion of dominant retail power. This fear does not possibly justify adopting a rule of *per se* illegality. Retail market power is rare, because of the usual presence of interbrand competition and other dealers, see [\*Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54 \(1977\)\*](#), and it should therefore not be assumed but rather must be proved. Cf. Baxter, The Viability of Vertical Restraints Doctrine, [\*75 Calif. L. Rev. 933, 948-949 \(1987\)\*](#). Of course this case was not prosecuted on the theory, and therefore the jury was not asked to find, that Hartwell possessed such market power.

can be attacked as designed to allow [\*\*\*\*21] existing dealers to charge higher prices. Manufacturers would be likely to forgo legitimate and competitively useful conduct rather than risk treble damages and perhaps even criminal penalties.

We cannot avoid this difficulty by invalidating as illegal *per se* only those agreements imposing vertical restraints that contain the word "price," or that affect the "prices" charged by dealers. Such formalism was explicitly rejected in *GTE Sylvania*. As the above discussion indicates, all vertical restraints, including the exclusive [\*\*1522] territory agreement held not to be *per se* illegal in *GTE Sylvania*, have the potential to allow dealers to increase "prices" and can be characterized as intended to achieve just that. In fact, vertical nonprice restraints only accomplish the benefits identified in *GTE Sylvania* because they reduce intrabrand price competition to the point where the dealer's profit margin permits provision of the desired services. As we described it in *Monsanto*: "The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical [\*\*\*22] features of the product, and will want to see that 'free-riders' do not interfere." [465 U.S., at 762-763](#). See also [GTE Sylvania, 433 U.S., at 55](#).

[LEdHN\[1E\]↑](#) [1E] [LEdHN\[6A\]↑](#) [6A] [LEdHN\[7A\]↑](#) [7A] The dissent erects a much more complex analytic structure, which ultimately rests, however, upon the same discredited [\*729] premise that the only function this [\*\*\*820] nonprice vertical restriction can serve is restraint of dealer-level competition. Specifically, the dissent's reasoning hinges upon its perception that the agreement between Sharp and Hartwell was a "naked" restraint -- that is, it was not "ancillary" to any other agreement between Sharp and Hartwell. *Post*, at 736-742, 744-745. But that is not true, unless one assumes, contrary to *GTE Sylvania* and *Monsanto*, and contrary to our earlier discussion, that it is not a quite plausible purpose of the restriction to enable Hartwell to provide better services under the sales franchise agreement. [\*\*\*\*23] <sup>3</sup> From its [\*730] faulty conclusion that what we have before us is a "naked" restraint, the dissent proceeds, by reasoning we do not entirely follow, to the further conclusion that it is therefore a horizontal rather than a vertical restraint. We pause over this only to note that in addition to producing what we think the wrong result in the present case, it introduces needless confusion into antitrust terminology. Restraints imposed by agreement between [\*\*1523] competitors have traditionally been denominated as

<sup>3</sup> [LEdHN\[6B\]↑](#) [6B]

The conclusion of "naked" restraint could also be sustained on another assumption, namely, that an agreement is not "ancillary" unless it is designed to enforce a contractual obligation of one of the parties to the contract. The dissent appears to accept this assumption. See *post*, at 739-741, and n. 3, 744-746. It is plainly wrong. The classic "ancillary" restraint is an agreement by the seller of a business not to compete within the market. See *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711); *Restatement (Second) of Contracts* § 188(2)(a) (1981). That is not ancillary to any other contractual obligation, but, like the restraint here, merely enhances the value of the contract, or permits the "enjoyment of [its] fruits." [United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 \(CA6 1898\)](#), aff'd, [175 U.S. 211 \(1899\)](#); cf. *Restatement (Second) of Contracts* §§ 187, 188 (1981) (restraint may be ancillary to a "transaction or relationship") (emphasis added); R. Bork, *The Antitrust Paradox* 29 (1978) (hereinafter Bork) (vertical arrangements are ancillary to the "transaction of supplying and purchasing").

More important than the erroneousness of the dissent's common-law analysis of "naked" and "ancillary" restraints are the perverse economic consequences of permitting nonprice vertical restraints to avoid *per se* invalidity only through attachment to an express contractual obligation. Such an approach is contrary to the express views of the principal scholar on whom the dissent relies. See 7 P. Areeda, *Antitrust Law* § 1457c, p. 170 (1986) (hereinafter Areeda) (legality of terminating price cutter should not depend upon formal adoption of service obligations that termination is assertedly designed to protect). In the precise case of a vertical agreement to terminate other dealers, for example, there is no conceivable reason why the existence of an exclusivity commitment by the manufacturer to the one remaining dealer would render anticompetitive effects less likely, or the procompetitive effects on services more likely -- so that the dissent's line for *per se* illegality fails to meet the requirement of [Continental T. V., Inc. v. GTE Sylvania Inc., supra, at 59](#), that it be based on "demonstrable economic effect." If anything, the economic effect of the dissent's approach is perverse, encouraging manufacturers to agree to otherwise inefficient contractual provisions for the sole purpose of attaching to them efficient nonprice vertical restraints which, only by reason of such attachment, can avoid *per se* invalidity as "naked" restraints. The dissent's approach would therefore create precisely the kind of "irrational dislocation in the market" that legal rules in this area should be designed to avoid. [Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 \(1984\)](#).

horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.<sup>4</sup>

[\*\*\*\*25] [\*731] [\*\*\*821] [LEdHN\[1F\]](#) [1F]Finally, we do not agree with petitioner's contention that an agreement on the remaining dealer's price or price levels will so often follow from terminating another dealer "because of [its] price cutting" that prophylaxis against resale price maintenance warrants the District Court's *per se* rule. Petitioner has provided no support for the proposition that vertical price agreements generally underlie agreements to terminate a price cutter. That proposition is simply incompatible with the conclusion of *GTE Sylvania* and *Monsanto* that manufacturers are often motivated by a legitimate desire to have dealers provide services, combined with the reality that price cutting is frequently made possible by "free riding" on the services provided by other dealers. The District Court's *per se* rule would therefore discourage conduct recognized by *GTE Sylvania* and *Monsanto* as beneficial to consumers.

B

[LEdHN\[8\]](#) [8]In resting our decision upon the foregoing economic analysis, we do not ignore common-law [\*\*\*\*26] precedent concerning what constituted "restraint of trade" at the time the Sherman Act was adopted. But neither do we give that pre-1890 precedent the dispositive effect some would. The term "restraint of trade" in the statute, like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances. The changing content of the term "restraint of trade" was well recognized at the time the Sherman Act was enacted. See *Gibbs v. Consolidated Gas Co., 130 U.S. 396, 409 (1889)* (noting that English case laying down the common-law rule [\*732] that contracts in restraint of trade are invalid "was made under a condition of things, and a state of society, different from those which now prevail, [and therefore] the rule laid down is not regarded as inflexible, and has been considerably modified"); see also *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S., at 406* ("With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation [\*\*\*\*27] to modern conditions"); B. Cardozo, *The Nature of the Judicial Process* 94-96 (1921).

[\*\*\*822] The Sherman Act adopted the term "restraint of trade" along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890. See *GTE Sylvania, 433 U.S., at 53, n. 21*; *Standard Oil Co. v. United States, 221 U.S., at 51-60*; see also *McNally v. [\*\*1524] United States, 483 U.S. 350, 372-373 (1987)* (STEVENS, J., joined by O'CONNOR, J., dissenting); *Associated General Contractors of California, Inc. v. Carpenters, 459 U.S. 519, 533, n. 28, 539-540*, and n. 43 (1983); Bork 37. If it were otherwise, not only would the line of *per se* illegality have to be drawn today precisely where it was in 1890, but also case-by-case evaluation of legality (conducted where *per se* rules do not apply) would have to be governed by 19th-century notions of reasonableness. It would make no sense to create out of the

<sup>4</sup> [\*\*\*\*24] [LEdHN\[7B\]](#) [7B]

The dissent apparently believes that whether a restraint is horizontal depends upon whether its anticompetitive effects are horizontal, and not upon whether it is the product of a horizontal agreement. *Post*, at 745-747, and n. 10. That is of course a conceivable way of talking, but if it were the language of antitrust analysis there would be no such thing as an unlawful vertical restraint, since all anticompetitive effects are by definition horizontal effects. The dissent quotes a statement of Professor Areeda as supposed adoption of its definition of horizontal restraint. *Post*, at 745-746, n. 10, quoting Areeda § 1457d, p. 174. That statement seems to us to be, to the contrary, Professor Areeda's attempt to explain a peculiar usage of the term "horizontal" in *Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 168 (CA3 1979)*, noting that (even though *Cernuto* did not involve a horizontal restraint) the use of the term "horizontal" was "appropriate to capture the fact that dealer interests opposed to those of the manufacturer were being served." Areeda § 1457d, p. 174. The dissent also seeks to associate Judge Bork with its terminological confusion. See *post*, at 746, n. 10, quoting Bork 288. What the quoted passage says, however, is that a facially vertical restraint imposed by a manufacturer only because it has been coerced by a "horizontal cartel" agreement among his distributors is in reality a horizontal restraint. That says precisely what we say: that a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement.

single term "restraint of trade" a chronologically schizoid statute, in which a "rule of reason" evolves with new circumstances [\*\*\*\*28] and new wisdom, but a line of *per se* illegality remains forever fixed where it was.

Of course the common law, both in general and as embodied in the Sherman Act, does not lightly assume that the economic realities underlying earlier decisions have changed, or that earlier judicial perceptions of those realities were in error. It is relevant, therefore, whether the common law of [\*733] restraint of trade ever prohibited as illegal *per se* an agreement of the sort made here, and whether our decisions under § 1 of the Sherman Act have ever expressed or necessarily implied such a prohibition.

[LEdHN\[9\]](#) [↑] [9]With respect to this Court's understanding of pre-Sherman Act common law, petitioner refers to our decision in [Dr. Miles Medical Co. v. John D. Park & Sons Co., supra](#). Though that was an early Sherman Act case, its holding that a resale price maintenance agreement was *per se* illegal was based largely on the perception that such an agreement was categorically impermissible at common law. [Id., at 404-408](#). As the opinion made plain, however, the basis for that common-law [\*\*\*\*29] judgment was that the resale restriction was an unlawful restraint on alienation. See *ibid.* As we explained in [Boston Store of Chicago v. American Graphophone Co., 246 U.S. 8, 21-22 \(1918\)](#), "Dr. Miles . . . decided that under the general law the owner of movables . . . could not sell the movables and lawfully by contract fix a price at which the product should afterwards be sold, because to do so would be at one and the same time to sell and retain, to part with and yet to hold, to project the will of the seller so as to cause it to control the movable parted with when it was not subject to his will because owned by another." In the present case, of course, no agreement on resale price or price level, and hence no restraint on alienation, was found by the jury, so the common-law rationale of *Dr. Miles* does not apply. Cf. [United States v. General Electric Co., 272 U.S. 476, 486-488 \(1926\)](#) (*Dr. Miles* does not apply to restrictions on price to be charged by one who is in reality an agent of, not a buyer from, the manufacturer).

[\*\*\*\*30] [LEdHN\[10\]](#) [↑] [10] [LEdHN\[11\]](#) [↑] [11] Petitioner's principal contention has been that the District [\*\*\*823] Court's rule on *per se* illegality is compelled not by the old common law, but by our more recent Sherman Act precedents. First, petitioner contends that since certain horizontal agreements have been held to constitute price fixing (and [\*734] thus to be *per se* illegal) though they did not set prices or price levels, see, e. g., [Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647-650 \(1980\)](#) (*per curiam*), [HN8](#) [↑] it is improper to require that a vertical agreement set prices or price levels before it can suffer the same fate. This notion of equivalence between the scope of horizontal *per se* illegality and that of vertical *per se* illegality was explicitly rejected in *GTE Sylvania*, see [433 U.S., at 57, n. 27](#) -- as it had to be, since a horizontal agreement to divide territories is *per se* illegal, see [United States v. Topco Associates, Inc., 405 U.S. 596, 608 \(1972\)](#), while [\*\*\*\*31] *GTE Sylvania* held that a vertical agreement to do so is not. See also [United States v. Arnold, Schwinn & Co., 388 U.S. 365, 390-391 \(1967\)](#) (Stewart, J., joined by Harlan, J., concurring in part and dissenting in part); [White Motor Co. v. United States, 372 U.S. 253, 263 \(1963\)](#).

Second, petitioner contends that *per se* illegality here follows from our two cases holding *per se* illegal a group boycott of a dealer because of its price cutting. See [United States v. General Motors Corp., 384 U.S. 127 \(1966\)](#); [Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 \(1959\)](#). This second contention is merely a restatement of the first, since both cases involved horizontal combinations -- [General Motors, supra, at 140, 143-145](#), at the dealer level,<sup>5</sup> and [Klor's, supra, at 213](#), at the manufacturer and wholesaler levels. Accord, [GTE Sylvania, supra, at 58, n. 28](#), [United States v. Arnold, Schwinn & Co., 388 U.S., at 373, 378](#); [id., at 390](#) (Stewart, J., joined by Harlan, J., concurring in part and dissenting in part); [\*\*\*\*32] [White Motor Co. v. United States, supra, at 263](#).

[\*735] Third, petitioner contends, relying on [Albrecht v. Herald Co., 390 U.S. 145 \(1968\)](#), and [United States v. Parke, Davis & Co., 362 U.S. 29 \(1960\)](#), that our vertical price-fixing cases have already rejected the proposition that *per se* illegality requires setting a price or a price level. We disagree. In *Albrecht*, the maker of the product

<sup>5</sup>Contrary to the dissent, *post*, at 742-743, 747, *General Motors* does not differ from the present case merely in that it involved a three-party rather than a two-party agreement. The agreement was among competitors in *General Motors*; it was between noncompetitors here. Cf. Bork 330 (defining "boycotts" as "agreements among competitors to refuse to deal").

formed a combination to force a retailer to charge the maker's advertised retail price. See [390 U.S., at 149](#). This combination had two aspects. Initially, the maker [\*\*\*33] hired a third party to solicit customers away from the noncomplying retailer. This solicitor "was aware that the aim of the solicitation campaign was to force [the \*\*\*824] noncomplying retailer] to lower his price" to the suggested retail price. [Id., at 150](#). Next, the maker engaged another retailer who "undertook to deliver [products] at the suggested price" to the noncomplying retailer's customers obtained by the solicitor. *Ibid.* This combination of maker, solicitor, and new retailer was held to be *per se* illegal. [Id., at 150, 153](#). It is plain that the combination involved both an explicit agreement on resale price and an agreement to force another to adhere to the specified price.

In *Parke, Davis*, a manufacturer combined first with wholesalers and then with retailers in order to gain the "retailers' adherence to its suggested minimum retail prices." [362 U.S., at 45-46](#), and n. 6. The manufacturer also brokered an agreement among its retailers not to advertise prices below its suggested retail prices, which agreement was held to be part of the *per se* illegal combination. This holding also does not support [\*\*\*34] a rule that an agreement on price or price level is not required for a vertical restraint to be *per se* illegal -- first, because the agreement not to advertise prices was part and parcel of the combination that contained the price agreement, [id., at 35-36](#), and second because the agreement among retailers that the manufacturer organized was a *horizontal* conspiracy among competitors. [Id., at 46-47](#).

**LEdHN[1G]** [1G]In sum, economic analysis supports the view, and no precedent opposes it, that **HN9** a vertical restraint is not illegal *per se* [\*736] unless it includes some agreement on price or price levels. Accordingly, the judgment of the Fifth Circuit is

Affirmed.

JUSTICE KENNEDY took no part in the consideration or decision of this case.

**Dissent by:** STEVENS

## Dissent

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[\*\*1526] JUSTICE **STEVENS**, with whom JUSTICE **WHITE** joins, dissenting.

In its opinion the majority assumes, without analysis, that the question presented by this case concerns the legality of a "vertical nonprice [\*\*\*35] restraint." As I shall demonstrate, the restraint that results when one or more dealers threaten to boycott a manufacturer unless it terminates its relationship with a price-cutting retailer is more properly viewed as a "horizontal restraint." Moreover, an agreement to terminate a dealer because of its price cutting is most certainly not a "nonprice restraint." The distinction between "vertical nonprice restraints" and "vertical price restraints," on which the majority focuses its attention, is therefore quite irrelevant to the outcome of this case. Of much greater importance is the distinction between "naked restraints" and "ancillary restraints" that has been a part of our law since the landmark opinion written by Judge (later Chief Justice) Taft in [United States v. Addyston Pipe & Steel Co., 85 F. 271 \(CA6 1898\)](#), aff'd, [175 U.S. 211 \(1899\)](#).

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The plain language of [§ 1](#) of the [\*\*\*825] Sherman Act prohibits "every" contract that restrains trade.<sup>1</sup> Because such a literal reading of the statute would outlaw the entire body of private contract law, and because Congress

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<sup>1</sup> [Section 1](#) of the Sherman Act, as set forth in [15 U. S. C. § 1](#), provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

plainly intended [**\*737**] the Act to be interpreted in the light of [\*\*\*\*36] its common-law background, the Court has long held that certain "ancillary" restraints of trade may be defended as reasonable. As we recently explained without dissent:

"The Rule of Reason suggested by *Mitchel v. Reynolds* [1 P. Wms. 181, 24 Eng. Rep. 347 (1711)] has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business. Judge (later Mr. Chief Justice) Taft so interpreted the Rule in his classic rejection of the argument that competitors may lawfully agree to sell their goods at the same price as long as the agreed-upon price is reasonable. *United States v. Addyston Pipe & Steel Co.* . . . ." [\*National Society of Professional Engineers v. United States, 435 U.S. 679, 689 \(1978\)\*](#).

[\*\*\*\*37] Judge Taft's rejection of an argument that a price-fixing agreement could be defended as reasonable was based on a detailed examination of common-law precedents. He explained that in England there had been two types of objection to voluntary restraints on one's ability to transact business. "One was that by such contracts a man disabled himself from earning a livelihood with the risk of becoming a public charge, and deprived the community of the benefit of his labor. The other was that such restraints tended to give to the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same means might exclude others." [\*85 F., at 279\*](#). Certain contracts, however, such as covenants not to compete in a particular business, for a certain period of time, within a defined geographical area, had always been considered reasonable when necessary to carry out otherwise procompetitive contracts, such as the sale of a business. [\*Id., at 280-282\*](#). The difference between ancillary covenants that [**\*738**] may be justified as reasonable and those that are "void" because there is "nothing to justify [\*\*\*\*38] or excuse the restraint," [\*id., at 282-283\*](#), was described in the opinion's seminal discussion:

"The contract must be one in which there is a main purpose, to which the [\*\*1527] covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the [\*\*\*826] necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have [\*\*\*\*39] a tendency to monopoly, and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster." *Ibid.*

Although Judge Taft was writing as a Circuit Judge, his opinion is universally accepted as authoritative. We affirmed [**\*739**] his decision without dissent, we have repeatedly cited it with approval,<sup>2</sup> and it is praised by a respected scholar as "one of the greatest, if not the greatest, antitrust opinions in the history of the law." R. Bork, *The Antitrust Paradox* 26 (1978). In accordance with the teaching in that opinion, it is therefore appropriate to look more closely at the character of the restraint of trade found by the jury in this case.

#### [\*\*\*\*40] II

It may be helpful to begin by explaining why the agreement in this case does not fit into certain categories of agreement that are frequently found in antitrust litigation. First, despite the contrary implications in the majority

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<sup>2</sup> See, e. g., [\*Arizona v. Maricopa County Medical Society, 457 U.S. 332, 350, n. 22 \(1982\); United States v. Topco Associates, Inc., 405 U.S. 596, 608 \(1972\); Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 \(1958\).\*](#)

opinion, this is not a case in which the manufacturer is alleged to have imposed any vertical nonprice restraints on any of its dealers. The term "vertical nonprice restraint," as used in *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), and similar cases, refers to a contractual term that a dealer must accept in order to qualify for a franchise. Typically, the dealer must agree to meet certain standards in its advertising, promotion, product display, and provision of repair and maintenance services in order to protect the goodwill of the manufacturer's product. Sometimes a dealer must agree to sell only to certain classes of customers -- for example, wholesalers generally may only sell to retailers and may be required not to sell directly to consumers. In *Sylvania*, to take another example, we examined agreements between a manufacturer and its dealers that included "provisions barring the retailers from selling [\*\*\*\*41] franchised products from locations other than those specified in agreements." *Id. at 37.* [\*\*\*827] Restrictions of that kind, which are a part of, or ancillary to, [\*740] the basic franchise agreement, are perfectly lawful unless the "rule of reason" is violated. Although vertical nonprice restraints may have some adverse effect on competition, as long as they serve the main purpose of a [\*\*1528] procompetitive distribution agreement, the ancillary restraints may be defended under the rule of reason. And, of course, a dealer who violates such a restraint may properly be terminated by the manufacturer.<sup>3</sup>

[\*\*\*42] In this case, it does not appear that respondent imposed any vertical nonprice restraints upon either petitioner or Hartwell. Specifically, respondent did not enter into any "exclusive" agreement, as did the defendant in *Sylvania*. It is true that before Hartwell was appointed and after petitioner was terminated, the manufacturer was represented by only one retailer in the Houston market, but there is no evidence that respondent ever made any contractual commitment to give either of them any exclusive rights. This therefore is not a case in which a manufacturer's right to grant exclusive territories, or to change the identity of the dealer in an established exclusive territory, is implicated. The case is one in which one of two competing dealers entered into an agreement with the manufacturer to terminate a particular competitor without making any promise to provide better or more efficient services and without receiving any guarantee of exclusivity in the future. The contractual relationship between respondent and Hartwell was exactly [\*741] the same after petitioner's termination as it had been before that termination.

Second, this case does not involve a typical [\*\*\*43] vertical price restraint. As the Court of Appeals noted, there is some evidence in the record that may support the conclusion that respondent and Hartwell implicitly agreed that Hartwell's prices would be maintained at a level somewhat higher than petitioner had been charging before petitioner was terminated. *780 F.2d 1212, 1219 (CA5 1986)*. The illegality of the agreement found by the jury does not, however, depend on such evidence. For purposes of analysis, we should assume that no such agreement existed and that respondent was perfectly willing to allow its dealers to set prices at levels that would maximize their profits. That seems to have been the situation during the period when petitioner was the only dealer in Houston. Moreover, after respondent appointed Hartwell as its second dealer, it was Hartwell, rather than respondent, who objected to petitioner's pricing policies.

Third, this is not a case in which the manufacturer acted independently. Indeed, given the jury's verdict, it is not even a case in which the [\*\*\*828] termination can be explained as having been based on the violation of any distribution policy adopted by respondent. The termination [\*\*\*44] was motivated by the ultimatum that respondent received from Hartwell and that ultimatum, in turn, was the culmination of Hartwell's complaints about

<sup>3</sup>Thus, in *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430 (CA7 1986), cited *ante*, at 720, n. 1, the plaintiff had been terminated because he violated a lawful restriction on the customers to whom he could sell. As the court correctly explained:

"As long as the supplier's motive is not to keep his established dealers' prices up but only to maintain his system of lawful nonprice restrictions, he can terminate noncomplying dealers without fear of antitrust liability even if he learns about the violation from dealers whose principal or perhaps only concern is with protecting their prices." *797 F.2d, at 1440*.

There was no such justification for the termination in this case.

petitioner's competitive price cutting. The termination was plainly the product of coercion by the stronger of two dealers rather than an attempt to maintain an orderly and efficient system of distribution.<sup>4</sup>

**[\*\*\*\*45] [\*742] [\*\*1529]** In sum, this case does not involve the reasonableness of any vertical restraint imposed on one or more dealers by a manufacturer in its basic franchise agreement. What the jury found was a simple and naked "agreement between Sharp and Hartwell to terminate Business Electronics because of Business Electronics' price cutting." *Ante*, at 722.

### III

Because naked agreements to restrain the trade of third parties are seldom identified with such stark clarity as in this case, there appears to be no exact precedent that determines the outcome here. There are, however, perfectly clear rules that would be decisive if the facts were changed only slightly.

Thus, on the one hand, if it were clear that respondent had acted independently and decided to terminate petitioner because respondent, for reasons of its own, objected to petitioner's pricing policies, the termination would be lawful. See *United States v. Parke, Davis & Co.*, 362 U.S. 29, 43-45 (1960). On the other hand, it is equally clear that if respondent had been represented by three dealers in the Houston market instead of only two, and if two of them had threatened to terminate [\*\*\*\*46] their dealerships "unless respondent ended its relationship with petitioner within 30 days," *ante*, at 721, an agreement to comply with the ultimatum would be an obvious violation of the Sherman Act. See, e. g., *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).<sup>5</sup> The [\*743] question then is whether [\*\*\*829] the two-party agreement involved in this case is more like an illegal three-party agreement or a legal independent decision. For me, the answer is plain.

<sup>4</sup> "When a manufacturer acts on its own, in pursuing its own market strategy, it is seeking to compete with other manufacturers by imposing what may be defended as reasonable vertical restraints. This would appear to be the rationale of the *GTE Sylvania* decision. However, if the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, level." *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 168 (CA3 1979).

<sup>5</sup> Thus, a boycott "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S., at 213, (footnote omitted). Again, Judge Adams' analysis in the *Cernuto* opinion, n. 4, *supra*, is relevant:

"The importance of the horizontal nature of this arrangement is illustrated by *United States v. General Motors Corp.*, 384 U.S. 127 . . . (1966). Although General Motors, the manufacturer, was seemingly imposing vertical restraints when it pressured recalcitrant automobile dealers not to deal with discounters, the Supreme Court noted that in fact these restraints were induced by the dealers seeking to choke off aggressive competitors at their level, and found a *per se* violation, rejecting the suggestion that only unilateral restraints were at issue. So here, if [the manufacturer and the sales representative acted at the nonterminated dealer's] direction, both the purpose and effect of the termination was to eliminate competition at the retail level, and not, as in *GTE Sylvania*, to promote competition at the manufacturer level. Accordingly, the pro-competitive redeeming virtues so critical in *GTE Sylvania* may not be present here." *595 F.2d, at 168* (footnote omitted).

As we said in *General Motors*:

"The protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws. We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market, by combination or conspiracy, of a class of traders. Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely." *384 U.S., at 148*.

[\*\*\*\*47] The distinction between independent action and joint action is fundamental in antitrust jurisprudence.<sup>6</sup> Any attempt [\*744] to define [\*\*1530] the boundaries of *per se* illegality by the number of parties to different agreements with the same anticompetitive consequences can only breed uncertainty in the law and confusion for the businessman.

[\*\*\*\*48] More importantly, if instead of speculating about irrelevant vertical nonprice restraints, we focus on the precise character of the agreement before us, we can readily identify its anticompetitive nature. Before the agreement was made, there was price competition in the Houston retail market for respondent's products. The stronger of the two competitors was unhappy about that competition; it wanted to have the power to set the price level in the market and therefore it "complained to respondent on a number of occasions about petitioner's prices." *Ante*, at 721. Quite obviously, if petitioner had agreed with either Hartwell or respondent to discontinue its competitive pricing, there would have been no ultimatum from Hartwell and no termination by respondent. It is equally obvious that either of those agreements would have been illegal *per se*.<sup>7</sup> Moreover, it is also reasonable to [\*\*\*830] assume that if respondent were to replace petitioner with another price-cutting dealer, there would soon be more complaints and another ultimatum from Hartwell. Although respondent has not granted Hartwell an exclusive dealership -- it retains the right to appoint multiple dealers [\*\*\*\*49] -- its [\*745] agreement has protected Hartwell from price competition. Indeed, given the jury's finding and the evidence in the record, that is the *sole function* of the agreement found by the jury in this case. It therefore fits squarely within the category of "naked restraints of trade with no purpose except stifling of competition." [White Motor Co. v. United States, 372 U.S. 253, 263 \(1963\)](#).

[\*\*\*\*50] This is the sort of agreement that scholars readily characterize as "inherently suspect."<sup>8</sup> [\*\*\*\*51] When a manufacturer responds to coercion from a dealer, instead of making an independent decision to enforce a predetermined distribution policy, the anticompetitive character of the response is evident.<sup>9</sup> As Professor Areeda has correctly noted, the fact that the agreement is between only one complaining dealer and the manufacturer does not prevent it from imposing a "horizontal" restraint.<sup>10</sup> [\*\*\*\*52] If two critical facts are present -- a [\*746] naked

<sup>6</sup> See [United States v. Colgate & Co., 250 U.S. 300, 307-308 \(1919\)](#). In [Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 \(1984\)](#), we noted that "the basic distinction between concerted and independent action" was "not always clearly drawn by parties and courts." In its opinion today the majority virtually ignores that basic distinction. Thus, *ante*, at 728, the majority discusses the manufacturer's risks arising out of its agreement "with one dealer to terminate another for failure to provide contractually obligated services." But if such a breach of contract has occurred, the manufacturer should have an independent motivation for acting and need not enter into any agreement with a dealer to do so. As we held in *Monsanto*, the mere fact that the breach of contract may have been called to the manufacturer's attention by another dealer does not make the manufacturer's independent decision to terminate a price-cutting dealer unlawful.

<sup>7</sup> "We have not wavered in our enforcement of the *per se* rule against price fixing." [Arizona v. Maricopa County Medical Society, 457 U.S. 332, 347 \(1982\)](#). Thus, in [Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 \(1911\)](#), the Court determined that vertical price fixing is *per se* invalid because resale price maintenance plans serve the profit motives of the dealers, not the manufacturers, and are thereby similar to plans pursuant to which the dealers themselves conspire to fix prices. *Id.*, at 407-408. There is no doubt that horizontal intrabrand price fixing is *per se* illegal, even if the conspirators lack the market power to affect interbrand competition in a manner that would violate the rule of reason.

<sup>8</sup> "Scenarios that involve a firm or firms at one level of activity using vertical restraints deliberately to confer market power on firms at an adjacent level are inherently suspect. To do so is, typically, to inflict self-injury, just as it would be for consumers to confer market power on the retailers from whom they buy." Baxter, The Viability of Vertical Restraints Doctrine, [75 Calif. L. Rev. 933, 938 \(1987\)](#).

<sup>9</sup> "Termination responses reflecting the manufacturer's own distribution policy differ greatly from those imposed upon him by a complaining dealer. In the latter case, the manufacturer's compliance with the complainer's demand is more likely to be anticompetitive. There is a superficial resemblance to *Parke Davis* in that three parties are involved, but my earlier analysis suggested that the key to that case was 'complex enforcement,' which is absent where a complaining dealer simply threatens to abandon the manufacturer who continues selling to discounting dealers." 7 P. Areeda, [Antitrust Law](#) § 1457, p. 166 (1986).

purpose **[\*\*1531]** to eliminate price competition as such and **[\*\*\*831]** coercion of the manufacturer<sup>11</sup> **[\*\*\*\*53]** -- the conflict with antitrust policy is manifest.<sup>12</sup>

**[\*\*\*\*54] [\*747]** Indeed, since the economic consequences of Hartwell's ultimatum to respondent are identical to those that would result from a comparable ultimatum by two of three dealers in a market -- and since a two-party

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<sup>10</sup> Commenting on Judge Adams' opinion in *Cernuto*, see nn. 4 and 5, *supra*, Professor Areeda wrote:

"That the complainer was a single firm did not weaken the 'horizontal' characterization. Because the elimination of price competition was the purpose of the complaint and the termination, the court declared that *per se* illegality would be appropriate. However, the court made clear that no illegal agreement would be found if United was implementing its own unilaterally chosen distribution policy. Thus, the court's implicit theory was that an agreement arose when the manufacturer bowed to the complainer's will. In that situation, the 'horizontal' characterization is appropriate to capture the fact that dealer interests opposed to those of the manufacturer were being served." Areeda, *supra*, at 174 (footnotes omitted).

See also R. Bork, *The Antitrust Paradox* 288 (1978):

"A restraint -- whether on price, territory, or any other term -- is vertical, according to the usage employed here, when a firm operating at one level of an industry places restraints upon rivalry at another level for its own benefit. (This definition excludes restraints, vertical in form only, that are actually imposed by horizontal cartels at any level of the industry, e. g., resale price maintenance that is compelled not by the manufacturer but by the pressure of organized retailers.)"

<sup>11</sup> The two critical facts that had not yet been determined by a jury in the *Cernuto* case are perfectly plain in this case. As Professor Areeda explained:

"The *Cernuto* case was decided on summary judgment which accepted the plaintiff's view of the facts. But two facts critical for the court will often be obscure. *First*, was it the manufacturer's purpose to eliminate price competition as such? Let us assume that termination was not based on such completely independent grounds as non-payment of bills. Even so, the existence of an inevitable price effect does not establish a purpose to control prices in a forbidden way. A purpose to facilitate point-of-sale services or to protect minimum economies of scale could induce a manufacturer to limit intrabrand competition. Notwithstanding price effects, such limitations are lawful when reasonable and not subject to automatic condemnation. Indeed, termination of one dealer in order to grant another exclusive distribution rights in an area is generally lawful. Nevertheless, so long as the manufacturer is not implementing his own interest but that of the complainer, the vice of eliminating 'horizontal' competition with the complainer's rivals seems equally present when the complainer thereby succeeds in eliminating horizontal competition with respect to customers or territories. *Second*, was the manufacturer coerced or was he indulging his own preferences? As we have seen, this question cannot be answered in the abstract. The court correctly acknowledged that the manufacturer might also be implementing his own unilateral vision of optimal distribution without regard to the complainer's desires and held that no illegal agreement would arise if that were the case." Areeda, *supra*, at 174-175 (footnotes omitted).

<sup>12</sup> "Let us defer for the moment problems of proof and assume that a manufacturer does not wish to terminate the plaintiff dealer but does so to placate the complaining dealer, who would otherwise cease handling the product. This manufacturer would rather keep both dealers but, when forced to choose between them, concludes that terminating the plaintiff hurts him less (considering sales lost, transaction costs in finding and perhaps training a replacement, and any spillover effects upon his relations with other dealers) than losing the complainer's patronage.

"The present situation is *Colgate* in reverse. In *Colgate*, it was the supplier who was controlling the dealer's behavior. Here a dealer is conditioning his patronage in a way that controls the manufacturer's behavior. The agreement concept seems parallel. But the economic effects can be very different. From the policy viewpoint, it can matter greatly whether manufacturer or dealer interests are being served. The former is more likely to seek efficient distribution, which stimulates interbrand competition; the latter is more likely to seek excess profits, which dampen interbrand competition. Accordingly, antitrust policy can be more hospitable toward manufacturer efforts to control dealer prices, customers, or territories than toward the efforts of dealers to control *their* competitors through the manufacturer.

"Of course, manufacturer and dealer interests are not necessarily antagonistic. Like the manufacturer, dealers might also believe that restricted distribution increases dealer services and sales and thus strengthens interbrand competition. However, this objective seems unlikely when the manufacturer is forced to violate the distribution policy he thinks best. Although he might be mistaken about what his optimal distribution policy ought to be, he should be presumed a better judge of that than coercing dealers who always desire excess profits unnecessary for efficient distribution." Areeda, *supra*, at 167-168 (footnotes omitted).

price-fixing agreement is just as unlawful as a three-party price-fixing agreement -- [\*\*1532] it is appropriate to employ the term "boycott" to characterize this agreement. In my judgment the case is therefore controlled by our decision in *United States v. General Motors Corp.*, 384 U.S. 127 (1966).

The majority disposes quickly of both *General Motors and Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 \*\*\*831 (1959), by concluding that "both cases involved horizontal combinations." *Ante*, at 734. But this distinction plainly will [\*748] not suffice. In *General Motors*, a group of Chevrolet dealers conspired with General Motors to eliminate sales from the manufacturer to discounting dealers. We held that "elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Act," 384 U.S., at 145, and explained that "inherent [\*\*\*\*55] in the success of the combination in this case was a substantial restraint upon price competition -- a goal unlawful *per se* when sought to be effected by combination or conspiracy." *Id.*, at 147. Precisely the same goal was sought and effected in this case -- the elimination of price competition at the dealer level. Moreover, the method of achieving that goal was precisely the same in both cases -- the manufacturer's refusal to sell to discounting dealers. The difference between the two cases is not a difference between horizontal and vertical agreements -- in both cases the critical agreement was between market actors at the retail level on the one hand and the manufacturer level on the other. Rather, the difference is simply a difference in the number of conspirators. Hartwell's coercion of respondent in order to eliminate petitioner because of its same-level price competition is not different in kind from the Chevrolet dealers' coercion of General Motors in order to eliminate other, price-cutting dealers; the only difference between the two cases -- one dealer seeking a naked price-based restraint in today's case, many dealers seeking the same end in [\*\*\*\*56] *General Motors* -- is merely a difference in degree. Both boycotts lack any efficiency justification -- they are simply naked restraints on price competition, rather than integral, or ancillary, parts of the manufacturers' predetermined distribution policies.

#### IV

What is most troubling about the majority's opinion is its failure to attach any weight to the value of intrabrand competition. In *Continental T. V., Inc. v. GTE Sylvania Inc.*, [\*749] 433 U.S. 36 (1977), we correctly held that a demonstrable benefit to interbrand competition will outweigh the harm to intrabrand competition that is caused by the imposition of vertical nonprice restrictions on dealers. But we also expressly reaffirmed earlier cases in which the illegal conspiracy affected only intrabrand competition.<sup>13</sup> Not a word in the *Sylvania* opinion implied that the elimination of intrabrand competition could be justified as reasonable without any evidence of a purpose to improve interbrand competition.

[\*\*\*\*57] In the case before us today, the relevant economic market was the sale at retail in the Houston area of calculators manufactured by respondent.<sup>14</sup> There is no dispute [\*\*1533] that an [\*\*\*833] agreement [\*750] to fix

<sup>13</sup> See 433 U.S., at 58, n. 28 (citing *United States v. General Motors Corp.*, 384 U.S. 127 (1966), and *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972)).

<sup>14</sup> "It might be helpful to note at this point that although the majority mentions only the reduction of *interbrand* competition as a justification for a *per se* rule against vertical price restraints, see *ante*, at 725-726, our opinion in *Sylvania* was quite different. As we stated then:

"The market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition. Significantly, the Court in *Schwinn* did not distinguish among the challenged restrictions on the basis of their individual potential for intrabrand harm or interbrand benefit. Restrictions that completely eliminated intrabrand competition among Schwinn distributors were analyzed no differently from those that merely moderated intrabrand competition among retailers." 433 U.S., at 51-52 (footnotes omitted).

In the following pages, we pointed out that because vertical nonprice restrictions imposed by manufacturers may serve to advance interbrand competition, the restriction on intrabrand competition should be subject only to a rule of reason analysis. Along these same lines, we explained that "economists also have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products." *Id.*, at 56. Thus, although the majority neglects to mention it, fostering intrabrand competition has been recognized as an important goal of

prices in that market, either horizontally between petitioner and Hartwell or vertically between respondent and either or both of the two dealers, would violate the Sherman Act. The "quite plausible" assumption, see *ante*, at 729, that such an agreement might enable the retailers to provide better services to their customers would not have avoided the strict rule against price fixing that this Court has consistently enforced in the past.

[\*\*\*\*58] [\*751] Under petitioner's theory of the case, an agreement between respondent and Hartwell to terminate petitioner because of its price cutting was just as indefensible as any of those price-fixing agreements. At trial the jury found the existence of such an agreement to eliminate petitioner's price competition. Respondent had denied that any agreement [\*\*\*834] had been made and asked the jury to find that it had independently decided to terminate petitioner because of its poor sales performance,<sup>15</sup> but after hearing several days of testimony, the jury concluded that this defense was pretextual.

[\*\*\*\*59] Neither the Court of Appeals nor the majority questions the accuracy of the jury's resolution of the factual issues in this case. Nevertheless, the rule the majority fashions today is based largely on its concern that in other cases juries will be unable to tell the difference between truthful [\*\*1534] and pretextual defenses. Thus, it opines that "even a manufacturer that agrees with one dealer to terminate another for failure to provide contractually obligated services, exposes itself to the highly plausible claim that its real motivation was to terminate a price cutter." *Ante*, at 728. But such a "plausible" concern in a hypothetical case that is so different from this one should not be given greater weight than facts that can be established by hard evidence. If a dealer has, in fact, failed to provide contractually obligated services, and if the manufacturer has, in fact, terminated the dealer for that reason, both of those objective facts should be provable by admissible [\*752] evidence.<sup>16</sup> [\*\*\*\*61] Both in its disposition

antitrust law, and although a manufacturer's efficiency-enhancing vertical nonprice restraints may subject a reduction of intrabrand competition only to a rule of reason analysis, a similar reduction without the procompetitive "redeeming virtues" of manufacturer-imposed vertical nonprice restraints, *id., at 54*, causes nothing but economic harm. As one commentator has recently stated:

"Intrabrand competition can benefit the consumer, and it is therefore important to insure that a manufacturer's motive for a vertical restriction is not simply to acquiesce in his distributors' desires to limit competition among themselves. The Supreme Court has recognized that restrictions on intrabrand competition can only be tolerated because of the countervailing positive impact on interbrand competition." Piraino, The Case for Presuming the Legality of Quality Motivated Restrictions on Distribution, *63 Notre Dame L. Rev. 1, 17 (1988)* (footnotes omitted).

See also H. R. Rep. No. 100-421, pp. 23, 38 (1987) (accompanying bill H. R. 585, the Freedom from Vertical Price Fixing Act of 1987, passed by the House and currently pending before the Senate; criticizing the Fifth Circuit's decision in this case, and restating "plainly and unequivocally that *all forms* of resale price maintenance are illegal per se under the antitrust laws," including "where a conspiracy exists between a supplier and distributor to terminate or cut off supply to a second distributor because of the second distributor's pricing policies") (emphasis in original); Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act, 1986, Pub. L. 99-180, 99 Stat. 1169-1170 (congressional resolution that Department of Justice Vertical Restraints Guidelines "are inconsistent with established antitrust law, . . . in maintaining that such policy guidelines do not treat vertical price fixing when, in fact, some provisions of such policy guidelines suggest that certain price fixing conspiracies are legal if such conspiracies are 'limited' to restricting intrabrand competition; . . . in stating that vertical restraints that have an impact upon prices are subject to the per se rule of illegality only if there is an 'explicit agreement as to the specific prices'"); Report of Attorney General's National Committee to Study the Antitrust Laws 149-155 (1955) (criticizing laws that permit resale price maintenance as a "throttling of price competition in the process of distribution").

<sup>15</sup> The court instructed the jury:

"Sharp, on the other hand, contends that it terminated Business Electronics unilaterally, not as a result of any agreement or understanding with Hartwell, but because of Business Electronics' sales performance. If you find that Sharp did not terminate Business Electronics pursuant to an agreement or understanding with Hartwell to eliminate price cutting by Business Electronics, then you should answer 'no' to question number 1."

22 Record 1587.

See also nn. 18-19, *infra*.

of this case and in its attempt to justify a new approach to agreements to eliminate price competition, the majority exhibits little confidence in [\*\*\*\*60] the judicial process as a means of ascertaining the truth.<sup>17</sup>

[\*753] [\*\*\*835] The majority fails to consider that manufacturers such as respondent will only be held liable in the rare case in which the following can be proved: First, the terminated dealer must overcome the high hurdle of *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). A terminated dealer [\*\*\*62] must introduce "evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Id.*, at 764. Requiring judges to adhere to the strict test for agreement laid down in *Monsanto*, in their jury instructions or own findings of fact, goes a long way toward ensuring that many legitimate dealer termination decisions do not succumb improperly to antitrust liability.<sup>18</sup>

[\*\*\*63] [\*\*1535] Second, the terminated dealer must prove that the agreement was based on a purpose to terminate it because of its price cutting. Proof of motivation is another commonplace in antitrust litigation of which the majority appears apprehensive, but as we have explained or demonstrated many times, see, e. g., *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610-611 (1985); *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 243 (1980); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-226, n. 59

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<sup>16</sup> In *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430 (CA7 1986), cited ante, at 720, n. 1, Morrison, a wholesale distributor, sued Murray Biscuit, a producer of cookies and crackers, charging a conspiracy between Murray Biscuit and Feldman, a food broker, to suppress price competition between Feldman and Morrison. *Id.*, at 1431. But it was quite clear that Murray Biscuit "had assigned particular customers to particular middlemen, whether brokers [like Feldman] or warehouse distributors [like Morrison]." *Id.*, at 1435. Judge Posner's opinion explained:

"Suppose that after *Sylvania* was decided, a seller that had a price-fixing agreement (illegal per se) with its dealers adopted a lawful customer allocation agreement pursuant to which it terminated a dealer. That dealer could not sue for price fixing, even if the price-fixing agreement had never been rescinded, unless he could show that his breach of the customer allocation agreement was not the real reason for his termination; maybe the agreement was a mask behind which the illegal price fixing continued. The reason for Morrison's termination was that he tried to take away a customer who had been assigned to Feldman; there is no indication that the assignment was a mask for resale price maintenance. Since Feldman had the exclusive right to sell Murray Biscuit's products to the Certified account, Morrison had no business selling to Certified at any price." *Id.*, at 1439 (emphasis added).

Judge Posner thus made it clear that although Morrison had been terminated pursuant to a valid vertical nonprice restraint, a terminated dealer might prevail if it could prove that the nonprice agreement was "a mask behind which the illegal price fixing continued." *Ibid.*

<sup>17</sup> "When faced with conflicting evidence, the jury must determine whether the nonprice justifications for the termination advanced by the defendant are legitimate, or are mere pretext to disguise a per se illegal agreement with the nonterminated dealer to maintain resale prices. It is the Court's duty under *Monsanto* to decide whether sufficient evidence was presented for a jury to make that determination." *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323, 329 (CA8 1986), cited ante, at 720, n. 1.

See also L. Sullivan, Law of Antitrust 202 (1977) ("A shorthand method which may help to identify a restraint affecting price as naked is to examine the arguments which are being pressed in justification of the practice").

<sup>18</sup> Although at trial respondent had asked the jury to find that it had acted independently, see n. 15, *supra*, and accompanying text, respondent has not disputed, either in the Court of Appeals or here, the jury's finding of an agreement. (Respondent has, of course, contended that no agreement was reached requiring some level of resale price maintenance. As I have argued, though, such an agreement is not needed to invoke the *per se* rule in a case such as this.) Respondent did argue before the District Court for an instruction explaining that "it must be shown that the manufacturer agreed with the complaining dealer to terminate the existing dealer and that, in so agreeing, the manufacturer shared with the complaining dealer the same desire of eliminating price competition for the complaining dealer." 1 Record 151. Respondent later objected to the court's decision not to give this instruction, 1 Record 54, 22 Record 1599, but the court in fact had quite carefully explained to the jury that "what a preponderance . . . of the evidence in the case must show in order to establish the existence of the required combination, agreement, or understanding is that Sharp and Hartwell knowingly came to a common and mutual understanding to accomplish or to attempt to accomplish an unlawful purpose." *Id.*, at 1584-1585.

(1940); *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918); see also Piraino, The Case for Presuming the Legality of Quality Motivated Restrictions on Distribution, 63 *Notre Dame L. Rev.* 1, 4, 16-19 (1988), in antitrust, as in many other areas of the law, motivation matters and factfinders are able to distinguish bad from good intent.

Third, the manufacturer may rebut the evidence tending to prove that the sole purpose of the agreement was to eliminate a price cutter by offering evidence that it entered the agreement [\*\*\*\*64] for legitimate, nonprice-related reasons.

Although in this case the jury found a naked agreement to terminate a dealer because of its price [\*\*\*836] cutting, *ante*, at 721-722, the majority boldly characterizes the same agreement as "this nonprice vertical restriction." *Ante*, at 729. That characterization is surely an oxymoron when applied to the agreement the jury actually found. Nevertheless, the majority proceeds to justify it as "ancillary" to a "quite plausible purpose . . . to enable Hartwell to provide better services under the sales franchise agreement." *Ante*, at 729. There are two significant reasons why that justification is unacceptable.

First, it is not supported by the jury's verdict. Although it did not do so with precision, the District Court did instruct the jury that in order to hold respondent liable it had to find that the agreement's purpose was to eliminate petitioner because of its price cutting and that no valid vertical nonprice restriction existed to which the motivation to eliminate price competition at the dealership level was merely ancillary.<sup>19</sup>

[\*\*\*\*65] [\*755] [\*\*1536] Second, the "quite plausible purpose" the majority hypothesizes as salvation for the otherwise anticompetitive elimination of price competition -- "to enable Hartwell to provide better services under the sales franchise agreement," *ante*, at 729 -- is simply not the type of concern we sought to protect in *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). I have emphasized in this dissent the difference between restrictions imposed in pursuit of a manufacturer's structuring of its product distribution, and those imposed at the behest of retailers who care less about the general efficiency of a product's promotion than their own profit margins. *Sylvania* stressed the importance of the former, not the latter; we referred to the use that manufacturers can [\*756] make of vertical nonprice restraints, see *id.*, at 54-57, and nowhere did we discuss the benefits of permitting dealers to structure intrabrand competition at the retail level by coercing [\*\*\*837] manufacturers into essentially anticompetitive agreements. Thus, while Hartwell may indeed be able to provide better services under [\*\*\*\*66] the sales franchise agreement with petitioner out of the way, one would not have thought, until today, that the mere possibility of such a result -- at the expense of the elimination of price competition and absent the salutary overlay

<sup>19</sup> The Court instructed the jury:

"The Sherman Act is violated when a seller enters into an agreement or understanding with one of its dealers to terminate another dealer because of the other dealer's price cutting. Plaintiff contends that Sharp terminated Business Electronics in furtherance of Hartwell's desire to eliminate Business Electronics as a price-cutting rival."

"If you find that there was an agreement between Sharp and Hartwell to terminate Business Electronics because of Business Electronics' price cutting, you should answer 'yes' to question number 1."

"Sharp, on the other hand, contends that it terminated Business Electronics unilaterally, not as a result of any agreement or understanding with Hartwell, but because of Business Electronics' sales performance. If you find that Sharp did not terminate Business Electronics pursuant to an agreement or understanding with Hartwell to eliminate price cutting by Business Electronics, then you should answer 'no' to question number 1." 22 Record 1587.

Respondent had asked for an instruction requiring the jury to consider circumstantial evidence as proof of a motivation to eliminate price competition only if such evidence could not "equally be interpreted to show that Sharp terminated Business Electronics Corporation for other business reasons and not pursuant to any agreement with Mr. Hartwell to fix resale prices of calculators." 1 Record 148. Respondent objected to the failure to give this instruction, *id.*, at 54, and also objected, more specifically, to the instruction that was given on the ground that "it allows the jury to find against the defendant even if they do not believe that Sharp cared about [Business Electronics] price cutting or if they believe that Sharp had a dual motive in making the termination." 22 Record 1599. The instruction quoted above, though, makes it highly unlikely that the jury would have found for petitioner although finding respondent's motives to be mixed ones.

of a manufacturer's distribution decision with the entire product line in mind -- would be sufficient to legitimate an otherwise purely anticompetitive restraint. See n. 14, *supra*. In fact, given the majority's total reliance on "economic analysis," see *ante*, at 735, it is hard to understand why, if such a purpose were sufficient to avoid the application of a *per se* rule in this context, the same purpose should not also be sufficient to trump the *per se* rule in all other price-fixing cases that arguably permit cartel members to "provide better services."

If, however, we continue to accept the premise that competition in the relevant market is worthy of legal protection -- that we should not rely on competitive pressures exerted by sellers in other areas and purveyors of similar but not identical products -- and if we are faithful to the competitive philosophy that has animated our antitrust jurisprudence since Judge Taft's opinion [\*\*\*\*67] in *Addyston Pipe*, we can agree that the elimination of price competition will produce wider gross profit margins for retailers, but we may not assume that the retailer's self interest will result in a better marketplace for consumers.

"The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.' [Standard Oil Co. v. FTC, 340 U.S. 231, 248](#). The assumption that competition is the best [\*757] method of allocating resources in a free market recognizes that all elements of a bargain -- quality, service, safety, and durability -- and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad." [National Society of Professional Engineers v. United States, 435 U.S., at 695](#).

The "plausible purpose" posited by the majority as its sole [\*\*\*\*68] justification for this mischaracterized "nonprice vertical restriction" is inconsistent with the legislative judgment that underlies the Sherman Act itself. Under the facts as found by the jury in this case, the agreement before us is one whose "sole object is to restrain trade in order to avoid the competition" [\*\*1537] which it has always been the policy of the common law to foster." [United States v. Addyston Pipe & Steel Co., 85 F., at 283](#), aff'd, [175 U.S. 211 \(1899\)](#).

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In sum, this simply is not a case in which procompetitive vertical nonprice restraints have been imposed; in fact, it is not a case in which *any* procompetitive agreement [\*\*\*838] is at issue.<sup>20</sup> The sole purpose of the agreement between respondent [\*758] and Hartwell was to eliminate price competition at Hartwell's level. As Judge Bork has aptly explained:

"Since the naked boycott is a form of predatory behavior, there is little doubt that it should be a *per se* violation of the Sherman Act." Bork, *The Antitrust Paradox*, at 334.

[\*\*\*\*69] I respectfully dissent.

## References

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<sup>20</sup> Thus, the Courts of Appeals decisions cited by the majority as supporting its view, see *ante*, at 720, n. 1, are, in fact, consistent with the rule that a naked intent to eliminate price competition is *per se* invalid. Each of the opinions contains a discussion that distinguishes between, on the one hand, an agreement between manufacturer and dealer to eliminate a price-cutting competitor based solely on an intent to eliminate price competition, and, on the other hand, an agreement between manufacturer and dealer to eliminate a price-cutting competitor that is grounded not only in an antipathy to price competition, but also in a purpose to implement a procompetitive system of vertical nonprice restraints. See [McCabe's Furniture, Inc. v. La-Z-Boy Chair Co., 798 F.2d, at 329-330](#); [Morrison v. Murray Biscuit Co., 797 F.2d, at 1439-1440](#); [Westman Commission Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1223 \(CA10 1986\)](#). Moreover, none of these opinions proposes the rule that the majority sanctions today: that an agreement as to some level of resale price maintenance is necessary for invocation of the *per se* rule in these situations.

485 U.S. 717, \*758; 108 S. Ct. 1515, \*\*1537; 99 L. Ed. 2d 808, \*\*\*838; 1988 U.S. LEXIS 2033, \*\*\*\*69

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 30-32, 50, 74

12 Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade 48:81, 48:83, 48:101

12 Am Jur Legal Forms 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 178:64

43 Am Jur Proof of Facts 2d 577, Wrongful Termination of Dealership

24 Am Jur Trials 1, Defending Antitrust Lawsuits

15 USCS 1

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 9, 31

Index to Annotations, Dealers and Distributors; Price Fixing; Restraints of Trade and Monopolies

[\*\*\*\*70] Annotation References:

Supreme Court's views as to what constitutes per se illegal "price fixing" under the Sherman Act ([15 USCS 1 et seq.](#)). [64 L Ed 2d 997](#).

Propriety of preliminary injunctive relief in private antitrust actions involving dealership terminations. 79 ALR Fed 44.

Refusals to deal as violations of the federal antitrust laws. 41 ALR Fed 175.

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## Allied Tube & Conduit Corp. v. Indian Head

Supreme Court of the United States

February 24, 1988, Argued ; June 13, 1988, Decided

No. 87-157

**Reporter**

486 U.S. 492 \*; 108 S. Ct. 1931 \*\*; 100 L. Ed. 2d 497 \*\*\*; 1988 U.S. LEXIS 2629 \*\*\*\*; 56 U.S.L.W. 4539; 1988-1 Trade Cas. (CCH) P68,062

ALLIED TUBE & CONDUIT CORP. v. INDIAN HEAD, INC.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

**Disposition:** [817 F.2d 938](#), affirmed.

## **Core Terms**

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immunity, conduit, standard-setting, electrical, government action, antitrust liability, products, steel, anti trust law, anticompetitive, polyvinyl chloride, antitrust, state and local government, publicity campaign, organizations, codes, marketplace, private association, decisionmaking, associations, benefits, Sherman Act, railroads, boycott, genuine, private organization, legislative action, political activity, restraint of trade, economic interest

## **LexisNexis® Headnotes**

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

### [\*\*HN1\*\*](#) **Exemptions & Immunities, Noerr-Pennington Doctrine**

Concerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability under the doctrine established by Noerr. The scope of this protection depends, however, on the source, context, and nature of the anticompetitive restraint at issue. Where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint.

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

### [\*\*HN2\*\*](#) **Exemptions & Immunities, Noerr-Pennington Doctrine**

Where, independent of any government action, an anticompetitive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is "incidental" to a valid effort to influence governmental action. The validity of such efforts, and thus the applicability of Noerr immunity, varies with the context and nature of

the activity. A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods. But in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations.

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

### **HN3** Exemptions & Immunities, Noerr-Pennington Doctrine

In whatever forum, private action that is not genuinely aimed at procuring favorable government action is a mere sham that cannot be deemed a valid effort to influence government action.

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

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

### **HN4** Exemptions & Immunities, Noerr-Pennington Doctrine

Typically, private standard-setting associations include members having horizontal and vertical business relations. Undoubtedly members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm. Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny. When, however, private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant procompetitive advantages. It is this potential for procompetitive benefits that has led most lower courts to apply rule-of-reason analysis to private associations.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

### **HN5** Regulated Practices, Price Fixing & Restraints of Trade

Absent a showing to the contrary, a government acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf. The dividing line between restraints resulting from governmental action and those resulting from private action may not always be obvious. But where persons unaccountable to the public impose the restraint and without official authority, many of whom have personal financial interests in restraining competition, the U.S. Supreme Court has no difficulty concluding that the restraint has resulted from private action.

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

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

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

## **HN6** Exemptions & Immunities, Noerr-Pennington Doctrine

The Noerr doctrine does not immunize every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action.

## **Lawyers' Edition Display**

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### **Decision**

Antitrust exemption for efforts to influence government action held not applicable to attempt to influence fire protection association's promulgation of private electrical code routinely incorporated into law.

### **Summary**

A manufacturer of plastic electrical conduit sought to have the National Fire Protection Association (NFPA)--a private, voluntary association representing industry, labor, firefighters, and others--list such conduit as an acceptable alternative to steel conduit in the NFPA's triennially revised National Electrical Code (NEC), which code is routinely adopted into law by many state and local governments and is widely accepted by insurers, contractors, and others as identifying acceptable electrical products. Manufacturers of steel conduit and other interested parties agreed among themselves to recruit numerous individuals to join the NFPA, pay those individuals' expenses, and organize those individuals at the NFPA annual meeting as a bloc vote against the proposal to include plastic conduit in the 1981 NEC; and they were successful in defeating that proposal. The plastic conduit manufacturer then filed an action against the steel conduit interests in the United States District Court for the Southern District of New York, which action alleged that those interests had unreasonably restrained trade in the electrical conduit market in violation of 1 of the Sherman Act ([15 USCS 1](#)). The jury, determining that the interests had subverted the NFPA's consensus standard-making process even though they had not actually broken any NFPA rules, found the interests liable and awarded to the plaintiff manufacturer damages for profits which that manufacturer had lost as a result of the effect which the exclusion of plastic conduit from the 1981 NEC had in the marketplace of its own force, though not for any damages resulting from the adoption of the NEC by government entities. The District Court, however, set aside the jury's verdict on the ground that the interests' actions were subject to the Noerr-Pennington doctrine--which protects petitioning of the government from scrutiny under the Sherman Act--because (1) the NFPA was akin to a legislature, and (2) the interests had genuinely sought, through acceptable political methods, to influence the NFPA and thereby influence the government entities which adopt the NEC. The United States Court of Appeals for the Second Circuit, vacating the District Court's judgment and remanding with instructions to reinstate the jury's award, declined to extend the Noerr-Pennington doctrine to (1) the lobbying of private "quasi-legislative" bodies or (2) efforts to indirectly influence government action through such bodies ([817 F2d 938](#)).

On certiorari, the United States Supreme Court affirmed. In an opinion by Brennan, J., joined by Rehnquist, Ch. J., and Marshall, Blackmun, Stevens, Scalia, and Kennedy, JJ., it was held that the conduct of the steel conduit interests, despite its political impact, was not immune from federal antitrust liability under the Noerr doctrine, since (1) as to the immunity accorded those who merely urge the government to restrain trade, the NFPA--being (a) without official authority, (b) unaccountable to the public, and (c) composed in part of persons having economic incentives to restrain trade--could not be treated as a "quasi-legislative" body simply because legislatures routinely adopt the NEC; and (2) as to the immunity accorded to private restraints which are incidental to a valid effort to

influence governmental action, an economically interested party, exercising decisionmaking authority in formulating a product standard for a private association that comprises market participants, enjoys no Noerr immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.

White, J., joined by O'Connor, J., dissented, expressing the view that the Noerr doctrine protects participants in private organizations such as the NFPA that regularly propound and publish health and safety standards for a variety of products and industries and then present these standards to state and local governments for the purpose of having them enacted into law.

## Headnotes

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RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §29 > combination to influence government action -- formulation of private electrical code -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D] [LEdHN\[1E\]](#) [1E] [LEdHN\[1F\]](#) [1F]

The conduct of manufacturers of steel electrical conduit, and other interested parties, in attempting to influence a private fire protection association's promulgation of electrical systems product standards so as to prevent the recognition of plastic conduit as an acceptable alternative to steel conduit--by agreeing among themselves to recruit numerous individuals to join the association and vote as a bloc against a proposal to include plastic conduit in the standards--is not immune from federal antitrust liability under the doctrine of [\*Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc. \(1961\) 365 US 127, 5 L Ed 2d 464, 81 S Ct 523\*](#), which protects concerted efforts to restrain or monopolize trade by petitioning government officials, even though the association's standards are widely adopted into law by state and local governments; such conduct does not enjoy the immunity accorded under the Noerr doctrine to those who merely urge the government to restrain trade, since the association--being (1) without official authority, (2) unaccountable to the public, and (3) composed in part of persons having economic incentives to restrain trade--cannot be treated as a "quasi-legislative" body simply because legislatures routinely adopt its standards; nor does Noerr immunity apply on the theory that the exclusion of plastic conduit from the standards is incidental to a valid effort to influence government action by influencing a source from which many governments derive their laws, since the context and nature of the conduct at issue make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws, rather than the kind of political activity which the Noerr doctrine is designed to protect; where, as here, an economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants, that party enjoys no Noerr immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace. (White and O'Connor, JJ., dissented from this holding.)

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > petitioning government officials --

> Headnote:

[LEdHN\[2\]](#) [2]

Concerted efforts to restrain or monopolize trade by petitioning government officials are protected from federal antitrust liability, but the scope of this protection depends on the source, context, and nature of the anticompetitive restraint at issue.

486 U.S. 492, \*492; 108 S. Ct. 1931, \*\*1931; 100 L. Ed. 2d 497, \*\*\*497; 1988 U.S. LEXIS 2629, \*\*\*\*1

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > petitioning government -- public restraint --  
> Headnote:

[LEdHN\[3\]](#) [3]

Where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > petitioning government -- private restraint  
-- > Headnote:

[LEdHN\[4A\]](#) [4A] [LEdHN\[4B\]](#) [4B] [LEdHN\[4C\]](#) [4C] [LEdHN\[4D\]](#) [4D] [LEdHN\[4E\]](#) [4E]

Where an anticompetitive restraint results directly from private action, independent of any government action, that restraint cannot form the basis for federal antitrust liability if it is incidental to a valid effort to influence governmental action, but the mere fact that an anticompetitive activity is also genuinely intended to influence governmental action is not alone sufficient to render that activity immune from antitrust liability; the validity of efforts to influence government action, and thus the applicability of this immunity, varies with the context and nature of the activity, so that a publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even when the campaign employs unethical and deceptive methods, whereas in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations; private action that is not genuinely aimed at procuring favorable government action is a mere sham that cannot be deemed a valid effort to influence government action.

EVIDENCE §173 > presumption as to motive -- private parties -- government -- > Headnote:

[LEdHN\[5\]](#) [5]

It may be presumed, absent a showing to the contrary, that a government acts in the public interest; private parties, on the other hand, may be presumed to be acting primarily on their own behalf.

APPEAL §1662 > effect of decision on other grounds -- > Headnote:

[LEdHN\[6A\]](#) [6A] [LEdHN\[6B\]](#) [6B]

Given the United States Supreme Court's conclusion--in an action by a manufacturer of plastic electrical conduit who (1) alleges that parties interested in the marketing of steel electrical conduit violated 1 of the Sherman Act ([15 USCS 1](#)) by conspiring to improperly influence a private fire protection association to exclude plastic conduit from its electrical systems product standards, which standards are routinely adopted into law by many state and local governments, and (2) has obtained a jury verdict for damages based on the effect the exclusion had in the marketplace of its own force, as opposed to the effect of the standards' adoption into law--that the conduct of the steel conduit interests is not immune from federal antitrust liability under the rule relating to concerted efforts to restrain or monopolize trade by petitioning government officials, the Supreme Court need not decide whether, or to what extent, the efforts of the steel conduit interests to publicize the stigma which plastic conduit suffered by being excluded from the standards--which efforts may have exacerbated the independent market effect of the exclusion--alter the incidental status of the resulting anticompetitive harm.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > immunity for petitioning government -- sham exception -- > Headnote:

[LEdHN\[7A\]](#) [7A] [LEdHN\[7B\]](#) [7B]

With regard to the doctrine that concerted efforts to restrain or monopolize trade by petitioning government officials are immune from federal antitrust liability, the "sham" exception to that doctrine does not cover the activity of an antitrust defendant who genuinely seeks to achieve a governmental result but does so through improper means.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §29 > influencing industry standards -- compliance with rules -- > Headnote:

[LEdHN\[8\]](#) [8]

The validity, under the federal antitrust laws, of efforts by manufacturers of steel electrical conduit and other interested parties to influence a private fire protection association's promulgation of electrical systems product standards so as to prevent the recognition of plastic conduit as an acceptable alternative to steel conduit, is not established solely by the literal compliance of those parties with the rules of the association, since the hope of procompetitive benefits from the promulgation of such private standards depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members which have economic interests in restraining competition; an association cannot validate the anticompetitive activities of its members simply by adopting rules that fail to provide such safeguards.

## Syllabus

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The National Fire Protection Association -- a private organization that includes members representing industry, labor, academia, insurers, organized medicine, firefighters, and government -- sets and publishes product standards and codes related to fire protection. Its National Electrical Code (Code), which establishes requirements for the design and installation of electrical wiring systems, is routinely adopted into law by a substantial number of state and local governments, and is widely adopted as setting acceptable standards by private product-certification laboratories, insurance underwriters, and electrical inspectors, contractors, and distributors. Throughout the relevant period, the Code permitted the use of electrical conduit made of [\*\*\*\*2] steel. Respondent, a manufacturer of plastic conduit, initiated a proposal before the Association to extend Code approval to plastic conduit as well. The proposal was approved by one of the Association's professional panels, and thus could be adopted into the Code by a simple majority of the members attending the Association's 1980 annual meeting. Before the meeting was held, petitioner, the Nation's largest producer of steel conduit, members of the steel industry, other steel conduit manufacturers, and independent sales agents collectively agreed to exclude respondent's product from the 1981 Code by packing the annual meeting with new Association members whose only function was to vote against respondent's proposal. After the proposal was defeated at the meeting and an appeal to the Association's Board of Directors was denied, respondent brought suit in Federal District Court, alleging that petitioner and others had unreasonably restrained trade in the electrical conduit market in violation of [§ 1](#) of the Sherman Act. The jury found petitioner liable, but the court granted a judgment n.o.v. for petitioner, reasoning that it was entitled to antitrust immunity under the doctrine of [\*\*\*\*3] [Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523](#). The Court of Appeals reversed.

*Held:* Noerr antitrust immunity does not apply to petitioner. Pp. 499-510.

(a) The scope of *Noerr* protection depends on the source, context, and nature of the anticompetitive restraint at issue. Where a restraint is the result of valid governmental action, as opposed to private action, those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. In this case, the relevant context is the standard-setting process of a private association without official authority that includes members having horizontal and vertical business relations and economic incentives to restrain competition. Such an association cannot be treated as a "quasi-legislative" body simply because legislatures routinely adopt its Code, and thus petitioner does not enjoy the immunity afforded those who merely urge the government to restrain trade. Pp. 499-502.

(b) Nor does *Noerr* immunity apply to petitioner on the theory that the exclusion of plastic conduit from [\*\*\*\*4] the Code, and the effect that exclusion had of its own force in the marketplace, were incidental to a valid effort to influence governmental action. Although, because a large number of governments routinely adopt the Code into law, efforts to influence the Association's standard-setting process are arguably the most effective means of influencing legislation regulating electrical conduit, and although *Noerr* immunity is not limited to "direct" petitioning of government officials, the *Noerr* doctrine does not immunize every concerted activity that is genuinely intended to influence governmental action. There is no merit to the argument that, regardless of the Association's nonlegislative status, petitioner's efforts to influence the Association must be given the same wide berth accorded legislative lobbying or efforts to influence legislative action in the political arena. Pp. 502-504.

(c) Unlike the publicity campaign to influence legislation in *Noerr*, petitioner's activity did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but took place within the confines of a private standard-setting process. The validity of petitioner's [\*\*\*\*5] efforts to influence the Code is not established, without more, by petitioner's literal compliance with the Association's rules, for the hope of the Code's procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition. An association cannot validate the anticompetitive activities of its members simply by adopting rules that fail to provide such safeguards. At least where, as here, an economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace. Pp. 505-510.

**Counsel:** Marvin E. Frankel argued the cause for petitioner. With him on the briefs were Robert M. Heller, Arthur B. Kramer, and Debora K. Grobman.

Fredric W. Yerman argued the cause for respondent. With him on the brief were Michael Malina, Randolph S. Sherman, and Richard A. De Sevo. \*

\* Briefs of amici curiae urging reversal were filed for the State of Illinois by Neil F. Hartigan, Attorney General, and Robert E. Davy, Jr., Assistant Attorney General; and for the Western Fire Chiefs Association et al. by William J. Meeske and Alexander D. Thomson.

Briefs of amici curiae urging affirmance were filed for the United States et al. by Solicitor General Fried, Assistant Attorney General Rule, Deputy Solicitor General Cohen, Deputy Assistant Attorney General Starling, Paul J. Larkin, Jr., Robert B. Nicholson, John J. Powers III, Marion L. Jetton, Robert D. Paul, and Ernest J. Isenstadt; and for the State of Alaska et al. by Robert Abrams, Attorney General of New York, O. Peter Sherwood, Solicitor General, and Lloyd E. Constantine, Susan Beth Farmer, Elizabeth M. O'Neill, and George W. Sampson, Assistant Attorneys General, Grace Berg Schable, Attorney General of Alaska, Richard D. Monkmon, Assistant Attorney General, Robert K. Corbin, Attorney General of Arizona, John Steven Clark, Attorney General of Arkansas, Jeffrey A. Bell, Deputy Attorney General, John Van de Kamp, Attorney General of California, Andrea Ordin, Chief Assistant Attorney General, Thomas P. Dove, Deputy Attorney General, Duane Woodard, Attorney General of Colorado, Thomas P. McMahon, First Assistant Attorney General, Joseph I. Lieberman, Attorney General of Connecticut, Robert M. Langer, Assistant Attorney General, Warren Price III, Attorney General of Hawaii, Robert A. Marks, Supervising Deputy Attorney General, Thomas J. Miller, Attorney General of Iowa, John Perkins, Deputy Attorney General, James E. Tierney, Attorney General of Maine, Stephen L. Wessler, Assistant Attorney General, J. Joseph Curran, Jr., Attorney General of Maryland, Michael F. Brockmeyer, Assistant Attorney General, Frank J. Kelley, Attorney General of Michigan, Louis J. Caruso, Solicitor General, Robert C. Ard, Jr., Assistant Attorney General, Hubert H. Humphrey III, Attorney General of Minnesota, Cary Edwards, Attorney General of New Jersey, Laurel A. Price, Deputy Attorney General, Lacy H. Thornburg, Attorney General of

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**Judges:** BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and MARSHALL, BLACKMUN, STEVENS, SCALIA, and KENNEDY, JJ., joined. WHITE, J., filed a dissenting opinion, in which O'CONNOR, J., joined, post, p. 511.

**Opinion by:** BRENNAN

## Opinion

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[\*495] [\*502] [\*\*1934] JUSTICE BRENNAN delivered the opinion of the Court.

[LEdHN\[1A\]](#) [1A]Petitioner contends that its efforts to affect the product standard-setting process of a private association are immune from antitrust liability under the *Noerr* doctrine primarily because the association's standards are widely adopted into law by state and local governments. [Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 \(1961\)](#) (*Noerr*). The United States Court of Appeals for the Second Circuit held that *Noerr* immunity did not apply. We affirm.

I

The National Fire Protection Association (Association) is a private, voluntary organization with more than 31,500 individual and group members representing industry, labor, academia, insurers, organized medicine, firefighters, [\*\*\*\*7] and government. The Association, among other things, publishes product standards and codes related to fire protection through a process known as "consensus standard making." One of the codes it publishes is the National Electrical Code (Code), which establishes product and performance requirements for the design and installation of electrical wiring systems. Revised every three years, the Code is the most influential electrical code in the nation. A substantial number of state and local governments routinely adopt the Code into law with little or no change; private certification laboratories, such as Underwriters Laboratories, normally will not list and label [\*496] an electrical product that does not meet Code standards; many underwriters will refuse to insure structures that are not built in conformity with the Code; and many electrical inspectors, contractors, and distributors will not use a product that falls outside the Code.

[\*\*1935] Among the electrical products covered by the Code is electrical conduit, the hollow tubing used as a raceway to carry electrical wires through the walls and floors of buildings. Throughout the relevant period, the Code permitted using [\*\*\*\*8] electrical conduit made of steel, and almost all conduit sold was in fact steel conduit. Starting in 1980, respondent began to offer plastic conduit made of polyvinyl chloride. Respondent claims its plastic conduit offers significant competitive advantages over steel conduit, including pliability, lower installed cost, and lower susceptibility to short circuiting. In 1980, however, there was also a scientific basis for concern that, during fires in high-rise buildings, polyvinyl chloride conduit might burn and emit toxic fumes.

Respondent initiated a proposal to include polyvinyl chloride conduit as an approved type of electrical conduit in the 1981 edition of the Code. Following approval by one of the Association's professional panels, this proposal was scheduled for consideration at the 1980 annual meeting, where it could be adopted or [\*\*\*503] rejected by a

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North Carolina, Richard H. Carlton, Assistant Attorney General, Anthony J. Celebrezze, Jr., Attorney General of Ohio, Dave Frohnmayer, Attorney General of Oregon, LeRoy S. Zimmerman, Attorney General of Pennsylvania, Eugene F. Wayne, Chief Deputy Attorney General, James E. O'Neil, Attorney General of Rhode Island, Roger A. Tellinghuisen, Attorney General of South Dakota, Jim Mattox, Attorney General of Texas, Mary F. Keller, Executive Assistant Attorney General, John J. White, Assistant Attorney General, David L. Wilkinson, Attorney General of Utah, Kenneth O. Eikenberry, Attorney General of Washington, John R. Ellis, Deputy Attorney General, Tina Kondo, Assistant Attorney General, Charles G. Brown, Attorney General of West Virginia, Mark D. Kindt, Deputy Attorney General, Donald J. Hanaway, Attorney General of Wisconsin, and Kevin J. O'Connor, Assistant Attorney General.

simple majority of the members present. Alarmed that, if approved, respondent's product might pose a competitive threat to steel conduit, petitioner, the Nation's largest producer of steel conduit, met to plan strategy with, among others, members of the steel industry, other steel conduit manufacturers, and its independent [\*\*\*\*9] sales agents. They collectively agreed to exclude respondent's product from the 1981 Code by packing the up-coming annual meeting with new Association members whose only function would be to vote against the polyvinyl chloride proposal.

Combined, the steel interests recruited 230 persons to join the Association and to attend the annual meeting to [\*497] vote against the proposal. Petitioner alone recruited 155 persons -- including employees, executives, sales agents, the agents' employees, employees from two divisions that did not sell electrical products, and the wife of a national sales director. Petitioner and the other steel interests also paid over \$ 100,000 for the membership, registration, and attendance expenses of these voters. At the annual meeting, the steel group voters were instructed where to sit and how and when to vote by group leaders who used walkie-talkies and hand signals to facilitate communication. Few of the steel group voters had any of the technical documentation necessary to follow the meeting. None of them spoke at the meeting to give their reasons for opposing the proposal to approve polyvinyl chloride conduit. Nonetheless, with their solid vote in [\*\*\*\*10] opposition, the proposal was rejected and returned to committee by a vote of 394 to 390. Respondent appealed the membership's vote to the Association's Board of Directors, but the Board denied the appeal on the ground that, although the Association's rules had been circumvented, they had not been violated.<sup>1</sup>

In October 1981, respondent brought this suit in Federal District Court, alleging that petitioner and others had unreasonably restrained trade in the electrical conduit market in violation of § 1 of the Sherman Act. 26 Stat. 209, 15 U.S. C. § 1. A bifurcated jury trial began in March 1985. Petitioner conceded that it had conspired with the other [\*\*\*\*11] steel interests to exclude respondent's product from the Code and that it had a pecuniary interest to do so. The jury, instructed under the rule of reason that respondent carried the burden of showing that the anticompetitive effects of petitioner's actions outweighed any procompetitive benefits of standard [\*498] setting, found petitioner liable. In answers to special interrogatories, the jury found that petitioner did not violate any rules of the Association and acted, at least in part, based on a genuine belief that plastic conduit was unsafe, but that petitioner nonetheless [\*\*1936] did "subvert" the consensus standardmaking process of the Association. App. 23-24. The jury also made special findings that petitioner's actions had an adverse impact on competition, were not the least restrictive means of expressing petitioner's opposition to the use of polyvinyl [\*\*\*504] chloride conduit in the marketplace, and unreasonably restrained trade in violation of the antitrust laws. The jury then awarded respondent damages, to be trebled, of \$ 3.8 million for lost profits resulting from the effect that excluding polyvinyl chloride conduit from the 1981 Code had of its own force [\*\*\*\*12] in the marketplace. No damages were awarded for injuries stemming from the adoption of the 1981 Code by governmental entities.<sup>2</sup>

[\*\*\*\*13] The District Court then granted a judgment n.o.v. for petitioner, reasoning that *Noerr* immunity applied because the Association was "akin to a legislature" and because petitioner, "by the use of methods consistent with acceptable standards of political action, genuinely intended to influence the [Association] with respect to the National Electrical Code, and to thereby influence the various state and local legislative bodies which adopt the [Code]." App. to Pet. for [\*499] Cert. 28a, 30a. The Court of Appeals reversed, rejecting both the argument that

<sup>1</sup> Respondent also sought a tentative interim amendment to the Code, but that was denied on the ground that there was not sufficient exigency to merit an interim amendment. The Association subsequently approved use of polyvinyl chloride conduit for buildings of less than three stories in the 1984 Code, and for all buildings in the 1987 Code.

<sup>2</sup> Although the District Court was of the view that at trial respondent relied solely on the theory that its injury "flowed from legislative action," App. to Pet. for Cert. 31a, the Court of Appeals determined that respondent was awarded damages *only* on the theory "that the stigma of not obtaining [Code] approval of its products and [petitioner's] 'marketing' of that stigma caused independent marketplace harm to [respondent] in those jurisdictions *permitting* use of [polyvinyl chloride] conduit, as well as those which later adopted the 1984 [Code], which permitted use of [polyvinyl chloride] conduit in buildings less than three stories high. [Respondent] did *not* seek redress for any injury arising from the adoption of the [Code] by the various governments." 817 F.2d 938, 941, n. 3 (1987) (emphasis added). We decide the case as it was framed by the Court of Appeals.

the Association should be treated as a "quasi-legislative" body because legislatures routinely adopt the Code and the argument that efforts to influence the Code were immune under *Noerr* as indirect attempts to influence state and local governments. [817 F.2d 938 \(1987\)](#). We granted certiorari to address important issues regarding the application of *Noerr* immunity to private standard-setting associations.<sup>3</sup> [484 U.S. 814 \(1987\)](#).

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[LEdHN\[2\]](#) [↑] [2][LEdHN\[3\]](#) [↑] [3][LEdHN\[4A\]](#) [↑] [4A][HN1](#) [↑] Concerted efforts to restrain or monopolize trade by petitioning government officials are protected from antitrust liability under the doctrine established by *Noerr*; [Mine Workers v. Pennington](#), [381 U.S. 657, 669-672, 14 L. Ed. 2d 626, 85 S. Ct. 1585 \(1965\)](#); and [California Motor Transport Co. v. Trucking Unlimited](#), [404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 \(1972\)](#). The scope of this protection depends, however, on the source, context, and nature of the anticompetitive restraint at issue. "Where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action," those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. [Noerr](#), [365 U.S. at 136](#); see also [Pennington, supra, at 671](#). In addition, [HN2](#) [↑] where, independent of any government action, the anticompetitive restraint [\*\*\*\*15] results directly from [\*\*\*505] private action, the restraint cannot form the basis for antitrust liability if it is "incidental" to a valid effort to influence governmental action. [Noerr, supra, at 143](#). The validity of such efforts, and thus the applicability of *Noerr* immunity, varies with the context and nature of the activity. A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity even [\*\*1937] when the campaign employs unethical [\*500] and deceptive methods. [Noerr, supra, at 140-141](#). But in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations.<sup>4</sup> [California Motor Transport, supra, at 512-513](#).

[\*\*\*\*16] In this case, the restraint of trade on which liability was predicated was the Association's exclusion of respondent's product from the Code, and no damages were imposed for the incorporation of that Code by any government. The relevant context is thus the standard-setting process of a private association. [HN4](#) [↑] Typically, private standard-setting associations, like the Association in this case, include members having horizontal and vertical business relations. See generally 7 P. Areeda, [Antitrust Law](#) P1477, p. 343 (1986) (trade and standard-setting associations routinely treated as continuing conspiracies of their members). There is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm.<sup>5</sup> [\*\*\*\*18] See [American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.](#), [456 U.S. 556, 571, 72 L. Ed. 2d 330, 102 S. Ct. 1935 \(1982\)](#). Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have [\*\*\*\*17] traditionally been objects of antitrust scrutiny. See, e. g., *ibid.*; [Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.](#), [364 U.S. 656, 5 L. Ed. 2d 358, 81 S. Ct. 365 \(1961\)](#) (*per curiam*). See also [FTC v. Indiana Federation of Dentists](#), [I\\*501 476 U.S. 447 \(1986\)](#). When, however, private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by

<sup>3</sup> We also granted certiorari on the issue whether, if not immune under *Noerr*, petitioner's conduct violated the Sherman Act, but we now vacate our grant of that issue as improvident.

<sup>4</sup> [LEdHN\[4B\]](#) [↑] [4B]

Of course, [HN3](#) [↑] in whatever forum, private action that is not genuinely aimed at procuring favorable government action is a mere sham that cannot be deemed a valid effort to influence government action. [Noerr, 365 U.S. at 144](#); [California Motor Transport, 404 U.S. at 511](#).

<sup>5</sup> "Product standardization might impair competition in several ways. . . . [It] might deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing by easing rivals' ability to monitor each other's prices." 7 P. Areeda, [Antitrust Law](#) P1503, p. 373 (1986).

486 U.S. 492, \*501; 108 S. Ct. 1931, \*\*1937; 100 L. Ed. 2d 497, \*\*\*505; 1988 U.S. LEXIS 2629, \*\*\*\*17

members with economic interests in stifling product competition, cf. *Hydrolevel, supra, at 570-573* (noting absence of "meaningful safeguards"), those private standards can have significant procompetitive advantages. It is this potential for procompetitive benefits that has led most lower courts to apply rule-of-reason [\*\*\*506] analysis to product standard-setting by private associations.<sup>6</sup>

[LEdHN\[1B\]](#)[] [1B][LEdHN\[5\]](#)[] [5]Given this context, petitioner does not enjoy the immunity accorded those who merely urge the government to restrain trade. We agree with the Court of Appeals that the Association cannot be treated as a "quasi-legislative" body simply because legislatures routinely adopt the Code the Association publishes. *817 F.2d, at 943-944*. Whatever *de facto* authority [\*\*\*19] the Association enjoys, no official authority has been conferred on it by any government, and the decisionmaking body of the Association is composed, at least in part, of persons with economic incentives to restrain trade. See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707-708, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962). See also *id.*, at 706-707; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791-792, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975). "We may presume, [HN5](#)[] absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." *Hallie v. Eau Claire*, 471 U.S. 34, 45, 85 L. Ed. 2d 24, 105 S. Ct. 1713 (1985). The dividing line between restraints resulting from governmental action and those resulting from private action [\*502] may not always be obvious.<sup>7</sup> But where, as here, the restraint is imposed by persons unaccountable to the public and without official authority, many of whom have personal financial interests in restraining competition, we have no difficulty [\*\*\*20] concluding that the restraint has resulted from private action.

[\*\*\*21] [LEdHN\[1C\]](#)[] [1C][LEdHN\[6A\]](#)[] [6A]Noerr immunity might still apply, however, if, as petitioner argues, the exclusion of polyvinyl chloride conduit from the Code, and the effect that exclusion had of its own force in the marketplace, were incidental to a valid effort to influence governmental action. Petitioner notes that the lion's share of the anticompetitive effect in this case came from the predictable adoption of the Code into law by a large number of state and local governments. See *817 F.2d at 939, n. 1*.Indeed, petitioner argues that, because state and local governments rely so heavily on the Code and lack the resources or technical expertise to second-guess it, efforts to influence the Association's standard-setting process are the most effective means [\*\*\*507] of influencing legislation regulating electrical conduit. This claim to Noerr immunity has some force. The effort to influence governmental action in this case certainly cannot be characterized as a sham given the actual adoption of the 1981 Code into a number of statutes [\*\*\*22] and local ordinances. Nor can we quarrel with petitioner's contention that, given the widespread adoption of the Code into [\*503] law, any effect the 1981 Code had in the marketplace of its own force was, in the main, incidental to petitioner's genuine effort to influence governmental action.<sup>8</sup> And, as

<sup>6</sup>See 2 J. von Kalinowski, Antitrust Laws and Trade Regulation §§ 6I.01[3], 6I.03, 6I.04, pp. 6I-6 to 6I-7, 6I-18 to 6I-29 (1981) (collecting cases). Concerted efforts to enforce (rather than just agree upon) private product standards face more rigorous antitrust scrutiny. See *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659-660, 5 L. Ed. 2d 358, 81 S. Ct. 365 (1961) (*per curiam*). See also *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 (1941).

<sup>7</sup>See, e. g., *California Motor Transport, supra, at 513* (stating in dicta that "conspiracy with a licensing authority to eliminate a competitor" or "bribery of a public purchasing agent" may violate the antitrust laws); *Mine Workers v. Pennington*, 381 U.S. 657, 671, 14 L. Ed. 2d 626, 85 S. Ct. 1585, and *n. 4* (1965) (holding that immunity applied but noting that the trade restraint at issue "was the act of a public official who is not claimed to be a co-conspirator" and contrasting *Continental Ore*); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707-708, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962); 1 P. Areeda & D. Turner, *Antitrust Law* P206 (1978) (discussing the extent to which Noerr immunity should apply to commercial transactions involving the government). See also *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791-792, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975); *Continental Ore, supra, at 706-707*.

petitioner persuasively argues, the claim of *Noerr* immunity cannot be dismissed on the ground that the conduct at issue involved no "direct" petitioning of government officials, for *Noerr* itself immunized a form of "indirect" petitioning. See *Noerr* (immunizing a publicity campaign directed at the general public on the ground that it was part of an effort to influence legislative and executive action).

[\*\*\*\*23] [LEdHN\[4C\]](#)<sup>8</sup> [4C]Nonetheless, the validity of petitioner's actions remains an issue. [HN6](#)<sup>8</sup> We cannot agree with petitioner's absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. [\*\*1939] If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. But see [Georgia v. Pennsylvania R. Co., 324 U.S. 439, 456-463, 89 L. Ed. 1051, 65 S. Ct. 716 \(1945\)](#). Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. But see [Georgia v. Evans, 316 U.S. 159, 86 L. Ed. 1346, 62 S. Ct. 972 \(1942\)](#). Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry [\*\*\*\*24] and spur legislative action. Immunity might even be [\*504] claimed for anticompetitive mergers on the theory that they give the merging corporations added political clout. Nor is it necessarily dispositive that packing the Association's meeting may have been the most effective means of securing government action, for one could imagine situations where the most effective means of influencing government officials is bribery, and we have never suggested that that kind of attempt to influence the government merits protection. We thus conclude that the *Noerr* immunity of anticompetitive activity intended to influence the government depends not only on its impact, but also on the context and nature of the activity.

Here petitioner's actions took [\*\*\*508] place within the context of the standard-setting process of a private association. Having concluded that the Association is not a "quasi-legislative" body, we reject petitioner's argument that any efforts to influence the Association must be treated as efforts to influence a "quasi-legislature" and given the same wide berth accorded legislative lobbying. That rounding up supporters is an acceptable and constitutionally protected [\*\*\*\*25] method of influencing elections does not mean that rounding up economically interested persons to set private standards must also be protected. Nor do we agree with petitioner's contention that, regardless of the Association's nonlegislative status, the effort to influence the Code should receive the same wide latitude given ethically dubious efforts to influence legislative action in the political arena, see [Noerr, 365 U.S. at 140-141](#), simply because the ultimate aim of the effort to influence the private standard-setting process was (principally) legislative action. The ultimate aim is not dispositive. A misrepresentation to a court would not necessarily be entitled to the same antitrust immunity allowed deceptive practices in the political arena simply because the odds were very good that the court's decision would be codified -- nor for that matter would misrepresentations made under oath at a legislative committee hearing in the hopes of spurring legislative action.

[\*505] [LEdHN\[1D\]](#)<sup>8</sup> [1D]What distinguishes this case from *Noerr* and its progeny is that the context and nature of petitioner's [\*\*\*\*26] activity make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves. True, in *Noerr* we immunized conduct that could be characterized as a conspiracy among railroads to destroy business relations between truckers and their customers. [Noerr, supra, at 142](#). But we noted there:

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<sup>8</sup> [LEdHN\[6B\]](#)<sup>8</sup> [6B]

The effect, independent of government action, that the 1981 Code had in the marketplace may to some extent have been exacerbated by petitioner's efforts to "market" the stigma respondent's product suffered by being excluded from the Code. See 17 F.2d at 941, n. 3. Given our disposition *infra*, we need not decide whether, or to what extent, these "marketing" efforts alter the incidental status of the resulting anticompetitive harm. See generally [Noerr, 365 U.S. at 142](#) (noting that in that case there were. "no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers").

"There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers. Moreover, all the evidence in the record, both oral and documentary, deals with the railroads' efforts to influence the passage and enforcement of laws. Circulars, speeches, newspaper articles, editorials, magazine articles, memoranda and all other documents discuss in one way or another the railroads' charges that heavy trucks injure the roads, violate the laws and create traffic hazards, and urge that truckers should be forced [\*\*1940] to pay a fair share of the costs of rebuilding the roads, that they should be compelled to obey the laws, and that limits should be placed upon the weight of the loads they are permitted to carry." [365 U.S. at 142-143.](#)

In light of those findings, [\*\*\*27] we characterized the railroads' activity as a classic "attempt . . . to influence legislation by a campaign of publicity," an "inevitable" and "incidental" effect of which was "the infliction of some direct injury upon the interests of the party against whom the campaign is directed." [Id., at 143.](#) The essential character of such a publicity campaign was, we concluded, political, and could not be segregated from the activity's impact on business. Rather, the plaintiff's cause of action simply embraced the inherent possibility in such political fights "that [\*\*\*509] one group or the other will get hurt by the arguments that are made." [Id., at 144.](#) As a political activity, special factors counseled against regulating the publicity campaign under the antitrust laws:

[\*506] "Insofar as [the Sherman] Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate [\*\*\*28] for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical." [Id., at 140-141](#) (footnote omitted).

In *Noerr*, then, the political context and nature of the activity precluded inquiry into its antitrust validity.<sup>9</sup>

[\*\*\*29] [LEdHN\[7A\]\[↑\]](#) [7A] Here the context and nature of the activity do not counsel against inquiry into its validity. Unlike the publicity campaign in *Noerr*, the activity at issue here did not take place in the open political arena, where partisanship is the hallmark of decisionmaking, but within the confines of a private standard-setting process. The validity of conduct within that process has long been defined and circumscribed by the antitrust laws without regard to whether the private standards are likely to be adopted into law. See [supra, at 500](#). Indeed, because private standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws only on the [\*507] understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits, see *ibid.*, the standards of conduct in this context are, at least in some respects, more rigorous than the standards of conduct prevailing in the partisan political arena or in the adversarial process of adjudication. The activity at issue here thus cannot, as in *Noerr*, be characterized [\*\*\*30] as an activity that has traditionally been regulated with extreme caution, see [Noerr, 365 U.S. at 141](#), or as an activity that "bear[s] little if any resemblance to the combinations normally held violative of the Sherman Act," [id., at 136](#). And petitioner did not confine itself to efforts to persuade an independent decisionmaker, cf. [id., at 138, 139](#) (describing the immunized [\*\*\*510] conduct as "mere solicitation"); rather, it organized and orchestrated the actual exercise of the Association's decisionmaking authority in setting a standard. [\*\*1941] Nor can the setting of the Association's Code be characterized as merely an exercise of the power of persuasion, for it in part involves the exercise of market power. The Association's members, after all, include consumers, distributors, and manufacturers of electrical conduit, and any agreement to exclude polyvinyl chloride conduit from the Code is in part an implicit agreement not to trade in that type of electrical conduit. Cf. [id., at 136](#). Although one could reason backwards from

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<sup>9</sup> Similarly in *California Motor Transport* any antitrust review of the validity of the activity at issue was limited and structured by the fact that there the antitrust defendants were "us[ing] the channels and procedures of state and federal agencies and courts." [404 U.S. at 511](#); see also [id., at 512-513](#).

the legislative impact of the Code to the conclusion that the conduct at [\*\*\*\*31] issue here is "political," we think that, given the context and nature of the conduct, it can more aptly be characterized as commercial activity with a political impact. Just as the antitrust laws should not regulate political activities "simply because those activities have a commercial impact," *id.*, at 141, so the antitrust laws should not necessarily immunize what are in essence commercial activities simply because they have a political impact.<sup>10</sup>

[\*\*\*\*32]

[\*508] [LEdHN\[4D\]](#) [4D] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 73 L. Ed. 2d 1215, 102 S. Ct. 3409 (1982), is not to the contrary. In that case we held that the [First Amendment](#) protected the nonviolent elements of a boycott of white merchants organized by the National Association for the Advancement of Colored People and designed to make white government and business leaders comply with a list of demands for equality and racial justice. Although the boycotters intended to inflict economic injury on the merchants, the boycott was not motivated by any desire to lessen competition or to reap economic benefits but by the aim of vindicating rights of equality and freedom lying at the heart of the [\*\*\*511] Constitution, and the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market. *Id.*, at 914-915. Here, in contrast, [\*509] petitioner was at least partially motivated by the desire to lessen competition, and, because of petitioner's line of business, stood to reap substantial economic benefits [\*\*\*33] from making it difficult for respondent to compete.<sup>11</sup>

[LEdHN\[1E\]](#) [1E] [LEdHN\[8\]](#) [8] [\*\*\*\*34] Thus in this case the context and nature of petitioner's efforts to influence the Code [\*\*1942] persuade us that the validity of those efforts must, despite their political impact, be evaluated under the standards of conduct set forth by the antitrust laws that govern the private standard-setting process. The antitrust validity of these efforts is not established, without more, by petitioner's literal compliance with the rules of the Association, for the hope of procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition. An association cannot validate the anticompetitive activities of its members simply by

<sup>10</sup> [LEdHN\[7B\]](#) [7B]

It is admittedly difficult to draw the precise lines separating anticompetitive political activity that is immunized despite its commercial impact from anticompetitive commercial activity that is unprotected despite its political impact, and this is itself a case close to the line. For that reason we caution that our decision today depends on the context and nature of the activity. Although criticizing the uncertainty of such a particularized inquiry, *post*, at 513, the dissent does not dispute that the types of activity we describe *supra*, at 503-504, could not be immune under *Noerr* and fails to offer an intelligible alternative for distinguishing those nonimmune activities from the activity at issue in this case. Rather, the dissent states without elaboration that the sham exception "is enough to guard against flagrant abuse," *post*, at 516, apparently embracing the conclusion of the United States Court of Appeals for the Ninth Circuit that the sham exception covers the activity of a defendant who "genuinely seeks to achieve his governmental result, but does so *through improper means*." *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 827 F.2d 458, 465, n. 5 (1987) (emphasis in original). Such a use of the word "sham" distorts its meaning and bears little relation to the sham exception *Noerr* described to cover activity that was not genuinely intended to influence governmental action. [365 U.S. at 144](#). See also P. Areeda & H. Hovenkamp, [Antitrust Law](#) P203.1a, pp. 13-14 (Supp. 1987). More importantly, the Ninth Circuit's approach renders "sham" no more than a label courts could apply to activity they deem unworthy of antitrust immunity (probably based on unarticulated consideration of the nature and context of the activity), thus providing a certain superficial certainty but no real "intelligible guidance" to courts or litigants. *Post*, at 513. Indeed, the Ninth Circuit concluded that the very activity the dissent deems protected was an unprotected "sham." [827 F.2d at 465](#).

<sup>11</sup> [LEdHN\[4E\]](#) [4E]

Although the absence of such anticompetitive motives and incentives is relevant to determining whether petitioner's restraint of trade is protected under *Claiborne Hardware*, we do not suggest that the absence of anticompetitive purpose is necessary for *Noerr* immunity. As the dissent points out, in *Noerr* itself the major purpose of the activity at issue was anticompetitive. *Post*, at 512-513. Our statement that the "ultimate aim" of petitioner "is not dispositive," *supra*, at 504, stands only for the proposition that, at least outside the political context, the mere fact that an anticompetitive activity is also intended to influence governmental action is not alone *sufficient* to render that activity immune from antitrust liability.

adopting rules that fail to provide such safeguards.<sup>12</sup> The issue of immunity in this case thus collapses into the issue of antitrust liability. Although we do not here set forth the rules of antitrust liability governing the private standard-setting process, we hold that at least where, as here, an economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market [\*\*\*\*35] participants, that [\*510] party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.

LEDHN[1F] [1F]This conclusion does not deprive state and local governments of input and information from interested individuals or organizations or leave petitioner without ample means to petition those governments. Cf. *Noerr*, 365 U.S. at 137-138. See also *California Motor Transport*, 404 U.S. at 510. Petitioner, and others concerned about the safety or competitive threat of polyvinyl chloride conduit, can, with full antitrust immunity, engage in concerted efforts to influence those governments through direct lobbying, publicity campaigns, [\*\*\*\*36] and other traditional avenues of political expression. To the extent state and local governments are more difficult to persuade through these other avenues, that no doubt reflects their preference for and confidence [\*\*\*512] in the nonpartisan consensus process that petitioner has undermined. Petitioner remains free to take advantage of the forum provided by the standard-setting process by presenting and vigorously arguing accurate scientific evidence before a nonpartisan private standard-setting body.<sup>13</sup> And petitioner can avoid the strictures of the private standard-setting process by attempting to influence legislatures through other forums. [\*511] What petitioner may not do (without exposing itself to possible antitrust liability for direct injuries) is bias the process by, as in this case, stacking the private standard-setting body with decisionmakers sharing their economic interest in restraining competition.

[\*\*\*\*37] The judgment of the Court of Appeals is

*Affirmed.*

**Dissent by:** WHITE

## Dissent

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JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961), held that the Sherman Act should not be construed [\*\*1943] to forbid joint efforts by railway companies seeking legislation that would disadvantage the trucking industry. These efforts for the most part involved a public relations campaign rather than direct lobbying of the lawmakers and were held not subject to antitrust challenge because of the fundamental importance of maintaining the free flow of information to the government and the right of the people to seek legislative relief, directly or indirectly. *Mine Workers v. Pennington*, 381 U.S. 657, 14 L. Ed.

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<sup>12</sup> Even petitioner's counsel concedes, for example, that *Noerr* would not apply if the Association had a rule giving the steel conduit manufacturers a veto over changes in the Code. Tr. of Oral Arg. 41-42.

<sup>13</sup> The dissent mistakenly asserts that we today hold that *Noerr* immunity does not apply to mere efforts to persuade others to exclude a competitor's product from a private code. See *post*, at 514-516. Our holding is expressly limited to cases where an "economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants." *Supra, at 509* (emphasis added); see also *supra, at 506-507* (relying in part on the distinction between activity involving the exercise of decisionmaking authority and market power and activity involving mere attempts to persuade an independent decisionmaker). Cf. *Noerr*, 365 U.S. at 136. The dissent also mistakenly asserts that this description encompasses all private standardsetting associations. See *post*, at 515. In fact, many such associations are composed of members with expertise but no economic interest in suppressing competition. See, e. g., *Sessions, supra, at 461*, and n. 2.

[2d 626, 85 S. Ct. 1585 \(1965\)](#), and [California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 \(1972\)](#), applied the rule to efforts to seek executive action and to administrative and adjudicative proceedings.

The Court now refuses to apply the rule of these cases [\*\*\*\*38] to the participants in those private organizations, such as the National Fire Protection Association (NFPA), that regularly propound and publish health and safety standards for a variety of products and industries and then present these codes to state and local authorities for the purpose of having them enacted into law. The NFPA and those participating in the code-writing process will now be subject to antitrust liability if their efforts have anticompetitive effects and do not withstand scrutiny under the rule of reason. Believing that this [\*\*\*513] result is a misapplication of the *Noerr* decision and an improvident construction of the Sherman Act, I respectfully dissent.

[\*512] This case presents an even stronger argument for immunity than did *Noerr* itself. That decision turned on whether the design or purpose of the conduct was to obtain or influence the passage or enforcement of laws. The Court concedes that petitioner's actions in this case constituted a "genuine effort to influence governmental action," *ante*, at 503, and that this was its "ultimate aim," *ante*, at 504. In *Noerr*, the publicity campaign was dispersed widely among the public in a broad [\*\*\*\*39] but necessary diluted attempt to move public opinion in hopes that government officials would take note and respond accordingly. The campaign apparently had some influence on the passage of tax laws and other legislation favorable to the railroads in New Jersey, New York, and Ohio, and procured the Governor's veto of a bill that had been passed in Pennsylvania. See [365 U.S. at 130](#); see also [155 F. Supp. 768, 777-801 \(ED Pa. 1957\)](#). Here, the NFPA actually drafted proposed legislation in the form of the National Electrical Code (NEC) and presented it countrywide. Not only were petitioner's efforts in this case designed to influence the passage of state laws, but there was also a much greater likelihood that they would be successful than was the case in *Noerr*. This is germane because it establishes a much greater likelihood that the "purpose" and "design" of petitioner's actions in this case was the "solicitation of governmental action with respect to the passage and enforcement of laws," [365 U.S. at 138](#).

Rather than directly confronting the severe damage that today's decision does to the *Noerr* doctrine, the majority asserts that the [\*\*\*\*40] "ultimate aim" of petitioner's efforts "is not dispositive." *Ante*, at 504. That statement cannot be reconciled with the statements quoted earlier from *Noerr*, where it was held that even if one of the major purposes, or even the *sole* purpose, of the publicity campaign was "to destroy the truckers as competitors," [365 U.S. at 138](#), those actions were immunized from antitrust liability because ultimately they were "directed toward obtaining governmental action," [\*513] [id., at 140](#). The majority later doubles back on this statement, and suggests that it is important in this case that "petitioner was at least partially motivated by the desire to lessen competition, and . . . stood to reap substantial economic benefits from making it difficult for respondent to compete." *Ante*, at 509. It need hardly be said that all of this was also true in *Noerr*. Nobody condones fraud, bribery, [\*\*1944] or misrepresentation in any form, and other state and federal laws ensure that such conduct is punishable. But the point here is that conduct otherwise punishable under the antitrust laws either becomes immune from the operation of those laws when [\*\*\*\*41] it is part of a larger design to influence the passage and enforcement of laws, or it does not. No workable boundaries to the *Noerr* doctrine are established by declaring, and then repeating at every turn, that everything depends on "the context and nature of" the activity, [\*\*\*514] *ante*, at 504, 505, 506, 509, if we are unable to offer any further guidance about what this vague reference is supposed to mean, especially when the result here is so clearly wrong as long as *Noerr* itself is reputed to remain good law. One unfortunate consequence of today's decision, therefore, is that district courts and courts of appeals will be obliged to puzzle over claims raised under the doctrine without any intelligible guidance about when and why to apply it.

If there were no private code-writing organizations, and state legislatures themselves held the necessary hearing and wrote codes from scratch, then business concerns like Allied, together with their friends, could jointly testify with impunity about the safety of various products, even though they had anticompetitive motives in doing so. This much the majority concedes, as it does that the major purpose of the code-writing organizations [\*\*\*\*42] is to influence legislative action. These days it is almost a foregone conclusion that the vast majority of the States will adopt these codes with little or no change. It is untenable to consider the code-writing process by such organizations as the NFPA as too far removed [\*514] from the legislative process to warrant application of the doctrine announced in

*Noerr* and faithfully applied in other cases. This was the view of Judge Snead and his colleagues on the Ninth Circuit in Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 827 F.2d 458 (1987), and the reasons they gave for applying *Noerr* in this context are much more persuasive than anything to the contrary the majority now has to offer.

The Court's decision is unfortunate for another reason. There are now over 400 private organizations preparing and publishing an enormous variety of codes and standards. State and local governments necessarily, and as a matter of course, turn to these proposed codes in the process of legislating to further the health and safety of their citizens. The code that is at issue in this case, for example, was adopted verbatim by 25 States and the District of Columbia; [\*\*\*\*43] 19 others adopted it with only minor changes. It is the most widely disseminated and adopted model code in the world today. There is no doubt that the work of these private organizations contributes enormously to the public interest and that participation in their work by those who have the technical competence and experience to do so should not be discouraged.

The Court's decision today will surely do just that. It must inevitably be the case that codes such as the NEC will set standards that some products cannot satisfy and hence in the name of health and safety will reduce or prevent competition, as was the case here. Yet, putative competitors of the producer of such products will now think twice before urging in the course of the code-making process that those products not be approved; for if they are successful (or even if they are not), they may well become antitrust defendants facing treble-damages liability unless they can prove to a court and a jury that they had no evil motives but were merely "presenting and vigorously arguing accurate scientific evidence before a nonpartisan private standard-setting body," *ante*, at 510 (though with the knowing and inevitable result [\*\*\*\*44] of eliminating competition). In [\*\*\*515] this case, for example, even [\*515] if Allied had not resorted to the tactics it employed, but had done no more than successfully argue in good faith the hazards of using respondent's products, it would have inflicted the same damage on respondent and would [\*\*1945] have risked facing the same antitrust suit, with a jury ultimately deciding the health and safety implications of the products at issue.

The Court's suggestion that its decision will not affect the ability of these organizations to assist state and local governments is surely wrong. The Court's holding is "that at least where, as here, an economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effects the standard has of its own force in the marketplace." *Ante*, at 509-510. This description encompasses the structure and work of all such organizations as we now know them. The Court is saying, in effect, that where a private organization sets standards, the participants can be sued [\*\*\*\*45] under the antitrust laws for *any* effects those standards have in the marketplace *other than* those flowing from their adoption into law. But the standards will have *some* effect in the marketplace even where they are also adopted into law, through publicity and other means, thus exposing the participants to liability. Henceforth, therefore, any private organization offers such standards at its peril, and without any of the breathing room enjoyed by other participants in the political process.

The alternative apparently envisioned by the Court is that an organization can gain the protection of the *Noerr* doctrine as long as nobody with any economic interest in the product is permitted to "exercis[e] decisionmaking authority" (*i. e.*, vote) on its recommendations as to particular product standards. Insisting that organizations like the NFPA conduct themselves like courts of law will have perverse effects. Legislatures are willing to rely on such organizations precisely because their standards are being set by those who [\*516] possess an expert understanding of the products and their uses, which are primarily if not entirely those who design, manufacture, sell, [\*\*\*\*46] and distribute them. Sanitizing such bodies by discouraging the active participation of those with economic interests in the subject matter undermines their utility.

I fear that exposing organizations like the NFPA to antitrust liability will impair their usefulness by inhibiting frank and open discussion of the health and safety characteristics of new or old products that will be affected by their codes. The Court focuses on the tactics of petitioner that are thought to have subverted the entire process. But it is not suggested that if there are abuses, they are anything more than occasional happenings. The Court does speculate about the terrible practices that applying *Noerr* in this context could lead us to condone in future cases, *ante*, at 503-504, but these are no more than fantasies, since nothing of the sort occurred in the wake of *Noerr* itself. It seems to me that today's decision is therefore an unfortunate case of overkill.

Of course, the *Noerr* immunity is not unlimited and by its terms is [\*\*\*516] unavailable where the alleged efforts to influence legislation are nothing but a sham. As the Ninth Circuit held, this limitation is enough to guard against [\*\*\*\*47] flagrant abuse. In any event, occasional abuse is insufficient ground to render the entire process less useful and reliable. I would reverse the judgment below and remand for further proceedings.

## References

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[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 108](#)

24 Am Jur Trials 1, Defending Antitrust Lawsuits

[15 USCS 1](#)

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 9, 29

Index to Annotations, Lobbying; *Noerr-Pennington* Doctrine; Restraints of Trade and Monopolies

Annotation References:

"Sham" exception to application of *Noerr-Pennington* doctrine, exempting from federal antitrust laws joint efforts to influence governmental action. 71 ALR Fed 723.

Application of doctrine exempting from federal antitrust laws joint efforts to influence legislative or executive action. 17 ALR Fed 645.

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## *Christianson v. Colt Indus. Operating Corp.*

Supreme Court of the United States

April 18, 1988, Argued ; June 17, 1988, Decided

No. 87-499

### **Reporter**

486 U.S. 800 \*; 108 S. Ct. 2166 \*\*; 100 L. Ed. 2d 811 \*\*\*; 1988 U.S. LEXIS 2733 \*\*\*\*; 7 U.S.P.Q.2D (BNA) 1109; 56 U.S.L.W. 4625; 1988-1 Trade Cas. (CCH) P68,081; 11 Fed. R. Serv. 3d (Callaghan) 452

CHRISTIANSON ET AL. v. COLT INDUSTRIES OPERATING CORP.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

**Disposition:** [822 F.2d 1544](#), vacated and remanded.

## **Core Terms**

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patents, patent law, district court, petitioners', patent-law, cases, court of appeals, cause of action, well-pleaded, antitrust, courts, law of the case, invalid, trade secret, monopolization, decisions, appellate jurisdiction, jurisdictional issue, federal patent law, federal law, infringement, accessories, manufacture, proprietary, adherence, customers, litigated, lawsuit, lack jurisdiction, summary judgment

## **LexisNexis® Headnotes**

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Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Copyright Law > ... > Civil Infringement Actions > Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

### **[HN1](#) [down arrow] Jurisdiction Over Actions, Exclusive Jurisdiction**

[28 U.S.C.S. § 1295\(a\)\(1\)](#) grants the Court of Appeals for the Federal Circuit exclusive jurisdiction over an appeal from a final decision of a district court of the United States if the jurisdiction of that court was based, in whole or in

part, on [28 U.S.C.S. § 1338](#). [Section 1338\(a\)](#), in turn, provides that the district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

## [\*\*HN2\*\*](#) **Subject Matter Jurisdiction, Federal Questions**

In order to demonstrate that a case is one "arising under" federal patent law, the plaintiff must set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction of these laws.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > Substantial Questions

Constitutional Law > ... > Jurisdiction > Subject Matter Jurisdiction > Federal Questions

Copyright Law > ... > Civil Infringement Actions > Jurisdiction > General Overview

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

## [\*\*HN3\*\*](#) **Federal Questions, Substantial Questions**

A district court's federal-question jurisdiction extends over only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law, in that federal law is a necessary element of one of the well-pleaded claims. Linguistic consistency demands that [28 U.S.C.S. § 1338\(a\)](#) jurisdiction likewise extends only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.

Copyright Law > ... > Civil Infringement Actions > Jurisdiction > General Overview

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

## [\*\*HN4\*\*](#) **Civil Infringement Actions, Jurisdiction**

Under the well-pleaded complaint rule, as appropriately adapted to [28 U.S.C.S. § 1338\(a\)](#), whether a claim "arises under" patent law must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.

Copyright Law > ... > Civil Infringement Actions > Jurisdiction > General Overview

Patent Law > Jurisdiction & Review > Subject Matter Jurisdiction > General Overview

## [\*\*HN5\*\*](#) **Civil Infringement Actions, Jurisdiction**

A case raising a federal patent-law defense does not, for that reason alone, "arise under" patent law, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case. Nor is it necessarily sufficient that a well-pleaded claim alleges a single theory under which resolution of a patent-law question is essential. If, on the face of a well-pleaded complaint there are reasons completely unrelated to the provisions and purposes of the patent laws why the plaintiff may or may not be entitled to the relief it seeks, then the claim does not "arise under" those laws. Thus, a claim supported by alternative theories in the complaint may not form the basis for [28 U.S.C.S. § 1338\(a\)](#) jurisdiction unless patent law is essential to each of those theories.

Antitrust & Trade Law > Sherman Act > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

#### **[HN6](#)[] Antitrust & Trade Law, Sherman Act**

Section 2 of the Sherman Act condemns every person who shall monopolize, or attempt to monopolize. [15 U.S.C.S. § 2](#).

Antitrust & Trade Law > Sherman Act > General Overview

#### **[HN7](#)[] Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 1](#).

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

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

#### **[HN8](#)[] Pleadings, Amendment of Pleadings**

See *Fed. R. Civ. P. 15(b)*.

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

#### **[HN9](#)[] Preclusion of Judgments, Law of the Case**

The doctrine of the law of the case posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. This rule of practice promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

### **HN10** Standards of Review, Clearly Erroneous Review

The law-of-the-case doctrine merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources

Constitutional Law > The Judiciary > Jurisdiction > General Overview

Governments > Courts > Creation & Organization

### **HN11** Jurisdictional Sources, Statutory Sources

Courts created by statute can have no jurisdiction but such as the statute confers.

## **Lawyers' Edition Display**

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### **Decision**

Court of Appeals for Federal Circuit held not to have jurisdiction over appeal from District Court where complaint asserted antitrust claims for which patent law theory was not necessary to success.

### **Summary**

Three days after the leading manufacturer of the M16 rifle had voluntarily dismissed patent infringement claims which it had brought in the United States District Court for the Central District of Illinois against one of its former employees, who had started a business of selling M16 parts, the former employee brought an action in the District Court against the manufacturer, seeking (1) damages and injunctive and equitable relief for the manufacturer's violations of 1 and 2 of the Sherman Act ([15 USCS 1](#) and [2](#)), and (2) actual and punitive damages under state law for the manufacturer's tortious interference with his business relationships. In the complaint, the former employee alleged that he had been driven out of the business of selling parts for the M16 by the manufacturer's litigation tactics and communications to others, including representations by the manufacturer to several of the former employee's current and potential customers that the former employee was misappropriating the manufacturer's trade secrets. The complaint also included allegations stating that unless the manufacturer's basic and improvement patents relating to the M16--many of which had already expired--were invalid, anyone with ordinary skill in the rifle-making art was able to use the technology of the patents upon their expiration. The manufacturer answered, interposing the defense that its conduct was justified by a need to protect its trade secrets, and asserting counterclaims which arose out of the former employee's alleged misappropriation of such trade secrets. Prior to trial, the former employee moved for summary judgment, expressly raising for the first time the contention that the manufacturer's patents relating to the M16 were invalid from their inception for failure to meet the "enablement" and "best mode" requirements of [35 USCS 112](#). Because of such invalidity, the former employee argued, the trade secrets which the patents should have disclosed lost any applicable state-law protections, and were invalid with respect to the former employee's claims to which such invalidity was material, including (1) his monopolization claim under 2 of the Sherman Act, based on the manufacturer's lawsuit and letters to his competitors, and (2) his "group-boycott" claim under 1 of the Sherman Act, in that virtually all his suppliers and customers had agreed with the manufacturer to stop doing business with him. The District Court granted the former employee's summary judgment motion ([609 F Supp 1174](#)), and subsequently entered an order stating that (1) nine of the manufacturer's already-

expired patents relating to the M16 were invalidated from their inception, and (2) all of the manufacturer's trade secrets regarding the M16, whether connected with the patents or not, were void and unenforceable, and technical information relating to such trade secrets was to be made available to the former employee ([613 F Supp 330](#)). The manufacturer appealed to the United States Court of Appeals for the Federal Circuit. The former employee moved to transfer the appeal to the United States Court of Appeals for the Seventh Circuit, on the ground that the claims of the complaint in the action did not "arise under" a federal patent statute, and thus that the Federal Circuit did not have jurisdiction of the claim under [28 USCS 1295\(a\)\(1\)](#), which incorporates [28 USCS 1338](#) by reference. In an unpublished order, the Court of Appeals for the Federal Circuit granted the transfer motion. The Court of Appeals for the Seventh Circuit, raising the issue of its jurisdiction over the appeal *sua sponte*, concluded that the Court of Appeals for the Federal Circuit had been "clearly wrong," and transferred the appeal back to the [Court of Appeals for the Federal Circuit \(798 F2d 1051\)](#). On retransfer, the Court of Appeals for the Federal Circuit (1) adhered to its prior conclusion that it lacked jurisdiction over the appeal, and stated that the Court of Appeals for the Seventh Circuit had exhibited a monumental misunderstanding of the patent jurisdiction granted to the Court of Appeals for the Federal Circuit, (2) ruled that it nevertheless would address the merits of the appeal in the "interest of justice," and (3) reversed the summary judgment which the District Court had granted to the former employee ([822 F2d 1544](#)).

On certiorari, the United States Supreme Court vacated the judgment of the Court of Appeals for the Federal Circuit and remanded with instructions to transfer the case to the Court of Appeals for the Seventh Circuit. In an opinion by Brennan, J., expressing the unanimous view of the court, it was held that (1) pursuant to the well-pleaded complaint rule, the Court of Appeals for the Federal Circuit did not have jurisdiction over the manufacturer's appeal, since a patent law issue, while arguably necessary to at least one theory under both the former employee's monopolization and group-boycott antitrust claims, was not necessary to the overall success of either claim, in that there were reasons completely unrelated to the provisions and purposes of patent law why the former employee might or might not be entitled to the relief he sought under both claims; (2) the Court of Appeals for the Federal Circuit was not obliged to adopt the Court of Appeals for the Seventh Circuit's analysis of the jurisdictional issue as the law of the case; and (3) the Court of Appeals for the Federal Circuit, upon properly concluding that it lacked jurisdiction, should not have decided the merits anyway "in the interest of justice."

Stevens, J., joined by Blackmun, J., concurred, expressing the view that if the question whether a claim arises under the patent laws is asked at the end of a trial in order to decide whether the Court of Appeals for the Federal Circuit has appellate jurisdiction, the answer may be different than if the question had been asked at the outset to decide whether a Federal District Court has jurisdiction to try the case.

## Headnotes

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APPEAL §228 > Federal Circuit jurisdiction -- claims "arising under" patent laws -- antitrust claims -- remand -- > Headnote:  
[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D] [LEdHN\[1E\]](#) [1E]

The United States Court of Appeals for the Federal Circuit does not have appellate jurisdiction, pursuant to its authority under [28 USCS 1295\(a\)\(1\)](#), to review a final decision of a Federal District Court based in whole or in part on [28 USCS 1338](#)--which provides, in 1338(a), that District Courts have original jurisdiction of civil actions "arising under" any Act of Congress relating to patents--where a patent law issue, while arguably necessary to at least one theory under (1) a monopolization claim under 2 of the Sherman Act ([15 USCS 2](#)) and (2) a group-boycott claim under 1 of the Sherman Act ([15 USCS 1](#)), both of which were raised in District Court in the plaintiff's antitrust count, which was the only complaint count arguably involving such issues, is not necessary to the overall success of either claim; accordingly, the United States Supreme Court will (1) vacate, for lack of jurisdiction, a judgment of the Court of Appeals for the Federal Circuit which, while disavowing the Court of Appeals for the Federal Circuit's appellate jurisdiction in a case retransferred to it by the United States Court of Appeals for the Seventh Circuit--after the Court of Appeals for the Seventh Circuit had found the Court of Appeals for the Federal Circuit's initial transfer to it under

[28 USCS 1631](#) to be "clearly wrong"--improperly proceeded to reach the merits anyway "in the interest of justice," and (2) remand the case to the Court of Appeals for the Federal Circuit with instructions to transfer the case to the Court of Appeals for the Seventh Circuit.

COURTS §257 > federal question jurisdiction -- > Headnote:

[LEdHN\[2\]](#) [2]

Under [28 USCS 1331](#), a Federal District Court's federal question jurisdiction extends over only those cases in which a well-pleaded complaint establishes either that the federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law, in that federal law is a necessary element of one of the well-pleaded claims.

COURTS §289 > federal question jurisdiction -- patent laws -- > Headnote:

[LEdHN\[3\]](#) [3]

A Federal District Court's jurisdiction under [28 USCS 1338](#) extends only to those cases in which a well-pleaded complaint establishes either that the federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.

COURTS §289 > federal question jurisdiction -- patent laws -- anticipation of defenses -- > Headnote:

[LEdHN\[4\]](#) [4]

Under the well-pleaded complaint rule, as appropriately adapted to [28 USCS 1338](#), whether a claim "arises under" patent law must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose; a case raising a patent law defense does not, for that reason alone, "arise under" patent law, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.

COURTS §289 > REMOVAL OF CAUSES §67 > federal question jurisdiction -- patent laws -- omission of necessary patent claims -- > Headnote:

[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B]

Merely because a claim makes no reference to federal patent law does not necessarily mean that the claim does not "arise under" patent law within the meaning of [28 USCS 1338](#); just as a plaintiff may not defeat removal, for lack of general federal question jurisdiction, by omitting to plead necessary federal questions in a complaint, so a plaintiff may not defeat 1338 jurisdiction by omitting to plead necessary federal patent law questions.

COURTS §289 > federal question jurisdiction -- patent laws -- alternative theories -- > Headnote:

[LEdHN\[6\]](#) [6]

It is not necessarily sufficient, for purposes of securing jurisdiction under [28 USCS 1338](#), that a well-pleaded claim alleges a single theory under which resolution of a patent law question is essential; if on the face of a well-pleaded complaint there are reasons completely unrelated to the provisions and purposes of the patent laws why the plaintiff may or may not be entitled to the relief it seeks, then the claim does not "arise under" those laws for purposes of 1338; thus, a claim supported by alternative theories in the complaint may not form the basis for 1338 jurisdiction unless patent law is essential to each of those theories.

COURTS §289 > federal jurisdiction -- patent laws -- monopolization claim -- > Headnote:

[LEdHN\[7A\]](#) [7A] [LEdHN\[7B\]](#) [7B] [LEdHN\[7C\]](#) [7C]

A claim in a Federal District Court action that the leading manufacturer, seller, and marketer of M16 rifles engaged in conduct constituting monopolization against a former employee who operated a business of manufacturing and selling M16 parts, in violation of 2 of the Sherman Act ([15 USCS 2](#)), does not "arise under" the federal patent laws within the meaning of [28 USCS 1338](#) where, although one theory of relief advanced by the former employee involves a patent law issue--namely, that the manufacturer made false assertions in its letters and pleadings that the former employee was violating its trade secrets, when such trade secrets were not protected under state law because the manufacturer's M16 patents were invalid under [35 USCS 112](#)--there are other reasons completely unrelated to the provisions and purposes of federal patent law why the former employee may or may not be entitled to the relief he seeks under the monopolization claim, including the facts, as disclosed in the complaint, (1) that the manufacturer authorized the former employee's use of the trade secrets to some extent, and (2) that most of the manufacturer's alleged monopolization conduct--which included the use of inapplicable court orders, misrepresentations that such orders protected its proprietary data, and the filing of a prior lawsuit against the former employee in bad faith so as to urge current and potential customers to refrain from doing business with the former employee--could be deemed wrongful apart from the truth or falsity of the manufacturer's accusations that the former employee had infringed the manufacturer's trade secrets.

COURTS §289 > federal jurisdiction -- patent laws -- group boycott claim -- > Headnote:

[LEdHN\[8A\]](#) [8A] [LEdHN\[8B\]](#) [8B]

A claim in a Federal District Court action that the leading manufacturer, seller, and marketer of M16 rifles, engaged in conduct constituting a group boycott, in violation of 1 of the Sherman Act ([15 USCS 1](#)), by agreeing with virtually all suppliers and customers of a former employee who operated a business of manufacturing and selling M16 parts to refrain from transacting further business with the former employee, does not "arise under" the federal patent laws within the meaning of [28 USCS 1338](#) where, notwithstanding the former employee's attempt to prove the unreasonableness of the alleged agreement--under the theory that its purpose was to protect the manufacturer's trade secrets from infringement by the former employee, but that the manufacturer had no trade secrets to infringe since the patents giving rise to the proprietary information protected were invalid under [35 USCS 112](#)--the complaint contains alternative, nonpatent theories of relief on its face, including the theory that the alleged agreement was unreasonable because the manufacturer had authorized the former employee to use the trade secrets.

COURTS §255 > federal question jurisdiction -- well-pleaded complaint -- > Headnote:

[LEdHN\[9\]](#) [9]

The well-pleaded complaint rule for determining federal question jurisdiction under [28 USCS 1331](#) focuses on claims, and not theories of entitlement to relief.

APPEAL §228 > COURTS §255 > Federal Circuit jurisdiction -- well-pleaded complaint -- patent laws -- > Headnote:

[LEdHN\[10A\]](#) [10A] [LEdHN\[10B\]](#) [10B]

The United States Court of Appeals for the Federal Circuit cannot assert appellate jurisdiction over an appeal under [28 USCS 1295\(a\)\(1\)](#), notwithstanding the well-pleaded complaint rule, based on a derivation from the congressional policy of creating a Court of Appeals for the Federal Circuit with exclusive jurisdiction over certain patent cases, that Congress' goals would be better served if such jurisdiction were instead fixed by reference to the case actually litigated; since a Federal District Court's jurisdiction is determined by reference to the well-pleaded complaint, not the well-tried case, the referent for the Court of Appeals for the Federal Circuit's jurisdiction under 1295(a)(1) must be the same, and the legislative history of the Court of Appeals for the Federal Circuit's jurisdictional provisions confirms that focus; the United States Supreme Court has no more authority to read 1295(a)(1) as granting the Court of Appeals for the Federal Circuit jurisdiction over an appeal where the well-pleaded complaint does not depend on patent law, than to read [28 USCS 1338](#) as granting a District Court jurisdiction over such a complaint.

APPEAL §228 > Federal Circuit jurisdiction -- patent laws -- implied cause of action -- consent of parties -- > Headnote:

[LEdHN\[11A\]](#) [11A] [LEdHN\[11B\]](#) [11B]

The United States Court of Appeals for the Federal Circuit does not have appellate jurisdiction, notwithstanding the well-pleaded complaint rule, to review a Federal District Court summary judgment on grounds that summary judgment papers gave rise to an implied cause of action under [35 USCS 112](#), a federal patent statute--in which case the pleadings were amended by the consent of the parties to include such cause of action under *Rule 15(b)* of the *Federal Rules of Civil Procedure*--where, although the papers focused almost entirely on patent law issues, (1) there was no evidence of any consent among the parties to litigate the new patent law claim, but rather such issues fell squarely within the purview of theories of recovery, defenses, and counterclaims that the pleadings in the case already encompassed, and (2) the District Court never intimated that the patent issues were relevant to any cause of action other than those raised expressly in the complaint.

APPEAL §228 > COURTS §632 > Federal Circuit -- determination of jurisdiction -- law of the case -- effect of transfer --

> Headnote:

[LEdHN\[12A\]](#) [12A] [LEdHN\[12B\]](#) [12B]

The United States Court of Appeals for the Federal Circuit cannot assert appellate jurisdiction over an appeal from a Federal District Court judgment, notwithstanding the well-pleaded complaint rule, based on principles of the law of the case--pursuant to a determination by the United States Court of Appeals for the Seventh Circuit, on transfer from the Court of Appeals for the Federal Circuit, that the Court of Appeals for the Federal Circuit had jurisdiction over the appeal--where (1) the Court of Appeals for the Federal Circuit, to which the appeal had first been taken, was the first to decide the jurisdictional issue by transferring the case to the Court of Appeals for the Seventh Circuit, even though the Court of Appeals for the Federal Circuit did not explicate its rationale for transferring the

case--which meant that the Court of Appeals for the Seventh Circuit, and not the Court of Appeals for the Federal Circuit, had departed from the law of the case, (2) even if the Court of Appeals for the Seventh Circuit's decision was the law of the case, the Court of Appeals for the Federal Circuit did not exceed its power in revisiting the jurisdictional issue and concluding that the Court of Appeals for the Seventh Circuit's decision was "clearly wrong," and (3) law of the case did not bind the United States Supreme Court in reviewing the decisions below.

APPEAL §1766 > law of the case -- coordinate courts -- > Headnote:

[LEdHN\[13\]](#) [13]

Under the doctrine of the law of the case, when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case; such rule of practice, promoting the finality and efficiency of the judicial process by protecting against the agitation of settled issues, applies as much to the decisions of a coordinate court in the same case as to a court's own decisions, since the policies supporting the doctrine apply with even greater force to transfer decisions than to decisions of substantive law--otherwise, transferee courts that feel entirely free to revisit transfer decisions of a coordinate court could threaten to send litigants into a vicious circle of litigation.

APPEAL §1766 > law of the case -- > Headnote:

[LEdHN\[14\]](#) [14]

The law of the case doctrine turns on whether a court previously decided upon a rule of law, not on whether, or how well, it explained its decision; the doctrine expresses the practice of the courts generally to refuse to reopen what has been decided, and is not a limit to their power; a court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances, such as where the initial decision was clearly erroneous and would work a manifest injustice.

APPEAL §1766 > law of the case -- Supreme Court review -- > Headnote:

[LEdHN\[15\]](#) [15]

The doctrine of the law of the case cannot bind the United States Supreme Court in reviewing decisions below, and a petition to the Supreme Court for a writ of certiorari can expose the entire case to review; just as a Federal District Court's adherence to the law of the case cannot insulate an issue from appellate review, a Federal Court of Appeals' adherence to the law of the case cannot insulate an issue from the Supreme Court's review.

APPEAL §228 > Federal Circuit -- authority where jurisdiction is lacking -- > Headnote:

[LEdHN\[16\]](#) [16]

Where the United States Court of Appeals for the Federal Circuit has correctly concluded that it lacks jurisdiction, the Court of Appeals for the Federal Circuit has no authority to reach the merits anyway "in the interest of justice"; under [28 USCS 1631](#), the Court of Appeals for the Federal Circuit has authority to make a single decision upon

concluding that it lacks jurisdiction--whether to dismiss the case or, "in the interest of justice," to transfer it to a Federal Court of Appeals that has jurisdiction.

COURTS §161 > statutory jurisdiction -- > Headnote:

[LEdHN\[17\]](#) [17]

Courts created by statute can have no jurisdiction but such as the statute confers.

APPEAL §1766 > COURTS §632 > law of the case -- transfer -- > Headnote:

[LEdHN\[18\]](#) [18]

Under law of the case principles, if a transferee Federal Court of Appeals can find the transfer decision by another Court of Appeals plausible, the transferee court's jurisdictional inquiry is at an end.

## Syllabus

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The principal statutes involved in this case, which arises from a jurisdictional dispute between Courts of Appeals, are [28 U.S. C. § 1295\(a\)\(1\)](#) -- granting the Federal Circuit exclusive jurisdiction over an appeal from a final decision of a federal district court "if the jurisdiction of that court was based, in whole or in part, on" [28 U.S. C. § 1338](#) -- and [§ 1338\(a\)](#), which grants the district courts original jurisdiction of any civil action "arising under" any federal statute relating to patents. Respondent (Colt), which is the leading manufacturer, seller, and marketer of M16 rifles and their parts and accessories, held and developed patents relating to the rifle, and has maintained the secrecy [\*\*\*2] as to specifications essential to the mass production of interchangeable M16 parts. Petitioner Christianson, a former Colt employee, established a corporation (also a petitioner), and began selling M16 parts. Colt joined petitioners with other defendants in a patent-infringement lawsuit, but ultimately voluntarily dismissed its claims against petitioners. In the meantime, Colt notified several of petitioners' current and potential customers that petitioners were illegally misappropriating Colt's trade secrets, and urged them to refrain from doing business with petitioners. Petitioners then brought this antitrust action against Colt in Federal District Court for violations of [§§ 1](#) and [2](#) of the Sherman Act. The complaint alleged, *inter alia*, that Colt's letters, litigation tactics, and other conduct drove petitioners out of business. Petitioners later amended the complaint to assert a second cause of action under state law for tortious interference with their business relationships. Colt asserted a defense that its conduct was justified by a need to protect its trade secrets and countersued on a variety of claims arising out of petitioners' alleged misappropriation of M16 patent [\*\*\*3] specifications. Petitioners filed a motion for summary judgment raising a patent-law issue -- related to the validity of Colt's patents -- to which the complaint only obliquely hinted. The District Court awarded petitioners summary judgment as to liability on both the antitrust and the tortious-interference claims. On Colt's appeal, the Court of Appeals for the Federal Circuit held that it lacked jurisdiction and transferred the appeal to the Court of Appeals for the Seventh Circuit. The Seventh Circuit, however, raising the jurisdictional issue *sua sponte*, concluded that the Federal Circuit was "clearly wrong" and transferred the case back. The Federal Circuit, although concluding that the Seventh Circuit's jurisdictional decision was "clearly wrong," addressed the merits in the "interest of justice," and reversed the District Court.

*Held:*

1. The Court of Appeals for the Federal Circuit would not have jurisdiction of the appeal of a final judgment in this case under [28 U.S. C. § 1295\(a\)\(1\)](#), since the action is not one "arising under" the patent statutes for purposes of [§ 1338\(a\)](#). Pp. 807-813.

(a) In order to demonstrate that a case [\*\*\*\*4] is one "arising under" federal patent law the plaintiff must set up some right, title, or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction, of those laws. [Section 1338\(a\)](#) jurisdiction extends only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims. A case raising a federal patent-law defense does not, for that reason alone, "arise under" patent law, even if the defense is anticipated in the complaint, and even if both parties admit that the defense is the only question truly at issue in the case. Nor is it necessarily sufficient that a well-pleaded claim alleges a single theory under which resolution of a patent-law question is essential. If on the face of a well-pleaded complaint there are reasons completely unrelated to the provisions and purposes of the patent laws why the plaintiff may or may not [\*\*\*\*5] be entitled to the relief it seeks, then the claim does not "arise under" those laws. Pp. 807-810.

(b) Petitioners' antitrust count can readily be understood to encompass both a monopolization claim under [§ 2](#) of the Sherman Act and a group-boycott claim under [§ 1](#). The patent-law issue, while arguably necessary to at least one theory under each claim, is not necessary to the overall success of either claim. Even assuming, without deciding, that the validity of Colt's patents is an essential element of petitioners' monopolization theory rather than merely an argument in anticipation of a defense, the well-pleaded complaint rule focuses on claims, not theories, and just because an element that is essential to a particular theory might be governed by federal patent law does not mean that the entire monopolization claim "arises under" patent law. Examination of the complaint reveals that the monopolization theory (on which petitioners ultimately prevailed in the District Court) is only one of several involved, and the only one for which the patent-law issue is even arguably essential. Since there are reasons completely unrelated to the provisions and purposes of federal patent law [\*\*\*\*6] why petitioners may or may not be entitled to the relief sought under their monopolization claim, the claim does not "arise under" federal patent law. The same analysis obtains as to petitioners' group-boycott claim under [§ 1](#) of the Sherman Act. Pp. 810-813.

2. Nor does reference to congressional policy compel a finding of Federal Circuit jurisdiction. One of Congress' objectives in creating the Federal Circuit was to reduce the lack of uniformity and uncertainty of legal doctrine in the administration of patent law. Although arguably Congress' goals might be better served if the Federal Circuit's jurisdiction were to be fixed by reference to the case actually litigated, nevertheless, Congress determined the relevant focus when it granted Federal Circuit jurisdiction on the basis of the district courts' jurisdiction. Since the latter courts' jurisdiction is determined by reference to the well-pleaded complaint, not the well-tried case, the referent for the Federal Circuit's jurisdiction must be the same. The legislative history of the Federal Circuit's jurisdictional provisions confirms that focus. Pp. 813-814.

3. Federal Circuit jurisdiction here cannot be based on *Federal [\*\*\*\*7] Rule of Civil Procedure 15(b)* by deeming the complaint amended to encompass a new and independent cause of action -- an implied cause of action under the patent laws. Even assuming that a court of appeals could furnish itself a jurisdictional basis under such theory, there is simply no evidence of any "express or implied consent" among the parties, as required by the Rule, to litigate a new patent-law claim. Although the summary judgment papers focused almost entirely on patent-law issues that petitioners deemed fundamental to the lawsuit, those issues fell squarely within the purview of the theories of recovery, defenses, and counterclaims that the pleadings already encompassed. Pp. 814-815.

4. There is no merit to the contention that the Federal Circuit was obliged to adopt the Seventh Circuit's analysis of the jurisdictional issue as the law of the case. The law-of-the-case doctrine applies as much to the decisions of a coordinate court in the same case as to a court's own decisions, and the policies supporting the doctrine apply with even greater force to transfer decisions than to decisions of substantive law. However, the Federal Circuit, in transferring the case to the [\*\*\*\*8] Seventh Circuit, was the first to decide the jurisdictional issue. That the Federal Circuit did not explain its rationale is irrelevant. Thus, the law of the case was that the Seventh Circuit had jurisdiction, and it was the Seventh Circuit that departed from the law of the case. Moreover, the doctrine merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit on their power. Thus, even if the Seventh Circuit's decision was law of the case, the Federal Circuit did not exceed its power in revisiting the jurisdictional issue, and once it concluded that the prior decision was "clearly wrong" it was obliged to

decline jurisdiction. Most importantly, law of the case cannot bind this Court in reviewing decisions below. Pp. 815-818.

5. The Federal Circuit, after concluding that it lacked jurisdiction, erred in deciding to reach the merits anyway "in the interest of justice." Courts created by statute only have such jurisdiction as the statute confers. Upon concluding that it lacked jurisdiction, the Federal Circuit had authority, under 28 U.S. C. § 1631, to make a single decision -- whether to dismiss the case or, [\*\*\*\*9] "in the interest of justice," to transfer it to a court of appeals that has jurisdiction. The rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists has always worked injustice in particular cases -- especially in the situation where, as here, the litigants are bandied back and forth between two courts, each of which insists that the other has jurisdiction. Such situations inhere in the very nature of jurisdictional lines, for few jurisdictional lines can be so finely drawn as to leave no room for disagreement on close cases. However, the courts of appeals should achieve the end of quick settlement of questions of transfer by adhering strictly to principles of law of the case. Under those principles, if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end. Pp. 818-819.

**Counsel:** Stuart R. Lefstein argued the cause for petitioners. With him on the briefs were Spiro Berevskos and John C. McNett.

Anthony M. Radice argued the cause for respondent. With him on the brief were Joseph C. Markowitz, Kim J. Landsman, and Robert L. Harmon.

**Judges:** BRENNAN, J., delivered the opinion for [\*\*\*\*10] a unanimous Court. STEVENS, J., filed a concurring opinion, in which BLACKMUN, J., joined, post, p. 819.

**Opinion by:** BRENNAN

## Opinion

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[\*803] [\*822] [\*\*2171] JUSTICE BRENNAN delivered the opinion of the Court.

[1111] LEdHN[1A] [↑] [1A]This case requires that we decide a peculiar jurisdictional battle between the Court of Appeals for the Federal Circuit and the Court of Appeals for the Seventh Circuit. Each court has adamantly disavowed jurisdiction over this case. Each has transferred the case to the other. And each insists that the other's jurisdictional decision is "clearly wrong." [\*804] 798 F.2d 1051, 1056-1057 (CA7 1986); 822 F.2d 1544, 1551, n. 7 (CA Fed. 1987). The parties therefore have been forced to shuttle their appeal back and forth between Chicago and the District of Columbia in search of a hospitable forum, ultimately to have the merits decided, after two years, by a Court of Appeals that still insists it lacks jurisdiction to do so.

I

Respondent Colt Industries Operating Corp. is the leading manufacturer, seller, and marketer of M16 rifles and their parts and accessories. [\*\*\*\*11] Colt's dominant market position dates back to 1959, when it acquired a license for 16 patents to manufacture the M16's precursor. Colt continued to develop the rifle, which the United States Army adopted as its standard assault rifle, and patented additional improvements. Through various devices, Colt has also maintained a shroud of secrecy around certain specifications essential to the mass production of interchangeable M16 parts. For example, Colt's patents conceal many of the manufacturing specifications that might otherwise be revealed by its engineering drawings, and when Colt licenses others to manufacture M16 parts or hires employees with access to proprietary information, it contractually obligates them not to disclose specifications.

Petitioner Christianson is a former Colt employee who acceded to such a nondisclosure agreement. Upon leaving respondent's employ in 1975, Christianson established petitioner International Trade Services, Inc. (ITS), and began selling M16 parts to various customers domestically and abroad. Petitioners' business depended on information that Colt considers proprietary. Colt expressly waived its proprietary rights [\*\*2172] at least as to

some [\*\*\*\*12] of petitioners' [\*\*\*823] early transactions. The precise scope of Colt's waiver is a matter of considerable dispute. In 1983, however, Colt joined petitioners as defendants in a patent-infringement lawsuit against two companies that had arranged a sale of M16's to El Salvador. [\*805] Evidence suggested that petitioners supplied the companies with certain M16 [1112] specifications, and Colt sought a court order enjoining petitioners from any further disclosures. When the District Court declined the motion, Colt voluntarily dismissed its claims against petitioners. In the meantime, Colt notified several of petitioners' current and potential customers that petitioners were illegally misappropriating Colt's trade secrets, and urged them to refrain from doing business with petitioners.

Three days after their dismissal from the lawsuit, petitioners brought this lawsuit in the District Court against Colt "pursuant to Section 4 . . . ([15 U.S. C. § 15](#)) and Section 16 of the Clayton Act ([15 U.S. C. § 26](#)) for damages, injunctive and equitable relief by reason of its violations of [Sections 1](#) and [2](#) of the Sherman Act ([15 U.S. C. §§ 1](#) [\*\*\*\*13] & [2](#)) . . . ." App. 7. The complaint alleged that Colt's letters, litigation tactics, and "othe[r] . . . conduct" drove petitioners out of business. In that context, petitioners included the following obscure passage:

"18. The validity of the Colt patents had been assumed throughout the life of the Colt patents through 1980. Unless such patents were invalid through the wrongful retention of proprietary information in contravention of United States Patent Law ([35 U.S. C. § 112](#)), in 1980, when such patents expired, anyone 'who has ordinary skill in the rifle-making art' is able to use the technology of such expired patents for which Colt earlier had a monopoly position for 17 years.

"19. ITS and anyone else has the right to manufacture, contract for the manufacture, supply, market and sell the M-16 and M-16 parts and accessories thereof at the present time." *Id.*, at 9.

Petitioners later amended their complaint to assert a second cause of action under state law for tortious interference with their business relationships. Colt interposed a defense that [\*806] its conduct was justified by a need to protect its trade secrets and countersued [\*\*\*\*14] on a variety of claims arising out of petitioners' alleged misappropriation of M16 specifications.

Petitioners' motion for summary judgment raised only a patent-law issue obliquely hinted at in the above-quoted paragraphs -- that Colt's patents were invalid from their inception for failure to disclose sufficient information to "enable any person skilled in the art . . . to make and use the same" as well as a description of "the best mode contemplated by the inventor of carrying out his invention." [35 U.S. C. § 112](#). Since Colt benefited from the protection of the invalid patents, the argument continues, the "trade secrets" that the patents should have disclosed lost any state-law protection. Petitioners therefore argued that the District Court should hold that "Colt's trade secrets are invalid and that [their] claim of invalidity shall be taken as established with respect to all claims [\*\*\*824] and counterclaims to which said issue is material." App. 58.

The District Court awarded petitioners summary judgment as to liability on both the antitrust and the tortious-interference claims, essentially relying on the [§ 112](#) theory articulated above. In the process, [\*\*\*\*15] the District Court invalidated nine of Colt's patents, declared all trade secrets relating to the M16 unenforceable, enjoined Colt from enforcing "any form of trade secret right in any technical information relating to the M16," and ordered Colt to disgorge to petitioners all such information. [613 F. Supp. 330, 332 \(CD Ill. 1985\)](#).

Respondent appealed to the Court of Appeals for the Federal Circuit, which, after full briefing and argument, concluded that it lacked jurisdiction and issued an unpublished order transferring the appeal to the Court of Appeals for the Seventh Circuit. See [28 U.S. C. § 1631](#). The Seventh Circuit, [\*\*2173] however, raising the jurisdictional issue *sua sponte*, concluded that the Federal Circuit was "clearly wrong" and transferred the case back. [798 F.2d at 1056-1057, 1062](#). [\*807] The Federal Circuit, for its part, adhered to its prior jurisdictional ruling, concluding that the Seventh Circuit exhibited "a monumental misunderstanding of the patent jurisdiction granted this court," [822 F.2d at 1547](#), and was "clearly wrong," *id., at 1551, n. 7*. Nevertheless, the [\*\*\*\*16] Federal Circuit proceeded to address the merits in the "interest of justice," *id., at 1559-1560*, and reversed the District Court. We granted certiorari, *484 U.S. 985* (1987), and now vacate the judgment of the Federal Circuit.

II

LEdHN[1B] [1B] As relevant here, 28 U.S. C. § 1295(a)(1) HN1 grants the Court of Appeals for the Federal Circuit exclusive jurisdiction over "an appeal from a final decision of a district court of the United States . . . if the jurisdiction of that court was based, in whole or in part, on [28 U.S. C.] section 1338 . . ." <sup>1</sup> Section 1338(a), [1113] in turn, provides in relevant part that "the district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents . . ." Thus, the jurisdictional issue before us turns on whether this is a case "arising under" a federal patent statute, for if it is then the jurisdiction of the District Court was based at least "in part" on § 1338.

[\*\*\*\*17] A

LEdHN[2] [2] LEdHN[3] [3] In interpreting § 1338's precursor, we held long ago that HN2 in order to demonstrate that a case is one "arising under" federal patent law "the plaintiff must set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, [\*808] or sustained by the opposite construction of these laws." Pratt v. Paris Gas Light & Coke Co., 168 U.S. 255, 259, 42 L. Ed. 458, 18 S. Ct. 62 (1897). See [\*\*\*825] Henry v. A. B. Dick Co., 224 U.S. 1, 16, 56 L. Ed. 645, 32 S. Ct. 364 (1912). Our cases interpreting identical language in other jurisdictional provisions, particularly the general federal-question provision, 28 U.S. C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"), have quite naturally [\*\*\*\*18] applied the same test.<sup>2</sup> See Gully v. First National Bank in Meridian, 299 U.S. 109, 112, 81 L. Ed. 70, 57 S. Ct. 96 (1936) (the claim alleged in the complaint "must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another") (citations omitted). HN3 A district court's federal-question jurisdiction, we recently explained, extends over "only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question" [\*2174] of federal law," Franchise Tax Board of California v. Construction Laborers Vacation Trust, 463 U.S. 1, 27-28, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983), in that "federal law is a necessary element of one of the well-pleaded . . . claims," *id.* at 13. Linguistic consistency, to which we have historically adhered, demands that [\*\*\*\*19] § 1338(a) jurisdiction likewise extend [\*809] only to those cases in which a well-pleaded complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims. See 822 F.2d at 1553-1556; 798 F.2d at 1059-1061.

[\*\*\*\*20] LEdHN[4] [4] LEdHN[5A] [5A] The most superficial perusal of petitioners' complaint establishes, and no one disputes, that patent law did not in any sense create petitioners' antitrust or intentional-interference claims. Since no one asserts that federal jurisdiction rests on petitioners' state-law claims, the dispute centers around whether patent law "is a necessary element of one of the well-pleaded [antitrust] claims." See Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 813, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986). Our cases, again

<sup>1</sup> Colt's appeal to the Federal Circuit actually invoked 28 U.S. C. §§ 1292(a)(1) and (c)(1), which together grant the Federal Circuit exclusive jurisdiction over appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving [an] injunctio[n]," § 1292(a)(1), "in any case over which the court would have jurisdiction over an appeal under section 1295," § 1292(c)(1).

<sup>2</sup> Colt correctly points out that in this case our interpretation of § 1338(a)'s "arising under" language will merely determine which of two federal appellate courts will decide the appeal, and suggests that our "arising under" jurisprudence might therefore be inapposite. Since, however, § 1338(a) delineates the jurisdiction of the federal and state courts over cases involving patent issues, the phrase (like the identical phrase in § 1331) "masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." See Franchise Tax Board of California v. Construction Laborers Vacation Trust, 463 U.S. 1, 8, 77 L. Ed. 2d 420, 103 S. Ct. 2841 (1983) (footnote omitted). See also Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 810, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986) ("Determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system").

mostly in the [§ 1331](#) context, establish principles for both defining the "well-pleaded . . . claims" and discerning which elements are "necessary" or "essential" to them. [HN4](#) Under the well-pleaded complaint rule, as appropriately adapted to [§ 1338\(a\)](#), whether a claim "arises under" patent law "must be determined from what necessarily appears in the plaintiff's statement of his own claim in the [\*\*\*\*21] bill or declaration, unaided by anything [\*\*\*826] alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." [Franchise Tax Board, supra, at 10](#) (quoting [Taylor v. Anderson, 234 U.S. 74, 75-76, 58 L. Ed. 1218, 34 S. Ct. 724 \(1914\)](#)). See [Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 53 L. Ed. 126, 29 S. Ct. 42 \(1908\)](#). Thus, [HN5](#) a case raising a federal patent-law defense does not, for that reason alone, "arise under" patent law, "even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." [Franchise Tax Board, supra, at 14.](#)<sup>3</sup> See also [Merrell Dow, supra, at 808](#).

[1114] [\*\*\*\*22] [\*810] [LEdHN\[6\]](#) [6]Nor is it necessarily sufficient that a well-pleaded claim alleges a single theory under which resolution of a patent-law question is essential. If "on the face of a well-pleaded complaint there are . . . reasons completely unrelated to the provisions and purposes of [the patent laws] why the [plaintiff] may or may not be entitled to the relief it seeks," [Franchise Tax Board, 463 U.S. at 26](#) (footnote omitted), then the claim does not "arise under" those laws. See [id., at 26, n. 29](#). Thus, a claim supported by alternative theories in the complaint may not form the basis for [§ 1338\(a\)](#) jurisdiction unless patent law is essential to each of those theories.

B

[LEdHN\[1C\]](#) [1C] [LEdHN\[7A\]](#) [7A] [LEdHN\[8A\]](#) [8A]Framed in these terms, our resolution of the jurisdictional issue in this case is straightforward. Petitioners' antitrust count can readily be understood to encompass [\*\*\*\*23] both a monopolization claim under [§ 2](#) of the Sherman Act and a group boycott claim under [§ 1](#). The patent-law issue, while arguably necessary to at least one [\*\*2175] theory under each claim, is not necessary to the overall success of either claim.

[LEdHN\[7B\]](#) [7B] [7B][Section 2](#) of the Sherman Act [HN6](#) condemns " every person who shall monopolize, or attempt to monopolize . . ." [15 U.S. C. § 2](#). The thrust of petitioners' monopolization claim is that Colt has "embarked on a course of conduct to illegally extend its monopoly position with respect to the described patents and to prevent ITS from engaging in any business with respect to parts and accessories of the M-16." App. 10. The complaint specifies several acts, most of which relate either to Colt's prosecution of the lawsuit against petitioners or to letters Colt sent to petitioners' potential and existing customers. To make out a [§ 2](#) claim, petitioners would [\*811] have to present a theory under which the identified conduct amounted to a "willful [\*\*\*\*24] acquisition or maintenance of [monopoly] power as distinguished from growth or development [\*\*\*827] as a consequence of a superior product, business acumen, or historic accident." [United States v. Grinnell Corp., 384 U.S. 563, 570-571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#). Both the Seventh Circuit and Colt focus entirely on what they perceive to be "the only basis Christianson asserted in the complaint for the alleged antitrust violation, "[798 F.2d at 1061](#); see Brief for Respondent 32 -- namely, that Colt made false assertions in its letters and pleadings that petitioners were violating its trade secrets, when those trade secrets were not protected under state law because Colt's patents were invalid under [§ 112](#). Thus, Colt concludes, the validity of the patents is an essential element of petitioners' *prima facie* monopolization theory and the case "arises under" patent law.

[LEdHN\[9\]](#) [9]We can assume without deciding that the invalidity of Colt's patents is an essential element of the foregoing monopolization theory rather than merely an argument in anticipation of a defense. [\*\*\*\*25] But see [822 F.2d at 1547](#). The well-pleaded complaint rule, however, focuses on claims, not theories, see [Franchise Tax Board,](#)

<sup>3</sup> [LEdHN\[5B\]](#) [5B]

On the other hand, merely because a claim makes no reference to federal patent law does not necessarily mean the claim does not "arise under" patent law. Just as "a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint," [Franchise Tax Board, supra, at 22](#) (citations omitted); see [Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 397, n. 2, 69 L. Ed. 2d 103, 101 S. Ct. 2424 \(1981\)](#); [id., at 408, n. 3](#) (BRENNAN, J., dissenting), so a plaintiff may not defeat [§ 1338\(a\)](#) jurisdiction by omitting to plead necessary federal patent-law questions.

supra, at 26, and n. 29; Gully, 299 U.S. at 117, and just because an element that is essential to a particular theory might be governed by federal patent law does not mean that the entire monopolization claim "arises under" patent law.

LEdHN[7C] [↑] [7C] Examination of the complaint reveals that the monopolization theory that Colt singles out (and on which petitioners ultimately prevailed in the District Court) is only one of several, and the only one for which the patent-law issue is even arguably essential. So far as appears from the complaint, for example, petitioners might have attempted to prove that Colt's accusations of trade-secret infringement were false not because Colt had no trade secrets, but because Colt authorized petitioners to use them. App. 9-10 ("Contrary to the permission extended to ITS to sell Colt parts and accessories [\*812] and in violation of the anti-trust laws . . . Colt has embarked upon a course of conduct . . . [\*\*\*\*26] . to prevent ITS from engaging in any business with respect to parts and accessories of the M-16"). In fact, most of the conduct alleged in the complaint could be deemed wrongful quite apart from the truth or falsity of Colt's accusations. According to the complaint, Colt's letters also (1) contained "copies of inapplicable court orders" and "suggest[ed] that these court orders prohibited [the recipients] from doing business with" petitioners; and (2) "falsely stat[ed] that 'Colt's right' to proprietary data had been 'consistently upheld in various courts.'" Id., at 10. Similarly, the complaint alleges that Colt's lawsuit against petitioners (1) was designed "to contravene the permission previously given"; (2) was "pursued . . . in bad faith by subjecting [petitioners] to substantial expense in extended discovery procedures"; and (3) was [1115] brought only to enable Colt "to urge customers and potential customers of [petitioners] to refrain from doing business with them." Id., at 10-11. Since there are "reasons completely unrelated to the provisions and purposes" of federal patent law why petitioners "may or may not be entitled to the [\*\*2176] relief [they] see[k]" [\*\*\*\*27] under their monopolization claim, Franchise Tax Board, supra, at 26 [\*\*\*828] (footnote omitted), the claim does not "arise under" federal patent law.

LEdHN[8B] [↑] [8B] The same analysis obtains as to petitioners' group-boycott claim under § 1 of the Sherman Act, which provides that HNT [↑] "every contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . is declared to be illegal," 15 U.S.C. § 1. This claim is set forth in the allegation that "virtually all suppliers of ITS and customers of ITS have agreed with Colt to refrain from supplying and purchasing M-16 parts and accessories to or from ITS, which has had the effect of requiring ITS to close its doors and no longer transact business." App. 11. As this case unfolded, petitioners attempted to prove that the alleged agreement was unreasonable because its purpose was to protect Colt's trade secrets from petitioners' infringement and, given the patents' [\*813] invalidity under § 112, Colt had no trade secrets [\*\*\*\*28] to infringe. Whether or not the patent-law issue was an "essential" element of that group-boycott *theory*, however, petitioners could have supported their group-boycott *claim* with any of several theories having nothing to do with the validity of Colt's patents. Equally prominent in the complaint, for example, is a theory that the alleged agreement was unreasonable not because Colt had no trade secrets to protect, but because Colt authorized petitioners to use them. Once again, the appearance on the complaint's face of an alternative, nonpatent theory compels the conclusion that the group-boycott claim does not "arise under" patent law.

### III

LEdHN[10A] [↑] [10A] LEdHN[11A] [↑] [11A] LEdHN[12A] [↑] [12A] Colt offers three arguments for finding jurisdiction in the Federal Circuit, notwithstanding the well-pleaded complaint rule. The first derives from congressional policy; the second is based on *Federal Rule of Civil Procedure 15(b)*; and the third is grounded in principles of the law of the case. We [\*\*\*\*29] find none of them persuasive.

#### A

LEdHN[10B] [↑] [10B] Colt correctly observes that one of Congress' objectives in creating a Federal Circuit with exclusive jurisdiction over certain patent cases was "to reduce the widespread lack of uniformity and uncertainty of legal doctrine that exist[ed] in the administration of patent law." H. R. Rep. No. 97-312, p. 23 (1981). Colt might be correct (although not clearly so) that Congress' goals would be better served if the Federal Circuit's jurisdiction were to be fixed "by reference to the case actually litigated," rather than by an *ex ante* hypothetical assessment of the elements of the complaint that might have been dispositive. Brief for Respondent 31. Congress determined the relevant focus, however, when it granted jurisdiction to the Federal Circuit over "an appeal from . . . a [\*814]

district court . . . if the jurisdiction of *that court* was based . . . on [section 1338](#)." [28 U.S.C. § 1295\(a\)\(1\)](#) (emphasis added). Since the district court's jurisdiction is determined by reference to the well-pleaded complaint, not the well-tried case, [\*\*\*\*30] the referent for the Federal Circuit's jurisdiction must be the same. The legislative history of the Federal Circuit's jurisdictional provisions confirms that focus. See, e. g., H. R. Rep. No. 97-312, [supra, at 41](#) (cases fall within the Federal Circuit's patent jurisdiction "in the [\*\*\*\*829] same sense that cases are said to 'arise under' federal law for purposes of federal question jurisdiction"). In view of that clear congressional intent, we have no more authority to read [§ 1295\(a\)\(1\)](#) as granting the Federal Circuit jurisdiction over an appeal where the well-pleaded complaint does not depend on patent law, than to read [§ 1338\(a\)](#) as granting a district court jurisdiction over such a complaint. See [Pratt, 168 U.S. at 259](#).

## B

[LEdHN\[11B\]](#) [↑] [11B]Colt suggests alternatively that under [\*\*2177] *Federal Rule of Civil Procedure 15(b)*<sup>4</sup> we should deem the complaint amended to encompass a new and independent cause of action -- "an implied cause of action under [section 112](#) of the patent laws." Brief for Respondent 28. Such a cause of action, which Colt finds in petitioners' summary judgment [\*\*\*\*31] papers, would plainly "arise under" [1116] the patent laws, regardless of its merit. See [822 F.2d at 1566](#) (Nichols, J., concurring and dissenting).

We need not decide under what circumstances, if any, a court of appeals could furnish itself a jurisdictional basis unsupported by the pleadings by deeming the complaint [\*815] amended in light of the parties' "express or implied consent" to litigate a claim. *Fed. Rule Civ. [\*\*\*\*32] Proc.* 15(b). In this case there is simply no evidence of any consent among the parties to litigate the new patent-law claim that Colt imputes to petitioners. Colt points to nothing in petitioners' summary judgment motion expressly raising such a new cause of action, much less anything in its own motion papers suggesting consent to one. See App. 57-58. True, the summary judgment papers focused almost entirely on the patent-law issues, which petitioners deemed "basic and fundamental to the subject lawsuit." [Id. at 57](#). But those issues fell squarely within the purview of the theories of recovery, defenses, and counterclaims that the pleadings already encompassed. Petitioners recognized as much when they moved the District Court to hold that their "claim of [patent] invalidity shall be taken as established with respect to all claims and counter-claims to which said issue is material." [Id. at 58](#). Thus, the patent-law focus of the summary judgment papers hardly heralded the assertion of a new patent-law claim. See, e. g., [Quillen v. International Playtex, Inc., 789 F.2d 1041, 1044 \(CA4 1986\)](#); 6 C. Wright & A. Miller, *Federal Practice and Procedure* § 1493, [\*\*\*\*33] p. 466 (1971). Moreover, the District Court never intimated that the patent issues were relevant to any cause of action other than the antitrust and intentional-interference claims raised expressly in the complaint; the court four times linked its judgment to "liability on Counts I and II," without any reference to the hypothetical Count III that Colt imputes to petitioners. [609 F. Supp. 1174, 1185 \(CD Ill. 1985\)](#) See also [613 F. Supp. at 332](#).

## [\*\*\*830] C

[LEdHN\[13T\]](#) [↑] [13]Colt's final argument is that the Federal Circuit was obliged not to revisit the Seventh Circuit's thorough analysis of the jurisdictional issue, but merely to adopt it as the law of the case. See also [822 F.2d at 1565](#) (Nichols, J., concurring and dissenting). "As most commonly defined, [HN9](#) [↑] the doctrine [\*816] [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." [Arizona v. California, 460 U.S. 605, 618, 75 L. Ed. 2d 318, 103 S. Ct. 1382 \(1983\)](#) [\*\*\*\*34] (dictum). This rule of practice promotes the finality and efficiency of the judicial process by "protecting against the agitation of settled issues." 1B J. Moore, J. Lucas, & T. Currier, *Moore's Federal Practice* P0.404[1], p. 118 (1984) (hereinafter Moore's).

<sup>4</sup> [HN8](#) [↑] **Rule 15(b)** provides in relevant part:

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues."

Colt is correct that the doctrine applies as much to the decisions of a coordinate court in the same case as to a court's own decisions. See, e. g., [Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc.](#), 761 F.2d 649, 657 (CA Fed.), cert. denied, 474 U.S. 902, 88 L. Ed. 2d 229, 106 S. Ct. 230 (1985); [Perkin-Elmer Corp. v. Computervision Corp.](#), 732 F.2d 888, 900-901 [\*\*2178] (CA Fed.), cert. denied, 469 U.S. 857, 83 L. Ed. 2d 120, 105 S. Ct. 187 (1984). Federal courts routinely apply law-of-the-case principles to transfer decisions of coordinate courts. See, e. g., [Hayman Cash Register Co. v. Sarokin](#), 669 F.2d 162, 164-170 (CA3 1982) (transfer under 28 U.S.C. § 1406 (a)); [Skil Corp. v. Millers Falls Co.](#), 541 F.2d 554, 558-559 (CA6) (alternative holding) (transfer under 28 U.S.C. § 1404 [\*\*\*\*35] (a)), cert. denied, 429 U.S. 1029, 50 L. Ed. 2d 631, 97 S. Ct. 653 (1976); 1B Moore's PP0.404[4.-5], 0.404[8]. Cf. [Hoffman v. Blaski](#), 363 U.S. 335, 340-341, n. 9, 4 L. Ed. 2d 1254, 80 S. Ct. 1084 (1960) (res judicata principles did not limit power of Court of Appeals to reconsider transfer decision not upset by coordinate court). Indeed, the policies supporting the doctrine apply with even greater force to transfer decisions than to decisions of substantive law; transferee courts that feel entirely free to revisit transfer decisions of a coordinate court threaten to send litigants into a vicious circle of litigation. See [Hayman, supra, at 169](#); [Chicago & N. W. Transp. Co. v. United States](#), 574 F.2d 926, 930 (CA7 1978). Cf. [Blaski, supra, at 348-349](#) (Frankfurter, J., dissenting).<sup>5</sup>

[\*\*\*\*36] [\*817] [LEdHN\[12B\]](#) [↑] [12B] [LEdHN\[14\]](#) [↑] [14] [LEdHN\[15\]](#) [↑] [15] Colt's conclusion that jurisdiction therefore lay in the Federal Circuit is flawed, however, for three reasons. First, the Federal Circuit, in transferring the case to the Seventh Circuit, was the first to decide the [1117] jurisdictional issue. That the Federal Circuit did not explicate its rationale is irrelevant, for the law of the case turns on whether a court previously "decide[d] upon a rule of law" -- which the Federal Circuit necessarily did -- not on whether, or how well, it explained the decision. Thus, the law of the case was that the Seventh Circuit had jurisdiction, and it was the Seventh [\*\*\*831] Circuit, not the Federal Circuit, that departed from the law of the case. Second, [HN10](#) [↑] the law-of-the-case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. [\*\*\*\*37] " [Messenger v. Anderson](#), 225 U.S. 436, 444, 56 L. Ed. 1152, 32 S. Ct. 739 (1912) (Holmes, J.) (citations omitted). A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was "clearly erroneous and would work a manifest injustice." [Arizona v. California, supra, at 618, n. 8](#) (citation omitted). Thus, even if the Seventh Circuit's decision was law of the case, the Federal Circuit did not exceed its power in revisiting the jurisdictional issue, and once it concluded that the prior decision was "clearly wrong" it was obliged to decline jurisdiction. Most importantly, law of the case cannot bind this Court in reviewing decisions below. A petition for writ of certiorari can expose the entire case to review. [Panama R. Co. v. Napier Shipping Co.](#), 166 U.S. 280, 283-284, 41 L. Ed. 1004, 17 S. Ct. 572 (1897). Just as a district court's adherence to law of the case cannot insulate an issue from appellate review, a court of appeals' adherence to the [\*\*\*38] law of the case cannot insulate an issue from this Court's review. See [Messenger, \[\\*818\] supra, at 444](#); [Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.](#), 240 U.S. 251, 257-259, 60 L. Ed. 629, 36 S. Ct. 269 (1916).

#### IV

[LEdHN\[1D\]](#) [↑] [1D] [LEdHN\[16\]](#) [↑] [16] [LEdHN\[17\]](#) [↑] [17] Our agreement with the Federal Circuit's conclusion that it lacked jurisdiction, compels us to disapprove of its decision to reach the merits anyway "in the interest of justice." [822 F.2d at 1559](#). [HN11](#) [↑] [\*\*2179] Courts created by statute can have no jurisdiction but such as the statute confers." [Sheldon v. Sill](#), 49 U.S. 441, 8 HOW 441, 449, 12 L. Ed. 1147 (1850). See also [Firestone Tire & Rubber Co. v. Risjord](#), 449 U.S. 368, 379-380, 66 L. Ed. 2d 571, 101 S. Ct. 669 (1981). The statute confers on the Federal Circuit authority to make a single [\*\*\*39] decision upon concluding that it lacks jurisdiction -- whether to dismiss the case or, "in the interest of justice," to transfer it to a court of appeals that has jurisdiction. 28 U.S.C. § 1631.

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<sup>5</sup> There is no reason to apply law-of-the-case principles less rigorously to transfer decisions that implicate the transferee's jurisdiction. Perpetual litigation of any issue -- jurisdictional or nonjurisdictional -- delays, and therefore threatens to deny, justice. But cf. [Potomac Passengers Assn. v. Chesapeake & Ohio R. Co.](#), 171 U.S. App. D.C. 359, 363, n. 22, 520 F.2d 91, 95, n. 22 (1975).

The age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists has always worked injustice in particular cases. Parties often spend years litigating claims only to learn that their efforts and expense were wasted in a court that lacked jurisdiction. Even more exasperating for the litigants (and wasteful for all concerned) is a situation where, as here, the litigants are bandied back and forth helplessly between two courts, each of which insists the other has jurisdiction. Such situations inhere in the very nature of jurisdictional lines, for as our cases aptly illustrate, few jurisdictional lines can be so finely drawn as to leave no room for disagreement on close cases. See, e. g., *K mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 99 L. Ed. 2d 151, 108 S. Ct. 950 (1988); *United States v. Hohri*, 482 U.S. 64, 96 L. Ed. 2d 51, 107 S. Ct. 2246 (1987).

[\*\*\*\*40] [LEdHN\[18\]](#) [↑] [18]That does not mean, however, [\*\*\*832] that every borderline case must inevitably culminate in a perpetual game of jurisdictional ping-pong until this Court intervenes to resolve the underlying jurisdictional dispute, or (more likely) until one of the parties surrenders to futility. Such a state of affairs would undermine public confidence in our judiciary, squander [\*819] private and public resources, and commit far too much of this Court's calendar to the resolution of fact-specific jurisdictional disputes that lack national importance. "Surely a seemly system of judicial remedies . . . regarding controverted transfer provisions of the United States Code should encourage, not discourage, quick settlement of questions of transfer . . ." *Blaski*, 363 U.S. at 349 (Frankfurter, J., dissenting). The courts of appeals should achieve this end by adhering strictly to principles of law of the case. See *supra, at 816*. Situations might arise, of course, in which the transferee court considers the transfer "clearly erroneous." *Arizona v. California*, 460 U.S. at 618, n. 8. But [\*\*\*\*41] as "the doctrine of the law of the case is . . . a heavy deterrent to vacillation on arguable issues," 1B Moore's P0.404[1], at 124, such reversals should necessarily be exceptional; courts will rarely transfer cases over which they have clear jurisdiction, and close questions, by definition, never have clearly correct answers. Under law-of-the-case principles, if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end. See *Fogel v. Chestnutt*, 668 F.2d 100, 109 (CA2 1981) ("The law of the case will be disregarded only when the court has 'a clear conviction of error'") (citation omitted), cert. denied, 459 U.S. 828 [1118] (1982). While adherence to the law of the case will not shield an incorrect jurisdictional decision should this Court choose to grant review, see *supra, at 817-818*, it will obviate the necessity for us to resolve every marginal jurisdictional dispute.

[LEdHN\[1E\]](#) [↑] [1E]We vacate the judgment of the Court of Appeals for the Federal Circuit and remand with instructions to transfer the case to the Court of Appeals for the [\*\*\*\*42] Seventh Circuit. See 28 U.S. C. § 1631.

*It is so ordered.*

**Concur by:** STEVENS

## Concur

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JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, concurring.

In a seminal case construing federal-question jurisdiction, Justice Cardozo wrote that "what is needed is something of [\*820] that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of [\*\*2180] problems of causation . . . a selective process which picks the substantial causes out of the web and lays the other ones aside." *Gully v. First National Bank in Meridian*, 299 U.S. 109, 117-118, 81 L. Ed. 70, 57 S. Ct. 96 (1936). Although I agree with the Court's conclusion in this case that appellate jurisdiction is in the Seventh Circuit rather than the Federal Circuit, I write separately to emphasize that a common-sense application of Justice Cardozo's dictum requires that the answer to the question whether a claim arises under the patent laws [\*\*\*833] may depend on the time when the question is asked. More specifically, if the question is asked at the end of a trial in order to decide whether the Federal Circuit has appellate [\*\*\*\*43] jurisdiction, the answer may be different than if it had been asked at the outset to decide whether a federal district court has jurisdiction to try the case.

When Congress passed the Federal Courts Improvement Act in 1982 and vested exclusive jurisdiction in the Court of Appeals for the Federal Circuit to resolve appeals of claims that had arisen under the patent laws in the federal district courts, it was responding to concerns about both the lack of uniformity in federal appellate construction of the patent laws and the forum-shopping that such divergent appellate views had generated. Nonetheless, its definition of the Federal Circuit's jurisdiction did not embrace all cases in which a district court had decided a patent-law question. Instead, it adopted a standard that requires the appellate court to decide whether the jurisdiction of the district court was based, in whole or in part, on a claim "arising under" the patent laws.<sup>1</sup>

[\*\*\*\*44] [\*821] The question whether a claim arises under the patent laws is similar to the question whether a claim arises under federal law. Although there is no single, precise, all-embracing definition of either body of law, the "vast majority" of cases that come within either "grant of jurisdiction" are covered by Justice Holmes' statement that a 'suit arises under the law that creates the cause of action.' Thus, the vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action." *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986) (citation omitted). In this case it is clear that the causes of action asserted by petitioners were created by the antitrust laws and not the patent laws. Congress did not create an express cause of action to enforce § 112 of the patent laws, and I find no merit in respondent's suggestion that we should recognize an implied cause of action under § 112. Accordingly, I agree with the Court's conclusion that the issue of wrongful retention of proprietary information that became the focus [\*\*\*\*45] of this case under § 112 of the patent laws could not confer appellate jurisdiction in the Federal Circuit, because the issue [\*\*\*834] arose as a defense rather than as a claim.<sup>2</sup>

[\*\*\*\*46] [\*822] [\*\*2181] [1119] To the extent that Part III-A of the Court's opinion does nothing more than abjure the notion that the Federal Circuit has jurisdiction over patent-law issues as well as claims, I am thus in complete agreement. However, in rejecting respondent's contention that "Congress' goals would be better served if the Federal Circuit's jurisdiction were to be fixed 'by reference to the case actually litigated,' rather than by an *ex ante* hypothetical assessment of the elements of the complaint that might have been dispositive," *ante*, at 813, the Court's opinion might be read as suggesting that whether patent claims are properly before the Federal Circuit on

<sup>1</sup> Title *28 U.S. C. § 1295(a)(1)* grants the Federal Circuit appellate jurisdiction over final decisions of federal district courts whose jurisdiction "was based, in whole or in part, on *section 1338* of this title." Title *28 U.S. C. § 1338(a)*, in turn, grants the federal district courts "original jurisdiction of any civil action arising under any Act of Congress relating to patents . . ." As the Court correctly states, *ante*, at 807-810, § 1338 jurisdiction, like § 1331 jurisdiction, is over claims, not issues. See H. R. Rep. No. 97-312, p. 41 (1981) ("Cases will be within the jurisdiction of the Court of Appeals for the Federal Circuit in the same sense that cases are said to 'arise under' federal law for purposes of federal question jurisdiction. *Contrast*, *Coastal States Marketing, Inc. v. New England Petroleum Corp.*, 604 F.2d 179 (2d Cir., 1979) [Temporary Emergency Court of Appeals properly has jurisdiction over *issues*, not *claims*, arising under the Economic Stabilization Act]").

In this context, it is important to note that the "well-pleaded complaint" rule helps ferret out claims from issues, and says nothing about whether such separation should be made only on the basis of the original complaint.

<sup>2</sup> Indeed, since it seems plain that no implied cause of action exists under § 112 -- which, after all, merely describes the nature of the specifications that must be included with a patent application -- a plaintiff's attempt at gaining federal-court jurisdiction through a claim arising under § 112 would be properly rejected under the "artful pleading" doctrine. See, e. g., *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673-674, 94 L. Ed. 1194, 70 S. Ct. 876 (1950) ("To sanction suits for declaratory relief as within the jurisdiction of the District Courts merely because, as in this case, artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purpose of the Declaratory Judgment Act"); *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397, n. 2, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981) (District Court properly found that respondents "had attempted to avoid removal jurisdiction by 'artful[ly]' casting their 'essentially federal law claims' as state-law claims"); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 397, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987) ("artful pleading" doctrine cannot be invoked by party attempting to justify removal on the basis of facts not alleged in the complaint); 14A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3722, pp. 266-276 (1985); see also *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986) (incorporation of federal standard in state-law private action, when no cause of action, either express or implied, exists for violations of that federal standard, does not make the action one "arising under the Constitution, laws, or treaties of the United States").

appeal should be determined by examining only the initial complaint and not by ascertaining whether a patent claim in fact was litigated in the case. Such an approach would assume that whether a case "arises under" the patent laws turns on the same considerations whether one is determining the Federal Circuit's appellate jurisdiction or a federal district court's original jurisdiction. But although [28 U.S.C. § 1338\(a\)](#) provides the basis for both types of jurisdictional [\*\*\*\*47] assessment, I think it clear that Congress could not have intended precisely the same analysis in both instances. Two simple examples will illustrate the point.

If a patentee should file a two-count complaint seeking damages (1) under the antitrust laws and (2) for patent infringement, the district court's jurisdiction would unquestionably be based, at least in part, on [§ 1338\(a\)](#). If, however, pretrial discovery convinced the plaintiff that no infringement had occurred, and Count 2 was therefore dismissed voluntarily in advance of trial, the case that would actually be litigated would certainly not arise under the patent laws for purposes of appellate jurisdiction. Even though the district court's original jurisdiction when the complaint was filed had been based, in part, on [§ 1338\(a\)](#), the case would no longer be one arising under the patent laws for purposes of Federal [\*\*\*835] Circuit review when the district court's judgment was entered. Conversely, if an original complaint alleging only an antitrust violation should be amended after discovery to add a patent-law claim, and if the plaintiff should be successful in proving that its patent was valid and infringed but unsuccessful [\*\*\*\*48] in proving any basis for recovery under the antitrust laws, the district court's judgment would sustain a claim arising under the patent laws even though the complaint initially invoking its jurisdiction had not mentioned it, and an appeal would properly lie in the Federal Circuit.

Whether the complaint is actually amended, as in the previous example, or constructively amended to conform to the proof, see *Fed. Rule Civ. Proc. 15(b)*,<sup>3</sup> Congress' goal of ensuring [\*824] that appeals of patent-law [\*\*2182] claims go to the Federal Circuit would be thwarted by determining that court's appellate jurisdiction only through an examination of the complaint as initially filed. That approach would enable an unscrupulous plaintiff to manipulate appellate court jurisdiction by the timing of the amendments to its complaint. The Court expressly leaves open the question whether a constructive amendment could provide the foundation for Federal Circuit patent-law jurisdiction, see *ante*, at 814-815,<sup>4</sup> and says nothing on the subject whether actual amendments to the complaint can [1120] so suffice. But since respondent has asked us to rule in its favor on the ground that petitioners' complaint [\*\*\*\*49] added a patent-law claim through constructive amendment, I think we should make it perfectly clear that even though respondent's approach to the jurisdictional question is sound, its application of that approach to this case fails because the claim that was actually litigated did not arise under the patent laws. Nevertheless, since what the Court has written is not inconsistent with this view, I join its opinion.

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## References

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60 Am Jur 2d, Patents 1131-1133

2 Federal Procedure, L Ed, Appeal, Certiorari, and Review 3:301.5; 26 Federal Procedure, L Ed, Patents 60:1062

[28 USCS 1295\(a\)\(1\), 1338\(a\)](#)

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<sup>3</sup> "Rule 15. Amended and Supplemental Pleadings.

"(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. . . ."

<sup>4</sup> "We need not decide under what circumstances, if any, a court of appeals could furnish itself a jurisdictional basis unsupported by the pleadings by deeming the complaint amended in light of the parties' 'express or implied consent' to litigate a claim. *Fed. Rule Civ. Proc. 15(b)*."

US L Ed Digest, Appeal 228

Index to Annotations, Court of Appeals; Patents

Annotation References:

Application of doctrine of law of the case to review by one federal Court of Appeals of determination by another federal Court of Appeals. 74 ALR Fed 878.

Erroneous decision as law of the case on subsequent appellate review. 87 ALR2d 271.

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## California v. ARC America Corp.

Supreme Court of the United States

February 27, 1989, Argued ; April 18, 1989, Decided

No. 87-1862

### **Reporter**

490 U.S. 93 \*; 109 S. Ct. 1661 \*\*; 104 L. Ed. 2d 86 \*\*\*; 1989 U.S. LEXIS 2024 \*\*\*\*; 57 U.S.L.W. 4425; 1989-1 Trade Cas. (CCH) P68,537

CALIFORNIA ET AL. v. ARC AMERICA CORP. ET AL.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

**Disposition:** [817 F. 2d 1435](#), reversed.

## **Core Terms**

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purchasers, indirect, state law, federal law, anti trust law, pre-empted, antitrust, Sherman Act, damages, cases, purpose of congress, settlement fund, federal court, Clayton Act, settlement, purposes, distributing, pre-emption, overcharge, concrete

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Clayton Act > General Overview

**[HN1](#)[ Antitrust & Trade Law, Clayton Act**

See § 4 of the Clayton Act, [15 U.S.C.S. § 15\(a\)](#).

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

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

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

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

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

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

**[HN2](#)[ Purchasers, Direct Purchasers**

There are three purposes or objectives of federal **antitrust law**: avoiding unnecessarily complicated litigation; providing direct purchasers with incentives to bring private antitrust actions; and avoiding multiple liability of defendants.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

### **HN3** [] Remedies, Damages

Under federal law, no indirect purchaser is entitled to sue for damages for a violation of the Sherman Act, [15 U.S.C.S. § 1](#), and there is no claim here that state law could provide a remedy for the federal violation that federal law forbids.

Constitutional Law > Supremacy Clause > General Overview

### **HN4** [] Constitutional Law, Supremacy Clause

It is accepted that Congress has the authority, in exercising its U.S. Const. art. I powers, to preempt state law.

Constitutional Law > Supremacy Clause > General Overview

### **HN5** [] Constitutional Law, Supremacy Clause

In the absence of an express statement by Congress that state law is pre-empted, there are two other bases for finding preemption. First, when Congress intends that federal law occupy a given field, state law in that field is pre-empted. Second, even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Constitutional Law > Supremacy Clause > General Overview

Governments > Legislation > Statutory Remedies & Rights

Governments > Federal Government > US Congress

### **HN6** [] Constitutional Law, Supremacy Clause

When Congress legislates in a field traditionally occupied by the states, the court starts with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the states.

Constitutional Law > Supremacy Clause > General Overview

## [HN7 Constitutional Law, Supremacy Clause](#)

Congress has not preempted the field of **antitrust law**. Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies.

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

Constitutional Law > Supremacy Clause > General Overview

## [HN8 Regulated Practices, Private Actions](#)

State statutes cannot and do not purport to affect remedies available under federal law. Furthermore, state indirect purchaser actions will not necessarily be brought in federal court.

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

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

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

## [HN9 Regulated Practices, Private Actions](#)

Since many state indirect purchaser actions would be heard in state courts, at least when the federal courts determined that hearing those claims would be overly burdensome, any complication of federal direct purchaser actions in federal court would be minimal.

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

Antitrust & Trade Law > Clayton Act > General Overview

## [HN10 Private Actions, Purchasers](#)

Requiring direct and indirect purchasers to apportion the recovery under a single statute, § 4 of the Clayton Act, [15 U.S.C.S. § 15\(a\)](#), would result in no one plaintiff having a sufficient incentive to sue under that statute. State indirect purchaser statutes pose no similar risk to the enforcement of the federal law.

Constitutional Law > Supremacy Clause > General Overview

## [HN11 Constitutional Law, Supremacy Clause](#)

Ordinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law.

## Lawyers' Edition Display

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### Decision

Federal rule barring indirect purchasers from recovering damages for violations of federal antitrust laws held not to pre-empt state antitrust statutes permitting recovery by indirect purchasers.

### Summary

A number of states brought suits in various Federal District Courts, on the states' own behalf and on behalf of classes of all nonfederal governmental entities within each state, against various cement and concrete manufacturers who had allegedly engaged in a nationwide conspiracy to fix cement prices. In these suits the states, raising claims based in part on their indirect purchases of cement--that is, purchases of cement or of products containing cement from middle level distributors rather than directly from a manufacturer--(1) alleged violations of 1 of the Sherman Act ([15 USCS 1](#)) and sought treble damages under 4 of the Clayton Act ([15 USCS 15\(a\)](#)), which the United States Supreme Court had held to be inapplicable to indirect purchaser claims, and also (2) alleged violations of their respective state antitrust laws which expressly or arguably allowed indirect purchasers to sue. These lawsuits, together with others brought by private groups, were consolidated in the United States District Court for the District of Arizona for coordinated pretrial proceedings ([437 F Supp 750](#)), and several major defendants subsequently settled, creating a settlement fund in excess of \$ 32 million. However, when the states sought payment out of the fund for their indirect purchaser claims, the class members who were direct purchasers objected; and the District Court, holding that the state indirect purchaser statutes were clear attempts to frustrate the purpose of 4 as interpreted by the Supreme Court and were thus pre-empted by federal law, approved a plan for distributing the settlement fund which did not allow claims against the fund pursuant to those statutes. In affirming the District Court's plan, the United States Court of Appeals for the Ninth Circuit held that (1) if the state statutes were construed as allowing indirect purchasers to sue for the amount of any overcharge they absorbed, then they directly conflicted with the federal law as construed by the Supreme Court to allow direct purchasers to claim damages for the entire amount of any overcharge; and alternatively (2) if state law permitted indirect purchasers to bring claims for damages in addition to those brought by direct purchasers, then that law impermissibly interfered with the three policy goals underlying the federal ban on indirect purchaser claims, which goals were (a) avoiding unnecessarily complicated litigation, (b) providing direct purchasers with incentives to bring private antitrust actions, and (c) avoiding multiple liability of defendants ([817 F2d 1435](#)).

On appeal, the United States Supreme Court reversed. In an opinion by White, J., expressing the unanimous view of the seven participating members of the court, it was held that the federal rule barring antitrust recovery by indirect purchasers relates solely to the construction of the federal antitrust laws, and does not pre-empt state antitrust laws which permit recovery by indirect purchasers, because (1) the federal antitrust statutes do not expressly pre-empt such state statutes; (2) Congress has not pre-empted the field of **antitrust law**; and (3) the state statutes do not pose an obstacle to the accomplishment of congressional objectives, since such state laws (a) are consistent with the broad purpose of the federal antitrust laws in deterring anticompetitive conduct and insuring the compensation of victims of such conduct, (b) are not likely to lead to unnecessarily complicated proceedings on federal antitrust claims, given that claims under the state laws may be brought in state court and that federal courts have discretion to decline to exercise pendent jurisdiction over them, (c) do not, with respect to the federal statute with which the rule is concerned, pose a risk of reducing the incentives of direct purchasers to bring antitrust actions, and (d) do not contravene any express federal policy condemning multiple liability, since the federal decisions stating the indirect purchaser rule relate to the construction of federal law and do not identify any federal policy against states imposing additional liability.

Stevens and O'Connor, JJ., did not participate.

## Headnotes

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COURTS §240 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §6 > STATES, TERRITORIES, AND POSSESSIONS §36 > pre-emption by federal law -- state antitrust statutes -- indirect purchaser recovery - - statutory purpose -- pendent jurisdiction -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D] [LEdHN\[1E\]](#) [1E] [LEdHN\[1F\]](#) [1F] [LEdHN\[1G\]](#) [1G]

A federal rule which construes 4 of the Clayton Act ([15 USCS 15\(a\)](#)) as prohibiting indirect purchasers from recovering damages for a violation of the Sherman Act ([15 USCS 1 et seq.](#)) relates solely to the construction of the federal antitrust laws, and does not pre-empt state antitrust statutes which permit recovery by indirect purchasers, because the federal antitrust statutes do not expressly pre-empt such state statutes, Congress has not pre-empted the field of **antitrust law**, and the state statutes do not pose an obstacle to the accomplishment of the purposes and objectives of Congress; with regard to congressional objectives, such state laws (1) are consistent with the broad purpose of the federal antitrust laws in deterring anticompetitive conduct and insuring the compensation of victims, (2) do not interfere with the congressional purpose of avoiding unnecessarily complicated proceedings on federal antitrust claims, given that (a) the state statutes cannot and do not purport to affect remedies available under federal law, (b) state indirect purchaser actions may be brought in state court rather than in federal court, and (c) federal courts have discretion to decline to exercise pendent jurisdiction over such actions even if those actions are brought in the first instance in federal court, (3) do not interfere with the congressional purpose by reducing the incentives of direct purchasers to bring antitrust actions, since the federal rule regarding indirect purchasers is concerned with the effect of apportioning recovery between direct and indirect purchasers under a single federal statute, and since state indirect purchaser statutes pose no similar risk to the enforcement of the federal law, and (4) do not contravene any express federal policy condemning multiple liability, since the federal indirect purchaser decisions relate to the construction of the Clayton Act and do not identify any federal policy against states imposing liability in addition to that imposed by federal law.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > antitrust damages -- indirect purchasers - - > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

No indirect purchaser is entitled to sue for damages for a violation of the Sherman Act ([15 USCS 1 et seq.](#)); 4 of the Clayton Act ([15 USCS 15\(a\)](#)) authorizes only direct purchasers to recover monopoly overcharges under federal law.

STATES, TERRITORIES, AND POSSESSIONS §18 > federal power -- > Headnote:

[LEdHN\[3\]](#) [3]

Congress has the authority, in exercising its powers under Article I of the Federal Constitution, to pre-empt state law.

STATES, TERRITORIES, AND POSSESSIONS §22 > pre-emption by federal law -- tests -- > Headnote:

[LEdHN\[4\]](#) [4]

In the absence of an express statement by Congress that state law is pre-empted, there are two other bases for finding pre-emption: (1) when Congress intends that federal law occupy a given field, state law in that field is pre-empted; and (2) even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent that it actually conflicts with federal law--that is, when compliance with both state and federal law is impossible--or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

EVIDENCE §91 > STATES, TERRITORIES, AND POSSESSIONS §33 > federal law -- pre-emption of police power --

presumption -- > Headnote:

[LEdHN\[5\]](#) [5]

When Congress legislates in a field traditionally occupied by the states, it is assumed that the historic police powers of the states are not to be superseded by the federal statute unless that is the clear and manifest purpose of Congress.

STATES, TERRITORIES, AND POSSESSIONS §36 > pre-emption by federal antitrust law -- state remedies -- > Headnote:

[LEdHN\[6\]](#) [6]

Congress intends the federal antitrust laws to supplement, not displace, state antitrust remedies.

STATES, TERRITORIES, AND POSSESSIONS §46 > pre-emption by federal law -- state causes of action -- > Headnote:

[LEdHN\[7\]](#) [7]

Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law.

## Syllabus

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*Illinois Brick Co. v. Illinois*, 431 U.S. 720, held that, generally, only overcharged direct purchasers, and not subsequent indirect purchasers, are entitled to recover treble damages under § 4 of the Clayton Act for price fixing violative of § 1 of the Sherman Act. Appellant States -- who are, at least in part, indirect purchasers of cement -- brought class actions against various cement producers in the appropriate federal courts seeking treble damages under the federal antitrust laws for an alleged nationwide conspiracy to fix cement prices and damages for alleged violations of their respective state antitrust laws, which arguably allow indirect purchasers to recover for all overcharges passed on to them by direct purchasers. The [\*\*\*\*2] cases were transferred to the District Court in Arizona for coordinated pretrial proceedings, and a settlement was reached with several major defendants. When appellants sought payment out of the settlement fund for their state indirect purchaser claims, appellees, class members who are direct purchasers, objected. The court refused to allow the claims, ruling that the state statutes are preempted by federal law because they are clear attempts to frustrate Congress' purposes and objectives, as

interpreted in *Illinois Brick*. The Court of Appeals affirmed, holding that, depending on how they were construed, the state statutes would either conflict directly with federal law under *Illinois Brick* or would impermissibly interfere with the three federal antitrust policy goals that the court identified as having been defined by *Illinois Brick and Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481*: avoiding unnecessarily complicated litigation; providing direct purchasers with incentives to bring private antitrust actions; and avoiding multiple liability of defendants.

*Held:* The rule limiting federal antitrust recoveries to direct purchasers [\*\*\*\*3] does not prevent indirect purchasers from recovering damages flowing from state antitrust law violations. Pp. 100-106.

(a) The state indirect purchaser statutes are not pre-empted by the federal antitrust laws. There is no claim of express pre-emption or of congressional occupation of the field. The claim that the state laws are inconsistent with, and stand as an obstacle to, effectuating the congressional purposes identified in *Hanover Shoe* and *Illinois Brick* misunderstands these cases, which merely construed the federal antitrust laws and did not consider state-law or pre-emption standards or define the interrelationship between the federal and state law. Nothing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws. Pp. 100-103.

(b) In any event, the state indirect purchaser statutes do not interfere with accomplishing the federal-law purposes as identified in *Illinois Brick*. First, the state statute will not engender unnecessarily complicated federal antitrust proceedings, since they cannot and do not purport to affect available federal-law remedies; [\*\*\*\*4] since claims under them could be brought in state court, separately from federal direct purchaser actions; and since federal courts have discretion to decline to exercise pendent jurisdiction over burdensome state claims. Second, claims under the state statutes will not reduce the incentives of direct purchasers to bring private federal antitrust actions by reducing their potential recoveries. *Illinois Brick* was not concerned with the risk that a federal plaintiff might not be able to recover its entire damages award or might be offered less to settle. Rather, it was concerned that requiring direct and indirect purchasers to apportion the recovery under a single statute -- § 4 of the Clayton Act -- would result in no one plaintiff having a sufficient incentive to sue under that statute. The state statutes at issue pose no similar risk. That direct purchasers' recoveries may be reduced because they will have to share the settlement fund with indirect purchasers is not due to the impermissible operation of the state statutes but is, rather, a function of the fact and form of the settlement, which was intended to dispose of all claimants, whether claiming under federal or state [\*\*\*\*5] law and whether direct or indirect purchasers. Third, claims under the state statutes will not contravene any express federal policy condemning multiple liability for antitrust defendants, since *Illinois Brick* and similar cases simply construed § 4, and did not identify a federal policy against imposing state liability in addition to that imposed by federal law. Pp. 103-106.

**Counsel:** Thomas Greene, Supervising Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were John K. Van de Kamp, Attorney General, Andrea Sheridan Ordin, Chief Assistant Attorney General, Sanford N. Gruskin, Assistant Attorney General, Owen Lee Kwong, and H. Chester Horne, Jr., Deputy Attorney General, Don Siegelman, Attorney General of Alabama, and James B. Prude, Assistant Attorney General, Robert K. Corbin, Attorney General of Arizona, Hubert H. Humphrey III, Attorney General of Minnesota, Stephen P. Kilgriff, Deputy Attorney General, and Kathleen M. Mahoney, Special Assistant Attorney General.

Roy T. Englert, Jr., argued the cause for the United States as amicus curiae urging reversal. With him on the briefs were Solicitor General Fried, Assistant Attorney [\*\*\*\*6] General Rule, Deputy Solicitor General Merrill, Deputy Assistant Attorney General Starling, Catherine G. O'Sullivan, and Marion L. Jetton.

Theodore B. Olson argued the cause for appellees. With him on the brief for appellee ARC America Corp. were Phillip H. Rudolph, John J. Hanson, and John J. Waller, Jr. David J. Leonard and David H. Nix filed a brief for appellees Class Members Allied Concrete, Inc., et al.\*

\* Briefs of *amici curiae* urging reversal were filed for Thirty-five States et al. by J. Joseph Curran, Jr., Attorney General of Maryland, Michael F. Brockmeyer, and Ellen S. Cooper, Alan M. Barr, and Craig J. Hornig, Assistant Attorneys General, Grace Berg Schaible, Attorney General of Alaska, and Richard D. Monkman, John Steven Clark, Attorney General of Arkansas, Duane

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**Judges:** White, J., delivered the opinion of the Court, in which all other Members joined, except Stevens and O'Connor, JJ., who took no part in the consideration or decision of the case.

**Opinion by:** WHITE

## Opinion

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[\*96] [\*\*91] [\*\*1663] JUSTICE WHITE delivered the opinion of the Court.

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the State of Illinois [\*\*\*92] brought suit on its own behalf and on behalf [\*97] of a number of local governmental entities seeking treble damages under § 4 of the Clayton Act, 38 Stat. 731, as amended, [15 U. S. C. § 15\(a\)](#),<sup>1</sup> for an alleged conspiracy to fix the price of concrete block in violation

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Woodard, Attorney General of Colorado, and Thomas P. McMahon, First Assistant Attorney General, Joseph I. Lieberman, Attorney General of Connecticut, and Robert M. Langer and Steven M. Rutstein, Assistant Attorneys General, Charles M. Oberly III, Attorney General of Delaware, and David G. Culley, Deputy Attorney General, Robert A. Butterworth, Attorney General of Florida, Warren Price III, Attorney General of Hawaii, and Robert A. Marks, Rod Kimura, and Ann Catherine Blank, Deputy Attorneys General, Neil F. Hartigan, Attorney General of Illinois, Linley E. Pearson, Attorney General of Indiana, and Frank A. Baldwin, Deputy Attorney General, Thomas J. Miller, Attorney General of Iowa, and John R. Perkins, Deputy Attorney General, Robert T. Stephan, Attorney General of Kansas, and David M. Cooper, Assistant Attorney General, William J. Guste, Jr., Attorney General of Louisiana, James E. Tierney, Attorney General of Maine, and Stephen L. Wessler, Deputy Attorney General, James M. Shannon, Attorney General of Massachusetts, and George Weber, Assistant Attorney General, Frank J. Kelley, Attorney General of Michigan, Michael C. Moore, Attorney General of Mississippi, and Robert E. Sanders, Special Assistant Attorney General, William L. Webster, Attorney General of Missouri, and Tom A. Glassberg, Assistant Attorney General, Mike Greely, Attorney General of Montana, and Joe Roberts, Assistant Attorney General, Robert M. Spire, Attorney General of Nebraska, and Dale A. Comer, Assistant Attorney General, Stephen E. Merrill, Attorney General of New Hampshire, and Terry L. Robertson, Senior Assistant Attorney General, W. Cary Edwards, Attorney General of New Jersey, and Laurel A. Price, Deputy Attorney General, Robert Abrams, Attorney General of New York, Anthony J. Celebrezze, Jr., Attorney General of Ohio, and Doreen C. Johnson, Assistant Attorney General, Robert H. Henry, Attorney General of Oklahoma, and Jane Wheeler, Assistant Attorney General, James E. O'Neil, Attorney General of Rhode Island, and Robyn Y. Davis, Assistant Attorney General, Roger A. Tellinghuisen, Attorney General of South Dakota, W. J. Michael Cody, Attorney General of Tennessee, and Perry A. Craft, Deputy Attorney General, Jim Mattox, Attorney General of Texas, Mary F. Keller, Executive Assistant Attorney General, and Allene D. Evans, Assistant Attorney General, David L. Wilkinson, Attorney General of Utah, and Richard M. Hagstrom, Assistant Attorney General, Mary Sue Terry, Attorney General of Virginia, and Allen L. Jackson, Assistant Attorney General, Kenneth O. Eikenberry, Attorney General of Washington, and Carol A. Smith, Assistant Attorney General, Charles G. Brown, Attorney General of West Virginia, C. William Ullrich, First Deputy Attorney General, and Dan Huck, Deputy Attorney General, Donald J. Hanaway, Attorney General of Wisconsin, and Kevin J. O'Connor, Assistant Attorney General, and Joseph B. Meyer, Attorney General of Wyoming; for the Consumers Union of U.S., Inc., by Alan Mark Silbergeld; and for the National Conference of State Legislatures et al. by Benna Ruth Solomon, David J. Burman, and Thomas L. Boeder.

Briefs of *amicus curiae* urging affirmance were filed for the Business Roundtable by Thomas B. Leary and Janet L. McDavid; for the Chamber of Commerce of the United States by Bert W. Rein, James M. Johnstone, and Stephen A. Bokat; and for the National Association of Manufacturers by Otis Pratt Pearsall, Philip H. Curtis, Ronald C. Redcay, Jan S. Amundson, and Quentin Riegel.

Robert K. Corbin, Attorney General, and Anthony B. Ching, Solicitor General, filed a brief for the State of Arizona as *amicus curiae*.

<sup>1</sup> Section 4 provides as follows:

**HN1** [↑] "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent,

of [§ 1](#) of the Sherman Act, 26 Stat. 209, as amended, [15 U. S. C. § 1](#). The State and the local governments were all indirect purchasers of concrete block -- that is, they did not purchase concrete block directly from the price-fixing defendants but rather purchased products or contracted for construction into which the concrete block was incorporated by a prior purchaser. The Court held that, with limited exceptions,<sup>2</sup> only overcharged direct purchasers, and not subsequent [\*\*\*\*8] indirect purchasers, were persons "injured in [their] business or property" within the meaning of § 4, and that therefore the State of Illinois was not entitled to recover under federal law for the portion of the overcharge passed on to it.

[\*\*\*\*9] Appellants in the present case, the States of Alabama, Arizona, California, and Minnesota, brought suit in the appropriate federal courts on their own behalf and on behalf of classes of all governmental entities within each State, excluding the Federal Government, seeking treble damages under § 4 of the Clayton Act for an alleged nationwide conspiracy to fix prices of cement in violation of [§ 1](#) of the Sherman Act. Appellants are, at least in part, indirect purchasers of cement, and so under *Illinois Brick*, like the State of Illinois in that [\*98] case, would not be entitled to recover on their indirect purchaser claims under § 4 unless those claims fell within one of the exceptions. In their complaints, however, appellants also alleged violations of their respective state antitrust laws under which, as a matter of state law, indirect purchasers arguably are allowed to recover for all overcharges passed on to them by direct purchasers.<sup>3</sup> The claims under [\*\*\*93] these [\*\*1664] state indirect purchaser statutes are the focus of this case.

[\*\*\*\*10] Numerous similar actions were filed by other plaintiffs in various District Courts, and the actions were transferred to the United States District Court for the District of Arizona for coordinated pretrial proceedings. [In re Cement and Concrete Antitrust Litigation, 437 F. Supp. 750 \(JPML 1977\)](#). The District Court certified the actions as class actions and established a number of plaintiff classes. Between July 1979 and October 1981, several major defendants settled [\*99] with the various classes, resulting in a settlement fund in excess of \$ 32 million. The settlements left distribution of the fund for later resolution, subject to approval of the District Court.

Appellants sought payment out of the settlement fund for their state indirect purchaser claims. Appellees, class members who are direct purchasers, objected. When the District Court approved a plan for distributing the settlement fund, it refused to allow the claims against the fund pursuant to state indirect purchaser statutes. According to the District Court, "[s]uch statutes are clear attempts to frustrate the purposes and objectives of Congress, as interpreted by the Supreme Court in [\*\*\*\*11] *Illinois Brick*, and, accordingly, are preempted by federal law." App. to Juris. Statement A-31 (emphasis omitted).

without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." [15 U. S. C. § 15\(a\)](#).

<sup>2</sup> The Court noted two possible exceptions: when the direct purchaser and the indirect purchaser have entered into pre-existing cost-plus contracts, *Illinois Brick Co. v. Illinois*, 431 U.S., at 732, n. 12, and when the direct purchaser is owned or controlled by the indirect purchaser, *id.*, at 736, n. 16.

<sup>3</sup> The statutes of Alabama, California, and Minnesota expressly allow indirect purchasers to sue. See [Ala. Code § 6-5-60\(a\)](#) (1975) (allowing recovery by any person "injured or damaged . . . , direct or indirect"); [Cal. Bus. & Prof. Code Ann. § 16750\(a\)](#) (West Supp. 1989) (allowing recovery "regardless of whether such injured person dealt directly or indirectly with the defendant"); [Minn. Stat. § 325D.57](#) (1988) (allowing recovery by any person "injured directly or indirectly"). A number of other jurisdictions have similar statutes. [Colo. Rev. Stat. § 6-4-106](#) (Supp. 1988); [D. C. Code § 28-4509\(a\)](#) (1981); [Haw. Rev. Stat. § 480-14\(c\)](#) (1985); Ill. Rev. Stat., ch. 38, para. 60-7(2) (1988); [Kan. Stat. Ann. § 50-801\(b\)](#) (Supp. 1988); [Md. Com. Law Code Ann. § 11-209](#) (1983); [Mich. Comp. Laws Ann. § 445.778](#) (West Supp. 1988); [Miss. Code Ann. § 75-21-9](#) (1972); [N. M. Stat. Ann. § 57-1-3\(A\)](#) (1987); [R. I. Gen. Laws § 6-36-12\(g\)](#) (1985); [S. D. Codified Laws § 37-1-33](#) (1986); [Wis. Stat. § 133.18](#) (1987-1988).

The Arizona statute, [Ariz. Rev. Stat. Ann. § 44-1408\(A\)](#) (1987), generally follows the language of the Clayton Act, but it might be interpreted as a matter of state law as authorizing indirect purchasers to recover. This is appellants' position. See Brief for Appellants 19, n. 6; Juris. Statement 9. Appellees dispute this interpretation, Brief for Appellee ARC America Corp. 21, n. 14, and the District Court and the Court of Appeals did not pass on this question given their holdings that even if the statute was so interpreted it was pre-empted by federal law. We express no opinion on this question of Arizona law.

The Ninth Circuit affirmed. *In re Cement and Concrete Antitrust Litigation*, 817 F. 2d 1435 (1987). The Court of Appeals identified [HN2](#) "three purposes or objectives of federal **antitrust law** in this context," as defined by *Illinois Brick* and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968): avoiding unnecessarily complicated litigation; providing direct purchasers with incentives to bring private antitrust actions; and avoiding multiple liability of defendants. [817 F. 2d, at 1445](#). If state laws permitting indirect purchasers to recover were construed to restrict direct purchasers to suing only for the amount of any overcharge they have absorbed, the Court of Appeals was of the view that state law conflicted directly with federal law as construed in *Illinois Brick*. Alternatively, if state law permitted indirect purchasers to bring claims for damages in addition to the claims brought by direct [\*\*\*\*12] purchasers, it would "impermissibly interfere with the three policy goals outlined in *Hanover Shoe* and *Illinois Brick*." [817 F. 2d, at 1445](#). The Court of Appeals therefore held that state indirect purchaser claims that did not satisfy any exception to *Illinois Brick* were pre-empted.

[\*100] Appellants appealed to this Court, invoking our jurisdiction under [28 U. S. C. § 1254\(2\)](#). We noted probable jurisdiction, 488 U.S. 814 (1988), and we now reverse.

[LEdHN\[1A\]](#) [1A][LEdHN\[2A\]](#) [2A]We should first make it clear exactly what the issue is before us. These cases alleged violations of both the Sherman Act and state antitrust Acts. The settlements, as [\*\*\*94] we understand it, covered both the federal and the state-law claims; the settlement fund was intended to be distributed in complete satisfaction of those claims. [HN3](#) Under federal law, no indirect purchaser is entitled to sue for damages for a Sherman [\*\*\*13] Act violation, and there is no claim here that state law could provide a remedy for the federal violation that federal law forbids. Had these cases gone to trial and a Sherman Act violation been proved, only direct purchasers would have been entitled to damages for that violation, and there is no suggestion by the parties that the same rule should not apply to distributing that part of the fund that was meant to settle the Sherman Act claims. The issue before us is whether this rule limiting recoveries under the Sherman Act also prevents indirect purchasers from recovering damages flowing from violations of state law, despite express state statutory provisions giving [\*\*1665] such purchasers a damages cause of action.

[LEdHN\[3\]](#) [3] [LEdHN\[4\]](#) [4]The path to be followed in pre-emption cases is laid out by our cases. [HN4](#) It is accepted that Congress has the authority, in exercising its Article I powers, to pre-empt state law. [\*\*\*14] [HN5](#) In the absence of an express statement by Congress that state law is pre-empted, there are two other bases for finding pre-emption. First, when Congress intends that federal law occupy a given field, state law in that field is pre-empted. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 212-213 (1983). Second, even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or [\*101] when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See, e. g., *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

[LEdHN\[5\]](#) [5]In this case, in addition, appellees must overcome the pre-umption against [\*\*\*15] finding pre-emption of state law in areas traditionally regulated by the States. See *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716 (1985). [HN6](#) When Congress legislates in a field traditionally occupied by the States, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Given the long history of state common-law and statutory remedies against monopolies and unfair business practices,<sup>4</sup> it is plain that this is an area traditionally [\*\*\*95] regulated by the States. Cf. *Florida Lime & Avocado Growers, supra*, at 146 (regulation to "prevent the deception of consumers").

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<sup>4</sup> At the time of the enactment of the Sherman Act, 21 States had already adopted their own antitrust laws. Mosk, State Antitrust Enforcement and Coordination with Federal Enforcement, 21 A. B. A. Antitrust Section 358, 363 (1962). Moreover, the Sherman Act itself, in the words of Senator Sherman, "does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government." 21 Cong. Rec. 2456 (1890).

[\*\*\*\*16] [LEdHN\[1B\]](#) [↑] [1B] [LEdHN\[6\]](#) [↑] [6]In light of these principles, the Court of Appeals erred in holding that the state indirect purchaser statutes are pre-empted. There is no claim that the federal antitrust laws expressly pre-empt state laws permitting indirect purchaser recovery.<sup>5</sup> Moreover, appellees concede that [HNT](#) [↑] Congress has not pre-empted the field of **antitrust law**. Brief for Appellee [\*102] ARC America Corp. 10, n. 5; Brief for Appellees Allied Concrete, Inc., et al. 4. Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies. 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman); see [Cantor v. Detroit Edison Co.](#), [428 U.S. 579, 632-635 \(1976\)](#) (Stewart, J., dissenting). And on several prior occasions, the Court has recognized that the federal antitrust laws do not pre-empt state law. See [Watson v. Buck](#), [313 U.S. 387, 403 \(1941\)](#); [Puerto Rico v. Shell Co.](#), [302 U.S. 253, 259-260 \(1937\)](#); [\*\*\*\*17] cf. [Exxon Corp. v. Governor of Maryland](#), [437 U.S. 117, 133-134 \(1978\)](#).

[\*\*1666] [LEdHN\[1C\]](#) [↑] [1C]Appellees' only contention is that state laws permitting indirect purchaser recoveries pose an obstacle to the accomplishment of the purposes and objectives of Congress. State laws to this effect are consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct. [Illinois Brick](#), [431 U.S., at 746](#); [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.](#), [429 U.S. 477, 485-486 \(1977\)](#). The Court of Appeals concluded, however, that such laws are inconsistent with and stand as an obstacle to effectuating [\*\*\*\*18] the congressional purposes and policies identified in *Hanover Shoe* and *Illinois Brick*.<sup>6</sup> In this respect, the Court of Appeals has misunderstood both *Hanover Shoe* and *Illinois Brick*.

Neither of those cases addressed the pre-emptive force of the federal antitrust laws. Neither case contains any discussion of state law or of the relevant standards for pre-emption [\*\*\*\*19] of state law. As we made clear in *Illinois Brick*, the issue [\*103] before the Court in both that case and in *Hanover Shoe* was strictly a question of statutory interpretation -- what was the proper construction of § 4 of the Clayton Act. See, e. g., [431 U.S., at 736](#).

[LEdHN\[1D\]](#) [↑] [1D][LEdHN\[2B\]](#) [↑] [2B]It is one thing to consider the congressional policies identified in *Illinois Brick* and *Hanover Shoe* [\*\*\*96] in defining what sort of recovery federal **antitrust law** authorizes; it is something altogether different, and in our view inappropriate, to consider them as defining what federal law allows States to do under their own **antitrust law**. As construed in *Illinois Brick*, § 4 of the Clayton Act authorizes only direct purchasers to recover monopoly overcharges under federal law. We construed § 4 as not authorizing indirect purchasers to recover under federal law because that would be contrary to the purposes of Congress. But nothing in *Illinois Brick* suggests that it would be contrary to congressional purposes [\*\*\*\*20] for States to allow indirect purchasers to recover under their own antitrust laws.

[LEdHN\[1E\]](#) [↑] [1E]The Court of Appeals also erred in concluding that state indirect purchaser statutes interfere with accomplishing the purposes of the federal law that were identified in *Illinois Brick*. First, the Court of Appeals concluded that state indirect purchaser statutes interfere with the congressional purpose of avoiding unnecessarily complicated proceedings on federal antitrust claims. But these [HN8](#) [↑] state statutes cannot and do not purport to affect remedies available under federal law. Furthermore, state indirect purchaser actions will not necessarily be

<sup>5</sup> Cf. National Cooperative Research Act of 1984, [15 U. S. C. § 4303\(c\) \(1982 ed., Supp. V\)](#); Export Trading Company Act of 1982, [15 U. S. C. §§ 4016, 4002\(a\)\(7\)](#).

<sup>6</sup> In one respect, the Court of Appeals was overly narrow in its description of the congressional purposes identified in *Illinois Brick*. In *Illinois Brick*, the Court was concerned not merely that direct purchasers have sufficient incentive to bring suit under the antitrust laws, as the Court of Appeals asserted, but rather that at least some party have sufficient incentive to bring suit. Indeed, we implicitly recognized as much in noting that indirect purchasers might be allowed to bring suit in cases in which it would be easy to prove the extent to which the overcharge was passed on to them. See [431 U.S., at 732, n. 12](#).

brought in federal court. [817 F. 2d, at 1445](#). Unlike the federal indirect purchaser claims asserted in *Illinois Brick*, which would have been exclusively within the jurisdiction of the federal courts, [15 U. S. C. §§ 15\(a\), 26](#), claims under state indirect purchaser statutes could be brought in state courts, separately from federal actions brought [\*\*\*\*21] by direct purchasers. Moreover, federal courts have the discretion to decline to exercise pendent jurisdiction over state indirect purchaser claims, even if those claims are brought in [\*104] the first instance in federal court. See [Mine Workers v. Gibbs, 383 U.S. 715, 725-726 \(1966\)](#). [HN9](#)[ Since many state indirect purchaser actions would be heard in state courts, at least when the federal courts determined that hearing those claims would be overly burdensome, any complication of federal direct purchaser actions in federal court would be minimal.

Second, the Court of Appeals reasoned that allowing state indirect purchaser [\*\*1667] claims could reduce the incentives of direct purchasers to bring antitrust actions by reducing their potential recoveries. The presence of indirect purchaser claims would reduce settlement offers to direct purchasers, the Court of Appeals believed, and if the total liability were to exhaust a defendant's assets, the direct purchasers would have to share the defendant's estate in bankruptcy with indirect purchasers. But the Court in [\*\*\*\*22] *Illinois Brick* was not concerned with the risk that a plaintiff might not be able to recover its entire damages award or might be offered less to settle. Indeed, taken to its extreme, the Court of Appeals' logic would lead to the pre-emption of any state-law claims against antitrust defendants, even if wholly unrelated, because the presence of other litigation could threaten the defendants with bankruptcy and reduce their willingness to settle. *Illinois Brick* was concerned that [HN10](#)[ requiring direct and indirect purchasers to apportion the recovery under a single statute -- § 4 [\*\*\*97] of the Clayton Act -- would result in no one plaintiff having a sufficient incentive to sue under that statute. State indirect purchaser statutes pose no similar risk to the enforcement of the federal law.

Appellees argue that because the defendants in these antitrust actions have settled and there is a limited settlement fund, the indirect purchasers' claims are pre-empted because those claims will likely reduce the amount that can be paid from the fund to direct purchasers.<sup>7</sup> But as we said earlier, [\*\*\*\*23] [\*105] the settlement covered both federal and state-law claims, and whatever amount is allocable to federal claims will be distributed only to direct purchasers. Indirect purchasers will participate only in distributing the funds available to claimants under state law. Even if the settlement fund is not to be divided between state and federal-law claimants, the settlement necessarily was intended to dispose of all claimants, whether claiming under federal or state law and whether direct or indirect purchasers. That direct purchasers may have to share with indirect purchasers is a function of the fact and form of settlement rather than the impermissible operation of state indirect purchaser statutes.

[LEdHN\[1F\]](#)[][1F] [\*\*\*\*24] [LEdHN\[7\]](#)[][7]Third, the Court of Appeals concluded that state indirect purchaser claims might subject antitrust defendants to multiple liability, in contravention of the "express federal policy" condemning multiple liability. [817 F. 2d, at 1446](#) (citing *Illinois Brick*; [Associated General Contractors of California, Inc. v. Carpenters, 459 U.S. 519, 544 \(1983\)](#); and [Blue Shield of Virginia v. McCready, 457 U.S. 465, 474-475 \(1982\)](#)). But *Illinois Brick*, as well as *Associated General Contractors* and *Blue Shield*, all were cases construing § 4 of the Clayton Act; in none of those cases did the Court identify a federal policy against States imposing liability in addition to that imposed by federal law. [HN11](#)[ Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law, see [Silkwood v. Kerr-McGee Corp., 464 U.S., at 257-258](#); [California v. Zook, 336 U.S. 725, 736 \(1949\)](#), [\*\*\*\*25] and no clear purpose of Congress indicates that we should decide otherwise in this case.

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<sup>7</sup> Contrary to the Court of Appeals' suggestion, [817 F. 2d, at 1445](#), there is no contention here that the state indirect purchaser statutes themselves seek to limit the recovery direct purchasers can obtain under federal law.

LEdHN[1G] [↑] [1G] When viewed properly, *Illinois Brick* was a decision construing the federal antitrust laws, not a decision defining the interrelationship between the federal and state antitrust laws. The congressional purposes on which *Illinois Brick* was based provide no support for a finding that state indirect [\*106] purchaser statutes are pre-empted by federal law. The judgment of the Court of Appeals is therefore reversed.

So ordered.

## References

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[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 296, 469, 628](#)

24 Federal Procedure, L Ed, Monopolies and Restraints of Trade 54:177, 54:179.5

12 Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade 48:74, 48:84

24 Am Jur Trials 1, Defending Antitrust Lawsuits

[15 USCS 15\(a\)](#)

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 67; States, Territories, and Possessions 36

Index to Annotations, Pre-emption; Restraints [\*\*\*\*26] of Trade and Monopolies; States

Annotation References:

Standing to sue, under 4 of the Clayton Act ([15 USCS 15](#)) and predecessor statute, to recover treble damages for antitrust violation-- Supreme Court cases. 73 L Ed 2d 1427.

Discretion of federal court to remit relevant state issues to state court in which no action is pending. [94 L Ed 879; 3 L Ed 2d 1827](#).

Discretionary exercise of pendent jurisdiction of federal court over state claim when joined with claim arising under laws, treaties, or Constitution of United States. 76 ALR Fed 46.

Right of retail buyer of price-fixed product to sue manufacturer on federal antitrust claim. 55 ALR Fed 919.

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## **Browning-Ferris Indus. v. Kelco Disposal**

Supreme Court of the United States

April 18, 1989, Argued ; June 26, 1989, Decided

No. 88-556

### **Reporter**

492 U.S. 257 \*; 109 S. Ct. 2909 \*\*; 106 L. Ed. 2d 219 \*\*\*; 1989 U.S. LEXIS 3285 \*\*\*\*; 57 U.S.L.W. 4985; 1989-1 Trade Cas. (CCH) P68,630

BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., ET AL. v. KELCO DISPOSAL, INC., ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

**Disposition:** [845 F. 2d 404](#), affirmed.

## **Core Terms**

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fine, amercements, punitive damages, excessive fines, award of punitive damages, damages, cases, limits, courts, monetary penalty, district court, award damages, monetary sanctions, civil case, inflicted, private party, common law, proceedings, Dictionary, forfeiture, pecuniary, wrongdoer, purposes, sentence, juries, cruel and unusual punishment, criminal law, proportionality, court of appeals, suggests

## **LexisNexis® Headnotes**

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Civil Procedure > Remedies > Damages > Punitive Damages

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Torts > ... > Types of Damages > Punitive Damages > General Overview

Civil Procedure > Remedies > Damages > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Torts > ... > Punitive Damages > Measurement of Damages > Constitutional Requirements

### **[HN1](#) [blue icon] Damages, Punitive Damages**

On the basis of the history and purpose of the [Eighth Amendment](#), its Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties.

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Civil Procedure > Remedies > Damages > Punitive Damages

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Preliminary Proceedings > Bail > General Overview

Torts > ... > Punitive Damages > Measurement of Damages > General Overview

## **HN2** [DAMAGES] Damages, Punitive Damages

The [\*Eighth Amendment\*](#) reads: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Although the Court has never considered an application of the Excessive Fines Clause, it has interpreted the Amendment in its entirety in a way which suggests that the Clause does not apply to a civil-jury award of punitive damages. Given that the Amendment is addressed to bail, fines, and punishments, the cases long have understood it to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments. The [\*eighth amendment\*](#) is addressed to courts of the United States exercising criminal jurisdiction. The Amendment is inapplicable to deportation because deportation is not punishment for a crime. Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government.

Civil Procedure > Remedies > Damages > Monetary Damages

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

## **HN3** [DAMAGES] Damages, Monetary Damages

The Excessive Fines Clause applies just to criminal cases. Whatever the outer confines of the Clause's reach may be, it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Constitutional Law > Bill of Rights > General Overview

Constitutional Law > Bill of Rights > Fundamental Rights > General Overview

## **HN4** [CRUEL & UNUSUAL PUNISHMENT] Fundamental Rights, Cruel & Unusual Punishment

The primary focus of the [\*Eighth Amendment\*](#) is the potential for governmental abuse of its "prosecutorial" power, not concern with the extent or purposes of civil damages. The Excessive Fines Clause is intended to limit only those fines directly imposed by, and payable to, the government.

Civil Procedure > Remedies > Damages > Punitive Damages

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

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## [\*\*HN5\*\*](#) Damages, Punitive Damages

The [\*Eighth Amendment\*](#) jurisprudence has not been inflexible. The Court, when considering the [\*Eighth Amendment\*](#), has stated: Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions. Constitutions are not ephemeral enactments, designed to meet passing occasions. They are designed to approach immortality as nearly as human institutions can approach it. The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, the court's contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

Torts > ... > Types of Damages > Punitive Damages > General Overview

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Punitive Damages > Availability > Governmental Entities

Torts > ... > Punitive Damages > Measurement of Damages > General Overview

## [\*\*HN6\*\*](#) Fundamental Rights, Cruel & Unusual Punishment

The [\*Eighth Amendment\*](#) places limits on the steps a government may take against an individual, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments. The court shall not ignore the language of the Excessive Fines Clause, or its history, or the theory on which it is based, in order to apply it to punitive damages.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Punitive Damages > Measurement of Damages > Constitutional Requirements

Civil Procedure > ... > Jury Trials > Jurors > Misconduct

Civil Procedure > Remedies > Damages > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Torts > ... > Types of Damages > Punitive Damages > General Overview

Torts > ... > Punitive Damages > Measurement of Damages > Judicial Review

## [\*\*HN7\*\*](#) Damages, Punitive Damages

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Due process imposes some limits on jury awards of punitive damages, and a jury award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Torts > ... > Punitive Damages > Measurement of Damages > Constitutional Requirements

Civil Procedure > Remedies > Damages > Punitive Damages

#### **HN8** **Reviewability of Lower Court Decisions, Preservation for Review**

The court shall not assume that a nonconstitutional argument also includes a constitutional one, and shall not stretch the specific claims made under an *Eighth Amendment* to cover those that might arise under the Due Process Clause as well.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Punitive Damages > Measurement of Damages > Determinative Factors

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Civil Procedure > Remedies > Damages > General Overview

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

Torts > Remedies > Damages > General Overview

Torts > ... > Types of Damages > Punitive Damages > General Overview

Torts > ... > Punitive Damages > Measurement of Damages > Judicial Review

#### **HN9** **Damages, Punitive Damages**

It is not the court's role to review directly an award for excessiveness, or to substitute its judgment for that of the jury. Rather, its only inquiry is whether the court of appeals erred in finding that the district court did not abuse its discretion in refusing to grant a motion, under *Fed. R. Civ. P. 59*, for a new trial or remittitur. In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law. Federal law, however, will control on those issues involving the proper review of the jury award by a federal district court and court of appeals. In reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under *Rule 59*, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard.

## **Lawyers' Edition Display**

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### **Decision**

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Eighth Amendment's excessive fines clause held inapplicable to punitive damage awards between private parties.

## Summary

A local waste-disposal company brought an action in the United States District Court for the District of Vermont, alleging that a nationwide waste-disposal company had violated federal antitrust law by attempting to monopolize a particular segment of the local waste-disposal market, and had interfered with the local company's contractual relations in violation of Vermont tort law. After a jury found the nationwide company liable on both counts and awarded the local company \$ 51,146 in compensatory damages on both the federal and state-law claims, and \$ 6 million in punitive damages on the state-law claim, the District Court denied the nationwide company's motion for judgment notwithstanding the verdict, a new trial, or remittitur. On appeal, the United States Court of Appeals for the Second Circuit, affirming the judgment both as to liability and as to damages, expressed the view that, even if the Federal Constitution's Eighth Amendment, which includes a prohibition against excessive fines, were applicable to the case, the punitive damages were not so disproportionate as to be constitutionally excessive ([845 F2d 404](#)).

On certiorari, the United States Supreme Court affirmed. In an opinion by Blackmun, J., joined by Rehnquist, Ch. J., and Brennan, White, Marshall, Scalia, and Kennedy, JJ., as to holding 1 below, and expressing the unanimous view of the court as to holding 2 below, it was held that (1) the Eighth Amendment's excessive fines clause does not apply to awards of punitive damages in cases between private parties, where the government neither has prosecuted the action nor has any right to receive a share of the damages awarded, because the primary focus of the Amendment is the potential for governmental abuse of its prosecutorial power, since (a) nothing in English history suggests that the excessive fines clause of the English Bill of Rights of 1689, the direct ancestor of the Eighth Amendment, was intended to apply to damages awarded in disputes between private parties, (b) even if the limits Magna Carta placed on the use of amercements were the forerunners of the 1689 Bill of Rights' prohibition on excessive fines, Magna Carta was aimed at putting limits on the power of the King, and English courts never have understood the amercements clauses of Magna Carta to be relevant to private damages, and (c) although punitive damages are imposed through the aegis of courts and serve to advance the governmental interests of punishment and deterrence, this overlap does not require the application of the excessive fines clause in a case between private parties; and (2) where the District Court properly instructed the jury on state law and applied the proper state-law standard in considering whether the punitive damages were excessive, and where the Court of Appeals' conclusion that the District Court did not abuse its discretion in denying the motion for judgments notwithstanding the verdict, a new trial, or remittitur was consistent with federal standards of review, the Supreme Court would not craft some federal common-law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages or refers to statutory penalties for similar conduct, since these are matters of state law.

Brennan, J., joined by Marshall, J., concurring, joined the opinion of Blackmun, J., and expressed the view that the court's opinion left the door open for a holding that the Fourteenth Amendment's due process clause constrains the imposition of punitive damages in civil cases brought by private parties, because (1) prior Supreme Court decisions have held that, even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the due process clause forbids awards that are grossly excessive, and (2) the court's scrutiny of awards made without the benefit of a legislature's deliberation and guidance should be less indulgent than its consideration of those that fall within statutory limits.

O'Connor, J., joined by Stevens, J., concurring in part and dissenting in part, joined holding 2 above of the opinion of Blackmun, J., and expressed the view that the \$ 6 million award of punitive damages constituted a fine subject to the limitations of the Eighth Amendment, because (1) there is considerable historical support, including the fact that around the time of the framing and enactment of the Eighth Amendment some courts and commentators believed that the word "fine" encompassed civil penalties, for application of the excessive fines clause to punitive damages, (2) the identity of the recipient of a monetary penalty is irrelevant for purposes of determining the constitutional validity of the penalty, (3) the excessive fines clause applies to the states by incorporation through the Fourteenth Amendment, and (4) a corporation is protected from overbearing and oppressive monetary sanctions by the excessive fines clause.

## Headnotes

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APPEAL §1673 > CONSTITUTIONAL LAW §14 > CONSTITUTIONAL LAW §17 > CONSTITUTIONAL LAW §25 > CRIMINAL LAW §75 > DAMAGES §16 > DAMAGES §181 > punitive damages -- private civil case -- excessive fines prohibition of Eighth Amendment -- purpose, history, and language -- verdict, new trial, or remittitur -- affirmation -- > Headnote: [LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D] [LEdHN\[1E\]](#) [1E] [LEdHN\[1F\]](#) [1F] [LEdHN\[1G\]](#) [1G]

The prohibition of excessive fines, under the *Federal Constitution's Eighth Amendment*, does not apply to awards of punitive damages in cases between private parties, where the government neither has prosecuted the action nor has any right to receive a share of the damages awarded, because the primary focus of the Amendment is the potential for governmental abuse of its prosecutorial power, rather than concern with the extent or purposes of civil damages, since (1) nothing in English history suggests that the excessive fines clause of the English *Bill of Rights* of 1689, the direct ancestor of the *Eighth Amendment*, was intended to apply to damages awarded in disputes between private parties, (2) even if the limits Magna Carta placed on the use of amercements were the forerunners of the 1689 *Bill of Rights*' prohibition on excessive fines, Magna Carta was aimed at putting limits on the power of the King, and English courts never have understood the amercements clauses of Magna Carta to be relevant to private damages of any kind, and (3) although punitive damages are imposed through the aegis of courts and serve to advance the governmental interests of punishment and deterrence, which are also among the interests advanced by the criminal law, this overlap does not require the application of the *Eighth Amendment's* excessive fines clause in a case between private parties, because (a) from both the language of the excessive fines clause and the nature of the nation's constitutional framework, the *Eighth Amendment* places limits on the steps a government may take against an individual, and (b) at the time the *Eighth Amendment* was drafted and ratified, the word "fines" was understood to mean a payment to a sovereign as punishment for some offense, and the practice of awarding punitive civil damages was well recognized; thus, the United States Supreme Court, on certiorari, will affirm a Federal Court of Appeals' judgment upholding a jury award of \$ 6 million in punitive damages in a Federal District Court against a nationwide waste-disposal company for interfering with a local waste-disposal company's contractual relations in violation of state tort law, where (1) the jury found the company liable and assessed \$ 51,146 in compensatory damages, (2) the District Court properly instructed the jury on state law and applied the proper state-law standard in considering whether the punitive damages were excessive, and (3) the Court of Appeals' conclusion that the District Court did not abuse its discretion in denying the nationwide company's motion for judgments notwithstanding the verdict, a new trial, or remittitur was consistent with federal standards of review. (O'Connor and Stevens, JJ., dissented from this holding.)

COURTS §767 > Eighth Amendment -- excessive fines -- effect of cruel and unusual punishment precedents -- > Headnote: [LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

Although insights into the meaning of the *Federal Constitution's Eighth Amendment* reached by the United States Supreme Court in cases involving the *Eighth Amendment's cruel and unusual punishments clause* are instructive for purposes of determining whether the *Eighth Amendment's* prohibition of excessive fines applies to awards of punitive damages in cases between private parties, where the government neither has prosecuted the action nor has any right to receive a share of the damages awarded, the court's holdings in those cases are not directly controlling in a case involving the *Eighth Amendment's* excessive fines clause.

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BAIL AND RECOGNIZANCE §6.5 > COURTS §767 > Eighth Amendment -- excessive fines -- effect of excessive bail precedents -- jurisdiction -- > Headnote:

[LEdHN\[3A\]](#) [3A] [LEdHN\[3B\]](#) [3B]

Although there is language in a previous United States Supreme Court opinion suggesting that a clause of the [Federal Constitution's Eighth Amendment](#) that prohibits excessive bail may be implicated in civil deportation proceedings, this case provides little support for the argument that the [Eighth Amendment's](#) clause that prohibits excessive fines applies to punitive damages awarded by a jury in a civil case, because (1) the question whether the [Eighth Amendment](#) applies in civil cases was not addressed in the previous opinion, (2) bail, by its very nature, is implicated only when there is a direct government restraint on personal liberty, and the potential for governmental abuse against which the bail clause guards is therefore present, and (3) the abuses against which the excessive fines clause protects are not present in such a way when a jury assesses punitive damages.

COURTS §757 > Eighth Amendment -- applicability only to criminal cases -- decision not necessary -- > Headnote:

[LEdHN\[4\]](#) [4]

Because the United States Supreme Court, in deciding that the prohibition of excessive fines under the [Federal Constitution's Eighth Amendment](#) does not apply to awards of punitive damages in cases between private parties, where the government neither has prosecuted the action nor has any right to receive a share of the damages, need not decide whether the excessive fines clause applies just to criminal cases, the court will not make such a decision.

CONSTITUTIONAL LAW §14 > CONSTITUTIONAL LAW §17 > Eighth Amendment -- excessive fines -- history and purpose --

> Headnote:

[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B]

In considering the scope of the [Federal Constitution's Eighth Amendment's](#) clause prohibiting excessive fines, a court should, as in other [Eighth Amendment](#) contexts, look to the origins of the clause, and to the purposes which directed its framers, because the applicability of the [Eighth Amendment](#) turns on its original meaning, as demonstrated by its historical derivation; however, because this historical emphasis concerns the question of when the [Eighth Amendment](#) is to be applied, the United States Supreme Court will not rely on history to the same extent when considering the scope of the Amendment as when considering its applicability.

APPEAL §1662 > Eighth Amendment -- applicability of excessive fines clause -- effect of decision on other grounds --

> Headnote:

[LEdHN\[6A\]](#) [6A] [LEdHN\[6B\]](#) [6B]

In deciding, on certiorari, that the prohibition of excessive fines under the [Federal Constitution's Eighth Amendment](#) does not apply to awards of punitive damages in cases between private parties, where the government neither has prosecuted the action nor has any right to receive a share of the damages awarded, the United States Supreme Court will leave open the question whether an action in which a private party brings a suit in the name of the United States and shares with the United States in any award of damages would implicate the [Eighth Amendment's](#) excessive fines clause.

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APPEAL §1662 > effect of decision on other grounds -- > Headnote:

[LEdHN\[7A\]](#) [7A] [LEdHN\[7B\]](#) [7B]

The United States Supreme Court, having decided, on certiorari, that, because the prohibition of excessive fines under the *Federal Constitution's Eighth Amendment* does not apply to awards of punitive damages in cases between private parties, where the government neither has prosecuted the action nor has the right to receive a share of the damages awarded, the clause is inapplicable to punitive damages awarded by a jury in an action brought in a Federal District Court by one corporation against another under state tort law, will not decide whether (1) the *Eighth Amendment's* excessive fines clause applies to the several states by incorporation through the *Federal Constitution's Fourteenth Amendment*, or (2) the *Eighth Amendment* protects corporations as well as individuals.

APPEAL §1087.5 > APPEAL §1123 > APPEAL §1165 > APPEAL §1307 > Fourteenth Amendment -- due process -- argument not raised below or in certiorari petition -- amount of award -- assumptions > Headnote:

[LEdHN\[8A\]](#) [8A] [LEdHN\[8B\]](#) [8B]

In determining, on certiorari, that, because the prohibition of excessive fines under the *Federal Constitution's Eighth Amendment* does not apply to awards of punitive damages in cases between private parties, where the government neither has prosecuted the action nor has any right to receive a share of the damages awarded, the *Eighth Amendment's* excessive fines clause does not apply to punitive damages awarded by a jury in a Federal District Court action brought by one corporation against another corporation under state tort law, the United States Supreme Court will not address whether the due process clause of the *Constitution's Fourteenth Amendment* acts as a check on undue jury discretion to award punitive damages in the absence of any excess statutory limit, where (1) the corporation against which the punitive damages were awarded (a) failed to raise the due process argument before either the District Court or a Federal Court of Appeals, (b) has made no specific mention of the argument in its petition for certiorari in the Supreme Court, and (c) argued in the lower courts that the punitive damages award violated state law and the *Eighth Amendment*; and (2) the Supreme Court will not (a) assume that the nonconstitutional argument also includes a constitutional one, (b) stretch the specific claims made under the *Eighth Amendment* to cover those that might arise under the due process clause, or (c) in the absence of a developed record on the issues relevant to this due process inquiry, stretch the "clear intendments" doctrine to hold that the due process question is within the clear intendments of the objection made by the corporation throughout the proceedings, where the due process question is not "only an enlargement" of the *Eighth Amendment* inquiry.

APPEAL §1415 > APPEAL §1419 > APPEAL §1460 > excessiveness of punitive damages -- review of jury verdict -- remittitur - - new trial -- Federal District Court's discretion -- > Headnote:

[LEdHN\[9\]](#) [9]

On certiorari to review a Federal Court of Appeals' affirmation of a Federal District Court's denial of a corporation's motion for judgment notwithstanding the verdict, a new trial, or remittitur concerning the \$ 6 million in punitive damages awarded against the corporation by a jury for violation of a state tort law for which the jury awarded \$ 51,146 in compensatory damages, it is not the role of the United States Supreme Court to review directly the award for excessiveness, or to substitute its judgment for that of the jury, because the Supreme Court's only inquiry is whether the Court of Appeals erred in finding that the District Court did not abuse its discretion in refusing to grant the motion, under *Rule 59 of the Federal Rules of Civil Procedure*, for a new trial or remittitur.

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APPEAL §1415 > APPEAL §1419 > APPEAL §1460 > COURTS §591 > COURTS §611 > COURTS §623 > excessiveness of punitive damages -- federal review of jury verdict -- state law -- remittitur -- new trial -- > Headnote:

[LEdHN\[10A\]](#) [10A] [LEdHN\[10B\]](#) [10B]

In a lawsuit that is in a federal court as a result of diversity jurisdiction, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors a jury may consider in determining their amount, are questions of state law, but federal law controls those issues involving the proper review of the jury award by a Federal District Court and Court of Appeals; thus, in reviewing an award of punitive damages, the role of a District Court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under [Rule 59 of the Federal Rules of Civil Procedure](#), which authorizes federal courts to grant a new trial or amend a judgment, whether a new trial or remittitur should be ordered, and a Court of Appeals should then review the District Court's determination under an abuse-of-discretion standard.

APPEAL §1415 > APPEAL §1419 > APPEAL §1460 > DAMAGES §16 > DAMAGES §18 > DAMAGES §181 > EVIDENCE §841 > punitive damages -- setting aside jury award -- malice -- excessiveness -- pecuniary ability of defendant -- > Headnote:

[LEdHN\[11A\]](#) [11A] [LEdHN\[11B\]](#) [11B]

Under Vermont law, (1) a jury may award punitive damages only if the evidence supports a finding that the defendant acted with malice or "malice or wantonness shown by the act," (2) punitive damage awards may be set aside as grossly and manifestly excessive, (3) although there is no rule of proportionality between compensatory and punitive damages, punitive damages are not allowed to stand when an award of compensatory damages has been vacated, and (4) once a plaintiff has presented sufficient evidence of malice, evidence of the defendant's pecuniary ability may be considered in order to determine what would be a just punishment for the defendant.

APPEAL §1662 > excessive damages -- Seventh Amendment -- issue decided on other grounds -- > Headnote:

[LEdHN\[12A\]](#) [12A] [LEdHN\[12B\]](#) [12B]

In deciding, on certiorari, that the prohibition of excessive fines under the [Federal Constitution's Eighth Amendment](#) does not apply to awards of punitive damages in cases between private parties, where the government neither has prosecuted the action nor has any right to receive a share of the damages, the United States Supreme Court will not decide whether the [Federal Constitution's Seventh Amendment](#), which provides that any fact tried by a jury in a civil case can be reviewed by a federal court according to only common-law rules, allows appellate review of a Federal District Court's denial of a motion to set aside an award as excessive, because it is unnecessary to reach this question when making such a decision.

APPEAL §1415 > APPEAL §1419 > APPEAL §1460 > COURTS §591 > DAMAGES §16 > DAMAGES §181 > excessiveness of punitive damages awarded by jury -- state law -- federal review -- new trial -- remittitur -- Seventh Amendment -- > Headnote:

[LEdHN\[13A\]](#) [13A] [LEdHN\[13B\]](#) [13B] [LEdHN\[13C\]](#) [13C]

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With respect to a Federal Court of Appeals' judgment upholding a jury award of \$ 6 million in punitive damages in a Federal District Court against a nationwide waste-disposal company that the jury found liable for interfering with a local waste-disposal company's contractual relations in violation of state tort law, and assessed \$ 51,146 in compensatory damages, the United States Supreme Court will not craft some federal common-law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages, or that makes reference to statutory penalties for similar conduct, because these are matters of state, not federal law; thus, where the District Court properly instructed the jury on state law and applied the proper state-law standard in considering whether the damages were excessive, the Court of Appeals' conclusion that there was no abuse of discretion by the District Court in denying the nationwide company's motion for a new trial or remittitur is consistent with federal standards developed under [Rule 59 of the Federal Rules of Civil Procedure](#), which authorizes federal courts to grant a new trial or amend a judgment, because (1) there is no federal common-law standard or compelling federal policy convincing the Supreme Court that it should not continue, in performing the limited function of a federal appellate court, to accord considerable deference to a District Court's decision not to order a new trial, and (2) particularly since the federal courts operate under the strictures of the [Federal Constitution's Seventh Amendment](#), which provides that a federal court can review only under the rules of the common law a fact tried by a jury, the Supreme Court is reluctant to stray too far from traditional common-law standards or to take steps which ultimately might interfere with the proper role of the jury.

APPEAL §1415 > APPEAL §1419 > APPEAL §1460 > DAMAGES §16 > excessive punitive damages -- denial of new trial or remittitur -- discretion of court -- > Headnote:

[LEdHN\[14\]](#) [14]

On certiorari to review a Federal Court of Appeals' judgment upholding a jury award of \$ 6 million in punitive damages in a Federal District Court against a nationwide waste-disposal company that the jury found liable for interfering with a local waste-disposal company's contractual relations in violation of state tort law, and assessed \$ 51,146 in compensatory damages, where it is not clear whether the Court of Appeals applied state or federal law in reviewing the District Court's order denying the nationwide company's motion for a new trial or remittitur, the Supreme Court will find that the Court of Appeals' conclusion that there was no abuse of discretion by the District Court is consistent with federal standards of review, where the state law permits juries to consider a broad range of factors in awarding punitive damages.

## Syllabus

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Respondents Joseph Kelley and Kelco Disposal, Inc., filed suit against petitioners (collectively BFI) in Federal District Court, charging BFI with antitrust violations and with interfering with Kelco's contractual relations in violation of Vermont tort law. A jury found BFI liable on both counts, and awarded Kelco, in addition to \$ 51,146 in compensatory damages, \$ 6 million in punitive damages on the state-law claim. Denying BFI's post-trial motions, the District Court upheld the jury's punitive damages award. The Court of Appeals affirmed as to both liability and damages, holding that even if the [Eighth Amendment](#) were applicable, the punitive damages awarded were not so disproportionate as to be constitutionally excessive.

*Held:*

1. The Excessive Fines Clause of the [Eighth Amendment](#) does not apply to punitive damages awards in cases between private parties; it does not constrain such an award when the government neither has prosecuted the action nor has any right to recover a share of the damages awarded. Pp. 262-276.

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(a) The primary concern which drove [\*\*\*2] the Framers of the *Eighth Amendment* was the potential for governmental abuse of "prosecutorial" power, not concern with the extent or purposes of civil damages. Nothing in English history suggests that the Excessive Fines Clause of the English *Bill of Rights* of 1689, the direct ancestor of the *Eighth Amendment*, was intended to apply to damages awarded in disputes between private parties. Pp. 264-268.

(b) The history of the use and abuse in England of amercements, including the fact that Magna Carta placed limits on the Crown's use of excessive amercements, is no basis for concluding that the Excessive Fines Clause limits a civil jury's ability to award punitive damages. Magna Carta was aimed at putting limits on the excesses of royal power, purposes which are clearly inapposite in a case where a private party receives exemplary damages from another party, and the government has no share in the recovery. Any overlap between civil and criminal procedure at the time of Magna Carta is insignificant when all indications are that English courts never have understood Magna Carta's amercements clauses to be relevant to private damages of any kind. Pp. 268-273.

(c) The language of the Excessive [\*\*\*3] Fines Clause and the nature of our constitutional framework make it clear that the *Eighth Amendment* places limits on the steps a government may take against an individual. The fact that punitive damages are imposed through the aegis of courts and serve to advance governmental interests in punishment and deterrence is insufficient to support applying the Excessive Fines Clause in a case between private parties. Here, the government of Vermont has not taken a positive step to punish, as it does in the criminal context, nor used the civil courts to extract large payments or forfeiture for the purpose of raising revenue or disabling some individual. Pp. 273-276.

2. Because BFI failed to raise before either the District Court or the Court of Appeals the question whether the punitive damages award was excessive under the *Due Process Clause of the Fourteenth Amendment*, this Court will not consider the effect of due process on the award. Pp. 276-277.

3. Federal common law does not provide a basis for disturbing the jury's punitive damages award. In performing the limited function of a federal appellate court, this Court perceives no federal common-law standard, or compelling federal policy, [\*\*\*4] that convinces the Court it should not accord considerable deference to a district court's decision not to order a new trial. The District Court in this case properly instructed the jury on Vermont law and applied the proper state-law standard in considering whether the verdict was excessive, and the Court of Appeals correctly held that the District Court did not abuse its discretion. Pp. 277-280.

**Counsel:** Andrew L. Frey argued the cause for petitioners. With him on the briefs were Kenneth S. Geller, Mark I. Levy, James D. Holzhauer, Andrew J. Pincus, and J. Paul McGrath.

H. Bartow Farr III argued the cause for respondents. With him on the brief were Joel I. Klein, Paul M. Smith, Robert B. Hemley, and Norman Williams.\*

\* Briefs of *amicus curiae* urging reversal were filed for the city of New York by Peter L. Zimroth, Leonard J. Koerner, and John Hogrogian; for the American National Red Cross et al. by Rex E. Lee, Carter G. Phillips, Elizabeth H. Esty, Charles A. Rothfeld, Benjamin W. Heineman, Jr., Philip A. Lacovara, and Fred J. Hiestand; for Arthur Andersen & Co. et al. by Leonard P. Novello, Jon N. Ekdahl, Carl D. Liggio, Harris J. Amhowitz, Kenneth H. Lang, and Eldon Olson; for Johnson & Higgins et al. by George Clemon Freeman, Jr., John Calvin Jeffries, Jr., and James W. Morris III; for Merrill Lynch, Pierce, Fenner & Smith, Inc., et al. by Louis R. Cohen, Lloyd N. Cutler, Ronald J. Greene, and Robert C. Dinerstein; for Navistar International Transportation Corp. by David A. Strauss and John A. Rupp; for the Pharmaceutical Manufacturers Association et al. by John Reese, Geoffrey Richard Wagner Smith, Richard F. Kingham, and Bruce N. Kuhlik; and for the United States Chamber of Commerce et al. by Herbert L. Fenster and Malcolm E. Wheeler.

Sherman L. Cohn and Jeffrey Robert White filed a brief for the Association of Trial Lawyers of America as *amicus curiae* urging affirmance.

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**Judges:** Blackmun, J., delivered the opinion for a unanimous Court with respect to Parts I, III, and IV, and the opinion of the Court with respect to Part II, in which Rehnquist, C. J., and Brennan, White, Marshall, Scalia, and Kennedy, JJ., joined. Brennan, J., filed a concurring opinion, in which Marshall, J., joined, *post*, p. 280. O'Connor, J., filed an opinion concurring in part and dissenting in part, in which Stevens, J., joined, *post*, p. 282.

**Opinion by:** BLACKMUN

## Opinion

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[\*259] [\*\*\*228] [\*\*2912] JUSTICE BLACKMUN delivered the opinion of the Court.

LEdHN[1A] [1A]We face here the questions whether the Excessive Fines Clause of the *Eighth Amendment* applies to a civil-jury award of punitive or exemplary damages, and, if so, whether an award of \$ 6 million was excessive in this particular case.<sup>1</sup> This Court has never held, or even intimated, that the [\*260] *Eighth Amendment* serves as a check on the power of a jury to award damages in a civil case. Rather, our concerns in applying the *Eighth Amendment* have been with criminal process and with direct actions initiated by government to inflict punishment. Awards of punitive damages do not implicate these concerns. We therefore hold, HN1 [1] on the basis of the history [\*\*\*6] and purpose of the *Eighth Amendment*, that its Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties.

[\*\*\*229] I

These weighty questions of constitutional law arise from an unlikely source: the waste-disposal business in Burlington, Vt. Petitioner Browning-Ferris Industries of Vermont, Inc., is a subsidiary of petitioner Browning-Ferris Industries, Inc. (collectively, BFI), which operates a nationwide commercial waste-collection and disposal business. In 1973 BFI entered the Burlington area trash-collection market, and in 1976 began to offer roll-off collection services.<sup>2</sup> Until 1980 BFI was the sole provider of such services in the Burlington area; that year respondent Joseph Kelley, who, since 1973, had been BFI's local district manager, went into business for himself, starting respondent Kelco Disposal, [\*\*\*7] Inc. Within a year Kelco obtained nearly 40% of the Burlington roll-off market, and by 1982 Kelco's market share had risen to 43%. During 1982 BFI reacted by attempting to drive Kelco out of business, first by offering to buy Kelco and then by cutting prices by 40% or more on new business for

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Briefs of *amici curiae* were filed for the Alliance of American Insurers et al. by Jack H. Blaine, Phillip E. Stano, Craig A. Berrington, John B. Crosby, John J. Nangle, Kenneth H. Nails, James H. Bradner, Jr., Joe W. Peel, and Theresa L. Sorota; for Bethlehem Steel Corp. et al. by Martin S. Kaufman; for the California Trial Lawyers Association by Joseph Remcho, Harvey R. Levine, Amy Langerman, and William L. Denton; for CBS, Inc., et al. by P. Cameron DeVore, Marshall J. Nelson, Douglas P. Jacobs, Richard M. Schmidt, R. Bruce Rich, Harvey L. Lipton, and Bruce W. Sanford; for the Consumers Union of the United States et al. by Andrew F. Popper; for Golden Rule Insurance Co. et al. by Darrell S. Richey, N. Douglas Martin, Jr., and Thomas J. Norman; for Goodyear Tire & Rubber Co. by Theodore B. Olson and Larry L. Simms; for the Illinois Trial Lawyers Association by Robert J. Cooney; for the Insurance Consumer Action Network by Roger O'Sullivan; for Metromedia, Inc., by Theodore B. Olson and Larry L. Simms; for the National Association of Mutual Insurance Companies by Bert S. Nettles, Forrest S. Latta, and Geoffrey C. Hazard, Jr.; and for Martha Hoffmann Sanders by Bruce J. Ennis, Jr., Donald N. Bersoff, and W. Sidney Fuller.

<sup>1</sup> Petitioners before this Court also challenge the award on due process grounds. For reasons set forth in Part III of this opinion, we decline to reach that issue.

<sup>2</sup> "Roll-off waste collection is usually performed at large industrial locations and construction sites with the use of a large truck, a compactor, and a container that is much larger than the typical 'dumpster.'" 845 F. 2d 404, 406 (CA2 1988).

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approximately six months. The orders given to the Burlington BFI office by its regional vice president were clear: "Put [Kelley] out of business. Do whatever it takes. Squish him like a bug." App. 10. BFI's Burlington salesman was also instructed to [\*261] put Kelco out of business and told that if "it meant give the stuff away, give it away." *Ibid.*

During the first four months of BFI's predatory campaign, Kelco's revenues dropped 30%. Kelco's attorney wrote [\*\*\*8] to BFI's legal department asserting that BFI's pricing strategy was illegal, and threatened to initiate court proceedings if it continued. BFI did not respond, and continued its price-cutting policy for several more months. BFI's market share remained [\*\*2913] stable from 1982 to 1984, but by 1985 Kelco had captured 56% of the market. That same year BFI sold out to a third party and left the Burlington market.

In 1984, Kelco and Kelley brought an action in the United States District Court for the District of Vermont, alleging a violation of § 2 of the Sherman Act for attempts to monopolize the Burlington roll-off market. They also claimed that BFI had interfered with Kelco's contractual relations in violation of Vermont tort law. Kelley's claims were severed from Kelco's, and Kelco's antitrust and tort claims were tried to a jury. After a 6-day trial BFI was found liable on both counts. A 1-day trial on damages followed, at which Kelco submitted evidence regarding the revenues and profits it lost as a result of BFI's predatory prices. Kelco's attorney urged the jury to return an award of punitive damages, asking the jurors to "deliver a message to Houston [BFI's headquarters]." [\*\*\*9] *Id.*, at 53. Kelco also stressed BFI's total revenues of \$ 1.3 billion in the previous year, noting that this figure broke down to \$ 25 million a week. BFI urged that punitive damages were not appropriate, but made no argument as to amount.

The District Court instructed the jury that it could award punitive damages on the state-law claims if it found by clear and convincing evidence [\*\*230] that BFI's conduct "revealed actual malice, outrageous conduct, or constituted a willful and wanton or reckless disregard of the plaintiff's rights." *Id.*, at 81. It also told the jury that in determining the amount of punitive damages it could take into account "the character of the [\*262] defendants, their financial standing, and the nature of their acts." *Ibid.* BFI raised no relevant objection to the charge on punitive damages. The jury returned a verdict of \$ 51,146 in compensatory damages on both the federal-antitrust and state-tort counts, and \$ 6 million in punitive damages.

BFI moved for judgment notwithstanding the verdict, a new trial, or remittitur. The District Court denied these motions and awarded Kelco \$ 153,438 in treble damages and \$ 212,500 in attorney's fees and [\*\*\*10] costs on the antitrust claim, or, in the alternative, \$ 6,066,082.74 in compensatory and punitive damages on the state-law claim. BFI appealed. The United States Court of Appeals for the Second Circuit affirmed the judgment both as to liability and as to damages. [845 F. 2d 404 \(1988\)](#). On the issue of punitive damages, the court noted that the evidence showed that BFI "wilfully and deliberately attempted to drive Kelco out of the market," and found no indication of jury prejudice or bias. *Id.*, at 410. Addressing the [Eighth Amendment](#) issue, the court noted that even if the Amendment were applicable "to this nominally civil case," the damages were not "so disproportionate as to be cruel, unusual, or constitutionally excessive," and upheld the award. *Ibid.* Because of its importance, we granted certiorari on the punitive damages issue. [488 U.S. 980 \(1988\)](#).

## II

[LEdHN\[2A\]](#) [↑] [2A][LEdHN\[3A\]](#) [↑] [3A][HN2](#) [↑] The [Eighth Amendment](#) reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Although this Court has never considered an application of the Excessive Fines Clause, it has interpreted [\*\*\*11] the Amendment in its entirety in a way which suggests that the Clause does not apply to a civil-jury award of punitive damages. Given that the Amendment is addressed to bail, fines, and punishments, our cases long have understood it to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments. See, e. g., *Ex parte Watkins*, 7 Pet. 568, 573-574 (1833) ("The [eighth](#) [\*263] [amendment](#) is addressed to courts of the United States exercising criminal jurisdiction"); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (Amendment inapplicable to deportation because deportation is not punishment for a crime); *Ingraham v. Wright*, 430 U.S. 651, 664-668 [\*\*2914] (1977). "Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the

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three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government." *Id.*, at 664.<sup>3</sup>

[LEdHN\[2B\]](#) [↑] [2B]

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[\*\*\*231] [LEdHN\[1B\]](#) [↑] [1B] [LEdHN\[4\]](#) [↑] [4] [LEdHN\[5A\]](#) [↑] [5A] To decide the instant case, however, we need not go so far as to hold that [HN3](#) [↑] the Excessive Fines Clause applies just to criminal cases. Whatever the outer confines of the Clause's [\*264] reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded. To hold otherwise, we believe, would be to ignore the purposes and concerns of the Amendment, as illuminated by its history.<sup>4</sup>

[LEdHN\[5B\]](#) [↑] [5B]

[\*\*\*\*13] A

[LEdHN\[1C\]](#) [↑] [1C] The *Eighth Amendment* received little debate in the First Congress, see *Weems v. United States*, 217 U.S. 349, 368 (1910), and the Excessive Fines Clause received even less attention. This is not surprising; at least eight of the original States which ratified the Constitution had some equivalent of the Excessive Fines Clause in their respective Declarations of Rights or State Constitutions,<sup>5</sup> [\*\*\*\*14] so the matter was not a

<sup>3</sup> *Ingraham*, like most of our *Eighth Amendment* cases, involved the *Cruel and Unusual Punishments Clause*, and it therefore is not directly controlling in this Excessive Fines Clause case. The insights into the meaning of the *Eighth Amendment* reached in *Ingraham* and similar cases, however, are highly instructive.

We left open in *Ingraham* the possibility that the *Cruel and Unusual Punishments Clause* might find application in some civil cases. See *430 U.S., at 669, n. 37*. The examples we cited as possibilities -- persons confined in mental or juvenile institutions -- do not provide much support for petitioners' argument that the Excessive Fines Clause is applicable to a civil award of punitive damages. In any event, petitioners have not made any argument specifically based on the *Cruel and Unusual Punishments Clause*.

[LEdHN\[3B\]](#) [↑] [3B] There is language in *Carlson v. Landon*, 342 U.S. 524, 546 (1952), suggesting that the Bail Clause may be implicated in civil deportation proceedings. The Court there held that "the *Eighth Amendment* does not require that bail be allowed" in such cases, but the opinion in that case never addressed the question whether the *Eighth Amendment* applied in civil cases: the Court held that the Bail Clause does not require Congress to provide for bail in *any* case, but prohibits only the imposition of excessive bail. *Carlson* provides petitioners with little support for another reason as well. Bail, by its very nature, is implicated only when there is a direct government restraint on personal liberty, be it in a criminal case or in a civil deportation proceeding. The potential for governmental abuse which the Bail Clause guards against is present in both instances, in a way that the abuses against which the Excessive Fines Clause protects are not present when a jury assesses punitive damages.

<sup>4</sup> The same basic mode of inquiry should be applied in considering the scope of the Excessive Fines Clause as is proper in other *Eighth Amendment* contexts. We look to the origins of the Clause and the purposes which directed its Framers. "The applicability of the *Eighth Amendment* always has turned on its original meaning, as demonstrated by its historical derivation." *Ingraham*, 430 U.S., at 670-671, n. 39. We emphasize, however, that this historical emphasis concerns the question of when the *Eighth Amendment* is to be applied; as the Court's jurisprudence under the *Cruel and Unusual Punishments Clause* indicates, its approach has not relied on history to the same extent when considering the scope of the Amendment. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

<sup>5</sup> Delaware, Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, and Virginia all had a Declaration of Rights or a Constitution expressly prohibiting excessive fines. See 1 B. Schwartz, *The Bill of Rights: A*

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likely source of controversy or extensive discussion. Although the prohibition of excessive fines was mentioned as part of a complaint that the Amendment was unnecessary and imprecise, see [217 U.S., at 369](#), [\*\*2915] [\*\*\*232] Congress did not discuss [\*265] what was meant by the term "fines," or whether the prohibition had any application in the civil context. In the absence of direct evidence of Congress' intended meaning, we think it significant that at the time of the drafting and ratification of the Amendment, the word "fine" was understood to mean a payment to a sovereign as punishment for some offense.<sup>6</sup> Then, as now, fines were assessed in criminal, rather than in private civil, actions.<sup>7</sup>

[\*\*\*\*15] [\*266] But there is more than inferential evidence from language to support our conclusion that the Excessive Fines Clause is inapplicable to an award of punitive damages. The undisputed purpose and history of the Amendment generally, and of the Excessive Fines Clause specifically, confirm our reading. The [Eighth Amendment](#) clearly was adopted with the particular intent of placing limits on the powers of the new Government. "At the time of its ratification, the original Constitution was criticized in the Massachusetts and Virginia Conventions for its failure to provide any protection for persons convicted of crimes. This criticism provided the impetus for inclusion of the [Eighth Amendment](#) in the [Bill of Rights](#)." [Ingraham v. Wright, 430 U.S., at 666](#) (footnote omitted). See generally [Barron v. Mayor and City Council of Baltimore, 7 Pet. 243, 250 \(1833\)](#) ("In almost every convention by which the constitution was adopted, amendments to guard against the abuse of power were recommended"); [Weems v. United States, 217 U.S., at 372](#) (the "predominant political impulse" of proponents of [\*\*\*\*16] the [Bill of Rights](#) "was distrust of power, and they insisted on constitutional limitations against its abuse"). Simply put, [HN4](#) the primary [\*\*\*233] focus of the [Eighth Amendment](#) was the potential for governmental abuse of its "prosecutorial" power, not concern with the extent or purposes of civil damages.

Moreover, specific and persuasive support for our reading of the Excessive Fines Clause comes from the pedigree of the Clause itself. As we have noted in other cases, it is clear that the [Eighth Amendment](#) was "based directly on Art I, § 9, of the Virginia Declaration of Rights," which "adopted verbatim the language of the English [Bill of Rights](#)."[Solem v. Helm, 463 U.S. 277, 285, n. 10 \(1983\)](#). Section 10 of the English [Bill of Rights](#) of 1689, like our [\*\*2916]

Documentary History 235 (Virginia), 272 (Pennsylvania), 278 (Delaware), 282 (Maryland), 287 (North Carolina), 300 (Georgia), 343 (Massachusetts), and 379 (New Hampshire) (1971).

<sup>6</sup> A "fine signifieth a percuniarie punishment for an offence, or a contempt committed against the king." 1 E. Coke, [Institutes](#) \*126b. The second edition of Cunningham's Law-Dictionary, published in 1771, defined "fines for offences" as "amends, pecuniary punishment, or recompence for an offence committed against the King and his laws, or against the Lord of a manor." 2 T. Cunningham, [A New and Complete Law-Dictionary](#) (unpaginated). See also 1 T. Tomlins, [Law-Dictionary](#) 796-799 (1836) (same); 1 J. Bouvier, [Law Dictionary](#) 525 (4th ed. 1852) (same).

<sup>7</sup> Petitioners have come forward with no evidence, or argument, which convinces us that the word "fine," as used in the late 18th century, would have encompassed private civil damages of any kind. Indeed, the term "damages" was also in use at the time the [Eighth Amendment](#) was drafted and ratified, and had a precise meaning limited to the civil context. Cunningham defined damages as follows: "in the Common law it is a part of what the jurors are to inquire of, and bring in, when an action passeth for the plaintiff: . . . [Damages] comprehend a recompence for what the plaintiff or defendant hath suffered, by means of the wrong done to him by the defendant or tenant." 1 Cunningham, [supra](#); see also 1 Tomlins, at 498 (same); 1 Bouvier, at 360 (same). The dichotomy between fines and damages was clear.

There have been cases which have used the word "fine" to refer to civil damages assessed by statute. As the partial dissent notes, two cases decided 70 years after the Excessive Fines Clause was adopted considered the term "fines" to include money, recovered in a civil suit, which was paid to government. See [Hanscomb v. Russell, 77 Mass. 373, 375 \(1858\)](#); [Gosselink v. Campbell, 4 Iowa 296 \(1856\)](#). These cases, however, provide no support for petitioners' argument that the [Eighth Amendment](#) is applicable in cases between private parties. As to the partial dissent's reliance on the Bard, *post*, at 290, we can only observe:

Though Shakespeare, of course,

Knew the Law of his time,

He was foremost a poet,

In search of a rhyme.

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Eighth Amendment, states that "excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted." 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. at Large [\*267] 440, 441 (1689). We recounted in Ingraham, 430 U.S., at 664: "The English version, adopted after the accession of William and Mary, was intended to curb the [\*\*\*\*17] excesses of English judges under the reign of James II." During the reigns of the Stuarts the King's judges had imposed heavy fines on the King's enemies, much as the Star Chamber had done before its abolition in 1641. L. Schwoerer, The Declaration of Rights, 1689, p. 91 (1981). In the 1680's the use of fines "became even more excessive and partisan," and some opponents of the King were forced to remain in prison because they could not pay the huge monetary penalties that had been assessed. *Ibid.*<sup>8</sup> The group which drew up the 1689 Bill of Rights had firsthand experience; several had been subjected to heavy fines by the King's bench. *Id.*, at 91-92, and n. 198.

The Framers of our Bill of Rights were aware and took account of the abuses that led to the 1689 Bill of Rights.<sup>9</sup> [\*\*\*\*19] This [\*\*\*\*18] history, when coupled with the fact that the accepted English definition of "fine" in 1689 appears to be identical to that in use in colonial America at the time of our Bill of Rights,<sup>10</sup> seems to us clear support for reading our Excessive Fines Clause as limiting the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends. Providing even clearer support for this view is the English case law, immediately prior to the enactment of [\*268] the English Bill of Rights, which stressed the difference between civil damages and criminal fines. See *Lord Townsend v. Hughes*, 2 Mod. 150, 86 Eng. Rep. 994 (C. P. 1677). In short, nothing in English history suggests that the Excessive Fines Clause of the 1689 Bill of Rights, the direct ancestor of our Eighth Amendment, was intended to apply [\*\*\*234] to damages awarded in disputes between private parties. Instead, the history of the Eighth Amendment convinces us that the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government.

## B

LEdHN[1D][↑] [1D]Petitioners, however, argue that the Excessive Fines Clause "derives from limitations in English law on monetary penalties exacted in private civil cases to punish and deter misconduct." Brief for Petitioners 17. They recognize that nothing in the history we have recounted thus far espouses that view. To find support, they turn the clock hundreds of years further back to English history prior to Magna Carta, and in particular to the use and abuse of "amercedments." According to petitioners, amercedments were essentially civil damages, and the limits Magna Carta placed on the use of amercedments were the forerunners of the 1689 Bill of Rights' prohibition on excessive fines. In their view, the English Bill of Rights and our Eighth Amendment must be understood as reaching beyond the criminal context, because Magna Carta did. Punitive damages, they suggest, must be within the scope of the Excessive Fines [\*\*\*\*20] Clause because they are a modern-day analog of 13th-century amercedments.

[\*\*2917] The argument is somewhat intriguing, but we hesitate to place great emphasis on the particulars of 13th-century English practice, particularly when the interpretation we are urged to adopt appears to conflict with the lessons of more recent history. Even so, our understanding of the use of amercedments, and the development of actions for damages at [\*269] common law, convince us that petitioners' view of the relevant history does not support the result they seek.

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<sup>8</sup> For particular examples, see the 1683 *Trial of Thomas Pilkington, and others, for a Riot*, 9 State Tr. 187, and the 1684 *Trial of Sir Samuel Barnardiston*, 9 State Tr. 1333.

<sup>9</sup> Justice Story was of the view that the Eighth Amendment was "adopted as an admonition to all departments of the national government, to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of some of the Stuarts." 2 J. Story, *Commentaries on the Constitution of the United States* 624 (T. Cooley 4th ed. 1873).

<sup>10</sup> By 1689, the definition of "fines" and "damages" discussed in nn. 6 and 7, *supra*, already had taken hold. For a definition of "damages," see T. Blount, *A Law-Dictionary* (1670) (unpaginated).

Amercements were payments to the Crown, and were required of individuals who were "in the King's mercy," because of some act offensive to the Crown. Those acts ranged from what we today would consider minor criminal offenses, such as breach of the King's peace with force and arms, to "civil" wrongs against the King, such as infringing "a final concord" made in the King's court. See 2 F. Pollock & F. Maitland, History of English Law 519 (2d ed. 1905) (Pollock & Maitland); see also Solem v. Helm, 463 U.S., at 284, n. 8 (an amercement "was the most common criminal sanction in 13th-century England"); W. McKechnie, [\*\*\*\*21] Magna Carta 285-286 (2d ed. 1958) (McKechnie) (discussing amercements as a step in the development of criminal law). Amercements were an "all-purpose" royal penalty; they were used not only against plaintiffs who failed to follow the complex rules of pleading<sup>11</sup> [\*\*\*\*22] and against defendants who today would be liable in tort, but also against an entire township [\*\*\*\*235] which failed to live up to its obligations, or against a sheriff who neglected his duties.<sup>12</sup> The use of amercements was widespread; one commentary has said that most men in England could expect [\*270] to be amerced at least once a year. See 2 Pollock & Maitland 513.<sup>13</sup>

[\*\*\*\*23] In response to the frequent, and occasionally abusive, use of amercements by the King, Magna Carta included several provisions placing limits on the circumstances under which a person could be amerced, and the amount of the amercement.<sup>14</sup> [\*\*\*\*24] The barons who forced John to [\*\*2918] agree to Magna Carta sought to reduce arbitrary royal power, and in particular [\*271] to limit the King's use of amercements as a source of royal revenue, and as a weapon against enemies of the Crown.<sup>15</sup> The Amercements Clause of Magna Carta limited

<sup>11</sup> See Treatise on the Laws and Customs of the Realm of England Commonly called Glanvill 127-128 (G. Hall ed. 1965) (written between 1187-1189); Introduction to the Curia Regis Rolls, 1199-1230 A. D., in 62 Publications of the Selden Society 465 (C. Flower ed. 1944). Defendants could be amerced as well. "The justices did not hesitate to extract amercements from both parties when the occasion arose." Id., at 466. For a wide variety of conduct for which amercements were assessed on parties, see Beecher's Case, 8 Co. Rep. 58a, 59b-60a, 77 Eng. Rep. 559, 564-565 (Ex. 1609); 1 Select Pleas of the Crown (A. D. 1200-1225), in 1 Publications of the Selden Society 2, 4, 5-6, 7-8, 9-10, 13, 43-44, 90 (F. Maitland ed. 1888); 62 Selden Society, at 464-467.

<sup>12</sup> See id., at 467; Pleas of the Crown for the County of Gloucester: A. D. 1221, p. xxxiii (F. Maitland ed. 1884) (Pleas for Gloucester); see generally 1 Selden Society.

<sup>13</sup> Without discussing the complex origins of civil damages in detail, see 2 Pollock & Maitland 522-525; 62 Selden Society, at 473-479, we can say confidently that damages and amercements were not the same. In the time before Magna Carta, damages awards were rare, 2 Pollock & Maitland 523, the more usual relief being a fixed monetary payment or specific relief. But "[t]he distinction between amercements and damages is well known. The former were payable to the crown after legal action or for an error or ineptitude which took place in its course; the latter represented the loss incurred by a litigant through an unlawful act. They were payable to [the private litigant]." 62 Selden Society, at 463.

The only overlap between the two might occur in the Assize of Novel Disseisin, in which the court could grant the recovery of land and chattels, and might amerce the defendant as well. Id., at 156; see generally 2 Pollock & Maitland 44-56, 523-524. But even in this action, the amerciable offense is one to the Crown, for every disseisin was a breach of the peace, as well as an improper possession of another's property. Id., at 44. Along these lines, see 62 Selden Society, at 478-479 ("In comparison with amercements, damages were seldom remitted, for the good reason that the king could do as he liked with his own but had to be careful not to show mercy at the expense of a wronged subject").

<sup>14</sup> "A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; (2) and a Merchant likewise, saving to him his Merchandise; (3) and any other's villain than ours shall be likewise amerced, saving his wainage, if he falls into our mercy. (4) And none of the said amerciaments shall be assessed, but by the oath of honest and lawful men of the vicinage. (5) Earls and Barons shall not be amerced but by their Peers, and after the manner of their offence. (6) No man of the Church shall be amerced after the quantity of his spiritual Benefice, but after his Lay-tenement, and after the quantity of his offence." Magna Charta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 5 (1769), confirmed, 25 Edw. I, ch. 1 (1297), id., at 131-132.

<sup>15</sup> See generally McKechnie 278; G. Smith, A Constitutional and Legal History of England 129, 131 (1955). Although most amercements were not large, see McKechnie 287; 2 Pollock & Maitland 513, being placed in the King's mercy meant, at least theoretically, that a man's estate was in the King's hands, and it was within the King's power to require its forfeit. See 62 Selden Society, at 463; McKechnie 71-72 (one called to the King's service who did not go was in mercy, and his estate was subject to

these abuses in four ways: by requiring that one be amerced only for some genuine harm to the Crown; by requiring that the amount of the amercement be proportioned to the wrong; by requiring that the amercement not be so large as to deprive him of his livelihood; and by requiring that the amount of [\*\*\*236] the amercement be fixed by one's peers, sworn to amerce only in a proportionate amount.<sup>16</sup>

[\*\*\*\*25] Petitioners, and some commentators,<sup>17</sup> find in this history a basis for concluding that the Excessive Fines Clause operates to limit the ability of a civil jury to award punitive damages. We do not agree. Whatever uncertainties surround the use of amercements prior to Magna Carta, the compact signed at Runnymede was aimed at putting limits on the [\*272] power of the King, on the "tyrannical extortions, under the name of amercements, with which John had oppressed his people," T. Taswell-Langmead, English Constitutional History 83 (T. Plucknett 10th ed. 1946), whether that power be exercised for purposes of oppressing political opponents, for raising revenue in unfair ways, or for any other improper use. See 2 W. Holdsworth, A History of English Law 214 (4th ed. 1936). These concerns are clearly inapposite in a case where a private party receives exemplary damages from another party, and the government has no share in the recovery. Cf. [United States v. Halper, 490 U.S. 435 \(1989\) \(Double Jeopardy Clause\)](#).

[\*\*\*\*26] Petitioners ultimately rely on little more than the fact that the distinction between civil and criminal law was cloudy (and perhaps nonexistent) at the time of Magna Carta. But any overlap between civil and criminal procedure at that time does nothing to support petitioners' case, when all the indications are that English courts never have understood the amercements clauses to be relevant to private damages of any kind, either then or at any later time. See *Lord Townsend v. Hughes*, 2 Mod., at 151, 86 Eng. Rep., at 994-995 (Magna Carta's amercements provisions apply in criminal, but not civil, cases). Even after the common [\*\*2919] law had developed to the point where courts occasionally did decrease a damages award or eliminate it altogether, such action was never predicated on the theory that the *government* somehow had overstepped its bounds. Rather, the perceived error was one made by the jury, as determined by reference to common-law, rather than constitutional, standards. Whether based on reasoning that the jury's award was so excessive that it must have been based on bias or prejudice, see *Wood v. Gunston*, Sty. 466, 82 Eng. Rep. 867 (K. B. 1655); [\*\*\*\*27] *Leith v. Pope*, 2 Bl. W. 1327, 96 Eng. Rep. 777 (C. P. 1780), or that the jury must have misconstrued the evidence, see *Ash v. Ash*, Comb. 357, 90 Eng. Rep. 526 (1696), the proper focus was, and still is, on the behavior of the jury. It is difficult [\*273] to understand how Magna Carta, or the English *Bill of Rights* as [\*\*\*237] viewed through the lens of Magna Carta, compels us to read our *Eighth Amendment's* Excessive Fines Clause as applying to punitive damages when those documents themselves were never so applied.<sup>18</sup>

forfeiture). Amercements also resembled a form of taxation, particularly when used against entire townships. See Pleas for Gloucester xxxiv.

<sup>16</sup> According to Pollock and Maitland, after the court found a person to be in the King's mercy, and that person obtained a pledge for the payment of whatever sum was to be amerced, the court would go on to other cases. At this point the person had not yet been amerced. "At the end of the session some good and lawful men, the peers of the offender (two seem to be enough) were sworn to 'affeer' the amercements. They set upon each offender some fixed sum of money that he was to pay; this sum is his amercement." 2 Pollock & Maitland 513; see also Pleas for Gloucester xxxiv. This procedure indicates that amercements were assessed by a "jury" different from that which considered the case.

<sup>17</sup> See, e. g., Massey, The Excessive Fines Clause and Punitive Damages: Some Lessons from History, [40 Vand. L. Rev. 1233 \(1987\)](#); Note, The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the *Eighth Amendment*, [85 Mich. L. Rev. 1699 \(1987\)](#).

<sup>18</sup> So, for example, when the House of Lords placed certain limits on the types of cases in which exemplary damages could be awarded, Lord Devlin's extensive discussion mentioned neither Magna Carta or the Excessive Fines Clause of the 1689 *Bill of Rights*, nor did it suggest that English constitutional or common law placed any restrictions on the award of exemplary damages other than those discussed above. *Rookes v. Barnard*, [1964] A. C. 1129, 1221-1231. In fact, Lord Devlin recognized that his suggested alterations were a departure from the traditional common-law view. *Id.*, at 1226. We find it significant that other countries that share an English common-law heritage have not followed the decision in *Rookes*, and continue to allow punitive or exemplary damages to be awarded without substantial interference. See, e. g., *Uren v. John Fairfax & Sons*, [1967] A. L. R. 25,

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LEdHN[1E] [1E] Our conclusion that the Framers of the Eighth Amendment did not expressly intend it to apply to damages awards made by civil juries does not necessarily complete our inquiry. HN5 [1E] Our Eighth Amendment jurisprudence has not been inflexible. The Court, when considering the Eighth Amendment, has stated: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions." Weems v. United States, 217 U.S., at 373.<sup>19</sup> [\*\*\*\*30] This aspect [\*274] of our Eighth Amendment jurisprudence might have some force here were punitive damages a strictly modern creation, without solid grounding in pre-Revolutionary days. But the practice of awarding damages far in excess of actual compensation for quantifiable injuries was well recognized at the time the Framers produced the Eighth Amendment. Awards of double or treble damages authorized by statute date back to the 13th century, see Statute of Gloucester, 1278, 6 Edw. I, ch. 5, 1 Stat. at Large 66 (treble damages for waste); see also 2 Pollock & Maitland 522, and the [\*\*\*\*29] doctrine was expressly recognized in cases as early as 1763.<sup>20</sup> Despite this recognition [\*\*\*238] [\*\*2920] of civil exemplary damages as punitive [\*275] in nature, the Eighth Amendment did not expressly include it within its scope. Rather, as we earlier have noted, the text of the Amendment points to an intent to deal only with the prosecutorial powers of government.

[\*\*\*\*31] LEdHN[1F] [1F] LEdHN[6A] [1F] LEdHN[7A] [1F] [7A] Furthermore, even if we were prepared to extend the scope of the Excessive Fines Clause beyond the context where the Framers clearly intended it to apply, we would not be persuaded to do so with respect to cases of punitive damages awards in private civil cases, because they are too far afield from the concerns that animate the Eighth Amendment. We think it clear, from both the language of the Excessive Fines Clause and the nature of our constitutional framework, that HN6 [1F] the Eighth Amendment places limits on the steps a government may take against an individual, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments. The fact that punitive damages are imposed through the aegis of courts and serve to advance governmental interests is insufficient to support the step petitioners ask us to take. While we agree with petitioners that punitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law, we fail to see how this overlap requires us to apply the Excessive Fines Clause in a case between private parties. Here the government of Vermont has not taken a positive [\*\*\*\*32] step to punish, as it most obviously does in the criminal context, nor has it used the civil courts to extract large payments or forfeitures for the purpose of raising revenue or

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27 (Australia) (declining to follow *Rookes*); *Bahner v. Marwest Hotel Co.*, 6 D. L. R. 3d 322, 329 (1969) (Canada) (same); *Fogg v. McKnight*, [1968] N. Z. L. R. 330, 333 (New Zealand) (same).

<sup>19</sup> In *Weems*, Justice McKenna continued his writing for the Court: "[Constitutions] are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality." 217 U.S., at 373.

<sup>20</sup> Among the first cases to make explicit reference to exemplary damages was *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 768 (K. B. 1763), where the court refused to set aside a jury award of # 300 where the plaintiff's injury would have been compensated by # 20. Upholding what it referred to as an award of "exemplary damages," the court noted that "the law has not laid down what shall be the measure of damages in actions of tort; the measure is vague and uncertain, depending on a vast variety of causes, facts, and circumstances," and declined to "intermeddle" in the damages determination. "[I]t must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages." *Id.*, at 206-207, 95 Eng. Rep., at 768-769. Another case decided that year stated the applicable principle with particular clarity: "Damages are designed not only as a satisfaction to the injured person, but likewise as punishment to the guilty, to deter from any such proceeding for the future and as a proof of the detestation of the jury to the action itself." *Wilkes v. Wood*, Loftt 1, 18-19, 98 Eng. Rep. 489, 498-499 (K. B.). Other English cases followed a similar approach. See, e. g., *Roe v. Hawkes*, 1 Lev. 97, 83 Eng. Rep. 316 (K. B. 1663); *Grey v. Grant*, 2 Wils. 252, 253, 95 Eng. Rep. 794, 795 (K. B. 1764); *Benson v. Frederick*, 3 Burr. 1846, 97 Eng. Rep. 1130 (K. B. 1766).

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disabling some individual.<sup>21</sup> We shall not ignore the language of the Excessive [\*\*276] Fines Clause, or its history, or the theory [\*\*\*239] on which it is based, in order to apply it to punitive damages.<sup>22</sup>

[LEdHN\[6B\]](#) [↑] [6B]

[\*\*\*\*33] [LEdHN\[7B\]](#) [↑] [7B]

[\*\*2921] III

[LEdHN\[8A\]](#) [↑] [8A] Petitioners also ask us to review the punitive damages award to determine whether it is excessive under the *Due Process Clause of the Fourteenth Amendment*. The parties agree that [HN7](#) [↑] due process imposes some limits on jury awards of punitive damages, and it is not disputed that a jury award may not be upheld if it was the product of bias or passion, or if it was reached in proceedings lacking the basic elements of fundamental fairness. But petitioners make no claim that the proceedings themselves were unfair, or that the jury was biased or blinded by emotion or prejudice. Instead, [\*\*\*\*34] they seek further due process protections, addressed directly to the size of the damages award. There is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme, see, e. g., *St. Louis, I. M. & S. R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919), but we have never addressed the precise question presented here: [\*277] whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit. See *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring in part and concurring in judgment). That inquiry must await another day. Because petitioners failed to raise their due process argument before either the District Court or the Court of Appeals, and made no specific mention of it in their petition for certiorari in this Court, we shall not consider its effect on this award.<sup>23</sup>

<sup>21</sup> In *United States v. Halper*, 490 U.S. 435 (1989), we held that the *Double Jeopardy Clause of the Fifth Amendment* places limits on the amounts the Federal Government may recover in a civil action, after the defendant already has been punished through the criminal process. While our opinion in *Halper* implies that punitive damages awarded to the Government in a civil action may raise *Eighth Amendment* concerns, that case is materially different from this one, because there the *Government* was exacting punishment in a civil action, whereas here the damages were awarded to a private party. We noted in *Halper* that nothing in our opinion "precludes a *private* party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment. The protections of the *Double Jeopardy Clause* are not triggered by litigation between private parties." *Id.*, at 451 (emphasis added). We left open the question whether a *qui tam* action, in which a private party brings suit in the name of the United States and shares in any award of damages, would implicate the *Double Jeopardy Clause*. *Id.*, at 451, n. 11. We leave the same question open for purposes of the *Eighth Amendment's* Excessive Fines Clause.

<sup>22</sup> Because of the result we reach today, we need not answer several questions that otherwise might be necessarily antecedent to finding the *Eighth Amendment's* Excessive Fines Clause applicable to an award of punitive damages, and that have not been briefed by the parties. We shall not decide whether the *Eighth Amendment's* prohibition on excessive fines applies to the several States through the *Fourteenth Amendment*, nor shall we decide whether the *Eighth Amendment* protects corporations as well as individuals.

<sup>23</sup> Petitioners claim that the due process question is within the "clear intendment" of the objection it has made throughout these proceedings. Our review of the proceedings in the District Court and the Court of Appeals shows that petitioners' primary claim in both of those courts was that the punitive damages award violated Vermont state law. Petitioners also argued that the award violated the *Eighth Amendment*. We fail to see how the claim that the award violates due process is necessarily a part of these arguments. [HN8](#) [↑] We shall not assume that a nonconstitutional argument also includes a constitutional one, and shall not stretch the specific claims made under the *Eighth Amendment* to cover those that might arise under the Due Process Clause as well. Although in particular cases we have applied the doctrine petitioners advance, see *Braniff Airways, Inc. v. Nebraska Bd. of Equalization and Assessment*, 347 U.S. 590, 598-599 (1954), this is not a case where a respondent is making arguments in support of a judgment. See *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244, n. 6 (1983); *Dandridge v. Williams*, 397 U.S. 471, 475-476, n. 6 (1970). In the absence of a developed record on the issues relevant to this due process inquiry, we shall not stretch the "clear intendment" doctrine to include this case, as we do not think that the due process question is "only an enlargement" of the *Eighth Amendment* inquiry. Although the due process analysis of an award of punitive damages may track

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## LEdHN[8B] [↑] [8B]

[\*\*\*35] [\*\*\*240] IV

LEdHN[9] [↑] [9]Petitioners also ask us to hold that this award of punitive damages is excessive as a matter of federal common law. Rather than directing us to a developed body of federal law, [\*278] however, they merely repeat the standards they urged us to adopt under the Eighth Amendment. HN9 [↑] It is not our role to review directly the award for excessiveness, or to substitute our judgment for that of the jury. Rather, our only inquiry is whether the Court of Appeals erred in finding that the District Court did not abuse its discretion in refusing to grant petitioners' motion, under Federal Rule of Civil Procedure 59, for a new trial or remittitur. Applying proper deference to the District Court, the award of punitive damages should stand.

LEdHN[10A] [↑] [10A]LEdHN[11A] [↑] [11A]Review of the District Court's order involves questions of both state and federal law. In a diversity action, or in any other lawsuit where state law provides the [\*\*2922] basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.<sup>24</sup> Federal [\*279] law, however, will control on those issues involving the proper review [\*\*\*36] of the jury award by a federal district court and court of appeals. See Donovan v. Penn Shipping Co., 429 U.S. 648, 649-650 (1977); see also 6A J. Moore, J. Lucas, & G. Grotheer, Moore's Federal Practice, para. 59.04[1] (2d ed. 1987).

## LEdHN[11B] [↑] [11B]

[\*\*\*37] LEdHN[10B] [↑] [10B]LEdHN[12A] [↑] [12A]LEdHN[13A] [↑] [13A]In reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard.<sup>25</sup> Although [\*\*\*241] petitioners and their *amici* would like us to craft some common-law

closely the Eighth Amendment analysis suggested by petitioners, we shall not assume that to be the case and shall not attempt to decide the question in the absence of a record on the due process point developed in the District Court and the Court of Appeals.

<sup>24</sup> The law of punitive damages in Vermont is typical of the law in most American jurisdictions. The doctrine has long standing. As far back as 1862, the Supreme Court of Vermont noted that the law on exemplary damages was "long settled in this state." Nye v. Merriam, 35 Vt. 438, 446. A Vermont jury may award punitive damages only if the evidence supports a finding that the defendant acted with malice, see, e. g., Appropriate Technology Corp. v. Palma, 146 Vt. 643, 647, 508 A. 2d 724, 726 (1986), or "malice or wantonness shown by the act," Rogers v. Bigelow, 90 Vt. 41, 49, 96 A. 417, 420 (1916). Punitive damages awards may be set aside if grossly and manifestly excessive. See Glidden v. Skinner, 142 Vt. 644, 648, 458 A. 2d 1142, 1145 (1983). The Vermont Supreme Court has declined to adopt a rule of proportionality between compensatory and punitive damages, Pezzano v. Bonneau, 133 Vt. 88, 92, 329 A. 2d 659, 661 (1974), but does not allow punitive damages to stand when an award of compensatory damages has been vacated, Allard v. Ford Motor Credit Co., 139 Vt. 162, 164, 422 A. 2d 940, 942 (1980). Once a plaintiff has presented sufficient evidence of malice, evidence of "the defendant's pecuniary ability may be considered in order to determine what would be a just punishment for him." Lent v. Huntoon, 143 Vt. 539, 550, 470 A. 2d 1162, 1170 (1983), quoting Kidder v. Bacon, 74 Vt. 263, 274, 52 A. 322, 324 (1902).

The \$ 6 million in punitive damages in this case apparently is the largest such judgment in the history of Vermont; there have been other substantial jury awards, however, in the State. See, e. g., Coty v. Ramsey Associates, Inc., 149 Vt. 451, 546 A. 2d 196 (\$ 380,000 in punitive damages), cert. denied, 487 U.S. 1236 (1988).

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standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages, or makes reference to statutory penalties for similar conduct, these are matters of state, and not federal, common law. Adopting a rule along the lines petitioners suggest would require us to ignore the distinction between the state-law and federal-law issues. For obvious reasons we decline that invitation.

#### LEdHN[12B] [↑] [12B]

[\*\*\*\*38] LEdHN[13B] [↑] [13B] LEdHN[14] [↑] [14] In performing the limited function of a federal appellate court, we perceive no federal common-law standard, or compelling [\*280] federal policy, which convinces us that we should not continue to accord considerable deference to a district court's decision not to order a new trial.<sup>26</sup> In this case the District Court properly instructed the jury on Vermont law, see n. 24, *supra*, and applied the proper state-law standard in considering whether the verdict returned was excessive. Although the opinion of [\*\*2923] the Court of Appeals is not clear to us as to whether it applied state or federal law in reviewing the District Court's order denying the new trial or remittitur, we are convinced that its conclusion that there was no abuse of discretion by the District Court is consistent with federal standards, in light of the broad range of factors Vermont law permits juries to consider in awarding punitive damages.

[\*\*\*\*39] V

LEdHN[1G] [↑] [1G] LEdHN[13C] [↑] [13C] In sum, we conclude that neither federal common law nor the Excessive Fines Clause of the *Eighth Amendment* provides a basis for disturbing the jury's punitive damages award in this case. Accordingly, the judgment of the Court of Appeals is affirmed.

*It is so ordered.*

**Concur by:** BRENNAN; O'CONNOR (In Part)

## Concur

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JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties. See *ante*, at 276-277.

Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are "grossly excessive," *Waters-Pierce Oil Co. v. [\*281] Texas*, 212 U.S. 86, 111 (1909), or "so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable," *St. Louis, I. M. & S. R. Co. v. Williams*, 251 U.S. 63, 66-67 [\*\*\*242] (1919). See also *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 491 (1915); [\*\*\*\*40] *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512, 522-523 (1885). I should think that, if anything, our

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<sup>25</sup> We have never held expressly that the *Seventh Amendment* allows appellate review of a district court's denial of a motion to set aside an award as excessive. Although we granted certiorari in two cases in order to consider the issue, in both instances we found it unnecessary to reach the question when we decided the case. See *Neese v. Southern R. Co.*, 350 U.S. 77 (1955) (even assuming appellate review power under the *Seventh Amendment*, Court of Appeals was not justified in reversing denial of new trial on the particular facts of the case); *Grunenthal v. Long Island R. Co.*, 393 U.S. 156, 158 (1968) (same). In light of the result we reach today, we follow the same course here.

<sup>26</sup> This is particularly true because the federal courts operate under the strictures of the *Seventh Amendment*. As a result, we are reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury.

scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits.

Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision. Indeed, the jury in this case was sent to the jury room with nothing more than the following terse instruction: "In determining the amount of punitive damages, . . . you may take into account the character of the defendants, their financial standing, and the nature of their acts." App. 81. Guidance like this is scarcely better than no guidance at all. I do not suggest that the instruction itself was in error; indeed, it appears to have been a correct statement of Vermont law. The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an [\*\*\*41] admonition to do what they think is best. Because "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *Daniels v. Williams*, 474 U.S. 327, 331 (1986), quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), I for one would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed.

Since the Court correctly concludes that Browning-Ferris' challenge based on the Due Process Clause is not properly [\*282] before us, however, I leave fuller discussion of these matters for another day.

**Dissent by:** O'CONNOR (In Part)

## Dissent

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JUSTICE O'CONNOR, with whom JUSTICE STEVENS joins, concurring in part and dissenting in part.

Awards of punitive damages are skyrocketing. As recently as a decade ago, [\*\*2924] the largest award of punitive damages affirmed by an appellate court in a products liability case was \$ 250,000. See Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1329-1332 (1976). [\*\*\*42] Since then, awards more than 30 times as high have been sustained on appeal. See *Ford Motor Co. v. Durrill*, 714 S. W. 2d 329 (Tex. App. 1986) (\$ 10 million); *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S. E. 2d 470 (1984) (\$ 8 million); *Palmer v. A. H. Robins Co.*, 684 P. 2d 187 (Colo. 1984) (\$ 6.2 million). The threat of such enormous awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market. See, e. g., Brief for Pharmaceutical Manufacturers Association et. al. as *Amici Curiae* 5-23. Similarly, designers of airplanes and motor vehicles have been forced to abandon new projects for fear of lawsuits that can often lead to awards of punitive damages. See generally P. Huber, *Liability: [\*\*\*243] The Legal Revolution and Its Consequences* 152-171 (1988).

The trend toward multimillion dollar awards of punitive damages is exemplified by this case. A Vermont jury found [\*\*\*43] that Browning-Ferris Industries, Inc. (BFI), tried to monopolize the Burlington roll-off waste disposal market and interfered with the contractual relations of Kelco Disposal, Inc. (Kelco). The jury awarded Kelco \$ 51,000 in compensatory damages (later trebled) on the antitrust claim, and over \$ 6 million in punitive damages. The award of punitive damages was 117 times the actual damages suffered by Kelco and far exceeds the highest reported award of punitive damages affirmed by a Vermont court. Cf. *Coty v. Ramsey Associates*, [\*283] Inc., 149 Vt. 451, 546 A. 2d 196 (punitive damages of \$ 380,000 based on compensatory damages of \$ 187,500), cert. denied, 487 U.S. 1236 (1988).

The Court holds today that the Excessive Fines Clause of the *Eighth Amendment* places no limits on the amount of punitive damages that can be awarded in a suit between private parties. That result is neither compelled by history nor supported by precedent, and I therefore respectfully dissent from Part II of the Court's opinion. I do, however, agree with the Court that no due process claims -- either procedural or substantive -- are [\*\*\*44] properly presented in this case, and that the award of punitive damages here should not be overturned as a matter of federal

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common law. I therefore join Parts I, III, and IV of the Court's opinion. Moreover, I share Justice Brennan's view, *ante*, at 280-282, that nothing in the Court's opinion forecloses a due process challenge to awards of punitive damages or the method by which they are imposed, and I adhere to my comments in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 86-89 (1988) (opinion concurring in part and concurring in judgment), regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages.

I

Before considering the merits of BFI's *Eighth Amendment* claim, two preliminary questions must be addressed. First, does the Excessive Fines Clause apply to the States through the *Due Process Clause of the Fourteenth Amendment*? Second, is a corporation such as BFI protected by the Excessive Fines Clause?

A

The award of punitive damages against BFI was based on Vermont law. See 845 F. 2d 404, 409 (CA2 1988). Almost 100 years ago, the Court [\*\*\*\*45] held that the *Eighth Amendment* did not apply to the States. See *O'Neil v. Vermont*, 144 U.S. 323, 332 (1892). See also *Pervair v. Commonwealth*, [\*284] 5 Wall. 475 (1867). But 13 years [\*\*2925] before O'Neil, the Court had applied the *Eighth Amendment's* ban on cruel and unusual punishments to a Territory. See *Wilkerson v. Utah*, 99 U.S. 130 (1879) (holding that execution by firing squad was not prohibited by the *Eighth Amendment*). In *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947), the Court assumed, without deciding, that the *Eighth Amendment* [\*\*244] applied to the States. Any confusion created by O'Neil, Wilkerson, and Francis was eliminated in *Robinson v. California*, 370 U.S. 660, 666-667 (1962), in which the Court, albeit without discussion, reversed a state conviction for the offense of narcotics addiction as constituting cruel and unusual punishment and being repugnant to the *Fourteenth Amendment*. Since *Robinson*, the *Cruel and Unusual Punishments Clause* has been regularly [\*\*\*\*46] applied to the States, most notably in the capital sentencing context. In addition, the Court has assumed that the *Excessive Bail Clause of the Eighth Amendment* applies to the States. See *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971). I see no reason to distinguish one Clause of the *Eighth Amendment* from another for purposes of incorporation, and would hold that the Excessive Fines Clause also applies to the States.

B

In the words of Chief Justice Marshall, a corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law." *Dartmouth College v. Woodward*, 4 Wheat. 518, 636 (1819). As such, it is not entitled to "purely personal" guarantees whose "'historic function' . . . has been limited to the protection of individuals." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 779, n. 14 (1978). Thus, a corporation has no *Fifth Amendment* privilege against self-incrimination, *Wilson v. United States*, 221 U.S. 361 (1911), or right to privacy, *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). [\*\*\*\*47] On the other hand, a corporation has a *First Amendment* right to freedom [\*285] of speech, *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and cannot have its property taken without just compensation, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). A corporation is also protected from unreasonable searches and seizures, *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), and can plead former jeopardy as a bar to a prosecution, *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). Furthermore, a corporation is entitled to due process, *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984), and equal protection, *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), of law.

Whether a particular constitutional guarantee applies to corporations "depends on the nature, history, and purpose" of the guarantee. *First National Bank of Boston, supra, at 779, n. 14*. The payment [\*\*\*\*48] of monetary penalties, unlike the ability to remain silent, is something that a corporation can do as an entity, and the Court has reviewed fines and monetary penalties imposed on corporations under the *Fourteenth Amendment* at a time when the *Eighth Amendment* did not apply to the States. See *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111-112 (1909). See also *St. Louis I. M. & S. R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919). If a corporation is protected [\*\*\*245] by the Due Process Clause from overbearing and oppressive monetary sanctions, it is also protected from such penalties

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by the Excessive Fines Clause. See *Whitney Stores, Inc. v. Summerford*, 280 F. Supp. 406, 411 (SC) (three-judge court) [\*\*2926] (entertaining *Eighth Amendment* challenge by corporation to fine for violation of Sunday closing laws), summarily aff'd, 393 U.S. 9 (1968).

11

Language in *Ingraham v. Wright*, 430 U.S. 651 (1977), and *Ex parte Watkins*, 7 Pet. 568 (1833), suggests that the entire *Eighth Amendment* [\*\*\*\*49] is confined to criminal prosecutions and punishments. But as the Court correctly acknowledges, [\*286] ante, at 262-263, and n. 3, that language is not dispositive here.

In *Ingraham*, the Court held that the *Cruel and Unusual Punishments Clause of the Eighth Amendment* does not apply to disciplinary corporal punishment at a public school. Because the Excessive Fines Clause was not at issue in *Ingraham*, the Court's statement that the "text of the [Eighth] Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government," [430 U.S., at 664](#), is not controlling. The similar statement in *Ex parte Watkins*, that the *Eighth Amendment* "is addressed to courts of the United States exercising criminal jurisdiction," 7 Pet., at 573-574, is dictum, for the Court there held only that it did not have appellate jurisdiction to entertain a challenge, by way of a writ for habeas corpus, to criminal fines imposed upon a defendant: "[T]his Court has no appellate jurisdiction to revise the sentences of inferior courts in criminal cases; and cannot, even if the excess of the fine were apparent [\*\*\*\*50] on the record, reverse the sentence." *Id.*, at 574. There is another reason not to rely on or be guided by the sweeping statements in *Ingraham* and *Ex parte Watkins*. Those statements are inconsistent with the Court's application of the *Excessive Bail Clause of the Eighth Amendment* to civil proceedings in [Carlson v. Landon, 342 U.S. 544-546 \(1952\)](#) (immigration and deportation). See [United States v. Salerno, 481 U.S. 739, 754 \(1987\)](#) (recognizing that *Carlson* "was a civil case"). In sum, none of the Court's precedents foreclose application of the Excessive Fines Clause to punitive damages.

三

The history of the Excessive Fines Clause has been thoroughly canvassed in several recent articles, all of which conclude that the Clause is applicable to punitive damages. See Boston, *Punitive Damages and the Eighth Amendment*: Application of the Excessive Fines Clause, 5 Cooley L. Rev. [\*287] 667 (1988) (Boston); Massey, The Excessive Fines Clause and Punitive Damages: Some Lessons from History, *40 Vand. L. Rev.* 1233 (1987) [\*\*\*\*51] (Massey); Jeffries, A Comment on the Constitutionality of Punitive Damages, *72 Va. L. Rev.* 139 (1986) (Jeffries); Note, The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the *Eighth Amendment*, *85 Mich. L. Rev.* 1699 (1987) (Note). In my view, a chronological account of the Clause and its [\*\*\*246] antecedents demonstrates that the Clause derives from limitations in English law on monetary penalties exacted in civil *and* criminal cases to punish and deter misconduct. History aside, this Court's cases leave no doubt that punitive damages serve the same purposes -- punishment and deterrence -- as the criminal law, and that excessive punitive damages present precisely the evil of exorbitant monetary penalties that the Clause was designed to prevent.

A

The story of the Excessive Fines Clause begins in the "early days of English justice, before crime and tort were clearly distinct." Jeffries 154. Under the Saxon legal system in pre-Norman England, the victim of a wrong would, rather than seek vengeance through retaliation or "bloodfeud," accept financial compensation for the injury from the wrongdoer. The [\*\*\*\*52] [\*\*2927] wrongdoer could also be made to pay an additional sum "on the ground that every evil deed inflicts a wrong on society in general." W. McKechnie, *Magna Carta* 284-285 (1958) (McKechnie).

At some point after the Norman Conquest in 1066, this method of settling disputes gave way to a system in which individuals who had engaged in conduct offensive to the Crown placed themselves "in the King's mercy" so as not to have to satisfy all the monetary claims against them. *Id.* at 285. See generally 2 F. Pollock & F. Maitland, The History of English Law 512-516 (2d ed. 1899) (Pollock & Maitland). In order to receive clemency, these individuals were required to pay an "amercement" to the Crown, its representative, or [\*288] a feudal lord. *Tumey v. Ohio*, 273 U.S. 510, 525 (1927); Massey 1252-1253, and n. 111. But cf. R. Stringham, Magna Carta: Fountainhead of

Freedom 40 (1966) (a share of the amercement went to the victim or the victim's family). Because the amercement originated at a time when there was little distinction between criminal law and tort law, it was "neither strictly a civil nor a criminal sanction." Note, at 1716. Blackstone, [\*\*\*\*53] however, clearly thought that amercements were civil punishments. See 4 W. Blackstone, *Commentaries* \*372 ("amercements for misbehaviour in matters of civil right"). As one commentator has noted, the "amercement was assessed most commonly as a civil sanction for wrongfully bringing or defending a civil lawsuit." Massey 1251. The list of conduct meriting amercement was voluminous: trespass, improper or false pleading, default, failure to appear, economic wrongs, torts, and crimes. See generally *Beecher's Case*, 8 Co. Rep. 58a, 59b-61b, 77 Eng. Rep. 559, 564-567 (Ex. 1609).

The amount of an amercement was set arbitrarily, according to the extent to which the King or his officers "chose to relax the forfeiture of all the offender's goods." Jeffries 154-155. See also Boston 725. Because of the frequency and sometimes abusive nature of amercements, Chapter 20 of Magna Carta, 9 Hen. III, ch. 14 (1225), prohibited amercements that were disproportionate to the offense or that would deprive the wrongdoer of his means of livelihood:

"A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness [\*\*\*\*54] [\*\*\*247] thereof, saving to him his contenement; and a Merchant likewise, saving to him his Merchandise; and any other's villain than ours shall be likewise amerced, saving his wainage, if he fall into our mercy. And none of the said amerciaments shall be assessed, but by the oath of honest and lawful men of the vicinage. Earls and Barons shall not be amerced but by their Peers, and after the manner of their offence. No man of [\*289] the Church shall be amerced after the quantity of his spiritual Benefice, but after his Lay-tenement, and after the quantity of his offence" (numbers omitted).

After Magna Carta, the amount of an amercement was initially set by the court. A group of the amerced party's peers would then be assembled to reduce the amercement in accordance with the party's ability to pay. McKechnie 288-289. For example, in *Le Gras v. Bailiff of Bishop of Winchester*, Y. B. Mich. 10 Edw. II, pl. 4 (C. P. 1316), reprinted in 52 Publications of the Selden Society 3, 5 (1934), an amercement for improper civil pleading was vacated, and the bailiff who had imposed the amercement was ordered to "take a moderate amercement proper to the magnitude and manner of that [\*\*\*\*55] offence." See also Granucci, "Nor Cruel and Unusual Punishments Inflicted: The Original Meaning," 57 Calif. L. Rev. 839, 845-846 (1969) (Granucci) (listing other examples of amercements that were reduced or set aside).

Fines and amercements had very similar functions. Fines originated in the 13th century as voluntary sums paid to the Crown to avoid an indefinite prison sentence for a common-law crime or to avoid [\*\*2928] royal displeasure. 2 Pollock & Maitland 517; Massey 1261. The fine operated as a substitute for imprisonment. Having no actual power to impose a fine, the court would sentence the wrongdoer to prison. "To avoid imprisonment, the wrongdoer would then 'make fine' by 'voluntarily' contracting with the Crown to pay money, thereby ending the matter. The Crown gradually eliminated the voluntary nature of the fine by imposing indefinite sentences upon wrongdoers who effectively would be forced to pay the fine. Once the fine was no longer voluntary, it became the equivalent of an amercement." Note, at 1715. See also Boston 719-720. Although in theory fines were voluntary while amercements were not, the purpose of the two penalties was equivalent, [\*\*\*\*56] and it is not surprising that in practice it became difficult to distinguish the two.

#### [\*290] B

By the 17th century, fines had lost their original character of bargain and had replaced amercements as the preferred penal sanction. The word "fine" took on its modern meaning, while the word "amercement" dropped out of ordinary usage. McKechnie 293. But the nomenclature still caused some confusion. See *Griesley's Case*, 8 Co. Rep. 38a, 77 Eng. Rep. 530 (C. P. 1609) ("fine" for refusing to serve as a constable analyzed as an "amercement"). William Shakespeare, an astute observer of English law and politics, did not distinguish between fines and amercements in the plays he wrote in the late 16th century. In *Romeo and Juliet*, published in 1597, Prince Escalus uses the words "amerce" and "fine" interchangeably [\*\*\*248] in warning the Montagues and the Capulets not to shed any more blood on the streets of Verona:

"I have an interest in your hate's proceeding,

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My blood for your rude brawls doth lie a-bleeding;  
 But I'll amerce you with so strong a fine,  
 That you shall all repent the loss of mine."  
 Act III, scene 1, lines 186-189.

The preeminence of fines [\*\*\*\*57] gave courts much more power, for only they could impose fines. Massey 1253. Once it was clear that Magna Carta did not apply to fines for offenses against the Crown, see *John Hampden's Case*, 9 State Tr. 1054, 1126 (K. B. 1684), English courts during the reigns of Charles II and James II took advantage of their newly acquired power and imposed ruinous fines on wrongdoers and critics of the Crown. After James II fled England during the Glorious Revolution of 1688-1689, the House of Commons, in an attempt to end the crisis precipitated by the vacation of the throne, appointed a committee to draft articles concerning essential laws and liberties that would be presented to William of Orange. As the Court correctly notes, some of the men who made up the committee had been subjected to heavy fines by the courts of James II. See generally [\*291] L. Schwoerer, *The Declaration of Rights*, 1689, pp. 30-33, 91-92 (1981) (Schwoerer). The committee ultimately reported 13 Articles to the House of Commons. The final draft of Article 10 provided that "excessive Baile ought not to be required, nor excessive Fines imposed, nor cruel and unusual Punishments inflicted." [\*\*\*\*58] 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. at Large 440, 441 (1689).

According to Blackstone, the English *Bill of Rights* was "only declaratory . . . of the old constitutional law." 4 W. Blackstone, *Commentaries* \*372. See also Schwoerer 92 (excessive fines provision of Article 10 "reaffirmed ancient law"). Of course, the only prohibition on excessive monetary penalties predating Article 10 was contained in Magna Carta. "Since it incorporated the earlier prohibition against excessive amercements -- which could arise in civil settings -- as well as other forms of punishment, [Article 10's limitation on excessive fines] cannot be limited to strictly criminal cases but extends to monetary sanctions imposed in both criminal and civil contexts." Note, at 1717. Because the word "amercement" had dropped out of ordinary [\*\*2929] usage by the late 17th century, it appears that the word "fine" in Article 10 was simply shorthand for all monetary penalties, "whether imposed by judge or jury, in both civil and criminal proceedings." Massey 1256. Indeed, three months after the adoption of the English *Bill of Rights*, the House of Lords reversed a fine by referring to Magna Carta, and not to Article [\*\*\*\*59] 10. See *Earl of Devonshire's Case*, 11 State Tr. 1367, 1372 (H. L. 1689) (ruling that "fine" of # 30,000 for striking another was "excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land").

The Court argues that Chapter 20 of Magna Carta and Article 10 of the English *Bill of Rights* were concerned only with limiting governmental abuses of power. Because amercements and fines were paid to the Crown, the Court assumes that governmental abuses can only take place when the sovereign itself exacts [\*\*\*249] a penalty. That assumption, however, [\*292] simply recalls the historical accident that, prior to the mid-18th century, monetary sanctions filled the coffers of the King and his barons.

As early as 1275, with the First Statute of Westminster, double and treble damages were allowed by statute. See *ante*, at 274. However, "[i]t was only after the prevalence of the amercement had diminished that the cases began to report the award of punitive damages as a common law entitlement." Massey 1266. One of the first reported cases allowing punitive damages is *Wilkes v. Wood*, Lofft. 1, 18-19, 98 Eng. Rep. 489, 498-499 (K. B. 1763): [\*\*\*\*60] "[A] jury have it in their power to give damages for more than the injury received. Damages are designed not only as satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." The link between the gradual disappearance of the amercement and the emergence of punitive damages provides strong historical support for applying the Excessive Fines Clause to awards of punitive damages. See Boston 728-732.

The case of *Lord Townsend v. Hughes*, 2 Mod. 150, 151, 86 Eng. Rep. 994, 994-995 (C. P. 1677), cited by the Court, *ante*, at 268, 272, is not inconsistent with this understanding of history. At the time *Hughes* was decided, damages were understood only as compensation for injury. See T. Blount, *Law-Dictionary* (1670) (Blount) (unpaginated) (defining "damages" as "a recompense for what the Plaintiff or Demandant hath suffered, by means of the wrong done him by the Defendant or Tenant") (emphasis added). *Hughes* involved an action for slander, and the jury was told to award damages for the harm [\*\*\*\*61] the plaintiff had sustained. The damages awarded were entirely compensatory and did not contain any punitive element whatsoever. Thus, *Hughes* does not stand for the

proposition that Magna Carta is inapplicable to punitive damages awarded in civil cases. For the same reasons, neither do the commentaries cited by the Court differentiating between [\*293] damages and amercements. See *ante*, at 265, n. 7, 270, n. 13. The damages referred to in those commentaries are compensatory, and not punitive, in nature. See, e. g., Introduction to the Curia Regis Rolls, 1199-1230 A. D., in 62 Publications of the Selden Society 463 (C. Flower ed. 1944) (damages "represented the *loss* incurred by a litigant through an unlawful act") (emphasis added). Amercements and fines were not meant to compensate the injured plaintiff, but rather to punish the wrongdoer and express society's displeasure at the improper act. Compensatory damages, even in Saxon England, had not been limited by Magna Carta, which was meant to ensure that monetary *penalties*, assessed in addition to compensatory sums, have some measure of proportionality.

The Court also points out that in *Rookes v. Barnard* [\*\*\*62] , [1964] A. C. 1129, 1221-1231, Lord Devlin, in his extensive discussion of exemplary damages and decision to limit them to certain cases, did not mention either [\*\*2930] Magna Carta or the Excessive Fines Clause of the English *Bill of Rights*. [\*\*\*250] *Ante*, at 273, n. 18. Although this is a small point, I think the Court is mistaken to place any reliance on the lack of citation to Magna Carta or the English *Bill of Rights* in *Rookes*. English courts today need not cite those two documents, for the principles set forth in them are now ingrained as part of the common law. See J. Holt, Magna Carta 2 (1965) ("[I]t is now possible and indeed justifiable for a lawyer to compose a general survey of the freedom of the individual in England without once referring to Magna Carta"). Indeed, English courts have not cited Magna Carta or the English *Bill of Rights* in cases involving the excessiveness of *criminal* fines. See *Queen v. Asif*, 82 Cr. App. R. 123 (1985) (upholding fine of # 25,000 for fraudulent evasion of taxes); *Queen v. Farenden*, 6 Cr. App. R. (S) 42 (1984) (finding that fine of # 250 for first offense [\*\*\*63] of careless driving was "too heavy" and reducing it to # 100). Moreover, Lord Devlin noted in *Rookes* that punitive damages could be "used against liberty. Some of the awards that juries have made in the past seem to me to [\*294] amount to a greater punishment than would be likely to be incurred if the conduct were criminal . . . . I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used without restraint." [1964] A. C., at 1227. Thus, he suggested that some limits might have to be placed on punitive damages: "It may even be that the House [of Lords] may find it necessary to . . . place some arbitrary limit on awards of damages that are made by way of punishment. Exhortations to be moderate may not be enough." *Id.*, at 1227-1228.

C

There was little debate over the *Eighth Amendment* in the First Congress, and no discussion of the Excessive Fines Clause. Consideration of the *Eighth Amendment* immediately followed consideration of the *Fifth Amendment*. After deciding to confine the benefits of the *Self-Incrimination Clause of the Fifth Amendment* to criminal proceedings, the Framers turned their [\*\*\*64] attention to the *Eighth Amendment*. There were no proposals to limit that Amendment to criminal proceedings, and the only discussion was by Mr. Smith of South Carolina and Mr. Livermore of New Hampshire, both of whom thought that the *Cruel and Unusual Punishments Clause* was too indefinite. See Granucci 842; *Weems v. United States*, 217 U.S. 349, 368-369 (1910). Exactly what significance the silence of the Framers has in constitutional interpretation is open to debate, compare, e. g., L. Tribe, Constitutional Choices 42-44 (1985), with, e. g., Powell, Rules for Originalists, *73 Va. L. Rev.* 659, 671-672 (1987), but it is not necessary to address that issue here. The *Eighth Amendment* was based directly on Article I, § 9, of the Virginia Declaration of Rights of 1776, which had in turn adopted verbatim the language of § 10 of the English *Bill of Rights*. "There can be no doubt that the Declaration of Rights guaranteed at least the liberties and privileges of Englishmen." [\*295] *Solem v. Helm*, 463 U.S. 277, 285-286, n. 10 (1983). See also A. Howard, The Road from Runnymede: Magna [\*\*\*65] Carta and Constitutionalism [\*\*\*251] in America 205-207 (1968) (Howard). If anything is apparent from the history set forth above, it is that a monetary penalty in England could be excessive, and that there is a strong link between amercements, which were assessed in civil cases, and fines. Cf. *Solem, supra, at 284, n. 8* (an "amercement was similar to a modern-day fine"). There is, in short, considerable historical support for application of the Excessive Fines Clause to punitive damages.

The Court, however, thinks otherwise, and emphasizes that at the time the *Eighth Amendment* was enacted, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense." [\*\*2931] *Ante*, at 265, and n. 6. In my view, the meaning of that word was much more ambiguous than the Court is willing to

concede. In defining the word "fine," some 18th-century dictionaries did not mention to whom the money was paid. See, e. g., T. Sheridan, A Dictionary of the English Language (6th ed. 1796) (unpaginated) ("a mulct [or] a pecuniary punishment"); S. Johnson, A Dictionary of the English Language (7th ed. 1785) (unpaginated) ("a mulct [or] pecuniary [\*\*\*\*66] punishment," a "penalty," or "money paid for any exemption or liberty"). To the same effect are some 19th-century dictionaries. See, e. g., 1 C. Richardson, A New Dictionary of the English Language 796 (1839) ("any thing (as a sum of money) paid at the end, to make an end, termination or conclusion of a suit, of a prosecution"). That the word "fine" had a broader meaning in the 18th century is also illustrated by the language of § 37 of the Massachusetts Body of Liberties of 1641. That provision granted courts the authority to impose on a *civil* plaintiff who had instituted an improper suit "a proportionable *fine* to the use of the defendant, or accused person." 1 B. Schwartz, *The Bill of Rights: A Documentary History* 76 (1971) (emphasis added). It is noteworthy that the "fine" was payable to a [\*296] private party, and not a governmental entity. Boston 714. In 1646, the Massachusetts General Court ruled that § 37 of the Body of Liberties was based directly on Chapter 20 of Magna Carta. Howard 401, 404.

The Court also finds it significant that, in the 18th and 19th centuries, "fines were assessed in criminal, rather than in private civil, actions." *Ante*, at 265, [\*\*\*\*67] and n. 7. Again, in my view the Court's recitation of history is not complete. As noted above, § 37 of the Massachusetts Body of Liberties required that "fines" payable to private litigants in civil cases be proportional. Furthermore, not all 17th-century sources unequivocally linked fines with criminal proceedings. See Blount ("fine" is "sometimes an amends, pecuniary punishment, or recompence upon an offence committed against the King, and his laws, or a Lord of a Mannor") (emphasis added). Nor did all American courts in the 19th century view "fines" as exclusively criminal. The Massachusetts Supreme Judicial Court held that the word "fine" in a statute meant "forfeitures and penalties recoverable in civil actions, as well as pecuniary punishments inflicted by sentence." *Hanscomb v. Russell*, 77 Mass. 373, 375 (1858). It explained that "the word 'fine' has other meanings" besides pecuniary penalties "inflicted by sentence of a court in the exercise of criminal jurisdiction . . . as [\*\*\*252] appears by most of the dictionaries of our language, where it is defined not only as a pecuniary punishment, but also as a forfeiture, a penalty, [etc.]" [\*\*\*\*68] *Id.*, at 374-375. The Iowa Supreme Court had the following to say about fines: "The terms, fine, forfeiture, and penalty, are often used loosely, and even confusedly . . . . A fine is a pecuniary penalty, and is commonly (perhaps always) to be collected by suit in some form. A 'forfeiture' is a penalty by which one loses his rights and interest in his property." *Gosselink v. Campbell*, 4 Iowa 296, 300 (1856) (emphasis added). Hence, around the time of the framing and enactment of the *Eighth Amendment* some courts and [\*297] commentators believed that the word "fine" encompassed civil penalties.

## D

In my view, the \$ 6 million award of punitive damages imposed on BFI constitutes a fine subject to the limitations of the *Eighth Amendment*. In current usage, the word "fine" comprehends a forfeiture or penalty recoverable in a civil action. See Black's Law Dictionary 569 (5th ed. 1979); Webster's Third New International Dictionary 852 (1971). Not only is that understanding supported by the history set forth above, it is buttressed by this Court's precedents. Punitive damages are "*private fines* levied by civil juries." [\*\*\*\*69] *Electrical Workers v. Foust*, 442 U.S. 42, 48 [\*2932] (1979) (emphasis added). They are not awarded to compensate for injury, but rather to further the aims of the criminal law: "to punish reprehensible conduct and to deter its future occurrence." *Bankers Life & Casualty Co.*, 486 U.S., at 87 (O'Connor, J., concurring in part and concurring in judgment). See also *Restatement (Second) of Torts* § 908(1) (1979). Their role therefore "runs counter to the normal reparative function of tort and contract remedies." K. Redden, *Punitive Damages* § 2.1, p. 24 (1980). The Court's cases abound with the recognition of the penal nature of punitive damages. See *Tull v. United States*, 481 U.S. 412, 422, and n. 7 (1987); *Memphis Community School District v. Stachura*, 477 U.S. 299, 306, n. 9 (1986); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 260-261 (1984) (Blackmun, J., dissenting); *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981); [\*\*\*\*70] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting); *Lake Shore & M. S. R. Co. v. Prentice*, 147 U.S. 101, 107 (1893).

This plethora of case law on the nature of punitive damages, it seems to me, is sufficient to find the Excessive Fines Clause applicable to the award in this case. There is, however, [\*298] even more support for the applicability of

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the Clause. In determining whether a sanction is penal, the Court has generally looked to several factors: (1) whether it involves an affirmative disability; (2) whether it has historically been regarded as punishment; (3) whether it comes into play on a finding of scienter; (4) whether its operation will [\*\*\*253] promote retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether there is an alternative purpose for it; and (7) whether it is excessive in relation to the alternative purpose assigned. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963). I agree with [\*\*\*71] those commentators who have found it easy to conclude that punitive damages are penal under the *Mendoza-Martinez* factors. See, e. g., Grass, The Penal Dimensions of Punitive Damages, 12 Hastings L. Q. 241 (1985).

The character of a sanction imposed as punishment "is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." *United States v. Chouteau*, 102 U.S. 603, 611 (1881). As the Court wrote only recently, "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment." *United States v. Halper*, 490 U.S. 435, 448 (1989) (emphasis added). In order to evade the teachings of cases like *Chouteau* and *Halper*, the Court determines that the Excessive Fines Clause becomes relevant only when some governmental entity is seeking to reap the benefits of a monetary sanction. *Ante*, at 275-276. I disagree with the Court's formalistic analysis. A governmental entity can abuse its power by allowing civil juries to impose ruinous punitive damages [\*\*\*72] as a way of furthering the purposes of its criminal law. Cf. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). I also note that by relying so heavily on the distinction between governmental involvement and purely private suits, the Court suggests (despite its claim, *ante*, at 275-276, n. 21, that it leaves the question open) that [\*299] the Excessive Fines Clause will place some limits on awards of punitive damages that are recovered by a governmental entity. See, [\*\*2933] e. g., *Fla. Stat. § 768.73(2)(b)* (1987) (60% of any award of punitive damages is payable to the State).

As far as I know, the applicability of a provision of the Constitution has never depended on the vagaries of state or federal law, and in *Missouri Pacific R. Co. v. Humes*, 115 U.S. 512 (1885), the Court stressed the constitutional insignificance of how a monetary sanction is administered or by whom it is recovered. *Humes* involved a state statute providing for double damages to any individual who suffered harm due to a railroad's failure to maintain fences and cattle guards. In holding that the double damages provision did [\*\*\*73] not violate the *Fourteenth Amendment*, *id.*, at 522-523, the Court said:

"The additional damages being by way of punishment, . . . it is not a valid objection that the sufferer instead of the State receives them. . . . The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion."

*Humes* teaches that the identity of [\*\*\*254] the recipient of a monetary penalty is irrelevant for purposes of determining the constitutional validity of the penalty. From the standpoint of the defendant who has been forced to pay an excessive monetary sanction, it hardly matters what disposition is made of the award.

#### IV

The only remaining question is whether the award of over \$ 6 million in this case is "excessive" within the meaning of the *Eighth Amendment*.

[\*300] A

Using economic analysis, some of the *amici* in support of BFI argue that the wealth of a defendant should not, [\*\*\*74] as a constitutional matter, be taken into account in setting the amount of an award of punitive damages. See, e. g., Brief for Navistar International Transportation Corp. as *Amicus Curiae* 9-25. It seems to me that this argument fails because the Excessive Fines Clause is only a substantive ceiling on the *amount* of a monetary sanction, and not an economic primer on what factors best further the goals of punishment and deterrence. Just as the *Fourteenth Amendment* does not enact Herbert Spencer's Social Statics, see *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), the *Eighth Amendment* does not incorporate the views of the Law and

Economics School. The "Constitution does not require the States to subscribe to any particular economic theory." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987). Moreover, as a historical matter, the argument is weak indeed. First, Magna Carta only required that an amercement be proportionate and not destroy a person's livelihood. Second, Blackstone remarked that the "*quantum*, in particular, of pecuniary fines neither can, nor ought to be, [\*\*\*\*75] ascertained by any invariable law. The value of money itself changes from a thousand causes; and at all events, what is ruin to one man's fortune, may be a matter of indifference to another's." 4 W. Blackstone, *Commentaries* \*371.

B

Determining whether a particular award of punitive damages is excessive is not an easy task. The proportionality framework that the Court has adopted under the *Cruel and Unusual Punishments Clause*, however, offers some broad guidelines. See *Solem*, 463 U.S., at 290-292. Cf. *United States v. Busher*, 817 F. 2d 1409, 1415 (CA9 1987) (applying *Solem* factors to civil forfeiture under RICO). I would adapt the *Solem* framework [\*\*2934] to punitive damages in the following [\*301] manner. First, the reviewing court must accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue. Second, the court should examine the gravity of the defendant's conduct and the harshness of the award of punitive damages. Third, because punitive damages are penal in nature, the court should compare the civil *and* criminal penalties imposed in the same [\*\*\*\*76] jurisdiction for different types of conduct, and the civil *and* criminal penalties imposed by different jurisdictions for the same or similar conduct. In identifying the relevant civil penalties, the court should consider [\*\*\*255] not only the amount of awards of punitive damages but also statutory civil sanctions. In identifying the relevant criminal penalties, the court should consider not only the possible monetary sanctions, but also any possible prison term.

The Court of Appeals did not think that the Excessive Fines Clause applied to awards of punitive damages, *845 F. 2d, at 410*, and therefore did not conduct any sort of proportionality analysis. I would remand the case to the Court of Appeals so that it could, in the first instance, apply the *Solem* framework set forth above and determine whether the award of over \$ 6 million imposed on BFI violates the Excessive Fines Clause.

## References

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Supreme Court's construction and application of excessive fines clause of *Federal Constitution's Eighth Amendment*

*16A Am Jur 2d, Constitutional Law* 447, 448, 450, 599; *21 Am Jur 2d, Criminal Law* 615; *22 Am Jur 2d, Damages* 736, 805-812; [\*\*\*\*77] *32 Am Jur 2d, Federal Practice and Procedure* 365, 405, 421; *45 Am Jur 2d, Interference* 61

2 Federal Procedure, L Ed, Appeal, Certiorari, and Review 3:651, 3:691, 3:707

18 Am Jur Trials 57, Actions for Interference With Contract Rights

USCS, *Constitution, Amendment 8*

US L Ed Digest, Damages 16, 181

Index to Annotations, Additur and Remittitur; *Eighth Amendment*; Excessive or Inadequate Damages; Fines, Penalties, and Forfeitures; Interference and Obstruction; Punitive Damages

Annotation References:

What issues will the Supreme Court consider, though not, or not properly, raised by the parties. *42 L Ed 2d 946*.

Supreme Court's construction of *Seventh Amendment's* guaranty of right to trial by jury. *40 L Ed 2d 846*.

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The Supreme Court and the post-Erie federal common law. [31 L Ed 2d 1006](#).

Punitive damages for interference with contract or business relationship. 44 ALR4th 1078.

Sufficiency of showing of actual damages to support award of punitive damages. 40 ALR4th 11.

Excessiveness or inadequacy of punitive damages in cases not involving personal [\*\*\*\*78] injury or death. 35 ALR4th 538.

Constitutional or statutory provision forbidding re-examination of facts tried by a jury as affecting power to reduce or set aside verdict because of excessiveness or inadequacy. 11 ALR2d 1217.

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End of Document



## California v. American Stores Co.

Supreme Court of the United States

August 22, 1989

Nos. A-151, 89-258

**Reporter**

492 U.S. 1301 \*; 110 S. Ct. 1 \*\*; 106 L. Ed. 2d 616 \*\*\*; 1989 U.S. LEXIS 3552 \*\*\*\*; 1989-2 Trade Cas. (CCH) P68,728

CALIFORNIA v. AMERICAN STORES COMPANY ET AL.

**Prior History:** [\*\*\*\*1] ON APPLICATION FOR STAY

### **Core Terms**

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merger, Divestiture, district court, Clayton Act, irreparable, enjoined, injunctive relief, anti trust law, writ petition, lessen

### **LexisNexis® Headnotes**

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Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

#### **HN1[ Remedies, Damages**

See [15 U.S.C.S. § 26](#).

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

Mergers & Acquisitions Law > Antitrust > Remedies

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

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

Mergers & Acquisitions Law > Antitrust > General Overview

## **[HN2](#)[] Private Actions, Remedies**

The weight of academic commentary favors a reading of § 16 of the Clayton Act that would permit divestiture as a remedy in private actions.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > General Overview

## **[HN3](#)[] Antitrust Statutes, Clayton Act**

The cost of enjoining a merger before consummation is staggering, and the cost of enjoining an already completed transaction even greater.

## **Lawyers' Edition Display**

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### **Decision**

Application for stay of Federal Court of Appeals' mandate removing injunction against grocery chains' merger, pending Supreme Court's disposition of certiorari petition, granted by O'Connor, J.

### **Summary**

The state of California, through its attorney general acting as a private plaintiff, sought, under 16 of the Clayton Act ([15 USCS 26](#)), to enjoin the merger of two retail grocery chains, contending that the merger would violate federal and state antitrust laws. The United States District Court for the Central District of California granted a preliminary injunction and ordered the chains to operate independently and to refrain from merging or integrating their assets and businesses during the pendency of the action ([697 F Supp 1125](#)). Affirming the District Court's finding that the state had shown a likelihood of success on the merits and the possibility of irreparable harm, the United States Court of Appeals for the Ninth Circuit reversed and remanded in part, holding that, because the District Court's remedy amounted to indirect divestiture, it was not available to private plaintiffs under 16, and that, accordingly, the District Court's order enjoining the chains from integrating their operations was overly broad and was thus an abuse of discretion ([872 F2d 837](#)). After the state declined to post a \$ 16,288,898 initial bond to protect the grocery store chains against potential financial losses resulting from the Court of Appeals' 30-day stay of its mandate removing the injunction, the Court of Appeals vacated its stay and ordered issuance of the mandate. The state then requested that the United States Supreme Court stay the mandate, pending the Supreme Court's disposition of the state's petition for a writ of certiorari.

O'Connor, J., as Circuit Justice, granted the application for a stay, conditioned upon the state's posting a good and sufficient bond with the Clerk of the District Court, for the reasons stated in the headnote below.

## **Headnotes**

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APPEAL §913.4 > stay application to individual Justice -- likelihood of review and reversal -- irreparable injury -- balance of equities -- posting of bond -- > Headnote:

An individual Justice of the United States Supreme Court, as Circuit Justice, will grant a state's application for a stay--pending disposition of a petition for a writ of certiorari to review a Federal Court of Appeals' mandate removing a Federal District Court's injunction against the merger or integration of the assets and businesses of two retail grocery chains--of the Court of Appeals' mandate, where (1) the state, through its attorney general acting as a private plaintiff, seeks, under 16 of the Clayton Act ([15 USCS 26](#)), to enjoin the merger of two retail grocery chains, and the Court of Appeals has held that the District Court's remedy amounted to indirect divestiture and was thus not available to private plaintiffs under 16; (2) the state's citizens will likely suffer irreparable harm from a substantial lessening of competition if integration of the grocery chains is not enjoined; (3) given the conflict among the lower courts concerning the important and recurring question whether divestiture is a remedy available to private plaintiffs under 16, and given the need for uniform enforcement of federal antitrust laws, there is a reasonable probability that at least four justices will vote to grant certiorari; (4) the fact that the weight of academic commentary favors a reading of 16 that would permit divestiture as a remedy in private actions suggests that there is a fair prospect that the state may prevail on the merits and a majority of the Supreme Court may vote to reverse the decision below; and (5) the balance of the equities favors a stay, under the circumstances and in light of the public interests involved, since the state alleges that the merger would cost the state's consumers \$ 400 million a year in higher prices, while the grocery chains contend that the District Court's injunction and the state's decision to file suit after the merger was consummated is costing the chains more than \$ 1 million dollars a week; the order granting the stay will be conditioned upon the state's posting of a good and sufficient bond with the Clerk of the District Court, the adequacy of such bond to be determined by the District Court. [Per O'Connor, J., as Circuit Justice.]

## **Syllabus**

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The request of applicant, the State of California, for a stay of the Court of Appeals' mandate is granted, pending disposition of its petition for a writ of certiorari and conditioned upon the posting of a bond with the Clerk of the District Court. The State, through its attorney general on behalf of himself and as *parens patriae*, filed in the District Court an action as a private plaintiff to enjoin the merger of respondents, the largest and fourth largest retail grocery chains in the State, contending that the merger would lessen competition in the relevant market in violation of the Clayton and Sherman Acts and state law. The court granted the motion for a preliminary injunction and ordered respondents to operate independently and to refrain from merging or integrating their assets and businesses during the pendency of the action. The Court of Appeals remanded, finding, [\*\*\*\*2] *inter alia*, that the order enjoining respondents from integrating their operations amounted to indirect divestiture, a remedy not available to private plaintiffs under the Clayton Act. However, it granted a stay of its mandate to allow the State to file a petition for a writ of certiorari. The District Court conditioned the stay on the posting of a bond. The State declined to post the bond, and the Court of Appeals vacated its stay and ordered issuance of the mandate. The State has set forth sufficient reasons for granting a stay. It has made an adequate showing of irreparable injury, since other appropriate injunctive relief may be inadequate to remedy the injury. There is also a reasonable probability that the petition will be granted, given the conflict among the lower courts on the important and recurring issue whether divestiture constitutes injunctive relief within the meaning of the Clayton Act and the need for uniform enforcement of federal antitrust laws. Moreover, the fact that the weight of academic authority favors a reading of the Act that would permit divestiture as a remedy in private actions suggests that there is at least a fair prospect that a majority of [\*\*\*\*3] the Court will vote to reverse the decision below. Finally, the equities favor the State, since the harm of a substantial lessening of competition in the relevant market outweighs the harm that respondents may suffer as the result of the stay.

**Judges:** O'Connor, Circuit Justice

**Opinion by:** O'CONNOR

## **Opinion**

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[\*\*\*618] [\*1302] [\*\*1] JUSTICE O'CONNOR, Circuit Justice.

Applicant, the State of California, requests a stay of the mandate of the judgment of the United States Court of Appeals for the Ninth Circuit, pending disposition of its petition for a writ of certiorari.

Applicant, through its attorney general on behalf of himself and as *parens patriae*, brought the underlying action as a private plaintiff to enjoin the merger of respondent Lucky Stores, Inc., the largest retail grocery chain in California, and respondent American Stores Company, operator of Alpha Beta, the fourth largest retail grocery chain in California. \* Applicant contends that the merger would substantially lessen competition in the relevant markets, in violation of § 7 of the Clayton Act, 38 Stat. 731, as amended, [15 U. S. C. § 18, § 1](#) of the Sherman Act, 26 Stat. 209, as amended, [\*\*\*\*4] [15 U. S. C. § 1](#), and California's Cartwright Antitrust [\*1303] and Unfair Competition Acts, [Cal. Bus. & Prof. Code §§ 16700-16761](#) and 17200-17208 (West 1987 and Supp. 1989).

[\*\*\*\*5] The District Court granted applicant's motion for a preliminary injunction and ordered respondents to operate the two companies independently and refrain from merging or integrating their assets and businesses during [\*\*2] the pendency of the action. [697 F. Supp. 1125 \(CD Cal. 1988\)](#). The court concluded:

"The overwhelming statistical evidence has demonstrated a strong probability that the proposed merger will substantially lessen competition in violation of Section 7 of the Clayton Act. This showing has not been rebutted by clear evidence that the proposed merger will not, in fact, substantially lessen competition. . . . Unless defendants are enjoined, the citizens of California will be substantially and irreparably harmed. While the Court in no way belittles the harm defendants may suffer as a result of this preliminary injunction, the Court concludes that it is substantially less than the harm plaintiff would suffer if the merger is not enjoined." [Id., at 1135](#).

The Court of Appeals for the Ninth Circuit affirmed in part and reversed and remanded in part. [872 F. 2d 837 \(1989\)](#). The Court of Appeals affirmed the District Court's [\*\*\*6] finding that applicant had shown a likelihood [\*\*\*619] of success on the merits and the possibility of irreparable harm. [Id., at 844](#). The Court of Appeals found, however, that the remedy ordered by the District Court amounted to indirect divestiture, which, the Court of Appeals held, was not a remedy available to private plaintiffs under § 16 of the Clayton Act, 38 Stat. 737, as amended, [15 U. S. C. § 26](#). [872 F. 2d, at 844-846](#). Accordingly, the Court of Appeals remanded the case, concluding that the District Court's order enjoining respondents from integrating their operations was overly broad and thus an abuse of discretion. [Id. at 845-846](#).

[\*1304] The Court of Appeals denied applicant's petition for rehearing and rehearing en banc, but granted a stay of its mandate for 30 days to enable applicant to file a petition for a writ of certiorari with this Court. The Court of Appeals also partially remanded the case to the District Court to determine whether, pursuant to *Federal Rule of Appellate Procedure 41(b)*, a bond or other security or condition should be required of applicant as a condition of the [\*\*\*7] stay. The District Court ordered applicant to post an initial bond of \$ 16,288,898 to protect respondents against potential financial losses as a result of the stay of mandate. Applicant, claiming budgetary and administrative impossibility, declined to post the bond and appealed the bond order. The Court of Appeals consequently vacated its stay and ordered issuance of the mandate.

\* American Stores initiated a hostile takeover bid for the Lucky chain on March 21, 1988. Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, 90 Stat. 1390, [15 U. S. C. § 18a](#), American Stores notified the Federal Trade Commission (FTC) of its intentions. On May 23, American Stores increased its tender offer, and Lucky's board of directors approved the merger. On May 31, the FTC filed an administrative complaint alleging violations of § 7 of the Clayton Act, 38 Stat. 731, as amended, [15 U. S. C. § 18](#), and [§ 5](#) of the Federal Trade Commission Act, 38 Stat. 719, as amended, [15 U. S. C. § 45](#). The FTC simultaneously proposed a consent order under which it would settle its antitrust complaint in exchange for American Stores' compliance with certain demands, including divestiture of certain supermarkets in northern California and an agreement to "hold separate" the two firms until American Stores satisfied all of the consent order's conditions. American Stores agreed to the consent order, and by June 9 completed its \$ 2.5 billion acquisition of the outstanding Lucky stock. On August 31, the FTC gave final approval to the proposed consent order without modification. On September 1, applicant initiated the underlying action.

In its application for a stay of the mandate pending this Court's disposition of its petition for certiorari, applicant contends that the Court of Appeals' bond requirement amounts to a denial of a stay and will result in irreparable harm to the State's consumers because of the merger's anticompetitive effects. Applicant also maintains that there is both a reasonable probability that its petition for a writ of certiorari will be granted, because the case presents an issue of great importance on which there is a conflict among the circuits, and a fair prospect that applicant will prevail on the merits. Finally, applicant asserts that the equities justify a stay of the Court of Appeals' mandate.

I am persuaded that applicant has set forth sufficient reasons for granting a stay in this case. I agree with [\*\*\*\*8] both the District Court and the Court of Appeals that applicant has made an adequate showing of irreparable injury. See [872 F. 2d, at 844](#) (lessening of competition "is precisely the kind of irreparable injury that injunctive relief under section 16 of the Clayton Act was intended to prevent") (citations omitted); [697 F. Supp., at 1134](#). Even if applicant is free to seek [\*1305] other appropriate injunctive relief on remand, the possibility of irreparable injury, it seems to me, remains to the extent that such other relief would be inadequate to remedy the injury. Cf. 2 P. Areeda & D. Turner, *Antitrust Law* § 328b, p. 137 (1978) ("Divestiture is the normal and usual remedy against an unlawful merger, whether sued by the government or by a private plaintiff").

[\*\*3] Moreover, the issue presented appears to be an important question of federal law over which the Circuits are in conflict. Section 16 of the Clayton Act provides in relevant part that [HN1](#) "any person . . . shall be entitled to sue for and have injunctive . . . relief . . . against threatened loss [\*\*\*\*9] or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." [15 U. S. C. § 26](#). The Court of Appeals, relying on Circuit precedent, held that divestiture, whether direct or indirect, did not constitute "injunctive relief" within the meaning of § 16. See [872 F. 2d, at 844-846](#) (citing [International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.](#), 518 F. 2d 913, 920 (CA9 1975)); accord [Arthur S. Langenderfer, Inc. v. S. E. Johnson Co.](#), 729 F. 2d 1050, 1060 (CA6), cert. denied, 469 U. S. 1036 (1984). As applicant notes, however, the Court of Appeals for the First Circuit has ruled that divestiture is a remedy available to private plaintiffs under § 16 in appropriate circumstances. [Compania Petrolera Caribe, Inc. v. Arco Caribbean, Inc.](#), 754 F. 2d 404, 413-430 (1985); see also [NBO Industries Treadway Cos. v. Brunswick Corp.](#), 523 F. 2d 262, 278-279 (CA3 1975) (dictum), vacated [\*\*\*\*10] on other grounds, 429 U. S. 477 (1977). A number of District Courts have also reached the same conclusion. See, e. g., [Tasty Baking Co. v. Ralston Purina, Inc.](#), 653 F. Supp. 1250, 1255-1256 (ED Pa. 1987); [Julius Nasso Concrete Corp. v. Dic Concrete Corp.](#), 467 F. Supp. 1016, 1024-1025 (SDNY 1979); [Credit Bureau Reports, Inc. v. Retail Credit Co.](#), 358 F. Supp. 780, 797 (SD Tex. 1971), aff'd, 476 F. 2d 989 (CA5 1973); [Bay Guardian Co. v. Chronicle Publishing Co.](#), 340 F. Supp. 76, 81-82 (ND Cal. 1972). Given the conflict among the lower courts on this important and recurring issue and the need for uniform enforcement of federal antitrust laws, I think it fair to say that there is a reasonable probability that the petition for a writ of certiorari will be granted in this case.

Indeed, [HN2](#) the weight of academic commentary favors a reading of § 16 that would permit divestiture as a remedy in private actions. See, e. g., 2 P. Areeda & D. Turner, *Antitrust Law* § 328b, [\*\*\*\*11] p. 137 (1978) ("divestiture is available in a private suit challenging unlawful mergers"); P. Areeda & H. Hovenkamp, *Antitrust Law* § 328'b, pp. 290-291 (Supp. 1988) (approving [Petrolera, supra](#)); E. Kintner, Primer on the Law of Mergers 361-364 (1973) (divestiture is available in private actions under § 16); L. Sullivan, Antitrust § 216, p. 672, n. 3 (1977) (same); Kintner & Wilberding, Enforcement of the Merger Laws by Private Party Litigation, 47 Ind. L. J. 293 (1972); Peacock, Private Divestiture Under Section 16 of the Clayton Act, 48 Tex. L. Rev. 54 (1969); Comment, Private Divestiture: Antitrust's Latest Problem Child, 41 Ford. L. Rev. 569 (1973); Note, The Use of Divestiture in Private Antitrust Suits, 43 Geo. Wash. L. Rev. 261 (1974); Note, Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act, 49 Minn. L. Rev. 267 (1964); Comment, Section 16 of the Clayton Act: Divestiture an Intended Type of Injunctive Relief, 19 Pac. L. J. 143 (1987). Although I cannot, of course, predict with mathematical certainty my colleagues' [\*\*\*\*12] views on the subject, see [New Motor Vehicle Board v. Orrin W. Fox Co.](#), 434 U. S. 1345, 1347 (1977) (REHNQUIST, J., in chambers), this commentary suggests to me that plausible [\*\*\*\*621] arguments exist for reversing the decision below and that there is at least a fair prospect that a majority of the Court may vote to do so. Cf. [Zenith Radio Corp. v. Hazeltine Research, Inc.](#), [\*1307] 395 U. S. 100, 130-131 (1969) ("Section 16 should be construed and applied . . . with the knowledge that the remedy it affords, like other

equitable remedies, is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' . . . Its availability should be 'conditioned by the necessities [\*\*4] of the public interest which Congress has sought to protect'"') (citation omitted).

Finally, balancing the stay equities persuades me that the harm to applicant if the stay is denied, in the form of a substantial lessening of competition in the relevant market, outweighs the harm respondents may suffer as a result of a stay of the mandate. Applicant alleges, for example, [\*\*\*\*13] that permitting the merger would cost the State's consumers \$ 400 million a year in higher prices. Respondents contend that they are incurring costs of over \$ 1 million a week by reason of the District Court's injunction and applicant's decision to file suit after the merger had been consummated. To be sure, [HN3](#)[] the cost of enjoining a merger before consummation is staggering, see *Western Airlines, Inc. v. Teamsters*, 480 U. S. 1301, 1309 (1987) (O'CONNOR, J., in chambers), and the cost of enjoining an already completed transaction even greater. But, as the District Court found, "the State conducted [its] investigation as swiftly as was responsibly possible." [697 F. Supp., at 1135](#). Under the circumstances, and in light of the public interests involved, it appears that the equities favor the applicant.

Because the citizens of California will likely suffer irreparable harm if integration of respondents' companies is not enjoined, and because there is both a reasonable probability that at least four Justices would vote to grant the petition for a writ of certiorari [\*\*\*\*14] and a fair prospect that applicant may prevail on the merits, I grant the requested stay of the mandate of the United States Court of Appeals for the Ninth Circuit in this case, pending the disposition by this Court of the petition for a writ of certiorari or further order of this Court.

This order is conditioned upon the posting of a good and sufficient bond with the Clerk of the United States District Court for the Central District of California, the adequacy of such bond to be determined by that Court.

This order is conditioned upon the posting of a good and sufficient bond with the Clerk of the United States district Court for the Central District of California, the adequacy of such bond to be determined by that court.

## References

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Annotation References:

Considerations affecting grant or vacation of stay or injunction by individual Justice of Supreme Court. [78 L Ed 2d 780](#).

Check or money as meeting requirement of appeal bond. 65 ALR2d 1134.

Necessity that person acting in fiduciary or representative capacity give bond to maintain appellate review proceedings. 41 ALR2d 1324.

## FTC v. Superior Court Trial Lawyers Ass'n

Supreme Court of the United States

October 30, 1989, Argued ; January 22, 1990, \* Decided

No. 88-1198

**Reporter**

493 U.S. 411 \*; 110 S. Ct. 768 \*\*; 107 L. Ed. 2d 851 \*\*\*; 1990 U.S. LEXIS 638 \*\*\*\*; 58 U.S.L.W. 3468; 58 U.S.L.W. 4145; 1990-1 Trade Cas. (CCH) P68,895

FEDERAL TRADE COMMISSION v. SUPERIOR COURT TRIAL LAWYERS ASSOCIATION ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

**Disposition:** [272 U.S. App. D. C. 272, 856 F.2d 226](#), reversed in part and remanded.

### **Core Terms**

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boycott, lawyers, per se rule, respondents', market power, anti trust law, antitrust, rates, Sherman Act, per hour, cases, appointments, condemnation, price-fixing, communicate, governmental interest, indigent defendant, criminal justice, competitors, concerted, campaign, prices, anticompetitive, regulation, immunized, regulars, effects, rights, restraint of trade, rule of reason

### **LexisNexis® Headnotes**

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

**[HN1](#)[**

See [15 U.S.C.S. § 45\(a\)\(1\)](#).

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

**[HN2](#)[**

See [U.S. Const. amend. I.](#)

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\* Together with No. 88-1393, Superior Court Trial Lawyers Association et al. v. Federal Trade Commission, also on certiorari to the same court.

493 U.S. 411, \*411; 110 S. Ct. 768, \*\*768; 107 L. Ed. 2d 851, \*\*\*851; 1990 U.S. LEXIS 638, \*\*\*\*1

Antitrust & Trade Law > Sherman Act > General Overview

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

See [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

**HN4** [] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

The constriction of supply is the essence of "price-fixing," whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

**HN5** [] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

It is no excuse that the prices fixed are themselves reasonable.

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

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

No violation of the Sherman Act, [15 U.S.C.S. § 1](#), can be predicated upon mere attempts to influence the passage or enforcement of laws, even if the defendants' sole purpose is to impose a restraint upon the trade of their competitors.

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

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

The Noerr doctrine does not extend to every concerted effort that is genuinely intended to influence governmental action.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

**HN8** [] **Fundamental Freedoms, Freedom of Speech**

493 U.S. 411, \*411; 110 S. Ct. 768, \*\*768; 107 L. Ed. 2d 851, \*\*\*851; 1990 U.S. LEXIS 638, \*\*\*\*1

The right of the states to regulate economic activity can not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself. The nonviolent elements of such petitioners' activities are entitled to the protection of the [U.S. Const. amend. I.](#)

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Expressive Conduct

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

### [\*\*HN9\*\*](#) [blue icon] **Freedom of Speech, Expressive Conduct**

When "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on [U.S. Const. amend. I](#) freedoms. A government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged [U.S. Const. amend. I](#) freedoms is no greater than is essential to the furtherance of that interest.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Sherman Act

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

### [\*\*HN10\*\*](#) [blue icon] **Practices Governed by Per Se Rule, Boycotts**

The per se rules are the product of judicial interpretations of the Sherman Act, [15 U.S.C.S. § 1](#), but the rules nevertheless have the same force and effect as any other statutory commands.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

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

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

### [\*\*HN11\*\*](#) [blue icon] **Regulated Industries, Higher Education & Professional Associations**

The rule of reason in [antitrust law](#) generates two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are "illegal per se." In the second category are

agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.

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

## **HN12** [ ] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Price-fixing cartels are condemned per se because the conduct is tempting to businessmen but very dangerous to society. The conceivable social benefits are few in principle, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power which is likely to be exercised adversely to the public. Moreover, toleration implies a burden of continuous supervision for which the courts consider themselves ill-suited. And even if power is usually established while any defenses are not, litigation will be complicated, condemnation delayed, would be price-fixers encouraged to hope for escape, and criminal punishment less justified. Deterrence of a generally pernicious practice would be weakened. The key points are the first two. Without them, there is no justification for categorical condemnation.

## Lawyers' Edition Display

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### Decision

Attorneys' concerted refusal to represent indigent criminal defendants without increase in compensation held (1) violative of federal antitrust laws, and (2) not protected by [First Amendment](#).

### Summary

Attorneys who regularly accepted court appointments to represent indigent defendants in minor felony and misdemeanor cases before the District of Columbia Superior Court sought an increase in the statutorily fixed fees they were paid for such work. When lobbying efforts failed, a group consisting of virtually all such attorneys agreed among themselves that they would not accept any new cases after a certain date if the District of Columbia had not passed legislation providing for an increase in their fees; and a trial lawyers' association to which the attorneys belonged supported and publicized their agreement. After the agreement went into effect, other available defense counsel were quickly overloaded, severely affecting the District's criminal justice system, and 2 weeks later the city council voted to increase the fees. The Federal Trade Commission (FTC) subsequently filed a complaint against the trial lawyers' association, which complaint alleged that the association and its officers had entered into a conspiracy to fix prices and conduct a boycott and had thereby engaged in unfair methods of competition in violation of 5 of the Federal Trade Commission Act ([15 USCS 45](#)). An administrative law judge rejected various defenses, but recommended that the complaint be dismissed because District of Columbia officials regarded the net effect of the boycott as beneficial in providing better representation for indigent defendants; however, the FTC did not regard the boycott as harmless and issued a cease and desist order prohibiting the association from initiating any similar future boycotts ([107 FTC 510](#)). The United States Court of Appeals for the District of Columbia Circuit vacated the FTC order and remanded for a determination whether the association possessed significant market power, as it held that (1) the attorneys' boycott contained an element of expression warranting protection under the [Federal Constitution's First Amendment](#), (2) a restriction on this form of expression cannot be justified unless it is no greater than is essential to an important governmental interest, and (3) this test could not be satisfied by the application of a per se rule against price-fixing boycotts, but rather the FTC was required to prove that such conduct presented the evil against which the Sherman Act (15 USCS 1-7) was directed ([272 App DC 272, 856 F2d 226](#)).

On certiorari, the United States Supreme Court reversed in part and remanded for further proceedings. In an opinion by Stevens, J., expressing the unanimous view of the court in part (as to points 1, 2, and 3 below), and joined in part (as to point 4 below) by Rehnquist, Ch. J., and White, O'Connor, Scalia, and Kennedy, JJ., it was held

that the attorneys' boycott (1) constituted a restraint of trade within the meaning of 1 of the Sherman Act ([15 USCS 1](#)), and as such also violated the prohibition against unfair methods of competition in 5 of the Federal Trade Commission Act ([15 USCS 45](#)); (2) was not outside the coverage of the Sherman Act simply because the objective was the enactment of favorable legislation, given that the attorneys' alleged restraint of trade was not the intended consequence of public action, but rather was the means by which the attorneys sought to obtain favorable legislation; (3) was not excepted from condemnation under the antitrust laws as expressive conduct protected by the [First Amendment](#), given that the undenied purpose of the attorneys' boycott was an economic advantage for those who agreed to participate; and (4) was not excepted, as expressive conduct protected by the [First Amendment](#), from the application of per se rules permitting the condemnation of such a boycott and price-fixing arrangement under the federal antitrust laws in the absence of proof of the attorneys' market power.

Brennan, J., joined by Marshall, J., concurred in part and dissented in part, (1) joining in the court's holding that the attorneys' conduct was neither (a) clearly outside the scope of the Sherman Act, nor (b) automatically immunized from antitrust regulation by the [First Amendment](#); but (2) expressing the view that (a) the government may not subject expressive political boycotts to a presumption of illegality without inquiring as to whether they actually cause any of the harms that the antitrust laws are designed to prevent, and (b) the Court of Appeals therefore properly remanded the case to the FTC for a showing that the attorneys had wielded market power.

Blackmun, J., concurred in part and dissented in part, (1) joining in the court's opinion as to points 1, 2, and 3 above, and (2) agreeing with the reasoning of the dissent of Brennan, J., but (3) expressing the view that a remand for findings of fact concerning the attorneys' market power would not be warranted because the attorneys, as officers of the court, had a legal duty to represent indigent defendants which the District of Columbia could have enforced had it wished to do so.

## **Headnotes**

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > attorneys' boycott and price-fixing arrangement -- unfair competition -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D] [LEdHN\[1E\]](#) [1E] [LEdHN\[1F\]](#) [1F] [LEdHN\[1G\]](#) [1G] [LEdHN\[1H\]](#) [1H] [LEdHN\[1I\]](#) [1I]

The actions of a group of attorneys, in agreeing among themselves that they would not accept further appointments to represent indigent criminal defendants in the District of Columbia Superior Court until the District of Columbia government substantially increased their compensation for such representation--which actions involved both a boycott and a horizontal price-fixing arrangement--constitute a restraint of trade within the meaning of 1 of the Sherman Act ([15 USCS 1](#)), and as such also violate the prohibition against unfair methods of competition in 5 of the Federal Trade Commission Act ([15 USCS 45](#)); the attorneys' agreement is not outside the coverage of the Sherman Act (15 USCS 1-7) simply because the agreement's objective was the enactment of favorable legislation, given that in this situation the alleged restraint of trade--the boycott--was not the intended consequence of public action, but rather was the means by which the attorneys sought to obtain favorable legislation.

CONSTITUTIONAL LAW §953 > free speech -- attorneys' compensation -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B] [LEdHN\[2C\]](#) [2C] [LEdHN\[2D\]](#) [2D] [LEdHN\[2E\]](#) [2E]

The actions of a group of attorneys, in agreeing among themselves that they would not accept further appointments to represent indigent criminal defendants in the District of Columbia Superior Court until the District of Columbia government substantially increased their compensation for such representation, are not excepted from

condemnation as a restraint of trade violating 1 of the Sherman Act ([15 USCS 1](#)), and as an unfair method of competition violating 5 of the Federal Trade Commission Act ([15 USCS 45](#)), on the theory that such actions constitute expressive conduct protected by the [\*Federal Constitution's First Amendment\*](#), the rule that the right of government to regulate economic activity cannot justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change, and to effectuate rights guaranteed by the Federal Constitution itself, does not apply to a boycott such as that engaged in by the attorneys where the undenied purpose of the attorneys' boycott was an economic advantage for those who agreed to participate.

CONSTITUTIONAL LAW §953 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > free speech -- attorneys' compensation -- application of per se rule -- market power -- > Headnote:

[LEdHN\[3A\]](#) [ ] [3A] [LEdHN\[3B\]](#) [ ] [3B] [LEdHN\[3C\]](#) [ ] [3C] [LEdHN\[3D\]](#) [ ] [3D] [LEdHN\[3E\]](#) [ ] [3E] [LEdHN\[3F\]](#) [ ] [3F]

Although the actions of a group of attorneys, in agreeing among themselves that they would not accept further appointments to represent indigent criminal defendants in the District of Columbia Superior Court until the District of Columbia government substantially increased their compensation for such representation--a demand to which the District government acceded after the boycott seriously affected the functioning of the District's criminal justice system--had an expressive content, the [\*Federal Constitution's First Amendment\*](#) does not require that those actions therefore be excepted from analysis as per se violations of the federal antitrust laws, so as to require proof that the attorneys had market power beyond that already disclosed by the record before they could be held to have violated those laws, because (1) the expressive component of the attorneys' boycott is not unique, but is present in every concerted refusal to deal with a potential customer or supplier, as the participants in such boycotts must exchange views about their objectives and the means of obtaining them and must communicate the terms of their demands to the target; (2) to the extent that boycotters may communicate with third parties to enlist public support for their objectives, as the attorneys did, this type of expression is not an element of the boycott, and such boycotts may attract publicity precisely because the harms they produce are matters of public concern, which is no reason for removing the per se prohibition; (3) the per se rules against price fixing and boycotts, which rules have been established by judicial interpretations of the Sherman Act (15 USCS 1-7), are not merely rules of administrative convenience, but also reflect a longstanding judgment that the prohibited practices by their nature have a substantial potential for impact on competition; and (4) even if the attorneys' boycott had been uniquely expressive, and even if the purpose of the per se rules were purely that of administrative efficiency, the [\*First Amendment\*](#) would not protect the attorneys from the application of the per se rules, as the administrative efficiency interests in antitrust regulation--which the per se rules serve by avoiding the necessity for a complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable--are unusually compelling. (Brennan, Marshall, and Blackmun, JJ., dissented from this holding.)

APPEAL §1662 > effect of decision on other grounds -- > Headnote:

[LEdHN\[4A\]](#) [ ] [4A] [LEdHN\[4B\]](#) [ ] [4B]

In reviewing a cease and desist order issued by the Federal Trade Commission (FTC) against attorneys who obtained an increase in the fees paid to them for representing indigent criminal defendants in the District of Columbia by agreeing among themselves that they would not accept any new cases until the District agreed to raise the fees, which agreement the FTC found to be a violation of federal antitrust laws, the United States Supreme Court need not decide whether the FTC rejected a trial examiner's finding that there was no credible evidence that the District had agreed to the attorneys' demands as a result of public pressure, where the Supreme Court does not rely upon this finding in reaching its decision.

CRIMINAL LAW §46.5 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §17 > benefit to public -- government duty to provide defense counsel -- judicial review -- > Headnote:

[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B]

It is not the task of the United States Supreme Court, in reviewing Federal Trade Commission enforcement proceedings, to pass upon the social utility or political wisdom of price-fixing agreements; thus, a case considering whether the actions of a group of lawyers, in agreeing not to accept further appointments to represent indigent criminal defendants in the District of Columbia Superior Court until the District of Columbia government substantially increased their compensation for such representation, constituted a restraint of trade violating 1 of the Sherman Act ([15 USCS 1](#)) and 5 of the Federal Trade Commission Act ([15 USCS 45](#)), is not controlled by assumptions that (1) the preboycott compensation rates were unreasonably low, (2) the increase in compensation obtained by the attorneys has produced better legal representation for indigent defendants, and (3) there would have been no increase in compensation without the boycott; neither the fact that the District of Columbia purchases the attorneys' services because it has a constitutional duty to provide representation to criminal defendants, nor the fact that the quality of representation may improve when attorney compensation rates are increased, is an acceptable justification for an otherwise unlawful restraint of trade. (Brennan, Marshall, and Blackmun, JJ., dissented in part from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §5 > rationale of Sherman Act -- > Headnote:

[LEdHN\[6\]](#) [6]

The Sherman Act (15 USCS 1-7) reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > factors affecting applicability of law --

> Headnote:

[LEdHN\[7\]](#) [7]

The statutory policy underlying the Sherman Act (15 USCS 1-7) precludes inquiry into the question whether competition is good or bad.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > influencing legislation -- > Headnote:

[LEdHN\[8\]](#) [8]

No violation of the Sherman Act (15 USCS 1-7) can be predicated upon mere attempts to influence the passage or enforcement of laws, even if the defendants' sole purpose is to impose a restraint upon the trade of their competitors.

493 U.S. 411, \*411; 110 S. Ct. 768, \*\*768; 107 L. Ed. 2d 851, \*\*\*851; 1990 U.S. LEXIS 638, \*\*\*\*1

CONSTITUTIONAL LAW §938 > freedom of speech and petition -- lobbying -- publicizing cause -- > Headnote:

[LEdHN\[9\]](#) [9]

A District of Columbia trial lawyers' association engages in activities that are fully protected by the [\*Federal Constitution's First Amendment\*](#) where it makes efforts (1) to publicize an agreement among certain members of the association that they would not accept any further appointments as counsel for indigent criminal defendants unless the fees paid for such representation were increased, (2) to explain the merits of the cause, and (3) to lobby District officials to enact favorable legislation.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §15 > parties' constitutional concerns --

> Headnote:

[LEdHN\[10A\]](#) [10A] [LEdHN\[10B\]](#) [10B]

Boycotts based upon sincere constitutional concerns--such as the alleged goal of vindicating the [\*Sixth Amendment\*](#) rights of indigent defendants, which goal was asserted by attorneys who refused to accept appointments to represent such defendants unless the fees paid for such representation were increased--are not thereby immunized from prosecution under the federal antitrust laws.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §4 > regulation -- > Headnote:

[LEdHN\[11A\]](#) [11A] [LEdHN\[11B\]](#) [11B]

The right of business entities to associate to suppress competition may properly be curtailed by government regulation.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §95 > unfair trade practices -- regulation --

> Headnote:

[LEdHN\[12A\]](#) [12A] [LEdHN\[12B\]](#) [12B]

Unfair trade practices may properly be restricted by government regulation.

LABOR §122 > restriction of picketing and boycotts -- > Headnote:

[LEdHN\[13A\]](#) [13A] [LEdHN\[13B\]](#) [13B]

Secondary boycotts and picketing by labor unions may properly be prohibited, as part of Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation.

493 U.S. 411, \*411; 110 S. Ct. 768, \*\*768; 107 L. Ed. 2d 851, \*\*\*851; 1990 U.S. LEXIS 638, \*\*\*\*1

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > STATUTES §80 > price fixing -- boycotts -- per se rules -- statutory effect -- > Headnote:

[LEdHN\[14\]](#) [14]

Although per se rules against price fixing and boycotts are the product of judicial interpretations of the Sherman Act (15 USCS 1-7), these rules nevertheless have the same force and effect as any other statutory commands.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > rule of reason -- per se violations -- > Headnote:

[LEdHN\[15\]](#) [15]

The rule of reason in antitrust law generates two complementary categories of antitrust analysis, the first consisting of agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality and they are "illegal per se," and the second consisting of agreements whose competitive effect can be evaluated only by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it is imposed.

AERONAUTICS AND SPACE §2 > MOTOR VEHICLES AND CARRIERS §2 > public regulation -- > Headnote:

[LEdHN\[16\]](#) [16]

Laws prohibiting stuntflying in congested areas or setting speed limits for automobiles are justified by the state's interest in protecting human life and property; although, if especially skilled drivers and pilots were to paint messages on their cars or attach streamers to their planes, their conduct would have an expressive conduct, and high speeds and unusual maneuvers would help to draw attention to their messages, the laws may nonetheless be enforced against these skilled persons without proof that their conduct was actually harmful or dangerous.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > price fixing -- per se prohibition -- > Headnote:

[LEdHN\[17\]](#) [17]

Whatever economic justification particular price-fixing agreements may be thought to have, the federal antitrust law does not permit an inquiry into their reasonableness; they are all banned because of their actual or potential threat to the central nervous system of the economy.

## Syllabus

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A group of lawyers in private practice who regularly acted as court-appointed counsel for indigent defendants in District of Columbia criminal cases agreed at a meeting of the Superior Court Trial Lawyers Association (SCTLA) to stop providing such representation until the District increased group members' compensation. The boycott had a severe impact on the District's criminal justice system, and the District government capitulated to the lawyers' demands. After the lawyers returned to work, petitioner Federal Trade Commission (FTC) filed a complaint against SCTLA and four of its officers (respondents), alleging that they had entered into a conspiracy to fix prices and

to [\*\*\*\*2] conduct a boycott that constituted unfair methods of competition in violation of § 5 of the FTC Act. Declining to accept the conclusion of the Administrative Law Judge (ALJ) that the complaint should be dismissed, the FTC ruled that the boycott was illegal *per se* and entered an order prohibiting respondents from initiating future such boycotts. The Court of Appeals, although acknowledging that the boycott was a "classic restraint of trade" in violation of [§ 1](#) of the Sherman Act, vacated the FTC order. Noting that the boycott was meant to convey a political message to the public, the court concluded that it contained an element of expression warranting [First Amendment](#) protection and that, under [United States v. O'Brien, 391 U.S. 367](#), an incidental restriction on such expression could not be justified unless it was no greater than was essential to an important governmental interest. Reasoning that this test could not be satisfied by the application of an otherwise appropriate *per se* rule, but instead requires the enforcement agency to prove rather than presume that the evil against which the antitrust laws are directed looms in the conduct it condemns, [\*\*\*\*3] the court remanded for a determination whether respondents possessed "significant market power."

*Held:*

1. Respondent's boycott constituted a horizontal arrangement among competitors that was unquestionably a naked restraint of price and output in violation of the antitrust laws. Respondents' proffered social justifications for the restraint of trade do not make the restraint any less unlawful. Nor is respondents' agreement outside the coverage of the antitrust laws under [Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127](#), simply because its objective was the enactment of favorable legislation. The *Noerr* doctrine does not extend to horizontal boycotts designed to exact higher prices from the government simply because they are genuinely intended to influence the government to agree to the conspirators' terms. [Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 503](#). Pp. 421-425.
2. Respondents' boycott is not immunized from antitrust regulation by [NAACP v. Claiborne Hardware Co., 458 U.S. 886](#), which held that the [First Amendment](#) prevented a State from prohibiting [\*\*\*\*4] a politically motivated civil rights boycott. Unlike the boycott upheld in *Claiborne Hardware*, the undenied objective of this boycott was to gain an economic advantage for those who agreed to participate. [458 U.S., at 914-915](#). Pp. 425-428.
3. The Court of Appeals erred in creating a new exception, based on [O'Brien, supra](#), to the antitrust *per se* liability rules for boycotts having an expressive component. The court's analysis is critically flawed in at least two respects. First, it exaggerates the significance of the "expressive component" in respondents' boycott, since every concerted refusal to do business with a potential customer or supplier has such a component. Thus, a rule requiring courts to apply the antitrust laws "prudently and with sensitivity," in the Court of Appeals' words, whenever an economic boycott has an "expressive component" would create a gaping hole in the fabric of those laws. Second, the Court of Appeals' analysis denigrates the importance of the rule of law that respondents violated. The court's implicit assumption that the antitrust laws permit, but do not require, the condemnation of price fixing and boycotts [\*\*\*\*5] without proof of market power is in error, since, although the *per se* rules are the product of judicial interpretation of the Sherman Act, they nevertheless have the same force and effect as any other statutory commands. The court also erred in assuming that the categorical antitrust prohibitions are "only" rules of "administrative convenience" that do not serve any substantial governmental interest unless the price-fixing competitors actually possess market power. The *per se* rules reflect a long-standing judgment that every horizontal price-fixing arrangement among competitors poses some threat to the free market even if the participants do not themselves have the power to control market prices. Pp. 428-436.

**Counsel:** Ernest J. Eisenstadt, argued the cause for petitioner in No. 88-1198 and respondent in No. 88-1393. On the briefs for the Federal Trade Commission were Acting Solicitor General Bryson, Acting Assistant Attorney General Boudin, Kevin J. Arguit, Jay C. Shaffer, and Karen G. Bokat.

Willard K. Tom, argued the cause for respondents in No. 88-1198 and petitioners in No. 88-1393. With him on the brief for respondent Superior Court Trial Lawyers Association were [\*\*\*\*6] Donald I. Baker, David T. Shelledy, and Michael L. Denger. Douglas E. Rosenthal filed a brief for Ralph J. Perrotta et al. +

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**Judges:** STEVENS, J., delivered the opinion for a unanimous Court with respect to Parts I, II, III, and IV, and the opinion of the Court with respect to Parts V and VI, in which REHNQUIST, C. J., and WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p.436. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 453.

**Opinion by:** STEVENS

## Opinion

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[\*414] [\*860] [\*\*770] JUSTICE STEVENS delivered the opinion of the Court.

LEdHN[1A][↑] [1A] LEdHN[2A][↑] [2A] LEdHN[3A][↑] [3A]Pursuant to a well-publicized plan, a group of lawyers agreed not to represent indigent criminal defendants in the District of Columbia Superior Court until the District of Columbia government increased the lawyers' compensation. The questions presented are whether the lawyers' concerted conduct violated § 5 of the Federal Trade Commission Act and, if so, whether it was nevertheless [\*\*\*\*8] protected by the *First Amendment to the Constitution*.<sup>1</sup>

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+ Briefs of amici curiae urging reversal were filed for the State of South Dakota et al. by Roger A. Tellinghuisen, Attorney General of South Dakota, and Jeffrey P. Hallem, Assistant Attorney General, Robert K. Corbin, Attorney General of Arizona, and Alison J. Butterfield, Douglas B. Baily, Attorney General of Alaska, and Richard D. Monkman, Assistant Attorney General, Duane Woodard, Attorney General of Colorado, and Thomas P. McMahon, First Assistant Attorney General, Charles M. Oberly III, Attorney General of Delaware, and David G. Culley, Deputy Attorney General, Warren Price III, Attorney General of Hawaii, Thomas J. Miller, Attorney General of Iowa, and John R. Perkins, Deputy Attorney General, Robert T. Stephan, Attorney General of Kansas, John W. Campbell, Deputy Attorney General, and Mark S. Braun, Assistant Attorney General, Frederic J. Cowan, Attorney General of Kentucky, and James M. Ringo, Assistant Attorney General, William J. Guste, Jr., Attorney General of Louisiana, and Anne F. Benoit, Assistant Attorney General, J. Joseph Curran, Jr., Attorney General of Maryland, and Michael F. Brockmeyer and Ellen S. Cooper, Assistant Attorneys General, Robert M. Spire, Attorney General of Nebraska, and Dale A. Comer, Assistant Attorney General, Jim Mattox, Attorney General of Texas, Mary F. Keller, First Assistant Attorney General, Lou McCreary, Executive Assistant Attorney General, and Allene D. Evans, Assistant Attorney General, Donald J. Hanaway, Attorney General of Wisconsin, Mark E. Musolf, Deputy Attorney General, and Kevin J. O'Connor and Matthew J. Frank, Assistant Attorneys General; for the American Civil Liberties Union et al. by Wm. Warfield Ross, Gerald P. Norton, John A. Powell, Arthur B. Spitzer, and Elizabeth Symonds; and for the National Association of Criminal Defense Lawyers by Rick Harris.

Briefs of amici curiae urging affirmance were filed for the American Medical Association by Jack R. Bierig and Carter G. Phillips; and for the Washington Council of Lawyers et al. by Andrew J. Pincus.

<sup>1</sup> Section 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. § 45(a)(1), provides:

HN1[↑] "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." The *First Amendment to the Constitution* provides:

HN2[↑] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

493 U.S. 411, \*414; 110 S. Ct. 768, \*\*771; 107 L. Ed. 2d 851, \*\*\*860; 1990 U.S. LEXIS 638, \*\*\*\*8

The burden of providing competent [\*\*\*861] counsel to indigent defendants in the District of Columbia is substantial. During 1982, court-appointed [\*\*\*\*9] counsel represented the defendant in approximately 25,000 cases. In the most serious felony cases, representation was generally provided by full-time employees of the District's Public Defender System (PDS). Less serious felony and misdemeanor cases constituted about [\*415] 85 percent of the total caseload. In these cases, lawyers in private practice were appointed and compensated pursuant to the District of Columbia Criminal Justice Act (CJA).<sup>2</sup>

Although over 1,200 lawyers have registered for CJA appointments, relatively few actually apply for such work on a regular basis. In 1982, most appointments went to approximately 100 lawyers who are described as "CJA regulars." These lawyers derived almost all of their income from representing indigents.<sup>3</sup> In 1982, the total fees paid to CJA lawyers amounted to \$ 4,579,572. [\*\*\*\*10]

In 1974, the District created a Joint Committee on Judicial Administration with authority to establish rates of compensation for CJA lawyers not exceeding the rates established by the federal Criminal Justice Act of 1964. After 1970, the federal Act provided for fees of \$ 30 per hour for court time and \$ 20 per hour for out-of-court time. See 84 Stat. 916, codified at [18 U.S.C. § 3006A \(1970 ed.\)](#). These rates accordingly capped the rates payable to the District's CJA lawyers, and could not be exceeded absent amendment [\*\*\*\*11] to either the federal statute or the District Code.

Bar organizations began as early as 1975 to express concern about the low fees paid to CJA lawyers. Beginning in 1982, respondents, the Superior Court Trial Lawyers Association (SCTLA) and its officers, and other bar groups sought to persuade the District to increase CJA rates to at least \$ 35 per hour. Despite what appeared to be uniform support for the bill, it did not pass. It is also true, however, that nothing [\*416] in the record indicates that the low fees caused any actual shortage of CJA lawyers or denied effective representation to defendants.

In early August 1983, in a meeting with officers of SCTLA, the Mayor expressed his sympathy but firmly indicated that no money was available to fund an increase. The events giving rise to this litigation then ensued.

At an SCTLA meeting, the CJA lawyers voted to form a "strike committee." The eight members of that committee promptly met and informally agreed "that the only viable way of getting an increase in fees was to stop signing up to take new CJA appointments, and that the boycott should aim for a \$ 45 out-of-court and \$ 55 in-court rate schedule." [In re Superior Court Trial Lawyers Assn., 107 F. T. C. 510, 538 \(1986\)](#). [\*\*\*\*12]

[\*\*\*862] On August 11, 1983, about 100 CJA lawyers met and resolved not to accept any new cases after September 6 if legislation providing for an increase in their fees had not passed by that date. Immediately following the meeting, they prepared (and most of them signed) a petition stating:

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"We, the undersigned private criminal lawyers practicing in the Superior Court of the District of Columbia, agree that unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice [\*\*772] Act." [272 U.S. App. D. C. 272, 276, 856 F.2d 226, 230 \(1988\)](#).

<sup>2</sup> [D. C. Code §§ 11-2601--11-2609](#) (1981). In a small number of cases, the indigent defendants were represented by third-year law students or private counsel serving without compensation.

<sup>3</sup> As the Administrative Law Judge (ALJ), noted:

"Because of the nature of CJA practice -- its long hours away from the office (assuming the CJA lawyer has an office), the deadlines of Superior Court, and the problem of meeting deadlines in other courts -- CJA regulars ordinarily do not take civil cases, nor do they usually appear on the criminal side of U.S. District court." [In re Superior Court Trial Lawyers Assn., 107 F. T. C. 510, 522, n. 54 \(1986\)](#).

LEdHN[4A] [4A]On September 6, 1983, about 90 percent <sup>4</sup> of the CJA regulars refused to accept any new assignments. Thereafter, SCTLA arranged a series of events to attract the attention of the news media and to obtain additional support. These events were well publicized and did engender favorable editorial comment, but the Administrative Law Judge (ALJ) found that "there is no credible evidence that the District's [\*417] eventual capitulation to the demands of the CJA lawyers [\*\*\*\*13] was made in response to public pressure, or, for that matter, that this publicity campaign actually engendered any significant measure of public pressure." [107 F. T. C., at 543.](#)<sup>5</sup>

[\*\*\*\*14] As the participating CJA lawyers had anticipated, their refusal to take new assignments had a severe impact on the District's criminal justice system. The massive flow of new cases did not abate,<sup>6</sup> and the need for prompt investigation and preparation did not ease. As the ALJ found, "there was no one to replace the CJA regulars, and makeshift measures were totally inadequate. A few days after the September 6 deadline, PDS was swamped with cases. The handful of CJA regulars who continued to take cases were soon overloaded. The overall response of the uptown lawyers to the PDS call for help was feeble, reflecting their universal distaste for criminal law, their special aversion for compelled indigency representation, the near epidemic siege of self-doubt about their ability to handle cases in this field, and their underlying support for the demands of the CJA lawyers. Most of the law student volunteers initially observed the boycott, and later all law student volunteers were limited (as they usually are) to a relatively few minor misdemeanors." [107 F. T. C., at 544](#) (footnotes omitted).

[\*\*\*\*15] [\*418] Within 10 days, the key figures in the District's criminal justice system "became convinced that the system was on the brink of collapse because of the refusal of CJA lawyers to take [\*\*\*863] on new cases." *Ibid.* On September 15, they hand-delivered a letter to the Mayor describing why the situation was expected to "reach a crisis point" by early the next week and urging the immediate enactment of a bill increasing all CJA rates to \$ 35 per hour. The Mayor promptly met with members of the strike committee and offered to support an immediate temporary increase to the \$ 35 level as well as a subsequent permanent increase to \$ 45 an hour for out-of-court time and \$ 55 for in-court time.

At noon on September 19, 1983, over 100 CJA lawyers attended a SCTLA meeting and voted to accept the \$ 35 offer and end the boycott. The city council's Judiciary Committee convened at 2 p.m. that afternoon. The committee recommended legislation increasing CJA fees to \$ 35, and the council unanimously passed the bill on September 20. On September 21, the CJA regulars began to accept new assignments and the crisis subsided.

## II

The Federal Trade Commission (FTC) filed a complaint [\*\*\*\*16] against SCTLA and four of its officers (respondents) alleging that they had "entered into an agreement among themselves and with other lawyers to restrain [\*773] trade by refusing to compete for or accept new appointments under the CJA program beginning on September 6, 1983, unless and until the District of Columbia increased the fees offered under the CJA program." [Id., at 511.](#) The complaint alleged that virtually all of the attorneys who regularly compete for or accept new appointments under the CJA program had joined the agreement. The FTC characterized respondents' conduct as

<sup>4</sup> The ALJ found that "at most" 13 of the CJA regulars continued to take assignments. [107 F. T. C., at 542, n. 173.](#)

<sup>5</sup> LEdHN[4B] [4B]

It is not clear how much of this finding by the ALJ was accepted by the Federal Trade Commission (FTC or Commission). The Court of Appeals suggested that the finding was implicitly rejected by the Commission because not expressly accepted. See [272 U.S. App. D. C., at 297, 856 F. 2d, at 251.](#) We do not rely upon the finding, and need not decide whether the Commission did indeed reject it. We note, however, that the Commission endorsed findings attributing the District's eventual change of position to a crisis resulting from the lawyers' exercise of power. [107 F. T. C., at 572,](#) and n. 69. Those findings seem to embody the conclusion that the reversal is not attributable to public pressure or publicity.

<sup>6</sup> "During the period from September 6 to September 20, there was a daily average of 63 defendants on the weekday lock-up list and 43 on the Saturday list." [Id., at 543, n. 183.](#)

"a conspiracy to fix prices and to conduct a boycott" and concluded that they were engaged in "unfair methods of competition" [\*419] in violation of Section 5 of the Federal Trade Commission Act.<sup>7</sup>

[\*\*\*\*17] After a 3-week hearing, the ALJ found that the facts alleged in the complaint had been proved, and rejected each of respondents' three legal defenses -- that the boycott was adequately justified by the public interest in obtaining better legal representation for indigent defendants; that as a method of petitioning for legislative change it was exempt from the antitrust laws under our decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); and that it was a form of political action protected by the *First Amendment* under our decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). The ALJ nevertheless concluded that the complaint should be dismissed because the District officials, who presumably represented the victim of the boycott, recognized that its net effect was beneficial. The increase in fees would attract more CJA lawyers, enabling them to reduce their caseloads and provide better representation for their clients. "I see no point," he concluded, "in [\*\*\*864] striving resolutely for an antitrust triumph in this sensitive area when the particular case can be disposed of on [\*\*\*\*18] a more pragmatic basis -- there was no harm done." [107 F. T. C., at 561](#).

The ALJ's pragmatic moderation found no favor with the FTC. Like the ALJ, the FTC rejected each of respondents' defenses. It held that their "coercive, concerted refusal to deal" had the "purpose and effect of raising prices" and was illegal *per se*. [Id., at 573](#). Unlike the ALJ, the FTC refused to conclude that the boycott was harmless, noting that the "boycott forced the city government to increase the CJA fees from a level that had been sufficient to obtain an adequate supply of CJA lawyers to a level satisfactory to the respondents." [\*420] The city must, as a result of the boycott, spend an additional \$ 4 million to \$ 5 million a year to obtain legal services for indigents. We find that these are substantial anticompetitive effects resulting from the respondents' conduct." [Id., at 577](#). Finally, the FTC determined that the record did not support the ALJ's conclusion that the District supported the boycott. The FTC also held that such support would not in any event excuse respondents' antitrust violations. Accordingly, it entered a cease-and-desist order [\*419] "to prohibit the respondents from initiating another boycott . . . whenever they become dissatisfied with the results or pace of the city's legislative process." [Id., at 602](#).

The Court of Appeals vacated the FTC order and remanded for a determination whether respondents possessed "significant market power." The court began its analysis by recognizing that absent any special *First Amendment* protection, the boycott "constituted a classic restraint of trade within the meaning of *Section 1* of the Sherman Act."<sup>8</sup> [272 U.S. App. D. C., at 280, 856 F.2d at 234](#). [\*774] The Court of Appeals was not persuaded by respondents' reliance on *Claiborne Hardware* or *Noerr*, or by their argument that the boycott was justified because it was designed to improve the quality of representation for indigent defendants. It concluded, however, that "the SCTLA boycott did contain an element of expression warranting *First Amendment* protection." [272 U.S. App. D. C., at 294, 856 F.2d, at 248](#). It [\*421] noted that boycotts have historically been used as a dramatic means of expression and that respondents intended to convey a political message to the [\*\*\*20] public at large. It therefore concluded that under *United States v. O'Brien*, 391 U.S. 367 (1968), a restriction on this form of expression could not be justified unless it is no greater than is essential to an important governmental interest. This test, the court reasoned, could not be satisfied by the application of an otherwise appropriate *per se* rule, but instead required the enforcement agency to "prove rather than presume that the evil against which [\*\*\*865] the Sherman Act is directed looms in the conduct it condemns." [272 U.S. App. D. C., at 296, 856 F.2d, at 250](#).

<sup>7</sup> Commissioner Pertschuk dissented from the decision to issue a complaint on the ground that it represented an unwise use of the FTC's scarce resources. He did not, however, disagree with the conclusion that a violation of law had been alleged. [107 F. T. C., at 512-513](#).

<sup>8</sup> *Section 1* of the Sherman Act, 26 Stat. 209, as amended, [15 U.S.C. § 1](#), provides:

**HN3** [↑] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousands dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

[\*\*\*\*21] Because of our concern about the implications of the Court of Appeals' unique holding, we granted the FTC's petition for certiorari as well as respondents' cross-petition. *490 U.S. 1019* (1989).

We consider first the cross-petition, which contends that respondents' boycott is outside the scope of the Sherman Act or is immunized from antitrust regulation by the *First Amendment*. We then turn to the FTC's petition.

### III

LEdHN[1B] [↑] [1B] LEdHN[5A] [↑] [5A] Reasonable lawyers may differ about the wisdom of this enforcement proceeding. The dissent from the decision to file the complaint so demonstrates. So, too, do the creative conclusions of the ALJ and the Court of Appeals. Respondents' boycott may well have served a cause that was worthwhile and unpopular. We may assume that the preboycott rates were unreasonably low, and that the increase has produced better legal representation for indigent defendants. Moreover, given that neither indigent criminal defendants nor the lawyers who represent them command any special appeal with the electorate, [\*\*\*\*22] we may also assume that without the boycott there would have been no increase in District CJA fees at least until the Congress amended the federal statute. These assumptions do not control the case, for it is [\*422] not our task to pass upon the social utility or political wisdom of price-fixing agreements.

LEdHN[1C] [↑] [1C] As the ALJ, the FTC, and the Court of Appeals all agreed, respondents' boycott "constituted a classic restraint of trade within the meaning of *Section 1* of the Sherman Act." *272 U.S. App. D. C., at 280, 856 F.2d, at 234*. As such, it also violated the prohibition against unfair methods of competition in § 5 of the FTC Act. See *FTC v. Cement Institute*, *333 U.S. 683, 694* (1948). Prior to the boycott CJA lawyers were in competition with one another, each deciding independently whether and how often to offer to provide services to the District at CJA rates.<sup>9</sup> The agreement [\*\*\*866] among the [\*423] CJA lawyers was designed to [\*\*775] obtain higher prices for their services and was implemented by a concerted refusal to serve an important customer [\*\*\*\*23] in the market for legal services and, indeed, the only customer in the market for the particular services that CJA regulars offered. HN4 [↑] "This constriction of supply is the essence of 'price-fixing,' whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price

<sup>9</sup> The FTC found:

"The city's purchase of CJA legal services for indigents is based on competition. The price offered by the city is based on competition, because the city must attract a sufficient number of individual lawyers to meet its needs at that price. The city competes with other purchasers of legal services to obtain an adequate supply of lawyers, and the city's offering price is an element of that competition. Indeed, an acknowledgement of this element of competition is implicit in the respondents' argument that an increase in the CJA fee was 'necessary to attract, and retain, competent lawyers.' If the offering price had not attracted a sufficient supply of qualified lawyers willing to accept CJA assignments for the city to fulfill its constitutional obligation, then presumably the city would have increased its offering price or otherwise sought to make its offer more attractive. In fact, however, the city's offering price before the boycott apparently was sufficient to obtain the amount and quality of legal services that it needed." *272 U.S. App. D. C., at 278, 856 F.2d, at 232*.

The Court of Appeals agreed with this analysis:

"The Commission correctly determined that the CJA regulars act as 'competitors' in the only sense that matters for antitrust analysis: They are individual business people supplying the same service to a customer, and as such may be capable, through a concerted restriction on output, of forcing that customer to pay a higher price for their service. That the D. C. government, like the buyers of many other services and commodities, prefers to offer a uniform price to all potential suppliers does not alter in any way the anti-competitive potential of the petitioners' boycott. The antitrust laws do not protect only purchasers who negotiate each transaction individually, instead of posting a price at which they will trade with all who come forward. Nor should any significance be assigned to the origin of the demand for CJA services; here the District may be compelled by the *Sixth Amendment* to purchase legal services, there it may be compelled by the voters to purchase street paving services. The reason for the government's demand for a service is simply irrelevant to the issue of whether the suppliers of it have restrained trade by collectively refusing to satisfy it except upon their own terms. We therefore conclude, as did the Commission, that the petitioners engaged in a 'restraint of trade' within the meaning of *Section 1*." *Id., at 281, 856 F.2d, at 235* (footnote omitted).

offered." [272 U.S. App. D. C., at 280, 856 F.2d, at 234](#). The horizontal arrangement among these competitors was unquestionably a "naked restraint" on price and output. See [National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.](#), [468 U.S. 85, 110 \(1984\)](#).

[\*\*\*\*24] [LEdHN\[1D\]](#)<sup>↑</sup> [1D] [LEdHN\[5B\]](#)<sup>↑</sup> [5B] [LEdHN\[6\]](#)<sup>↑</sup> [6]It is of course true that the city purchases respondents' services because it has a constitutional duty to provide representation to indigent defendants. It is likewise true that the quality of representation may improve when rates are increased. Yet neither of these facts is an acceptable justification for an otherwise unlawful restraint of trade. As we have remarked before, the "Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services." [National Soc. of Professional Engineers v. United States](#), [435 U.S. 679, 695 \(1978\)](#). This judgment "recognizes that all elements of a bargain -- quality, service, safety, and durability -- and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." [\*424] *Ibid.* That is equally so when the quality of legal advocacy, rather than engineering design, [\*\*\*\*25] is at issue.

[LEdHN\[1E\]](#)<sup>↑</sup> [1E] [LEdHN\[7\]](#)<sup>↑</sup> [7]The social justifications proffered for respondents' restraint of trade thus do not make it any less unlawful. The statutory policy underlying the Sherman Act "precludes inquiry into the question whether competition is good or bad." *Ibid.* Respondents' argument, like that made by the petitioners in *Professional Engineers*, ultimately asks us to find that their boycott is permissible because the price it seeks to set is reasonable. But it was settled shortly after the Sherman Act was passed that [HN5](#)<sup>↑</sup> it "is no excuse that the prices fixed are themselves reasonable. See, e. g., [United v. Trenton Potteries Co.](#), [273 U.S. 392, 397-398 \(1927\)](#); [United States v. Trans-Missouri Freight Assn.](#), [166 U.S. 290, 340-341 \(1897\)](#)." [Catalano, Inc. v. Target Sales, Inc.](#), [446 U.S. 643, 647](#) [\*\*776] (1980). [\*\*\*867] Respondents' agreement is not outside the coverage of the [\*\*\*\*26] Sherman Act simply because its objective was the enactment of favorable legislation.

Our decision in *Noerr* in no way detracts from this conclusion. In *Noerr*, we "considered whether the Sherman Act prohibited a publicity campaign waged by railroads" and "designed to foster the adoption of laws destructive of the trucking business, to create an atmosphere of distaste for truckers among the general public, and to impair the relationships existing between truckers and their customers." [Claiborne Hardware](#), [458 U.S., at 913](#). Interpreting the Sherman Act in the light of the *First Amendment's* Petition Clause, the Court noted that "at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had." [365 U.S., at 139-140](#).

[LEdHN\[1F\]](#)<sup>↑</sup> [1F][LEdHN\[8\]](#)<sup>↑</sup> [8]It of course remains true that [HN6](#)<sup>↑</sup> "no violation of the Act can be predicated [\*\*\*\*27] upon mere attempts to influence the passage or enforcement of laws," *id., at 135*, even if the defendants' sole purpose is to impose a restraint upon the trade of their competitors, *id., at 138-140*. But in the *Noerr* case the alleged [\*425] restraint of trade was the intended *consequence* of public action; in this case the boycott was the *means* by which respondents sought to obtain favorable legislation. The restraint of trade that was implemented while the boycott lasted would have had precisely the same anticompetitive consequences during that period even if no legislation had been enacted. In *Noerr*, the desired legislation would have created the restraint on the truckers' competition; in this case the emergency legislative response to the boycott put an end to the restraint.

Indeed, respondents' theory of *Noerr* was largely disposed of by our opinion in [Allied Tube & Conduit Corp. v. Indian Head, Inc.](#), [486 U.S. 492 \(1988\)](#). We held that [HN7](#)<sup>↑</sup> the *Noerr* doctrine does not extend to "every concerted effort that [\*\*\*\*28] is genuinely intended to influence governmental action." [486 U.S., at 503](#). We explained:

"If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. But see [Georgia v. Pennsylvania R. Co.](#) [324 U.S. 439, 456-463 \(1945\)](#). Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. But

see [\*Georgia v. Evans, 316 U.S. 159 \(1942\)\*](#). Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action." *Ibid.*

#### IV

[LEdHN\[2B\]](#) [2B]SCTLA argues that if its [\*\*\*868] conduct would otherwise be prohibited by the Sherman Act and the Federal Trade Commission Act, it is nonetheless protected by [\*\*\*\*29] the [\*First Amendment\*](#) rights recognized in [\*NAACP v. Claiborne Hardware Co., \[\\*426\] 458 U.S. 886 \(1982\)\*](#). That case arose after black citizens boycotted white merchants in Claiborne County, Mississippi. The white merchants sued under state law to recover losses from the boycott. We found that [HN8](#) the "right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution [\*\*777] itself." [\*Id., at 914\*](#). We accordingly held that "the nonviolent elements of petitioners' activities are entitled to the protection of the [\*First Amendment\*](#)." [\*Id., at 915.\*](#)

[LEdHN\[9\]](#) [9]SCTLA contends that because it, like the boycotters in *Claiborne Hardware*, sought to vindicate constitutional rights, it should enjoy a similar [\*First Amendment\*](#) protection. It is, of course, clear that the association's efforts to publicize [\*\*\*30] the boycott, to explain the merits of its cause, and to lobby District officials to enact favorable legislation -- like similar activities in *Claiborne Hardware* -- were activities that were fully protected by the [\*First Amendment\*](#). But nothing in the FTC's order would curtail such activities, and nothing in the FTC's reasoning condemned any of those activities.

[LEdHN\[2C\]](#) [2C]The activity that the FTC order prohibits is a concerted refusal by CJA lawyers to accept any further assignments until they receive an increase in their compensation; the undenied objective of their boycott was an economic advantage for those who agreed to participate. It is true that the *Claiborne Hardware* case also involved a boycott. That boycott, however, differs in a decisive respect. Those who joined the *Claiborne Hardware* boycott sought no special advantage for themselves. They were black citizens in Port Gibson, Mississippi, who had been the victims of political, social, and economic discrimination for many years. They sought only the equal respect and equal treatment to which they were constitutionally entitled. They struggled [\*\*\*31] "to change a social order that had consistently treated them as second class citizens." [\*Id., at 912\*](#). As we observed, the campaign was not [\*427] intended "to destroy legitimate competition." [\*Id., at 914\*](#). Equality and freedom are preconditions of the free market, and not commodities to be haggled over within it.

[LEdHN\[2D\]](#) [2D][LEdHN\[10A\]](#) [10A]The same cannot be said of attorney's fees. As we recently pointed out, our reasoning in *Claiborne Hardware* is not applicable to a boycott conducted by business competitors who "stand to profit financially from a lessening of competition in the boycotted market." [\*Allied Tube & Conduit Corp. v. Indian Head, Inc., supra, at 508.\*](#)<sup>10</sup> [\*\*\*\*33] No matter how altruistic the motives of respondents may have [\*\*\*869] been, it is undisputed that their immediate objective was to increase the price that they would be paid for their

<sup>10</sup> In [*Claiborne Hardware*] we held that the [\*First Amendment\*](#) protected the nonviolent elements of a boycott of white merchants organized by the National Association for the Advancement of Colored People and designed to make white government and business leaders comply with a list of demands for equality and racial justice. Although the boycotters intended to inflict economic injury on the merchants, the boycott was not motivated by any desire to lessen competition or to reap economic benefits but by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution, and the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market. [\*Id., at 914-915\*](#). Here, in contrast, petitioner was at least partially motivated by the desire to lessen competition, and, because of petitioner's line of business, stood to reap substantial economic benefits from making it difficult for respondent to compete." [\*Allied Tube & Conduit Corp., 486 U.S., at 508-509.\*](#)

services. Such an economic boycott is well within the category that was expressly distinguished in the *Claiborne Hardware* opinion itself. [\*\*\*\*32] [458 U.S., at 914-915](#).<sup>11</sup>

[\*428] [\*\*778] [LEdHN\[11A\]](#)<sup>↑</sup> [11A] [\*\*\*\*34] [LEdHN\[12A\]](#)<sup>↑</sup> [12A] [LEdHN\[13A\]](#)<sup>↑</sup> [13A] Only after recognizing the well-settled validity of prohibitions against various economic boycotts did we conclude in *Claiborne Hardware* that "peaceful, political activity such as that found in the [Mississippi] boycott" are entitled to constitutional protection.<sup>12</sup> We reaffirmed the government's "power to regulate [such] economic activity." [Id., at 912-913](#). This conclusion applies with special force when a clear objective of the boycott is to economically advantage the participants.

[\*\*\*\*35] V

[LEdHN\[1G\]](#)<sup>↑</sup> [1G][LEdHN\[2E\]](#)<sup>↑</sup> [2E] Respondents' concerted action in refusing to accept further CJA assignments until their fees were increased was thus a plain violation of the antitrust laws. The exceptions derived from *Noerr* and *Claiborne Hardware* have no application to respondents' boycott. For these reasons we reject the arguments [\*\*\*870] made by respondents in the cross-petition.

[LEdHN\[3B\]](#)<sup>↑</sup> [3B] The Court of Appeals, however, crafted a new exception to the *per se* rules, and it is this exception which provoked the [\*429] FTC's petition to this Court. The Court of Appeals derived its exception from [United States v. O'Brien, 391 U.S. 367 \(1968\)](#). In that case O'Brien had burned his Selective Service registration certificate on the steps of the South Boston Courthouse. He did so before a sizable crowd and with the purpose of advocating his antiwar beliefs. We affirmed his conviction. We held that the governmental interest in regulating the "nonspeech" [\*\*\*\*36] element" of his conduct adequately justified the incidental restriction on [First Amendment](#) freedoms.<sup>13</sup> Specifically, we concluded that the statute's incidental restriction on O'Brien's freedom of expression

<sup>11</sup> [LEdHN\[10B\]](#)<sup>↑</sup> [10B]

Respondents contend that, just as the *Claiborne Hardware* boycott sought to secure constitutional rights to equality and freedom, the lawyers' boycott sought to vindicate the [Sixth Amendment](#) rights of indigent defendants. *Claiborne Hardware*, however, does not protect every boycott having a constitutional dimension. Indeed, insofar as respondents seek immunity from prosecution on the basis of their good intent, their theory of defense "is merely another variety of an age-old argument." See [United States v. Cullen, 454 F.2d 386, 392 \(CA7 1971\)](#). *Claiborne Hardware* does not, and could not, establish a rule immunizing from prosecution any boycott based upon sincere constitutional concerns. Such an exemption would authorize the government's contractors in nearly all areas to circumvent [antitrust law](#) on the basis of their own theory of the government's obligations.

<sup>12</sup> [LEdHN\[11B\]](#)<sup>↑</sup> [11B] [LEdHN\[12B\]](#)<sup>↑</sup> [12B] [LEdHN\[13B\]](#)<sup>↑</sup> [13B]

A nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions. This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association. See [Giboney v. Empire Storage & Ice Co., 336 U.S. 490](#) [(1949)]; [NLRB v. Retail Store Employees, 447 U.S. 607](#) [(1980)]. The right of business entities to 'associate' to suppress competition may be curtailed. [National Society of Professional Engineers v. United States, 435 U.S. 679](#) [(1978)]. Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions may be prohibited, as part of 'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.' [NLRB v. Retail Store Employees, supra, at 617-618](#) (Blackmun, J., concurring in part). See [Longshoremen v. Allied International, Inc., 456 U.S. 212, 222-223](#), and n. 20 [(1982)]."[458 U.S., at 912](#).

<sup>13</sup> "This Court has held that [HNG](#)<sup>↑</sup> when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on [First Amendment](#) freedoms. . . . We think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated

was no greater than necessary to further the Government's interest in requiring registrants to have valid certificates continually available.

[\*\*\*\*37] However, the Court of Appeals held that, in light of *O'Brien*, the expressive component of respondents' boycott compelled courts to apply the antitrust laws "prudently and with sensitivity," [272 U.S. App. D. C., at 279-280, 856 F. 2d, at 233-234](#), with a "special solicitude for the *First Amendment* rights" of respondents. The Court of Appeals concluded that the governmental interest in prohibiting boycotts is not sufficient to justify a restriction on the communicative element of the boycott unless the FTC can prove, and not merely presume, that the boycotters have market power. Because the Court of Appeals imposed this special requirement upon [\*\*779] the Government, it ruled that *per se* antitrust [\*430] analysis was inapplicable to boycotts having an expressive component.

There are at least two critical flaws in the Court of Appeals' antitrust analysis: it exaggerates the significance of the expressive component in respondents' boycott and it denigrates the importance of the rule of law that respondents violated. Implicit in the conclusion of the Court of Appeals are unstated assumptions that most economic boycotts do not have an expressive component, [\*\*\*\*38] and that the categorical prohibitions against price fixing and boycotts are merely rules of "administrative convenience" that do not serve any substantial governmental interest unless the price-fixing competitors actually possess market power.

It would not much matter to the outcome of this case if these flawed assumptions were sound. *O'Brien* would offer respondents no protection even if their boycott were uniquely expressive and even if the purpose of the *per se* rules were purely that of administrative efficiency. [\*\*\*871] We have recognized that the Government's interest in adhering to a uniform rule may sometimes satisfy the *O'Brien* test even if making an exception to the rule in a particular case might cause no serious damage. [United States v. Albertini, 472 U.S. 675, 688 \(1985\)](#) ("The *First Amendment* does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests"). The administrative efficiency interests in antitrust regulation are unusually compelling. The *per se* rules avoid "the necessity [\*\*\*\*39] for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable." [Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 \(1958\)](#). If small parties "were allowed to prove lack of market power, all parties would have that right, thus introducing the enormous complexities of market definition [\*431] into every price-fixing case." R. Bork, *The Antitrust Paradox* 269 (1978). For these reasons, it is at least possible that the *Claiborne Hardware* doctrine, which itself rests in part upon *O'Brien*,<sup>14</sup> exhausts *O'Brien*'s application to the antitrust statutes.

In any event, however, we cannot accept the Court of Appeals' characterization of this boycott or the antitrust laws. Every concerted refusal to do business with a potential customer or supplier has an expressive component. [\*\*\*\*40] At one level, the competitors must exchange their views about their objectives and the means of obtaining them. The most blatant, naked price-fixing agreement is a product of communication, but that is surely not a reason for viewing it with special solicitude. At another level, after the terms of the boycotters' demands have been agreed upon, they must be communicated to its target: "We will not do business until you do what we ask." That expressive component of the boycott conducted by these respondents is surely not unique. On the contrary, it is the hallmark of every effective boycott.

At a third level, the boycotters may communicate with third parties to enlist public support for their objectives; to the extent that the boycott is newsworthy, it will facilitate the expression of the boycotters' ideas. But this level of expression is not an element of the boycott. Publicity may be generated by any other activity that is sufficiently newsworthy. Some activities, including the boycott here, may be newsworthy precisely for the reasons that they are

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to the suppression of free expression; and if the incidental restriction on alleged *First Amendment* freedoms is no greater than is essential to the furtherance of that interest." [391 U.S., at 376-377](#).

<sup>14</sup> See [458 U.S., at 912](#).

prohibited: the harms they produce are matters of public concern. Certainly that is no reason for removing the prohibition.

[\*\*\*\*41] In sum, there is thus nothing unique about the "expressive component" of respondents' [\*\*780] boycott. A rule that requires courts to apply the antitrust laws "prudently and with sensitivity" whenever an economic boycott has an "expressive component" would create a gaping hole in the fabric of those [\*432] laws. Respondents' boycott thus has no special characteristics meriting an exemption [\*\*\*872] from the *per se* rules of antitrust law.

LEdHN[3C] [↑] [3C]LEdHN[14] [↑] [14]Equally important is the second error implicit in respondents' claim to immunity from the *per se* rules. In its opinion, the Court of Appeals assumed that the antitrust laws permit, but do not require, the condemnation of price fixing and boycotts without proof of market power.<sup>15</sup> The opinion further assumed that the *per se* rule prohibiting such activity "is only a rule of 'administrative convenience and efficiency,' not a statutory command." [272 U.S. App. D. C., at 295, 856 F. 2d, at 249](#). This statement contains two errors. HN10 [↑] [\*\*\*\*42] The *per se* [\*433] rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory commands. Moreover, while the *per se* rule against price fixing and boycotts is indeed justified in part by "administrative convenience," the Court of Appeals erred in describing the prohibition as justified only by such concerns. The *per se* rules also reflect a long-standing judgment that the prohibited practices by their nature have "a substantial potential for impact on competition." [Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 16 \(1984\)](#).

[\*\*\*\*43] LEdHN[15] [↑] [15]As we explained in *Professional Engineers*, HN11 [↑] the rule of reason in antitrust law generates

"two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are 'illegal *per se*.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." [435 U.S., at 692](#).

[\*\*\*873] "Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." [Arizona v. Maricopa County Medical Society, 457 U.S. 332, 344 \(1982\)](#).

<sup>15</sup> In our opinion in [Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 \(1984\)](#), we noted that "the rationale for *per se* rules in part is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct. See, e.g., [Arizona v. Maricopa County Medical Society, 457 U.S. 332, 350-351 \(1982\)](#)." *Id.*, at 15-16, n. 25. The Court of Appeals overlooked the words "in part" in that footnote, and also overlooked the statement in text that "there must be a substantial potential for impact on competition in order to justify *per se* condemnation." *Id.*, at 16. As the following paragraph from its opinion demonstrates, the Court of Appeals incorrectly assumed that the *per se* rule against price fixing is "only" a rule of administrative convenience:

"The antitrust laws permit, but do not require, the condemnation of price fixing without proof of market power; even the *per se* rule, as the Commission acknowledges in its brief, is only a rule of 'administrative convenience and efficiency,' not a statutory command. FTC Brief at 39; see [Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 15 n. 25 \(1984\)](#). While the rule may occasionally be overinclusive, condemning the ineffectual with the harmful, there is no known danger that socially beneficial arrangements will be prohibited, for price-fixing agreements rarely, if ever, have redeeming virtues. As for the hapless but harmless, as Professor Areeda has noted, defendants charged with conspiring to fix prices 'have little moral standing to demand proof of power or effect when the most they can say for themselves is that they tried to harm the public but were mistaken in their ability to do so.' VII P. Areeda, Antitrust Law para. 1509 at 411 (1986)." [272 U.S. App. D. C., at 295, 856 F.2d, at 249](#).

[\*\*781] [LEdHN\[16\]](#)<sup>16</sup> [16] [\*\*\*\*44] The *per se* rules in antitrust law serve purposes analogous to *per se* restrictions upon, for example, stunt flying in congested areas or speeding. Laws prohibiting stunt flying or setting speed limits are justified by the State's interest in protecting human life and property. Perhaps most violations of such rules actually cause no harm. No doubt many experienced drivers and pilots can operate much more safely, even at prohibited speeds, than the average citizen.

[\*434] If the especially skilled drivers and pilots were to paint messages on their cars, or attach streamers to their planes, their conduct would have an expressive component. High speeds and unusual maneuvers would help to draw attention to their messages. Yet the laws may nonetheless be enforced against these skilled persons without proof that their conduct was actually harmful or dangerous.

In part, the justification for these *per se* rules is rooted in administrative convenience. They are also supported, however, by the observation that every speeder and every stunt pilot poses some threat to the community. An unpredictable event may overwhelm the skills of the best driver or pilot, even if the [\*\*\*\*45] proposed course of action was entirely prudent when initiated. A bad driver going slowly may be more dangerous than a good driver going quickly, but a good driver who obeys the law is safer still.

So it is with boycotts and price fixing.<sup>16</sup> [\*\*\*\*46] Every such horizontal arrangement among competitors poses some threat to the free market. A small participant in the market is, obviously, less likely to cause persistent damage than a large participant. Other participants in the market may act quickly and effectively to take the small participant's place. For reasons including market inertia and information failures, however, a small conspirator may be able to impede competition [\*435] over some period of time.<sup>17</sup> Given an appropriate set of circumstances and some luck, the period can be long enough to inflict real injury upon particular consumers or competitors.<sup>18</sup>

[\*\*\*874] [LEdHN\[17\]](#)<sup>17</sup> [17] As Justice Douglas observed in an oft-quoted footnote to his United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), opinion:

"Price-fixing agreements may or may not be aimed at complete elimination of price competition. The group making those agreements may or may not have power to control the market. But the fact that the group cannot control the market prices does not necessarily mean that the agreement as to prices has no utility to the members of the combination. The effectiveness [\*\*\*\*47] of price-fixing agreements is dependent on many factors, such as competitive tactics, position in the industry, the formula underlying pricing policies. Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry [\*\*782] into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." Id., at 225-226, n. 59.

<sup>16</sup> "In sum, [HN12](#)<sup>18</sup> price-fixing cartels are condemned *per se* because the conduct is tempting to businessmen but very dangerous to society. The conceivable social benefits are few in principle, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power which is likely to be exercised adversely to the public. Moreover, toleration implies a burden of continuous supervision for which the courts consider themselves ill-suited. And even if power is usually established while any defenses are not, litigation will be complicated, condemnation delayed, would be price-fixers encouraged to hope for escape, and criminal punishment less justified. Deterrence of a generally pernicious practice would be weakened. The key points are the first two. Without them, there is no justification for categorical condemnation." 7 P. Areeda, Antitrust Law para. 1509, pp. 412-413 (1986).

<sup>17</sup> Cf. Markovits, The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook, 63 Tex. L. Rev. 41, 80 (1984) (suggesting circumstances in which a firm that lacks market power may nonetheless benefit from anticompetitive tactics).

<sup>18</sup> "Very few firms that lack power to affect market prices will be sufficiently foolish to enter into conspiracies to fix prices. Thus, the fact of agreement defines the market." R. Bork, The Antitrust Paradox 269 (1978).

See also [Maricopa County Medical Society, 457 U.S., at 351](#), and n. 23.

[LEdHN\[3D\]](#) [3D]Of course, some boycotts and some price-fixing agreements are more pernicious than others; some are only partly successful, and some may only succeed when they are buttressed by other causative factors, such as political influence. But [\*436] an assumption that, absent proof of market power, the boycott disclosed by this record was totally harmless -- when overwhelming testimony demonstrated that it almost produced a crisis in the administration of criminal justice in the District and when it achieved its economic goal -- is flatly inconsistent [\*\*\*\*48] with the clear course of our antitrust jurisprudence. Conspirators need not achieve the dimensions of a monopoly, or even a degree of market power any greater than that already disclosed by this record, to warrant condemnation under the antitrust laws.

VI

[LEdHN\[1H\]](#) [1H] [LEdHN\[3E\]](#) [3E]The judgment of the Court of Appeals is accordingly reversed insofar as that court held the *per se* rules inapplicable to the lawyers' boycott.<sup>19</sup> [\*\*\*\*49] The case is remanded for further proceedings consistent with this opinion.<sup>20</sup>

*It is so ordered.*

**Concur by:** BRENNAN (In Part); BLACKMUN (In Part)

**Dissent by:** BRENNAN (In Part); BLACKMUN (In Part)

## Dissent

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[\*\*\*875] JUSTICE BRENNAN, with whom Justice **Marshall** joins, concurring in part and dissenting in part.

The Court holds today that a boycott by the Superior Court Trial Lawyers Association (SCTLA or Trial Lawyers), whose members collectively refused to represent indigent [\*437] criminal defendants without greater compensation, constituted conduct that was neither clearly outside the scope of the Sherman Act nor automatically immunized from antitrust regulation by the [First Amendment](#). With this much I agree.<sup>1</sup> In Part V of its opinion, however, the Court maintains that under the *per se* rule the Federal Trade Commission (FTC or Commission) could find the boycott illegal because it *might* have implicated some of the concerns underlying the antitrust laws. I cannot countenance [\*\*\*\*50] this reasoning, which upon examination reduces to the Court's assertion that since the

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<sup>19</sup> [LEdHN\[1I\]](#) [1I] [LEdHN\[3F\]](#) [3F]

In response to JUSTICE BRENNAN's opinion, and particularly to its observation that some concerted arrangements that might be characterized as "group boycotts" may not merit *per se* condemnation, see *post*, at 452, n. 9, we emphasize that this case involves not only a boycott but also a horizontal price-fixing arrangement -- a type of conspiracy that has been consistently analyzed as a *per se* violation for many decades. All of the "group boycott" cases cited in JUSTICE BRENNAN's footnote involved nonprice restraints. There was likewise no price-fixing component in any of the boycotts listed on pages 446-448 of JUSTICE BRENNAN's opinion. Indeed, the text of the opinion virtually ignores the price-fixing component of respondent's concerted action.

<sup>20</sup> On remand, the Court of Appeals should review respondents' objections to the form of the order entered by the Commission. See [272 U.S. App. D. C., at 299, 856 F.2d, at 253](#).

<sup>1</sup> I join Parts I, II, III, and IV of the Court's opinion, although, as discussed further *infra*, I do not agree that the unreasonableness of the pre-boycott rates of compensation and the fact that the Trial Lawyers enjoyed no other effective means of making themselves heard are irrelevant to the proper analysis. Compare *ante*, at 421-422.

government may prohibit airplane stunt flying and reckless automobile driving as categorically harmful, see *ante*, at 433-434, it may also subject expressive political boycotts to a presumption of illegality without even inquiring as to whether they actually cause any of the harms that the antitrust laws are designed to prevent. This non sequitur cannot justify the significant restriction on *First Amendment* freedoms that the majority's rule entails. Because I believe that the majority's decision is insensitive to the venerable [\*\*783] tradition of expressive boycotts as an important means of political communication, I respectfully dissent from Part V of the Court's opinion.

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The Petition and Free Speech Clauses of the *First Amendment* guarantee citizens the right to communicate with the government, and when a group persuades the government to adopt a particular policy through the force of its ideas and the power of its message, no antitrust liability can attach. "There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them." *Citizens Against Rent [\*4381] Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 296 (1981). But a group's effort to use market power to coerce the government through economic means may subject the participants to antitrust liability.

In any particular case, it may be difficult to untangle these two effects by determining whether political or economic power was brought to bear on the government. The Court of Appeals thoughtfully analyzed this problem and concluded, I believe correctly, that there could be no antitrust violation absent a showing that the boycotters possessed some degree of market power -- that is, the ability to raise prices profitably through economic means or, more generally, [\*\*\*\*52] the capacity to act other than as would an actor in a perfectly competitive market. The court reasoned that [\*\*\*876] "when the government seeks to regulate an economic boycott with an expressive component . . . its condemnation without proof that the boycott could in fact be anticompetitive ignores the command of [United States v.] O'Brien that restrictions on activity protected by the *First Amendment* be 'no greater than is essential' to preserve competition from the sclerotic effects of combination." 272 U.S. App. D. C. 272, 295, 856 F.2d 226, 249 (1988) (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)) (emphasis in original). The concurring judge added that if the participants wielded no market power, "the boycott must have succeeded out of persuasion and been a political activity." 272 U.S. App. D. C., at 300, 856 F.2d, at 254 (opinion of Silberman, J.). This approach is quite sensible, and I would affirm the Court of Appeals' decision to remand the case to the FTC for a showing of market power.

A

The issue in this case is *not* whether boycotts may ever be punished under § 5 of the Federal Trade [\*\*\*\*53] Commission Act, 15 U.S.C. § 45(a)(1), consistent with the *First Amendment*; rather, the issue is *how* the government may determine *which* boycotts are illegal. Two well-established premises [\*439] lead to the ineluctable conclusion that when applying the antitrust laws to a particular expressive boycott, the government may not presume an antitrust violation under the *per se* rule, but must instead apply the more searching, case-specific rule of reason.

First, the *per se* rule is a *presumption* of illegality.<sup>2</sup> As Justice Stevens has written:

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<sup>2</sup> I disagree with the Court that the government's interest in employing the *per se* rule here is a substantial one. The *per se* rule's conceded service of the goals of administrative efficiency and judicial economy cannot justify its application to activity protected by the *First Amendment*. "The *First Amendment* does not permit the State to sacrifice speech for efficiency." *Riley v. National Federation of Blind of N. C., Inc.*, 487 U.S. 781, 795 (1988). See also *Schneider v. State*, 308 U.S. 147, 161, 164 (1939). Insofar as the *per se* rule is thought warranted by a speculation that even relatively small boycotts or those without market power might nonetheless inflict some measure of economic harm, see *ante*, at 434-436, the rule can be applied in ordinary antitrust cases where *First Amendment* freedoms are not implicated. In such cases, "the conceivable social benefits [of the conduct under scrutiny] are few in principle, small in magnitude, [and] speculative in occurrence." *Ante*, at 434, n. 16 (quoting 7 P. Areeda, *Antitrust Law* para. 1509, pp. 412-413 (1986)). But where an expressive boycott is at issue, the same cannot be said; the *First Amendment* establishes that the social benefits involved are not "small in magnitude" or "speculative in occurrence." Hence, even if it were possible that a boycott without market power might cause anticompetitive effects -- a dubious proposition, since

[\*\*784] "The costs of judging business practices under the rule of reason, however, have been reduced by the recognition of *per se* rules. Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable. As *in every rule of general application, the match between the presumed and the actual is* [\*\*\*877] *imperfect*. For the sake of business certainty and litigation efficiency, [\*440] we have tolerated the invalidation of some [\*\*\*\*54] *agreements that a fullblown inquiry might have proved to be reasonable.*" [\*Arizona v. Maricopa County Medical Society, 457 U.S. 332, 343-344 \(1982\)\*](#) (emphasis added; footnotes omitted).

We have freely admitted that conduct condemned under the *per se* rule sometimes would be permissible if subjected merely to rule-of-reason analysis. See [\*Maricopa, supra, at 344, n. 16\*](#); [\*Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50, n. 16 \(1977\)\*](#); [\*United States v. Topco Associates, Inc., 405 U.S. 596, 609 \(1972\)\*](#).

[\*\*\*\*55] Second, the government may not in a [\*First Amendment\*](#) case apply a broad presumption that certain categories of speech are harmful without engaging in a more particularized examination.<sup>3</sup> As the Court of Appeals perceptively reasoned, "the evidentiary shortcut to antitrust condemnation without proof of market power is inappropriate as applied to a boycott that served, in part, to make a statement on a matter of public debate." [\*272 U.S. App. D. C., at 296, 856 F. 2d, at 250\*](#). "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals"; rather, government must ensure that, even when its regulation is not content based, the restriction narrowly "focuses on the source of the evils the [State] seeks to eliminate." [\*Ward v. Rock Against Racism, 491 U.S. 781, 799, and n. 7 \(1989\)\*](#). This is [\*441] what it means for a law to be "narrowly tailored" to the State's interest. See [\*Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 478 \(1989\); Frisby v. Schultz, 487 U.S. 474, 485 \(1988\)\*](#). "Broad prophylactic [\*\*\*\*56] rules in the area of free expression are suspect." [\*NAACP v. Button, 371 U.S. 415, 438 \(1963\)\*](#).

In [\*Speiser v. Randall, 357 U.S. 513 \(1958\)\*](#), for example, we invalidated a state program under which taxpayers [\*\*\*\*57] applying for a certain tax exemption bore the burden of proving that they did not advocate the overthrow of the United States Government. We held that [\*785] the presumption against the taxpayer was unconstitutional because the State had "no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech." [\*Id., at 529\*](#). More recently, we determined that the [\*First Amendment\*](#) prohibits a State from [\*\*\*878] imposing liability on a newspaper for the publication of embarrassing but truthful information based on a "negligence *per se*" theory. See [\*The Florida Star v. B. J. F., 491 U.S. 524 \(1989\)\*](#). In language applicable to the instant case, we rejected "the broad sweep" of a standard where "liability follows automatically from publication," and we instead required "case-by-case findings" of harm. [\*Id., at 539\*](#). Similarly, I would hold in this case that the FTC cannot ignore the particular factual circumstances before it by employing a *presumption* of illegality in the guise of the *per se* rule.

## B

The Court's approach today is all the more inappropriate [\*\*\*\*58] because the success of the Trial Lawyers' boycott could have been attributable to the persuasiveness of its message rather than any coercive economic force. When a boycott seeks to generate public support for the passage of legislation, it may operate on a *political* rather than *economic* level, especially when the government is the target. Here, the demand for lawyers' services under the Criminal Justice Act (CJA) is [\*442] created by the command of the [\*Sixth Amendment\*](#). How that demand is

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by definition market power is the ability to alter prices -- the government still should be required to proceed under the rule of reason and demonstrate that such effects are actually present in the case *sub judice*.

<sup>3</sup> In [\*United States v. O'Brien, 391 U.S. 367 \(1968\)\*](#), the Court held: "When 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental restrictions on [\*First Amendment\*](#) freedoms. . . . We think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged [\*First Amendment\*](#) freedoms is no greater than is essential to the furtherance of that interest." [\*Id., at 376-377\*](#).

satisfied is determined by the political decisions of the Mayor, city council, and, because of the unique status of the District of Columbia, the Federal Government as well. As the FTC recognized, see [In re Superior Court Trial Lawyers Assn., 107 F. T. C. 510, 572-574 \(1986\)](#), a typical boycott functions by transforming its participants into a single monopolistic entity that restricts supply and increases price. See, e.g., [FTC v. Indiana Federation of Dentists, 476 U.S. 447, 459 \(1986\)](#); [National Collegiate Athletic Assn. v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 109-110 \(1984\)](#).

The boycott in this case [\*\*\*\*59] was completely different: it may have persuaded the consumer of the Trial Lawyers' services -- the District government -- to raise the price it paid by altering the *political* preferences of District officials. Prior to the boycott, these officials perceived that at a time of fiscal austerity, a pay raise for lawyers who represented criminal defendants was not likely to be well received by the voters, whatever the merits of the issue. The SCTLA campaign drew public attention to the lawyers' plight and generated enough sympathy among city residents to convince District officials, many of whom were already favorably inclined toward the Trial Lawyers' cause, that they could augment CJA compensation rates without risking their political futures. Applying the *per se* rule to such a complex situation ignores the possibility that the boycott achieved its goal through a politically driven increase in demand for improved quality of representation, rather than by a cartel-like restriction in supply. The Court of Appeals concluded that "it [was] . . . possible that, lacking any market power, [the Trial Lawyers] procured a rate increase by changing public attitudes through the publicity [\*\*\*\*60] attending the boycott," [272 U.S. App. D. C., at 297, 856 F.2d, at 251](#), or that "the publicity surrounding the boycott may have served . . . to dissipate any public opposition that a substantial raise for lawyers [\*\*\*879] who represent indigent [\*443] defendants had previously encountered." *Ibid.*<sup>4</sup> The majority is able to reach the contrary conclusion only by disregarding [\*\*786] the long history of attempts to raise defense lawyers' compensation levels in the District and the virtually unanimous support the Trial Lawyers enjoyed among members of the bar, the judiciary, and, indeed, officials of the city government.

[\*\*\*\*61] As the Court appears to recognize, see *ante*, at 421, pre-boycott rates were unreasonably low. City officials hardly could have reached a different conclusion. After 1970, the CJA set fees at \$ 30 per hour for court time and \$ 20 per hour for out-of-court time, and, despite a 147 percent increase in the Consumer Price Index, compensation remained at those levels until the boycott in 1983. Calculated in terms of 1970 dollars, at the time of the boycott CJA lawyers earned approximately \$ 7.80 per hour for out-of-court time and \$ 11.70 for in-court time. In contrast, in 1983 the typical billing rate for private attorneys in major metropolitan areas with 11 to 20 years of experience was \$ 123 per hour, and the rate for those with less than two years of experience was \$ 64 per hour. See App. in No. 86-1465 (CADC), pp. 678-679, 807. Even attorneys receiving compensation under the Equal Access to Justice Act, [28 U.S.C. § 2412\(d\)\(2\)\(A\)\(ii\) \(1982 ed.\)](#), obtained fees of \$ 75 per hour, with the possibility of upward adjustments to still larger sums. The Chairperson of the Judicial Conference Committee to Implement the Criminal Justice Act testified before [\*\*\*\*62] Congress that "generally, the present Criminal Justice Act compensation rates do not even [\*444] cover the appointed attorney's office overhead expenses related to time devoted to representation of defendants under the Act." Criminal Justice Act: Hearings on H. R. 3233 before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 98th Cong., 1st Sess., 22 (1983) (statement of Hon. Thomas J. MacBride). David B. Isbell, then District of Columbia Bar president, warned that "unrealistic and unreasonable compensation rates have hampered the D. C. CJA program in attracting and retaining significant numbers of qualified criminal defense counsel." [Id. at 306](#).

The legal community became concerned about the low level of CJA fees as early as 1975. The Report on the Criminal Defense Services in the District of Columbia by the Joint Committee of the Judicial Conference of the District of Columbia Circuit and the District of Columbia Bar (Austern-Rezneck Report) concluded that the prevailing

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<sup>4</sup>The Court quotes the finding of the FTC Administrative Law Judge (ALJ) that there was no evidence that the District government's decision to raise CJA compensation rates responded to the Trial Lawyers' campaign or to public pressure generally. See *ante*, at 416-417. The majority, however, conveniently omits the Court of Appeals' answer to this finding by the ALJ: "The Commission did not reach the question and rejected the ALJ's findings except insofar as it expressly adopted them." [272 U.S. App. D. C., at 297, 856 F.2d, at 251](#). By implication, therefore, the Commission rejected the trial examiner's finding on this point.

rates "drove talented attorneys out of CJA practice, and encouraged those who remained to do a less than adequate [\*\*\*\*63] job on their cases." [272 U.S. App. D. C., at 275, \\*\\*\\*8801 856 F.2d, at 229](#). The Austern-Rezneck Report recommended that CJA lawyers be paid \$ 40 per hour for time spent in or out of court, subject to a ceiling of \$ 800 for a misdemeanor case and \$ 1,000 for a felony case. The Report characterized this increase as "the absolute minimum necessary to attract and hold good criminal lawyers and assure their ability to render effective representation to their clients." *Ibid.* (quoting Austern-Rezneck Report 84).

In March 1982, the District of Columbia Court System Study Committee of the District of Columbia Bar issued the Horsky Report, which recommended the identical pay increase. See Senate Committee on Governmental Affairs, Senate Print No. 98-34, 98th Cong., 1st Sess. 69 (1983). Legislation increasing the hourly rate to \$ 50 was then introduced in the District of Columbia Council, but the bill died in committee in 1982 without a hearing.

[\*445] In September 1982, SCTLA officials began a lobbying effort to increase CJA compensation levels. They met with Chief Judge Moultrie of the District of Columbia Superior Court, Herbert Reid, who was counsel to [\*\*\*\*64] the Mayor, and Willy Branton, then Dean of Howard University Law School. Chief [\*787] Judge Moultrie told SCTLA representatives that he thought they deserved more money, but he declined to provide them any public support on the ground that if an increase were implemented, his court might be called upon to decide its legality. See [272 U.S. App. D. C., at 275, 856 F.2d, at 229](#). Reid informed them that the Mayor was sympathetic to their cause but would not support legislation without the urging of Chief Judge Moultrie. Dean Branton advised that the SCTLA should do "something dramatic to attract attention in order to get any relief." *Ibid.*

In March 1983, District of Columbia Council Chairman David Clarke introduced a new, less ambitious bill increasing CJA lawyers' pay to \$ 35 per hour. A wide variety of groups testified in favor of the bill at a hearing held by the city council's Judiciary Committee, reflecting an overwhelming consensus on the need to increase CJA rates.<sup>5</sup> No one testified against the bill, though the Executive Office of the District of Columbia Courts worried about how to fund it. The Court of Appeals concluded that "Mayor Barry and other [\*\*\*\*65] important city officials were sympathetic to the boycotters' goals and may even have been supportive of the boycott itself," [id., at 297, n. 35, 856 F.2d, at 251, n. 35](#), and that certain statements by the Mayor could be interpreted "as encouraging the [Trial Lawyers] to stage a demonstration of their political [\*446] muscle so that a rate increase could more easily be justified to the public." [Id., at 298, n. 35, 856 F.2d, at 252, n. 35](#).

Taken together, these facts strongly suggest that the Trial Lawyers' campaign persuaded the city to increase CJA compensation levels by creating [\*\*\*\*66] a favorable climate in which supportive District officials [\*\*\*881] could vote for a raise without public opposition, even though the lawyers lacked the ability to exert economic pressure. As the court below expressly found, the facts at the very do not exclude the possibility that the SCTLA succeeded due to political rather than economic power. See [id., at 297, 856 F.2d, at 251](#). The majority today permits the FTC to find an expressive boycott to violate the antitrust laws, without even requiring a showing that the participants possessed market power or that their conduct triggered any anticompetitive effects. I believe that the [First Amendment](#) forecloses such an approach.

II

A

The majority concludes that the Trial Lawyers' boycott may be enjoined without any showing of market power because "the government's interest in adhering to a uniform rule may sometimes satisfy the O'Brien test even if making an exception to the rule in a particular case might cause no serious damage." *Ante*, at 430 (citing [United States v. Albertini, 472 U.S. 675 \(1985\)](#)) (emphasis added). The Court draws an analogy between the *per se* rule in

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<sup>5</sup> Groups testifying in favor of the bill included the SCTLA, District of Columbia Bar, D. C. Chapter of the National Lawyers Guild, Public Defender Service, D. C. Chapter of the Washington Psychiatric Society, Family Law Association, National Capitol Area Chapter of the American Civil Liberties Union, and National Center of Institutional Alternatives. See App. in No. 86-1465 (CADC), pp. 800-801.

antitrust [\*\*\*\*67] law and categorical proscriptions against airplane stunt flying and reckless automobile driving. See *ante*, at 433-434. This analogy is flawed.

It is beyond peradventure that *sometimes* no exception need be made to a neutral rule of general applicability not aimed at the content of speech; "the arrest of a newscaster for a traffic violation," for example, does not offend the First Amendment. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986) (O'Connor, J., concurring). Neither do restrictions [\*447] on stunt flying and reckless driving usually raise First Amendment concerns.<sup>6</sup> [\*\*788] But ever since *Schneider v. State*, 308 U.S. 147 (1939), we have held that even when the government seeks to address harms entirely unconnected with the content of speech, it must leave open ample alternative channels for effective communication. See *Rock Against Racism*, 491 U.S., at 802-803; *Frisby*, 487 U.S., at 483-484; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 552 (1981) (Stevens, [\*\*\*\*68] J., dissenting in part); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981). Although *sometimes* such content-neutral regulations with incidental effects on speech leave open sufficient room for effective communication, application of the *per se* rule to expressive boycotts does not. The role of boycotts in political speech is too central, and the effective alternative [\*\*\*882] avenues open to the Trial Lawyers were too few, to permit the FTC to invoke the *per se* rule in this case.

[\*\*\*\*69] Expressive boycotts have been a principal means of political communication since the birth of the Republic. As the Court of Appeals recognized, "boycotts have historically been used as a dramatic means of communicating anger or disapproval and of mobilizing sympathy for the boycotters' cause." *272 U.S. App. D. C., at 294, 856 F.2d, at 248*. From the colonists' protest of the Stamp and Townsend Acts to the Montgomery bus boycott and the National Organization for Women's campaign to encourage ratification of the Equal Rights Amendment, boycotts have played a central role in our Nation's political discourse. In recent years there have [\*448] been boycotts of supermarkets, meat, grapes, iced tea in cans, soft drinks, lettuce, chocolate, tuna, plastic wrap, textiles, slacks, animal skins and furs, and products of Mexico, Japan, South Africa, and the Soviet Union. See *Missouri v. National Organization for Women, Inc.*, 620 F.2d 1301, 1304, n. 5 (CA8), cert. denied, 449 U.S. 842 (1980); Note, 80 Colum. L. Rev. 1317, 1318, 1334 (1980). Like soapbox oratory in the streets and parks, political boycotts are a traditional [\*\*\*\*70] means of "communicating thoughts between citizens" and "discussing public questions." *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.). Any restrictions on such boycotts must be scrutinized with special care in light of their historic importance as a mode of expression. Cf. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983).

The Court observes that all boycotts have "an expressive component" in the sense that participants must communicate their plans among themselves and to their target. *Ante*, at 431. The Court reasons that this expressive feature alone does not render boycotts immune from scrutiny under the *per se* rule. Otherwise, the rule could never be applied to any boycotts or to most price-fixing schemes. On this point I concur with the majority. But while some boycotts may not present First Amendment concerns, when a particular boycott appears to operate on a political rather than economic level, I believe that it cannot be condemned under the *per se* rule.<sup>7</sup> The Court disagrees and maintains that communication [\*449] [\*\*789] [\*\*\*\*71] of ideas to the public is a function not of a boycott itself but rather of media coverage, interviews, and other activities ancillary to the boycott and not prohibited by the antitrust laws. See *ante*, at 426. The Court also notes that other avenues of speech are open, because

<sup>6</sup> Even the criminal law, however, provides procedural safeguards to ensure that laws are not applied in an overbroad fashion to punish activity protected by the First Amendment. The defendant in a criminal trial is always able to raise the defense that the law is unconstitutional as applied to him. See, e. g., *Texas v. Johnson*, 491 U.S. 397 (1989). Application of the *per se* rule in the instant case denies the Trial Lawyers even this opportunity.

<sup>7</sup> If a boycott uses economic power in an unlawful way to send a message, it cannot claim First Amendment protection from the antitrust laws, any more than a terrorist could use an act of violence to express his political views and then assert immunity from criminal prosecution. Thus, if a cartel in a regulated industry inflicts economic injury on consumers by raising prices in order to communicate with the government, it still would be subject to the *per se* rule. The instant case is different: there is a genuine question whether the SCTLA boycott involved *any* economic coercion at all. That is why a showing of market power is necessary before the boycott can be condemned as an unfair method of competition.

"publicity may be generated by any other activity that is sufficiently newsworthy." *Ante*, at [\*\*\*883] 431. These views are flawed.

[\*\*\*\*72] First, we have already recognized that an expressive boycott necessarily involves "constitutionally protected activity." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982). That case, in which we held that a civil rights boycott was political expression, forecloses the Court's approach today. In *Claiborne Hardware*, Justice Stevens observed that "the established elements of speech, assembly, association, and petition, 'though not identical, are inseparable'" when combined in an expressive boycott. *Ibid.* (citation omitted). I am surprised that he now finds that the Trial Lawyers' boycott was not protected speech. In this case, as in *Claiborne Hardware*, "through the exercise of their *First Amendment* rights, petitioners sought to bring about political, social, and economic change." *Ibid.* The Court contends that the SCTLA's motivation differed from that of the boycotters in *Claiborne Hardware*, see *ante*, at 426-427, because the former sought to supplement its members' own salaries rather than to remedy racial injustice. Even if true, the different *purposes* of the speech can hardly render the Trial Lawyers' boycott any less [\*\*\*\*73] expressive.

Next, although the Court is correct that the media coverage of the boycott was substantial,<sup>8</sup> see *ante*, at 414, this [\*450] does not support the majority's argument that the boycott itself was not expressive. Indeed, that the SCTLA strove so mightily to communicate with the public and the government is an indication that it relied more on its ability to win public sympathy and persuade government officials politically than on its power to coerce the city economically. But media coverage is not the only, or even the principal, reason why the boycott was entitled to *First Amendment* protection. The refusal of the Trial Lawyers to accept appointments by itself communicated a powerful idea: CJA compensation rates had deteriorated so much, relatively speaking, that the lawyers were willing to forgo their livelihoods rather than return to work.

[\*\*\*\*74] By sacrificing income that they actually desired, and thus inflicting hardship on themselves as well as on the city, the lawyers demonstrated the intensity of their feelings and the depth of their commitment. The passive nonviolence of King and Gandhi are proof that the resolute [\*\*\*884] acceptance of pain [\*790] may communicate dedication and righteousness more eloquently than mere words ever could. A boycott, like a hunger strike, conveys an emotional message that is absent in a letter to the editor, a conversation with the mayor, or even a protest march. Cf. *Cohen v. California*, 403 U.S. 15, 26 (1971) (*First Amendment* protects "not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well"). In this respect, an expressive [\*451] boycott is a special form of political communication. Dean Branton's advice to the Trial Lawyers -- that they should do "something dramatic to attract attention" -- was sage indeed.

Another reason why expressive boycotts are irreplaceable as a means of communication is that they are essential to the "poorly financed causes of little people." *Martin v. Struthers*, 319 U.S. 141, 146 (1943). [\*\*\*\*75] It is no accident that boycotts have been used by the American colonists to throw off the British yoke and by the oppressed to assert their civil rights. See *Claiborne Hardware, supra*. Such groups cannot use established organizational techniques to advance their political interests, and boycotts are often the only effective route available to them.

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<sup>8</sup>The lawyers actively courted press coverage of their strike. They set up "picket lines," distributed press kits, and granted interviews; the media, both local and national, responded. No fewer than 19 newspaper articles regarding the boycott appeared in the Washington Post, Washington Times, USA Today, and New York Times. The Washington Post's editorial page endorsed the boycott, opining that "it is simply unfair that these fees have remained unchanged during a period when median income in the area has risen over 180 percent." Washington Post, Sept. 8, 1983, p. A20, col. 1. The New York Times reported that "the unusual thing about the lawyer's . . . job action is that almost no one disagrees with their argument." N. Y. Times, Sept. 1, 1983, p. B10, col. 3. United States District Judge Harold H. Greene wrote that the Trial Lawyers "should receive the modest increase they have requested." Washington Post, Sept. 12, 1983, p. A13, col. 2. Even the Economist of London carried a story on the boycott. Sept. 17, 1983, p. 25. Nor was coverage limited to the print media. Local television and radio stations aired numerous reports of the boycott, and an account of the Trial Lawyers' plight appeared on the CBS Morning News. See App. in No. 86-1465 (CADC), pp. 921, 923, 925, 937, 949.

Underlying the majority opinion are apprehensions that the Trial Lawyers' boycott was really no different from any other, and that requiring the FTC to apply a rule-of-reason analysis in this case will lead to the demise of the *per se* rule in the boycott area. I do not share the majority's fears. The boycott before us today is readily distinguishable from those with which the antitrust laws are concerned, on the very ground suggested by the majority: the Trial Lawyers intended to and in fact did "communicate with third parties to enlist public support for their objectives." *Ante*, at 431. As we have seen, in all likelihood the boycott succeeded not due to any market power wielded by the lawyers but rather because they were able to persuade the District government through political means. Other boycotts [\*\*\*\*76] may involve no expressive features and instead operate solely on an economic level. Very few economically coercive boycotts seek notoriety both because they seek to escape detection and because they have no wider audience beyond the participants and the target.

Furthermore, as the Court of Appeals noted, there may be significant differences between boycotts aimed at the government and those aimed at private parties. See [272 U.S. App. D. C., at 296, \[\\*452\] 856 F.2d, at 250](#). The government has options open to it that private parties do not; in this suit, for example, the boycott was aimed at a legislative body with the power to terminate it at any time by requiring all members of the District Bar to represent defendants *pro bono*. If a boycott against the government achieves its goal, it likely owes its success to political rather than market power.

The Court's concern for the vitality of the *per se* rule, moreover, is misplaced, in light of the fact that we have been willing to apply rule-of-reason analysis in a growing number of group-boycott cases. See, e. g., [Indiana Federation of Dentists, 476 U.S., at 458-459](#); [\*\*\*885] [Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 293-298 \(1985\)](#); [\*\*\*77] [National Collegiate Athletic Assn., 468 U.S., at 101; Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 9-10 \(1979\)](#) (criticizing application of *per se* rule because "literalness is overly simplistic and often overbroad").<sup>9</sup> We have recognized that "there is [\*453] often no bright [\*\*791] line separating *per se* from Rule of Reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct." [National Collegiate Athletic Assn., supra, at 104, n. 26](#).

[\*\*\*\*78] In short, the conclusion that *per se* analysis is inappropriate in this boycott case would not preclude its application in many others, nor would it create insurmountable difficulties for antitrust enforcement. The plainly expressive nature of the Trial Lawyers' campaign distinguishes it from boycotts that are the intended subjects of the antitrust laws.

I respectfully dissent.

Justice Blackmun, concurring in part and dissenting in part.

Like Justice Brennan, I, too, join Parts I, II, III, and IV of the Court's opinion. But, while I agree with the reasoning of Justice Brennan's dissent, I write separately to express my doubt whether a remand for findings of fact concerning the market power of the Superior Court Trial Lawyers Association (SCTLA or Trial Lawyers) would be warranted in the unique circumstances of this litigation. As Justice Brennan notes, the Trial Lawyers' boycott was aimed at the

<sup>9</sup> Although "group boycotts" often are listed among the types of activity meriting *per se* condemnation, see, e. g., [Silver v. New York Stock Exchange, 373 U.S. 341, 348 \(1963\)](#); [White Motor Co. v. United States, 372 U.S. 253, 259-260 \(1963\)](#); [Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 \(1959\)](#); [Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 \(1958\)](#); [Associated Press v. United States, 326 U.S. 1, 12 \(1945\)](#); [Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 465-468 \(1941\)](#), we have recognized that boycotts "are not a unitary phenomenon." [St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 543 \(1978\)](#). In fact, "there is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine." [Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 294 \(1985\)](#) (quoting L. Sullivan, Law of Antitrust 229-230 (1977)). We have observed that "the category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." [FTC v. Indiana Federation of Dentists, 476 U.S. 447, 458 \(1986\)](#). These considerations provide additional reason to analyze the instant case with great care, because the Trial Lawyers' boycott is certainly *sui generis*.

District's courts and legislature, governmental bodies that had the power to terminate the boycott at any time by requiring any or all members of the District Bar -- including the members of SCTLA -- to represent indigent defendants *pro bono*. Attorneys are not merely participants [\*\*\*\*79] in a competitive market for legal services; they are officers of the court. Their duty to serve the public by representing indigent defendants is not only a matter [\*\*\*886] of conscience, but is also enforceable by the government's power to order such representation, either as a condition of practicing law in the District or on pain of contempt. See [Powell v. Alabama, 287 U.S. 45, 73 \(1932\)](#) ("Attorneys are officers of the court, and are bound to render service when required" by court appointment); see also [United States v. Accetturo, 842 F.2d 1408, 1412-1413 \[\\*454\] \(CA3 1988\)](#); [Waters v. Kemp, 845 F.2d 260, 263 \(CA11 1988\)](#).\*

[\*\*\*\*80] The Trial Lawyers' boycott thus was a dramatic gesture not fortified by any real economic power. They *could not* have coerced the District to meet their demands by brute economic force, *i. e.*, by constricting [\*\*792] the supply of legal services to drive up the price. Instead, the Trial Lawyers' boycott put the government in a position where it had to make a political choice between exercising its power to break the boycott or agreeing to a rate increase. The factors relevant to this choice were political, not economic: that forcing the lawyers to stop the boycott would have been unpopular, because, as it turned out, public opinion supported the boycott; and that the District officials themselves may not have genuinely opposed the rate increase, and may have welcomed the appearance of a politically expedient "emergency."

I believe that, in this unique market where the government buys services that it could readily compel the sellers to provide, the Trial Lawyers lacked any market power and their boycott could have succeeded only through political persuasion. I therefore would affirm the judgment below insofar as it invokes the [United States v. O'Brien, 391 U.S. 367 \(1968\)](#), [\*\*\*\*81] analysis to preclude application of the *per se* rule to the Trial Lawyers' boycott, but reverse as to the remand to the FTC for a determination of market power.

## References

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[7 Am Jur 2d, Attorneys at Law 243, 244; 16A Am Jur 2d, Constitutional Law 510; 54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 30-32, 45, 46, 49, 80, 82, 108; 55 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 778](#)

24 Am Jur Trials 1, Defending Antitrust Lawsuits

USCS, [Constitution, Amendment 1; 15 USCS 1, 45](#)

US L Ed Digest, Constitutional Law 953; Restraints of Trade, Monopolies, and Unfair Trade Practices 36, 49

Index to Annotations, Attorney or Assistance of Attorney; Attorneys' Fees; Boycotts; Freedom of Speech and Press; Noerr-Pennington Doctrine; Restraints of Trade and Monopolies

Annotation References:

Licensing and regulation of attorneys as restricted by rights of free speech, expression ,and association under [First Amendment. 56 L Ed 2d 841.](#)

Minimum fee schedules for attorneys as constituting violation of Sherman [\*\*\*\*82] Act ([15 USCS 1 et seq.](#)). 44 L Ed 2d 818.

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\* This Court's recent decision in [Mallard v. United States District Court for Southern Dist. of Iowa, 490 U.S. 296 \(1989\)](#), is not to the contrary. In that case, the Court held that a particular federal statute, [28 U.S.C. § 1915\(d\)](#), authorizing the District Court to "request" that an attorney represent an indigent litigant, does not give the court power to require an unwilling attorney to serve. The Court expressed no opinion on "whether the federal courts possess inherent authority to require lawyers to serve." [490 U.S., at 310](#). Indeed, by way of background, the Court discussed numerous state and federal statutes that *do* empower the courts to compel attorneys to serve. [Id., at 302-308.](#)

493 U.S. 411, \*454; 110 S. Ct. 768, \*\*792; 107 L. Ed. 2d 851, \*\*\*886; 1990 U.S. LEXIS 638, \*\*\*\*82

"Sham" exception to application of Noerr-Pennington doctrine, exempting from federal antitrust laws joint efforts to influence governmental action. 71 ALR Fed 723.

"Learned profession" exemption in federal antitrust laws. 39 ALR Fed 774.

Application of doctrine exempting from federal antitrust laws joint efforts to influence legislative or executive action. 17 ALR Fed 645.

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## Tafflin v. Levitt

Supreme Court of the United States

November 27, 1989, Argued ; January 22, 1990, Decided

No. 88-1650

**Reporter**

493 U.S. 455 \*; 110 S. Ct. 792 \*\*; 107 L. Ed. 2d 887 \*\*\*; 1990 U.S. LEXIS 568 \*\*\*\*; 58 U.S.L.W. 3468; 58 U.S.L.W. 4157; Fed. Sec. L. Rep. (CCH) P94,880

TAFFLIN et al. v. LEVITT et al.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

**Disposition:** [865 F.2d 595](#), affirmed.

## Core Terms

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state court, concurrent jurisdiction, federal court, incompatibility, legislative history, federal interest, state-court, cases, Clayton Act, criminal statute, unmistakable, cause of action, state law, interpretations, offenses, exclusive federal jurisdiction, exclusive jurisdiction, federal criminal law, concurrent, borrow, dictum, district court, courts, suits, racketeering activity, adjudicate, savings

## LexisNexis® Headnotes

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Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Constitutional Law > Supremacy Clause > General Overview

Governments > Courts > Authority to Adjudicate

### **HN1** **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Under the federal system, the states possess sovereignty concurrent with that of the federal government, subject only to limitations imposed by the [Supremacy Clause](#). Under this system of dual sovereignty, state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Concurrent Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

493 U.S. 455, \*455; 110 S. Ct. 792, \*\*792; 107 L. Ed. 2d 887, \*\*\*887; 1990 U.S. LEXIS 568, \*\*\*\*1

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

## **HN2** [down] **Jurisdiction Over Actions, Concurrent Jurisdiction**

In considering the propriety of state-court jurisdiction over any particular federal claim, the court begins with the presumption that state courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests.

Securities Law > RICO Actions > General Overview

## **HN3** [down] **Securities Law, RICO Actions**

18 U.S.C.S. § 1964(c) provides that any person injured in his business or property by reason of a violation of § 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Concurrent Jurisdiction

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

## **HN4** [down] **Jurisdiction Over Actions, Concurrent Jurisdiction**

The mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

## **HN5** [down] **Racketeer Influenced & Corrupt Organizations, Claims**

The factors indicating clear incompatibility with federal interests include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

493 U.S. 455, \*455; 110 S. Ct. 792, \*\*792; 107 L. Ed. 2d 887, \*\*\*887; 1990 U.S. LEXIS 568, \*\*\*\*1

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

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

## **HN6** [blue icon] **Racketeer Influenced & Corrupt Organizations, Claims**

There is no "clear incompatibility" between state court jurisdiction over civil Racketeer Influenced and Corrupt Organizations Act (RICO) actions and federal interests. As a preliminary matter, concurrent jurisdiction over [18 U.S.C.S. § 1964\(c\)](#) suits is clearly not incompatible with [18 U.S.C.S. § 3231](#) itself, for civil RICO claims are not "offenses against the laws of the United States," [18 U.S.C.S. § 3231](#), and do not result in the imposition of criminal sanctions -- uniform or otherwise.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Concurrent Jurisdiction

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

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

## **HN7** [blue icon] **Racketeer Influenced & Corrupt Organizations, Claims**

State courts have concurrent jurisdiction to consider civil claims arising under the Racketeer Influenced and Corrupt Organizations Act. Nothing in the language, structure, legislative history, or underlying policies of RICO suggests that Congress intended otherwise.

## **Lawyers' Edition Display**

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### **Decision**

State courts held to have concurrent jurisdiction to hear civil claims under Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USCS 1961-1968).

### **Summary**

After the failure of a Maryland savings and loan association, a deposit insurance fund corporation was appointed as receiver of the association and brought suit in the Circuit Court for Baltimore City against various parties, including the former officers and directors of the association. Also, class actions by depositors were brought against the association and its principals in the Circuit Court. In addition, holders of unpaid certificates of deposit issued by the association brought suit against the association in United States District Court and alleged various state-law causes of action, as well as civil claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USCS 1961-1968) and under federal securities legislation. The District Court, granting the defendants' motion to dismiss, held that (1) the plaintiffs had failed to state a claim under federal securities legislation, and (2) because state courts have concurrent jurisdiction over civil RICO claims, federal abstention was appropriate for the other causes of action, since they had been raised in the pending litigation in the Circuit Court. After this decision by the District

Court, the plaintiffs filed a class action against the defendants in the Circuit Court and alleged RICO and common-law causes of action. The United States Court of Appeals for the Fourth Circuit, affirming the District Court's decision, expressed approval of the District Court's abstention from deciding the plaintiffs' RICO claims ([865 F2d 595](#)).

On certiorari, the United States Supreme Court affirmed. In an opinion by O'Connor, J., expressing the unanimous view of the court, it was held that state courts have concurrent jurisdiction to hear civil RICO claims, because (1) the language of RICO did not divest state courts of such jurisdiction, (2) a review of RICO's legislative history revealed no evidence that Congress even considered the question of concurrent state court jurisdiction over RICO claims, much less any suggestion that Congress affirmatively intended to confer exclusive jurisdiction over such claims on the federal courts, (3) the fact that Congress modeled RICO's remedial provision ([18 USCS 1964\(c\)](#)) after 4 of the Clayton Act ([15 USCS 15\(a\)](#)), which has been interpreted to confer exclusive jurisdiction on the federal courts, does not mean that Congress intended, by implication, to grant exclusive federal jurisdiction over claims arising under 1964(c), and (4) there is no clear incompatibility between state court jurisdiction over civil RICO actions and federal interests.

White, J., concurring, expressed the view that, although there was a possibility that state courts would disrupt the uniform construction of RICO's criminal provisions by launching new interpretations of certain elements of RICO when hearing civil RICO suits, this possibility was not enough to require exclusive federal jurisdiction of civil RICO claims.

Scalia, J., joined by Kennedy, J., concurring, expressed the view that (1) assuming that state jurisdiction can be excluded by implication, what is required is implication in the text of a statute, and not merely an "unmistakable" implication from legislative history, and (2) preclusion of state jurisdiction can perhaps be established where (a) a statute expressly mentions only federal courts, and (b) state court jurisdiction would plainly disrupt the statutory scheme, but (3) there is no foundation for the broader assertion that state court jurisdiction may be excluded when systemic federal interests make such jurisdiction undesirable.

## Headnotes

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COURTS §711 > concurrent state and federal jurisdiction -- civil RICO claims -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D] [LEdHN\[1E\]](#) [1E] [LEdHN\[1F\]](#) [1F] [LEdHN\[1G\]](#) [1G] [LEdHN\[1H\]](#) [1H]

State courts have concurrent jurisdiction to hear civil claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USCS 1961-1968); state courts have not been divested of jurisdiction to hear such claims, because (1) the grant of federal jurisdiction in [18 USCS 1964\(c\)](#), which provides that any person asserting a civil RICO claim "may" sue therefor in any appropriate United States District Court, is permissive and not mandatory, (2) a review of the legislative history reveals no evidence that Congress even considered the question of concurrent state court jurisdiction over RICO claims, much less any suggestion that Congress affirmatively intended to confer exclusive jurisdiction over such claims on the federal courts, (3) the fact that Congress modeled 1964(c) after 4 of the Clayton Act ([15 USCS 15\(a\)](#)), which has been interpreted to confer exclusive jurisdiction on the federal courts, does not mean that Congress intended, by implication, to grant exclusive federal jurisdiction over claims arising under 1964(c), and (4) there is no clear incompatibility between state court jurisdiction over civil RICO actions and federal interests, given that (a) such jurisdiction is not incompatible with [18 USCS 3231](#), which provides for exclusive federal court jurisdiction of "offenses against the laws of the United States," (b) state court adjudication of civil RICO actions will, in practice, have at most a negligible effect on the uniform interpretation and application of federal criminal law, and state courts are able to handle the complexities of such civil actions, (c) the fact that certain of RICO's procedural provisions are applicable only in federal courts does not by itself suffice to create a clear incompatibility with federal interests, and (d) state court jurisdiction will advance rather than

493 U.S. 455, \*455; 110 S. Ct. 792, \*\*792; 107 L. Ed. 2d 887, \*\*\*887; 1990 U.S. LEXIS 568, \*\*\*\*1

jeopardize federal policies underlying RICO, since permitting state courts to entertain federal causes of action facilitates the enforcement of federal rights.

STATES, TERRITORIES, AND POSSESSIONS §5 > sovereignty -- supremacy clause -- > Headnote:

[LEdHN\[2\]](#) [2]

Under the federal system, the states possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the [\*Federal Constitution's supremacy clause\*](#) (Art VI, cl 2).

COURTS §711 > concurrent state and federal jurisdiction -- federal questions -- > Headnote:

[LEdHN\[3A\]](#) [3A] [LEdHN\[3B\]](#) [3B] [LEdHN\[3C\]](#) [3C] [LEdHN\[3D\]](#) [3D]

If exclusive federal court jurisdiction over cases arising under federal law is neither express nor implied, the state courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it; in considering the propriety of state court jurisdiction over any particular federal claim, the United States Supreme Court begins with a presumption that state courts enjoy concurrent jurisdiction; however, the presumption can be rebutted by (1) an explicit statutory directive, (2) unmistakable implication from legislative history, or (3) a clear incompatibility between state court jurisdiction and federal interests; the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action; for purposes of rebutting the presumption of concurrent jurisdiction, the question is not whether any intent at all may be divined from legislative silence on the issue, but whether Congress in its deliberations may be said to have affirmatively or unmistakably intended jurisdiction to be exclusively federal.

STATUTES §152 > construction -- Congress' failure to consider issue -- > Headnote:

[LEdHN\[4\]](#) [4]

The United States Supreme Court is not at liberty to speculate as to whether Congress would have granted federal courts exclusive jurisdiction over civil claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USCS 1961-1968), even if the court could reliably discern what Congress' intent might have been had it considered the question of jurisdiction, where Congress has not considered the question.

STATUTES §134 > construction -- consideration of similiar worded provisions -- RICO -- Clayton Act -- > Headnote:

[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B] [LEdHN\[5C\]](#) [5C]

To whatever extent an analogy between the remedial provision of the Racketeer Influenced and Corrupt Organizations Act (RICO) ([18 USCS 1964\(c\)](#)) and the provision of the Clayton Act after which it was modeled ([15 USCS 15\(a\)](#)) may be relevant to the Supreme Court's interpretation of RICO generally, such an analogy has no place in an inquiry into the jurisdiction of state courts over civil RICO claims, given the lack of any indication in RICO's legislative history that Congress either considered or assumed that the importing of remedial language from the Clayton Act into RICO had any jurisdictional implications.

STATUTES §134 > construction of borrowed language -- > Headnote:

[LEdHN\[6\]](#) [6]

The mere borrowing by Congress of statutory language does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language.

STATUTES §129 > construction -- consideration of other laws -- > Headnote:

[LEdHN\[7\]](#) [7]

In determining whether federal court jurisdiction over claims under a federal statute is exclusive or concurrent, the United States Supreme Court is not free to add content to the statute via analogies to other statutes unless the legislature has specifically endorsed such action.

EXTORTION AND BLACKMAIL §1 > RICO -- civil claims -- > Headnote:

[LEdHN\[8\]](#) [8]

Civil claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USCS 1961-1968) are not offenses against the laws of the United States within the meaning of [18 USCS 3231](#)--which provides for exclusive federal court jurisdiction of such offenses--and do not result in the imposition of criminal sanctions.

## Syllabus

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Petitioners, nonresidents of Maryland who are holders of unpaid certificates of deposit issued by a failed Maryland savings and loan association, filed a civil action in the Federal District Court against respondents, former association officers and directors and others, alleging claims under, *inter alia*, the Racketeer Influenced and Corrupt Organizations Act (RICO), [18 U.S.C. §§ 1961-1968](#). The court dismissed the action, concluding, among other things, that federal abstention was appropriate as to the civil RICO claims, which had been raised in pending litigation in state court, since state courts have concurrent jurisdiction over such claims. The Court of Appeals affirmed.

*Held:* State courts have concurrent [\\*\\*\\*\\*2](#) jurisdiction over civil RICO claims. The presumption in favor of such jurisdiction has not been rebutted by any of the factors identified in [Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478](#). Pp. 458-467.

(a) As petitioners concede, there is nothing in RICO's explicit language to suggest that Congress has, by affirmative enactment, divested state courts of civil RICO jurisdiction. To the contrary, [§ 1964\(c\)](#)'s grant of federal jurisdiction over civil RICO claims is plainly permissive and thus does not operate to oust state courts from concurrent jurisdiction. Pp. 460-461.

(b) RICO's legislative history reveals no evidence that Congress even considered the question of concurrent jurisdiction, much less any suggestion that Congress affirmatively intended to confer exclusive jurisdiction over civil RICO claims on the federal courts. Petitioners' argument that, because Congress modeled [§ 1964\(c\)](#) after § 4 of

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the Clayton Act -- which confers exclusive jurisdiction on the federal courts -- it intended, by implication, to grant exclusive federal jurisdiction over § 1964(c) claims is rejected. *Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479, \*\*\*\*3* and *Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143*, are distinguished, since those cases looked to the Clayton Act in interpreting RICO without the benefit of a background juridical presumption of the type presented here. Pp. 461-463.

(c) No "clear incompatibility" exists between state court jurisdiction and federal interests. The interest in uniform interpretation of federal criminal laws, see 18 U.S.C. § 3231, is not inconsistent with such jurisdiction merely because state courts would be required to construe the federal crimes that constitute RICO predicate acts. Section 1964(c) claims are not "offenses against the laws of the United States," § 3231, and do not result in the imposition of criminal sanctions. There is also no significant danger of inconsistent application of federal criminal law, since federal courts would not be bound by state court interpretations of predicate acts, since state courts would be guided by federal court interpretations of federal criminal law, and since any state court judgments misinterpreting federal criminal law would be subject to direct review by this Court. Moreover, state courts [\*\*\*\*4] have the ability to handle the complexities of civil RICO actions. Many cases involve asserted violations of state law, over which state courts presumably have greater expertise, and it would seem anomalous to rule that they are incompetent to adjudicate civil RICO claims when such claims are subject to adjudication by arbitration, see *Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 239*. Further, although the fact that RICO's procedural mechanisms are applicable only in federal court may tend to suggest that Congress intended exclusive federal jurisdiction, it does not by itself suffice to create a "clear incompatibility" with federal interests. And, to the extent that Congress intended RICO to serve broad remedial purposes, concurrent jurisdiction will advance rather than jeopardize federal policies underlying the statute. Pp. 464-467.

**Counsel:** M. Norman Goldberger, argued the cause for petitioners. With him on the briefs were Brian P. Flaherty, Gary L. Leshko, and Lawrence I. Weisman.

Andrew H. Marks, argued the cause for respondents. With him on the brief were J. Joseph Curran, Jr., Attorney General of Maryland, Ralph S. Tyler III, Assistant [\*\*\*\*5] Attorney General, Clifton S. Elgarten, Luther Zeigler, David B. Isbell, William H. Allen, Charles F. C. Ruff, and Mark H. Lynch.

**Judges:** O'CONNOR, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion, *post*, p. 467. SCALIA, J., filed a concurring opinion, in which KENNEDY, J., joined, *post*, p. 469.

**Opinion by:** O'CONNOR

## Opinion

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[\*456] [\*892] [\*\*794] JUSTICE O'CONNOR delivered the opinion of the Court.

*LEdHN[1A]* [↑] [1A]This case requires us to decide whether state courts have concurrent jurisdiction over civil actions brought under the [\*457] Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. 91-452, Title IX, [\*\*\*893] 84 Stat. 941, as amended, 18 U.S.C. §§ 1961-1968.

I

The underlying litigation arises from the failure of Old Court Savings & Loan, Inc. (Old Court), a Maryland savings and loan association, and the attendant collapse of the Maryland Savings-Share Insurance Corp. (MSSIC), a state-chartered nonprofit corporation created to insure accounts in Maryland savings and loan associations that were not federally insured. [\*\*\*\*6] See *Brandenburg v. Seidel, 859 F.2d 1179, 1181-1183 (CA4 1988)* (reviewing history of Maryland's savings and loan crisis). Petitioners are nonresidents of Maryland who hold unpaid certificates of deposit issued by Old Court. Respondents are the former officers and directors of Old Court, the former officers and directors of MSSIC, the law firm of Old Court and MSSIC, the accounting firm of Old Court, and the State of

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Maryland Deposit Insurance Fund Corp., the state-created successor to MSSIC. Petitioners allege various state law causes of action as well as claims under the Securities Exchange Act of 1934 (Exchange Act), 48 Stat. 881, [15 U.S.C. § 78a et seq.](#), and RICO.

The District Court granted respondents' motions to dismiss, concluding that petitioners had failed to state a claim under the Exchange Act and that, because state courts have concurrent jurisdiction over civil RICO claims, federal abstention was appropriate for the other causes of action because they had been raised in pending litigation in state court. The Court of Appeals for the Fourth Circuit affirmed. [865 F.2d 595 \(1989\)](#). The Court of Appeals agreed [\*\*\*\*7] with the District Court that the Old Court certificates of deposit were not "securities" within the meaning of the Exchange Act, see [15 U.S.C. § 78c\(a\)\(10\)](#), and that petitioners' Exchange Act claims were therefore properly dismissed. [865 F.2d, at 598-599](#). The Court of Appeals further held, in reliance on its prior decision in [Brandenburg v. Seidel](#), [[\\*4581 supra](#)], that "a RICO action could be instituted in a state court and that Maryland's 'comprehensive scheme for the rehabilitation and liquidation of insolvent state-chartered savings and loan associations,' [859 F.2d at 1191](#), provided a proper basis for the district court to abstain under the authority of [Burford v. Sun Oil Co.](#), 319 U.S. 315 (1943)." [865 F.2d, at 600](#) (citations omitted).

To resolve a conflict among the federal appellate courts and state supreme courts,<sup>1</sup> we granted certiorari [\*\*\*894] limited to the question whether state courts have concurrent jurisdiction over civil RICO claims. 490 U.S. 1089 (1989). [\*\*795] We hold that they do and accordingly affirm the judgment of the Court [\*\*\*\*8] of Appeals.

[\*\*\*\*9] II

[LEdHN\[2\]\[↑\]](#) [2][LEdHN\[3A\]\[↑\]](#) [3A]We begin with the axiom that, [HN1\[↑\]](#) under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the [Supremacy Clause](#). Under this system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States. See, e.g., [Houston v. Moore](#), 5 Wheat. 1, 25-26 [[\\*4591 \(1820\)](#)]; [Claflin v. Houseman](#), 93 U.S. 130, 136-137 (1876); [Plaquemines Tropical Fruit Co. v. Henderson](#), 170 U.S. 511, 517 (1898); [Charles Dowd Box Co. v. Courtney](#), 368 U.S. 502, 507-508 (1962); [Gulf Offshore Co. v. Mobil Oil Corp.](#), 453 U.S. 473, 477-478 (1981). As we noted in [Claflin](#), "if exclusive jurisdiction be neither express nor implied, the State courts [\*\*\*\*10] have concurrent jurisdiction whenever, by their own constitution, they are competent to take it." [93 U.S. at 136](#); see also [Dowd Box, supra, at 507-508](#) ("We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule"). See generally 1 J. Kent, [Commentaries on American Law](#) \*400; The [Federalist No. 82](#) (A. Hamilton); F. Frankfurter & J. Landis, [The Business of the Supreme Court](#) 5-12 (1927); H. Friendly, [Federal Jurisdiction: A General View](#) 8-11 (1973).

[LEdHN\[3B\]\[↑\]](#) [3B]This deeply rooted presumption in favor of concurrent state court jurisdiction is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim. See, e. g.,

<sup>1</sup> Compare [McCarter v. Mitcham](#), 883 F.2d 196, 201 (CA3 1989) (concurrent jurisdiction); [Brandenburg v. Seidel](#), 859 F.2d 1179, 1193-1195 (CA4 1988) (same); [Lou v. Belzberg](#), 834 F.2d 730, 738-739 (CA9 1987) (same), cert. denied, 485 U.S. 993 (1988); [Simpson Elec. Corp. v. Leucadia, Inc.](#), 72 N. Y. 2d 450, 530 N. E. 2d 860 (1988) (same); [Rice v. Janovich](#), 109 Wash. 2d 48, 742 P. 2d 1230 (1987) (same); [Cianci v. Superior Court](#), 40 Cal. 3d 903, 710 P. 2d 375 (1985) (same); [County of Cook v. MidCon Corp.](#), 773 F.2d 892, 905, n. 4 (CA7 1985) (dictum); [Dubroff v. Dubroff](#), 833 F.2d 557, 562 (CA5 1987) (civil RICO claims can "probably" be brought in state court), with [Chivas Products, Ltd. v. Owen](#), 864 F.2d 1280, 1286 (CA6 1988) (exclusive jurisdiction); [Vander Weyst v. First State Bank of Benson](#), 425 N. W. 2d 803, 812 (Minn.) (expressing "serious reservations" about assuming concurrent RICO jurisdiction), cert. denied, 488 U.S. 943 (1988). See generally Note, [57 Ford. L. Rev. 271, 271, n. 9 \(1988\)](#) (listing federal and state courts in conflict); Note, [73 Cornell L. Rev. 1047, 1047, n. 5 \(1988\)](#) (same); Note, 62 St. John's L. Rev. 301, 303, n. 7 (1988) (same).

Claflin, supra, at 137 ("Congress may, if it see[s] fit, give to the Federal courts exclusive jurisdiction") (citations [\*\*\*\*11] omitted); see also Houston, supra at 25-26. As we stated in *Gulf Offshore*:

**HN2** [↑] "In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility [\*460] between state-court jurisdiction and federal interests." 453 U.S., at 478 (citations omitted).

See also Claflin, supra, at 136 [\*\*\*895] (state courts have concurrent jurisdiction "where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case"). The parties agree that these principles, which have "remained unmodified through the years," Dowd Box, supra, at 508, provide the analytical framework for [\*\*\*\*12] resolving this case.

III

**LEdHN[1B]** [↑] [1B]The precise question presented, therefore, is whether state courts have been divested of jurisdiction to hear civil RICO claims "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." Gulf Offshore, supra, at 478. Because we find none of these factors present with respect to civil claims arising under RICO, we hold that state courts retain their presumptive authority to adjudicate such claims.

**LEdHN[1C]** [↑] [1C]**LEdHN[3C]** [↑] [3C]At the outset, petitioners concede that there is nothing in the language of RICO -- [\*\*796] much less an "explicit statutory directive" -- to suggest that Congress has, by affirmative enactment, divested the state courts of jurisdiction to hear civil RICO claims. The statutory provision authorizing civil RICO claims provides in full:

[\*\*\*\*13] **HN3** [↑] "Any person injured in his business or property by reason of a violation of section 1962 of this chapter *may* sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c) (emphasis added).

This grant of federal jurisdiction is plainly permissive, not mandatory, for "the statute does not state nor even suggest that such jurisdiction shall be exclusive. It provides that suits of the kind described 'may' be brought in the federal district [\*461] courts, not that they must be." Dowd Box, supra, at 506. Indeed, "it is black letter law . . . that **HN4** [↑] the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." Gulf Offshore, supra, at 479 (citing United States v. Bank of New York & Trust Co., 296 U.S. 463, 479 (1936)).

Petitioners thus rely solely on the second and third factors suggested [\*\*\*\*14] in *Gulf Offshore*, arguing that exclusive federal jurisdiction over civil RICO actions is established "by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests," 453 U.S., at 478.

**LEdHN[1D]** [↑] [1D]**LEdHN[4]** [↑] [4]Our review of the legislative history, however, reveals no evidence that Congress even considered the question of concurrent state court jurisdiction over RICO claims, much less any suggestion that Congress affirmatively intended to confer exclusive jurisdiction over such claims on the federal courts. As the Courts of Appeals that have considered the question have concluded, "the legislative history contains no indication that Congress ever expressly considered the question of concurrent jurisdiction; indeed, as [\*\*\*896] the principal draftsman of RICO has remarked, 'no one even thought of the issue.'" Brandenburg, 859 F.2d, at 1193 (quoting Flaherty, Two States Lay Claim to RICO, Nat. L. J., May 7, 1984, p. 10, col. 2); see also [\*\*\*\*15] Lou v. Belzberg, 834 F.2d 730, 736 (CA9 1987) ("The legislative history provides 'no evidence that

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Congress ever expressly considered the question of jurisdiction; indeed, the evidence establishes that its attention was focused solely on whether to provide a private right of action") (citation omitted), cert. denied, 485 U.S. 993 (1988); *Chivas Products Ltd. v. Owen*, 864 F.2d 1280, 1283 (CA6 1988) ("There is no 'smoking gun' legislative history in which RICO sponsors indicated an express intention to commit civil RICO to the federal courts"). Petitioners nonetheless insist that if Congress had considered the issue, it would have granted federal courts exclusive jurisdiction over civil [\*462] RICO claims. This argument, however, is misplaced, for even if we could reliably discern what Congress' intent might have been had it considered the question, we are not at liberty to so speculate; the fact that Congress did not even consider the issue readily disposes of any argument that Congress unmistakably intended to divest state courts of concurrent jurisdiction.

[LEdHN\[1E\]](#) [1E] [\*\*\*\*16] [LEdHN\[5A\]](#) [5A]Sensing this void in the legislative history, petitioners rely, in the alternative, on our decisions in *Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479 (1985), and *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987), in which we noted that Congress modeled § 1964(c) after § 4 of the Clayton Act, [15 U.S.C. § 15\(a\)](#). See *Sedima, supra, at 489*; *Agency Holding, supra, at 151-152*. Petitioners assert that, because we have interpreted § 4 of the Clayton Act to confer exclusive jurisdiction on the federal courts, see, e. g., *General* [\*\*797] *Investment Co. v. Lake Shore & M. S. R. Co.*, 260 U.S. 261, 286-288 (1922), and because Congress may be presumed to have been aware of and incorporated those interpretations when it used similar language in RICO, cf. *Cannon v. University of Chicago*, 441 U.S. 677, 694-699 (1979), Congress intended, by implication, to grant exclusive federal jurisdiction over claims arising under § 1964(c).

[LEdHN\[1F\]](#) [1F] [\*\*\*\*17] [LEdHN\[3D\]](#) [3D] [LEdHN\[5B\]](#) [5B] [LEdHN\[6\]](#) [6]This argument is also flawed. To rebut the presumption of concurrent jurisdiction, the question is not whether any intent at all may be divined from legislative silence on the issue, but whether Congress in its deliberations may be said to have affirmatively or unmistakably intended jurisdiction to be exclusively federal. In the instant case, the lack of any indication in RICO's legislative history that Congress either considered or assumed that the importing of remedial language from the Clayton Act into RICO had any jurisdictional implications is dispositive. The "mere borrowing of statutory language does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language." *Lou, supra, at 737*. Indeed, to the [\*463] extent we impute to Congress knowledge of our Clayton Act precedents, it makes no less sense to impute to Congress knowledge of *Claflin* and [\*\*\*897] *Dowd Box* [\*\*\*\*18], under which Congress, had it sought to confer exclusive jurisdiction over civil RICO claims, would have had every incentive to do so expressly.

[LEdHN\[5C\]](#) [5C] [LEdHN\[7\]](#) [7] *Sedima* and *Agency Holding* are not to the contrary. Although we observed in *Sedima* that "the clearest current in [the legislative] history [of § 1964(c)] is the reliance on the Clayton Act model," [473 U.S., at 489](#), that statement was made in the context of noting the distinction between "private and governmental actions" under the Clayton Act. *Ibid.* We intimated nothing as to whether Congress' reliance on the Clayton Act implied any intention to establish exclusive federal jurisdiction for civil RICO claims, and in *Sedima* itself we rejected any requirement of proving "racketeering injury," noting that to borrow the "antitrust injury" requirement from *antitrust law* would "creat[e] exactly the problems Congress sought to avoid." *Id., at 498-499*. Likewise, in *Agency Holding* we were concerned with "borrowing," in light of [\*\*\*\*19] legislative silence on the issue, an appropriate statute of limitations period from an "analogous" statute. [483 U.S., at 146](#). Under such circumstances, we found it appropriate to borrow the statute of limitations from the Clayton Act. *Id., at 152*. In this case, by contrast, where the issue is whether jurisdiction is exclusive or concurrent, we are not free to add content to a statute via analogies to other statutes unless the legislature has specifically endorsed such action. Under *Gulf Offshore*, legislative silence counsels, if not compels, us to enforce the presumption of concurrent jurisdiction. In short, in both *Sedima* and *Agency Holding* we looked to the Clayton Act in interpreting RICO without the benefit of a background juridical presumption of the type present in this case. Thus, to whatever extent the Clayton Act analogy may be relevant to our interpretation of RICO generally, it has no place in our inquiry into the jurisdiction of state courts.

[\*464] Petitioners finally urge that state court jurisdiction over civil RICO claims would be clearly incompatible with federal interests. We noted in *Gulf Offshore* [\*\*\*\*20] [HN5](#) that factors indicating clear incompatibility "include

the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims." [453 U.S., at 483-484](#) (citation and footnote omitted). Petitioners' primary contention is that concurrent jurisdiction is clearly incompatible with the federal interest in uniform interpretation of federal [\[\\*\\*798\]](#) criminal laws, see [18 U.S.C. § 3231](#),<sup>2</sup> because state courts would be required to construe the federal crimes that constitute predicate acts defined as "racketeering activity," see [18 U.S.C. §§ 1961\(1\)\(B\), \(C\), and \(D\)](#). Petitioners predict that if state courts [\[\\*\\*\\*898\]](#) are permitted to interpret federal criminal statutes, they will create a body of precedent relating to those statutes and that the federal courts will consequently lose control over the orderly and uniform development of federal criminal law.

[\[\\*\\*\\*\\*21\] LEdHN\[1G\]\[↑\]](#) [1G][LEdHN\[8\]\[↑\]](#) [8][HN6\[↑\]](#) We perceive no "clear incompatibility" between state court jurisdiction over civil RICO actions and federal interests. As a preliminary matter, concurrent jurisdiction over [§ 1964\(c\)](#) suits is clearly not incompatible with [§ 3231](#) itself, for civil RICO claims are not "offenses against the laws of the United States," [§ 3231](#), and do not result in the imposition of criminal sanctions -- uniform or otherwise. See [Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 240-241 \(1987\)](#) (civil RICO intended to be primarily remedial rather than punitive).

[LEdHN\[1H\]\[↑\]](#) [1H]More to the point, however, our decision today creates no significant danger of inconsistent application of federal criminal [\[\\*465\]](#) law. Although petitioners' concern with the need for uniformity and consistency of federal criminal law is well taken, see [Ableman v. Booth, 21 How. 506, 517-518 \(1859\)](#); cf. [Messer v. Utah, 333 U.S. 95, 97 \(1948\)](#) [\[\\*\\*\\*\\*22\]](#) (vague criminal statutes may violate the Due Process Clause), federal courts, pursuant to [§ 3231](#), would retain full authority and responsibility for the interpretation and application of federal criminal laws, for they would not be bound by state court interpretations of the federal offenses constituting RICO's predicate acts. State courts adjudicating civil RICO claims will, in addition, be guided by federal court interpretations of the relevant federal criminal statutes, just as federal courts sitting in diversity are guided by state court interpretations of state law, see, e. g., [Commissioner v. Estate of Bosch, 387 U.S. 456, 465 \(1967\)](#). State court judgments misinterpreting federal criminal law would, of course, also be subject to direct review by this Court. Thus, we think that state court adjudication of civil RICO actions will, in practice, have at most a negligible effect on the uniform interpretation and application of federal criminal law, cf. [Pan-American Petroleum Corp. v. Superior Court of Delaware, Newcastle County, 366 U.S. 656, 665-666 \(1961\)](#) (rejecting claim that uniform interpretation of the Natural Gas Act will be jeopardized [\[\\*\\*\\*\\*23\]](#) by concurrent jurisdiction), and will not, in any event, result in any more inconsistency than that which a multimembered, multitiered federal judicial system already creates, cf. [H. J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 235, n. 2 \(1989\)](#) (surveying conflict among federal appellate courts over RICO's "pattern of racketeering activity" requirement).

Moreover, contrary to petitioners' fears, we have full faith in the ability of state courts to handle the complexities of civil RICO actions, particularly since many RICO cases involve asserted violations of state law, such as state fraud claims, over which state courts presumably have greater expertise. See [18 U.S.C. § 1961\(1\)\(A\)](#) (listing state law offenses constituting predicate acts); [Gulf Offshore, supra at 484](#) [\[\\*466\]](#) ("State judges have greater expertise in applying" laws "whose governing rules are borrowed [\[\\*\\*\\*899\]](#) from state law"); see also [Sedima, 473 U.S., at 499](#) (RICO "has become a tool for everyday fraud [\[\\*\\*799\]](#) cases"); BNA, Civil RICO Report, Vol. 2, No. 44, p. 7 (Apr. 14, 1987) (54.9% of all RICO cases after [\[\\*\\*\\*\\*24\]](#) Sedima involved "common law fraud" and another 18% involved

<sup>2</sup>Title [18 U.S.C. § 3231](#) provides in full:

"The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

"Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

either "nonsecurities fraud" or "theft or conversion"). To hold otherwise would not only denigrate the respect accorded coequal sovereigns, but would also ignore our "consistent history of hospitable acceptance of concurrent jurisdiction," *Dowd Box, 368 U.S., at 508*. Indeed, it would seem anomalous to rule that state courts are incompetent to adjudicate civil RICO suits when we have recently found no inconsistency in subjecting civil RICO claims to adjudication by arbitration. See *Shearson/American Express, 482 U.S., at 239* (rejecting argument that "RICO claims are too complex to be subject to arbitration" and that "there is an irreconcilable conflict between arbitration and RICO's underlying purposes").

Petitioners further note, as evidence of incompatibility, that RICO's procedural mechanisms include extended venue and service-of-process provisions that are applicable only in federal court, see *18 U.S.C. § 1965*. We think it sufficient, however, to observe that we have previously found concurrent state court jurisdiction even where federal law provided for [\*\*\*\*25] special procedural mechanisms similar to those found in RICO. See, e. g., *Dowd Box, supra* (finding concurrent jurisdiction over Labor Management Relations Act § 301(a) suits, despite federal enforcement and venue provisions); *Maine v. Thiboutot, 448 U.S. 1, 3, n. 1 (1980)* (finding concurrent jurisdiction over *42 U.S.C. § 1983* suits, despite federal procedural provisions in § 1988); cf. *Hathorn v. Lovorn, 457 U.S. 255, 269 (1982)* (finding concurrent jurisdiction over disputes regarding the applicability of § 5 of the Voting Rights Act of 1965, *42 U.S.C. § 1973c*, despite provision for a three-judge panel). Although congressional specification [\*467] of procedural mechanisms applicable only in federal court may tend to suggest that Congress intended exclusive federal jurisdiction, it does not by itself suffice to create a "clear incompatibility" with federal interests.

Finally, we note that, far from disabling or frustrating federal interests, "permitting state courts to entertain federal causes of action facilitates the enforcement of federal rights." *Gulf Offshore, supra, at 478, n. 4*; [\*\*\*\*26] see also *Dowd Box, supra, at 514* (conflicts deriving from concurrent jurisdiction are "not necessarily unhealthy"). Thus, to the extent that Congress intended RICO to serve broad remedial purposes, see, e. g., Pub. L. 91-452, § 904(a), 84 Stat. 947 (RICO must "be liberally construed to effectuate its remedial purposes"); *Sedima, 473 U.S., at 492, n. 10* ("If Congress' liberal-construction mandate is to be applied anywhere, it is in *§ 1964*, where RICO's remedial purposes are most evident"), concurrent state court jurisdiction over civil RICO claims will advance rather than jeopardize federal policies underlying the statute.

[\*\*\*900] For all of the above reasons, we hold that *HNT*<sup>↑</sup> state courts have concurrent jurisdiction to consider civil claims arising under RICO. Nothing in the language, structure, legislative history, or underlying policies of RICO suggests that Congress intended otherwise. The judgment of the Court of Appeals is accordingly.

*Affirmed.*

**Concur by:** WHITE; SCALIA

## Concur

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JUSTICE WHITE, concurring.

I agree that state courts have concurrent jurisdiction over civil RICO actions and join the opinion and judgment of the Court. [\*\*\*\*27] I add a few words only because this Court has rarely considered contentions that civil actions based on federal criminal statutes must be heard by the federal courts. As the Court observes, *ante*, at 465, the uniform construction of federal criminal statutes is no insignificant matter, particularly because Congress has recognized potential dangers in nonuniform [\*\*800] construction and has confined jurisdiction over [\*468] federal criminal cases to the federal courts. There is, therefore, reason for caution before concluding that state courts have jurisdiction over civil claims related to federal criminal statutes and for assessing in each case the danger to federal interests presented by potential inconsistent constructions of federal criminal statutes.

RICO is an unusual federal criminal statute. It borrows heavily from state law; racketeering activity is defined in terms of numerous offenses chargeable under state law, *18 U.S.C. § 1961(1)(A)*, as well as various federal

offenses. To the extent that there is any danger under RICO of nonuniform construction of criminal statutes, it is quite likely that the damage will result from federal [\*\*\*\*28] misunderstanding of the content of state law -- a problem, to be sure, but not one to be solved by exclusive federal jurisdiction. Many of the federal offenses named as racketeering activity under RICO have close, though perhaps not exact, state-law analogues, cf. *Durland v. United States*, 161 U.S. 306, 312 (1896), which construed the federal mail fraud statute, and it is unlikely that the state courts will be incompetent to construe those federal statutes. Nor does incorrect state-court construction of those statutes present as significant a threat to federal interests as that posed by improper interpretation of the federal antitrust laws, which could have a disastrous effect on interstate commerce, a particular concern of the Federal Government. Racketeering activity as defined by RICO includes other federal offenses without state-law analogues, but given the history as written until now of civil RICO litigation, I doubt that state-court construction of these offenses will be greatly disruptive of important federal interests.

There is also the possibility that the state courts will disrupt the uniform construction of criminal RICO by launching new interpretations [\*\*\*\*29] of the "pattern" and "enterprise" elements of that offense when hearing civil RICO suits. This possibility, though not insubstantial, cf. *H. J. Inc. v. Northwestern* [\*469] *Bell Telephone Co.*, 492 U.S. 229 (1989), is not enough to require exclusive federal jurisdiction of civil RICO claims. Even [\*\*\*901] though varying interpretations of the "pattern" and "enterprise" elements of RICO may drastically change the consequences that flow from particular acts, these variations cannot make an act criminal in one court system but blameless in another and therefore do not implicate the core due process concerns identified by the Court, *ante*, at 464, as underlying the need for uniform construction of criminal statutes. Moreover, we have the authority to reduce the risk of, and to set aside, incorrect interpretations of these elements of RICO liability.

JUSTICE SACLIA, with whom JUSTICE KENNEDY joins, concurring.

I join the opinion of the Court, addressing the issues before us on the basis argued by the parties, which has included acceptance of the dictum in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981), that "the [\*\*\*\*30] presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Ante*, at 459-460. Such dicta, when repeatedly used as the point of departure for analysis, have a regrettable tendency to acquire the practical status of legal rules. I write separately, before this one has become too entrenched, to note my view that in one respect it is not a correct statement of the law, and in another respect it may not be.

State courts have jurisdiction over federal causes of action not because it is "conferred" upon them by the Congress; nor even because their inherent powers permit them to entertain transitory causes of action arising under the laws of foreign sovereigns, see, e. g., *McKenna v. Fisk*, 1 How. 241, 247-249 [\*\*\*801] (1843); but because "the laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two [\*470] together form one system of jurisprudence, which constitutes the law of the [\*\*\*\*31] land for the State; and the courts of the two jurisdictions are not foreign to each other . . ." *Claflin v. Houseman*, 93 U.S. 130, 136-137 (1876); see also *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211, 221-223 (1916).

It therefore takes an affirmative act of power under the *Supremacy Clause* to oust the States of jurisdiction -- an exercise of what one of our earliest cases referred to as "the power of congress to withdraw" federal claims from state-court jurisdiction. *Houston v. Moore*, 5 Wheat. 1, 26 (1820) (emphasis added). See also *Bombolis, supra, at 221* (concurrent jurisdiction exists "unless excepted by express constitutional limitation or by valid legislation"); *Missouri ex rel. St. Louis, B. & M. R. Co. v. Taylor*, 266 U.S. 200, 208 (1924) ("As [Congress] made no provision concerning the remedy, the federal and the state courts have concurrent jurisdiction").

As an original proposition, it would be eminently arguable that depriving state courts of their sovereign authority to adjudicate the law of the land must be done, if not with the utmost clarity, [\*\*\*\*32] cf. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 [\*\*\*902] (1985) (state sovereign immunity can be eliminated only by "clear statement"), at least expressly. That was the view of Alexander Hamilton:

"When . . . we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited." The Federalist No. 82, p. 132 (E. Bourne ed. 1947).

See also [Galveston, H. & S. A. R. Co. v. Wallace, 223 U.S. 481, 490 \(1912\)](#) ("Jurisdiction is not defeated by implication"). Although as early as *Claflin*, see [93 U.S., at 137](#), [\*471] and as late as *Gulf Offshore*, we have said that the exclusion of concurrent state jurisdiction could be achieved by implication, the only cases in which to my knowledge we have acted upon such a principle are those relating to the Sherman Act and the Clayton Act -- where the full extent of our analysis was the less than [\*\*\*\*33] compelling statement that provisions giving the right to sue in United States District Court "show that [the right] is to be exercised *only* in a 'court of the United States.'" [General Investment Co. v. Lake Shore & Michigan Southern R. Co., 260 U.S. 261, 287 \(1922\)](#) (emphasis added). See also [Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U.S. 436, 440 \(1920\)](#) (dictum); [Freeman v. Bee Machine Co., 319 U.S. 448, 451, n. 6 \(1943\)](#) (dictum); [Hathorn v. Lovorn, 457 U.S. 255, 267, n. 18 \(1982\)](#) (dictum). In the standard fields of exclusive federal jurisdiction, the governing statutes specifically recite that suit may be brought "only" in federal court, Investment Company Act of 1940, as amended, 84 Stat. 1429, [15 U.S.C. § 80a-35\(b\)\(5\)](#); that the jurisdiction of the federal courts shall be "exclusive," Securities Exchange Act of 1934, as amended, 48 Stat. 902, [15 U.S.C. § 78aa](#); Natural Gas Act of 1938, 52 Stat. 833, [15 U.S.C. § 717u](#); Employee Retirement Income Security Act of 1974, 88 Stat. 892, [29 U.S.C. § 1132](#) [\*472] (\*\*\*\*34) (e)(1); or indeed even that the jurisdiction of the federal courts shall be "exclusive of the courts of the States," [18 U.S.C. § 3231](#) (criminal cases); [28 U.S.C. §§ 1333](#) (admiralty, maritime, and prize cases), 1334 (bankruptcy cases), 1338 (patent, plant variety protection, and copyright cases), 1351 (actions against consuls or vice consuls of foreign states), 1355 (actions [\*802] for recovery or enforcement of fine, penalty, or forfeiture incurred under Act of Congress), 1356 (seizures on land or water not within admiralty and maritime jurisdiction).

Assuming, however, that exclusion by implication is possible, surely what is required is implication in the text of the statute, and not merely, as the second part of the *Gulf Offshore* dictum would permit, through "unmistakable implication" [\*472] from legislative history." [453 U.S., at 478](#). Although [Charles Dowd Box Co. v. Courtney, 368 U.S. 502 \(1962\)](#), after concluding [\*\*\*\*903] that the statute "does not state nor even suggest that [federal] jurisdiction shall be exclusive," [id., at 506](#), proceeded quite unnecessarily [\*\*\*\*35] to examine the legislative history, it did so to reinforce rather than contradict the conclusion it had already reached. We have never found state jurisdiction excluded by "unmistakable implication" from legislative history. It is perhaps harmless enough to say that it can be, since one can hardly imagine an "implication from legislative history" that is "unmistakable" -- *i. e.*, that demonstrates agreement to a proposition by a majority of both Houses and the President -- unless the proposition is embodied in statutory text to which those parties have given assent. But harmless or not, it is simply wrong in principle to assert that Congress can effect this affirmative legislative act by simply talking about it with unmistakable clarity. What is needed to oust the States of jurisdiction is congressional *action* (*i. e.*, a provision of law), not merely congressional discussion.

It is perhaps also true that implied preclusion can be established by the fact that a statute expressly mentions only federal courts, plus the fact that state-court jurisdiction would plainly disrupt the statutory scheme. That is conceivably what was meant by the third part of the *Gulf Offshore* [\*\*\*\*36] dictum, "clear incompatibility between state-court jurisdiction and federal interests." [453 U.S., at 478](#). If the phrase is interpreted more broadly than that, however -- if it is taken to assert some power on the part of this Court to exclude state-court jurisdiction when systemic federal interests make it undesirable -- it has absolutely no foundation in our precedent.

*Gulf Offshore* cited three cases to support its "incompatibility" formulation. The first was [Dowd Box, supra, at 507-508](#), which contains nothing to support any "incompatibility" principle, except a quotation from the second case *Gulf Offshore* [\*473] cited, *Claflin*. Indeed, in response to the argument that "only the federal judiciary . . . possesses both the familiarity with federal labor legislation and the monolithic judicial system necessary" to elaborate a

coherent system of national labor laws, the *Dowd Box* opinion said: "Whatever the merits of this argument as a matter of policy, we find nothing to indicate that Congress adopted such a policy in enacting § 301." [368 U.S., at 507](#). The second case cited was *Claflin*, which said that concurrent [\*\*\*\*37] jurisdiction exists "where it is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case." [93 U.S., at 136](#). The subsequent discussion makes it entirely clear, however, that what the Court meant by "incompatibility in its exercise arising from the nature of the particular case" was that the particular statute at issue impliedly excluded state-court jurisdiction. "Congress," the Court said, "may, if it sees fit, give to the Federal courts exclusive jurisdiction," which it does "sometimes . . . by express enactment and sometimes by implication." [Id., at 137](#). The third case cited, *Garner v. Teamsters*, [346 U.S. 485 \(1953\)](#), had nothing to do with state-court jurisdiction over a federal cause of action. It held that the National Labor [\*\*\*904] Relations Act, whose express provision that the jurisdiction of the National Labor Relations Board shall be exclusive had already been held to prevent *federal* courts from assuming primary jurisdiction over labor [\*\*803] disputes, see *Myers v. Bethlehem Shipbuilding Corp.*, [303 U.S. 41, 48 \(1938\)](#), prevented [\*\*\*\*38] state courts as well.

In sum: As the Court holds, the RICO cause of action meets none of the three tests for exclusion of state-court jurisdiction recited in *Gulf Offshore*. Since that is so, the proposition that meeting any one of the tests would have sufficed is dictum here, as it was there. In my view meeting the second test is assuredly not enough, and meeting the third may not be.

## References

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Supreme Court's views as to state court's concurrent jurisdiction over federal cause of action in absence of federal legislation expressly granting such jurisdiction

[20 Am Jur 2d, Courts 13](#); 31A Am Jur 2d, Extortion, Blackmail, and Threats 218

1 Federal Procedure, L Ed, Access to District Courts 1:399

18 USCS 1961-1968

US L Ed Digest, Courts 711

Index to Annotations, Jurisdiction; Racketeer Influenced and Corrupt Organizations Act

Annotation References:

Civil action for damages under [18 USCS 1964\(c\)](#) of the Racketeer Influenced and Corrupt Organizations Act (RICO, [18 USCS 1961 et seq.](#)) for injuries sustained [\*\*\*\*39] by reason of racketeering activity. 70 ALR Fed 538.



## Cal. v. Am. Stores Co.

Supreme Court of the United States

January 16, 1990, Argued ; April 30, 1990, Decided

No. 89-258

### **Reporter**

495 U.S. 271 \*; 110 S. Ct. 1853 \*\*; 109 L. Ed. 2d 240 \*\*\*; 1990 U.S. LEXIS 2214 \*\*\*\*; 58 U.S.L.W. 4529; 1990-1 Trade Cas. (CCH) P69,003

CALIFORNIA v. AMERICAN STORES CO. ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

**Disposition:** [872 F. 2d 837](#), reversed and remanded.

## **Core Terms**

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divestiture, dissolution, merger, injunctive relief, Clayton Act, injunction, district court, violations, antitrust, equitable, Sherman Act, authorize, encompass, stock, threatened loss, anti trust law, decrees, legislative history, mandatory, remedies, cases, preliminary injunction, subcommittee, acquisition, conditions, principles, provisions, settlement, divest, merged

## **LexisNexis® Headnotes**

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Governments > Legislation > Interpretation

### [\*\*HN1\*\*](#) **Legislation, Interpretation**

When Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret a provision generously so as to effectuate important congressional goals.

Antitrust & Trade Law > Clayton Act > General Overview

### [\*\*HN2\*\*](#) **Antitrust & Trade Law, Clayton Act**

See [15 U.S.C.S. § 25](#).

Antitrust & Trade Law > Clayton Act > General Overview

### [\*\*HN3\*\*](#) [down] Antitrust & Trade Law, Clayton Act

See [15 U.S.C.S. § 26](#).

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Divestiture

Mergers & Acquisitions Law > Antitrust > Remedies

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

Mergers & Acquisitions Law > Antitrust > General Overview

### [\*\*HN4\*\*](#) [down] Civil Actions, Divestiture

The general language of [15 U.S.C.S. § 25](#) is broad enough to authorize divestiture. Indeed, in government actions divestiture is the preferred remedy for an illegal merger or acquisition. Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy when [15 U.S.C.S. § 18](#), which particularizes the Sherman Act standard of illegality, is involved.

Antitrust & Trade Law > Clayton Act > General Overview

### [\*\*HN5\*\*](#) [down] Antitrust & Trade Law, Clayton Act

[15 U.S.C.S. § 26](#) states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order. Rather, the statutory language indicates Congress' intention that traditional principles of equity govern the grant of injunctive relief. The plain text of [§ 26](#) authorizes divestiture decrees to remedy [15 U.S.C.S. § 18](#) violations.

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

Patent Law > Remedies > Equitable Relief > Injunctions

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

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Patent Law > Remedies > General Overview

Patent Law > Remedies > Equitable Relief > General Overview

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

## [\*\*HN6\*\*](#) [down] Private Actions, Remedies

Injunctions issued pursuant to [15 U.S.C.S. § 26](#) have been upheld regardless of whether they are mandatory or prohibitory in character. [Section 26](#) has been enacted not merely to provide private relief, but to serve as well the high purpose of enforcing antitrust laws. The remedy that [§ 26](#) affords, like other equitable remedies, is flexible and capable of nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

Governments > Legislation > Statute of Limitations > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Divestiture

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

## [\*\*HN7\*\*](#) [down] Legislation, Statute of Limitations

The Clayton Act's provisions manifest a clear intent to encourage vigorous private litigation against anticompetitive mergers. [15 U.S.C.S. § 18](#) itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect may be substantially to lessen competition. 11 U.S.C.S. § 26, construed to authorize a private divestiture remedy when appropriate in light of equitable principles, fits well in a statutory scheme that favors private enforcement, subjects mergers to searching scrutiny, and regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger.

Antitrust & Trade Law > Clayton Act > General Overview

## [\*\*HN8\*\*](#) [down] Antitrust & Trade Law, Clayton Act

Distinction between divestiture and injunctions that prohibit future conduct for purposes of [15 U.S.C.S. § 26](#) is illusory.

Civil Procedure > Preliminary Considerations > Equity > General Overview

## [\*\*HN9\*\*](#) [down] Preliminary Considerations, Equity

The essence of equity jurisdiction has been the power of a court to do equity and to mould decrees to the necessities of a particular case. Flexibility rather than rigidity distinguishes it.

Civil Procedure > Preliminary Considerations > Equity > General Overview

## [\*\*HN10\*\*](#) [ ↗ ] **Preliminary Considerations, Equity**

When Congress endows federal courts with equitable jurisdiction, Congress acts aware of a longstanding tradition of flexibility. Unless a statute in so many words, or by a necessary and inescapable inference, restricts a court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Divestiture

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

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

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

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > Injunctions

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

## [\*\*HN11\*\*](#) [ ↗ ] **Civil Actions, Divestiture**

In a government case under [15 U.S.C.S. § 25](#), a proof of a violation of law may itself establish sufficient public injury to warrant relief. A private litigant, however, must have standing under [15 U.S.C.S. § 26](#) and must prove threatened loss or damage to his own interests in order to obtain relief.

## **Lawyers' Edition Display**

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### **Decision**

Divestiture held to be form of injunctive relief authorized by 16 of Clayton Act ([15 USCS 26](#)), where antitrust suit by state of California claimed that supermarket merger violated 7 of Act ([15 USCS 18](#)).

### **Summary**

Section 16 of the Clayton Act ([15 USCS 26](#)) provides that any person, firm, corporation, or association shall be entitled to have injunctive relief against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. After a company which operated supermarkets in many states, including California, notified the Federal Trade Commission (FTC), under [15 USCS 18a](#), that the company intended to acquire all of a major competitor's outstanding stock, the FTC negotiated a settlement which included a condition that the acquirer comply with a "Hold Separate Agreement" preventing the acquirer from integrating the two companies' assets and operations until after the acquirer had divested itself of several designated supermarkets. The state of California then filed an action in the United States District Court for the Central District of California.

The complaint alleged that the merger violated federal antitrust statutes, including 7 of the Clayton Act ([15 USCS 18](#)), which generally prohibits acquisitions whose effect may be substantially to lessen competition. Meanwhile, the company consummated the merger as a matter of legal form under Delaware corporation law, but the two companies' business operations were not combined, as a matter of practical fact, due to the "Hold Separate Agreement." The District Court eventually entered a preliminary injunction--which ordered the acquirer, during the pendency of the action, to take all steps necessary to operate the two companies independently in California, and to refrain from taking any action to modify the status quo as to the California operations of the two companies, other than in the ordinary course of business--and expressed the view that (1) the state of California had proved a *prima facie* violation of 7; (2) the state had made an adequate showing of irreparable harm to Californians; (3) such harm outweighed the harm that the acquirer would suffer as a result of the injunction; and (4) under the circumstances, the injunction was not prohibited by United States Court of Appeals for the Ninth Circuit precedent to the effect that divestiture was not an authorized form of injunctive relief under 16 ([697 F Supp 1125](#)). On interlocutory appeal, the Court of Appeals, ordering that the preliminary injunction be set aside, expressed the view that (1) the District Court had not abused its discretion in finding that the state had proved (a) a likelihood of success on the merits, and (b) the probability of irreparable harm; but (2) divestiture was not an available remedy in private actions under 16; and (3) 16 did not permit indirect divestiture by means of an injunction which, as in the case at hand, (a) did not on its face order divestiture, but (b) had the same effect ([872 F2d 837](#)).

On certiorari, the United States Supreme Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings. In an opinion by Stevens, J., expressing the unanimous view of the court, it was held that divestiture is a form of injunctive relief within the meaning of 16, and that the District Court, with respect to the case at hand, had the power under 16 to divest the acquirer of any part of the acquirer's ownership interest in the acquired company--either by forbidding the exercise of the owner's normal right to integrate the operations of two previously separate companies, or by requiring the acquirer to sell certain assets located in California--because (1) if the merger violated antitrust laws, and if it were correctly found that the conduct of the merged enterprise threatened economic harm to California consumers, then the literal text of 16 was sufficient to authorize injunctive relief, including an order of divestiture, that would prohibit that conduct from causing that harm; (2) such a construction harmonizes 16 with its statutory context, which (a) favors private enforcement, (b) subjects mergers to searching scrutiny, and (c) regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger; (3) even though it was alleged that excerpts from subcommittee hearings on the adoption of the Act demonstrated that a conduct-structure distinction had been recognized and that Congress had rejected a private dissolution remedy, and thereby had rejected divestiture as well, such allegations were not confirmed by anything that had been called to the Supreme Court's attention in the committee reports, floor debates, conference report, or contemporaneous judicial interpretations concerning the Act, given the historical importance of the distinction between dissolution and divestiture; (4) the equitable principles that govern 16 support a construction that would enable a chancellor to impose the most effective, usual, and straightforward remedy to rescind an unlawful purchase of assets; and (5) the fact that the term "divestiture" is used to describe what is typically no more than the familiar remedy of rescission does not place the remedy beyond the normal reach of the chancellor.

Kennedy, J., concurring, expressed the view that (1) Congress has not yet enacted a strict rule prohibiting divestiture after a negotiated settlement with the FTC; but (2) [15 USCS 18a](#), by establishing a time period for review of merger proposals by the FTC, may lend a degree of objectivity to the determination whether divestiture is barred by laches.

## Headnotes

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RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §70 > STATUTES §108.5 > Clayton Act -- private injunctive relief -- divestiture -- dissolution -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D] [LEdHN\[1E\]](#) [1E] [LEdHN\[1F\]](#) [1F]

[1F][LEdHN\[1G\]](#) [1G][LEdHN\[1H\]](#) [1H][LEdHN\[1I\]](#) [1I][LEdHN\[1J\]](#) [1J][LEdHN\[1K\]](#)  
[1K][LEdHN\[1L\]](#) [1L][LEdHN\[1M\]](#) [1M]

Divestiture is a form of injunctive relief within the meaning of 16 of the Clayton Act ([15 USCS 26](#))--which authorizes any person to have injunctive relief against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity--and a Federal District Court, with respect to a state's claim that one company's acquisition of another company violated 7 of the Act ([15 USCS 18](#)), has the power under 16 to divest the acquirer of any part of the acquirer's ownership interest in the acquired company--either by forbidding the exercise of the owner's normal right to integrate the operations of two previously separate companies, or by requiring the acquirer to sell certain assets located in the state--because (1) if the merger violated antitrust laws, and if it is correctly found that the conduct of the merged enterprise threatens economic harm to the state's consumers, then the literal text of 16 is sufficient to authorize injunctive relief, including an order of divestiture, that will prohibit that conduct from causing that harm, where (a) 16's authority, on its face, would seem to encompass divestiture just as plainly as the comparable language in 15 of the Act ([15 USCS 25](#)) with respect to actions initiated by the Federal Government, which language, to the effect that antitrust violations shall be enjoined or otherwise prohibited, is agreed to be broad enough to authorize divestiture, (b) 16's requirement of threatened loss or damage (i) is satisfied under the assumed circumstances, and (ii) if divestiture is an appropriate means of preventing such harm, does not negate the power to grant such relief, and (c) 16's reference to threatened conduct is not the equivalent of a directive that unlawful conduct may be prohibited, but structural relief may not be mandated, since any distinction between conduct and structure, or between prohibitory and mandatory relief, is illusory in a case of this kind; (2) such a construction harmonizes 16 with its statutory context, which (a) favors private enforcement, (b) subjects mergers to searching scrutiny, and (c) regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger; (3) even though it is alleged that excerpts from subcommittee hearings on the adoption of the Act demonstrate that a conduct-structure distinction was recognized and that Congress rejected a private dissolution remedy, and thereby rejected divestiture as well, such allegations are not confirmed by anything that has been called to the United States Supreme Court's attention in the committee reports, floor debates, conference report, or contemporaneous judicial interpretations concerning the Act, given the historical importance of the distinction between dissolution and divestiture, where dissolution, at the time of the Act's adoption, was an ambiguous term that could (a) include divestiture, or (b) refer to greater penalties ranging up to a "corporate death sentence"; (4) the equitable principles that govern 16 support a construction that would enable a chancellor to impose the most effective, usual, and straightforward remedy to rescind an unlawful purchase of assets; and (5) the fact that the term "divestiture" is used to describe what is typically no more than the familiar remedy of rescission does not place the remedy beyond the normal reach of the chancellor.

APPEAL §1339.5 > STATUTES §145.4 > language -- legislative history -- review of Federal Court of Appeals' decision -- certiorari -- > Headnote:

[LEdHN\[2A\]](#) [2A][LEdHN\[2B\]](#) [2B]

On certiorari to review a Federal Court of Appeals' judgment which set aside a Federal District Court's preliminary injunction on the ground of the alleged limits on such injunctive relief under 16 of the Clayton Act ([15 USCS 26](#)), the statutory text is the natural place for the United States Supreme Court to begin its analysis; although the Supreme Court does not believe the statutory language to be ambiguous, the Supreme Court will nonetheless consider the legislative history that persuaded the Court of Appeals to place a narrow construction on 16; in order to understand such history, however, it is necessary to place the statute in its historical perspective.

495 U.S. 271, \*271; 110 S. Ct. 1853, \*\*1853; 109 L. Ed. 2d 240, \*\*\*240; 1990 U.S. LEXIS 2214, \*\*\*\*1

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §78 > divestiture -- > Headnote:

[LEdHN\[3\]](#) [3]

Under 15 of the Clayton Act ([15 USCS 25](#))--which provides that, in actions initiated by the Federal Government, antitrust violations shall be enjoined or otherwise prohibited--divestiture is the preferred remedy for an illegal merger or acquisition; divestiture, which is simple, relatively easy to administer, and sure, should always be in the forefront of a court's mind when a violation of 7 of the Act ([15 USCS 18](#)) has been found.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34.5 > merger -- violation -- > Headnote:

[LEdHN\[4A\]](#) [4A] [LEdHN\[4B\]](#) [4B]

Section 7 of the Clayton Act ([15 USCS 18](#)) particularizes the Sherman Act ([15 USCS 1 et seq.](#)) standard of illegality and creates a relatively expansive definition of antitrust liability, as a plaintiff, in order to show that a merger is unlawful under 7, need only prove that the merger's effect "may be" substantially to lessen competition.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §74 > STATUTES §145.4 > injunctive relief -- forms -- equitable principles -- > Headnote:

[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B] [LEdHN\[5C\]](#) [5C] [LEdHN\[5D\]](#) [5D] [LEdHN\[5E\]](#) [5E]

The text of 16 of the Clayton Act ([15 USCS 26](#)) states no restrictions or exceptions to the forms of injunctive relief that a private plaintiff may seek, or that a federal court may order, as 16 authorizes any person to have injunctive relief against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity; rather, the language of 16 indicates Congress' intention that traditional principles of equity govern the grant of injunctive relief, and a fair reading of the entire legislative history supports the conclusion that 16 means what it says when it endorses the conditions and principles governing injunctive relief in the courts of equity--that 16 should be construed generously and flexibly, pursuant to the principles of equity; the evident import of 16's reference to threatened loss or damage is not to constrict the availability of injunctive remedies against violations that have already begun or occurred, but rather to expand such remedies' availability against harms that are as yet unrealized; the reference in 16 to threatened conduct that will cause loss or damage is not a limitation on the power to grant relief, but part of the general reference to the standards that should be applied in fashioning injunctive relief.

APPEAL §1363 > review of preliminary injunction -- satisfaction of conditions -- > Headnote:

[LEdHN\[6\]](#) [6]

On certiorari to review a Federal Court of Appeals' setting aside of a Federal District Court's preliminary injunction under 16 of the Clayton Act ([15 USCS 26](#))--which authorizes such injunctions in certain situations which involve threatened loss or damage by a violation of the antitrust laws--the United States Supreme Court will conclude that 16's requirement of threatened loss or damage is satisfied, where the allegations of a complaint filed by a state, the findings of the District Court, and the opinion of the Court of Appeals all assume that, even if the merger is a completed violation of law, the threatened harm to the state's consumers will persist.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §78 > STATUTES §180 > divestiture -- dissolution -- > Headnote:

[LEdHN\[7\]](#) [7]

In interpreting 16 of the Clayton Act ([15 USCS 26](#))--which authorizes any person to have injunctive relief against threatened loss or damage by a violation of the antitrust laws, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity--the fact that divestiture was encompassed within the concept of dissolution at the time of the Act's framing does not imply that the equitable formulation of 16 cannot permit divestiture while excluding the more severe sanctions, ranging up to a "corporate death sentence," that also traveled at that time under the name "dissolution," for the rejection of a proposed remedy that would terminate the corporate existence of a company and would appoint a receiver to supervise the disposition of the company's assets is not the equivalent of the rejection of a remedy that would merely rescind a purchase of stock or assets.

EQUITY §1 > jurisdiction -- statutory grant -- > Headnote:

[LEdHN\[8\]](#) [8]

Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

EVIDENCE §979 > LIMITATION OF ACTIONS §27 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §70 > divestiture -- government suit -- private suit -- sufficiency of proof -- standing -- laches -- > Headnote:

[LEdHN\[9\]](#) [9]

A conclusion that a Federal District Court has the power to order divestiture in appropriate private antitrust cases brought under 16 of the Clayton Act ([15 USCS 26](#)) does not mean that such power should be exercised in every situation in which the Federal Government would be entitled to such relief under 15 of the Act ([15 USCS 25](#)), for (1) in a Federal Government case, the proof of the violation of law may itself establish sufficient public injury to warrant relief; but (2) a private litigant must have standing--that is, such a litigant must prove threatened loss or damage to the litigant's own interest in order to obtain relief under 16; and (3) equitable defenses such as laches, or perhaps "unclean hands," may protect consummated transactions from belated attacks by private parties when it would not be too late for the Federal Government to vindicate the public interest.

APPEAL §1363 > preliminary injunction -- what reviewable -- > Headnote:

[LEdHN\[10A\]](#) [10A] [LEdHN\[10B\]](#) [10B]

On certiorari to review a Federal Court of Appeals' setting aside of a Federal District Court's preliminary injunction, under 16 of the Clayton Act ([15 USCS 26](#)), against a company which acquired another company--where the Court of Appeals based its decision on the court's view that divestiture is not an available remedy in private actions under 16--the United States Supreme Court (1) is merely confronted with the naked question whether the District Court had the power to divest the acquirer of any part of the acquirer's ownership interest in the acquired company, either

(a) by forbidding the exercise of the owner's normal right to integrate the operation of two previously separate companies, or (b) by requiring the acquirer to sell certain assets located in a particular state; and (2) is not presented with questions as to whether divestiture is appropriate in the particular case, with respect to such issues as the plaintiff's standing or the possible existence of equitable defenses such as laches, or perhaps "unclean hands."

## Syllabus

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Shortly after respondent American Stores Co., the fourth largest supermarket chain in California, acquired all of the outstanding stock of the largest chain, the State filed suit in the District Court alleging, *inter alia*, that the merger constituted an anticompetitive acquisition violative of § 7 of the Clayton Act and would harm consumers throughout the State. The court granted the State a preliminary injunction requiring American to operate the acquired stores separately pending resolution of the suit. Although agreeing that the State had proved a likelihood of success on the merits and the probability of irreparable harm, the Court [\*\*\*\*2] of Appeals set aside the injunction on the ground that the relief granted exceeded the District Court's authority under § 16 of the Act to order "injunctive relief." The court relied on an earlier decision in which it had concluded on the basis of its reading of excerpts from subcommittee hearings that § 16's draftsmen did not intend to authorize the remedies of "dissolution" or "divestiture" in private litigants' actions. Thus, held the court, the "indirect divestiture" effected by the preliminary injunction was impermissible.

Held: Divestiture is a form of "injunctive relief" authorized by § 16. Pp. 278-296.

(a) The plain text of § 16 -- which entitles "[a]ny person . . . to . . . have injunctive relief . . . against threatened loss or damage . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity" -- authorizes divestiture decrees to remedy § 7 violations. On its face, the simple grant of authority to "have injunctive relief" would seem to encompass that remedy just as plainly as the comparable language in § 15 of the Act, which authorizes the district courts [\*\*\*\*3] to "prevent and restrain violations" in antitrust actions brought by the United States, and under which divestiture is the preferred remedy for illegal mergers. Moreover, § 16 states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek or a court may order, but, rather, evidences Congress' intent that traditional equitable principles govern the grant of such relief. The section's "threatened loss or damage" phrase does not negate the court's power to order divestiture. Assuming, as did the lower courts, that the merger in question violated the antitrust laws, and that the conduct of the merged enterprise threatens economic harm to consumers, such relief would prohibit that conduct from causing that harm. Nor does the section's "threatened conduct that will cause loss or damage" phrase limit the court's power to the granting of relief against anticompetitive "conduct," as opposed to "structural relief," or to the issuance of prohibitory, rather than mandatory, injunctions. That phrase is simply a part of the general reference to the standards that should be applied in fashioning injunctive relief. Section 16, construed to authorize a private [\*\*\*\*4] divestiture remedy, fits well in a statutory scheme that favors private enforcement, subjects mergers to searching scrutiny, and regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger. Pp. 278-285.

(b) The legislative history does not require that § 16 be construed narrowly. American's reliance on the subcommittee hearing excerpts cited by the Court of Appeals and on Graves v. Cambria Steel Co., 298 F. 761 -- each of which contains statements indicating that private suits for dissolution do not lie under § 16 -- is misplaced. At the time of the Act's framing, dissolution was a vague and ill-defined concept that encompassed the drastic remedy of corporate termination as well as divestiture. Thus, the fact that Congress may have excluded the more severe sanction does not imply that the equitable formulation of § 16 cannot permit divestiture. Since the inferences that American draws simply are not confirmed by anything else in the legislative history or contemporaneous judicial interpretation, § 16 must be taken at its word when it endorses the "conditions and principles" governing injunctive relief in equity courts. There [\*\*\*\*5] being nothing in the section that restricts courts' equitable jurisdiction, the provision should be construed generously and flexibly to enable a chancellor to impose the most effective, usual, and straightforward remedy to rescind an unlawful stock purchase. Pp. 285-295.

(c) Simply because a district court has the power to order divestiture in appropriate § 16 cases does not mean that it should do so in every situation in which the Government would be entitled to such relief under § 15. A private litigant must establish standing by proving "threatened loss or damage" to his own interests, and his suit may be barred by equitable defenses such as laches or "unclean hands." Pp. 295-296.

**Counsel:** H. Chester Horn, Jr., Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were John K. Van de Kamp, Attorney General, Andrea Sheridan Ordin, Chief Assistant Attorney General, Michael J. Strumwasser, Special Assistant Attorney General, Sanford N. Gruskin, Assistant Attorney General, and Lawrence R. Tapper and Ernest Martinez, Deputy Attorneys General.

Rex E. Lee argued the cause for respondents. With him on the brief were Carter G. Phillips, [\*\*\*\*6] Mark D. Hopson, Donald B. Holbrook, and Kent T. Anderson.\*

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**Judges:** STEVENS, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, post, p. 296.

**Opinion by:** STEVENS

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\* Briefs of amici curiae urging reversal were filed for the State of Alabama et al. by Jim Mattox, Attorney General of Texas, Mary F. Keller, First Assistant Attorney General, Lou McCreary, Executive Assistant Attorney General, Allene D. Evans, Assistant Attorney General, and Donna L. Nelson, Assistant Attorney General, Don Siegelman, Attorney General of Alabama, and Walter S. Turner, Chief Assistant Attorney General, Douglas B. Baily, Attorney General of Alaska, and Thomas E. Wagner, Assistant Attorney General, John Steven Clark, Attorney General of Arkansas, Duane Woodard, Attorney General of Colorado, Clarine Nardi Riddle, Attorney General of Connecticut, and Robert M. Langer, Assistant Attorney General, Robert A. Butterworth, Attorney General of Florida, and Jerome W. Hoffman, Assistant Attorney General, Warren Price III, Attorney General of Hawaii, and Robert A. Marks and Ted Gamble Clause, Deputy Attorneys General, Jim Jones, Attorney General of Idaho, and Catherine K. Broad, Deputy Attorney General, Neil F. Hartigan, Attorney General of Illinois, Robert Ruiz, Solicitor General, and Christine H. Rosso, Senior Assistant Attorney General, Thomas J. Miller, Attorney General of Iowa, and John R. Perkins, Deputy Attorney General, Robert T. Stephan, Attorney General of Kansas, Frederic J. Cowan, Attorney General of Kentucky, and James M. Ringo, Assistant Attorney General, James E. Tierney, Attorney General of Maine, and Stephen L. Wessler, Deputy Attorney General, J. Joseph Curran, Jr., Attorney General of Maryland, and Michael F. Brockmeyer and R. Hartman Roemer, Assistant Attorneys General, James M. Shannon, Attorney General of Massachusetts, and George K. Weber and Thomas M. Alpert, Assistant Attorneys General, Hubert H. Humphrey III, Attorney General of Minnesota, Stephen P. Kilgriff, Deputy Attorney General, Thomas F. Pursell, Assistant Attorney General, and James P. Spencer, Special Assistant Attorney General, Brian McKay, Attorney General of Nevada, and J. Kenneth Creighton, Deputy Attorney General, Peter N. Perretti, Jr., Attorney General of New Jersey, and Laurel A. Price, Deputy Attorney General, Robert Abrams, Attorney General of New York, O. Peter Sherwood, Solicitor General, and Lloyd E. Constantine, Assistant Attorney General, Lacy H. Thornburg, Attorney General of North Carolina, James C. Gulick, Special Deputy Attorney General, and K. D. Sturgis, Assistant Attorney General, Anthony J. Celebrezze, Jr., Attorney General of Ohio, Dave Frohnmayer, Attorney General of Oregon, Ernest D. Preate, Jr., Attorney General of Pennsylvania, Eugene F. Waye, Chief Deputy Attorney General, and Carl S. Hisiro, Senior Deputy Attorney General, James E. O'Neil, Attorney General of Rhode Island, and Edmund F. Murray, Jr., Special Assistant Attorney General, Roger A. Tellinghuisen, Attorney General of South Dakota, and Jeffrey P. Hallem, Assistant Attorney General, Charles W. Burson, Attorney General of Tennessee, and Perry Craft, Deputy Attorney General, Jeffrey L. Amestoy, Attorney General of Vermont, and Julie Brill, Assistant Attorney General, Mary Sue Terry, Attorney General of Virginia, Kenneth O. Eikenberry, Attorney General of Washington, and Carol A. Smith, Assistant Attorney General, Roger W. Tompkins, Attorney General of West Virginia, Daniel N. Huck, Deputy Attorney General, and Robert William Schulenberg III, Senior Assistant Attorney General, and Joseph B. Meyer, Attorney General of Wyoming; and for the Center for Public Interest Law by Robert C. Fellmeth.

Briefs of amici curiae urging affirmance were filed for the Business Roundtable by Thomas B. Leary and Janet L. McDavid; for the California Retailers Association et al. by Theodore B. Olson, James R. Martin, Phillip H. Rudolph, and Adrian A. Kragen; and for the United Food and Commercial Workers International Union et al. by George R. Murphy, Nicholas W. Clark, Robert W. Gilbert, Laurence D. Steinsapir, and D. William Heine.

## Opinion

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[\*274] [\*\*\*248] [\*\*1855] JUSTICE STEVENS delivered the opinion of the Court.

LEdHN[1A] [↑] [1A]By merging with a major competitor, American Stores Co. (American) more than doubled the number of supermarkets that it owns in California. The State sued, claiming that the merger violates the federal antitrust laws and will harm consumers in 62 California cities. The complaint prayed for a preliminary injunction requiring American to operate the acquired stores separately until the case is decided, and then to divest itself of all of the acquired assets located in California. The District Court granted a preliminary injunction preventing American from integrating the operations of the two companies. The Court of Appeals for the Ninth Circuit agreed with the District Court's conclusion that California had made [\*275] an adequate showing of probable success on the merits, but held that the relief granted by the District Court exceeded its authority under § 16 of [\*\*\*\*8] the Clayton Act, 38 Stat. 737, as amended, [15 U.S.C. § 26](#). In its view, the "injunctive [\*\*1856] relief . . . against threatened loss or damage" authorized by § 16 does not encompass divestiture, and therefore the "indirect divestiture" effected by the preliminary injunction was impermissible. [872 F. 2d 837 \(1989\)](#). We granted certiorari to resolve a conflict in the Circuits over whether divestiture is a form of injunctive relief within the meaning of § 16. [493 U.S. 916 \(1989\)](#). We conclude that it is.

I

American operates over 1,500 retail grocery stores in 40 States. Prior to the merger, its 252 stores in California made it the fourth largest supermarket chain in that State. Lucky Stores, Inc. (Lucky), which operated in seven Western and Midwestern States, was the largest, with 340 stores. The second and third largest, Von's Companies and Safeway Stores, were merged in December 1987. [697 F. Supp. 1125, 1127 \(CD Cal. 1988\)](#); Pet. for Cert. 3.

On March 21, 1988, American notified the Federal Trade Commission (FTC) that it intended to acquire all of Lucky's outstanding stock for a price of \$ 2.5 billion. [\*\*\*9] <sup>1</sup> The FTC conducted an investigation and negotiated a settlement with American. On May 31, it simultaneously filed both a complaint alleging that the merger violated § 7 of the Clayton [\*\*\*249] Act and a proposed consent order disposing of the § 7 charges subject to certain conditions. Among those conditions was a requirement that American comply with a "Hold Separate Agreement" preventing it from integrating the two companies' assets and operations until after it had divested itself of [\*276] several designated supermarkets.<sup>2</sup> American accepted the terms of the FTC's consent order. In early June, it acquired and paid for Lucky's stock and consummated a Delaware "short form merger." [872 F. 2d, at 840](#); Brief for Respondent 2. Thus, as a matter of legal form American and Lucky were merged into a single corporate entity on June 9, 1988, but as a matter of practical fact their business operations have not yet been combined.

[\*\*\*10] On August 31, 1988, the FTC gave its final approval to the merger. The next day California filed this action in the United States District Court for the Central District of California. The complaint alleged that the merger violated § 1 of the Sherman Act, [15 U.S.C. § 1](#), and § 7 of the Clayton Act, [15 U.S.C. § 18](#), and that the acquisition, "if consummated," would cause considerable loss and damage to the State: Competition and potential competition "in many relevant geographic markets will be eliminated," App. 61, and "the prices of food and non-food products might be increased." Id., at 62. In its prayer for relief, California sought, inter alia, (1) a preliminary injunction "requiring American to hold and operate separately from American all of Lucky's California assets and businesses

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<sup>1</sup> See [15 U.S.C. § 18a](#) (Hart-Scott-Rodino Antitrust Improvements Act of 1976).

<sup>2</sup> Among other requirements, the Hold Separate Agreement obligated American to maintain separate books and records for the acquisition; to prevent any waste or deterioration of the acquired company's California operation; to refrain from replacing the company's executives; to assure that it is maintained as a viable competitor in California; to refrain from selling or otherwise disposing of the acquired company's warehouse, distribution or manufacturing facilities, or any retail grocery stores in California; and to preserve separate purchasing for its retail grocery sales. [697 F. Supp. 1125, 1134 \(CD Cal. 1988\)](#).

pending final adjudication of the merits"; (2) "such injunctive relief, including rescission . . . as is necessary and appropriate to prevent the effects" alleged in the complaint; and (3) "an injunction requiring American to divest itself of all of Lucky's assets and businesses in the State of California." *Id.*, at 65, 66-67.

[\*277] The District [\*\*\*\*11] Court granted California's motion for a temporary restraining order and, after considering extensive statistical evidence, entered a preliminary injunction. Without reaching the Sherman Act claim, the [\*\*1857] court concluded that the State had proved a *prima facie* violation of § 7 of the Clayton Act. On the question of relief, the District Court found that the State had made an adequate showing "that Californians will be irreparably harmed if the proposed merger is completed," *697 F. Supp., at 1134*, and that the harm the State would suffer if the merger was not enjoined "far outweighs" the harm that American will suffer as the result of an injunction. *Id., at 1135*. The court also rejected American's argument that the requested relief was foreclosed by a prior decision of the Court of Appeals for the Ninth Circuit holding that divestiture is not a remedy authorized by § 16 of the Clayton Act. American contended that the proposed injunction was "tantamount to divestiture" since the merger of the two companies [\*\*\*250] had already been completed, but the District Court disagreed. It held that since the FTC's Hold Separate Agreement was still in effect, [\*\*\*\*12] the transaction was not a completed merger.<sup>3</sup>

American filed an interlocutory appeal pursuant to *28 U.S.C. § 1292(a)(1)*. The Court of Appeals for the Ninth Circuit first held that the District Court had not abused its discretion in finding that California had proved a likelihood of success on the merits and the probability of irreparable harm. Nevertheless, on the authority of its earlier decision in *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F. 2d 913 (1975) [\*\*\*\*13] (IT&T), [\*278] it set aside the injunction. The Court of Appeals reasoned that its own prior decisions established both that "divestiture is not an available remedy in private actions under § 16 of the Clayton Act," and that "section 16 does not permit indirect divestiture, that is, an injunction which on its face does not order divestiture but which has the same effect. IT&T, 518 F. 2d at 924." *872 F. 2d, at 844*. The Court of Appeals applied this rule to conclude that the injunction issued by the District Court was legally impermissible. Observing that under the injunction "these stores must operate as if Lucky had never been acquired by American Stores at all," the Court of Appeals held that "such an injunction requires indirect divestiture." *Id., at 845*. Finally, the Court of Appeals added that the District Court had "compounded its misapprehension of the law of divestiture" by misunderstanding "the legal status of the merger." Specifically, the District Court erred by concluding that the "FTC's consent order" undid "the legal effect of this merger" which "had already taken place" according to Delaware corporation law. *Ibid.*

[\*\*\*\*14] On California's application, JUSTICE O'CONNOR entered a stay continuing the District Court's injunction pending further review by this Court. *492 U.S. 1301 (1989)*. We then granted certiorari to resolve the conflict between this decision and the earlier holding of the Court of Appeals for the First Circuit in *CIA, Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F. 2d 404 (1985). We now reverse.

## II

In its IT&T opinion, the Court of Appeals for the Ninth Circuit reasoned that the term "injunctive relief" as used in § 16 is ambiguous and that it is necessary to review the statute's legislative history to determine whether it includes divestiture. Then, based on its reading of a colloquy during a hearing before a subcommittee of the Judiciary Committee of the House of Representatives, it concluded that the draftsmen of the bill did not intend to authorize the remedies of [\*279] "dissolution" or "divestiture" in actions [\*\*1858] brought by private litigants. *518 F. 2d, at 921-922*. The Court of Appeals [\*\*\*251] for the First Circuit has rejected that reasoning. It found instead that a fair reading of the statutory text, buttressed [\*\*\*\*15] by recognized canons of construction,<sup>4</sup> required a construction of

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<sup>3</sup>The District Court observed that because the Hold Separate Agreement was still in effect, "this is not a completed merger. [American] and Lucky, pursuant to the Hold Separate Agreement, are performing numerous functions as separate entities. They retain their separate names and with them their respective corporate identities." The court stated that only by completing a "linguistic triathlon" could one conclude that an injunction stopping such a merger was "tantamount to divestiture." *697 F. Supp., at 1134*.

the words "injunctive relief" broad enough to encompass divestiture. Moreover, it doubted whether the references to "dissolution" in the legislative history referred to "divestiture," and did not consider this evidence sufficiently probative, in any event, to justify a restrictive reading of the Act that seemed inconsistent with its basic policy. [754 F. 2d, at 415-428.](#)

[\*\*\*\*16] American endorses the analysis of the Court of Appeals for the Ninth Circuit, but places greater reliance on two additional arguments. First, it argues that there is a significant difference between the text of § 15 of the Act, which authorizes equitable relief in actions brought by the United States, and the text of § 16, which applies to other parties. Specifically, it argues that the former is broad enough to encourage "structural relief" whereas the latter is limited to relief against anticompetitive "conduct." Second, reading § 16 in its historical context, American argues that it reflects a well-accepted distinction between prohibitory injunctions (which are authorized) and mandatory injunctions (which, American argues, are not).

[LEdHN\[1B\]](#) [↑] [1B] [LEdHN\[2A\]](#) [↑] [2A] American's argument directs us to two provisions in the statutory text, and that is the natural place to begin our analysis. Section 15 grants the federal district courts jurisdiction "to prevent and restrain violations of this Act" when [\[\\*280\]](#) United States attorneys "institute proceedings [\*\*\*\*17] in equity to prevent and restrain such violations" through petitions "praying that such violation shall be enjoined or otherwise prohibited."<sup>5</sup> [\[\\*\\*\\*\\*18\]](#) Section 16 entitles "any person, firm, corporation, or association . . . to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity."<sup>6</sup>

[\*\*\*252] [LEdHN\[1C\]](#) [↑] [1C] [LEdHN\[3\]](#) [↑] [3] [LEdHN\[4A\]](#) [↑] [4A] [\[\\*\\*\\*\\*19\]](#) [HN4](#) [↑] It is agreed that the general language of § 15, which provides that antitrust violations "shall be enjoined or otherwise prohibited," is broad enough to authorize divestiture. Indeed, in Government actions divestiture is the preferred [\[\\*281\]](#) remedy for an illegal merger [\[\\*\\*1859\]](#) or acquisition. As we wrote in the Du Pont case:

"Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy when [§ 7](#) of

<sup>4</sup> The Court of Appeals observed: [HN1](#) [↑]

"Although we have no way of definitively determining the congressional intent in passing § 16, there remains at least one secure guidepost: when Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals." [CIA. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F. 2d 404, 428 \(1985\).](#)

<sup>5</sup> [HN2](#) [↑] The section provides in pertinent part:

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. . . ." [15 U.S.C. § 25.](#)

<sup>6</sup> [HN3](#) [↑] The section provides in pertinent part:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss of damage is immediate, a preliminary injunction may issue . . ." [15 U.S.C. § 26.](#)

the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved. Of the very few litigated § 7 cases which have been reported, most decreed divestiture as a matter of course. Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found." [United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 329-331 \(1961\)](#) (footnotes omitted).

[LEdHN\[1D\]](#) [↑] [1D] [LEdHN\[5A\]](#) [↑] [5A] [\*\*\*\*20] On its face, the simple grant of authority in § 16 to "have injunctive relief" would seem to encompass divestiture just as plainly as the comparable language in § 15. Certainly § 16's reference to "injunctive relief . . . against threatened loss or damage" differs from § 15's grant of jurisdiction to "prevent and restrain violations," but it obviously does no follow that one grant encompasses remedies excluded from the other.<sup>7</sup> Indeed, we think it could plausibly be argued that § 16's terms are the more expansive. [HNS](#) [↑] In any event, however, as the Court of Appeals for the First Circuit correctly observed, § 16 "states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order. . . . Rather, the statutory language indicates Congress' intention that traditional principles of equity govern the grant of injunctive relief." [754 F. 2d, at 1\\*282](#) 416. We agree that the plain text of § 16 authorizes divestiture decrees to remedy § 7 violations.

[\*\*\*\*21] American rests its contrary argument upon two phrases in § 16 that arguably narrow its scope. The entitlement "to sue for and have injunctive relief" affords relief "against threatened loss or damage by a violation of the antitrust laws." Moreover, the right to such relief exists "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. . . ."

[LEdHN\[1E\]](#) [↑] [1E] [LEdHN\[5B\]](#) [↑] [5B] [LEdHN\[6\]](#) [↑] [6] In this case, however, the requirement of "threatened loss or damage" is unquestionably satisfied. The allegations of the complaint, [\*\*\*253] the findings of the District Court, and the opinion of the Court of Appeals all assume that even if the merger is a completed violation of law, the threatened harm to California consumers persists. If divestiture is an appropriate means of preventing that harm, the statutory reference to "threatened loss or damage" surely does not negate the court's power to grant [\*\*\*\*22] such relief.<sup>8</sup>

[LEdHN\[1F\]](#) [↑] [1F] [LEdHN\[5D\]](#) [↑] [5D] The second phrase, which refers to "threatened conduct that will cause loss or damage," is not drafted as a limitation on the power to grant relief, but rather is a part of the general reference to the standards that should be applied in fashioning injunctive relief. It is surely not the equivalent of a directive stating that unlawful conduct may be prohibited but structural [\*\*\*\*23] relief may not be mandated. Indeed, as the Ninth Circuit's analysis of the issue demonstrates, the distinction between conduct and structure -- or between prohibitory and mandatory relief -- [\\*\\*1860](#) is illusory in a case of this kind. Thus, in the IT&T case the court recognized that an injunction prohibiting [\[\\*283\]](#) the parent company from voting the stock of the subsidiary should not be treated differently from a mandatory order of divestiture.<sup>9</sup> [\[\\*\\*\\*\\*24\]](#) And in this case the court treated

<sup>7</sup> That the two provisions do differ is not surprising at all, since § 15 was largely copied from § 4 of the Sherman Act, see 26 Stat. 209, ch. 647, [15 U.S.C. § 4](#), while § 16, which had to incorporate standing limits appropriate to private actions -- see [Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 \(1986\)](#) -- had no counterpart in the Sherman Act.

<sup>8</sup> [LEdHN\[5C\]](#) [↑] [5C]

Indeed, the evident import of Congress' reference to "threatened loss or damage" is not to constrict the availability of injunctive remedies against violations that have already begun or occurred, but rather to expand their availability against harms that are as yet unrealized. See [Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, and n. 24 \(1969\)](#).

<sup>9</sup> The District Court in the IT&T case had observed that "[i]f it were necessary to strain terminology in order to accomplish the same result, a court could easily phrase a "negative injunction" in such terms as to enjoin the activities of a corporation to such a degree that divestiture would be the only economical choice available to that corporation." [518 F. 2d, at 924](#). The Court of Appeals admitted the force of this observation, agreeing with the District Court that the Standard Oil dissolution decree, [Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 78 \(1911\)](#), served as an example of an "indirect" divestiture decree[e]." [518 F. 2d, at 924](#).

the Hold Separate Agreement as a form of "indirect divestiture." In both cases the injunctive relief would unquestionably prohibit "conduct" by the defendants. American's textual arguments -- which rely on a distinction between mandatory and prohibitive relief -- do not explain why such remedies would not be appropriate.<sup>10</sup>

If we assume that the merger violated the antitrust laws, and if we agree with the District Court's finding that the conduct of the merged enterprise threatens economic harm to California consumers, the literal text of § 16 is plainly sufficient to authorize injunctive relief, including an order of divestiture, that will prohibit that conduct from causing that harm. [HN6](#)[<sup>11</sup>] This interpretation is consistent with our precedents, which have upheld injunctions issued pursuant to § 16 regardless of whether they were mandatory or prohibitory in character. See [Zenith Radio Corp. v. Hazeltine Research, Inc.](#), 395 U.S. 100, 129-133 (1969) (reinstating injunction that required defendants to withdraw from patent pools); see also [Silver v. New York Stock Exchange](#), 373 U.S. 341, 345, 365 (1963) [\*\*\*\*25] (reinstating judgment for defendants in suit to compel [\*284] installation of wire services). We have recognized when construing § 16 that it was enacted "not merely to provide private relief, but . . . to serve as well the high purpose of enforcing the antitrust laws." [Zenith Radio Corp.](#), 395 U.S., at 130-131. We have accordingly applied the section "with this purpose in mind, and with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.'" Ibid., quoting [Hecht Co. v. Bowles](#), 321 U.S. 321, 329-330 (1944).

[LEdHN\[1G\]](#)[<sup>12</sup>] [1G] [LEdHN\[4B\]](#)[<sup>13</sup>] [4B] Finally, by construing § 16 to encompass divestiture decrees we are better able than is American to harmonize the section with its statutory context. [HN7](#)[<sup>14</sup>] The Act's other provisions manifest a clear intent to encourage vigorous private [\*\*\*\*26] litigation against anticompetitive mergers. [Section 7](#) itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect "may be substantially to lessen competition." Clayton Act [§ 7](#), 38 Stat. 731, [15 U.S.C. § 18](#) (emphasis supplied). See [Brown Shoe Co. v. United States](#), 370 U.S. 294, 323 (1962). In addition, [§ 5](#) of the Act provided that during the pendency of a Government action, the statute of limitations for private actions would be tolled. The section also permitted plaintiffs to use the final judgment in a Government antitrust suit as prima facie evidence of liability in a later civil suit. Private enforcement of the Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition. See [Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.](#), 381 U.S. 311, 318 (1965). Congress also made express its view that divestiture was the most suitable remedy in a suit for relief from a [§ 7](#) violation: In § 11 of the Act, Congress directed the FTC to issue orders requiring that a violator [\*\*\*\*27] of [§ 7](#) "cease and desist from the violation," and, specifically, that the violator [\*285] "divest itself of the stock held" in violation of the Act.<sup>11</sup> Section 16, [\*\*\*\*255] construed to authorize a private divestiture remedy when appropriate in light of equitable principles, fits well in a statutory scheme that favors private enforcement, subjects mergers to searching scrutiny, and regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger.

### [\*\*\*\*28] III

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<sup>10</sup> Notably, the Court of Appeals for the Ninth Circuit did not rely on either of the textual arguments that American has advanced here. Had it done so, it would have been forced to acknowledge a distinction between direct divestiture and indirect divestiture.

<sup>11</sup> In the context of construing the FTC's authority to issue such "cease and desist" orders, this Court -- speaking through Justice McReynolds, who had served as President Wilson's chief antitrust enforcement officer at the time the Clayton Act was framed -- had no difficulty finding that the continuing ownership of stock unlawfully acquired was itself a continuing violation of the Act:

"The order here questioned was entered when respondent actually held and owned the stock contrary to law. The Commission's duty was to prevent the continuance of this unlawful action by an order directing that it cease and desist therefrom and divest itself of what it had no right to hold. Further violations of the Act through continued ownership could be effectively prevented only by requiring the owner wholly to divest itself of the stock and thus render possible once more free play of the competition which had been wrongfully suppressed." [FTC v. Western Meat Co.](#), 272 U.S. 554, 559 (1926) (McReynolds, J.).

The suggestion that continuing ownership of stock unlawfully acquired might constitute a "further violatio[n] of the Act" would cast some doubt upon the utility of American's distinction between mandatory and prohibitory injunctions even were we inclined to accept the relevance of that distinction. As we reject the distinction, we have, however, no cause to pursue this line of inquiry further.

[LEdHN\[1H\]](#) [1H] [LEdHN\[2B\]](#) [2B] Although we do not believe the statutory language is ambiguous, we nonetheless consider the legislative history that persuaded the Ninth Circuit to place a narrow construction on § 16. To understand that history, however, it is necessary to place the statute in its historical perspective.

The Sherman Act became law just a century ago. It matured some 15 years later, when, under the administration of Theodore Roosevelt, the Sherman Act "was finally being used against trusts of the dimension that had called it into [\*286] being, and with enough energy to justify the boast that the President was using a Big Stick." W. Letwin, Law and Economic Policy in America 240 (1965). Two of the most famous prosecutions concluded in 1911, with decisions from this Court endorsing the "Rule of Reason" as the principal guide to the construction of the Sherman Act's general language. [Standard Oil Co. of New Jersey v. United States, 221 U.S. 1](#); [United States v. American Tobacco Co., 221 U.S. 106](#). In consequence [\*\*\*\*29] of the violations found in those two cases, wide-ranging injunctions were entered requiring the separation of the "oil trust" and the "tobacco trust" into a number of independent, but still significant, companies. The relief granted received mixed reviews. In some quarters, the cases were hailed as great triumphs over the forces of monopoly; in others, they were regarded as Pyrrhic victories.

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[\*\*\*\*30] [\*\*1862] Concern about the adequacy of the Sherman Act's prohibition against combinations in restraint of trade prompted President Wilson to make a special address to Congress in 1914 recommending that the antitrust laws be strengthened. 2 The New Democracy, The Public Papers of Woodrow Wilson 81-89 (R. Baker & W. Dodd eds. 1926). Congressman Clayton, the Chairman of the House Judiciary Committee, promptly appointed a subcommittee to prepare the legislation. The bill drafted by the subcommittee contained most of the provisions that were eventually enacted into the law now known as the Clayton Act. The statute reenacted certain provisions of the Sherman Act and added new provisions of both a substantive and procedural character. Letwin, [\*287] Law and Economic Policy in America, at 272-273; 2 A. Link, Wilson: The New Freedom 426 (1956). Thus, [§ 4](#) of the Sherman Act, which authorizes equitable [\*\*256] relief in actions brought by the United States, was reenacted as § 15 of the Clayton Act, while § 16 filled a gap in the Sherman Act by authorizing equitable relief in private actions. [Section 7](#) of the Clayton Act made stock acquisitions of competing companies more [\*\*\*\*31] vulnerable, and [§§ 4](#) and [5](#) gave special procedural advantages to private litigants. The reform project had broad social significance, and it is obvious that the Act as a whole is fairly characterized as important remedial legislation.

Some proponents of reform, however, were critical of the bill for not going further. Thus, for example, proposals that were never enacted would have expressly authorized private individuals to bring suit for the dissolution of corporations adjudged to have violated the law and for appointment of receivers to wind up the corporation's affairs.<sup>12</sup> Samuel Untermyer, a New York lawyer who urged Congress to give private plaintiffs express authority to seek dissolution decrees, stated his views in a colloquy with Congressman John Floyd during a hearing on the bill before a subcommittee of the House Judiciary Committee. Floyd told Untermyer that "We did not intend by section 13 to give the individual the same power to bring a suit to dissolve the corporation that the Government has," and added that the committee Members [\*288] had discussed the matter very thoroughly. Untermyer replied that "the very

<sup>12</sup> The Taft Administration received the decisions warmly, but they provoked bitter criticism from the Democratic Party leadership. Antitrust policy was sharply debated during the 1912 Presidential campaign. See W. Letwin, Law and Economic Policy in America 266, 269 (1965). Upon becoming Woodrow Wilson's first Attorney General shortly thereafter, James McReynolds promised to deliver dissolutions "free from the fundamental defect in the plans adopted in the Standard Oil and Tobacco cases where the separate parts into which the business was divided were left under the control of the same stockholders." Annual Report of Attorney General, H.R. Doc. No. 460, 63d Cong., 2d Sess., 7 (1913).

<sup>13</sup> An amendment passed by the Senate, but rejected by the House, provided:

"That whenever a corporation shall acquire or consolidate the ownership or control of the plants, franchises, or property of other corporations, co-partnerships, or individuals, so that it shall be adjudged to be a monopoly or combination in restraint of trade, the court rendering such judgment shall decree its dissolution and shall to that end appoint receivers to wind up its affairs and shall cause all of its assets to be sold in such manner and to such persons as will, in the opinion of the court, restore competition as fully and completely as it was before said corporation or combination began to be formed. The court shall reserve in its decree jurisdiction over said assets so sold for a sufficient time to satisfy the court that full and free competition is restored and assured." 51 Cong. Rec. 15863 (1914).

relief that the man needs nine times out of ten [\*\*\*\*32] is the dissolution of the corporation, because . . . it may not be doing any specific act of illegality, but its very existence, in violation of law, is the thing that is injuring him." Hearings on Trust Legislation before the House Committee on the Judiciary, 63d Cong., 2d Sess. 842-846 (1914) (House Hearings).

[\*\*\*\*33] Two weeks later, Louis Brandeis, testifying on behalf of the administration before the same committee, was asked whether he favored a proposal "to give the individual the right to file a bill in equity for the dissolution of one of these combinations, the same right which the Government now has and which it is its duty to perform." Brandeis responded that the proposal was not sound and added:

"It seems to me that the right to change the status [of the combination], which is the right of dissolution, is a right which ought to be exercised only by the Government, although the right for full redress for grievances and protection against future [\*\*1863] wrongs is a right which every individual ought to enjoy.

"Now, all of this procedure ought to be made so as to facilitate, [\*\*\*257] so far as possible, the enforcement of the law in aid, on the one hand, of the Government, and in aid, on the other hand, of the individual. But that fundamental principle is correct, that the Government ought to have the right, and the sole right, to determine whether the circumstances are such as to call for a dissolution of an alleged trust." *Id., at 649-650.*

LEdHN[1] [↑] [1] [\*\*\*\*34] American relies on these exchanges to support two slightly different arguments. First, it suggests that the committee recognized a distinction between relief directed at conduct and relief that is designed to change a company's status or structure. Second, it suggests that Congressman Floyd's statements permit an inference that the Congress as a whole rejected the possibility of a private dissolution remedy, and [\*289] thereby rejected divestiture as well, because divestiture is a species of dissolution. Neither suggestion is persuasive.

HN8 [↑] We have already concluded that the suggested distinction between divestiture and injunctions that prohibit future conduct is illusory. These excerpts, moreover, from the legislative history provide even less support for such a categorical distinction than does the text of § 16 itself.

The flaw in American's second suggestion is its assumption that the dissolution proposals submitted to Congress contemplated nothing more extreme than divestiture. Dissolution could be considerably more awesome. As the New York Court of Appeals ominously declared [\*\*\*\*35] before affirming a decree against the North River Sugar Refining Company, dissolution was a "judgment . . . of corporate death," which "represent[ed] the extreme rigor of the law."<sup>14</sup> [\*\*\*\*36] This meaning is evident from the text of the Senate amendment proposing private dissolution suits, which provided for a receiver to administer the doomed corporation's assets.<sup>15</sup>

<sup>14</sup> *People v. North River Sugar Refining Co.*, 121 N.Y. 582, 608, 24 N.E. 834 (1890). The New York attorney general had sought dissolution of the company for its participation in the sugar trust, relying upon two theories: that dissolution was appropriate because the company had violated the terms of its charter by entering the trust, and that dissolution was appropriate under the state antitrust laws. The Court of Appeals agreed that dissolution was appropriate on the first ground, and so declined to reach the second. *Id., at 626, 24 N.E., at 841.*

Judge Finch, writing for a unanimous court, began the opinion by announcing, "The judgment sought against the defendant is one of corporate death." *Id., at 608, 24 N.E., at 834.* He then said that although the "life of a corporation is indeed less than that of the humblest citizen," "destruction of the corporate life" may not be effected "without clear and abundant reason." *Ibid.* The ensuing opinion bristles with the rhetoric of moral condemnation; when characterizing the corporation's defense, for example, Judge Finch commented that the court had been asked "to separate in our thought the soul from the body, and admitting the sins of the latter to adjudge that the former remains pure." *Id., at 626, 24 N.E., at 837.*

<sup>15</sup> See n. 13, supra. Senator Reed, the sponsor of the Senate amendment which would have expressly authorized dissolution proceedings, stated that the statute's dissolution remedy should guarantee that "we shall have a real decree, that there shall be a real burial, and that we shall sod down the grave upon the monster that was created in defiance of law, but that we shall at the same time preserve its parts and restore them to competition and activity . . ." 51 Cong. Rec. 15864 (1914).

[\*290] [LEdHN\[1J\]](#) [1J] [LEdHN\[7\]](#) [7]The concept of dissolution, of course, also encompassed remedies comparable to divestiture, or to our present-day understanding of [\*\*\*258] dissolution.<sup>16</sup> [\*\*\*39] It was one thing to [\*\*1864] dissolve a [\*291] pool, trust, combination, or merger, and quite another to atomize, or to revoke the charter of, a large corporation.<sup>17</sup> In the early part of this century, however, new forms of corporate organization were arising at a pace that [\*\*\*37] outstripped the vocabulary used to describe them.<sup>18</sup> Concern about monopoly and competition dominated domestic politics, but people disagreed about [\*\*\*259] what these things were, and about why, and to what extent, they were good or bad.<sup>19</sup> [\*\*\*40] Men like McReynolds, Wilson's Attorney General, and Brandeis, the President's chief adviser on antitrust policy, could concur upon the need for forceful antitrust legislation and prosecution while finding themselves parted -- as their later battles on this Court made clear -- by a vast gulf in their understandings of economic theory and marketplace ethics.<sup>20</sup> Absent [\*292] agreement

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<sup>16</sup> There is a common core to present-day and early 20th-century understandings of the distinction between dissolution and divestiture:

"As applied in both early and more recent antitrust cases, 'dissolution' refers to an antitrust judgment which dissolves or terminates an illegal combination or association -- putting it out of business, so to speak. 'Divestiture' is used to refer to situations where the defendants are required to divest or dispossess themselves of specified property in physical facilities, securities, or other assets." Oppenheim, Divestiture as a Remedy Under the Federal Antitrust Laws, 19 Geo. Wash. L. Rev. 119, 120 (1950).

Nevertheless, for at least the past four decades dissolution and divestiture have been treated as interchangeable terms in antitrust law. See United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 330, n. 11 (1961) (terms are to a "large degree interchangeable"); see also Oppenheim, 19 Geo. Wash. L. Rev., at 121 (recognizing technical distinction between terms, but treating them as interchangeable nonetheless).

During the first decades of this century, however, "dissolution" was the favored term for a remedy that put an end to an unlawful combination and "divestiture" was rarely mentioned in the antitrust context. The early 20th-century treatise writers seem to have spoken exclusively in terms of dissolution. See, e.g., W. Thornton, A Treatise on the Sherman Anti-Trust Act § 372 (1913). Not surprisingly, all of the legislative history cited by the parties to this case refers to dissolution, not to divestiture.

Yet even without using the term "divestiture," Congress could and did recognize the appropriateness of a divestiture remedy in merger cases: § 11 of the Clayton Act expressly authorizes the FTC to order a defendant corporation to "divest itself of the stock held . . . contrary to the provisions of sectio[n] seven . . . of this Act." 38 Stat. 735. Indeed, the term "divestiture" appears to have entered the antitrust vocabulary as a consequence of FTC proceedings against alleged violators of § 7 of the Act. See, e.g., Arrow-Hart & Hegeman Electric Co. v. FTC, 291 U.S. 587 (1934); FTC v. Western Meat Co., 272 U.S. 554 (1926). Use of the term in those cases is unsurprising, for the text of the Act suggested that "divestiture," rather than "dissolution," was the remedy being sought.

By 1944, Justice Douglas was using the two terms in close proximity, see United States v. Crescent Amusement Co., 323 U.S. 173, 188-189 (1944) (Sherman Act case), although it is at least arguable that his usage preserved the technical distinction that was to be generally elided less than a decade later. Cf. Swift & Co. v. United States, 276 U.S. 311, 319 (1928) (referring to "divestiture of the instrumentalities" in a case raising both Sherman Act and Clayton Act claims). It would appear that, as the moral conception of dissolution lost favor and divestiture decrees became paradigmatic of dissolution remedies, the two concepts were collapsed into one another.

<sup>17</sup> For discussion of the scope of various dissolution decrees entered pursuant to the federal antitrust laws, see Hale, Trust Dissolution: "Atomizing" Business Units of Monopolistic Size, 40 Colum. L. Rev. 615 (1940); Adams, Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust, 27 Ind. L.J. 1 (1951). See also 2 A. Link, Wilson: The New Freedom 417-423 (1956).

<sup>18</sup> See, e.g., H. Thorelli, The Federal Antitrust Policy 72-87 (1954). Thorelli observes that "[n]o general incorporation law before 1888 explicitly sanctioned intercorporate stockholdings; some state laws even explicitly forbade them in the absence of special permission by the legislature. Common law rules did not recognize such relationships between corporations." Id., at 83. Perhaps because of the rapid pace of developments in corporate law, the politically charged "trust" concept came to embrace any large corporate combination as well as one specific device for creating such combinations. Id., at 84-85. See also D. Martin, Mergers and the Clayton Act 15, 43 (1959).

<sup>19</sup> See, e.g., Thorelli, The Federal Antitrust Policy 108-163, 309-352.

on the terms of debate, dissolution could mean the corporate death sentence, or the decrees of the Standard Oil and American Tobacco cases, or something else.<sup>21</sup> So long as this ambiguity persisted, dissolution had to be considered a public remedy, one that encompassed a power peculiarly suited to transgressions so "material and serious" as to "harm or menace the public welfare" in a manner transcending the "[\*\*1865] quarrels of private litigants."<sup>22</sup> For those like Brandeis, who viewed dissolution as desirable only if treated not as a moral penalty [\*\*\*\*38] but rather as a necessary economic remedy,<sup>23</sup> it would be imprudent to allow private parties to control a weapon potentially so lethal. Although it may now be second nature to conceive of dissolution in economic terms compatible with the policy Brandeis championed,<sup>24</sup> this view was anything but uncontroversial when the Act was drafted.<sup>25</sup>

[\*\*\*\*41] Once the historical importance of the distinction between dissolution and divestiture is understood, American's argument from the legislative history becomes singularly unpersuasive. The rejection of a proposed remedy that would terminate the corporate existence of American and appoint a [\*293] receiver to supervise the disposition of its assets is surely not the equivalent of the rejection of a remedy that would merely rescind a purchase of stock or assets. Dissolution was too vague and ill defined a remedy to be either incorporated into or excluded from § 16 as such; Congress instead sensibly avoided the problematic word and spoke in terms of equitable relief drawn to redress damage or loss which a private party might suffer by consequence of the Act's violation.<sup>26</sup> That [\*\*\*260] divestiture was encompassed within the concept of dissolution as understood at the time of the Clayton Act's framing does not imply that the equitable formulation of § 16 cannot permit divestiture while excluding more severe sanctions that also traveled under the name "dissolution."

[\*\*\*\*42] For similar reasons, we need not consider how much weight might otherwise be due to *Graves v. Cambria Steel Co.*, 298 F. 761 (NY 1924), a brief District Court decision by Judge Learned Hand upon which American relies heavily.<sup>27</sup> The suit appears to have been brought by dissatisfied shareholders of a target corporation who wished

<sup>20</sup> See 2 Link, Wilson: The New Freedom 117, n. 83.

<sup>21</sup> See *CIA. Petrolera Caribe, Inc.*, 754 F. 2d, at 419-422.

<sup>22</sup> *North River Sugar Refining Co.*, 121 N.Y., at 609, 24 N.E., at 835.

<sup>23</sup> "[Brandeis] believed that anti-trust policy should be constructive rather than destructive: ' . . . we should approach this subject from the point of view of regulation rather than of restriction; because industrial crime is not a cause, it is an effect -- the effect of a bad system.'" A. Mason, Brandeis: A Free Man's Life 402 (1956) (footnote omitted).

<sup>24</sup> Cf. *United States v. Du Pont & Co.*, 366 U.S., at 326 ("divestiture" is the "most drastic, but most effective, of antitrust remedies," yet it should be imposed only to "restore competition" and must not be "punitive"). See also Comment, The Personification of the Business Corporation in American Law, 54 U. Chi. L. Rev. 1441, 1478-1483 (1987) (discussing decline of moral conceptions of the corporation).

<sup>25</sup> The notion that a proper remedy for violating the antitrust laws is complete dissolution of the wrongdoer persists in some state antitrust statutes that allow termination of a foreign corporation's right to do business within the State when the corporation is found guilty of violating the law. See e.g., *Wis. Stat. § 133.12* (1987-1988).

<sup>26</sup> Congress could, of course, have referred expressly to the divestiture remedy, as was done in § 11 of the Act, directing that the FTC shall require a violator of § 7 to "divest itself of the stock" unlawfully acquired. There was, however, no reason for Congress to itemize the various remedies which might be available in a § 16 suit. Moreover, while divestiture might be the appropriate remedy in every § 7 case prosecuted by the FTC, there is no reason to believe that the same would be true in private § 7 cases. There is thus nothing remarkable about the absence of any specific reference to divestiture in § 16.

<sup>27</sup> American also seeks to buttress its position by citations to *Fleitmann v. Welsbach Co.*, 240 U.S. 27 (1916); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *General Investment Co. v. Lake Shore & M.S.R. Co.*, 260 U.S. 261, 287 (1922); *Continental Securities Co. v. Michigan Cent. R. Co.*, 16 F. 2d 378 (CA6 1926), cert. denied, 274 U.S. 741 (1927); and *Venner v. Pennsylvania Steel Co. of New Jersey*, 250 F. 292 (NJ 1918). Several of these cases seem to us to involve issues entirely

to dissolve the new merged entity. The plaintiffs sought relief [\*294] under § 16 of the Clayton [\*\*1866] Act. Judge Hand remarked that the suit "is really a suit for the dissolution of a monopoly pro tanto. I cannot suppose that any one would argue that a private suit for dissolution would lie under section 16 of the Clayton Act." [298 F. at 762](#). Not only does Hand, like Floyd, Untermeyer, and Brandeis before him, refer to dissolution rather than divestiture, but, moreover, the state corporation law overtones of the inchoate complaint make it possible that the suit implicated the more drastic forms of dissolution.

[\*\*\*\*43] [LEdHN\[1K\]](#) [↑] [1K] [LEdHN\[5E\]](#) [↑] [5E] [LEdHN\[8\]](#) [↑] [8]The inferences that American draws from its excerpts from the subcommittee hearings simply are not confirmed by anything that has been called to our attention in the Committee Reports, the floor debates, the Conference Report, or contemporaneous judicial interpretations.<sup>28</sup> Indeed, a fair reading [\*\*\*261] of the entire legislative history supports the conclusion that § 16 means exactly what it says when it endorses the "conditions and principles" governing injunctive relief in courts of equity: that the provision should be construed generously and flexibly pursuant to principles of equity. See [\*295] [CIA. Petrolera Caribe, Inc., 754 F. 2d, at 418-427](#). As the Court stated in [Hecht Co. v. Bowles, 321 U.S., at 329](#):

[HN9](#) [↑] "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each [\*\*\*\*44] decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."

[HN10](#) [↑] More recently, in [Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 \(1982\)](#), we observed that when Congress endows the federal courts with equitable jurisdiction, Congress acts aware of this longstanding tradition of flexibility. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Ibid.*, quoting [Porter v. Warner Holding Co., 328 U.S. 395, 398 \(1946\)](#). These principles unquestionably support a construction of the statute that will enable a chancellor to impose the most effective, usual and straightforward remedy to rescind an unlawful purchase of stock or assets. The fact that the term "divestiture" is used to describe what is typically nothing more than the familiar remedy of rescission does not place the remedy beyond the normal reach of the chancellor.

[\*\*\*\*45] IV

[LEdHN\[1L\]](#) [↑] [1L] [LEdHN\[9\]](#) [↑] [9] [LEdHN\[10A\]](#) [↑] [10A]Our conclusion that a district court has the power to order divestiture in appropriate cases brought under § 16 of the Clayton Act does not, of course, mean that such power should be exercised in every situation in which the Government would be entitled to such relief under § 15. [HN11](#) [↑] In a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief. See [Du Pont, 366 U.S., at 319-321](#); see also [Virginian R. Co. v. Railway Employees, 300 U.S. 515,](#)

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distinct from those posed here, and, in any event, in none of these precedents do we find anything that casts any doubt upon the rule we announce today.

<sup>28</sup> Professors Areeda and Turner have criticized the Court of Appeals for the Ninth Circuit on the ground that it did not correctly evaluate the legislative history of § 16 in IT&T. Areeda and Turner state that the "fragment of legislative history" relied upon by the Court of Appeals "cannot bear the weight the court placed upon it, when the reports of the relevant House and Senate committees were silent on the point, which also did not appear to have been mentioned on the House or Senate floor." They point out that "other courts have indicated, correctly, that divestiture is available in a private suit challenging unlawful mergers," and conclude that "divestiture is the normal and usual remedy against an unlawful merger, whether sued by the government or by a private plaintiff." 2 P. Areeda & D. Turner, [Antitrust Law](#) § 328b (1978) (footnotes omitted). Other commentators have likewise reasoned that § 16 affords private plaintiffs a divestiture remedy. See, e.g., Peacock, Private Divestiture Suits Under Section 16 of the Clayton Act, 48 Tex. L. Rev. 54 (1969); Note, Availability of Divestiture in Private Litigation as a Remedy for violation of [Section 7](#) of the Clayton Act, 49 Minn. L. Rev. 267 (1964); Note, Divestiture as a Remedy in Private Actions Brought Under Section 16 of the Clayton Act, [84 Mich. L. Rev. 1579 \(1986\)](#).

552 [\*\*1867] (1937) ("Courts of equity may and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved"); United States v. San Francisco, 310 U.S. 16, 30-31 (1940) [\*296] (authorizing issuance [\*\*\*46] of injunction at Government's request without balancing of the equities). A private litigant, however, must have standing -- in the words of § 16, he must prove "threatened loss or damage" to his own interests in order to obtain relief. See Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986). Moreover, equitable defenses such as laches, or perhaps "unclean hands," may protect consummated transactions from belated attacks by private parties when it would not be too late for the Government to vindicate the public interest.

LEdHN[1M] [↑] [1M] LEdHN[10B] [↑] [10B] Such questions, however, are not presented in this case. We are merely confronted [\*\*\*262] with the naked question whether the District Court had the power to divest American of any part of its ownership interests in the acquired Lucky Stores, either by forbidding the exercise of the owner's normal right to integrate the operations of the two previously separate companies, or by requiring it to sell certain assets located in California. We hold that such a remedy is a form [\*\*\*47] of "injunctive relief" within the meaning of § 16 of the Clayton Act. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

**Concur by:** KENNEDY

## Concur

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JUSTICE KENNEDY, concurring.

In agreement with our holding that § 16 of the Clayton Act does authorize divestiture as a remedy for violations of § 7 of the Clayton Act, I join the Court's opinion. I write further to note that both the respondents and various interested labor unions, the latter as amici curiae, have argued for a different result on the basis of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Clayton Act § 7A, as added and amended), 15 U.S.C. § 18a. See Brief for Respondents 47-48; Brief for United Food and Commercial International Union et al. as Amici Curiae 7-15. Although I do not believe that § 7A is controlling as an interpretation of the earlier [\*297] enacted § 16, it may be of vital relevance in determining whether to order divestiture in a particular case.

Section 7A enables the Federal Government to review certain transactions that might violate § 7 before [\*\*\*48] they occur. The provision, in brief, requires those contemplating an acquisition within its coverage to provide the Federal Trade Commission (FTC) with the information necessary for determining "whether such acquisition may, if consummated, violate the antitrust laws." 15 U.S.C. § 18a(d)(1). During the mandatory waiting period that follows the submission of this information, see § 18a(b)(1), the agency may decide, as it did in this case, to negotiate a settlement intended to eliminate potential violations. See 16 CFR §§ 2.31-2.34 (1989). The procedure may resolve antitrust disputes in a manner making it easier for businesses and unions to predict the consequences of mergers and to conform their economic strategies in accordance with the probable outcome.

The respondents, and the unions in their brief as amici, argue that a State or private person should not have the power to sue for divestiture under § 16 following a settlement approved by the FTC. They maintain that the possibility of such actions will reduce the Federal Government's negotiating strength and destroy the predictability that Congress sought to provide when it enacted § 7A. It is plausible, [\*\*\*49] in my view, that allowing suits under § 16 may have these effects in certain instances. But the respondents and unions have identified nothing in § 7A that contradicts the Court's interpretation of § 7 and § 16. Section 7A, indeed, may itself contain [\*\*1868] language contrary to their position. See, e.g., 15 U.S.C. § 18a(i)(1). Although Congress might [\*\*\*263] desire at some point to enact a strict rule prohibiting divestiture after a negotiated settlement with the FTC, it has not done so yet.

The Court's opinion, however, does not render compliance with the Hart-Scott-Rodino Antitrust Improvements Act irrelevant to divestiture actions under § 16. The Act, for instance, may bear upon the issue of laches. By establishing a [\*298] time period for review of merger proposals by the FTC, § 7A may lend a degree of objectivity to the laches determination. Here the State received the respondents' § 7A filings in mid-April 1988, see Brief for Petitioner 3, and so had formal notice of the parties' intentions well before completion of the merger or the settlement with the FTC. It elected not to act at that time, but now seeks a divestiture [\*\*\*\*50] which, the facts suggest, would upset labor agreements and other matters influenced in important ways by the FTC proceeding. These considerations should bear upon the ultimate disposition of the case. As the Ninth Circuit stated:

"California could have sued several months earlier and attempted to enjoin the merger before the stock sale was completed. The Attorney General chose not to do so. California must accept the consequences of his choice." [872 F. 2d 837, 846 \(1989\)](#).

With the understanding that these consequences may include the bar of laches, I join the Court's decision.

## References

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[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 370, 378, 385, 387](#)

24 Federal Procedure, L Ed, Monopolies and Restraints of Trade 54:381, 54:383, 54:384, 54:399-54:409

12B Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade 48:269, 48:270, 48:303, 48:311

18 Am Jur PI & Pr Forms (Rev), Monopolies, Restraints of Trade, and Unfair Trade Practices, [\*\*\*\*51] Form 17

24 Am Jur Trials 1, Defending Antitrust Lawsuits

[15 USCS 26](#)

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 78

Index to Annotations, Dissolution or Liquidation; Divestiture; Injunctions ;Restraints of Trade and Monopolies

Annotation References:

Propriety and scope of injunctive relief in federal antitrust case. [55 L Ed 2d 892](#).

Construction, by Supreme Court of the United States, of 7 of Clayton Act ([15 USCS 18](#)), dealing with acquisition by one corporation of stock of another. [14 L Ed 2d 784](#).

Standing of private party under 16 of Clayton Act ([15 USCS 26](#)) to seek injunction to prevent merger or acquisition allegedly prohibited under 7 of the Act ([15 USCS 18](#)). 78 ALR Fed 159.

Divestiture as available relief under 16 of Clayton Act ([15 USCS 26](#)) in action by private parties. 77 ALR Fed 509.



## Atl. Richfield Co. v. USA Petroleum Co.

Supreme Court of the United States

December 5, 1989, Argued ; May 14, 1990, Decided

No. 88-1668

### **Reporter**

495 U.S. 328 \*; 110 S. Ct. 1884 \*\*; 109 L. Ed. 2d 333 \*\*\*; 1990 U.S. LEXIS 2543 \*\*\*\*; 58 U.S.L.W. 4547; 1990-1 Trade Cas. (CCH) P69,019

ATLANTIC RICHFIELD CO. v. USA PETROLEUM CO.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

**Disposition:** [859 F. 2d 687](#), reversed and remanded.

## **Core Terms**

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antitrust, prices, competitor, vertical, dealers, conspiracy, predatory, anti trust law, Sherman Act, price-fixing, consumers, retail, gasoline, price competition, maximum price, Clayton Act, maximum-price-fixing, anticompetitive, nonpredatory, distributor, stations, effects, losses, price fixing, sales, per se rule, practices, damages, per se violation, conspirators

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

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

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

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Civil Actions > General Overview

### **[HN1](#)[ Remedies, Damages**

Section 4 of the Clayton Act, [15 U.S.C.S. § 15](#), is a remedial provision that makes available treble damages to any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

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

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

## **HN2** [] Remedies, Damages

A private plaintiff may not recover antitrust damages under [15 U.S.C.S. § 15](#) merely by showing injury causally linked to an illegal presence in a market. Instead, a plaintiff must prove the existence of antitrust injury, which is to say injury of the type antitrust laws are intended to prevent and that flows from that which makes a defendant's acts unlawful. Injury, although causally related to an antitrust violation, nevertheless will not qualify as "antitrust injury" unless it is attributable to an anticompetitive aspect of a practice under scrutiny, since it is inimical to antitrust laws to award damages' for losses stemming from continued competition.

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

Contracts Law > Defenses > Illegal Bargains

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

## **HN3** [] Vertical Restraints, Nonprice Restraints

A maximum-price vertical agreement is per se illegal and operates by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market and may severely intrude upon the ability of buyers to compete and survive in a market. Maximum prices may be fixed too low for a dealer to furnish services essential to the value which goods have for a consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. By limiting the ability of small dealers to engage in nonprice competition, a maximum-price-fixing agreement might channel distribution through a few large or specifically advantaged dealers. If the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of a dealer, a scheme tends to acquire all the attributes of an arrangement fixing minimum prices.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

## **HN4** [] Vertical Restraints, Price Fixing

A vertical, maximum price-fixing agreement is per se unlawful because of its potential effects on dealers and consumers, not because of its effect on competitors. If a vertical agreement fixes maximum prices too low for a dealer to furnish services desired by consumers, or in such a way as to channel business to large distributors, then

a firm dealing in a competing brand would not be harmed. A competitor may not complain of conspiracies that set minimum prices at any level.

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

## **HN5** Price Fixing & Restraints of Trade, Vertical Restraints

When a firm, or even a group of firms adhering to a vertical agreement, lowers prices but maintains them above predatory levels, business lost by rivals cannot be viewed as an "anticompetitive" consequence of a claimed violation. A firm complaining about the harm it suffers from nonpredatory price competition is really claiming that it is unable to raise prices. This is not antitrust injury; indeed, cutting prices in order to increase business often is the very essence of competition. The antitrust laws are enacted for the protection of competition, not competitors. To hold that the antitrust laws protect competitors from the loss of profits due to nonpredatory price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share.

Antitrust & Trade Law > Sherman Act > Claims

Contracts Law > Defenses > Illegal Bargains

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

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

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

Antitrust & Trade Law > Sherman Act > Scope > General Overview

## **HN6** Sherman Act, Claims

Price fixing violates § 1 of the Sherman Act (Act) even if a single firm's decision to price at the same level would not create § 2 of the Act liability. In a § 1 case, a price agreement itself is illegal. Although a vertical, maximum-price-fixing agreement is unlawful under § 1, it does not cause a competitor antitrust injury unless it results in predatory pricing. Antitrust injury does not arise for purposes of 15 U.S.C.S. § 15 until a private party is adversely affected by an anticompetitive aspect of a defendant's conduct. In the context of pricing practices, only predatory pricing has the requisite anticompetitive effect. Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury.

495 U.S. 328, \*328; 110 S. Ct. 1884, \*\*1884; 109 L. Ed. 2d 333, \*\*\*333; 1990 U.S. LEXIS 2543, \*\*\*\*1

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > Clayton Act

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

## **[HN7](#) [PDF]** Clayton Act, Claims

Nonpredatory price competition for increased market share, as reflected by prices that are below "market price" or even below the costs of a firm's rivals, is not activity forbidden by the antitrust laws. When prices are not predatory, any losses flowing from them cannot be said to stem from an anticompetitive aspect of a defendant's conduct. It is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.

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

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

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

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

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

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

Antitrust & Trade Law > Sherman Act > Remedies > Damages

## **[HN8](#) [PDF]** Regulated Practices, Private Actions

The per se rule is a method of determining whether [§ 1](#) of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages under [15 U.S.C.S. § 15](#). Per se and rule-of-reason analysis are but two methods of determining whether a restraint is

"unreasonable," that is, whether its anticompetitive effects outweigh its procompetitive effects. The per se rule is a presumption of unreasonableness based on business certainty and litigation efficiency. It represents a longstanding judgment that the prohibited practices by their nature have a substantial potential for impact on competition. Once experience with a particular kind of restraint enables a court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that a restraint is unreasonable.

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

### **HN9** Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Both per se rules and the rule of reason are employed to form a judgment about the competitive significance of a pricing restraint. Whether an ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same - whether or not a challenged restraint enhances competition.

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

Antitrust & Trade Law > Clayton Act > General Overview

### **HN10** Private Actions, Remedies

The antitrust injury requirement under [15 U.S.C.S. § 15](#) ensures that the harm claimed by a plaintiff corresponds to the rationale for finding a violation of antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief. Actions per se unlawful under antitrust laws may nonetheless have some procompetitive effects, and private parties might suffer losses therefrom. Conduct in violation of antitrust laws may have three effects, often interwoven: in some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition. The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. The need for this showing is at least as great under the per se rule as under the rule of reason.

Antitrust & Trade Law > Clayton Act > General Overview

### **HN11** Antitrust & Trade Law, Clayton Act

Proof of a per se violation and of antitrust injury under [15 U.S.C.S. § 15](#) are distinct matters that must be shown independently.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

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

## **HN12** Standing, Clayton Act

Even in cases involving per se violations, the right of action under [15 U.S.C. § 15](#) is available only to those private plaintiffs who have suffered antitrust injury. Plaintiffs are required to show that a conspiracy caused them an injury for which antitrust laws provide relief. A restraint of trade may be illegal per se in the sense that it could be condemned even without proof of its actual market effect, but even if it may have been unlawful, it does not, of course, necessarily follow that still another party .is a person injured by reason of a violation of the antitrust laws within the meaning of [§ 15](#).

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

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

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

Antitrust & Trade Law > Public Enforcement > State Civil Actions

## **HN13** Vertical Restraints, Price Fixing

The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party to perform the office of a private attorney general.

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

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

## **HN14** Vertical Restraints, Price Fixing

A competitor is not injured by anticompetitive effects of vertical, maximum price-fixing, and does not have any incentive to vindicate the legitimate interests of a rival's dealer. A competitor will not bring suit to protect a dealer against a maximum price that is set too low, inasmuch as a competitor would benefit from such a situation. Instead, a competitor will be motivated to bring suit only when a vertical restraint promotes interbrand competition between a competitor and a dealer subject to a restraint. A competitor will be injured and hence motivated to sue only when a vertical, maximum-price-fixing arrangement has a procompetitive impact on a market. Therefore, providing a competitor a cause of action will not protect the rights of dealers and consumers under antitrust laws.

## **Lawyers' Edition Display**

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### **Decision**

Firm held not to suffer "antitrust injury," and thus held unable to sue under 4 of Clayton Act ([15 USCS 15](#)), for alleged loss of sales to competitor charging nonpredatory prices pursuant to vertical, maximum price-fixing scheme.

### **Summary**

Section 4 of the Clayton Act ([15 USCS 15](#)) generally authorizes a treble damages suit by any person injured in the person's business or property by reason of anything forbidden in the antitrust laws. The United States Supreme Court has held that, in order for a private plaintiff to bring such a 4 suit, the plaintiff must prove the existence of "antitrust injury"--injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. An independent retail marketer of gasoline competed with the dealers of an integrated oil company. The marketer brought a suit against the oil company in the United States District Court for the Central District of California and included in the suit an antitrust claim of the existence of a vertical, maximum price-fixing agreement prohibited by 1 of the Sherman Act ([15 USCS 1](#)). The District Court, however, in granting summary judgment for the oil company on the 1 claim, expressed the view that (1) even assuming that the marketer could establish a vertical conspiracy to maintain low prices, the marketer could not satisfy the "antitrust injury" requirement of 4, without showing such prices to be predatory; and (2) the marketer could make no such showing of predatory pricing, because, given the oil company's market share and the ease of entry into the market, the oil company was in no position to exercise market power. On appeal, the United States Court of Appeals for the Ninth Circuit, reversing, expressed the view that (1) injuries resulting from vertical, nonpredatory, maximum price-fixing agreements could constitute "antitrust injury" for purposes of a private suit under 4; and (2) in the case at hand, the marketer's claimed injuries were the direct result and, if the marketer's allegations were accepted as true, the intended objective of the alleged price-fixing scheme, where, according to the marketer, the purpose of the alleged price fixing was to disrupt the market of retail gasoline sales ([859 F2d 687](#)).

On certiorari, the Supreme Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings. In an opinion by Brennan, J., joined by Rehnquist, Ch. J., and Marshall, Blackmun, O'Connor, Scalia, and Kennedy, JJ., it was held that--assuming for the purposes of decision that the oil company's pricing was not predatory in nature, and that vertical, maximum price fixing was subject to a per se rule of illegality under 1--(1) a firm does not suffer an antitrust injury, and thus the firm cannot bring a treble damages suit under 4, when the firm allegedly loses sales to a competitor charging nonpredatory prices pursuant to a vertical, maximum price-fixing scheme allegedly prohibited by 1, because (a) the firm's losses do not flow from the aspects of the vertical, maximum price fixing that render it illegal, (b) the business lost by the firm as a rival cannot be viewed as an anticompetitive consequence of the claimed violation, (c) any differences between liability under 1 and liability under 2 of the Sherman Act ([15 USCS 2](#)) do not affect the result, (d) similarly, no salient difference results from the fact that the source of the nonpredatory price competition is an agreement alleged to be unlawful under 1 of the Sherman Act, rather than a merger alleged to be unlawful under 7 of the Clayton Act ([15 USCS 18](#)), and (e) the fact that a vertical price-fixing scheme may facilitate predatory pricing in some circumstances is no reason to dispense with the antitrust-injury requirement in an action by the firm against the competitor's vertical agreement; (2) the allegation of a per se violation of 1 does not obviate the need to satisfy the antitrust-injury test; and (3) there is no need to encourage private enforcement in such circumstances, and thus to permit the dilution of the antitrust-injury requirement.

Stevens, J., joined by White, J., dissenting, expressed the view that the court's opinion undermined the enforceability of a substantive price-fixing violation with a flawed construction of 4, which erroneously assumed that (1) the level of a price fixed by a 1 conspiracy is relevant to legality, and (2) all vertical arrangements conform to a single model.

## Headnotes

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > STATUTES §108.5 > damages suit -- vertical, maximum price-fixing scheme by competitor -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D] [LEdHN\[1E\]](#) [1E] [LEdHN\[1F\]](#) [1F] [LEdHN\[1G\]](#) [1G] [LEdHN\[1H\]](#) [1H] [LEdHN\[1I\]](#) [1I] [LEdHN\[1J\]](#) [1J] [LEdHN\[1K\]](#) [1K] [LEdHN\[1L\]](#) [1L] [LEdHN\[1M\]](#) [1M]

A firm does not suffer an "antitrust injury," and thus the firm cannot bring a treble damages suit under 4 of the Clayton Act ([15 USCS 15](#)), when the firm allegedly loses sales to a competitor charging nonpredatory prices pursuant to a vertical, maximum price-fixing scheme allegedly prohibited by 1 of the Sherman Act ([15 USCS 1](#)), because, even assuming for the purposes of decision that vertical, maximum price fixing is subject to a per se rule of illegality under 1, (1) the firm's losses do not flow from the aspects of the vertical, maximum price fixing that render it illegal, for, even if the agreement had ultimately acquired all the attributes of a minimum price-fixing scheme, the competitor's higher prices would work to the firm's advantage; (2) when a competitor, or even a group of competitors adhering to a vertical agreement, lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an anticompetitive consequence of the claimed violation, for a firm complaining about the harm it suffers from nonpredatory pricing is really claiming that the firm is unable to raise prices; (3) any differences between liability under 1 and liability under 2 of the Sherman Act ([15 USCS 2](#)) do not affect the result, for although a vertical, maximum price-fixing agreement may be unlawful under 1, such an agreement does not cause a competitor antitrust injury unless the agreement results in predatory pricing, for, in the context of pricing practices, only predatory pricing has requisite anticompetitive effect; (4) for similar reasons, no salient difference, for purposes of the antitrust-injury requirement, results from the fact that the source of the nonpredatory price competition is an agreement alleged to be unlawful under 1 of the Sherman Act, rather than a merger alleged to be unlawful under 7 of the Clayton Act ([15 USCS 18](#)); and (5) the fact that a vertical price-fixing scheme may facilitate predatory pricing in some circumstances is no reason to dispense with the antitrust-injury requirement in an action by a firm against a competitor's vertical agreement, because a firm always is able to challenge directly a competitor's pricing as predatory. (Stevens and White, JJ., dissented from this holding.)

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > damages suit -- injury to plaintiff -- per se violation -- equitable relief -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B] [LEdHN\[2C\]](#) [2C] [LEdHN\[2D\]](#) [2D] [LEdHN\[2E\]](#) [2E]

The allegation of a per se violation of 1 of the Sherman Act ([15 USCS 1](#)) does not obviate a private plaintiff's need to satisfy the "antitrust injury" test, in order to bring a treble damages suit under 4 of the Clayton Act ([15 USCS 15](#)), because the per se rule, which is a method for determining whether 1 has been violated, does not indicate whether a plaintiff has suffered antitrust injury, for (1) the antitrust-injury requirement has the different purpose of (a) insuring that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and (b) preventing losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief; (2) the antitrust-injury requirement insures that a plaintiff can recover only if the loss stems from the competition-reducing aspect or effect of the defendant's behavior, rather than any competition-increasing or competition-neutral aspect or effect of such behavior; (3) the need for such a showing is at least as great under the per se rule as under the rule of reason; (4) insofar as the per se rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust-injury requirement is underscored; and (5) thus, proof of a per se violation and of antitrust injury are distinct matters that must be shown independently. (Stevens and White, JJ., dissented from this holding.)

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > damages suit -- encouragement of enforcement -- > Headnote:

[LEdHN\[3A\]](#) [3A] [LEdHN\[3B\]](#) [3B] [LEdHN\[3C\]](#) [3C] [LEdHN\[3D\]](#) [3D] [LEdHN\[3E\]](#) [3E] [LEdHN\[3F\]](#) [3F] [LEdHN\[3G\]](#) [3G] [LEdHN\[3H\]](#) [3H]

With respect to the requirement that a private plaintiff show "antitrust injury" in order to bring a treble damages suit under 4 of the Clayton Act ([15 USCS 15](#)), even if it is assumed for the purposes of decision that vertical, maximum price fixing is subject to a per se rule of illegality under 1 of the Sherman Act ([15 USCS 1](#)), there is no need to

encourage a rival firm's private enforcement of such a rule, and thus to permit the dilution of the antitrust-injury requirement when the firm allegedly loses sales to a competitor charging nonpredatory prices pursuant to a vertical, maximum price-fixing scheme, because (1) if such a scheme causes anticompetitive consequences so as to result in a per se violation of 1, consumers and the manufacturer's own dealers may bring suit; and (2) providing the firm, as a rival, with a cause of action will not protect the rights of dealers and consumers under the antitrust laws, for the firm's injury is not inextricably intertwined with the antitrust injury that a dealer would suffer, where the firm (a) is not injured by the anticompetitive effects of vertical, maximum price fixing, and (b) will be injured, and hence motivated to sue, only when the competitor's vertical, maximum price-fixing arrangement has a procompetitive impact on the market. (Stevens and White, JJ., dissented from this holding.)

APPEAL §1289 > summary judgment -- inferences from facts -- > Headnote:

[LEdHN\[4A\]](#) [4A] [LEdHN\[4B\]](#) [4B]

On certiorari, in a case coming to the United States Supreme Court on review of summary judgment, inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion.

APPEAL §1331.5 > what reviewable -- predatory pricing -- > Headnote:

[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B] [LEdHN\[5C\]](#) [5C] [LEdHN\[5D\]](#) [5D]

On certiorari to determine whether a firm suffers an "antitrust injury," for purposes of the firm's ability to bring a treble damages suit, under 4 of the Clayton Act ([15 USCS 15](#)), for sales allegedly lost to a competitor charging nonpredatory prices pursuant to a vertical, maximum price-fixing scheme, the United States Supreme Court, upon assuming for the purposes of decision that the competitor's pricing was not predatory in nature, has no occasion (1) to consider the proper definition of "predatory pricing," or (2) to determine whether an accurate statement of the law was made by the Supreme Court's dictum, in a prior case, that predatory pricing might consist of pricing below the level necessary to sell the offender's products.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > suit for damages -- injury -- > Headnote:

[LEdHN\[6\]](#) [6]

A private plaintiff may not recover damages under 4 of the Clayton Act ([15 USCS 15](#)) merely by showing injury causally linked to an illegal presence in the market; instead, such a plaintiff must prove the existence of "antitrust injury"--injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > minimum prices -- damages suit --

> Headnote:

[LEdHN\[7\]](#) [7]

In a treble damages suit under 4 of the Clayton Act ([15 USCS 15](#)) for an alleged violation of 1 of the Sherman Act ([15 USCS 1](#)), a competitor may not complain of conspiracies that set minimum prices at any level.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §6 > purpose -- > Headnote:

[LEdHN\[8A\]](#) [8A] [LEdHN\[8B\]](#) [8B]

Under the antitrust laws, which were enacted for the protection of competition, not competitors, the statutory policy precludes inquiry into the question whether competition is good or bad.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > nonpredatory pricing -- damages suit --

> Headnote:

[LEdHN\[9A\]](#) [9A] [LEdHN\[9B\]](#) [9B]

For purposes of the requirement that a private plaintiff show "antitrust injury" in order to bring a treble damages suit under 4 of the Clayton Act ([15 USCS 15](#)), such a plaintiff cannot claim antitrust injury from nonpredatory price competition on the asserted ground that it is "ruinous," for to hold that the antitrust laws protect competitors from the loss of profits due to nonpredatory price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. (Stevens and White, JJ., dissented in part from this holding.)

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > STATUTES §108.5 > price-fixing violations -- > Headnote:

[LEdHN\[10\]](#) [10]

Price fixing violates 1 of the Sherman Act ([15 USCS 1](#)) as an agreement in restraint of trade, even if a single firm's decision to price at the same level would not create liability under 2 of the Act ([15 USCS 2](#)) as an attempt to monopolize, because, in a 1 case, the price agreement itself is illegal; 1 in general and the per se rule in particular are grounded on faith in price competition as a market force, and not on a policy of low selling prices at the price of eliminating competition.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > damages suit -- injury -- > Headnote:

[LEdHN\[11A\]](#) [11A] [LEdHN\[11B\]](#) [11B]

"Antitrust injury" does not arise, for purposes of a private party's ability to maintain a treble damages suit under 4 of the Clayton Act ([15 USCS 15](#)), until the private party is adversely affected by an anticompetitive aspect of the defendant's conduct; for purposes of 4, injury in fact cannot be equated with "antitrust injury," and the antitrust-injury requirement cannot be met by broad allegations of harm to the "market" as an abstract entity; although all antitrust violations, under both per se and rule-of-reason analyses, "distort" the market, not every loss stemming from a violation counts as antitrust injury.

EVIDENCE §343.5 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > violations per se - rule of reason -- presumptions -- > Headnote:

[LEdHN\[12A\]](#) [12A] [LEdHN\[12B\]](#) [12B]

For purposes of determining whether 1 of the Sherman Act ([15 USCS 1](#)) has been violated, per se and rule-of-reason analyses are but two methods of determining whether a restraint is "unreasonable," that is, whether the restraint's anticompetitive effects outweigh its procompetitive effects; both per se rules and the rule of reason are employed to form a judgment about the competitive significance of the restraint; whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same--whether the challenged restraint enhances competition; a per se rule (1) is a presumption of a reasonableness based on business certainty and litigation efficiency, and (2) represents a long-standing judgment that the prohibited practices, by their nature, have a substantial potential for impact on competition; and once experience with a particular type of restraint enables the United States Supreme Court to predict with confidence that the rule of reason will condemn the restraint, the Supreme Court applies a conclusive presumption that the restraint is unreasonable.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 > rule of reason -- > Headnote:

[LEdHN\[13A\]](#) [13A] [LEdHN\[13B\]](#) [13B]

With respect to whether a manufacturer's vertical arrangements with a dealer violate 1 of the Sherman Act ([15 USCS 1](#)), exclusive territorial arrangements and other nonprice restrictions are subject to only rule-of-reason scrutiny, rather than to a rule of per se illegality.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > suit for damages -- injury -- > Headnote:

[LEdHN\[14\]](#) [14]

For purposes of determining the required "antitrust injury" that a private plaintiff must suffer in order to bring a treble damages suit under 4 of the Clayton Act ([15 USCS 15](#)), the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party to perform the office of a private attorney general.

## Syllabus

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Petitioner Atlantic Richfield Company (ARCO), an integrated oil company, increased its retail gasoline sales and market share by encouraging its dealers to match the prices of independents such as respondent USA Petroleum Company, which competes directly with the dealers at the retail level. When USA's sales dropped, it sued ARCO in the District Court, charging, *inter alia*, that the vertical, maximum-price-fixing scheme constituted a conspiracy in restraint of trade in violation of [§ 1](#) of the Sherman Act. The court granted summary judgment to ARCO, holding that USA could not satisfy the "antitrust injury" requirement for purposes of a private damages suit under [\[\\*\\*\\*\\*2\]](#) § 4 of the Clayton Act because it was unable to show that ARCO's prices were predatory. The Court of Appeals reversed, holding that injuries resulting from vertical, nonpredatory, maximum-price-fixing agreements could constitute "antitrust injury." Reasoning that any form of price fixing contravenes Congress' intent that market forces alone determine what goods and services are offered, their prices, and whether particular sellers succeed or fail, the court concluded that USA had shown that its losses resulted from a disruption in the market caused by ARCO's price fixing.

Held:

1. Actionable "antitrust injury" is an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Injury, although casually related to an antitrust violation, will not qualify unless it is attributable to an anticompetitive aspect of the practice under scrutiny, since it is inimical to the antitrust laws to award damages for losses stemming from continued competition. [Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 109-110](#). P. 334

2. A vertical, maximum-price-fixing conspiracy in violation of [§ 1](#) of the Sherman [\*\*\*\*3] Act must result in predatory pricing to cause a competitor antitrust injury. Pp. 335-341.

(a) As a competitor, USA has not suffered "antitrust injury," since its losses do not flow from the harmful effects on dealers and consumers that rendered vertical, maximum price fixing per se illegal in [Albrecht v. Herald Co., 390 U.S. 145](#). USA was benefited rather than harmed if ARCO's pricing policies restricted ARCO's sales to a few large dealers or prevented its dealers from offering services desired by consumers. Even if the maximum price agreement acquired all of the attributes of a minimum-price-fixing scheme, USA still would not have suffered antitrust injury, because higher ARCO prices would have worked to USA's advantage. Pp. 335-337.

(b) USA's argument that, even if it was not harmed by any of the Albrecht anticompetitive effects, its lost business caused by ARCO's agreement lowering prices to above predatory levels constitutes antitrust injury is rejected, since cutting prices to increase business is often the essence of competition. Pp. 337-338.

(c) It is not inappropriate to require a showing of predatory pricing before antitrust injury can be established [\*\*\*\*4] in a case under [§ 1](#) of the Sherman Act. Although under [§ 1](#) the price agreement itself is illegal, all losses flowing from the agreement are not by definition antitrust injuries. Low prices benefit consumers regardless of how they are set. So long as they are above predatory levels, they do not threaten competition and, hence, cannot give rise to antitrust injury. Pp. 338-341.

3. A loss flowing from a per se violation of [§ 1](#) does not automatically satisfy the antitrust injury requirement, which is a distinct matter that must be shown independently. The purpose of per se analysis is to determine whether a particular restraint is unreasonable. Actions per se unlawful may nonetheless have some procompetitive effects, and private parties might suffer losses therefrom. The antitrust injury requirement, however, ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. Pp. 341-345.

4. Providing competitors with a private cause of action to enforce the rule against vertical, maximum price fixing would not protect the rights of dealers and consumers -- the class of persons whose self-interest would [\*\*\*\*5] normally motivate them to vindicate Albrecht's anticompetitive consequences -- under the antitrust laws. USA's injury is not inextricably intertwined with a dealer's antitrust injury, since a competitor has no incentive to vindicate the legitimate interests of a rival's dealer and will be injured and motivated to sue only when the arrangement has a procompetitive impact on the market. Pp. 345-346.

**Counsel:** Ronald C. Reday argued the cause for petitioner. With him on the briefs were Matthew T. Heartney, Otis Pratt Pearsall, Philip H. Curtis, Francis X. McCormack, Donald A. Bright, and Edward E. Clark.

John G. Roberts, Jr., argued the cause for the United States et al. as amici curiae urging reversal. With him on the brief were General Boudin, Deputy Solicitor General Shapiro, Michael R. Dreeben, Catherine G. O'Sullivan, and Kevin J. Arquit.

Maxwell M. Blecher argued the cause for respondent. With him on the brief were Alicia G. Rosenberg and Lawrence A. Sullivan. \*

\* Daniel K. Mayers, David Westin, and W. Terry Maguire filed a brief for the American Newspaper Publishers Association as amicus curiae urging reversal.

Briefs of amici curiae urging affirmance were filed for the State of California et al. by John K. Van de Kamp, Attorney General of California, Andera S. Ordin, Chief Assistant Attorney General, Sanford N. Gruskin, Assistant Attorney General Thomas P. Dove

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**Judges:** BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and MARSHALL, BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE, J., joined, post, p. 346.

**Opinion by:** BRENNAN

## Opinion

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[\*331] [\*341] [\*\*1887] JUSTICE BRENNAN delivered the opinion of the Court.

LEdHN[1A] [↑] [1A] LEdHN[2A] [↑] [2A] LEdHN[3A] [↑] [3A] This case presents the question whether a firm incurs an "injury" within the meaning of the antitrust laws when it loses sales to a competitor charging nonpredatory prices pursuant to a vertical, maximum-price-fixing scheme. We hold that such a firm does not suffer an "antitrust injury" and that it therefore cannot bring suit under § 4 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. § 15.<sup>1</sup>

[\*\*\*\*7] I

Respondent USA Petroleum Company (USA) sued petitioner Atlantic Richfield Company (ARCO) in the United States District Court for the Central District of California, alleging the existence of a vertical, maximum-price-fixing agreement prohibited by § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1, an attempt to monopolize the local retail gasoline sales market in violation of § 2 of the Sherman Act, 15 U.S.C. § 2, and other misconduct not relevant here. Petitioner ARCO is an integrated oil company that, inter alia, markets gasoline in the Western United States. It sells gasoline to consumers both directly through its own stations and indirectly through ARCO-brand dealers. Respondent USA is an independent retail marketer of gasoline which, like other independents, buys gasoline from major petroleum [\*342] companies for resale under its own brand name. Respondent competes directly with ARCO dealers at the retail level. Respondent's outlets typically are low-overhead, high-volume "discount" stations that charge less than stations selling equivalent quality gasoline under major brand names.

LEdHN[4A] [↑] [4A] [\*\*\*\*8] In early 1982, petitioner ARCO adopted a new marketing strategy in order to compete more effectively with discount [\*332] independents [\*1888] such as respondent.<sup>2</sup> Petitioner encouraged its

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and Richard N. Light, Deputy Attorneys General, Douglas B. Baily, Attorney General General of Alaska, and Richard D. Monkman, Assistant Attorney General, Warren Price III, Attorney General of Hawaii, Thomas J. Miller, Attorney General of Iowa, and Gordon E. Allen, Deputy Attorney General, William J. Guste, Jr., Attorney General of Louisiana, and Anne F. Benoit, Assistant Attorney General, Robert M. Spire, Attorney General of Nebraska, and Dale A. Comer, Assistant Attorney General, Brian McKay, Attorney General of Nevada, and J. Kenneth Creighton, Deputy Attorney General, Dave Frohmayer, Attorney General of Oregon, Ernest D. Prete, Jr., Attorney General of Pennsylvania, Eugene F. Wayne, Chief Deputy Attorney General, and Carl S. Hisiro, Senior Deputy Attorney General, Charles W. Burson, Attorney General of Tennessee, and Gerry Craft, Deputy Attorney General, R. Paul Van Dam, Attorney General of Utah, and Arthur M. Strong, Assistant Attorney General; for the Service Station Dealers of America by Dimitri G. Daskalopoulos; and for the Society of Independent Gasoline Marketers of America by William W. Scott and Christopher J. MacAvoy.

<sup>1</sup> Section 4 of the Clayton Act is HN1 [↑] a remedial provision that makes available treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."

<sup>2</sup> LEdHN[4B] [↑] [4B]

dealers to match the retail gasoline prices offered by independents in various ways; petitioner made available to its dealers and distributors such short-term discounts as "temporary competitive allowances" and "temporary volume allowances," and it reduced its dealers' costs by, for example, eliminating credit card sales. ARCO's strategy increased its sales and market share.

[\*\*\*\*9] [LEdHN\[1B\]](#) [↑] [1B] [LEdHN\[3B\]](#) [↑] [3B] [LEdHN\[5A\]](#) [↑] [5A] In its amended complaint, respondent USA charged that ARCO engaged in "direct head-to-head competition with discounters" and "drastically lowered its prices and in other ways sought to appeal to price-conscious consumers." First Amended Complaint para. 19, App. 15. Respondent asserted that petitioner conspired with retail service stations selling ARCO brand gasoline to fix prices at below-market levels: "Arco and its co-conspirators have organized a resale price maintenance scheme, as a direct result of which competition that would otherwise exist among Arco-branded dealers has been eliminated by agreement, and the retail price of Arco-branded gasoline has been fixed, stabilized and maintained at artificially low and uncompetitive levels." para. 27, App. 17. Respondent alleged that petitioner "has solicited its dealers and distributors to participate or acquiesce in the conspiracy and has used threats, intimidation and coercion to secure compliance [\*\*\*\*10] with its terms." para. 37, App. 19. According to respondent, this conspiracy drove many independent gasoline dealers in California out of business. para. 39, App. 20. Count one of the amended complaint charged that petitioner's vertical, maximum-price-fixing scheme constituted an agreement in restraint of trade and thus violated [§ 1](#) of the Sherman Act. Count two, later withdrawn with prejudice by respondent, [\*333] asserted that petitioner had engaged in an attempt to monopolize the retail gasoline market through predatory pricing in violation of [§ 2](#) of the Sherman Act.<sup>3</sup>

[\*\*\*\*11] The District Court granted summary judgment for ARCO on the [§ 1](#) claim. The court stated that "[e]ven [\*\*\*343] assuming that [respondent USA] can establish a vertical conspiracy to maintain low prices, [respondent] cannot satisfy the 'antitrust injury' requirement of Clayton Act § 4, without showing such prices to be predatory." App. to Pet. for Cert. 3b. The court then concluded that respondent could make no such showing of predatory pricing because, given petitioner's market share and the ease of entry into the market, petitioner was in no position to exercise market power.

A divided panel of the Court of Appeals for the Ninth Circuit reversed. [859 F. 2d 687 \(1988\)](#). Acknowledging that its decision was in conflict with the approach of the Court of Appeals for the Seventh Circuit in several recent cases,<sup>4</sup> see [id., at 697, n. 15](#), the Ninth Circuit nonetheless held that injuries resulting from vertical, nonpredatory, maximum pricefixing agreements could constitute "antitrust [\*\*1889] injury" for purposes of a private suit under § 4 of the Clayton Act. The court reasoned that any form of price fixing contravenes Congress' intent that [\*\*\*\*12] "market forces alone determine what goods and services are offered, at what price these goods and services [\*334] are sold, and whether particular sellers succeed or fail." [Id., at 693](#). The court believed that the key inquiry in determining whether respondent suffered an "antitrust injury" was whether its losses "resulted from a disruption . . . in the . . . market caused by the . . . antitrust violation." Ibid. The court concluded that "[i]n the present case, the

Because the case comes to us on review of summary judgment, "inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." [Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 \(1986\)](#) (quoting [United States v. Diebold, Inc., 369 U.S. 654, 655 \(1962\)](#)).

<sup>3</sup> [LEdHN\[1C\]](#) [↑] [1C] [LEdHN\[3C\]](#) [↑] [3C] [LEdHN\[5B\]](#) [↑] [5B]

The District Court granted petitioner's motion to dismiss the [§ 2](#) claim as originally pleaded. [577 F. Supp. 1296, 1304 \(1983\)](#). Respondent subsequently amended its [§ 2](#) claim, but shortly after petitioner filed for summary judgment, respondent voluntarily dismissed that claim with prejudice. See App. 76-78. The Court of Appeals framed the issue as "whether a competitor's injuries resulting from vertical, non-predatory, maximum price fixing fall within the category of 'antitrust injury.'" [859 F. 2d 687, 689 \(CA9 1988\)](#) (emphasis added). For purposes of this case we likewise assume that petitioner's pricing was not predatory in nature.

<sup>4</sup> See [Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F. 2d 1409, 1418-1420 \(1989\)](#); [Local Beauty Supply, Inc. v. Lamac, Inc., 787 F. 2d 1197, 1201-1203 \(1986\)](#); [Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F. 2d 698, 708-709, cert. denied, 469 U.S. 1018 \(1984\)](#).

inquiry seems straightforward: USA's claimed injuries were the direct result, and indeed, under the allegations we accept as true, the intended objective, of ARCO's price-fixing scheme. According to USA, the purpose of ARCO's price-fixing is to disrupt the market of retail gasoline sales, and that disruption is the source of USA's injuries." Ibid.

[\*\*\*\*13] We granted certiorari, 490 U.S. 1097 (1989).

II

[LEdHN\[6\]](#) [↑] [6][HN2](#) [↑] A private plaintiff may not recover damages under § 4 of the Clayton Act merely by showing "injury causally linked to an illegal presence in the market." [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 \(1977\)](#). Instead, a plaintiff must prove the existence of "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Ibid. (emphasis in original). In [Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 \(1986\)](#), we reaffirmed that injury, although causally related to an antitrust violation, nevertheless will not qualify as "antitrust injury" unless it is attributable to an anticompetitive aspect of the practice under scrutiny, "since '[i]t is inimical to [the antitrust] laws to award damages' for losses stemming from continued competition." [Id., at 109-110](#) (quoting [Brunswick, supra, at 488](#)). [\*\*\*\*14] [\*\*\*344] See also [Associated General Contractors of California, Inc. v. Carpenters, 459 U.S. 519, 539-540 \(1983\)](#); [Blue Shield of Virginia v. McCready, 457 U.S. 465, 483, and n. 19 \(1982\)](#); [J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562 \(1981\)](#).

[\*335] [LEdHN\[1D\]](#) [↑] [1D] [LEdHN\[2B\]](#) [↑] [2B] [LEdHN\[3D\]](#) [↑] [3D] Respondent argues that, as a competitor, it can show antitrust injury from a vertical conspiracy to fix maximum prices that is unlawful under [§ 1](#) of the Sherman Act, even if the prices were set above predatory levels. In addition, respondent maintains that any loss flowing from a per se violation of [§ 1](#) automatically satisfies the antitrust injury requirement. We reject both contentions and hold that respondent has failed to meet the antitrust injury test in this case. We therefore reverse the judgment of the Court of Appeals.

A

[LEdHN\[1E\]](#) [↑] [1E] [LEdHN\[3E\]](#) [↑] [3E] [\*\*\*\*15] In [Albrecht v. Herald Co., 390 U.S. 145 \(1968\)](#), we found that a vertical, maximum-price-fixing scheme was unlawful per se under [§ 1](#) of the Sherman Act because it threatened to inhibit vigorous competition by the dealers bound by it and because it threatened to become a minimum-price-fixing scheme.<sup>5</sup> That case concerned a newspaper distributor who sought to charge his customers more than the suggested retail price advertised by the publisher. After the publisher attempted to discipline the distributor by hiring another carrier to take away some of the distributor's customers, the distributor brought suit under [§ 1](#). The Court found that "the combination [\*\*1890] formed by the [publisher] in this case to force [the distributor] to maintain a specified price for the resale of newspapers which he had purchased from [the publisher] constituted, without more, an illegal restraint of trade under [§ 1](#) of the Sherman Act." [Id., at 153](#).

[\*\*\*\*16] In holding such a maximum-price vertical agreement illegal, we analyzed the manner in which it might restrain competition by dealers. [HN3](#) [↑] First, we noted that such a scheme, "by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market." [Id., at 152](#). We further explained that "[m]aximum [\*336] prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay." [Id., at 152-153](#). By limiting the ability of small dealers to engage in nonprice competition, a maximum-price-fixing agreement might "channel distribution through a few large or specifically advantaged dealers." [Id., at 153](#). Finally, we observed that "if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is

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<sup>5</sup> [LEdHN\[1F\]](#) [↑] [1F] [LEdHN\[3F\]](#) [↑] [3F]

We assume, arguendo, that Albrecht correctly held that vertical, maximum price fixing is subject to the per se rule.

increasingly likely as the maximum price approaches the [\*\*\*\*17] actual cost of the dealer, the scheme tends to acquire all the attributes of [\*\*\*345] an arrangement fixing minimum prices." *Ibid.*

[LEdHN\[1G\]](#) [↑] [1G] [LEdHN\[7\]](#) [↑] [7] Respondent alleges that it has suffered losses as a result of competition with firms following a vertical, maximum-price-fixing agreement. [HN4](#) [↑] But in Albrecht we held such an agreement per se unlawful because of its potential effects on dealers and consumers, not because of its effect on competitors. Respondent's asserted injury as a competitor does not resemble any of the potential dangers described in Albrecht.<sup>6</sup> For example, if a vertical agreement fixes "[m]aximum prices . . . too low for the dealer to furnish services" desired by consumers, or in such a way as to channel business to large distributors, [id., at 152-153](#), then a firm dealing in a competing brand would not be harmed. Respondent was benefited rather than harmed if petitioner's pricing policies restricted ARCO [\*337] [\*\*\*\*18] sales to a few large dealers or prevented petitioner's dealers from offering services desired by consumers such as credit card sales. Even if the maximum-price agreement ultimately had acquired all of the attributes of a minimum-price-fixing scheme, respondent still would not have suffered antitrust injury because higher ARCO prices would have worked to USA's advantage. A competitor "may not complain of conspiracies that . . . set minimum prices at any level." [Matsushita Electric Industrial Corp. v. Zenith Radio Corp.](#), 475 U.S. 574, 585, n. 8 (1986); see also [id., at 582-583](#) ("R)espondents [cannot] recover damages for any conspiracy by petitioners to charge higher than competitive prices in the . . . market. Such conduct would indeed violate the Sherman Act, but it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price . . ."). Indeed, the gravamen of respondent's complaint -- that the price-fixing scheme between petitioner and its dealers enabled those dealers to increase their sales -- amounts to an assertion that the dangers with which we were concerned in Albrecht [\*\*1891] [\*\*\*\*19] have not materialized in the instant case. In sum, respondent has not suffered "antitrust injury," since its losses do not flow from the aspects of vertical, maximum price fixing that render it illegal.

[\*\*\*\*20] [LEdHN\[1H\]](#) [↑] [1H] [LEdHN\[8A\]](#) [↑] [8A] [LEdHN\[9A\]](#) [↑] [9A] Respondent argues that even if it was not harmed by any of the anticompetitive effects identified in Albrecht, it nonetheless suffered antitrust injury because of the low prices produced by the vertical restraint. We disagree. [HN5](#) [↑] When a firm, or even a group of firms adhering to a vertical agreement, lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an "anticompetitive" consequence of the claimed [\*\*\*346] violation.<sup>7</sup> A firm [\*338] complaining about the harm it suffers from nonpredatory price competition "is really claiming that it [is] unable to raise prices." Blair & Harrison, Rethinking Antitrust Injury, [42 Vand. L. Rev. 1539, 1554 \(1989\)](#). This is not antitrust injury; indeed, "cutting prices in order to increase business often is the very essence of competition." [Matsushita, supra, at 594](#). The antitrust laws were enacted for "the protection of competition, [\*\*\*\*21] not competitors." [Brown Shoe Co. v. United States](#), 370 U.S. 294, 320 (1962) (emphasis in original). "To hold that the antitrust laws protect competitors from the loss of profits due to [nonpredatory] price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share." [Cargill](#), 479 U.S., at 116.

<sup>6</sup> Albrecht is the only case in which the Court has confronted an unadulterated vertical, maximum-price-fixing arrangement. In [Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.](#), 340 U.S. 211, 213 (1951), we also suggested that such an arrangement was illegal because it restricted vigorous competition among dealers. The restraint in Kiefer-Stewart had an additional horizontal component, however, see [Arizona v. Maricopa County Medical Society](#), 457 U.S. 332, 348, n. 18 (1982), since the agreement was between two suppliers that had agreed to sell liquor only to wholesalers adhering to "maximum prices above which the wholesalers could not resell." [Kiefer-Stewart, supra, at 212](#).

<sup>7</sup> [LEdHN\[8B\]](#) [↑] [8B] [LEdHN\[9B\]](#) [↑] [9B]

The Court of Appeals implied that the antitrust injury requirement could be satisfied by a showing that the "long-term" effect of the maximum-price agreements could be to eliminate retailers and ultimately to reduce competition. [859 F. 2d, at 694, 696](#). We disagree. Rivals cannot be excluded in the long run by a nonpredatory maximum-price scheme unless they are relatively inefficient. Even if that were false, however, a firm cannot claim antitrust injury from nonpredatory price competition on the asserted ground that it is "ruinous." Cf. [United States v. Topco Associates, Inc.](#), 405 U.S. 596, 610-612 (1972); [United States v. Socony-Vacuum Oil Co.](#), 310 U.S. 150, 220-221 (1940). "[T]he statutory policy precludes inquiry into the question whether competition is good or bad." [National Society of Professional Engineers v. United States](#), 435 U.S. 679, 695 (1978).

[\*\*\*\*22] [LEdHN\[1J\]](#)<sup>↑</sup> [1I] [LEdHN\[10\]](#)<sup>↑</sup> [10] Respondent further argues that it is inappropriate to require a showing of predatory pricing before antitrust injury can be established when the asserted antitrust violation is an agreement in restraint of trade illegal under [§ 1](#) of the Sherman Act, rather than an attempt to monopolize prohibited by [§ 2](#). Respondent notes that the two sections of the Act are quite different. [HN6](#)<sup>↑</sup> Price fixing violates [§ 1](#), for example, even if a single firm's decision to price at the same level would not create [§ 2](#) liability. See generally [Copperweld Corp. v. Independence Tube Corp.](#), 467 U.S. 752, 767-769 (1984). In a [§ 1](#) case, the price agreement itself is illegal, and respondent contends that all losses flowing from such an agreement must by definition constitute "antitrust injuries." Respondent observes that [§ 1](#) in general and the per se rule in particular are grounded "on faith in price competition as a market force" [\*339] [\*\*\*\*23] [and not] on a policy of low selling prices at the price of eliminating competition." [Arizona v. Maricopa County Medical Society](#), 457 U.S. 332, 348 (1982) (quoting Rahl, Price Competition and the Price Fixing Rule -- Preface and Perspective, 57 Nw. U.L. Rev. 137, 142 (1962)). In sum, respondent maintains that it has suffered antitrust injury even if petitioner's pricing was not predatory under [§ 2](#) of the Sherman Act.

[LEdHN\[1J\]](#)<sup>↑</sup> [1J] [LEdHN\[11A\]](#)<sup>↑</sup> [11A] We reject respondent's argument. Although a vertical, maximum-price-fixing agreement is unlawful under [§ 1](#) of the Sherman Act, it does not cause a competitor antitrust injury unless it results in [\*\*1892] predatory pricing.<sup>8</sup> [\*\*\*\*25] Antitrust injury [\*\*\*\*347] does not arise for purposes of § 4 of the Clayton Act, see n. 1, *supra*, until a private party is adversely affected by an anticompetitive aspect of the defendant's conduct, see [Brunswick](#), 429 U.S., at 487; in the context of pricing practices, only predatory pricing has the requisite anticompetitive effect. [\*\*\*\*24] <sup>9</sup> See Areeda & Turner, Predatory Pricing and Related [\*340] Practices Under [Section 2](#) of the Sherman Act, 88 Harv. L. Rev. 697, 697-699 (1975); McGee, Predatory Pricing Revisited, 23 J. Law & Econ. 289, 292-294 (1980). Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury.

[LEdHN\[1L\]](#)<sup>↑</sup> [1L] [LEdHN\[5C\]](#)<sup>↑</sup> [5C] We have adhered to this principle regardless of the type of antitrust claim involved. In [Cargill, Inc. v. Monfort of Colorado, Inc., supra](#), for example, we found that a plaintiff competitor had not shown antitrust injury and thus could not challenge a merger that was assumed [\*\*\*\*26] to be illegal under § 7 of the Clayton Act, even though the merged company threatened to engage in vigorous price competition that would reduce the plaintiff's profits. [HN7](#)<sup>↑</sup> We observed that nonpredatory price competition for increased market share, as reflected by prices that are below "market price" or even below the costs of a firm's rivals, "is not activity forbidden by the antitrust laws." 479 U.S., at 116. Because the prices charged were not predatory, we found no antitrust injury. Similarly, we determined that antitrust injury was absent in [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra](#), even though the plaintiffs alleged that an illegal acquisition threatened to bring a "deep pocket" parent

<sup>8</sup> [LEdHN\[11B\]](#)<sup>↑</sup> [11B]

The Court of Appeals erred by reasoning that respondent satisfied the antitrust injury requirement by alleging that "[t]he removal of some elements of price competition distorts the markets, and harms all the participants." 859 F. 2d, at 694. Every antitrust violation can be assumed to "disrupt" or "distort" competition. "[O]therwise, there would be no violation." P. Areeda & H. Hovenkamp, [Antitrust Law](#) para. 340.3b, p. 411 (1989 Supp.). Respondent's theory would equate injury in fact with antitrust injury. We declined to adopt such an approach in [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.](#), 429 U.S. 477 (1977), and [Cargill, Inc. v. Monfort of Colorado, Inc.](#), 479 U.S. 104 (1986), and we reject it again today. The antitrust injury requirement cannot be met by broad allegations of harm to the "market" as an abstract entity. Although all antitrust violations, under both the per se rule and rule-of-reason analysis, "distort" the market, not every loss stemming from a violation counts as antitrust injury.

<sup>9</sup> [LEdHN\[1K\]](#)<sup>↑</sup> [1K]

This is not to deny that a vertical price-fixing scheme may facilitate predatory pricing. A supplier, for example, can reduce its prices to its own downstream dealers and share the losses with them, while forcing competing dealers to bear by themselves the full loss imposed by the lower prices. Cf. [FTC v. Sun Oil Co.](#), 371 U.S. 505, 522 (1963). But because a firm always is able to challenge directly a rival's pricing as predatory, there is no reason to dispense with the antitrust injury requirement in an action by a competitor against a vertical agreement.

495 U.S. 328, \*340; 110 S. Ct. 1884, \*\*1892; 109 L. Ed. 2d 333, \*\*\*347; 1990 U.S. LEXIS 2543, \*\*\*\*26

into a market of 'pygmies,'" [\*Id.\*, at 487](#), a scenario that would cause the plaintiffs economic harm. We opined nevertheless that "if [the plaintiffs] were injured, it was not 'by reason of anything forbidden in the antitrust laws': while [the plaintiffs'] loss occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that which [\*\*\*\*27] made the acquisitions unlawful." [\*Id.\*, at 488](#). To be sure, the source of the price competition in the instant case was an agreement allegedly unlawful [\[\\*\\*\\*348\]](#) under [§ 1](#) of the Sherman Act rather than a merger in violation of § 7 of the Clayton Act. But that difference is not salient. When prices are not predatory, any losses flowing from them cannot be said to stem from an anticompetitive aspect of the defendant's [\[\\*341\]](#) conduct.<sup>10</sup> [\[\\*\\*\\*\\*28\]](#) "It is in the interest of competition to permit dominant firms [\[\\*\\*1893\]](#) to engage in vigorous competition, including price competition." [\*Cargill, 479 U.S., at 116\*](#) (quoting [\*Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1057\*](#) (CA6), cert. denied, [469 U.S. 1036](#) (1984)).<sup>11</sup>

B

[\*\*LEdHN\[2C\]\*\*](#) [↑] [2C] [\*\*LEdHN\[12A\]\*\*](#) [↑] [12A] We also reject respondent's suggestion that no antitrust injury need be shown where a per se violation is involved. [\*\*HN8\*\*](#) [↑] The [\[\\*342\]](#) per se rule is a method of determining whether [§ 1](#) of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury and thus whether he may recover damages under § 4 of the Clayton [\[\\*\\*\\*\\*29\]](#) Act. Per se and rule-of-reason analysis are but two methods of determining whether a restraint is "unreasonable," i.e., whether its anticompetitive effects outweigh its procompetitive effects.<sup>12</sup> The per se rule is a presumption of [\[\\*\\*\\*349\]](#) unreasonableness based on "business certainty and litigation efficiency." [\*Arizona v. Maricopa County Medical Society, 457 U.S., at 344\*](#). It represents a "longstanding judgment that the prohibited practices by their nature have 'a substantial potential for impact on competition.'" [\*FTC v. Superior Court Trial Lawyers Assn., 493 U.S. 411, 433\* \(1990\)](#) (quoting [\*Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 16\* \(1984\)](#)). "Once experience with a particular kind of restraint

<sup>10</sup> [\*\*LEdHN\[5D\]\*\*](#) [↑] [5D]

We did not reach a contrary conclusion in [\*Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574\* \(1986\)](#), where we declined define precisely the term "predatory pricing" but stated instead that "[f]or purposes of this case it is enough to note that respondents have not suffered an antitrust injury unless petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." [\*Id., at 585, n. 8\*](#). This statement does not imply that losses from nonpredatory pricing might qualify as antitrust injury; we were quite careful to limit our discussion in that case to predatory pricing. See *ibid.* (nonpredatory prices would not cause antitrust injury because they would "leave respondents in the same position as would market forces"). We noted that "[e]xcept for the alleged conspiracy to monopolize the . . . market through predatory pricing, these alleged conspiracies could not have caused respondents to suffer an 'antitrust injury.'" [\*Id., at 586\*](#). We also observed that "respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief. That showing depends in turn on proof that petitioners conspired to price predatorily in the American market, caused such an injury." [\*Id., at 584, n. 7\*](#) (citations omitted); see also *Id., at 594; Cargill, supra, at 117, n. 12* (interpreting our decision in *Matsushita*). We have no occasion in the instant case to consider the proper definition of predatory pricing, nor to determine whether our dictum in *Matsushita* that predatory pricing might consist of "pricing below the level necessary to sell [the offender's] products," [\*475 U.S., at 585, n. 8\*](#), is an accurate statement of the law. See *n. 3, supra*.

<sup>11</sup> The Court of Appeals purported to distinguish *Cargill* and *Brunswick* on the ground that those cases turned on an "attenuated or indirect" relationship between the alleged violation -- the illegal merger -- and the plaintiffs' injury. [\*859 F.2d, at 695\*](#). We disagree. The Court in both cases described the injury as flowing directly from the alleged antitrust violation. See [\*Cargill, 479 U.S., at 108; Brunswick, 429 U.S., at 487\*](#).

<sup>12</sup> [\*\*LEdHN\[12B\]\*\*](#) [↑] [12B]

"[\*\*HN9\*\*](#) [↑] Both per se rules and the Rule of Reason are employed "to form a judgment about the competitive significance of the restraint." [\*National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma, 468 U.S. 85, 103\* \(1984\)](#) (quoting [\*National Society of Professional Engineers v. United States, 435 U.S., at 692\*](#)). "[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same -- whether or not the challenged restraint enhances competition." [\*468 U.S., at 104\*](#).

enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." *Maricopa County Medical Society, supra, at 344*.

[\*\*\*\*30] [LEdHN\[2D\]](#) [↑] [2D] [LEdHN\[13A\]](#) [↑] [13A] The purpose of the antitrust injury requirement is different. [HN10](#) [↑] It ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs for either [\\*\\*1894](#) damages or equitable relief. Actions per se unlawful under the antitrust laws may nonetheless have some procompetitive effects, and private parties might suffer losses [\[\\*343\]](#) therefrom.<sup>13</sup> See *Maricopa County Medical Society, supra, at 351*; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50, n. 16 (1977). Conduct in violation of the antitrust [\[\\*344\]](#) laws may have three effects, often interwoven: In some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition. [\[\\*\\*\\*\\*31\]](#) The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. The need for this showing is at least as great under the per se rule as under the rule of reason. Indeed, insofar as the per se rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust injury requirement is underscored. "[P]ro-competitive or efficiency-enhancing aspects of practices that nominally violate the antitrust laws may cause serious harm to individuals, but this kind of harm is the essence of competition and should play no role in the definition of antitrust damages." Page, *The Scope of Liability for Antitrust Violations*, [37 Stan. L. Rev.](#) 1445, 1460 (1985). [HN11](#) [↑] Thus, "proof of a per se violation and of antitrust injury are distinct matters that must be shown independently." P. Areeda & H. Hovenkamp, *Antitrust Law* para. 334.2c, p. 330 (1989 Sup.).

[\*\*\*\*32] [HN12](#) [↑]

For this reason, we have previously recognized that even in cases involving per se violations, the right of action under § 4 of the Clayton Act is available only to those private plaintiffs who have suffered antitrust injury. For example, in a case involving horizontal price fixing, "perhaps the paradigm of an unreasonable restraint of trade,"

<sup>13</sup> [LEdHN\[13B\]](#) [↑] [13B]

When a manufacturer provides a dealer an exclusive area within which to distribute a product, the manufacturer's decision to fix a maximum resale price may actually protect consumers against exploitation by the dealer acting as a local monopolist. The manufacturer acts not out of altruism, of course, but out of a desire to increase its own sales -- whereas the dealer's incentive, like that of any monopolist, is to reduce output and increase price. If an exclusive dealership is the most efficient means of distribution, the public is not served by forcing the manufacturer to abandon this method and resort to self-distribution or competing distributors. Vertical, maximum price fixing thus may have procompetitive interbrand effects even if it is per se illegal because of its potential effects on dealers and consumers. See *Albrecht v. Herald Co.*, 390 U.S. 145, 159 (1968) (Harlan, J., dissenting) (maximum price ceilings "do not lessen horizontal competition" but instead "drive prices toward the level that would be set by intense competition," by "prevent[ing] retailers or wholesalers from reaping monopoly or supercompetitive profits"). Indeed, we acknowledged in Albrecht that "[m]aximum and minimum price fixing may have different consequences in many situations." *Id.*, at 152. The procompetitive potential of a vertical maximum price restraint is more evident now than it was when Albrecht was decided, because exclusive territorial arrangements and other nonprice restrictions were unlawful per se in 1968. See *id.*, at 154; *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 375-376 (1967). These agreements are currently subject only to rule-of-reason scrutiny, making monopolistic behavior by dealers more likely. See *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47-59 (1977).

Many commentators have identified procompetitive effects of vertical, maximum price fixing. See, e.g., P. Areeda & H. Hovenkamp, *Antitrust Law* para. 340.3b, p. 378, n. 24 (1988 Sup.); Blair & Harrison, *Rethinking Antitrust Injury*, [42 Vand. L. Rev.](#) 1539, 1553 (1989); Blair & Schafer, *Evolutionary Models of Legal Change and the Albrecht Rule*, 32 *Antitrust Bull.* 989, 995-1000 (1987); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, part 2, 75 *Yale L.J.* 373, 464 (1966); Easterbrook, *Maximum Price Fixing*, 48 *U. Chi. L. Rev.* 886, 887-890 (1981); Hovenkamp, *Vertical Integration by the Newspaper Monopolist*, [69 Iowa L. Rev.](#) 451, 452-456 (1984); Polden, *Antitrust Standing and the Rule Against Resale Price Maintenance*, 37 *Cleveland State L. Rev.* 179, 216-217 (1989); Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, [75 Calif. L. Rev.](#) 797, 803-804 (1987).

[\*\*1895] *National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 100 (1984), we observed that the plaintiffs were still required to "show that the conspiracy caused them an injury for which the antitrust laws provide relief." *Matsushita*, 475 U.S., at 584, n. 7 (citing *Brunswick*) (emphasis added). Similarly, in *Associated General Contractors of California, Inc. v. Carpenters*, 459 U.S. 519 (1983), we noted that a restraint of trade was illegal per se in the sense that it could "be condemned even without proof of its actual market effect," but we maintained that even if it "may have [\*345] been unlawful, it does not, of course, necessarily follow that still [\*\*\*33] another party . . . is a person injured by reason of a violation of the antitrust laws within the meaning of § 4 of the Clayton Act." *Id.*, at 528-529.

C

LEdHN[3G] [↑] [3G] LEdHN[14] [↑] [14] We decline to dilute the antitrust injury requirement here because we find that there is no need to encourage private enforcement by competitors of the rule against vertical, maximum price fixing. If such a scheme causes the anticompetitive consequences detailed in Albrecht, consumers and the manufacturers' own dealers may bring suit. HN13 [↑] The "existence of an identifiable class of persons whose self-interest would normally motivate [\*\*\*351] them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general." *Associated General Contractors*, 459 U.S., at 542.

LEdHN[3H] [↑] [3H] [\*\*\*34] Respondent's injury, moreover, is not "inextricably intertwined" with the antitrust injury that a dealer would suffer, *McCready*, 457 U.S., at 484, and thus does not militate in favor of permitting respondent to sue on behalf of petitioner's dealers. HN14 [↑] A competitor is not injured by the anticompetitive effects of vertical, maximum price-fixing, see *supra*, at 336-337, and does not have any incentive to vindicate the legitimate interests of a rival's dealer. See Easterbrook, *The Limits of Antitrust*, 63 *Texas L. Rev.* 1, 33-39 (1984). A competitor will not bring suit to protect the dealer against a maximum price that is set too low, inasmuch as the competitor would benefit from such a situation. Instead, a competitor will be motivated to bring suit only when the vertical restraint promotes interbrand competition between the competitor and the dealer subject to the restraint. See n. 13, *supra*. In short, a competitor will be injured and hence motivated to sue only when a vertical, maximum-price-fixing arrangement has a procompetitive impact on the market. Therefore, [\*\*\*35] providing [\*346] the competitor a cause of action would not protect the rights of dealers and consumers under the antitrust laws.

III

LEdHN[1M] [↑] [1M] LEdHN[2E] [↑] [2E] Respondent has failed to demonstrate that it has suffered any antitrust injury. The allegation of a per se violation does not obviate the need to satisfy this test. The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

**Dissent by:** STEVENS

## Dissent

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JUSTICE STEVENS, with whom JUSTICE WHITE joins, dissenting.

The Court today purportedly defines only the contours of antitrust injury that can result from a vertical, nonpredatory, maximum-price-fixing scheme. But much, if not all, of its reasoning about what constitutes injury actionable by a competitor would apply even if the alleged conspiracy had been joined by other major oil companies doing business in California, as well as their retail outlets.<sup>1</sup> The Court undermines the enforceability of a [\*\*1896]

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<sup>1</sup> For example, the Court reasons:

substantive price-fixing violation with a flawed [\*\*\*\*36] construction of § 4, erroneously assuming that the level of a price fixed by a § 1 conspiracy is relevant to legality and that all vertical arrangements conform to a single model.

[\*\*\*352] I

Because so much of the Court's analysis turns on its characterization of USA's cause of action, it is appropriate to [\*347] begin with a more complete description of USA's theory. As the case comes to us on review of summary judgment, we assume the truth of USA's allegation that ARCO conspired with its retail dealers to fix the price of gas at specific ARCO stations that compete directly with USA stations. It is conceded that this price-fixing conspiracy is a per [\*\*\*\*37] se violation of § 1 of the Sherman Act.

USA's theory can be expressed in the following hypothetical example: In a free market ARCO's advertised gas might command a price of \$ 1 per gallon while USA's unadvertised gas might sell for a penny less, with retailers of both brands making an adequate profit. If, however, the ARCO stations reduce their price by a penny or two, they might divert enough business from USA stations to force them gradually to withdraw from the market.<sup>2</sup> [\*\*\*\*38] The fixed price would be lower than the price that would obtain in a free market, but not so low as to be "predatory" in the sense that a single actor could not lawfully charge it under 15 U.S.C. § 2 or § 13a.<sup>3</sup>

This theory rests on the premise that the resources of the conspirators, combined and coordinated, are sufficient to sustain below-normal profits in selected localities long enough to force USA to shift its capital to markets where it can receive a normal return on its investment.<sup>4</sup> Thus, during the initial [\*348] period of competitive struggle between the conspirators and the independents, consumers will presumably benefit from artificially low prices. If the alleged campaign is successful, however -- and as the case comes to us we must assume it will be -- in the long run there will be less competition, or potential competition, from independents such as USA, and the character of the market will be different [\*\*\*\*39] than if the conspiracy had never taken place. USA alleges that, in fact, the independent market already has suffered significant losses.<sup>5</sup>

[\*\*\*\*40] [\*\*\*353] [\*\*1897] II

"Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury." Ante, at 340.

"When prices are not predatory, any losses flowing from them cannot be said to stem from an anticompetitive aspect of the defendant's conduct." Ante, at 340-341.

<sup>2</sup> "31. Arco and its co-conspirators have engaged in limit pricing practices in which prices are deliberately set on gasoline at a level below their competitors' cost with the purpose and effect of making it impossible for plaintiff and other independents to compete. For example, Arco and its co-conspirators have sold gasoline, ex tax, at the retail pump for less than independents, such as plaintiff, can purchase gasoline at wholesale." Amended Complaint, App. 18.

<sup>3</sup> "27. Arco and its co-conspirators have organized a resale price maintenance scheme, as a direct result of which competition that would otherwise exist among Arco-branded dealers has been eliminated by agreement, and the retail price of Arco-branded gasoline has been fixed, stabilized and maintained at artificially low and uncompetitive levels. . . ." Amended Complaint, App. 17.

<sup>4</sup> It may be that ARCO could have accomplished its objectives independently, merely by reducing its own prices sufficiently to induce its retail customers to charge abnormally low prices and divert business from USA stations. See, e.g., Amended Complaint para. 30, App. 18. Such independent action by ARCO, followed by independent action by its retail customers, of course would be lawful, even if it produced the same consequences as the alleged conspiratorial program. See United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960). Indeed, a full trial might establish that that is what happened. Nevertheless, as the case comes to us, we assume that ARCO is the architect of an illegal conspiracy.

<sup>5</sup> "18. For the last few years, there has been, and still is, a steady and continuous reduction in the competitive effectiveness of independent refiners and marketers selling in California and the western United States. During this time period, more than a dozen large independents have sold out, liquidated or drastically curtailed their operations, and many independent retail stations have been closed. The barriers to entry into this market have been high, and today such barriers are effectively insurmountable; once an independent is eliminated, it is highly unlikely that it will be replaced." Amended Complaint, App. 15.

ARCO's alleged conspiracy is a naked price restraint in violation of [§ 1](#) of the Sherman Act, [15 U.S.C. § 1](#).<sup>6</sup> It is undisputed that ARCO's price-fixing arrangement, as alleged, [\*349] is illegal per se under the rule against maximum price fixing, which is "grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition." Rahl, Price Competition and the Price Fixing Rule -- Preface and Perspective, 57 Nw. U.L. Rev. 137, 142 (1962)." [Arizona v. Maricopa County Medical Society, 457 U.S. 332, 348 \(1982\)](#). At issue is only whether a maximum price, administered on a host of retail stations that are ostensibly competing with one another as well as with other retailers, may be challenged by the competitor targeted by the pricing scheme.

[\*\*\*\*41] Section 4 of the Clayton Act allows private enforcement of the antitrust laws by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." [15 U.S.C. § 15](#). See [Simpson v. Union Oil Co. of California, 377 U.S. 13, 16 \(1964\)](#) (quoting [Radovich v. National Football League, 352 U.S. 445, 454 \(1957\)](#)) (laws allowing private enforcement of the antitrust laws by an aggrieved party "protect the victims of the forbidden practices as well as the public"). In order to invoke § 4, a plaintiff must prove that it suffered an injury that (1) is "of the type the antitrust laws were intended to prevent" and (2) "flows from that which makes defendants' acts unlawful." [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 \(1977\)](#). In Brunswick, the plaintiff businesses claimed that they were deprived of the benefits of the increased concentration that would have resulted had failing businesses not been acquired by petitioner, allegedly in violation of § 7. In concluding that the plaintiffs had failed to prove "antitrust injury," we found that neither condition of § [\*\*\*\*42] 4 standing was satisfied: First, the plaintiffs sought to recover damages because the mergers had preserved businesses and competition, which is not the type of injury that the antitrust laws are designed to prevent; and second, the plaintiffs had not been harmed by any potential change in the market structure [\*350] effected by the entry of the "deep pocket" parent." [Id., at 487-488](#).

[\*\*\*354] In this case, however, both conditions of standing are met. First, [§ 1](#) is intended to forbid price-fixing conspiracies that are designed to drive competitors out of the market. See [Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 \(1959\)](#) (illegal coordination "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy"). USA alleges that ARCO's pricing scheme aims at forcing independent refiners and marketers out of business and has created "an immediate and growing probability that the independent [\*\*1898] segment of the industry will be destroyed altogether."<sup>7</sup>

[\*\*\*\*43] In Brunswick, we recognized that requiring a competitor to show that its loss is "of the type" antitrust laws were intended to prevent

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<sup>6</sup> We have long held under the Sherman Act that "a combination for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 222-223 \(1940\)](#). See also [Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 \(1951\)](#) (maximum resale prices); [Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 \(1984\)](#) (vertical resale prices); [Albrecht v. Herald Co., 390 U.S. 145 \(1968\)](#) (vertical maximum resale prices).

<sup>7</sup> USA's Amended Complaint specifically alleges:

"39. As a direct and proximate result of the above-described combinations and conspiracy and of the acts taken in furtherance thereof:

"(a) the price of gasoline has been artificially fixed, maintained and stabilized;

"(b) independent refiners and marketers have suffered substantial losses of sales and profits and their ability to compete has been seriously impaired;

"(c) independent refiners and marketers have gone out of business or been taken over by Arco;

"(d) there is an immediate and growing probability that the independent segment of the industry will be destroyed altogether and that control of the discount market will be acquired by Arco." App. 20.

495 U.S. 328, \*350; 110 S. Ct. 1884, \*\*1898; 109 L. Ed. 2d 333, \*\*\*354; 1990 U.S. LEXIS 2543, \*\*\*\*43

"does not necessarily mean . . . that § 4 plaintiffs must prove an actual lessening of competition in order to recover. The short-term effect of certain anticompetitive behavior -- predatory below-cost pricing, for example -- may be to stimulate price competition. But competitors may be able to prove antitrust injury before they actually [**\*351**] are driven from the market and competition is thereby lessened." [429 U.S., at 489, n. 14.](#)

The pricing behavior in the Court's hypothetical example may cause actionable injury because it is "predatory." This is so because the Court assumes that a predatory price is illegal. The direct relationship between the illegality and the harm is what makes the competitor's short-term loss "antitrust injury." The fact that the illegality in the case before us today stems from the illegal conspiracy, rather than the predatory character of the price, does not change the analysis of "that which makes defendants' acts unlawful."<sup>8</sup> [\*\*\*\*45] [\*\*\*355] Thus, notwithstanding any temporary benefit [\*\*\*\*44] to consumers, the unlawful pricing practice that is harmful in the long run to competition causes "antitrust injury" for which a competitor may seek damages.<sup>9</sup>

[\*352] Second, USA is directly and immediately harmed by this price-fixing scheme, that is to say, by "that which makes defendants' acts unlawful." [Id., at 489.](#) In Brunswick, the allegedly illegal conduct at issue -- the merger -- itself did not harm the plaintiffs; similarly, in [Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 \(1986\)](#), the alleged injury arose not from the illegality of the proposed merger, but merely from possible postmerger behavior. Although the link between the illegal mergers and the alleged harms was insufficient to prove antitrust injury in either Brunswick or Cargill, both of those cases recognize that illegal pricing practices may [\*\*1899] cause competitors "antitrust injury."<sup>10</sup>

[\*\*\*\*46] The Court accepts that, as alleged, the vertical price-fixing scheme by ARCO is per se illegal under [§ 1](#). Nevertheless, it denies USA standing to challenge the arrangement because it is neither a consumer nor a dealer in the vertical arrangement, but only a competitor of ARCO: The "antitrust laws were enacted for 'the protection of competition, not competitors.'" Ante, at 338 (quoting [Brown Shoe Co. v. United States, 370 U.S. 294, 320 \(1962\)](#)). This proposition -- which is often used as a test of whether a violation of law occurred -- cannot be read to deny all remedial actions by competitors. [\*353] When competitors are injured by illicit agreements among their rivals rather than by the free play of market forces, the antitrust laws protect competitors precisely for the purpose of

<sup>8</sup> [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 \(1977\)](#). The analysis in [Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 \(1986\)](#), also supports this conclusion. There, the respondent alleged "antitrust injury" on alternative theories: first, that after the challenged merger petitioners' company would be able to lower its prices because it would be more efficient; and second, that it might attempt to drive respondent out of business by engaging in sustained predatory pricing. We rejected the first theory because independent decisions to reduce prices based on efficiencies are legal and precisely what the antitrust laws are intended to encourage. [Id., at 116-117](#). We rejected the second theory because respondent "neither raised nor proved any claim of predatory pricing before the District Court." [Id., at 119](#). However, in discussing the second theory, we recognized that predatory pricing "is a practice that harms both competitors and competition," and because it aims at "the elimination of competition . . . . is thus a practice 'inimical to the purposes of [the antitrust] laws,' [Brunswick, 429 U.S., at 488](#), and one capable of inflicting antitrust injury." [Id., at 117-118](#) (footnote omitted). Again, a competitor suffers the same "antitrust injury" from an illegal conspiracy setting prices designed to eliminate it as it would suffer from a single firm setting predatory prices.

<sup>9</sup> See also Blair & Harrison, Rethinking Antitrust Injury, [42 Vand. L. Rev. 1539, 1561-1565 \(1989\)](#) (unsuccessful predatory efforts cause "antitrust injury" even though consumers have not suffered).

<sup>10</sup> I agree that not every loss that is causally related to an antitrust violation is "antitrust injury," ante, at 339, n. 8, but a scheme that prices the services of conspirators below those of competitors may cause injury for which the competitor may recover damages under § 4. In [Blue Shield of Virginia v. McCready, 457 U.S. 465 \(1982\)](#), the presumed injury to competitors was strong enough to support even an indirect action by a patient of the competitor. Petitioners, a medical insurance company and an organization of psychiatrists, conspired in violation of [§ 1](#) to compensate patients for the services of psychiatrists, but not those of psychologists. We recognized that if patients had chosen to go to psychiatrists, the "antitrust injury would have been borne in the first instance by the [psychologist] competitors of the conspirators." [Id., at 483](#). Instead, patient McCready went to a psychologist at her own expense. We held that "[a]lthough McCready was not a competitor of the conspirators, the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on the psychologists and the psychotherapy market." [Id., at 483-484](#).

protecting competition. The Court nevertheless interprets the proposition as categorically excluding actions by a competitor who suffers when others charge "nonpredatory prices pursuant to a vertical, maximum-price-fixing scheme." Ante, at 331. In the context of a § 1 violation, however, the distinctions both of the price level [\*\*\*356] and of the vertical nature of the conspiracy [\*\*\*\*47] are unfounded. Each of these two analytical errors merits discussion.

### III

The Court limits its holding to cases in which the noncompetitive price is not "predatory," ante, at 331, 333, n. 3, 335, 339, 340, essentially assuming that any nonpredatory price set by an illegal conspiracy is lawful, see n. 1, supra. This is quite wrong. Unlike the prohibitions against monopolizing or underselling in violation of § 2 or § 13a, the gravamen of the price-fixing conspiracy condemned by § 1 is unrelated to the level of the administered price at any particular point in time. A price fixed by a single seller acting independently may be unlawful because it is predatory, but the reasonableness of the price set by an illegal conspiracy is wholly irrelevant to whether the conspirators' work product is illegal.

If any proposition is firmly settled in the law of antitrust, it is the rule that the reasonableness of the particular price agreed upon by defendants does not constitute a defense to a price-fixing charge.<sup>11</sup> [\*\*\*50] In *United States v. Trenton Potteries* [\*354] Co., 273 U.S. 392 (1927), the Court explained that "[t]he reasonable price fixed today may through economic [\*\*\*48] and business changes become the unreasonable price of tomorrow," *id., at 397*, and cautioned that

"[\*\*1900] in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable -- a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies." *Id., at 398*.

See also *United States v. Masonite Corp.*, 316 U.S. 265, 281-282 (1942). This reasoning applies with equal force to a rule that provides conspirators with a defense if their agreed upon prices are nonpredatory, but no defense if their prices fall below the elusive line that defines predatory pricing.<sup>12</sup> [\*\*\*357] By assuming that the level of a price is relevant to the inquiry in a § 1 conspiracy case, the Court sets sail on the "sea of doubt" that Judge Taft condemned in his classic opinion in the Addyston Pipe & Steel case:

"It is true that there are some cases in which the courts, mistaking, as we conceive, [\*\*\*49] the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of [\*355] doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not." *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283-284 (CA6 1898).

<sup>11</sup> See *United States v. Trenton Potteries Co.*, 273 U.S. 392, 398 (1927); see also *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 291 (CA6 1898) ("[T]he association of the defendants, however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly").

<sup>12</sup> Like the determination of a "reasonable" price, determination of what is a "predatory price" is far from certain. The Court declines to define predatory pricing for the purpose of the § 4 inquiry it creates today, ante, at 341, n. 10. Predatory pricing by a conspiracy, rather than a single actor, may result from more than pricing below an appropriate measure of cost. See *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585, n. 8 (1986). See also *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F. 2d 1396, 1400 (CA7 1989) (describing the many considerations in a single firm case that make it difficult to infer predatory conduct from the relation of price to cost).

## IV

The Court is also careful to limit its holding to cases involving "vertical" price-fixing agreements. In a thinly veiled circumscription of the substantive reach of § 1, the Court simply interprets "antitrust injury" under § 4 so that it excludes challenges by any competitor alleging a vertical conspiracy: "[A] vertical price-fixing scheme may facilitate predatory [\*\*\*\*51] pricing . . . [b]ut because a firm always is able to challenge directly a rival's pricing as predatory, there is no reason to dispense with the antitrust injury requirement in an action by a competitor against a vertical agreement." Ante, at 339, n. 9.<sup>13</sup> This focus on the vertical character of the agreement is misleading because it incorrectly assumes that there is a sharp distinction between vertical and horizontal arrangements, and because it assumes that all vertical arrangements affect competition in the same way.

The characterization of ARCO's price-fixing arrangement as "vertical" does not limit its potential consequences to a neat category of injuries. A horizontal conspiracy among ARCO retailers administered by, for example, trade association executives instead of executives [\*\*\*\*52] of their common supplier would generate exactly the same anticompetitive consequences. ARCO and its retail dealers all share an interest in excluding independents like USA from the market. The fact [\*356] that each member of a group of price fixers may have made a separate, individual agreement with their common agent does not destroy the horizontal character of the agreement. We so held in the Masonite case:

[\*\*1901] "[T]here can be no doubt that this is a price-fixing combination which is illegal per se under the *Sherman Act*. *United States v. Trenton Potteries Co.*, 273 U.S. 392 [(1927)]; *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 [(1940)]; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 [(1940)]. That is true though the District Court found that, in negotiating and entering into the first agreements, each appellee, other than Masonite, acted independently [\*\*\*358] of the others, negotiated only with Masonite, desired the agreement regardless of the action that might be taken by any of the others, did not require as a condition of its acceptance that Masonite make such an agreement with any of the [\*\*\*53] others, and had no discussions with any of the others. . . . Prices are fixed when they are agreed upon. *United States v. Socony-Vacuum Oil Co.*, *supra*, p. 222. The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action. Id."<sup>14</sup>

Differences between vertical and horizontal agreements may support an argument that the former are more reasonable, and therefore more likely to be upheld as lawful, than the latter. But such differences provide no support for the Court's contradictory reasoning that the direct and intended consequences of one form of conspiracy [\*\*\*\*54] do not constitute "antitrust injury," while precisely the same consequences of the other form do.

[\*357] Finally, the Court's treatment of vertical maximum-price-fixing arrangements necessarily assumes that all such conspiracies have the same competitive consequences. Ante, at 337, 339-340, 345. The Court is again quite wrong.<sup>15</sup> For example, a price agreement that is ancillary to an exclusive distributorship might protect consumers

<sup>13</sup> Thus, a victim of a vertical maximum-price-fixing conspiracy that is successfully driving it from the market cannot bring an action under § 1 as long as the conspirators take care to fix their prices at "nonpredatory" levels.

<sup>14</sup> *United States v. Masonite Corp.*, 316 U.S. 265, 274-276 (1942). See also ante, at 336, n. 6 (suggesting a horizontal component of the maximum-price-fixing arrangement in Kiefer-Stewart); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 744-748 (1988) (STEVENS, J., dissenting).

<sup>15</sup> Indeed, the Court elsewhere acknowledges that "[m]aximum and minimum price fixing may have different consequences in many situations." Ante, at 343, n. 13 (quoting *Albrecht*, 390 U.S. at 152). This is quite true. See, e.g., *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348 (1982) (the per se rule against maximum prices guards against the elimination of competition, discouraging entry into the market, deterring experimentation, and allowing hidden price setting); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51, n. 18 (1977) (vertical price fixing reduces interbrand and intrabrand competition and may facilitate cartelizing). In Sylvania, the Court also recognized that "Congress recently has expressed its approval of a per se analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair-trade pricing at the option of the individual States." Ibid. See also *White Motor Co. v. United States*, 372 U.S. 253, 268 (1963)

495 U.S. 328, \*357; 110 S. Ct. 1884, \*\*1901; 109 L. Ed. 2d 333, \*\*\*358; 1990 U.S. LEXIS 2543, \*\*\*\*54

from an attempt by the distributor to exploit its limited monopoly. However, a conclusion that such an agreement would not cause any antitrust injury lends no support to the Court's holding that an illegal price arrangement designed to drive a competitor out of business is immune from challenge by its intended victim.<sup>16</sup>

[\*\*\*\*55] [\*358] [\*\*\*359] [\*\*1902] V

In a conspiracy case we should always ask ourselves why the defendants have elected to act in concert rather than independently.<sup>17</sup> Although in certain situations collective action may actually foster competition, see, e.g., *National Collegiate Athletic Assn. v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984), we normally presume that the free market functions most effectively when individual entrepreneurs act independently. This is true with respect to both maximum and minimum pricing arrangements.

[\*\*\*\*56] Professor Sullivan recognized that producers fixing maximum prices "are not acting from undiluted altruism," but [\*359] from self-interested goals such as prevention of new entries into the market. L. Sullivan, Law of Antitrust 211 (1977). He described the broad policy reasons to prohibit collusive pricing:

"The policy which insists on individual decisions about price thus has at its source more than a preference for the independence of the small businessman (though that is surely there) and more than a preference for the lower prices which such a policy will usually yield to consumers (though that too is strongly present). Also at work is the theoretical conviction that the most general function of the competitive process, the allocation and reallocation of resources in a rational yet automatic manner, can be carried out only if independence by each trader is scrupulously required. Created out of the confluence of these parallel strivings, the policy has a breadth [\*\*\*360] which makes it as forbidding to maximum price arrangements as to the more common ones which forestall price decreases." *Id.* at 212.

(BRENNAN, J., concurring) ("Resale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing brands").

<sup>16</sup> The Court grudgingly "assume[s], arguendo, that Albrecht correctly held that vertical, maximum price fixing is subject to the per se rule," ante, at 335, n. 5, but seeks to limit that holding to "potential effects on dealers and consumers, not . . . competitors," ante, at 336. However, in its zeal to narrow antitrust injury, the Court assumes that all vertical maximum-price-fixing arrangements mimic the circumstances present or discussed in Albrecht, in which there was monopoly power at both the production and exclusive distributorship stages. This approach is incorrect. For example, in Albrecht itself the Court identified possible injury to consumers as one basis for its per se rule, even though there was no evidence of actual consumer injury in that case. *390 U.S.* at 152-153. Furthermore, the Albrecht Court did not treat Albrecht himself as a "dealer" in the conspiracy, but essentially as a "competitor" targeted by the price-fixing conspiracy between Herald Company and the new dealers that were hired "to force petitioner to conform to the advertised retail price" by selling newspapers in his territory at lower, fixed prices. *Id.* at 149-150, and n. 6. Although Albrecht was a potential Herald dealer -- and thus not strictly a "dealer" or a "competitor" in the Court's use of those terms -- what is critical is that he had standing to bring a § 1 action as the victim of a vertical conspiracy to underprice his sales. Finally, the Court contradicts its own contrived model when it admits that vertical maximum-price-fixing schemes may facilitate predatory pricing for which a competitor could suffer "antitrust injury" in violation of § 2. Ante, at 339, n. 9.

<sup>17</sup> Until today, the Court has clearly understood why § 1 fundamentally differs from other antitrust violations:

"The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergers of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-769 (1984).

495 U.S. 328, \*359; 110 S. Ct. 1884, \*\*1902; 109 L. Ed. 2d 333, \*\*\*360; 1990 U.S. LEXIS 2543, \*\*\*\*56

In carving out this exception to the enforcement of [§ 1](#), [\*\*\*\*57] the Court has chosen to second-guess the wisdom of our per se rules and to embark on the questionable enterprise of parsing illegal conspiracies. This approach fails to heed the prudence urged in [\*United States v. Topco Associates, Inc., 405 U.S. 596 \(1972\)\*](#):

"The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against [\*\*1903] promotion of competition in another sector is one important reason we have formulated per se rules.

"In applying these rigid rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition.

[\*360] E.g., [\*United States v. General Motors Corp., 384 U.S. 127, 146-147 \(1966\)\*](#); [\*United States v. Masonite Corp., 316 U.S. 265 \(1942\)\*](#); [\*Fashion Originators' Guild v. FTC, 312 U.S. 457 \(1941\)\*](#)." *Id.*, at 609-610.

The Court, in its haste to excuse illegal behavior in the name of efficiency,<sup>18</sup> has cast aside a century of understanding [\*\*\*\*58] that our antitrust laws are designed to safeguard more than efficiency and consumer welfare,<sup>19</sup> and that private actions not only compensate the injured, but also deter wrongdoers.<sup>20</sup>

[\*\*\*\*59] [\*361] [\*\*\*361] As we explained in [\*United States v. American Tobacco Co., 221 U.S. 106, 183 \(1911\)\*](#): "[I]t was the danger which it was deemed would arise to individual liberty and the public well-being from acts like those which this record exhibits, which led the legislative mind to conceive and to enact the Anti-trust Act." The conspiracy alleged in this complaint poses the kind of threat to individual liberty and the free market that the Sherman Act was enacted to prevent. In holding such a conspiracy immune from challenge by its intended victim, the Court is unfaithful to its history of [\*\*1904] respect for this "charter of freedom."<sup>21</sup>

<sup>18</sup> See, e.g., ante, at 337-338, n. 7 ("Rivals cannot be excluded in the long run by a nonpredatory maximum-price scheme unless they are relatively inefficient"); ante, at 344 ("[I]nsofar as the per se rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust injury requirement is underscored"). Firms may properly go out of business because they are inefficient; market inefficiencies may also create imperfections leading to some firms' demise. The Court sanctions a new force -- the super-efficiency of an illegally combined group of firms who target their resources to drive an otherwise competitive firm out of business. Cf. Note, Below-Cost Sales and the Buying of Market Share, [\*42 Stan. L. Rev. 695, 741 \(1990\)\*](#) (discussing long-term displacement of "otherwise efficient producers" by pricing to buy out a market share in a geographic area).

<sup>19</sup> Chief Justice Hughes regarded the Sherman Act as a "charter of freedom," [\*Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359 \(1933\)\*](#). Judge Learned Hand recognized Congress' desire to strengthen small business concerns and to "put an end to great aggregations of capital because of the helplessness of the individual before them," [\*United States v. Aluminum Co. of America, 148 F. 2d 416, 428-429 \(CA2 1945\)\*](#), and we recently reaffirmed that the Sherman Act is "the Magna Carta of free enterprise," [\*United States v. Topco Associates, Inc., 405 U.S. 596, 610 \(1972\)\*](#). See also, e.g., Handler, Is Antitrust's Centennial a Time for Obsequies or for Renewed Faith in its National Policy? 10 Cardozo L. Rev. 1933 (1989); Hovenkamp, Distributive Justice and the Antitrust Laws, 51 Geo. Wash. L. Rev. 1 (1982); Flynn & Ponsoldt, Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes, [\*62 N.Y.U.L. Rev. 1125, 1137-1141 \(1987\)\*](#) (discussing the political, social, and moral -- as well as economic -- goals motivating Congress in enacting antitrust legislation).

<sup>20</sup> See, e.g., [\*Simpson v. Union Oil Co. of California, 377 U.S. 13 \(1964\)\*](#); see also Polden, Antitrust Standing and the Rule Against Resale Price Maintenance, 37 Clev. St. L. Rev. 179, 208-209, 220-221 (1989) (§ 4 furthers congressional objectives of deterrence and compensation by allowing private suits by injured competitors); Blair & Harrison, 42 Vand. L. Rev., at 1564-1565 (treating losses of firms that are targeted by unsuccessful predatory efforts as "antitrust injury" furthers private enforcement of antitrust laws and avoids "suboptimal levels of deterrence").

The Court of Appeals below observed that barring competitor standing leaves enforcement of the "vast majority of unlawful maximum resale price agreements" in the hands of "an unenthusiastic Department of Justice and, under certain circumstances, the dealers who are parties to the resale price maintenance agreement." [\*859 F. 2d 687, 694, n. 5 \(CA9 1988\)\*](#).

<sup>21</sup> [\*Appalachian Coals, Inc., 288 U.S., at 359\*](#).

I respectfully dissent.

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Vertical restraints on sales territory or location as violative of 1 of Sherman Act ([15 USCS 1](#)) [\*\*\*\*61] --post-GTE Sylvania cases. 92 ALR Fed 436.

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## **Texaco, Inc. v. Hasbrouck**

Supreme Court of the United States

December 5, 1989, Argued ; June 14, 1990, Decided

No. 87-2048

**Reporter**

496 U.S. 543 \*; 110 S. Ct. 2535 \*\*; 110 L. Ed. 2d 492 \*\*\*; 1990 U.S. LEXIS 3142 \*\*\*\*; 58 U.S.L.W. 4807; 1990-1 Trade Cas. (CCH) P69,056

TEXACO INC., PETITIONER v. RICKY HASBROUCK, DBA RICK'S TEXACO, ET AL.

**Prior History:** [\*\*\*\*1] On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

**Disposition:** [842 F.2d 1034](#), affirmed.

## **Core Terms**

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discount, retail, customers, prices, stations, distributor, wholesalers, price discrimination, supplier, damages, purchasers, gasoline, differential, marketing, respondents', functions, seller, sales, commerce, buyer, antitrust, compete, supplied, lower price, reimbursement, Robinson-Patman Act, integrated, rigorous, savings, injure

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

Contracts Law > Personal Property > Bona Fide Purchasers

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

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

### **HN1[ Defenses, Meeting Competition Defense**

See [15 U.S.C.S. § 13\(b\)](#).

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

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

### **HN2[ Robinson-Patman Act, Claims**

There may be a Robinson-Patman Act (Act), [15 U.S.C.S. § 13](#), violation even if favored and disfavored buyers do not compete, so long as the customers of a favored buyer compete with a disfavored buyer or its customers. A [§ 13\(a\)](#) violation may occur if (1) a discount received is not cost-based and (2) all or a portion of it is passed on by them to customers of theirs. To hold that price discrimination between a wholesaler and a retailer could never violate the Act would leave immune from antitrust scrutiny a discriminatory pricing procedure that can effectively serve to harm competition. Such a result would be contrary to the objectives of the Act.

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

### [\*\*HN3\*\*](#) [] **Antitrust & Trade Law, Robinson-Patman Act**

See [15 U.S.C.S. § 13\(a\)](#).

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Cost Justification Defense

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

Antitrust & Trade Law > Robinson-Patman Act > Defenses

### [\*\*HN4\*\*](#) [] **Defenses, Cost Justification Defense**

The Robinson-Patman Act, [15 U.S.C.S. § 13](#), contains no express reference to functional discounts. It does contain two affirmative defenses that provide protection for two categories of discounts, those that are justified by savings in a seller's cost of manufacture, delivery or sale, and those that represent a good faith response to equally low prices of a competitor.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

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

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

### [\*\*HN5\*\*](#) [] **Robinson-Patman Act, Claims**

In order to establish a violation of the Robinson-Patman Act, respondents have the burden of proving four facts: (1) that the seller's sales were made in interstate commerce; (2) that the product or commodity sold was of the same grade and quality as that sold to respondents; (3) that seller discriminated in price as between the purchasers; and (4) that the discrimination had a prohibited effect on competition. [15 U.S.C.S. § 13\(a\)](#).

496 U.S. 543, \*543; 110 S. Ct. 2535, \*\*2535; 110 L. Ed. 2d 492, \*\*\*492; 1990 U.S. LEXIS 3142, \*\*\*\*1

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

## **HN6** [down] **Robinson-Patman Act, Claims**

To recover damages under the Robinson-Patman Act, [15 U.S.C.S. § 13](#), a party has the burden of proving the extent of his actual injuries.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

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

## **HN7** [down] **Price Discrimination, Defenses**

A discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If two are competing in the resale of the goods concerned, that relationship exists. Where, also, a price to one is so low as to involve a sacrifice of some part of a seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination. Where no such relationship exists, where goods are sold in different markets and the conditions affecting those markets set different price levels for them, a sale to different customers at those different prices would not constitute a discrimination within the meaning of [15 U.S.C.S. § 13](#).

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Cost Justification Defense

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

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

Antitrust & Trade Law > Robinson-Patman Act > Defenses

## **HN8** [down] **Robinson-Patman Act, Claims**

A price discrimination within the meaning of [15 U.S.C.S. § 13](#) is merely a price difference. [Section 13](#) itself spells out the conditions which make a price difference illegal or legal. Were a court to read other conditions into the law by means of the nondirective phrase "discriminate in price," it would derange the integrated statutory scheme. Not only would such action be contrary to the meaning of the statute, but, perhaps because of this, it would be thoroughly undesirable. Inevitably every legal controversy over any price difference would shift from the detailed governing provisions, "injury," cost justification, and "meeting competition," over into the "discrimination" concept of ad hoc resolution divorced from specifically pertinent statutory text.

496 U.S. 543, \*543; 110 S. Ct. 2535, \*\*2535; 110 L. Ed. 2d 492, \*\*\*492; 1990 U.S. LEXIS 3142, \*\*\*\*1

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

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

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

## **HN9** [blue download icon] Price Discrimination, Competitive Injuries

An injury to competition under [15 U.S.C.S. § 13](#) may be inferred from evidence that some purchasers had to pay their supplier substantially more for their goods than their competitors had to pay.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

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

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

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

## **HN10** [blue download icon] Price Discrimination, Defenses

Suppliers granting functional discounts either to single-function or to integrated buyers should not be held responsible for any consequences of their customers' pricing tactics. Price cutting at the resale level is not in fact, and should not be held in law, "the effect of" a differential that merely accords due recognition and reimbursement for actual marketing functions. The price cutting of a customer who receives this type of differential results from his own independent decision to lower price and operate at a lower profit margin per unit. The legality or illegality of this price cutting must be judged by the usual legal tests. In any event, consequent injury or lack of injury should not be a supplier's legal concern. On the other hand, the law should tolerate no subterfuge. A distributor should be eligible for a discount corresponding to any part of the function he actually performs on that part of the goods for which he performs it under [15 U.S.C.S. § 13](#).

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Cost Justification Defense

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

Antitrust & Trade Law > Robinson-Patman Act > Defenses

## **HN11** [blue download icon] Robinson-Patman Act, Claims

A supplier need not satisfy the rigorous requirements of a cost justification defense in order to prove that a particular functional discount is reasonable and accordingly did not cause any substantial lessening of competition between a wholesaler's customers and a supplier's direct customers. To establish the defense a seller must show that the price reductions given did not exceed actual cost savings and this requirement of exactitude is ill-suited to the defense of discounts set by reference to legitimate, but less precisely measured, market factors. Discounters will therefore likely find it more useful to defend against claims under the Robinson-Patman Act, [15 U.S.C.S. § 13](#),

by negating the causation element in a case against them: a legitimate functional discount will not cause any substantial lessening of competition.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Cost Justification Defense

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

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Criminal Law & Procedure > Defenses > Burdens of Proof

Business & Corporate Compliance > ... > Transportation Law > Commercial Vehicles > Rates & Tariffs

## **HN12** [ ] **Defenses, Cost Justification Defense**

Conceived as a vehicle for allowing differential pricing to reward distributive efficiencies among customers operating at the same level, a cost justification defense focuses on narrowly defined savings to a seller derived from the different method or quantities in which goods are sold or delivered to different buyers. Moreover, the burden of proof as to a cost justification defense is on a seller charged with violating the Robinson-Patman Act, [15 U.S.C.S. § 13](#), whereas the burden of proof remains with an enforcement agency or plaintiff in circumstances involving functional discounts since functional pricing negates the probability of competitive injury, an element of a *prima facie* case of violation.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

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

## **HN13** [ ] **Price Discrimination, Defenses**

A price differential that merely accords due recognition and reimbursement for actual marketing functions is not illegal under the Robinson-Patman Act, [15 U.S.C.S. § 13](#).

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

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

## **HN14** [ ] **Price Discrimination, Defenses**

Functional discounts provide no safe harbor from the Robinson-Patman Act, [15 U.S.C.S. § 13](#).

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

## [\*\*HN15\*\*](#) [+] **Robinson-Patman Act, Claims**

Courts will not construe the Robinson-Patman Act (Act), [15 U.S.C.S. § 13](#), in a way that would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

## [\*\*HN16\*\*](#) [+] **Price Discrimination, Buyer Liability**

The competitive injury component of a Robinson-Patman Act (Act), [15 U.S.C.S. § 13](#), violation is not limited to an injury to competition between a favored and a disfavored purchaser; it also encompasses an injury to competition between their customers. Act language, which specifically encompasses not only the adverse effect of price discrimination on persons who either grant or knowingly receive the benefit of such discrimination, but also on customers of either of them. Such indirect competitive effects surely may not be presumed automatically in every functional discount setting, and, indeed, one would expect that most functional discounts will be legitimate discounts which do not cause harm to competition. At the least, a functional discount that constitutes a reasonable reimbursement for purchasers' actual marketing functions will not violate the Act.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

## [\*\*HN17\*\*](#) [+] **Robinson-Patman Act, Claims**

A plaintiff may not recover damages merely by showing a violation of the Robinson-Patman Act, [15 U.S.C.S. § 13](#); rather, a plaintiff must also make some showing of actual injury attributable to something the antitrust laws were designed to prevent. However, antitrust plaintiffs are excused from an unduly rigorous standard of proving antitrust injury.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

## **HN18** [ ] **Robinson-Patman Act, Claims**

Damage issues in Robinson-Patman, [15 U.S.C.S. § 13](#), cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.

## **Lawyers' Edition Display**

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### **Decision**

Gasoline supplier's discounts to two distributors held not legitimate functional discounts, and thus held to violate 2(a) of Clayton Act, as amended by Robinson-Patman Act ([15 USCS 13\(a\)](#)).

### **Summary**

In general, a supplier's functional discount is said to be a discount given to a purchaser based on the purchaser's role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier. A particular supplier (1) sold gasoline directly to independent retailers in Spokane, Washington at the supplier's retail tank wagon prices, and (2) granted substantial discounts to two distributors which (a) engaged in retail operations as well, and (b) increased their sales volume. Several independent retailers whose sales had suffered a decline filed an action against the supplier in the United States District Court for the Eastern District of Washington and alleged that the supplier's distributor discounts violated 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), which makes it unlawful to discriminate in price between different purchasers, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. The supplier, however, contended that it had granted the distributors legitimate functional discounts, which did not violate the Act. After the case had been remanded once for a new trial, the jury in the second trial returned a verdict in favor of the independent retailers. The District Court denied the supplier's motion for judgment notwithstanding the verdict and, in an opinion supplementing the court's oral ruling denying the supplier's motion for a directed verdict, expressed the view that any presumed legality of functional discounts had been rebutted by evidence that the amount of the discounts to the distributors was not related to the cost of any function that the distributors performed ([634 F Supp 34](#)). On appeal, the United States Court of Appeals for the Ninth Circuit, in affirming, expressed the view that the independent retailers had presented ample evidence to demonstrate that the services performed by the distributors were insubstantial and did not justify the functional discounts (initial opinion at [830 F2d 1513](#), amended opinion at [842 F2d 1034](#)).

On certiorari, the United States Supreme Court affirmed. In an opinion by Stevens, J., joined by Rehnquist, Ch. J., and Brennan, Marshall, Blackmun, and O'Connor, JJ., it was held that, although a legitimate functional discount constituting a reasonable reimbursement for a purchaser's actual marketing functions does not violate 2(a), the record in the case at hand adequately supported a finding that the supplier's distributor discounts were not legitimate functional discounts, and thus violated 2(a), where there was evidence that (1) one distributor was separately compensated for its hauling function; (2) neither distributor maintained any significant storage facilities;

(3) both distributors received the full discount on all their purchases even though most of their volume was resold directly to consumers; (4) the extra margin on such sales enabled the distributors to price aggressively in both their retail and wholesale marketing; (5) the supplier was fully informed about the persistent and marketwide consequences of its own pricing activity; (6) the supplier's own executives recognized that the dramatic impact on the market was almost entirely attributable to the magnitude of the distributor discounts and the hauling allowance; and (7) at the same time that the supplier was affirmatively encouraging one distributor to expand its retail business and integrate downward, and was providing the distributor with a generous discount useful to such integration, the supplier was inhibiting upward integration by the independent retailers by refusing permission to two of the independent retailers to haul their own fuel using their own tank wagons.

White, J., concurring in the result, expressed the view that (1) in the absence of congressional attention to the longstanding issue as to whether legitimate functional discounts violated 2(a), he would await a case challenging a functional discount ruling by the Federal Trade Commission (FTC), at which time the Supreme Court would be reviewing a construction of the Act by the FTC and the FTC's explanation of legitimate functional discount pricing; but (2) the case at hand was a private action for treble damages in which the Supreme Court ruled against the seller-discounter, since under no definition of a legitimate functional discount did the discounts extended in the case at hand qualify as a defense to a charge of price discrimination.

Scalia, J., joined by Kennedy, J., concurring in the judgment, expressed the view that (1) while he agreed with the court that none of the arguments pressed by the supplier for removing the supplier's conduct from the coverage of the Robinson-Patman Act was persuasive, he could not adopt the court's reasoning, which seemed to create an exemption for functional discounts that are "reasonable" even though prohibited by the text of the Act; and (2) although there might be a plausible argument that a functional basis for differential pricing would negate the possibility of competitive injury in a market that was really functionally divided, the merits of that argument ought not to be decided by the Supreme Court in the first instance, as the argument (a) had not been raised by the parties before the court or below, and (b) called forth a number of issues that would benefit from briefing and factual development.

## Headnotes

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EVIDENCE §979 > sufficiency -- Robinson-Patman Act violation -- functional discounts -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D] [LEdHN\[1E\]](#) [1E] [LEdHN\[1F\]](#) [1F] [LEdHN\[1G\]](#) [1G]

In a suit by several independent retailers against a supplier which sold gasoline both to the independent retailers and to two distributors which engaged in retail operations as well, the record adequately supports the finding that the supplier's discounts to the distributors were not legitimate functional discounts, and thus violated 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#))--which makes it unlawful to discriminate in price between purchasers, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them--where there is evidence that (1) one distributor was separately compensated for its hauling function; (2) neither distributor maintained any significant storage facilities; (3) both distributors received the full discount on all their purchases even though most of their volume was resold directly to consumers; (4) the extra margin on such sales enabled the distributors to price aggressively in both their retail and wholesale marketing; (5) the supplier was fully informed about the persistent and marketwide consequences of its own pricing activity; (6) the supplier's own executives recognized that the dramatic impact on the market was almost entirely attributable to the magnitude of the distributor discounts and the hauling allowance; and (7) at the same time that the supplier was affirmatively encouraging one distributor to expand its retail business and integrate downward, and was providing the distributor with a generous discount useful to such integration, the supplier was inhibiting upward integration by the

496 U.S. 543, \*543; 110 S. Ct. 2535, \*\*2535; 110 L. Ed. 2d 492, \*\*\*492; 1990 U.S. LEXIS 3142, \*\*\*\*1

independent retailers by refusing permission to two of the independent retailers to haul their own fuel using their own tank wagons.

APPEAL §1326 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §38 > discounts -- price discrimination -- defenses -- what reviewable -- denial of motion for judgment notwithstanding verdict -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B] [LEdHN\[2C\]](#) [2C]

With respect to 2 of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13](#)), even though the price-discrimination prohibition in 2(a) ([15 USCS 13\(a\)](#)) contains no express reference to functional discounts, two affirmative defenses provide protection for two categories of discounts--those discounts that (1) under 2(a), are justified by savings in the supplier's cost of manufacture, delivery, or sale, or (2) under 2(b) ([15 USCS 13\(b\)](#)), represent a good-faith response to the equally low prices of a competitor; with respect to a claim by several independent retailers in a Federal District Court suit that a gasoline supplier's discounts to two distributors violated 2(a), however, neither of those two defenses is available to the supplier as the case comes to the United States Supreme Court on certiorari--even though the supplier contended in the District Court that the special prices to the distributors were justified by cost savings, were a good-faith effort to meet competition, and were "legitimate functional discounts"--where (1) the District Court withheld the cost-justification defense from the jury on the ground that the cost-justification defense was not supported by the evidence, (2) the jury rejected the other defenses, (3) the supplier's motion for a judgment notwithstanding the verdict, which motion was denied by the District Court, claimed that, as a matter of law, the supplier's functional discounts did not violate 2, and (4) the Supreme Court granted certiorari to consider the supplier's contention that legitimate functional discounts do not violate 2.

APPEAL §1457 > review of jury verdict -- conflicting evidence -- > Headnote:

[LEdHN\[3\]](#) [3]

On certiorari to review a gasoline supplier's liability to several independent retailers for an alleged violation of 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), the United States Supreme Court, given the jury's general verdict in favor of the independent retailers, will resolve disputed questions of fact in the independent retailers' favor.

DAMAGES §159 > injury to business -- Robinson-Patman Act -- > Headnote:

[LEdHN\[4\]](#) [4]

In a suit by several independent retailers against a gasoline supplier, which suit is based upon a claim that the supplier's discounts to two distributors constituted price discrimination in violation of 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), it is improper to award damages measured by the difference between (1) the retail tank wagon price at which the supplier sold gasoline directly to the independent retailers, and (2) the price paid by one of the distributors.

EVIDENCE §167 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > STATUTES §82 > price discrimination -- functional discounts -- assumption of legislative intent -- > Headnote:

[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B] [LEdHN\[5C\]](#) [5C] [LEdHN\[5D\]](#) [5D] [LEdHN\[5E\]](#) [5E] [LEdHN\[5F\]](#) [5F]

Under a definition of a supplier's functional discount as a discount given to a purchaser based on the purchaser's role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier, there is no blanket exemption for such functional discounts from 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), which makes it unlawful in certain circumstances to "discriminate in price," where the claimed exemption would be based upon the comment by a sponsor of the Act--to the effect that 2(a) price discrimination requires some relationship's existing between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other--because such an exemption is foreclosed by the text of 2(a) itself, under which price discrimination is merely a price difference; it is anomalous to assume that Congress intended the term "discriminate" to have such a limited meaning, in the context of a statute that (1) reveals a concern with competitive consequences at different levels of distribution, and (2) carefully defines specific affirmative defenses; there are no overtones of business buccaneering in the 2(a) phrase "discriminate in price"; the statute itself spells out the conditions which make a price difference legal or illegal, and it would derange the statutory scheme to read other conditions into the law by means of the nondirective phrase "discriminate in price," for such action would not only be contrary to the meaning of the statute, but also have undesirable consequences.

#### EVIDENCE §343.5 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §38 > STATUTES

§158.8 > price discrimination -- functional discounts -- presumptions -- > Headnote:

[LEdHN\[6A\]](#) [6A] [LEdHN\[6B\]](#) [6B] [LEdHN\[6C\]](#) [6C] [LEdHN\[6D\]](#) [6D] [LEdHN\[6E\]](#) [6E] [LEdHN\[6F\]](#) [6F] [LEdHN\[6G\]](#) [6G] [LEdHN\[6H\]](#) [6H] [LEdHN\[6I\]](#) [6I] [LEdHN\[6J\]](#) [6J] [LEdHN\[6K\]](#) [6K] [LEdHN\[6L\]](#) [6L] [LEdHN\[6M\]](#) [6M] [LEdHN\[6N\]](#) [6N]

At the least--under a definition of a supplier's functional discount as a discount given to a purchaser based on the purchaser's role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier--a functional discount that constitutes a reasonable reimbursement for the purchaser's actual marketing functions does not violate 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), which makes it unlawful to discriminate in price between purchasers where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; indirect competitive-injury effects may not be presumed automatically in a functional discount setting, and, when a functional discount is legitimate, an inference of injury to competition--which may otherwise be established by evidence that some purchasers had to pay their supplier substantially more for their goods than their competitors had to pay--will not arise; thus, a legitimate functional discount negates the causation element in the case against a discounter, for such a discount will not cause any substantial lessening of competition; not every functional discount is entitled to a judgment of legitimacy, however, and it will sometimes be possible to produce evidence showing that a particular functional discount caused price discrimination of the sort that 2(a) prohibits; thus, a functional discount that merely accords due recognition and reimbursement for actual marketing functions is not illegal, but 2(a) does not countenance a functional discount completely untethered to either the supplier's savings or the wholesaler's costs; such a construction of 2(a) is supported by (1) the practice of the Federal Trade Commission, which, while permitting legitimate functional discounts, has proceeded against those discounts which have appeared to be subterfuges to avoid 2(a)'s restrictions, and (2) the remarks of commentators who, while disagreeing as to the extent to which functional discounts are allowable, have agreed that, in exceptional cases, what is nominally a functional discount may be unjustifiable 2(a) price discrimination; while many cases may involve discounts made questionable because offered to complex types of distributors whose functions have become scrambled, such a general tendency does not preclude the possibility that a supplier might pursue a price-discrimination strategy despite the absence of any discrete mechanism for allocating favorable price discrepancy between secondary recipients (that is, favored and

disfavored buyers) and tertiary recipients (that is, the customers of either of them). (White, Scalia, and Kennedy, JJ., dissented in part from this holding.)

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > STATUTES §145.6 > price discrimination -- functional discounts -- legislative history -- > Headnote:

[LEdHN\[7A\]](#) [7A] [LEdHN\[7B\]](#) [7B] [LEdHN\[7C\]](#) [7C] [LEdHN\[7D\]](#) [7D]

With respect to a functional discount--that is, a discount given by a supplier to a purchaser based on the purchaser's role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier--it is appropriate to begin consideration of the legal status of such a discount, under the price-discrimination prohibition in 2 of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13](#)), by examining the language of 2; while 2(a) of the Act ([15 USCS 13\(a\)](#)) contains no express reference to functional discounts, and while the legislative history indicates that earlier drafts to 2 did include a proviso excepting functional discounts, the deletion of the exception (1) has ambiguous significance, and (2) in any event, in no way detracts from the blunt direction of 2(a)'s statutory text, which indicates that any price discrimination substantially lessening competition will expose the discriminator to liability, regardless of whether the discriminator attempts to characterize the pricing scheme as a functional discount.

EVIDENCE §343.5 > burden of proof -- Robinson-Patman Act -- violation -- damages -- > Headnote:

[LEdHN\[8A\]](#) [8A] [LEdHN\[8B\]](#) [8B] [LEdHN\[8C\]](#) [8C]

In an action by several independent retailers against a gasoline supplier, which action is based upon the independent retailers' claim that the supplier's discounts to two distributors violated 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), the independent retailers, in order to establish a violation of 2(a), have the burden of proving four facts--that (1) the supplier's sales to the distributors were made in interstate commerce, (2) the gasoline sold to the distributors was of the same grade and quantity of that sold to the independent retailers, (3) the supplier discriminated in price as between the distributors on the one hand and the independent retailers on the other, and (4) the discrimination had a prohibited effect on competition; moreover, for each such independent retailer to recover damages, the retailer has the burden of proving the extent of the retailer's actual damages; the independent retailers, however, do not need to show any benefit to the supplier from the price-discrimination scheme in order to establish a violation of 2(a).

EVIDENCE §211.3 > Robinson-Patman Act violation -- functional discounts -- burden of proof -- causation -- > Headnote:

[LEdHN\[9A\]](#) [9A] [LEdHN\[9B\]](#) [9B] [LEdHN\[9C\]](#) [9C] [LEdHN\[9D\]](#) [9D] [LEdHN\[9E\]](#) [9E]

With respect to the legal status of a functional discount--that is, a discount given by a supplier to a purchaser based on the purchaser's role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier--under the price-discrimination prohibition in 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), while a supplier, in theory, could try to defend an allegedly legitimate functional discount by invoking 2(a)'s cost-justification defense, (1) the burden of proof with respect to the defense is on the supplier, and (2) a supplier, in order to establish the defense, must show that the price reductions given did not exceed the actual cost savings--a requirement of exactitude which is ill-suited to the defense of discounts set by reference to legitimate, but less precisely measured, market factors; however, a supplier need not satisfy the rigorous requirements of 2(a)'s cost-justification defense in order to prove that a particular functional

496 U.S. 543, \*543; 110 S. Ct. 2535, \*\*2535; 110 L. Ed. 2d 492, \*\*\*492; 1990 U.S. LEXIS 3142, \*\*\*\*1

discount is reasonable and accordingly did not cause any substantial lessening of the competition between a wholesaler's customers and the supplier's direct customers, for the concept of substantiality (1) permits the causation inquiry to accommodate a notion of economic reasonableness with respect to the pass-through effects of functional discounts, and (2) provides a latitude denied by the cost-justification defense. (White, Scalia, and Kennedy, JJ., dissented in part from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §38 > STATUTES §158.8 > price discrimination -- administrative construction -- functional discounts -- control of resale price -- > Headnote:

[LEdHN\[10A\]](#) [blue icon] [10A] [LEdHN\[10B\]](#) [blue icon] [10B] [LEdHN\[10C\]](#) [blue icon] [10C] [LEdHN\[10D\]](#) [blue icon] [10D] [LEdHN\[10E\]](#) [blue icon] [10E]

Although the United States Supreme Court will cite from Federal Trade Commission (FTC) practice to support the Supreme Court's holding that--under a definition of a supplier's functional discount as a discount given to a purchaser based on the purchaser's role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier--legitimate functional discounts do not violate 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), nothing in the Supreme Court's holding is to be read to condone or approve a result which rests upon a view that, under one FTC case, a supplier is charged with legal responsibility for the middlemen's pricing tactics, and hence (1) must control their resale prices lest they undercut the supplier to the unlawful detriment of the supplier's directly purchasing retailers, or (2) alternatively, may forego operational freedom by matching the supplier's quotations to retailers with the middlemen's; similarly, nothing in the Supreme Court's holding endorses a 2(a) theory so broad as the theory drawn by a commentator from that FTC case, where the theory is based on a flawed analysis which assumed that (1) seller liability for tertiary (that is, customer) implications of wholesaler discounts must follow the logic of the FTC's complaint in the case, and (2) such logic exposed to liability any seller who fails to monitor the resale prices of its wholesaler; also, the Supreme Court will reject the 2(a) requirement of exactitude which might otherwise be inferred from the dictum in another FTC case, which dictum is to the effect that the functional discount offered to a buyer should not exceed the cost of that part of the function that the buyer actually performs on that part of the goods for which the buyer performs the function. (White, Scalia, and Kennedy, JJ., dissented in part from this holding).

APPEAL §1331.5 > what reviewable -- discounts -- > Headnote:

[LEdHN\[11A\]](#) [blue icon] [11A] [LEdHN\[11B\]](#) [blue icon] [11B] [LEdHN\[11C\]](#) [blue icon] [11C]

On certiorari to review a verdict in favor of several independent retailers whose suit was based on a claim that a gasoline supplier's discounts to two distributors violated 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), the United States Supreme Court need not address the relative merits of two Federal Trade Commission (FTC) decisions in order to resolve the case before the Supreme Court, where the FTC, in the second case, (1) expressly disavowed any dicta from the first case, which dicta suggested that functional discounts were per se legal if justified by the buyer's costs, and (2) held that such discounts were controlled instead by reasoning which referred to the value of the services to the supplier giving the discounts.

APPEAL §1662 > effect of decision on other grounds -- > Headnote:

[LEdHN\[12A\]](#) [blue icon] [12A] [LEdHN\[12B\]](#) [blue icon] [12B]

On certiorari to review a Federal Court of Appeals' decision as to liability under 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), the United States Supreme Court need not decide whether the

Federal Government's interpretation, in an amicus brief, of the Court of Appeals' opinion is correct, where the Supreme Court affirms the Court of Appeals' judgment for reasons that do not entail the principles criticized by the Federal Government.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > price discrimination -- distribution links -- discounts -- > Headnote:

[LEdHN\[13A\]](#) [13A] [LEdHN\[13B\]](#) [13B]

The United States Supreme Court will not construe 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#))--which makes it unlawful to discriminate in price between purchasers, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them--in a way that would allow price discriminators to avoid the sanctions of 2(a) by the simple expedient of adding an additional link to the distribution chain; thus, for the purposes of determining, in a suit by several independent retailers against a supplier which sold gasoline both to the independent retailers and to two distributors which engaged in retail operations as well, whether the supplier's discounts to the distributors violated 2(a), the additional link in the distribution chain does not insulate the supplier from liability if the supplier's excessive discounts otherwise violated 2(a).

COURTS §93 > STATUTES §91 > faithfulness to intent -- rewriting -- > Headnote:

[LEdHN\[14A\]](#) [14A] [LEdHN\[14B\]](#) [14B]

Unlike scholarly commentators, the United States Supreme Court has a duty to be faithful to congressional intent when interpreting a statute, and is not free to consider whether, or how, the statute should be rewritten.

COURTS §141 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §38 > price discrimination -- functional discounts -- > Headnote:

[LEdHN\[15A\]](#) [15A] [LEdHN\[15B\]](#) [15B]

With respect to a supplier's functional discount--that is, a discount given to a purchaser based on the purchaser's role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier--although a scholarly commentator describes the status of functional discounts under 2 of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13](#)), with dissatisfaction, the commentator's observations about the merits of the statute and about prosecutorial discretion are irrelevant to the United States Supreme Court's inquiry as to the legal status of such functional discounts under 2.

EVIDENCE §343.5 > presumptions -- rebuttal -- Robinson-Patman Act violation -- > Headnote:

[LEdHN\[16\]](#) [16]

For the purposes of determining, in a suit by several independent retailers against a supplier which sold gasoline both to the independent retailers and to two distributors which engaged in retail operations as well, whether the

supplier's allegedly legitimate functional discounts to the distributors violated 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#))--which makes it unlawful to discriminate in price between purchasers, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them--a presumption of an adverse effect on competition becomes all the more appropriate to the extent that the two distributors competed with the independent retailers in the retail market; the distributors' competitive advantage in the retail market constitutes evidence tending to rebut any presumption of legality that would otherwise apply to their wholesale sales.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > STATUTES §164 > price discrimination

-- > Headnote:

[LEdHN\[17\]](#) [▼] [17]

The competitive-injury component of a price discrimination violation of 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), is not limited to the injury to competition between the favored and the disfavored purchaser, but also encompasses the injury to competition between their customers; such a conclusion is compelled by the statutory language, which specifically encompasses the adverse effect of price discrimination on not only persons who either grant or knowingly receive the benefit of such discrimination, but also customers of either of them.

APPEAL §1092 > what reviewable -- issue not raised -- > Headnote:

[LEdHN\[18A\]](#) [▼] [18A] [LEdHN\[18B\]](#) [▼] [18B]

On certiorari to review several independent retailers' suit against a gasoline supplier, which suit is based on a claim that the supplier's discounts to two distributors violated 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), the United States Supreme Court need not address the question whether, under 2(a), an inference of injury to competition might be negated by evidence that disfavored buyers could make purchases at a reasonable discount from favored buyers, where the parties do not raise the question.

DAMAGES §159 > JUDGMENT §314.5 > Robinson-Patman Act violation -- excessiveness of damages -- time for which awarded -- judgment notwithstanding verdict -- > Headnote:

[LEdHN\[19\]](#) [▼] [19]

With respect to the amount of damages awarded for the period 1972-1981 to several independent retailers in their suit against a supplier which sold gasoline both to the plaintiff retailers and to two distributors which engaged in retail operations as well--which suit is based upon a claim that the supplier's discounts to the two distributors violated 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#))--even if one of the distributors, on whose activities the plaintiffs relied in proving damages, was not also a retailer prior to 1974, a possible flaw in the jury's calculation of the amount of damages awarded is not an appropriate basis for granting the supplier's motion for a judgment notwithstanding the verdict on the theory that the award is allegedly excessive as a matter of law, where (1) the supplier's theory improperly blurs the distinction between the liability and damages issues; (2) the plaintiffs' proof established a continuing violation of 2(a) throughout the damages period; (3) the plaintiffs' proof of the specific amount of damages, although necessarily less precise, provided a sufficient basis for

an acceptable estimate of the amount of damages; and (4) the supplier did not object to the instructions to the jury on the damages issue.

EVIDENCE §652 > sufficiency -- expert testimony -- Robinson-Patman Act -- injury to business -- damages -- > Headnote:  
[LEdHN\[20\]](#) [20]

In a suit by several independent retailers against a gasoline supplier which sold gasoline both to the independent retailers and to two distributors which engaged in retail operations as well--which suit is based upon a claim that the supplier's discounts to the two distributors violated 2(a) of the Clayton Act, as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#))--the plaintiff retailers' proof of a continuing violation of 2(a) throughout the 9-year period of 1972-1981 is sufficient, where the plaintiffs' proof establishes that (1) the supplier's lower prices to both distributors were discriminatory throughout the entire 9-year period, (2) at least one distributor, and apparently the second distributor as well, was selling at retail during that entire period, (3) the discounts substantially affected competition throughout the entire market, and (4) the discounts injured each of the plaintiffs; under such circumstances, the plaintiffs' proof of the specific amount of their damages is necessarily less precise, and--even if the second distributor was not also a retailer prior to 1974, and even if some portion of the plaintiffs' injuries might therefore be attributable to the conduct of other independent retailers--the plaintiffs' expert testimony provides a sufficient basis, under the traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury, for an acceptable estimate of the amount of damages awarded for the period 1972-1981, where (1) the plaintiffs offered no direct testimony of any diversion by the first distributor and testified that they, the plaintiffs, did not even know that the first distributor was being supplied by the supplier, (2) the plaintiffs introduced evidence describing a diversion of their customers to specific stations supplied by the second distributor, and (3) the plaintiffs' expert testimony on damages (a) focused on the diversion of trade to specific stations supplied by the second distributor, and (b) analyzed the entire damages period, including the period prior to 1974 when the second distributor was arguably not a retailer.

## Syllabus

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Between 1972 and 1981, petitioner Texaco sold gasoline at its retail tank wagon prices to respondent independent Texaco retailers but granted substantial discounts to distributors Gull and Dompier. Gull resold the gas under its own name; the fact that it was being supplied by Texaco was unknown to respondents. Dompier paid a higher price than Gull, and supplied its gas under the Texaco brand name to retail stations. With the encouragement of Texaco, Dompier entered the retail market directly. Both distributors picked up gas at the Texaco plant and delivered it directly to their retail outlets, and neither maintained any significant storage facilities. Unlike Gull, Dompier received an additional [\*\*\*2] discount from Texaco for the deliveries. Texaco executives were well aware of Dompier's dramatic growth and attributed it to the magnitude of the discounts. During the relevant period, the stations supplied by the distributors increased their sales volume dramatically, while respondents' sales suffered a corresponding decline. In 1976, respondents filed suit against Texaco under the Robinson-Patman Amendments to the Clayton Act (Act), alleging that the distributor discounts violated § 2(a) of the Act, which, among other things, forbids any person to "discriminate in price" between different purchasers of commodities, where the effect of such discrimination is substantially to "injure . . . competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." The jury awarded respondents actual damages. The District Court denied Texaco's motion for judgment notwithstanding the verdict. Texaco had claimed that, as a matter of law, its "functional discounts" -- *i. e.*, discounts that are given to a purchaser based on its role in the supplier's distributive system and reflect, at least in a generalized sense, the [\*\*\*3] services performed by the purchaser for the supplier -- did not adversely affect competition within the meaning of the Act. The District Court rejected Texaco's argument, reasoning that the "presumed legality of functional discounts" had been rebutted by

evidence that the amount of Gull's and Dompier's discounts was not reasonably related to the cost of any function they performed. The Court of Appeals affirmed.

*Held:*

1. Respondents have satisfied their burden of proving that Texaco violated the Act. Pp. 9-26.

(a) Texaco's argument that it did not "discriminate in price" within the meaning of § 2(a) by charging different prices is rejected in light of this Court's holding in *FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549*, that "a price discrimination within the meaning of [§ 2(a)] is merely a price difference." Texaco's argument, which would create a blanket exemption for all functional discounts, has some support in the legislative history of the Act, but is foreclosed by the text of the Act itself, which plainly reveals a concern with competitive consequences at different levels of distribution and carefully defines two specific affirmative defenses [\*\*\*\*4] that are unavailable. Pp. 11-13.

(b) Also rejected is Texaco's argument that, at least to the extent that Gull and Dompier acted as wholesalers, the price differentials did not "injure . . . competition" within the meaning of the Act. It is true that a legitimate functional discount that constitutes a reasonable reimbursement for the purchaser's actual marketing functions does not violate the Act. Thus, such a discount raises no inference of injury to competition under *FTC v. Morton Salt Co., 334 U.S. 37, 46-47*. However, the Act does not tolerate a functional discount that is completely untethered either to the supplier's savings or the wholesaler's costs. This conclusion is consistent with Federal Trade Commission (FTC) practice, with *Perkins v. Standard Oil Co. of California, 395 U.S. 642*, and with the analysis of antitrust commentators. The record here adequately supports the finding that Texaco violated the Act. There was an extraordinary absence of evidence to connect Gull's and Dompier's discounts to any savings enjoyed by Texaco. Both Gull and Dompier received the full discount on all purchases even though most of their volume was resold [\*\*\*\*5] directly to consumers, and the extra margin on those sales obviously enabled them to price aggressively in both their retail and wholesale marketing. The *Morton Salt* presumption of adverse effect becomes all the more appropriate to the extent they competed with respondents in the retail market. Furthermore, the evidence indicates that Texaco was encouraging Dompier to integrate downward and was fully informed about the dramatic impact of the Dompier discount on the retail market at the same time that Texaco was inhibiting upward integration by respondents. Pp. 13-26.

2. There is no merit to Texaco's contention that the damages award must be judged excessive as a matter of law. Texaco's theory improperly blurs the distinction between the liability and damages issues. There is no doubt that respondents' proof of a continuing violation as to the discounts to both distributors throughout the 9-year damages period was sufficient. Proof of the specific amount of their damages necessarily was less precise, but the expert testimony provided a sufficient basis for an acceptable estimate of the amount of damages. Cf., e. g., *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 565-566*. [\*\*\*\*6] Pp. 26-28.

**Judges:** STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the result. SCALIA, J., filed an opinion concurring in the judgment, in which KENNEDY, J., joined.

**Opinion by:** STEVENS

## Opinion

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[\*546] [\*506] [\*\*2538] [LEdHN\[1A\]](#) [↑] [1A] [LEdHN\[2A\]](#) [↑] [2A] Petitioner (Texaco) sold gasoline directly to respondents and several other retailers in Spokane, Washington, at its retail [\*547] tank wagon prices (RTW) while it granted substantial discounts to two distributors. During the period between 1972 and 1981, the stations supplied by the two distributors increased their sales volume dramatically, while respondents' sales suffered a corresponding decline. Respondents filed an action against Texaco under the Robinson-Patman Amendment to the Clayton Act (Act), 38 Stat. 730, as amended, 49 Stat. 1526, [15 U.S.C. § 13](#), alleging that the distributor discounts violated § 2(a)

of the Act, **15 U.S.C. § 13** [\*\*\*\*7] (a). Respondents recovered treble damages, and the Court of Appeals for the Ninth Circuit affirmed the judgment. We granted certiorari, 490 U.S. (1989), to consider Texaco's contention that legitimate functional discounts do not violate the Act because a seller is not responsible for its customers' independent resale pricing decisions. While we agree with the basic thrust of Texaco's argument, we conclude that in this case it is foreclosed by the facts of record.

I

**LEdHN[3]** [3] Given the jury's general verdict in favor of respondents, disputed questions of fact have been resolved in their favor. There seems, moreover, to be no serious doubt about the character of the market, Texaco's pricing practices, or the relative importance of Texaco's direct sales to retailers [\*548] ("through put" business) and its sales to distributors. The principal disputes at trial related to questions of causation and damages.

Respondents are 12 independent Texaco retailers. They displayed the Texaco trademark, accepted Texaco credit cards, and bought their gasoline products directly from Texaco. Texaco delivered the gasoline [\*\*\*\*8] to respondents' stations.

The retail gasoline market in Spokane was highly competitive throughout the damages period, which ran from 1972 to 1981. Stations marketing the nationally advertised Texaco gasoline competed with other major brands as well as with stations featuring independent brands. Moreover, although discounted prices at a nearby Texaco station would have the most obvious impact on a respondent's trade, the cross-city traffic patterns and relatively small size of Spokane produced a city-wide competitive market. See, e. g., App. 244, 283-291. Texaco's [\*\*2539] through put sales in the Spokane market declined from a monthly volume of 569,269 gallons in 1970 to 389,557 gallons in 1975. Id., at 487-488. Texaco's independent retailers' share of the market for Texaco gas declined from 76% to 49%.<sup>1</sup> Ibid. Seven of the respondents' stations were out of business by the end of 1978. Id., at 22-23, R. 501.

[\*\*\*\*9] [\*\*\*507] The respondents tried unsuccessfully to increase their ability to compete with lower priced stations. Some tried converting from full service to self-service stations. See, e. g., App. 55-56. Two of the respondents sought to buy their own tank trucks and haul their gasoline from Texaco's supply point, but Texaco vetoed that proposal. *Id.*, at 38-41, 59.

[\*549] While the independent retailers struggled, two Spokane gasoline distributors supplied by Texaco prospered. Gull Oil Company (Gull) had its headquarters in Seattle and distributed petroleum products in four western States under its own name. *Id.*, at 94-95. In Spokane it purchased its gas from Texaco at prices that ranged from six to four cents below Texaco's RTW price. Id., at 31-32. Gull resold that product under its own name; the fact that it was being supplied by Texaco was not known by either the public or the respondents. See, e. g., id., at 256. In Spokane, Gull supplied about 15 stations; some were "consignment stations" and some were "commission stations." In both situations Gull retained title to the gasoline until it was pumped into a motorist's tank. In the consignment stations, the station operator [\*\*\*\*10] set the retail prices, but in the commission stations Gull set the prices and paid the operator a commission. Its policy was to price its gasoline at a penny less than the prevailing price for major brands. Gull employed two truck drivers in Spokane who picked up product at Texaco's bulk plant and delivered it to the Gull stations. It also employed one supervisor in Spokane. Apart from its trucks and investment in retail facilities, Gull apparently owned no assets in that market. App. 96-109, 504-512. At least with respect to the commission stations, Gull is fairly characterized as a retailer of gasoline throughout the relevant period.

The Dompier Oil Company (Dompier) started business in 1954 selling Quaker State Motor Oil. In 1960 it became a full line distributor of Texaco products, and by the mid-1970's its sales of gasoline represented over three-quarters of its business. App. 114-115. Dompier purchased Texaco gasoline at prices of 3.95 cents to 3.65 cents below the RTW price. Dompier thus paid a higher price than Gull, but Dompier, unlike Gull, resold its gas under the Texaco brand names. Id., at 24, 29-30. It supplied about eight to ten Spokane retail stations. In the period [\*\*\*\*11] prior to

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<sup>1</sup> The independent retailers' share includes not only the market share for the 12 respondents, who operated a total of 13 stations, but also the share of some independent Texaco retailers who are not parties to this action. Texaco had 27 independent dealers in the Spokane market in 1970, and 19 in 1975. App. 22, 487-488.

496 U.S. 543, \*549; 110 S. Ct. 2535, \*\*2539; 110 L. Ed. 2d 492, \*\*\*507; 1990 U.S. LEXIS 3142, \*\*\*\*11

October 1974, two of those stations were owned by the president of Dompier but the others were independently [\*550] operated. See, e. g., *id.*, at 119-121, 147-148. In the early 1970's, Texaco representatives encouraged Dompier to enter the retail business directly, and in 1974 and 1975 it acquired four stations.<sup>2</sup> *Id.*, at 114-135, 483-503. Dompier's president estimated at trial that the share of its total gasoline sales made [\*\*\*508] at retail during [\*\*2540] the middle 1970's was "probably 84 to 90 percent." *Id.*, at 115.

[\*\*\*\*12] Like Gull, Dompier picked up Texaco's product at the Texaco bulk plant and delivered directly to retail outlets. Unlike Gull, Dompier owned a bulk storage facility, but it was seldom used because its capacity was less than that of many retail stations. Again unlike Gull, Dompier received from Texaco the equivalent of the common carrier rate for delivering the gasoline product to the retail outlets. Thus, in addition to its discount from the RTW price, Dompier made a profit on its hauling function.<sup>3</sup> App. 123-131, 186-192, 411-413.

The stations supplied by Dompier regularly sold at retail at lower prices than respondents'. [\*\*\*\*13] Even before Dompier directly entered the retail business in 1974, its customers were [\*551] selling to consumers at prices barely above the RTW price. *Id.*, at 329-338; Record 315, 1250-1251. Dompier's sales volume increased continuously and substantially throughout the relevant period. Between 1970 and 1975 its monthly sales volume increased from 155,152 gallons to 462,956 gallons; this represented an increase from 20.7% to almost 50% of Texaco's sales in Spokane. App. 487-488.

There was ample evidence that Texaco executives were well aware of Dompier's dramatic growth and believed that it was attributable to "the magnitude of the distributor discount and the hauling allowance."<sup>4</sup> See also, e. g., App. 213-223, 407-413. In response to complaints from individual respondents about Dompier's aggressive pricing, however, Texaco representatives professed that they "couldn't understand it." Record 401-404.

[\*\*\*\*14] II

***LEdHN[4]*** [4] Respondents filed suit against Texaco in July 1976. After a four week trial, the jury awarded damages measured by the difference between the RTW price and the price paid by Dompier. As we subsequently decided in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), this measure of damages was improper. Accordingly, although it rejected Texaco's defenses on the issue of liability,<sup>5</sup> the Court of Appeals for the

<sup>2</sup> "Q. Did you have any conversations with Texaco during this period of time encouraging you to -- Dompier Oil Company to change its emphasis and to move into the retail business? A. Yes, we did.

"Q. Would you tell the jury about that? [A.] Well, at various times Texaco encouraged us to begin supplying retail service stations. In the early Seventies they did that, and then as time went on, they encouraged us to own the stations that we were supplying; in other words, to try to control our own retail business. And beginning about 1974 -- we did purchase a station in '74 and some more in '75 and we began operating those as company operations with salaried company employees." App. 116-117.

<sup>3</sup> "Q. That would have been a rate -- that if you had hired a common carrier to haul the product for you, you would have paid them to haul it? A. That's right.

"Q. And do you understand -- to your understanding does that common carrier rate have a built-in-profit? A. I am sure it does.

"Q. Did you find it to be an advantage to you to be hauling your own product? A. Yes." *Id.*, at 126.

<sup>4</sup> At trial one of Texaco's defenses was based on its obligation to comply with certain federal regulations during periods of shortage. In one of its communications to the Federal Government, a Texaco vice president wrote, in part:

"We believe that the dramatic shift in gasoline sales from the independent retailer classes of purchaser to the independent distributor classes of purchaser can be explained almost entirely by the magnitude of the distributor discount and the hauling allowance." App. 413.

<sup>5</sup> Texaco had argued that its pricing practices were mandated by federal regulations and that its sales in the Spokane market were not "in commerce" within the meaning of the Act.

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Ninth Circuit remanded the case for [\*552] a new trial. [\*Hasbrouck v. Texaco, Inc., 663 F.2d 930 \(1981\)\*](#), cert. denied, 459 U.S. 828 (1982).

[\*\*\*509] [LEdHN\[2B\]](#) [2B]At the second trial, Texaco contended that the special [\*\*\*15] prices to Gull and Dompier were justified by cost savings,<sup>6</sup> were the product of a good faith attempt to meet competition,<sup>7</sup> [\*\*\*16] and were lawful "functional discounts." The District Court withheld the cost justification [\*\*2541] defense from the jury because it was not supported by the evidence and the jury rejected the other defenses. It awarded respondents actual damages of \$ 449,900.<sup>8</sup> The jury apparently credited the testimony of respondents' expert witness who had estimated what the respondents' profits would have been if they had paid the same prices as the four stations owned by Dompier. See [\*634 F. Supp. 34, 43, 842 F.2d, at 1043-1044.\*](#)

In Texaco's motion for judgment notwithstanding the verdict, it claimed as a matter of law that its functional discounts did not adversely affect competition within the meaning of the Act because any injury to respondents was attributable to decisions made independently by Dompier. The District Court denied the motion. In an opinion supplementing its oral ruling denying Texaco's motion for a directed verdict, the Court assumed, arguendo, that Dompier was entitled to a [\*553] functional discount, even on the gas that was sold at retail,<sup>9</sup> [\*\*\*17] but nevertheless concluded that the "presumed legality of functional discounts" had been rebutted by evidence that the amount of the discounts to Gull and Dompier was not reasonably related to the cost of any function that they performed.<sup>10</sup> [\*634 F. Supp., at 37-38\*](#), and n. 4.

<sup>6</sup> Section 2(a) of the Act provides, in part:

"That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

<sup>7</sup> Section 2(b) of the Act provides, in part:

[HN1](#) [↑] "Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

<sup>8</sup> The award to each particular respondent of course differed. The awards represented an average of \$ 5,486.59 per year for each of the respondents.

<sup>9</sup> "While there is a serious question as to whether Dompier was entitled to a 'functional discount' on the gas it resold at retail, compare [\*Mueller Co., 60 F.T.C. 120 \(1962\)\*](#), aff'd, [\*323 F.2d 44 \(7th Cir. 1963\)\*](#), cert. denied, [\*377 U.S. 923 . . . \(1964\)\*](#) (entitlement to functional discount based on resale level) with [\*Doubleday and Co., 52 F.T.C. 169 \(1955\)\*](#) (entitlement to functional discount based on level of purchase), the court assumes, arguendo, that the mere fact that Dompier retailed the gas does not preclude a 'functional discount.' [\*634 F. Supp. 34, 37, n. 4 \(ED Wash. 1985\)\*](#) (emphasis in original).

<sup>10</sup> "Secondly, the functional discounts negatively affected competition because they were, in part, reflected in the favored purchasers' (or their customers') retail prices. In other words, the discount was not consumed or absorbed at the level of the favored buyers; rather, the amount of the discount (or a significant portion) appeared in the favored purchasers' retail price, or in the favored purchasers' price to their customers and in their customers' retail prices. Under such circumstances, the otherwise innocuous nature and presumed legality of functional discounts is rebutted, for it is universally recognized that a functional discount remains legal only to the extent it acts as compensation for the functions performed by the favored buyer. See 3 Kintner & Bauer, Federal Antitrust Law 309-10 (1983); Rill, Availability and Functional Discounts Justifying Discriminatory Pricing, 53 Antitrust L. J. 929, 939-41 (1985). The discount must 'be reasonably related to the expenses assumed by the [favored] buyer' and the discount 'should not exceed the cost of . . . the function [the favored buyer] actually performs . . .' [\*Doubleday and Company, 52 F.T.C. at 209\*](#), cited in Boise Cascade Corp., Docket No. 9133, slip op. at 117 (Feb. 14, 1984) (initial decision). If the discount exceeds such costs, it cannot be justified as a functional discount, particularly where, as here, the excess has a negative effect on competition.

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[\*\*\*510] The Court of Appeals affirmed. It reasoned:

[\*554] "As the Supreme Court long ago made clear, and recently reaffirmed, [HN2](#) [5A] there may be a Robinson-Patman violation even if the favored and disfavored buyers do not compete, so long as the customers of the favored buyer compete with the disfavored buyer or its customers. *Morton Salt*, 334 U.S. at 43-44 . . . ; *Perkins v. Standard Oil Co.*, 395 U.S. 642, 646-47 . . . (1969); *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983). Despite the fact that Dompier and Gull, at least in their capacities as wholesalers, did not compete directly with Hasbrouck, a section 2(a) violation may [\*\*2542] occur if (1) the discount they received was not cost-based and (2) all or a portion of it was passed on by them to customers of theirs who competed with Hasbrouck. *Morton Salt*, 384 U.S. at 43-44, . . . ; *Perkins v. Standard Oil*, 395 U.S. at 648-49, . . . ; see 3 E. Kintner & J. Bauer, *supra*, § 22.14.

"Hasbrouck presented ample evidence to demonstrate [\*\*\*\*19] that . . . . the services performed by Gull and Dompier were insubstantial and did not justify the functional discount." [842 F.2d, at 1039](#).

The Court of Appeals concluded its analysis by observing:

"To hold that price discrimination between a wholesaler and a retailer could never violate the Robinson-Patman Act would leave immune from antitrust scrutiny a discriminatory pricing procedure that can effectively serve to harm competition. We think such a result would be contrary to the objectives of the Robinson-Patman Act." [Id., at 1040](#) (emphasis in original).

### III

[LEdHN\[5A\]](#) [5A] [LEdHN\[6A\]](#) [5B] [LEdHN\[7A\]](#) [5C] [LEdHN\[7B\]](#) [5D] It is appropriate to begin our consideration of the legal status of functional discounts <sup>11</sup> by examining the language of the Act. Section 2(a) provides in part:

[\*555] [HN3](#) [5A] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, [\*\*\*20] either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either [\*\*\*511] or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . ." [15 U.S.C. § 13\(a\)](#).

[LEdHN\[5B\]](#) [5B] [LEdHN\[6B\]](#) [5C] [LEdHN\[7B\]](#) [5D] [LEdHN\[7C\]](#) [5E] [7B]

"In this case Texaco made no serious attempt to quantitatively justify its functional discounts. While a precise accounting of the value of the performed functions is not mandated, merely identifying some of the functions is not sufficient. There is no substantial evidence to support Texaco's position that the discounts were justified." [634 F. Supp., at 38](#) (footnote omitted).

<sup>11</sup> In their brief as amici curiae, the United States and the Federal Trade Commission suggest the following definition of "functional discount," which is adequate for our discussion: " A functional discount is one given to a purchaser based on its role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier." Brief for United States et al. as Amici Curiae 10 (filed Aug. 3, 1989).

496 U.S. 543, \*555; 110 S. Ct. 2535, \*\*2542; 110 L. Ed. 2d 492, \*\*\*511; 1990 U.S. LEXIS 3142, \*\*\*\*20

[\*\*\*\*21] [LEdHN\[2C\]](#) [↑] [2C][LEdHN\[7C\]](#) [↑] [7C][HN4](#) [↑] The Act contains no express reference to functional discounts.<sup>12</sup> [\*\*\*\*22] It does contain two affirmative defenses that provide protection for two categories of discounts -- those that [\*556] are justified by savings in the seller's cost of manufacture, delivery or sale,<sup>13</sup> and those that represent a good faith response to the equally low prices of a competitor. [Standard Oil Co. v. FTC, 340 U.S. 231, 250 \(1951\)](#). As the case comes to us, neither of those defenses is available to Texaco.

[LEdHN\[7D\]](#) [↑] [7D]

[LEdHN\[8A\]](#) [↑] [8A][HN5](#) [↑] In order to establish a violation of the Act, respondents had the burden of proving [\*\*2543] four facts: (1) that Texaco's sales to Gull and Dompier were made in interstate commerce; (2) that the gasoline sold to them was of the same grade and quality as that sold to respondents; (3) that Texaco discriminated in price as between Gull and Dompier on the one hand and respondents on the other; and (4) that the discrimination had a prohibited effect on competition. [15 U.S.C. § 13\(a\)](#). Moreover, for each respondent [HN6](#) [↑] to recover damages, he had the burden of proving the extent of his actual injuries. [J. Truett Payne, 451 U.S., at 562](#).

[LEdHN\[1B\]](#) [↑] [1B][LEdHN\[5C\]](#) [↑] [5C] The first two elements of respondents' case are not disputed in this Court,<sup>14</sup> [\*\*\*\*23] and we do not understand Texaco to be challenging the sufficiency of respondents' proof of damages. Texaco does argue, however, that although it charged different prices, it did not "discriminate in price" within the meaning of the Act, and that, at least to the extent that Gull and Dompier acted as wholesalers, the price differentials [\*\*\*512] did not injure competition. We consider the two arguments separately.

#### IV

[LEdHN\[5D\]](#) [↑] [5D] Texaco's first argument would create a blanket exemption for all functional discounts. Indeed, carried to its logical conclusion, it would exempt all price differentials [\*\*\*\*24] except those given to competing purchasers. The primary basis for [\*557] Texaco's argument is the following comment by Congressman Utterback, an active sponsor of the Act.

"In its meaning as simple English, [HN7](#) [↑] a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If the two are competing in the resale of the goods concerned, that relationship exists. Where, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination. But where no such relationship exists, where the goods are sold in different markets and the conditions affecting those markets set different price levels for them, the sale

<sup>12</sup> The legislative history indicates that earlier drafts of the Act did include such a proviso. See, e.g., Shniderman, "The Tyranny of Labels" -- A Study of Functional Discounts Under the Robinson-Patman Act, 60 Harv. L. Rev. 571, 583-586, and nn. 40-57 (1947). The deletion of this exception for functional discounts has ambiguous significance. It may be, as one commentator has suggested, that the circumstances of the Act's passage "must have conveyed to the congressional mind the realization that the judiciary and the FTC would view what had occurred as a narrowing of the gates through which the functional classification plan of a seller had to pass to come within the law." Id., at 588. In any event, the deletion in no way detracts from the blunt direction of the statutory text, which indicates that any price discrimination substantially lessening competition will expose the discriminator to liability, regardless of whether the discriminator attempts to characterize the pricing scheme as a functional discount.

<sup>13</sup> See n. 6, *supra*.

<sup>14</sup> Texaco has not contested here the proposition that branded gas and unbranded gas are of like grade and quality. See [FTC v. Borden Co., 383 U.S. 637, 645-646 \(1966\)](#) ("the economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory 'like grade and quality' test").

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to different [\*\*\*\*25] customers at those different prices would not constitute a discrimination within the meaning of this bill." 80 Cong. Rec. 9416 (1936).

LEdHN[5E] [↑] [5E]LEdHN[6C] [↑] [6C] We have previously considered this excerpt from the legislative history, and have refused to draw from it the conclusion which Texaco proposes. FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 547-551 (1960). Although the excerpt does support Texaco's argument, we remain persuaded that the argument is foreclosed by the text of the Act itself. In the context of a statute that plainly reveals a concern with competitive consequences at different levels of distribution, and carefully defines specific affirmative defenses, it would be anomalous to assume that the Congress intended the term "discriminate" to have such a limited meaning. In Anheuser-Busch we rejected an argument identical to Texaco's in the context of a claim that a seller's price differential had injured [\*558] its own competitors -- a so called "primary line" claim.<sup>15</sup> The reasons we gave for our decision in [\*\*2544] [\*\*\*\*26] Anheuser-Busch apply here as well. After quoting Congressman Utterback's statement in full, we wrote:

"The trouble with respondent's arguments is not that they are necessarily irrelevant in a § 2(a) proceeding, but that they are misdirected when the issue under consideration is solely whether there has been a price discrimination. We are convinced that, whatever may be said with respect to the rest of §§ 2(a) and 2(b) -- and we [\*\*\*513] say nothing here -- there are no overtones of business buccaneering in the § 2(a) phrase 'discriminate in price.' Rather, HN8 [↑] a price discrimination within the meaning of that provision is merely a price difference." 363 U.S., at 549.

After noting that this view was consistent with our precedents, we added:

"the statute itself spells out the conditions which make a price difference illegal or legal, and we would derange this integrated statutory scheme were we to read other conditions into the law by means of the nondirective phrase, 'discriminate in price.' Not only would such action be contrary to what we conceive to be the meaning [\*\*\*\*27] of the statute, but, perhaps because of this, it would be thoroughly undesirable. As one commentator has succinctly put it, "Inevitably every legal controversy over any price difference would shift from the detailed governing provisions -- "injury," cost justification, "meeting competition," etc. -- over into the "discrimination" concept of ad hoc resolution divorced from specifically pertinent statutory text." Rowe, Price Differentials [\*559] and Product Differentiation: The Issues Under the Robinson-Patman Act, 66 Yale L. J. 1, 38." 363 U.S., at 550-551.

LEdHN[6D] [↑] [6D]

[\*\*\*\*28] LEdHN[5F] [↑] [5F] Since we have already decided that a price discrimination within the meaning of § 2(a) "is merely a price difference," we must reject Texaco's first argument.

V

LEdHN[6E] [↑] [6E] In FTC v. Morton Salt Co., 334 U.S. 37, 46-47 (1948), we held that HN9 [↑] a injury to competition may be inferred from evidence that some purchasers had to pay their supplier "substantially more for their goods than their competitors had to pay." See also Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 435-436 (1983). Texaco, supported by the United States and the Federal Trade Commission as amici curiae, (the Government), argues that this presumption should not apply to differences between prices charged to wholesalers and those charged to retailers. Moreover, they argue that it would be inconsistent with fundamental antitrust policies to construe the Act as requiring a seller to control his customers' resale prices. The seller [\*\*\*\*29] should not be held liable for the independent pricing decisions of his customers. As the Government correctly notes, Brief for United States et. al. as Amici Curiae 21-22 (filed Aug. 3, 1989), this argument endorses the position

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<sup>15</sup> It has proven useful in Robinson-Patman Act cases to distinguish among "the probable impact of the [price] discrimination on competitors of the seller (primary-line injury), on the favored and disfavored buyers (second-line injury), or on the customers of either of them (third-line injury)." See 3 E. Kintner & J. Bauer, Federal Antitrust Law § 20.9 p. 127 (1983).

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advocated 35 years ago in the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955).

After observing that suppliers ought not to be held liable for the independent pricing decisions of their buyers,<sup>16</sup> [\*\*\*\*31] and [\*560] that without [\*\*\*514] functional discounts distributors might go [\*\*2545] uncompensated for services they performed,<sup>17</sup> the Committee wrote:

"The Committee recommends, therefore, that [HN10](#)<sup>↑</sup> suppliers granting functional discounts either to single-function or to integrated buyers should not be held responsible for any consequences of their customers' pricing tactics. Price cutting at the resale level is not in fact, and should not be held in law, 'the effect of' a differential that merely accords due recognition and reimbursement for actual marketing functions. The price cutting of a customer who receives this type [\*\*\*30] of differential results from his own independent decision to lower price and operate at a lower profit margin per unit. The legality or illegality of this price cutting must be judged by the usual legal tests. In any event, consequent injury or lack of injury should not be the supplier's legal concern.

"On the other hand, the law should tolerate no subterfuge. For instance, where a wholesaler-retailer buys only part of his goods as a wholesaler, he must not claim a functional discount on all. Only to the extent that a buyer actually performs certain functions, assuming all the risk, investment, and costs involved, should he legally [\*561] qualify for a functional discount. Hence a distributor should be eligible for a discount corresponding to any part of the function he actually performs on that part of the goods for which he performs it." [Id., at 208](#).

[LEdHN\[1C\]](#)<sup>↑</sup> [1C] [LEdHN\[6F\]](#)<sup>↑</sup> [6F] [LEdHN\[9A\]](#)<sup>↑</sup> [9A] We generally agree with this description of the legal status of functional discounts. [\*\*\*\*32] [HN11](#)<sup>↑</sup> A supplier need not satisfy the rigorous requirements of the cost justification defense in order to prove that a particular functional discount is reasonable and accordingly did not cause any substantial lessening of competition between a wholesaler's customers and the supplier's direct customers.<sup>18</sup> The record in this case, [\*\*\*515] however, adequately supports the finding that Texaco violated the Act.

<sup>16</sup> "In the Committee's view, imposing on any dual supplier a legal responsibility for the resale policies and prices of his independent distributors contradicts basic antitrust policies. Resale-price fixing is incompatible with the tenets of a free and competitive economy. What is more, the arrangements necessary for policing, detecting, and reporting price cutters may be illegal even apart from the resale-price agreement itself. And even short of such arrangements, a conscious adherence in a supplier's sales to retail customers to the price quotations by independent competing distributors is hardly feasible as a matter of business operation, or safe as a matter of law." Report of the Attorney General's National Committee to Study the Antitrust Laws 206-207 (1955) (footnotes omitted).

<sup>17</sup> "In our view, to relate discounts or prices solely to the purchaser's resale activities without recognition of his buying functions thwarts competition and efficiency in marketing. It compels affirmative discrimination against a substantial class of distributors, and hence serves as a penalty on integration. If a businessman actually fulfills the wholesale function by relieving his suppliers of risk, storage, transportation, administration, etc., his performance, his capital investment, and the saving to his suppliers, are unaffected by whether he also performs the retailing function, or any number of other functions. A legal rule disqualifying him from discounts recognizing wholesaling functions actually performed compels him to render these functions free of charge." [Id., at 207](#).

<sup>18</sup> In theory, a supplier could try to defend a functional discount by invoking the Act's cost justification defense, but the burden of proof with respect to the defense is upon the supplier, and interposing the defense "has proven difficult, expensive, and often unsuccessful." 3 E. Kintner & J. Bauer, *Federal Antitrust Law*, § 23.19, pp. 366-367 (1983). Moreover, to establish the defense a "seller must show that the price reductions given did not exceed the actual cost savings," id., § 23.10, p. 345, and this requirement of exactitude is ill-suited to the defense of discounts set by reference to legitimate, but less precisely measured, market factors. Cf. Calvani, Functional Discounts Under the Robinson-Patman Act, 17 B. C. Ind. & Com. L. Rev. 543, 546, n. 16 (1976) (distinguishing functional discounts from cost-justified price differences); Report of the Attorney General's National Committee on the Antitrust Laws, at 171 ("the cost defense has proved largely illusory in practice").

Discounters will therefore likely find it more useful to defend against claims under the Act by negating the causation element in the case against them: a legitimate functional discount will not cause any substantial lessening of competition. The concept of

[LEdHN\[9B\]](#) [↑] [9B] [LEdHN\[6G\]](#) [↑] [6G] [LEdHN\[9C\]](#) [↑] [9C]

[\*\*\*\*33]

[\*562] [LEdHN\[1D\]](#) [↑] [1D] [LEdHN\[6H\]](#) [↑] [6H] The hypothetical predicate for the Committee's entire discussion of functional [\*\*2546] discounts is [HN13](#) [↑] a price differential "that merely accords due recognition and reimbursement for actual marketing functions." Such a discount is not illegal. In this case, however, both the District Court and the Court of Appeals concluded that even without viewing the evidence in the light most favorable to the respondents, there was no substantial evidence indicating that the discounts to Gull and Dompier constituted a reasonable reimbursement for the value to Texaco of their actual marketing functions. [842 F.2d, at 1039; 634 F. Supp., at 37, 38](#). Indeed, Dompier was separately compensated for its hauling function, and neither Gull and Dompier maintained any significant storage facilities.

Despite this extraordinary absence of evidence to connect the discount to any savings enjoyed by Texaco, Texaco contends [\*\*\*\*34] that the decision of the Court of Appeals cannot be affirmed without departing "from established precedent, from practicality, and from Congressional intent." Brief for Petitioner 14.<sup>19</sup> This argument assumes that holding suppliers liable for a gratuitous functional discount is somehow a novel practice. That assumption is flawed.

[LEdHN\[6I\]](#) [↑] [6I] [LEdHN\[9D\]](#) [↑] [9D] [LEdHN\[10A\]](#) [↑] [10A] [LEdHN\[11A\]](#) [↑] [11A] [\*\*\*\*35] [LEdHN\[12A\]](#) [↑] [12A] As we have already observed, the "due recognition and reimbursement" concept endorsed in the Attorney General's [\*563] Committee's study would not countenance a functional discount completely untethered to either the supplier's savings or the wholesaler's costs. The longstanding principle that [HN14](#) [↑] functional discounts provide no safe harbor from the Act is likewise evident from the practice of the Federal Trade Commission, which has, while permitting legitimate functional discounts, proceeded against those discounts which appeared to be subterfuges to avoid the Act's restrictions. See, e. g., *In re Sherwin* [\*\*\*516] Williams Co., 36 F.T.C. 25, 70-71 (1943) (finding a violation of the Act by paint manufacturers who granted "functional or special discounts to some of their dealer-distributors on the purchases of such dealer-distributors which are resold by such dealer-distributors directly to the consumer through their retail departments or branch stores wholly owned by them"); *In re the Ruberoid Co.*, 46 F.T.C. 379, 386, para. 5 (1950) [\*\*\*\*36] (liability appropriate when functional designations do not always indicate accurately "the functions actually performed by such purchasers"), aff'd, [189 F.2d 893 \(CA2 1951\)](#), rev'd on rehearing, [191 F.2d 294](#), aff'd, [343 U.S. 470 \(1952\)](#).<sup>20</sup> [\*\*\*\*38] See also, e. g., *In re Doubleday & I\** [564]

substantiality permits the causation inquiry to accommodate a notion of economic reasonableness with respect to the pass-through effects of functional discounts, and so provides a latitude denied by the cost-justification defense. Cf. Shniderman, 60 Harv. L. Rev., at 603-604 (substantiality defense in functional discount cases). We thus find ourselves in substantial agreement with the view that:

[HN12](#) [↑] "Conceived as a vehicle for allowing differential pricing to reward distributive efficiencies among customers operating at the same level, the cost justification defense focuses on narrowly defined savings to the seller derived from the different method or quantities in which goods are sold or delivered to different buyers. . . . Moreover, the burden of proof as to the cost justification defense is on the seller charged with violating the Act, whereas the burden of proof remains with the enforcement agency or plaintiff in circumstances involving functional discounts since functional pricing negates the probability of competitive injury, an element of a *prima facie* case of violation." Rill, Availability and Functional Discounts Justifying Discriminatory Pricing, 53 Antitrust L. J. 929, 935 (1985) (footnotes omitted).

<sup>19</sup> Texaco continues the argument by summoning a parade of horribles whose march Texaco believes is at issue in this case; according to Texaco, the Court of Appeals' rule "would multiply distribution costs, rigidify and increase consumer prices, encourage resale price maintenance in violation of the Sherman Act, . . . , and jeopardize the businesses of wholesalers." Brief for Petitioner 14.

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Co., 52 F.T.C. 169, 209 (1955) ("the Commission should tolerate no subterfuge. Only to the extent that a buyer [\*\*2547] actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensating discount. The amount of the discount should be reasonably related to the expenses assumed by the buyer"); In re General Foods Corp., 52 F.T.C. 798, 824-825 (1956) ("a seller is not forbidden to sell at different prices to buyers in different functional classes and orders have been issued permitting lower prices to one functional class as against another, provided that injury to commerce as contemplated in the law does not result," but "to hold that the rendering of special services ipso facto [creates] a separate functional classification would be to read Section 2 (d) out of the Act"); In re Boise Cascade Corp., 107 F.T.C. 76, 212, 214-215 (1986) [\*\*\*\*37] (regardless of whether the FTC has judged functional discounts by reference to the supplier's savings or the buyer's costs, the FTC has recognized that "functional discounts may usually be granted to customers who operate at different levels of trade, and thus do not compete with each other, without risk of secondary line competitive injury under the Act"), rev'd on other grounds, 267 U.S. App. D.C. 124, 837 F.2d 1127 (1988).<sup>21</sup> [\*\*\*\*39] [\*565] Cf. FLM Collision [\*\*\*517] Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1027 (CA2 1976) ("We do not suggest or imply that, if a manufacturer grants a price discount or allowance to its wholesalers (whether or not labelled 'incentive'), which has the purpose or effect of defeating the objectives of the Act, § 2(a)'s language may not be construed to defeat it"); C. Edwards, Price Discrimination Law 286-348 (1959) (analyzing cases).<sup>22</sup>

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<sup>20</sup> See also, e. g., In re Whiting, 26 F.T.C. 312, 316, para. 3 (1938) (functional classification of customers involved unlawful price discrimination because of functional overlap); In re Standard Oil Co., 41 F.T.C. 263 (1945), modified and aff'd, 173 F.2d 210, 217 (CA7 1949) ("The petitioner should be liable if it sells to a wholesaler it knows or ought to have known . . . is using or intends to use [the wholesaler's] price advantage to undersell the petitioner in its prices made to its retailers"), rev'd and remanded on other grounds, 340 U.S. 231 (1951).

#### LEdHN[10B] [10B]

In the Standard Oil case, the FTC itself on remand dropped the part of its order prohibiting Standard Oil from giving functional discounts. See C. Edwards, Price Discrimination Law 309 (1959). The FTC's pre-remand theory in the Standard Oil case has of course been the subject of harsh criticism. See, e. g., Report of the Attorney General's National Committee to Study the Antitrust Laws, at 206. Much, if not all, of this criticism rests upon the view that, under the FTC's Standard Oil ruling, a "supplier is charged with legal responsibility for the middlemen's pricing tactics, and hence must control their resale prices lest they undercut him to the unlawful detriment of his directly purchasing retailers. Alternatively, the seller may forego his operational freedom by matching his quotations to retailers with theirs." Ibid. Nothing in our opinion today should be read to condone or approve such a result.

<sup>21</sup> LEdHN[11B] [11B]

See also In re Mueller Co., 60 F.T.C. 120, 127-128 (1962) (refusing to make allowance for functional discounts in any way that would "add a defense to a *prima facie* violation of Section 2(a) which is not included in either Section 2(a) or Section 2(b)"), aff'd, 323 F.2d 44 (CA7 1963), cert. denied, 377 U.S. 923 (1964). The FTC in Mueller expressly disavowed dicta from Doubleday suggesting that functional discounts are *per se* legal if justified by the buyer's costs. Mueller held that the discounts were controlled instead by the reasoning propounded in General Foods, which refers to the value of the services to the supplier giving the discount. 60 F.T.C., at 127-128.

#### LEdHN[9E] [9E] LEdHN[10C] [10C] LEdHN[11C] [11C]

We need not address the relative merits of Mueller and Doubleday in order to resolve the case before us. We do, however, reject the requirement of exactitude which might be inferred from Doubleday's dictum that a functional discount offered to a buyer "should not exceed the cost of that part of the function he actually performs on that part of the goods for which he performs it." 52 F.T.C., at 209. As already noted, a causation defense in a functional discount case does not demand the rigorous accounting associated with a cost justification defense.

<sup>22</sup> LEdHN[12B] [12B]

The Government's position in this case does not contradict this course of decision. The Government's amicus brief on Texaco's behalf criticizes the Court of Appeals opinion on the theory that it "would require a supplier to show that a functional discount is

[\*\*\*\*40] [LEdHN\[6J\]](#) [6J] [LEdHN\[8B\]](#) [8B] Most of these cases involve discounts made questionable because offered to [\*\*2548] "complex types of distributors" whose "functions became scrambled." [Doubleday & Co., 52 F.T.C., at 208](#). This fact is predictable: manufacturers will more likely be able to effectuate tertiary line price discrimination through functional discounts to a secondary line buyer when [\*566] the favored distributor is vertically integrated. Nevertheless, this general tendency does not preclude the possibility that a seller may pursue a price discrimination strategy despite the absence of any discrete mechanism for allocating the favorable price discrepancy between secondary and tertiary line recipients.<sup>23</sup>

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[\*\*\*518] [LEdHN\[13A\]](#) [13A] Indeed, far from constituting a novel basis for liability under the Act, the fact pattern here reflects conduct similar to that which gave rise to [Perkins v. Standard Oil Co of California, 395 U.S. 642 \(1969\)](#). Perkins purchased gas from Standard, and was both a distributor and a retailer. He asserted that his retail business had been damaged through two violations of the Act by Standard: first, Standard had sold directly to its own retailers at a price below that charged to Perkins; and, second, Standard had sold to another distributor, Signal, which sold gas to Western Hyway, which in turn [\*567] sold gas to Regal, a retailer in competition with Perkins.<sup>24</sup> [\*\*\*\*43] The question presented was whether the Act -- which refers to discriminators, purchasers, and their customers -- covered injuries to competition between purchasers and the customers of customers of purchasers. [Id., at 646-647](#). We held that a limitation excluding such "fourth level" competition would be "wholly an artificial one." [Id., at 647](#). We reasoned that from "Perkins' point of [\*\*\*\*42] view, the competitive harm done him by Standard is certainly no less because of the presence of an additional link in this particular distribution chain from

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justified by the wholesaler's costs," and that it imposed "liability for downstream competitive effects of legitimate functional discounts." Brief for United States et al. as Amici Curiae 16, 6 (filed Aug. 3, 1989). Cf. [Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1141-1143 \(267 U.S. App. D.C. 124 \(1988\)\)](#) (summarizing debate about relevance of buyer's costs to defense of functional discounts). If the Court of Appeals were indeed to have endorsed either of these rules, it would have departed perceptibly from the mainstream of the FTC's reading of the Act. We need not decide whether the Government's interpretation of the Court of Appeals opinion is correct, for we affirm its judgment for reasons that do not entail the principles criticized by the Government.

<sup>23</sup> [LEdHN\[8C\]](#) [8C]

The seller may be willing to accept any division of the price difference so long as some significant part is passed on to the distributor's customers. Although respondents here did not need to show any benefit to Texaco from the price discrimination scheme in order to establish a violation of the Act, one possibility is indicated by the brief filed amicus curiae by the Service Station Dealers of America (SSDA), an organization representing both stations supplied by independent jobbers and stations supplied directly by sellers. See Brief for SSDA as Amicus Curiae 1-2. SSDA suggests that an indirect price discount to competitors may be used to force directly supplied franchisees out of the market, and so to circumvent federal restrictions upon the termination of franchise agreements. See 92 Stat. 324-332, [15 U.S.C. §§ 2801-2806](#).

One would expect that -- absent a safe harbor rule making functional discounts a useful means to engage in otherwise unlawful price discrimination -- excessive functional discounts of the sort in evidence here would be rare. As the Government correctly observes, "this case appears to reflect rather anomalous behavior on the part of the supplier." Brief for United States et al. as Amici Curiae 17, n. 15 (filed Aug. 3, 1989). See also Brief for United States as Amicus Curiae 15 (filed May 16, 1989) ("market forces should tend to discourage a supplier from offering independent wholesalers discounts that would allow them to undercut the supplier's own retail customers").

<sup>24</sup> Much of Perkins's case parallels that of respondents. "There was evidence that Signal received a lower price from Standard than did Perkins, that this price advantage was passed on, at least in part, to Regal, and that Regal was thereby able to undercut Perkins' price on gasoline. Furthermore there was evidence that Perkins repeatedly complained to Standard officials that the discriminatory price advantage given Signal was being passed down to Regal and evidence that Standard Officials were aware that Perkins' business was in danger of being destroyed by Standard's discriminatory practices. This evidence is sufficient to sustain the jury's award of damages under the Robinson-Patman Act." [395 U.S., at 649](#).

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the producer to the retailer.<sup>25</sup> The same may justly be said in this case. The additional link in the distribution chain does not [\*\*2549] insulate Texaco from liability if Texaco's excessive discount otherwise violated the Act.<sup>26</sup>

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[\*568] [LEdHN\[6K\]](#) [6K] [LEdHN\[10D\]](#) [10D] [LEdHN\[14A\]](#) [14A] [LEdHN\[15A\]](#) [15A] Nor should any reader of the commentary on functional discounts be much surprised by today's result. Commentators have disagreed about the extent to [\*\*\*519] which functional discounts are generally or presumptively allowable under the Robinson-Patman Act. They nevertheless tend to agree that in exceptional cases what is nominally a functional discount may be an unjustifiable price discrimination entirely within the coverage of the Act.<sup>27</sup> [\*\*\*\*46] Others, like Frederick [\*569] Rowe, have asserted the legitimacy of function discounts in more sweeping terms,<sup>28</sup> but even

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<sup>25</sup> We added: "Here Standard discriminated in price between Perkins and Signal, and there was evidence from which the jury could conclude that Perkins was harmed competitively when Signal's price advantage was passed on to Perkins' retail competitor Regal. These facts are sufficient to give rise to recoverable damages under the Robinson-Patman Act." [395 U.S., at 648](#).

<sup>26</sup> [LEdHN\[13B\]](#) [13B]

In fact, the principles applied in Perkins -- that we [HN15](#) will not construe the Robinson-Patman Act in a way that "would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain," [395 U.S., at 647](#) -- seems capable of governing this case as well. It might be possible to view Perkins as standing for a narrower proposition, either because Signal apparently exercised majority control over the intermediary, Western Hyway, and its retailer, Regal, see [id., at 651](#) (MARSHALL, J., concurring in part and dissenting in part), or because Standard did not assert that its price to Signal reflected a "functional discount." However, as the Perkins dissent pointed out, *ibid.*, the Perkins majority did not put any such limits on the principle it declared.

<sup>27</sup> See, e.g., Celnicker & Seaman, Functional Discounts, Trade Discounts, Economic Price Discrimination and the Robinson-Patman Act, 1989 Utah L. Rev. 813, 857 (1989) (concluding that "trade discounts often are manifestations of economic price discrimination. . . . If a trade discount violates the normal competitive disadvantage criteria used under the Act, no special devices should be employed to protect it"); Rill, 53 Antitrust L.J., at 940-941 ("Although it is entirely appropriate for the FTC and the courts to insist that some substantial services be performed in order for a buyer to earn a functional discount, a requirement of precise mathematical equivalency makes no sense"); 3 E. Kintner & J. Bauer, *Federal Antitrust Law* 318-320, and n. 305 (1983) ("Functional discounts . . . are usually deemed lawful," but this usual rule is subject to exception in cases, "arising in unusual circumstances," when the seller's "discrimination caused" the tertiary line injury); Calvani, 17 B. C. Ind. & Com. L. Rev., at 549, and n. 26 (1976) (discounts to wholesalers are generally held not to injure competition, but this rule is subject to qualifications, and "perhaps the most important caveat focuses on the situation where the seller sells to both resellers and the consumers and the resellers pass on to consumers all or part of the wholesaling functional discount"); C. Edwards, *Price Discrimination Law* 312-313 (1959) ("It is not surprising that from time to time the Commission has been unable to avoid finding injurious discrimination between direct and indirect customers nor to avoid corrective orders that sought to define the gap between prices at successive levels of distribution"); Kelley, *Functional Discounts Under the Robinson-Patman Act*, 40 Cal. L. Rev. 526, 556 (1952) (concluding that the "characterization of a price differential between two purchasers as a functional or trade discount accords it no cloak of immunity from the prohibitions of the Robinson-Patman Act"); Shniderman, 60 Harv. L. Rev., at 599-600 (Commission's approach to functional discounts "may have been influenced by the possibility of subtle price discriminating techniques through the employment of wholesalers receiving more than ample discount differentials").

Professor Edwards, among others, describes the status of functional discounts under the Robinson-Patman Act with clear dissatisfaction. He complains that "The failure of the Congress to cope with the problem . . . has left the Commission an impossible job in this type of case." *Price Discrimination Law*, at 313. He adds that the Commission's "occasional proceedings" have been attributed to the "Commission's wrong-headedness." [Id., at 312](#). Professor Edward's observations about the merits of the statute and about prosecutorial discretion are obviously irrelevant to our own inquiry. Unlike scholarly commentators, we have a duty to be faithful to congressional intent when interpreting statutes, and are not free to consider whether, or how, the statute should be rewritten.

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Rowe concedes the existence of an "exception to the general rule." F. Rowe, Price Discrimination Under the Robinson-Patman Act 174, n. 7 (1962); *id.*, at 195-205.<sup>29</sup>

[LEdHN\[14B\]](#) [↑] [14B] [LEdHN\[15B\]](#) [↑] [15B] [\*\*\*\*45]

[LEdHN\[6L\]](#) [↑] [6L] [LEdHN\[10E\]](#) [↑] [10E]

[\*\*\*\*47]

[\*\*\*520] [\*\*2550] [LEdHN\[1E\]](#) [↑] [1E] [LEdHN\[6M\]](#) [↑] [6M] [LEdHN\[16\]](#) [↑] [16] We conclude that the commentators' analysis, like the reasoning in Perkins and like the Federal Trade Commission's practice, renders implausible Texaco's contention that holding it liable here involves some departure from established understandings. Perhaps respondents' case against Texaco [\*570] rests more squarely than do most functional discount cases upon direct evidence of the seller's intent to pass a price advantage through an intermediary. This difference, however, hardly cuts in Texaco's favor. In any event, the evidence produced by respondents also shows the scrambled functions which have more frequently signaled the illegitimacy under the Act of what is alleged to be a permissible functional discount. Both Gull and Dompier received the full discount on all their purchases even though most of their volume was resold directly to consumers. The extra margin on those sales obviously enabled them to price aggressively [\*\*\*\*48] in both their retail and their wholesale marketing. To the extent that Dompier and Gull competed with respondents in the retail market, the presumption of adverse effect on competition recognized in the Morton Salt case becomes all the more appropriate. Their competitive advantage in that market also constitutes evidence tending to rebut any presumption of legality that would otherwise apply to their wholesale sales.

[LEdHN\[1F\]](#) [↑] [1F] The evidence indicates, moreover, that Texaco affirmatively encouraged Dompier to expand its retail business and that Texaco was fully informed about the persistent and marketwide consequences of its own pricing policies. Indeed, its own executives recognized that the dramatic impact on the market was almost entirely attributable to the magnitude of the distributor discount and the hauling allowance. Yet at the same time that Texaco was encouraging Dompier to integrate downward, and supplying Dompier with a generous discount useful to such integration, Texaco was inhibiting upward integration by the respondents: two of the respondents sought permission from Texaco to haul their own fuel [\*\*\*\*49] using their own tankwagons, but Texaco refused. The special facts of this case thus make it peculiarly difficult for Texaco to claim that it is being held liable for the independent pricing decisions of Gull or Dompier.

[\*571] [LEdHN\[1G\]](#) [↑] [1G] [LEdHN\[6N\]](#) [↑] [6N] [LEdHN\[17\]](#) [↑] [17] [LEdHN\[18A\]](#) [↑] [18A] As we recognized in Falls City Industries, [HN16](#) [↑] "the competitive injury component of a Robinson-Patman Act violation is not limited to the injury to competition between the favored and the disfavored purchaser; it also encompasses the injury to competition between their customers." [460 U.S., at 436](#). This conclusion is compelled by the statutory language,

<sup>28</sup> "In practice, the competitive effects requirement permits a supplier to quote different prices between different distributor classes -- so long as those who are higher up (nearer the supplier) on the distribution ladder pay *less* than those who are further down (nearer the consumer)." F. Rowe, Price Discrimination Under the Robinson-Patman Act 174 (1962) (footnote omitted); see also *id.*, at 178.

<sup>29</sup> Rowe, writing prior to this Court's Perkins decision, describes the exception, which he identifies with the *Standard Oil* cases, as "of dubious validity today." *Id.*, at 196. Rowe's analysis is flawed because he assumes that seller liability for tertiary line implications of wholesaler discounts must follow the logic of the *Standard Oil* complaint, and likewise assumes that this logic exposes to liability any seller who fails to monitor the resale prices of its wholesaler. *Id.*, at 204. Indeed, Rowe's own discussion suggests one defect in his argument: legitimate wholesaler discounts will usually be insulated from liability by an absence of evidence on the causation issue. *Id.*, at 203-204. In any event, nothing in our opinion today endorses a theory of liability under the Robinson-Patman Act for functional discounts so broad as the theory Rowe draws from *Standard Oil*.

which specifically encompasses not only the adverse effect of price discrimination on persons who either grant or knowingly receive the benefit of such discrimination, but also on "customers [\*\*\*50] of either of them." Such indirect competitive effects surely may not be presumed automatically in every functional discount setting, and, indeed, [\*\*\*521] one would expect that most functional discounts will be legitimate discounts which do not cause harm to competition. At the least, a functional discount that constitutes a reasonable reimbursement for the purchasers' actual marketing functions will not violate the Act. When a functional discount is legitimate, the inference of injury to competition recognized in the Morton Salt case will simply not arise. Yet it is also true that not every functional discount is entitled to a judgment of legitimacy, and that it will sometimes be possible to produce evidence showing that a particular functional discount caused a price discrimination of the [\*\*2551] sort the Act prohibits. When such anti-competitive effects are proved -- as we believe they were in this case -- they are covered by the Act.<sup>30</sup>

#### LEdHN[18B][][18B]

[\*\*\*51] VI

LEdHN[19][][19] LEdHN[20][][20]At the trial respondents introduced evidence describing the diversion of their customers to specific stations supplied by Dompier. Respondents' expert testimony on damages also focused on the diversion of trade to specific Dompier-supplied stations. The expert testimony analyzed the entire [\*572] damages period, which ran from 1972 and 1981 and included a period prior to 1974 when Dompier did not own any retail stations (although the jury might reasonably have found that Dompier controlled the Red Carpet station from the outset of the damages period). Moreover, respondents offered no direct testimony of any diversion to Gull and testified that they did not even know that Gull was being supplied by Texaco. Texaco contends that by basing the damages award upon an extrapolation from data applicable to Dompier-supplied stations, respondents necessarily based the award upon the consequences of pricing decisions made by independent customers of Dompier. Texaco argues that the damages award must therefore be judged excessive [\*\*\*52] as a matter of law.

Even if we were to agree with Texaco that Dompier was not a retailer throughout the damages period, we could not accept Texaco's argument. Texaco's theory improperly blurs the distinction between the liability and the damages issues. The proof established that Texaco's lower prices to Gull and Dompier were discriminatory throughout the entire nine-year period; that at least Gull, and apparently Dompier as well, was selling at retail during that entire period; that the discounts substantially affected competition throughout the entire market; and that they injured each of the respondents. There is no doubt that respondents' proof of a continuing violation of the Act throughout the nine-year period was sufficient. Proof of the specific amount of their damages was necessarily less precise. Even if some portion of some of respondents' injuries may be attributable to the conduct of independent retailers, the expert testimony nevertheless provided a sufficient basis for an acceptable estimate of the amount of damages. We have held that HN17[] a plaintiff may not recover damages merely [\*\*\*53] by showing a violation of the Act; rather, the plaintiff must also "make [\*\*\*522] some showing of actual injury attributable to something the antitrust laws were designed to prevent. *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 [<sup>\*</sup>573] (1969) (plaintiff 'must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered')." *J. Turett Payne v. Chrysler Motors Corp.*, 451 U.S., at 562. At the same time, however, we reaffirmed our "traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury." *Id.*, at 565. See also *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-124 (1969); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-265 (1946).<sup>31</sup> Moreover, as we have noted, Texaco did not [\*\*2552]

<sup>30</sup> The parties do not raise, and we therefore need not address, the question whether the inference of injury to competition might also be negated by evidence that disfavored buyers could make purchases at a reasonable discount from favored buyers.

<sup>31</sup> In *J. Truett Payne*, 451 U.S., at 465-566, we quoted with approval the following passage:

HN18[] "Damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that

object to the instructions to the jury on the damages issue. A possible flaw in the jury's calculation of the amount of damages would not be an appropriate basis for granting Texaco's motion for a judgment notwithstanding the verdict.

[\*\*\*\*54] The judgment is affirmed.

It is so ordered.

**Concur by:** WHITE; SCALIA

## Concur

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JUSTICE WHITE, concurring in the result.

Texaco's first submission urging a blanket exemption for all functional discounts is rejected by the Court on the ground stated in [FTC v. Anheuser Busch, Inc., 363 U.S. 536, 550 \(1960\)](#), that the "statute itself spells out the conditions which make a price difference illegal or legal, and we would derange [\*574] this integrated statutory scheme" by providing a defense not contained in the statute. In the next section of its opinion, however, the Court not only declares that a price differential that merely accords due recognition and reimbursement for actual marketing functions not only does not trigger the presumption of an injury to competition, see [FTC v. Morton Salt Co., 334 U.S. 37, 46-47 \(1948\)](#), but also announces that "such a discount is not illegal." Ante, at 16. There is nothing in the Act to suggest such a defense to a charge of price discrimination that "may . . . substantially . . . lessen competition . . . in any line of commerce, or to injure, destroy, or prevent competition with any person [\*\*\*\*55] who either [\*\*\*523] grants or knowingly receives the benefit of such discrimination, or with customers of either of them." [15 U.S.C. § 13\(a\)](#). Nor is there any indication in prior cases that the Act should be so construed. The Court relies heavily on the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) and also suggests that the Federal Trade Commission permits "legitimate functional discounts" but will not countenance subterfuges. Ante, at 17.

Thus, a Texaco retailer charged a higher price than a distributor who is given what the Court would call a legitimate discount is entirely foreclosed, even though he offers to prove, and could prove, that the distributor sells to his customers at a price lower than the plaintiff retailer pays Texaco and that those customers of the distributor undersell the plaintiff and have caused plaintiff's business to fail. This kind of injury to the Texaco retailer's ability to compete is squarely covered by the language of [§ 13\(a\)](#), which reaches not only injury to competition but injury to Texaco retail customers' ability to compete with the distributor's customers. The Court neither explains [\*\*\*\*56] why this is not the case nor justifies its departure from the provisions of the Act other than by suggesting that when there is a legitimate discount, it is the distributor's decision, not the discount given by Texaco, that causes the injury, even though the latter makes possible the [\*575] distributor's discount. Perhaps this is the case if the concept of a legitimate price discrimination other than those legitimated by the Act's provisions is to be implied. But that poses the question whether the Act is open to such a construction.

The Attorney General's Committee noted the difficulty. Under the construction of the Act that the FTC was then espousing and applying, see [Standard Oil Co. v. FTC, 173 F.2d 210 \(CA7 1949\)](#), rev'd on other grounds, [340 U.S. 231 \(1951\)](#), the Committee said, "[a] supplier according functional discounts to a wholesaler and other middleman while at the same time marketing directly to retailers encounters serious legal risks." Report of Attorney General's National Committee, at 206. The Committee clearly differed with the FTC and called for an authoritative construction of the Act that would accommodate "functional [\*\*\*\*57] discounts to the broader purposes of the Act and of antitrust policy." [Id. at 208](#). At a later stage in the Standard Oil case, the FTC disavowed any purpose to

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defendants' wrongful acts had caused damage to the plaintiffs.' Bigelow v. RKO Pictures, Inc., [327 U.S.], at 264. See also [Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 377-379 \(1927\)](#); [Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 561-566 \(1931\)](#)." [Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S., at 123-124](#).

eliminate legitimate functional pricing or to make sellers responsible for the pricing practices of its wholesalers. The reversal of its position, which the Court of Appeals for the Seventh Circuit had affirmed, was explained on the ground of "broader antitrust policies." Reply Brief for Petitioner in *FTC v. Standard Oil Co.*, O. T. 1957, No. 24, p. 32. The FTC has also appeared as an amicus in this case urging us to recognize and define legitimate functional discounts. Its brief, however, does not spell out the types of functional discounts that the Commission considers defensible. Nor does the FTC cite any case since the filing of its reply brief in 1957 in which it has purported to describe the contours of legitimate functional pricing. Furthermore, the FTC's argument apparently does not persuade the [\*\*\*524] Court, for the Commission recommends reversal and remand, while the Court affirms the judgment.

[\*576] In the absence of Congressional attention to this long-standing issue involving antitrust policy, I doubt [\*\*\*\*58] that at this late date we should attempt to set the matter right, at least not in a case that does not require us to define what a legitimate functional discount is. If the FTC now recognizes that functional discounts given by a producer who sells both to distributors and retailers are legitimate if they reflect only proper factors and are not subterfuges, I would await a case challenging such a ruling by the FTC. We would then be reviewing a construction of the Act by the FTC and its explanation of legitimate functional discount pricing.

This is obviously not such a case. This is a private action for treble damages, and the Court rules against the seller-discounter since under no definition of a legitimate functional discount do the discounts extended here qualify as a defense to a charge of price discrimination. We need do no more than the Court did in *Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969). This the Court plainly recognizes, and it should stop there. Hence, I concur in the result.

JUSTICE SCALIA, with whom JUSTICE KENNEDY joins, concurring in the judgment.

I agree with the Court that none of the arguments pressed by petitioner for removing [\*\*\*\*59] its conduct from the coverage of the Robinson-Patman Act is persuasive. I cannot, however, adopt the Court's reasoning, which seems to create an exemption for functional discounts that are "reasonable" even though prohibited by the text of the Act.

The Act provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent [\*577] competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." 15 U.S.C. § 13(a).

As the Court notes, ante, at 10, sales of like goods in interstate [\*\*\*\*60] commerce violate this provision if three conditions are met: (1) the seller discriminates in price between purchasers, (2) the effect of such discrimination [\*\*2554] may be to injure competition between the victim and beneficiaries of the discrimination or their customers, and (3) the discrimination is not cost-based. Petitioner makes three arguments, one related to each of these conditions. First, petitioner argues that a price differential between purchasers at different [\*\*\*525] levels of distribution is not discrimination in price. As the Court correctly concludes, that cannot be so. As long ago as *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), we held that the Act prohibits differentials in the prices offered to wholesalers and retailers. True, in Morton Salt the retailers were being favored over the wholesalers, the reverse of the situation here. But if that factor could make any difference, it would bear not upon whether price discrimination occurred, but upon whether it affected competition, the point I address next.

Second, petitioner argues that its practice of giving wholesalers Gull and Dompier discounts unavailable to retailer Hasbrouck could not have [\*\*\*\*61] injured Hasbrouck's competition with retailers who purchased from Gull and Dompier. Any competitive advantage enjoyed by the competing retailers, petitioner asserts, was the product of

independent decisions by Gull and Dompier to pass on the discounts to those retailers. This also is unpersuasive. The Act forbids price discrimination whose effect may be "to injure, destroy, or prevent competition with any person who . . . knowingly receives the benefit of such discrimination, or with customers of [that person]." [15 U.S.C. § 13\(a\)](#) (emphasis added). Obviously, that effect upon "competition with customers" occurs whether or not the beneficiary's choice to pass on the discount is his own. The existence of an implied "proximate cause" requirement that would cut off liability by reason of the voluntary act of pass-on is simply implausible. This field is laden with "voluntary acts" of third persons that do not relieve the violator of liability -- beginning with the act of the ultimate purchaser, who in the last analysis causes the injury to competition by "voluntarily" choosing to buy from the seller who offers the lower price that the price discrimination [\*\*\*\*62] has made possible. The Act focuses not upon free will, but upon predictable commercial motivation; and it is just as predictable that a wholesaler will ordinarily increase sales (and thus profits) by passing on at least some of a price advantage, as it is that a retailer will ordinarily buy at the lower price. To say that when the Act refers to injury of competition "with customers" of the beneficiary it has in mind only those customers to whom the beneficiary is compelled to sell at the lower price is to assume that Congress focused upon the damage caused by the rare exception rather than the damage caused by the almost universal rule. The Court rightly rejects that interpretation. The independence of the pass-on decision is beside the point.

Petitioner's third point relates to the third condition of liability (i. e., lack of a cost justification for the discrimination), but does not assert that such a justification is present here. Rather, joined by the United States as amicus curiae, petitioner argues at length that even if petitioner's discounts to Gull and Dompier cannot be shown to be cost-based they should be exempted, because the "functional discount" is an efficient and legitimate [\*\*\*\*63] commercial practice that is ordinarily cost-based, though it is all but impossible to establish [\*579] cost justification in a particular case. The short answer to this argument is that it should be addressed to Congress.

The Court does not, however, provide [\*\*\*\*526] that response, but accepts this last argument in somewhat modified form. Petitioner has violated the Act, it says, only because the discount it gave to Gull and Dompier was not a "reasonable reimbursement for the value to [petitioner] of their actual marketing functions." Ante, at 16; see also ante, at 25. Relying on a mass of extratextual materials, the Court concludes that the Act permits such "reasonable" functional discounts even if the supplier cannot satisfy the "rigorous" [\*\*2555] requirements of the cost justification defense." Id., at 15. I find this conclusion quite puzzling. The language of the Act is straightforward: any price discrimination whose effect "may be substantially . . . to injure, destroy, or prevent completion" is prohibited, unless it is immunized by the "cost justification" defense, i. e., unless it "makes only due allowance for differences in the cost of manufacture, sale, or delivery [\*\*\*\*64] resulting from the differing methods or quantities in which [the] commodities are . . . sold or delivered." [15 U.S.C. § 13\(a\)](#). There is no exception for "reasonable" functional discounts that do not meet this requirement. Indeed, I am at a loss to understand what makes a functional discount "reasonable" unless it meets this requirement. It does not have to meet it penny-for-penny, of course: The "rigorous requirements of the cost justification defense" to which the Court refers, ante, at 15, are not the rigors of mathematical precision, but the rigors of proof that the amount of the discount and the amount of the cost saving are close enough that the difference cannot produce any substantial lessening of competition. See ante, at 15, n. 18. How is one to determine that a functional discount is "reasonable" except by proving (through the normally, alas, "rigorous" means) that it meets this test? Shall we use a nationwide average?

I suppose a functional discount can be "reasonable" (in the relevant sense of being unlikely to subvert the purposes of [\*580] the Act) if it is not commensurate with the supplier's costs saved (as the cost-justification defense [\*\*\*\*65] requires), but is commensurate with the wholesaler's costs incurred in performing services for the supplier. Such a discount would not produce the proscribed effect upon competition, since if it constitutes only reimbursement for the wholesaler one would not expect him to pass it on. The relevant measure of the discount in order to determine "reasonableness" on that basis, however, is not the measure the Court applies to Texaco ("value to [the supplier] of [the distributor's] actual marketing functions," ante, at 16), but rather "cost to the distributor of the distributor's actual marketing functions" -- which is of course not necessarily the same thing. I am therefore quite unable to understand what the Court has in mind by its "reasonable" functional discount that is not cost justified.

To my mind, there is one plausible argument for the proposition that a functional basis for differential pricing ipso facto -- cost justification or not -- negates the probability of competitive injury, thus destroying an element of the plaintiff's *prima facie* case, see *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434 [\*\*\*527] (1983): In a market that is [\*\*\*\*66] really functionally divided, retailers are in competition with one another, not with wholesalers. That competition among retailers cannot be injured by the supplier's giving lower prices to wholesalers -- because if the price differential is passed on, all retailers will simply purchase from wholesalers instead of from the supplier. Or, to put it differently, when the market is functionally divided all competing retailers have the opportunity of obtaining the same price from wholesalers, and the supplier's functional price discrimination alone does not cause any injury to competition. Therefore (the argument goes), if functional division of the market is established, it should be up to the complaining retailer to show that some special factor (e. g., an agreement between the supplier and the wholesaler that the latter will not sell to the former's retailer-customers) prevents this normal market [\*581] mechanism from operating. As the Court notes, ante, at 26, this argument was not raised by the parties here or below, and it calls forth a number of issues that would benefit from briefing and factual development. I agree that we should not decide the merit of this argument in the [\*\*\*\*67] first instance.

For the foregoing reasons, I concur in the judgment.

## References

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[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 149, 151, 153, 154, 341, 342, 344, 358](#)

24 Federal Procedure, L Ed, Restraints of Trade and Monopolies 54:337, 54:340, 54:341

24 Am Jur Trials 1, Defending Antitrust Lawsuits

[15 USCS 13\(a\)](#)

US L Ed Digest, Evidence 979; Restraints of Trade, Monopolies, and Unfair Trade Practices 38

Index to Annotations, Dealers and Distributors; Discounts and Rebates; Gas and Oil; Prices and Pricing; Restraints of Trade and Monopolies; Retail Businesses and Stores; Robinson-Patman Act

Annotation References:

Construction and application of "good faith meeting competition defense" of Clayton Act, as amended by Robinson-Patman Act ([15 USCS 13\(b\)](#)). 59 L Ed 2d 810.

What issues will the Supreme Court consider ,though not, or not properly, raised by the parties. [42 L Ed 2d 946](#).

Supreme Court's views as to weight and effect to be given, on subsequent judicial construction, [\*\*\*\*68] to prior administrative construction of statute. 39 L Ed 2d 942.

Construction of the cost-justification proviso of the [Robinson-Patman Act. 8 L Ed 2d 1033](#).

Robinson-Patman Act as construed by Supreme Court. [2 L Ed 2d 1737](#).

Proof of injury to competition as jurisdictional requirement under 2(a) of the Clayton Act as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)). 47 ALR Fed 846.

Measure and elements of damages for violation of Robinson-Patman Act. 9 ALR Fed 279.

Discounts permissible under Robinson-Patman Amendment to Clayton Act. 1 ALR2d 276.



## Kansas v. Utilicorp United, Inc.

Supreme Court of the United States

April 16, 1990, Argued ; June 21, 1990, Decided

No. 88-2109

### **Reporter**

497 U.S. 199 \*; 110 S. Ct. 2807 \*\*; 111 L. Ed. 2d 169 \*\*\*; 1990 U.S. LEXIS 3293 \*\*\*\*; 58 U.S.L.W. 4898; 1990-1 Trade Cas. (CCH) P69,064

KANSAS ET AL. v. UTILICORP UNITED INC.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

**Disposition:** [866 F. 2d 1286](#), affirmed.

## **Core Terms**

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overcharge, purchasers, indirect, customers, consumers, antitrust, regulators, Shoe, cases, costs, rates, anti trust law, parens patriae, damages, district court, apportionment, natural gas, passthrough, pass-on, prices, suits, public utility, cost-plus, suppliers, complicate, provable, multiple recoveries, Clayton Act, inflated, pipeline

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Clayton Act > General Overview

**[HN1](#)** [] **Antitrust & Trade Law, Clayton Act**

See [15 U.S.C.S. § 15\(a\)](#).

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

**[HN2](#)** [] **Private Actions, Purchasers**

The direct purchaser rule serves, in part, to eliminate the complications of apportioning overcharges between direct and indirect purchasers.

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

**[HN3](#)** [] **Private Actions, Purchasers**

The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for his price rise earlier; if a cost rise is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages. This statement merely recognizes the usual principle that the possessor of a right can recover for its unlawful deprivation whether or not he was previously exercising it.

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

#### **HN4** **Private Actions, Purchasers**

The task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system.

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

#### **HN5** **Private Actions, Purchasers**

The Illinois Brick rule serves to eliminate multiple recoveries.

Antitrust & Trade Law > Clayton Act > General Overview

#### **HN6** **Antitrust & Trade Law, Clayton Act**

Interpretation of § 4 of the Clayton Act, [15 U.S.C.S. § 15](#), must promote the vigorous enforcement of the antitrust laws.

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

#### **HN7** **Private Actions, Purchasers**

A court should not carve out exceptions to the direct purchaser rule for particular types of markets. The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule.

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

#### **HN8** **Private Actions, Purchasers**

The process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the Hanover Shoe rule was meant to avoid. The litigation over where the line should be drawn in a particular class of cases would inject the same massive evidence and complicated theories into treble-damages proceedings, albeit at a somewhat higher level of generality.

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

## **HN9** [down arrow] **Private Actions, Purchasers**

In a cost-plus contract situation, the direct purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

## **HN10** [down arrow] **Public Enforcement, State Civil Actions**

See [15 U.S.C.S. § 15c\(a\)\(1\)](#).

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

## **HN11** [down arrow] **Clayton Act, Remedies**

Section 4C of the Clayton Act, [15 U.S.C.S. § 15](#), did not establish any new substantive liability. Instead, it simply created a new procedural device -- parens patriae actions by states on behalf of their citizens -- to enforce existing rights of recovery under § 4 of the Clayton Act. Section 4 affords relief only to a person injured in his business or property by reason of anything forbidden in the antitrust laws. [15 U.S.C.S. § 15\(a\)](#). State attorneys general may bring actions on behalf of consumers who have such an injury.

## **Lawyers' Edition Display**

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### **Decision**

Utility alone, and not states on behalf of utility customers, held to have standing to bring antitrust suit under 4 of Clayton Act against natural gas suppliers allegedly overcharging utility.

### **Summary**

Section 4 of the Clayton Act ([15 USCS 15](#)) authorizes "any person who shall be injured" by an antitrust violation to sue for treble damages, costs, and attorneys' fees; 4C(a)(1) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ([15 USCS 15c\(a\)\(1\)](#)) authorizes state attorneys general to bring parens patriae actions on behalf of natural persons residing in their states to secure monetary relief for injury sustained by such persons as a result of antitrust violations. Alleging that certain natural gas producers and a gas pipeline company had conspired to inflate gas prices in violation of the federal antitrust laws, various plaintiffs--including public utility companies which purchased gas from the pipeline company in order to service customers in Kansas and Missouri, and the states of Kansas and Missouri, acting in part as parens patriae on behalf of residential consumers who purchased gas from the utilities--brought actions under 4 against the producers and the pipeline company in the United States District Court for the District of Kansas. The producers and the pipeline company asserted that the utilities lacked standing to bring such an action under 4, because they had passed all of the allegedly illegal price increase on to their customers and thus had suffered no antitrust "injury." The District Court, however, (1) interpreted United States Supreme Court precedents as holding that direct purchasers from antitrust violators suffer injury for purposes of 4 to the full extent

of an alleged overcharge even if all or part of that overcharge is passed on to customers, whereas those customers, as indirect purchasers, suffer no such injury; (2) granted the plaintiff utilities' motion for partial summary judgment disallowing the "pass-on" defense; and (3) treating the utilities' motion as a motion to dismiss the states' *parens patriae* claims, granted that motion (*695 F Supp 1109*). On the states' interlocutory appeal, the United States Court of Appeals for the Tenth Circuit affirmed the dismissals (*866 F2d 1286*).

On certiorari, the United States Supreme Court affirmed. In an opinion by Kennedy, J., joined by Rehnquist, Ch. J., and Stevens, O'Connor, and Scalia, JJ., it was held that (1) when suppliers overcharge a regulated public utility for natural gas, in violation of the federal antitrust laws, and the utility passes on the overcharge to its customers, only the utility has a cause of action under 4, because only the utility, as a direct purchaser, has suffered injury within the meaning of 4; (2) the direct-purchaser rule's purpose of avoiding the complications of apportioning damages is applicable in a case involving a regulated utility, even though such utilities allegedly can pass on all of an overcharge to their customers, because the utility remains an injured party and must remain in the suit, given that the utility might have been able to raise its rates in the absence of increased costs and also that the pass-on process may take time; (3) an exception to the rule may be unnecessary, as state regulators might require utilities to pass on at least some of the recovery obtained in a 4 suit; (4) even though bringing all classes of purchasers together in a single lawsuit may reduce the risk of multiple recovery which the rule was intended to eliminate, this reduction comes at too great a cost in complexity of litigation; (5) an exception to the rule in utility cases would not better secure the goal of vigorous antitrust enforcement, as (a) utilities do not lack incentive to prosecute 4 actions and in fact have a record of vigorous antitrust enforcement, whereas (b) consumers may lack the ability to detect improper pricing by suppliers, and (c) state attorneys general can bring *parens patriae* actions on behalf of only resident natural persons and may hesitate to bring suit in cases involving smaller and speculative harm to consumers; (6) although a possible exception to the rule has been suggested if an indirect purchaser buys under a pre-existing cost-plus contract, such an exception would not apply in the case at hand, where the utility customers made no commitment to purchase any particular quantity and the utility had no guarantee of a particular profit, and the need to inquire into the precise operation of market forces would negate the simplicity and certainty that could justify a cost-plus contract exception; and (7) 4C(a)(1) does not authorize a *parens patriae* action in such a case, because the utility is the injured party.

White, J., joined by Brennan, Marshall, and Blackmun, JJ., dissented, expressing the view that the case at hand raises none of the concerns which underlie the direct-purchaser rule, and that the rule should not be applied so as to deny the states standing to sue, because (1) the courts below assumed that there had been a perfect and provable pass-on of the allegedly illegal overcharge, and the issue should be decided on that basis; (2) where it is clear that the entire overcharge is passed through, the extent of the injury to indirect purchasers can easily be determined by examining their utility bills; (3) the problem of separating the price increase attributable to anticompetitive conduct from the price increase attributable to legitimate factors is not peculiar to indirect-purchaser suits; (4) granting standing in the case at hand would enhance enforcement of the antitrust laws, as, given that the pass-through of the overcharge is complete and easily demonstrated, the indirect purchasers--and the states in their *parens patriae* capacity--can readily discover their injury, whereas, though the utility could sue to recover lost profits, it has no incentive to seek a recovery of the overcharge which it has passed on; and (5) where there is a perfect and provable pass-through, there is no danger of multiple recovery of damages for the same anticompetitive conduct.

## Headnotes

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > damages suit -- direct-purchaser rule -- public utilities -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C]

When suppliers overcharge a regulated public utility for natural gas, in violation of the federal antitrust laws, and the utility passes on the overcharge to its customers, only the utility has a cause of action under 4 of the Clayton Act ([15 USCS 15](#))--which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees--because only the utility, as a direct purchaser, has suffered injury within the meaning of 4; thus, a state may not, as parens patriae, maintain an action against the suppliers on behalf of the utility's customers, who as indirect purchasers have not suffered injury for purposes of 4. (White, Brennan, Marshall, and Blackmun, JJ., dissented from this holding.)

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > damages suit -- public utilities -- apportionment of costs -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B] [LEdHN\[2C\]](#) [2C]

No exception to the rule that only a direct purchaser from an alleged antitrust violator, and not the direct purchaser's customers, suffers an injury within the meaning of 4 of the Clayton Act ([15 USCS 15](#))--which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees--is warranted in cases where the direct purchasers are regulated public utilities, as the rule's purpose of avoiding the need to apportion overcharges between direct and indirect purchasers is applicable in such cases, despite the argument that a utility which passes on its costs pursuant to state regulation allegedly passes on the entire overcharge and thus allegedly obviates litigation over the apportionment of the overcharge, because (1) an overcharge may injure a utility, apart from lost business, even if the utility raises its rates to offset the increased costs, since the utility might have been able to raise its rates in the absence of increased costs but will not enjoy the benefit of a raise because of those costs; (2) the existence of state regulation does not simplify the problem of proving what the direct purchaser could have done in the absence of the overcharges, but instead adds another level of complexity, as a court examining such a question will have to determine what state regulators would allow, a case-by-case inquiry turning on the intricacies of state law; (3) the existence of such potential injury requires that the utility remain in the case, so that the addition of indirect purchasers would require the development of an apportionment formula; (4) apportionment may also be necessary because, even if a utility can pass on 100 percent of its costs at some point, the regulatory process and other factors may delay the passing-on process and force the utility to pay some of the increased costs in the interim; and (5) the regulation of utilities may make an exception to the direct-purchaser rule unnecessary, as state regulators might require utilities to pass on at least some of the recovery obtained in a 4 suit. (White, Brennan, Marshall, and Blackmun, JJ., dissented from this holding.)

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > damages suit -- public utilities -- multiple recovery -- > Headnote:

[LEdHN\[3A\]](#) [3A] [LEdHN\[3B\]](#) [3B] [LEdHN\[3C\]](#) [3C]

No exception to the rule that only a direct purchaser from an alleged antitrust violator, and not the direct purchaser's customers, suffers an injury within the meaning of 4 of the Clayton Act ([15 USCS 15](#))--which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees--is warranted in cases where the direct purchasers are regulated public utilities, even though bringing all classes of direct and indirect purchasers together in a single lawsuit may reduce the risk of multiple recovery which the rule is intended to eliminate, because (1) that reduction comes at too great a cost, as expansion of the case to bring all of the potential plaintiffs together risks the confusion, cost, and error inherent in complex litigation, and (2) such expansion would serve little purpose, as state regulatory law may provide appropriate relief to consumers even if they cannot sue under 4. (White, Brennan, Marshall, and Blackmun, JJ., dissented from this holding.)

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > damages suit -- public utilities -- enforcement incentives -- > Headnote:

[LEdHN\[4A\]](#) [4A] [LEdHN\[4B\]](#) [4B] [LEdHN\[4C\]](#) [4C]

Although the argument for an exception, in cases involving antitrust violations against regulated public utilities, to the rule that only a direct purchaser from an alleged antitrust violator, and not the direct purchaser's customers, suffers an injury within the meaning of 4 of the Clayton Act ([15 USCS 15](#))--which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees--might be stronger if it were shown that interpreting 4 so as to allow such an exception would better secure the goal of vigorous enforcement of the antitrust laws, no such exception is warranted by such utilities' supposed lack of incentive to prosecute 4 actions, even though utilities allegedly can pass on their excess costs to customers and allegedly may be required to pass on damages recovered in a 4 action, since (1) utilities may bring 4 actions in some instances for fear that regulators will not allow them to shift known and avoidable overcharges onto their customers; (2) no authority has been cited to the effect that a utility winning a 4 action would have to pay the entire exemplary portion of its treble damages award to its customers; and (3) utilities have an established record of diligent antitrust enforcement, whereas (a) consumers may lack the expertise and experience necessary for detecting improper pricing by a utility's suppliers, and (b) state attorneys general, though possessing greater expertise, may hesitate to bring parens patriae actions in cases involving smaller and more speculative harm to consumers and, in any event, can bring such actions on behalf of only resident natural persons. (White, Brennan, Marshall, and Blackmun, JJ., dissented from this holding.)

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > damages suit -- exceptions to direct-purchaser rule -- > Headnote:

[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B] [LEdHN\[5C\]](#) [5C]

Although the rationales underlying the rule that only a direct purchaser from an alleged antitrust violator suffers an injury within the meaning of 4 of the Clayton Act ([15 USCS 15](#))--which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees--will not apply with equal force in all cases, no exceptions to the rule should be carved out for particular types of markets, since the possibility of allowing exceptions, even in meritorious cases, would undermine the rule.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > damages suit -- public utilities -- cost-plus contracts -- > Headnote:

[LEdHN\[6A\]](#) [6A] [LEdHN\[6B\]](#) [6B]

Although a departure from the rule that only a direct purchaser from an alleged antitrust violator, and not the direct purchaser's customers, suffers an injury within the meaning of 4 of the Clayton Act ([15 USCS 15](#))--which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees--may be necessary with regard to a case in which an indirect purchaser buys under a pre-existing cost-plus contract, where the direct purchaser will bear no portion of an overcharge and otherwise suffer no injury, such a departure does not justify an exception to the rule in a particular case where suppliers have allegedly overcharged a regulated public utility for natural gas and states seek to bring parens patriae actions on behalf of the utility's customers, since (1) the utility customers in question made no commitment to purchase any particular quantity of gas, and the utility itself had no guarantee of any particular profit; (2) even though the utility raised its prices to cover its costs, its precise injury cannot be ascertained, because it is not known what might have happened in the absence of an overcharge; and

(3) even if the utility customers have a highly inelastic demand for gas, the need to inquire into the precise operation of market forces would negate the simplicity and certainty that could justify a cost-plus contract exception.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §67 > damages suit -- public utilities -- *parens patriae* -- > Headnote:

[LEdHN\[7A\]](#) [7A] [LEdHN\[7B\]](#) [7B] [LEdHN\[7C\]](#) [7C]

State attorneys general may not maintain an action under 4 of the Clayton Act ([15 USCS 15](#))--which authorizes any person injured by an antitrust violation to sue for treble damages, costs, and attorneys' fees--on behalf of public utility customers who have allegedly borne the burden of inflated natural gas prices imposed on a utility by its suppliers, even though state attorneys general are authorized under 4C(a)(1) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ([15 USCS 15c\(a\)\(1\)](#)) to bring actions as *parens patriae* on behalf of natural persons residing in their states who have suffered antitrust injuries, and even though state attorneys general may thus bring actions on behalf of consumers who have suffered injuries within the meaning of 4, because in such a case, it is the utility that is the injured party under the antitrust laws, and the predicate for a *parens patriae* action has not been established. (White, Brennan, Marshall, and Blackmun, JJ., dissented in part from this holding.)

## Syllabus

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The respondent -- an investor-owned public utility operating in the petitioner States -- and other utilities and natural gas purchasers filed suit in the District Court against a pipeline company and five gas producers under § 4 of the Clayton Act, which authorizes any person injured by a violation of the antitrust laws to sue for treble damages. The utilities alleged that the defendants had unlawfully conspired to inflate the price of gas that they supplied to the utilities, and sought treble damages for both the amount overcharged and the decrease in sales to customers caused by the overcharge. The petitioner States filed separate § 4 actions in the District Court against the same defendants for the alleged antitrust violation, asserting, *inter alia, parens* [\*\*\*\*2] *patriae* claims on behalf of all natural persons residing in the States who had purchased gas from any utility at inflated prices. The court consolidated all of the actions and granted the utilities partial summary judgment with respect to the defendants' defense that, since the utilities had passed through all of the alleged overcharge to their customers, the utilities lacked standing because they had suffered no antitrust injury as required by § 4. In light of its conclusion that, under [Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224](#), and [Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061](#), the utilities had suffered antitrust injury as direct purchasers but their customers, as indirect purchasers, had not, the court dismissed the States' *parens patriae* claims. The Court of Appeals affirmed the dismissals.

*Held:* When suppliers violate antitrust laws by overcharging a public utility for natural gas, and the utility passes on the overcharge to its customers, only the utility has a cause of action under § 4 because it alone has suffered antitrust [\*\*\*\*3] injury. Pp. 206-219.

1. Three rationales underlie the indirect purchaser rule adopted in *Hanover Shoe* and *Illinois Brick*: (1) establishing the amount of an overcharge shifted to indirect purchasers would normally prove insurmountable in light of the wide range of considerations influencing a company's pricing decisions; (2) a pass-on defense would reduce the effectiveness of § 4 actions by diminishing the recovery available to any potential plaintiff; and (3) allowing suits by indirect purchasers would risk multiple liability because the alleged antitrust violators could not use a pass-on defense in an action by the direct purchasers. Pp. 206-208.

2. The aforesaid rationales compel the conclusion that no exception to the indirect purchaser rule should be made for suits involving regulated public utilities that pass on all of their costs to their customers. Pp. 208-217.

(a) Allowing indirect suits in such cases might necessitate complex cost apportionment calculations, since a utility bears at least some portion of a passed-on overcharge to the extent that it could have sought and gained state permission to raise its rates in the absence of the overcharge, cf. [\*\*\*\*4] [\*Hanover Shoe, supra, at 493\*](#), and n.9, and since various factors, such as the need to seek regulatory approval, may delay the passing-on process and thereby require the utility, in the interim, to bear some of the overcharge's costs in the form of lower earnings. Here, the certified question leaves unclear whether the respondent could have raised its prices prior to the overcharge, whether it had passed on "most or all" of its costs at the time of its suit, and even the means by which the pass through occurred. Proof of these preliminary issues, which are irrelevant to the defendants' liability, would turn upon the intricacies of state law, and, if it were determined that respondent had borne some of the costs, would require the adoption of an apportionment formula, the very complexity that *Hanover Shoe* and *Illinois Brick* sought to avoid. Moreover, creating an exception in such cases would make little sense when, in light of all its difficulty, its practical significance is diminished by the fact that some States require utilities to pass on at least some of the recovery obtained in a § 4 suit to their customers. Pp. 208-212.

(b) Even if the risk of [\*\*\*\*5] multiple recoveries would be eliminated by allowing the petitioners to recover only the amount of the overcharge and the respondent to recover only damages for its lost sales in a single lawsuit, the additional complexity thereby introduced into a case that already has become quite complicated argues strongly for retaining the indirect purchaser rule. See [\*Illinois Brick, 431 U.S. at 731, n.11\*](#). Pp. 212-213.

(c) Allowing indirect suits by utility customers would not better promote the goal of vigorous enforcement of the antitrust laws. The petitioners' argument that utilities lack incentives to sue overcharging suppliers is unpersuasive, since utilities may bring § 4 actions in some instances for fear that regulators will not allow them to shift known and avoidable overcharges on to their customers; since there is no authority indicating that utilities, which may have to pass on § 4 damages recovered, would also have to pay the entire exemplary portion of these damages to customers; and since utilities, in fact, have an established record of diligent and successful antitrust enforcement. On the other hand, indirect purchaser actions might be ineffective because [\*\*\*\*6] consumers may lack the expertise and experience necessary to detect improper pricing by a utility's suppliers, while state attorneys general may hesitate to exercise the *parens patriae* device in cases involving smaller, more speculative harm to consumers, and, in any event, may sue only on behalf of resident natural persons, leaving nonresidents and small businesses to fend for themselves. Pp. 214-216.

(d) Although the rationales of *Hanover Shoe* and *Illinois Brick* may not apply with equal force in all instances, ample justifications exist for the Court's stated decision not to carve out exceptions to the indirect purchaser rule for particular types of markets. [\*Illinois Brick, 431 U.S. at 744-745\*](#). Even assuming that any economic assumptions underlying the rule might be disproved in a specific case, it would be an unwarranted and counterproductive exercise to litigate a series of exceptions. Pp. 216-217.

3. The suggestion in [\*Hanover Shoe, supra, at 494\*](#), and [\*Illinois Brick, supra, at 736\*](#), that a departure from the indirect purchaser rule may be necessary when such a purchaser buys under a pre-existing cost-plus [\*\*\*\*7] contract does not justify an exception in this case, since the respondent did not sell gas to its customers under such a contract. Even if an exception could be created for situations that merely resemble those governed by such contracts, that exception could not be applied here, since there is no certainty that the respondent has borne no portion of the overcharge and otherwise suffered no injury. Pp. 217-218.

4. Section 4C of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 -- which authorizes States to bring *parens patriae* actions on behalf of resident natural persons to secure monetary relief for property injury sustained by reason of certain antitrust violations -- does not authorize the petitioners to sue on behalf of consumers notwithstanding the consumers' status as indirect purchasers. Section 4C did not establish any new substantive liability, but simply created a new procedural device to enforce existing rights of recovery under § 4 of the Clayton Act, [\*Illinois Brick, 431 U.S. at 734, n.14\*](#), which rights belong to the respondent in this case. Pp. 218-219.

497 U.S. 199, \*199; 110 S. Ct. 2807, \*\*2807; 111 L. Ed. 2d 169, \*\*\*169; 1990 U.S. LEXIS 3293, \*\*\*\*7

**Counsel:** Thomas J. Greenan argued the cause for petitioners. With him on the briefs [\*\*\*\*8] were Robert T. Stephan, Attorney General of Kansas, James E. Hurt, William L. Webster, Attorney General of Missouri, Donald D. Barry, William E. Quirk, Russell S. Jones, Jr., and Thomas A. Sheehan.

Floyd R. Finch, Jr., argued the cause for respondent. With him on the brief was Sally R. Burger.

Lawrence S. Robbins argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Solicitor General Starr, Assistant Attorney General Rill, Deputy Solicitor General Roberts, Deputy Assistant Attorney General Boudin, Stephen J. Marzen, Catherine G. O'Sullivan, and Jay C. Shaffer. \*

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\* Briefs of amici curiae urging reversal were filed for the State of Illinois by Neil F. Hartigan, Attorney General, Michael J. Hayes, Deputy Attorney General, Robert Ruiz, Solicitor General, and John W. McCaffrey and Christine Rosso, Senior Assistant Attorneys General, Bernard Nash, George Kaufmann, and Peter J. Kadzik; for the State of Maryland et al. by J. Joseph Curran, Jr., Attorney General of Maryland, and Michael F. Brockmeyer, Ellen S. Cooper, and Alan M. Barr, Assistant Attorneys General, Don Siegelman, Attorney General of Alabama, Douglas B. Baily, Attorney General of Alaska, and Thomas E. Wagner, Assistant Attorney General, Robert K. Corbin, Attorney General of Arizona, Alison J. Butterfield, John Steven Clark, Attorney General of Arkansas, John K. Van de Kamp, Attorney General of California, Andrea Sheridan Ordin, Chief Assistant Attorney General, and Sanford N. Gruskin, Assistant Attorney General, Duane Woodard, Attorney General of Colorado, Clarine Nardi Riddle, Attorney General of Connecticut, and Robert M. Langer and Steven M. Rutstein, Assistant Attorneys General, Charles M. Oberly III, Attorney General of Delaware, Robert A. Butterworth, Attorney General of Florida, Michael J. Bowers, Attorney General of Georgia, and George P. Shingler, Senior Assistant Attorney General, Warren Price III, Attorney General of Hawaii, and Robert A. Marks and Ted Gamble Clause, Deputy Attorneys General, James T. Jones, Attorney General of Idaho, Linley E. Pearson, Attorney General of Indiana, and Donna S. Nichols, Deputy Attorney General, Thomas J. Miller, Attorney General of Iowa, and John R. Perkins, Deputy Attorney General, Frederic J. Cowan, Attorney General of Kentucky, and James M. Ringo, Assistant Attorney General, William J. Guste, Jr., Attorney General of Louisiana, and Jesse James Marks and Anne F. Benoit, Assistant Attorneys General, James E. Tierney, Attorney General of Maine, and Stephen L. Wessler, Deputy Attorney General, James M. Shannon, Attorney General of Massachusetts, and George K. Weber and Thomas M. Alpert, Assistant Attorneys General, Frank Kelly, Attorney General of Michigan, Hubert H. Humphrey III, Attorney General of Minnesota, Stephen P. Kilgriff, Deputy Attorney General, and Thomas F. Pursell, Assistant Attorney General, Mike Moore, Attorney General of Mississippi, Marc Racicot, Attorney General of Montana, Robert M. Spire, Attorney General of Nebraska, and Dale A. Comer, Assistant Attorney General, Brian McKay, Attorney General of Nevada, John P. Arnold, Attorney General of New Hampshire, and Terry L. Robertson, Senior Assistant Attorney General, Robert J. Del Tufo, Attorney General of New Jersey, and Laurel A. Price, Deputy Attorney General, Robert Abrams, Attorney General of New York, O. Peter Sherwood, Solicitor General, and Lloyd A. Constantine, Assistant Attorney General, Lacy H. Thornburg, Attorney General of North Carolina, James C. Gulick, Special Deputy Attorney General, and K. D. Sturgis, Assistant Attorney General, Nicholas J. Spaeth, Attorney General of North Dakota, and David W. Huey, Assistant Attorney General, Anthony J. Celebrezze, Jr., Attorney General of Ohio, Dave Frohnmayer, Attorney General of Oregon, Ernest D. Preate, Jr., Attorney General of Pennsylvania, Eugene F. Waye, Chief Deputy Attorney General, and Carl S. Hisiro, Senior Deputy Attorney General, James E. O'Neil, Attorney General of Rhode Island, T. Travis Medlock, Attorney General of South Carolina, Roger A. Tellinghuisen, Attorney General of South Dakota, and Jeffrey P. Hallen, Assistant Attorney General, Charles W. Burson, Attorney General of Tennessee, and Barry Turner, Assistant Attorney General, Jim Mattox, Attorney General of Texas, Mary F. Keller, First Assistant Attorney General, and Allene D. Evans and Donna L. Nelson, Assistant Attorneys General, R. Paul Van Dam, Attorney General of Utah, Jeffrey L. Amestoy, Attorney General of Vermont, and Julie Brill, Assistant Attorney General, Mary Sue Terry, Attorney General of Virginia, and Frank Seales, Assistant Attorney General, Kenneth O. Eikenberry, Attorney General of Washington, and Carol A. Smith, Assistant Attorney General, Roger W. Thompkins, Attorney General of West Virginia, and Dan Huck, Deputy Attorney General, Donald J. Hanaway, Attorney General of Wisconsin, and Kevin J. O'Connor, Assistant Attorney General, Joseph B. Meyer, Attorney General of Wyoming, and Robert H. Henry, Attorney General of Oklahoma; for the National Conference of State Legislatures et al. by Benna Ruth Solomon, Beate Bloch, Robert L. Wald, and Richard M. Rindler; and for Nancy Allevato et al. by Richard E. Zuckerman, David B. Jaffe, Robert S. Harrison, and David N. Zacks.

Jeffrey I. Zuckerman, Daniel J. Popeo, Paul D. Kamenar, and John C. Scully filed a brief for the Washington Legal Foundation as amicus curiae urging affirmance.

**Judges:** KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, and SCALIA, JJ., joined. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, post, p. 219.

**Opinion by:** KENNEDY

## Opinion

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[\*203] [\*\*\*178] [\*\*2810] JUSTICE KENNEDY delivered the opinion of the Court.

[LEdHN\[1A\]](#) [1A]Section 4 of the Clayton Act, 38 Stat. 731, as amended, [15 U. S. C. § 15](#), authorizes any person injured by a violation of [\*204] the antitrust laws to sue for treble damages, costs, and an attorney's fee. We must decide who may sue under § 4 when, in violation of the antitrust laws, suppliers overcharge a public utility for natural gas and the utility passes on the overcharge to its customers. Consistent with [Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 \(1968\)](#), and [Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 \(1977\)](#), we hold that only the utility has the cause of action because it alone has suffered injury [\*\*\*\*10] within the meaning of § 4.

I

The respondent, UtiliCorp United Inc., an investor-owned public utility operating in Kansas and western Missouri, purchased natural gas from a pipeline company for its own use and for resale to its commercial and [\*2811] residential customers. Together with a second utility and several other gas purchasers, the respondent sued the pipeline company and five gas production companies in the United States District Court for the District of Kansas. The utilities alleged that the defendants had conspired to inflate the price of their gas in violation of the antitrust laws. They sought treble damages, pursuant to § 4 of the Clayton Act, for both the amount overcharged by the pipeline company and the decrease in sales to their customers caused by the overcharge.

The petitioners, the States of Kansas and Missouri, initiated separate § 4 actions in the District Court against the same defendants for the alleged antitrust violation. Acting as *parens patriae*, the petitioners asserted the claims of all natural persons residing within Kansas and Missouri who had purchased gas from any utility at inflated prices. They also [\*205] asserted claims as [\*\*\*\*11] representatives of state agencies, municipalities, and other political subdivisions that had purchased gas from the defendants. The District Court consolidated all of the actions.

The defendants, in their answer, asserted that the utilities lacked standing under § 4. They alleged that, pursuant to state and municipal regulations and tariffs filed with [\*179] state regulatory agencies, the utilities had passed through the entire wholesale cost of the natural gas to their customers. As a result, the defendants contended, the utility customers had paid 100 percent of the alleged overcharge, and the utilities had suffered no antitrust injury as required by § 4.

The utilities moved for partial summary judgment with respect to this defense, and the District Court granted their motion. The court ruled that our decisions in *Hanover Shoe* and *Illinois Brick* controlled its interpretation of § 4. It read these cases to hold that a direct purchaser from an antitrust violator suffers injury to the full extent of an illegal overcharge even if it passes on some or all of the overcharge to its customers. The District Court concluded that utilities, as direct purchasers, had suffered [\*\*\*\*12] antitrust injury, but that their customers, as indirect purchasers, had not.

In light of its ruling, the District Court chose to treat the partial summary judgment motion as a motion to dismiss the petitioners' *parens patriae* claims. It then granted this motion but allowed the petitioners to take an interlocutory appeal under [28 U. S. C. § 1292\(b\)](#). It certified the following question to the Court of Appeals:

"In a private antitrust action under [15 U. S. C. § 15](#) involving claims of price fixing against the producers of natural gas, is a State a proper plaintiff as *parens patriae* for its citizens who paid inflated prices for natural gas,

497 U.S. 199, \*205; 110 S. Ct. 2807, \*\*2811; 111 L. Ed. 2d 169, \*\*\*179; 1990 U.S. LEXIS 3293, \*\*\*\*12

when the lawsuit already includes as plaintiffs those public utilities who paid the inflated prices upon direct purchase from the producers and who subsequently passed on most or all of the price increase to the citizens [\*206] of the State?" *In re Wyoming Tight Sands Antitrust Cases*, 695 F. Supp. 1109, 1120 (Kan. 1988).

The Court of Appeals answered the question in the negative. It agreed with the District Court that *Hanover Shoe* and *Illinois Brick* [\*\*\*\*13] required dismissal of the *parens patriae* claims. See *In re Wyoming Tight Sands Antitrust Cases*, 866 F.2d 1286, 1294 (CA10 1989). We granted certiorari to resolve a conflict between this decision and *Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (CA7 1988) (en banc). 493 U.S. 1041 (1990). We now affirm.

## II

Section 4 of the Clayton Act provides in full:

**HN1** [↑] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, [\*\*2812] and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. § 15(a).

As noted by the District Court and the Court of Appeals, we have applied this section in two cases involving allegations that a direct purchaser had passed on an overcharge [\*\*\*\*14] to its customers.

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp., supra*, Hanover [\*\*\*\*180] alleged that United had monopolized the shoe manufacturing machinery industry in violation of § 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 2. It sought treble damages under § 4 of the Clayton Act for overcharges paid in leasing certain machinery from United. United defended, in part, on the ground that Hanover had passed on the overcharge to its customers and, as a result, had suffered no injury. We rejected the defense for two reasons. First, noting that a wide range of considerations may influence a company's pricing decisions, we concluded that [\*207] establishing the amount of an overcharge shifted to indirect purchasers "would normally prove insurmountable." 392 U.S. at 493. Second, we reasoned that a pass-on defense would reduce the effectiveness of § 4 actions by diminishing the recovery available to any potential plaintiff. See id. at 494.

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977), we applied these considerations [\*\*\*\*15] to reach a similar result. The State of Illinois sued Illinois Brick and other concrete block manufacturers for conspiring to raise the cost of concrete blocks in violation of § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1. We ruled that the State had suffered no injury within the meaning of § 4 because Illinois Brick had not sold any concrete blocks to it. The company, instead, had sold the blocks to masonry subcontractors, who in turn had sold them to the State's general contractors. We decided that, because Illinois Brick could not use a pass-on defense in an action by direct purchasers, it would risk multiple liability to allow suits by indirect purchasers. See 431 U.S. at 730-731. We declined to overrule *Hanover Shoe* or to create exceptions for any particular industries. See 431 U.S. at 735-736, 744-745.

**LEdHN[1B]** [↑] [1B] Like the State of Illinois in *Illinois Brick*, the consumers in this case have the status of indirect purchasers. In the distribution chain, they are not the immediate buyers from the alleged antitrust violators. They [\*208] bought their gas from the utilities, not from the suppliers said to have conspired to fix the price of the gas. Unless we create an exception to the direct purchaser rule established in *Hanover Shoe* and *Illinois Brick*, any antitrust claim against the defendants is not for them, but for the utilities to assert.

**LEdHN[2A]** [↑] [2A] **LEdHN[3A]** [↑] [3A] **LEdHN[4A]** [↑] [4A] **LEdHN[5A]** [↑] [5A] **LEdHN[6A]** [↑] [6A] **LEdHN[7A]** [↑] [7A] The petitioners ask us to allow them to press the consumers' claims for three reasons. First, they assert that none of the rationales underlying *Hanover Shoe* or *Illinois Brick* exist in cases involving regulated public utilities. Second, they argue that we should apply an exception, suggested in [\*208] *Illinois Brick*, for actions

based upon cost-plus contracts. Third, they maintain that § 4C [\*\*\*\*17] of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394, as amended, [15 U. S. C. § 15c](#), authorizes them to assert claims on behalf of utility customers even if the customers could not assert any claims themselves. Affirming the Court of Appeals, we reject each of these contentions in turn.

### III

[LEdHN\[2B\]](#) [↑] [2B] [LEdHN\[3B\]](#) [↑] [3B] [LEdHN\[4B\]](#) [↑] [4B] [LEdHN\[5B\]](#) [↑] [5B] The petitioners assert [\*\*\*181] that we should allow indirect purchaser suits in cases involving regulated public utilities that pass on 100 percent of their costs to their customers. They maintain that our concerns in *Hanover Shoe* and *Illinois Brick* about the difficulties of apportionment, the risk of multiple recovery, and the diminution of incentives for private antitrust enforcement would not exist in such cases. We disagree. Although the rationales [\*\*2813] of *Hanover Shoe* and *Illinois Brick* may not apply with equal [\*\*\*\*18] force in all instances, we find it inconsistent with precedent and imprudent in any event to create an exception for regulated public utilities.

#### A

[LEdHN\[2C\]](#) [↑] [2C] [HN2](#) [↑] The direct purchaser rule serves, in part, to eliminate the complications of apportioning overcharges between direct and indirect purchasers. See *Hanover Shoe*, 392 U.S. at 493; *Illinois Brick*, 431 U.S. at 740-742; *Blue Shield of Va. v. McCready*, 457 U.S. 465, 475, n.11, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982). The petitioners find the rule unnecessary, in this respect, when a utility passes on its costs to its customers pursuant to state regulations or tariffs filed with a utility commission. In such cases, they assert, the customers pay the entire overcharge, obviating litigation over its apportionment. They maintain that they can prove the exact injury to the residential customers whom they represent because the respondent made periodic public filings showing the volume and price of gas that it sold to these [\*\*\*\*19] consumers. They ask us to allow them to sue for [\*209] the entire amount of the overcharge and to limit the respondent's recovery to damages for its lost business.

The petitioners have oversimplified the apportionment problem in two respects. First, an overcharge may injure a utility, apart from the question of lost business, even if the utility raises its rates to offset its increased costs. As we explained in *Hanover Shoe*:

[HN3](#) [↑] "The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for his price rise earlier; if a cost rise is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages. This statement merely recognizes the usual principle that the possessor of a right can recover for its unlawful deprivation whether or not [\*\*\*\*20] he was previously exercising it." *392 U.S. at 493, n.9*.

In other words, to show that a direct purchaser has borne no portion of an overcharge, the indirect purchaser would have to prove, among other things, that the direct purchaser could not have raised its rates prior to the overcharge.

In *Hanover Shoe*, however, we decided not to allow proof of what the direct purchaser might have done because of the "nearly insuperable difficulty" of the issue. *Id., at 493*. The petitioners assume that the presence [\*\*\*182] of state regulation would make the proof less difficult here. We disagree. The state regulation does not simplify the problem but instead imports an additional level of complexity. To decide whether a utility has borne an overcharge, a court would have to consider not only the extent to which market conditions would have allowed the utility to raise its rates prior to the overcharge, as in the case of an unregulated business, but also what the state regulators would have allowed. In particular, [\*210] to decide that an overcharge did not injure a utility, a court would have to determine that the State's regulatory schemes [\*\*\*\*21] would have barred any rate increase except for the amount reflected by cost increases. Proof of this complex preliminary issue, one irrelevant to the liability of the defendant, would proceed on a case-by-case basis and would turn upon the intricacies of state law.

From the certified question in this case, we do not know whether the respondent could have raised its prices prior to the overcharge. Its customers may have been willing to pay a greater price, and the Kansas and Missouri regulators may have allowed a rate increase based on factors other than strict costs. See [[\\*\\*2814](#)] *Midwest Gas Users Assn. v. State Corporation Comm'n*, 5 Kan. App. 2d 653, 661, 623 P.2d 924, 931 (1981); *State ex rel. Associated Natural Gas Co. v. Public Service Comm'n*, 706 S.W.2d 870, 879-880 (Mo. App. 1985). To the extent that the respondent could have sought and gained permission to raise its rates in the absence of an overcharge, at least some portion of the overcharge is being borne by it; whether by overcharge or by increased rates, consumers would have been paying more for natural gas than they had been paying in the past. Because of this potential [[\\*\\*\\*\\*22](#)] injury, the respondent must remain in the suit. If we were to add indirect purchasers to the action, we would have to devise an apportionment formula. This is the very complexity that *Hanover Shoe* and *Illinois Brick* sought to avoid.

Second, difficult questions of timing might necessitate apportioning overcharges if we allowed indirect suits by utility customers. Even if, at some point, a utility can pass on 100 percent of its costs to its customers, various factors may delay the passing-on process. Some utilities must seek approval from the governing regulators prior to raising their rates. Other utilities, pursuant to purchase gas adjustment clauses (PGA's) filed with state regulators, may adjust their rates to reflect changes in their wholesale costs according to prearranged formulas without seeking regulatory approval in [[\\*211](#)] each instance. Yet, even utilities that use PGA's often encounter some delay. See Brief for State of Illinois as *Amicus Curiae* 9, n.11 (describing the various time lags under a typical PGA between the increase in a utility's wholesale costs and the rise in consumer rates). During any period in which a utility's costs rise before it may [[\\*\\*\\*\\*23](#)] adjust its rates, the utility will bear the costs in the form of lower earnings. See S. Breyer, *Regulation and its Reform* 48-49 (1982). Even after the utility raises its rates, moreover, the pass-through process may take time to complete. During this time, the utility and its customers each would pay for some of the increased costs.

In this case, we could not deprive the respondent of its § 4 action without first determining that the passing-on [[\\*\\*\\*183](#)] process in fact had allowed it to shift the entire overcharge to its customers. The certified question, however, leaves unclear whether the respondent had passed on "most or all" of its costs at the time of the suit. In addition, even the means by which the passthrough occurred remain unsettled. The petitioners allege that, pursuant to formulas in PGA's filed with the Kansas Corporation Commission and the Missouri Public Service Commission, the respondent "automatically" adjusted some of its rates to reflect increases in the wholesale cost of gas. Brief for Petitioners 5, n.5. The respondent, however, maintains that PGA's did not govern all of its sales. See Brief for Respondent 17. The difficulties posed by issues of this sort [[\\*\\*\\*\\*24](#)] led us to adopt the direct purchaser rule, and we must decline to create an exception that would require their litigation. As we have stated before: [HN4](#) "The task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system." *McCready*, 457 U.S. at 475, n.11.

In addition to these complications, the regulation of utilities itself may make an exception to *Illinois Brick* unnecessary. Our decisions in *Hanover Shoe* and *Illinois Brick* often deny relief to consumers who have paid inflated prices [[\\*212](#)] because of their status as indirect purchasers. See 2 P. Areeda & D. Turner, *Antitrust Law* § 337e, pp. 193-194 (1978); Harris & Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. Pa. L. Rev. 269, 342 (1979). Although one might criticize *Illinois Brick* for this consequence in other circumstances, the criticism may have less validity in the context of public utilities. Both the Court of Appeals in this case and the Seventh Circuit in *Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (1988), [[\\*\\*\\*\\*25](#)] have suggested that state regulators [[\\*\\*2815](#)] would require the utilities to pass on at least some of the recovery obtained in a § 4 suit. See *Wyoming Tight Sands*, 866 F.2d at 1291; *Panhandle Eastern, supra, at 895*. State regulators have followed this approach elsewhere. See, e. g., *Louisiana Power & Light Co., Ex Parte*, Nos. U-17906, U-12636, U-17649, [1989 La. PUC LEXIS 3](#), \*31-\*32 (Mar. 1, 1989) (requiring Louisiana Power & Light Co., which won a \$ 190 million judgment against United Gas Pipe Line Co., to flow the proceeds back to ratepayers through reduced rates over a 5-year period). If Kansas and Missouri impose similar requirements, then even if the customers cannot sue the alleged antitrust violators, they may receive some of the compensation obtained by the respondent. Creating an exception to allow apportionment in violation of *Illinois Brick* would make little sense when, in light of all its difficulty, its practical significance is so diminished.

B

LEdHN[3C] [↑] [3C] [\*\*\*\*26] HN5 [↑] The *Illinois Brick* rule also serves to eliminate multiple recoveries. See *Illinois Brick*, 431 U.S. at 730-731; *McCready, supra, at 474*. The petitioners assert that no risk of multiple recovery would exist here, if we allowed them to sue, because the direct and indirect purchasers would be seeking different, not duplicative, damages; the petitioners would recover [\*\*\*184] the amount of the overcharge and the utilities would recover damages for their lost sales. Leaving [\*213] aside the apportionment issue, we reject the argument in this case, just as we did in *Illinois Brick*. Bringing all classes of direct and indirect purchasers together in a single lawsuit may reduce the risk of multiple recovery, but the reduction comes at too great a cost. See *Illinois Brick, supra, at 731, n.11*.

This case already has become quite complicated. It involves numerous utilities and other companies operating in several States under federal, state, and municipal regulation and, in some instances, under no rate regulation at all. Even apart from gas sold to customers, the utilities seek damages for lost sales and for gas purchased [\*\*\*\*27] for their own use. The petitioners, in addition to their *parens patriae* claims, are asserting direct claims on behalf of numerous state agencies. Other direct purchasers also seek several measures of damages. Allowing the petitioners to proceed on behalf of consumers would complicate the proceedings further. Even if they could represent consumers residing in Kansas and Missouri, they could not represent industrial and commercial purchasers or consumers from other States. See 15 U. S. C. § 15c(a)(1) (extending *parens patriae* representation only to resident natural persons). These unrepresented consumers might seek intervention and further delay the prompt determination of the suit. The expansion of the case would risk the confusion, costs, and possibility of error inherent in complex litigation. At the same time, however, it might serve little purpose because, as noted above, state regulatory law may provide appropriate relief to consumers even if they cannot sue under § 4. As in *Illinois Brick*, we continue to believe that "even if ways could be found to bring all potential plaintiffs together in one huge action, the complexity thereby introduced [\*\*\*\*28] into treble-damages proceedings argues strongly for retaining the *Hanover Shoe* rule." 431 U.S. at 731, n.11.

[\*214] C

LEdHN[4C] [↑] [4C] We have maintained, throughout our cases, that our HN6 [↑] interpretation of § 4 must promote the vigorous enforcement of the antitrust laws. See *Hanover Shoe*, 392 U.S. at 493; *Illinois Brick, supra, at 746*; *McCready*, 457 U.S. at 475, n.11; *California v. ARC America Corp.*, 490 U.S. 93, 102, n.6, 104 L. Ed. 2d 86, 109 S. Ct. 1661 [\*\*2816] (1989). If we were convinced that indirect suits would secure this goal better in cases involving utilities, the argument to interpret § 4 to create the exception sought by the petitioners might be stronger. On balance, however, we do not believe that the petitioners can prevail in this critical part of the case. The petitioners assert that utilities, such as the respondent, lack the incentive to prosecute § 4 cases for two reasons. First, they state that utilities, [\*\*\*\*29] by law, may pass on their costs to customers. Second, they surmise that utilities might have to pass on damages recovered in a § 4 action. In other words, according to the petitioners, utilities lose nothing if they do not sue and gain nothing if they do sue. In contrast, the petitioners maintain, the large aggregate claims [\*\*\*185] of residential consumers will give state attorneys general ample motivation to sue in their capacity as *parens patriae*.

The petitioners' argument does not persuade us that utilities will lack incentives to sue overcharging suppliers. Utilities may bring § 4 actions in some instances for fear that regulators will not allow them to shift known and avoidable overcharges on to their customers. See Kan. Stat. Ann. § 66-128a (1985) (allowing the state commission to "review and evaluate the efficiency or prudence of any actions . . . of any public utility or common carrier for the purpose of establishing fair and reasonable rates"); Mo. Rev. Stat. § 393.150 (1986) (interpreted in State ex rel. Associated Natural Gas Co. v. Public Service Comm'n, 706 S.W.2d 870, 879-880 (Mo. App. 1985), to give regulators "considerable discretion" [\*\*\*\*30] in setting gas rates). In addition, even if state law would require a utility to reimburse its customers for recovered overcharges, a utility may seek treble damages in a § 4 action.

[\*215] The petitioners have cited no authority indicating that a victorious utility would have to pay the entire exemplary portion of these damages to its customers.

Utilities, moreover, have an established record of diligent antitrust enforcement, having brought highly successful § 4 actions in many instances. The well-known group of actions from the 1960's involving overcharges for electrical generating equipment provides an excellent example. In these cases, which involved "a series of horizontal price-fixing conspiracies characterized as the most shocking in the history of the Sherman Act, plaintiff utilities . . . recovered in unprecedented sums" even though some of the utilities "passed on to their own customers whatever higher costs they incurred as a consequence of the alleged conspiracies." Pollock, Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine, 32 A. B. A. Antitrust L. J. 5, 10-11 (1966). The courts in these suits, even before the *Hanover Shoe* and *Illinois* [\*\*\*\*31] *Brick* decisions, considered the pass-on issue and held that the causes of action were for the utilities to assert. See, e. g., [\*Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 335 F.2d 203, 208 \(CA7 1964\)\*](#); [\*Ohio Valley Electric Corp. v. General Electric Co., 244 F. Supp. 914, 949-951 \(SDNY 1965\)\*](#). Various factors may have prompted these and other utility actions. For example, in addition to the reasons stated above, the respondent asserts that, like any business, an investor-owned utility has an interest in protecting its market. But whatever the motivation for their § 4 suits, this history makes us quite hesitant to take from the utilities the responsibility for enforcing the antitrust laws.

Relying on indirect purchaser actions in utility cases might fail to promote antitrust enforcement for other reasons. Consumers may lack the expertise and experience necessary for detecting improper pricing by a utility's suppliers. See Landes & Posner, The Economics of Passing On: A Reply to Harris and Sullivan, 128 U. Pa. L. Rev. 1274, 1278-1279 (1980). Although state attorneys general have greater expertise, [\*216] they may [\*\*\*\*32] hesitate to exercise the *parens patriae* device in cases involving smaller, more speculative harm to consumers. See Landes & Posner, Should Indirect Purchasers Have Standing to Sue Under the Antitrust [\*\*\*186] Laws? An Economic [\*\*2817] Analysis of the Rule of *Illinois Brick*, 46 U. Chi. L. Rev. 602, 613 (1979). See also [\*Illinois Brick, 431 U.S. at 745\*](#) (stating that, in indirect actions, "the uncertainty of how much of an overcharge could be established . . . [and] the uncertainty of how that overcharge would be apportioned . . . would further reduce the incentive to sue"). And even when state attorneys general decide to bring *parens patriae* actions, they may sue only on behalf of resident natural persons. See [\*15 U. S. C. § 15c\(a\)\(1\)\*](#). All others, including non-residents and small businesses, might fail to enforce their claims because of the insignificance of their individual recoveries. For these reasons, we remain unconvinced that the exception sought by the petitioners would promote antitrust enforcement better than the current *Illinois Brick* rule.

D

[LEdHN\[5C\]](#) [↑] [5C] [\*\*\*\*33] The preceding conclusions bring us to a broader point. The rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases. We nonetheless believe that ample justification exists for our stated decision not to [HN7](#) [↑] "carve out exceptions to the [direct purchaser] rule for particular types of markets." [\*Illinois Brick, 431 U.S. at 744\*](#). The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule. As we have stated:

[HN8](#) [↑] "The process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the *Hanover Shoe* rule was meant to avoid. The litigation over where the line should be drawn in a particular class of cases would inject the same 'massive evidence and complicated theories' [\*217] into treble-damages proceedings, albeit at a somewhat higher level of generality. [\*\*\*\*34] " [\*Id. at 744-745\*](#).

In sum, even assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions. Having stated the rule in *Hanover Shoe*, and adhered to it in *Illinois Brick*, we stand by our interpretation of § 4.

IV

LEdHN[6B] [↑] [6B] The suggestion in *Hanover Shoe* and *Illinois Brick* that a departure from the direct purchaser rule may be necessary when an indirect purchaser buys under a pre-existing cost-plus contract does not justify an exception in this case. In *Hanover Shoe*, we stated:

"We recognize that there might be situations -- for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged -- where the considerations requiring that the passing-on defense not be permitted in this case would not be present." [392 U.S. at 494](#).

We observed further in *Illinois Brick*:

HN9 [↑] "\*\*\*\*35] In [a cost-plus contract] situation, the [direct] purchaser is insulated from any decrease in its sales as a [\*\*\*187] result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case." [431 U.S. at 736](#).

The petitioners argue that the regulations and tariffs requiring the respondent to pass on its costs to the consumers place this case within the cost-plus contract exception. We disagree.

[\*218] The respondent did not sell the gas to its customers under a pre-existing cost-plus contract. Even if we were to create an exception for situations that merely resemble those governed by such a contract, we would [\*\*2818] not apply the exception here. Our statements above show that we might allow indirect purchasers to sue only when, by hypothesis, the direct purchaser will bear no portion of the overcharge and otherwise suffer no injury. That certainty does not exist here.

The utility customers made no commitment [\*\*\*36] to purchase any particular quantity of gas, and the utility itself had no guarantee of any particular profit. Even though the respondent raised its prices to cover its costs, we cannot ascertain its precise injury because, as noted above, we do not know what might have happened in the absence of an overcharge. In addition, even if the utility customers had a highly inelastic demand for natural gas, see *Panhandle Eastern*, [852 F.2d at 895](#), the need to inquire into the precise operation of market forces would negate the simplicity and certainty that could justify a cost-plus contract exception. See *Illinois Brick*, *supra*, at [742](#); P. Areeda & H. Hovencamp, *Antitrust Law* § 337.3c, pp. 323-324 (Supp. 1988). Thus, although we do not alter our observations about the possibility of an exception for cost-plus contracts, we decline to create the general exception for utilities sought by the petitioners.

V

LEdHN[7B] [↑] [7B] The petitioners, in their final argument, contend that § 4C of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394, as amended, [15 U. S. C. § 15c](#), \*\*\*\*37] authorizes them to sue on behalf of consumers even though the consumers, as indirect purchasers, have no cause of action of their own. Section 4C(a)(1) provides in relevant part:

HN10 [↑] "Any attorney general of a State may bring a civil action in the name of such state as parens patriae on behalf of natural persons residing in such State . . . to secure monetary relief as provided in this section for injury sustained [\*219] by such natural persons to their property by reason of any violation of [sections 1 to 7](#) of this title." [15 U. S. C. § 15c\(a\)\(1\)](#).

Because the Act, in their view, has the clear purpose of protecting consumers, see Kintner, Griffin, & Goldston, The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis, 46 Geo. Wash. L. Rev. 1, 23 (1977), the petitioners contend that it must allow the States to sue on behalf of consumers notwithstanding their status as indirect purchasers.

[\*\*\*188] LEdHN[1C] [↑] [1C]LEdHN[7C] [↑] [7C] \*\*\*\*38] We have rejected this argument before. We stated in *Illinois Brick* that HN11 [↑] § 4C did not establish any new substantive liability. Instead, "it simply created a new

procedural device -- *parens patriae* actions by States on behalf of their citizens -- to enforce existing rights of recovery under § 4 [of the Clayton Act]." [431 U.S. at 734, n.14](#). Section 4, as noted above, affords relief only to a person "injured in his business or property by reason of anything forbidden in the antitrust laws." [15 U. S. C. § 15\(a\)](#). State attorneys general may bring actions on behalf of consumers who have such an injury. See, e. g., [Pennsylvania v. Mid-Atlantic Toyota Distributors, Inc., 704 F.2d 125, 128 \(CA4 1983\)](#) (suit on behalf of consumers injured by an alleged conspiracy to fix the price of cars). But here the respondent is the injured party under the antitrust laws, and the predicate for a *parens patriae* action has not been established. We conclude that the petitioners may not assert any claims on behalf of the customers.

*Affirmed* [\*\*\*\*39] .

**Dissent by:** WHITE

## Dissent

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JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

I dissent from the Court's opinion and judgment because it is inappropriate for the Court to deny standing to sue under § 4 of the Clayton Act, [15 U. S. C. § 15](#), to customers of a regulated utility in circumstances such as those presented in this case. By its plain language, § 4 reflects an "expansive remedial" [\*220] purpose." [Blue Shield of Va. v. \[\\*\\*2819\] McCready, 457 U.S. 465, 472, 73 L. Ed. 2d 149, 102 S. Ct. 2540 \(1982\)](#) (citation omitted). It does not distinguish between classes of customers, but rather grants a cause of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . ." [15 U. S. C. § 15\(a\)](#). In enacting § 4, Congress sought to ensure that victims of anticompetitive conduct receive compensation. [Blue Shield, supra, at 472; Pfizer Inc. v. India, 434 U.S. 308, 314, 54 L. Ed. 2d 563, 98 S. Ct. 584 \(1978\)](#).

In [Illinois Brick Co. v. Illinois, 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 \(1977\)](#), [\*\*\*\*40] we held that certain indirect purchasers of concrete block lacked standing to challenge the manufacturer's business practices under the antitrust laws because they could not be deemed to have suffered injury from the alleged illegal conduct. This suit, however, is very different from *Illinois Brick*. That case involved a competitive market where concrete block manufacturers sold to masonry contractors who in turn sold to general contractors who in turn sold to the *Illinois Brick* respondents; this case involves a highly regulated market where utilities possessing natural monopolies purchase gas from natural gas suppliers and then sell the gas to residential customers. *Illinois Brick* did not hold that, in all circumstances, indirect purchasers lack § 4 standing. Indeed, just last Term we observed that under *Illinois Brick* "indirect purchasers might be allowed to bring suit in cases in which it would be easy to prove the extent to which the overcharge was" [\*\*\*189] passed on to them." [California v. ARC America Corp., 490 U.S. 93, 102, 104 L. Ed. 2d 86, 109 S. Ct. 1661, and n.6 \(1989\)](#). See also [Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 \(1968\)](#). [\*\*\*\*41]

The issue in this case is whether *Illinois Brick* bars a suit by retail customers to whom the utilities have passed on the entire cost of the gas sold to them, including any illegal overcharge. Before the District Court, the utilities moved to dismiss the States as *parens patriae*, arguing that the States lacked standing because they represented indirect purchasers. [\*221] In response, the States contended that the indirect purchasers were proper plaintiffs because the utilities had passed through the entire overcharge to their residential customers. The District Court found it unnecessary "to wait upon evidence establishing the degree to which the utilities passed on the overcharge," [In re Wyoming Tight Sands Antitrust Cases, 695 F. Supp. 1109, 1116 \(Kan. 1988\)](#), for even accepting the States' position that there had been a total pass-on, decisions of this Court were thought to bar the suit. Likewise, in affirming the District Court, the Court of Appeals presumed a "perfect and provable pass-on of the allegedly illegal overcharge." [In re Wyoming Tight Sands Antitrust Cases, 866 F.2d 1286, 1293 \(CA10 1989\)](#). Indeed, the vice president [\*\*\*\*42] and general counsel of one of the respondent utilities is on record as stating that the utility's customers "pay all of any increases in the cost of natural gas [Kansas Power & Light] must purchase to serve

them." Affidavit of David S. Black, Vice President and General Counsel of the Kansas Power & Light Company, Record, Doc. No. 485, Exhibit D (emphasis in original). Rather than embarking, as the Court does, on what amounts to a factfinding mission, which the courts below eschewed, about the fact and provability of this pass-on, we should decide this case on the basis that there has been a complete passthrough of the overcharge. On that basis, it is evident that the concerns underlying the decision in *Illinois Brick* do not support the judgment below. Rather, we should follow the plain intent of § 4 that the victims of anticompetitive conduct be allowed the remedy provided by the section.

*Illinois Brick* barred indirect purchaser suits chiefly because we feared that permitting the use of pass-on theories under § 4 would transform these treble-damages actions into massive and inconclusive efforts [\*\*2820] to apportion the recovery among all potential plaintiffs [\*\*\*\*43] that could have absorbed part of the overcharge -- from direct purchasers to middlemen to ultimate consumers. [431 U.S. at 737](#). As Judge Posner has [\*222] written: "The optimal adjustment by an unregulated firm to the increased cost of the input will always be a price increase smaller than the increase in input cost, and this means that the increased cost will be divided between the two tiers, the direct and indirect purchasers -- but in what proportion will often be hard to determine, even by sophisticated techniques of economic analysis. This is a central insight of the *Illinois Brick* decision." [Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co., 852 F.2d 891, 894 \(CA7 1988\)](#).

[\*\*\*190] In this case, however, it is regulation rather than market forces that determines the amount of overcharge that the utility passes through to its residential customers. The rates of utilities are determined by law and are set at a level designed to allow a fair return on a rate base that includes the cost of furnishing the service, plainly including in this case the cost of gas purchased from the pipelines and resold to customers. It is fanciful, [\*\*\*\*44] at least unrealistic, to think that a utility entitled to pass on to its customers the cost of gas that it has purchased will not do so to the maximum extent permitted by law. Furthermore, petitioners assert that in this case the applicable law requires that such cost be passed on to consumers. And, as we have said, the Tenth Circuit opinion reflects the likelihood of a perfect and provable pass-on.

Of course, to recover in a case like this, the plaintiff must prove that the utility paid the pipelines an illegally high price and must demonstrate the amount of the overcharge. That amount is included in the rates charged by the utility and hence is passed through to the consumer. The result is that determining the injury inflicted on consumers involves nothing more than reading their utility bills, which reveal the amount of gas purchased by them at a price which includes the amount of the illegal overcharge passed through to them. Where it is clear that the entire overcharge is passed through, there can be no claim that indirect purchasers cannot [\*223] prove the extent of their damage caused by a rate calculated on a rate base inflated by an illegal price paid for gas.

The [\*\*\*45] Court contends that the apportionment problem is not so simple. It maintains that, even where a utility raises its rates to compensate for the overcharge and passes the overcharge through to the indirect purchasers, an apportionment problem still exists because "to show that a direct purchaser has borne no portion of an overcharge, the indirect purchaser would have to prove, among other things, that the direct purchaser could not have raised its rates prior to the overcharge." 497 U.S. at 209. The problem identified by the majority is not peculiar to indirect purchaser suits. In antitrust cases where suppliers increase their prices, courts frequently must separate the price increase attributable to anticompetitive conduct (*i. e.*, the "overcharge") from the price increase attributable to legitimate factors. This type of calculation "has to be done in every case where the plaintiff claims to have lost sales because of the defendant's unlawful conduct and the defendant argues that the loss was due partly or entirely to other factors." [Panhandle Eastern, supra, at 897](#); see [Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 90 L. Ed. 652, 66 S. Ct. 574 \(1946\)](#). [\*\*\*\*46] The problem identified in *Illinois Brick* was entirely different: There, we were concerned that it would unduly complicate litigation to require courts to separate the portion of the overcharge absorbed by the direct purchaser from the portion of the overcharge passed onto the indirect purchaser. As argued above, this difficulty is not a concern in the present case. \* It is at [\*\*\*191] least very doubtful that a utility that is

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\* The majority also suggests that "difficult questions of timing might necessitate apportioning overcharges if we allowed indirect suits by utility customers. Even if, at some point, a utility can pass on 100 percent of its costs to its customers, various factors may delay the passing-on process." 497 U.S. at 210. This suggestion, as indicated by the words "might" and "may," is quite

[\*224] in position to secure a rate increase on grounds having nothing to [\*\*2821] do with the price paid for its gas would fail to request a rate increase that included as well the entire amount paid for gas purchased from pipelines and sold to consumers.

[\*\*\*\*47] *Illinois Brick* also observed that granting standing to the indirect purchasers in that case would lead to the under-enforcement of the antitrust laws. [431 U.S. at 745-747](#). In the cases where there is "a perfect and provable pass-through," however, the opposite is true for two reasons. First, because the passthrough of the overcharge is complete and easily demonstrated, the indirect purchasers -- and the States in their *parens patriae* capacity -- may readily discover their injury. Second, although the utility could sue to recover lost profits resulting from lost sales due to the illegally high price, its injury is not measured by the amount of the illegal overcharge that it has passed on, and hence the utility would have no incentive to seek such a recovery.

The majority suggests that, even where a utility passes the entire overcharge through to the indirect customers, the utility nonetheless might actively prosecute antitrust claims because the state regulatory commission may allow the utility to keep any damages that the utility recovers. But the utility commissions cannot allow an antitrust recovery forbidden by federal law. Given a passthrough, the customer, [\*\*\*\*48] not the utility, suffers the antitrust injury, and it is the customer or the State on his behalf that is entitled to recover treble damages. In any event, it seems to me that the majority conjures up a very strange utility commission, the possible existence of which the court fails to document.

A third consideration prompting our decision in *Illinois Brick* was our belief that permitting indirect purchaser suits might subject antitrust defendants to multiple liability. [431 U.S. at 730-731](#). Again however, where there is a "perfect and provable" passthrough, there is no danger that both the utilities and the indirect purchasers will recover damages for the same anticompetitive conduct because the utilities [\*225] have not suffered any overcharge damage: The petitioners will sue for the amount of the overcharge, while the utilities will sue for damages resulting from their lost sales.

The majority argues that, even "leaving aside the apportionment issue" (i. e., assuming that there is no apportionment difficulty as the Tenth Circuit did in affirming summary judgment), the multiple recovery problem identified in *Illinois Brick* still exists. 497 U.S. at 212-213. [\*\*\*\*49] I disagree. *Illinois Brick* "focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws." [Blue Shield, 457 U.S. at 474-475](#). [\*\*\*192] The danger of multiple recoveries does not exist aside from the apportionment difficulty; rather, it stems from it. If only defensive use of a pass-through defense were barred, or if it were extremely difficult to ascertain the percentage of an overcharge that the utility passed through, then the supplier of natural gas might potentially have to pay overlapping damages to successive purchasers at different levels in the distribution chain. But where there is no apportionment difficulty, there is no comparable risk.

In sum, I cannot agree with the rigid and expansive holding that in no case, even in the utility context, would it be possible to determine in a reliable way a passthrough to [\*\*2822] consumers of an illegal overcharge that would measure the extent of their damage. There may be cases, as the Court speculates, where there would be insuperable difficulties. But we are to judge this [\*\*\*\*50] case on the basis that the pass-through is complete and provable. There have been no findings below that this is not the fact. Instead, the decision we review is that consumers may not sue even where it is clear and provable that an illegal overcharge has been passed on to them and that they, rather than the utility, have to that extent been injured.

None of the concerns that caused us to bar the indirect purchaser's suit in *Illinois Brick* exist in this case. For that [\*226] reason, rather than extending the *Illinois Brick* exception to § 4's grant of a cause of action to persons injured through anticompetitive conduct, I would hold that the petitioners in this case have standing to sue. This result would promote the twin antitrust goals of ensuring recompense for injured parties and encouraging the diligent prosecution of antitrust claims.

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speculative. It is much more realistic to believe that sooner or later, the customer will foot the cost of overpriced gas. If timing was such a problem, the Tenth Circuit would not have assumed a "perfect and provable" passthrough.

## References

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[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 246, 289, 296, 300, 310, 360](#)

24 Federal Procedure, L Ed, Monopolies and Restraints of Trade 54:164-54:169, 54:177, 54:191

24 Am Jur Trials 1, Defending Antitrust Lawsuits

[15 USCS 15 \[\\*\\*\\*\\*51\] \(a\), 15c\(a\)\(1\)](#)

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 67

Index to Annotations, Parens Patriae; Restraints of Trade and Monopolies; States

Annotation References:

Standing to sue, under 4 of the Clayton Act ([15 USCS 15](#)) and predecessor statute, to recover treble damages for antitrust violation-- Supreme Court cases. 73 L Ed 2d 1427.

"Target area" doctrine as basis for determining standing to sue under 4 of Clayton Act ([15 USCS 15](#)) allowing treble damages for violation of antitrust laws. 70 ALR Fed 637.

Right of retail buyer of price-fixed product to sue manufacturer on federal antitrust claim. 55 ALR Fed 919.

Authority of state to sue as parens patriae to recover treble damages under 4 of Clayton Act ([15 USCS 15](#)). 23 ALR Fed 878.

Liability in damages for price-fixing in violation of federal antitrust laws as affected by plaintiff's passing excessive charges on to his own customers. 1 ALR Fed 500.

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## Norfolk & W. R. Co. v. Am. Train Dispatchers' Ass'n

Supreme Court of the United States

December 3, 1990, Argued ; March 19, 1991, \* Decided

No. 89-1027

### **Reporter**

499 U.S. 117 \*; 111 S. Ct. 1156 \*\*; 113 L. Ed. 2d 95 \*\*\*; 1991 U.S. LEXIS 1709 \*\*\*\*; 59 U.S.L.W. 4189; 118 Lab. Cas. (CCH) P10,598; 102-69 Fulton County D. Rep. 17B; 136 L.R.R.M. 2727; 91 Cal. Daily Op. Service 1970; 91 Daily Journal DAR 3215

NORFOLK & WESTERN RAILWAY COMPANY et al., PETITIONERS v. AMERICAN TRAIN DISPATCHERS' ASSOCIATION et al. CSX TRANSPORTATION, INC., PETITIONER V. BROTHERHOOD OF RAILWAY CARMEN ET AL.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

**Disposition:** [279 U.S. App. D. C. 239, 880 F.2d 562](#), reversed and remanded.

## **Core Terms**

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carriers, merger, exemption, collective-bargaining, conditions, consolidation, anti trust law, approving, employees, railroad, obligations, rights, carry out, arbitration, Railway, immunity provision, private contract, provisions, override, Transportation, parties, terms, collective bargaining agreement, public interest, labor-protective, liquidation, cases, impose obligation, municipal law, federal law

## **LexisNexis® Headnotes**

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Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Mergers & Acquisitions Law > Antitrust > Regulated Industry Mergers

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Transportation Law > Interstate Commerce > General Overview

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\* Together with No. 89-1028, CSX Transportation, Inc. v. Brotherhood of Railway Carmen et al., also on certiorari to the same court.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

## **HN1** [down] Interstate Commerce, Restraints of Trade

The Interstate Commerce Act (Act), [49 U.S.C.S. § 11301 et seq.](#), grants the Interstate Commerce Commission (Commission) exclusive authority to examine, condition, and approve proposed mergers and consolidations of transportation carriers within its jurisdiction. [49 U.S.C.S. § 11343\(a\)\(1\)](#). The Act requires the Commission to approve and authorize the transactions when they are consistent with the public interest. [49 U.S.C.S. § 11344\(c\)](#). Among the factors the Commission must consider in making its public interest determination are the interests of carrier employees affected by the proposed transaction. [§ 11344\(b\)\(1\)\(D\)](#). In authorizing a merger or consolidation, the Commission may impose conditions governing the transaction. [§ 11344\(c\)](#). Once the Commission approves a transaction, a carrier is exempt from the antitrust laws and from all other law, including state and municipal law, as necessary to let it carry out the transaction. [49 U.S.C.S. § 11341\(a\)](#).

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Consolidation & Merger

Transportation Law > Interstate Commerce > General Overview

## **HN2** [down] Railroads & Rail Transportation, Consolidation & Merger

See [49 U.S.C.S. § 11344\(b\)\(1\)](#).

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Transportation Law > Interstate Commerce > General Overview

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Maintenance & Safety

## **HN3** [down] Regulated Industries, Transportation

When a proposed merger involves rail carriers, the Act requires the Commission to impose labor-protective conditions on the transaction to safeguard the interests of adversely affected railroad employees. [49 U.S.C.S. § 11347](#).

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Consolidation & Merger

Mergers & Acquisitions Law > General Business Considerations > Labor Laws

Transportation Law > Interstate Commerce > General Overview

## **HN4** [down] Railroads & Rail Transportation, Consolidation & Merger

Section 2 of the New York Dock conditions provides that the rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits under applicable laws and/or existing collective bargaining agreements shall be preserved unless changed by future collective bargaining agreements. Section 4 sets forth negotiation and arbitration procedures for resolution of labor disputes arising from an approved railroad merger. Under § 4, a merged or consolidated railroad which plans an operational change that may cause dismissal or displacement of any employee must provide the employee and his union 90 days' written notice. If the carrier and

union cannot agree on terms and conditions within 30 days, each party may submit the dispute for an expedited "final, binding and conclusive" determination by a neutral arbitrator.

Business & Corporate Compliance > ... > Pretrial Matters > Alternative Dispute Resolution > Mandatory ADR

Transportation Law > Interstate Commerce > General Overview

#### **HN5** [down] Alternative Dispute Resolution, Mandatory ADR

It has long been the Interstate Commerce Commission's (Commission) view that private collective bargaining agreements and Railway Labor Act provisions must give way to the Commission-mandated procedures of section 4 of the New York Dock conditions when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission. 360 I. C. C. § 84.

Transportation Law > Interstate Commerce > General Overview

#### **HN6** [down] Transportation Law, Interstate Commerce

See [49 U.S.C.S. § 11341\(a\)](#).

Transportation Law > Interstate Commerce > General Overview

#### **HN7** [down] Transportation Law, Interstate Commerce

For purposes of this decision, the court assumes, without deciding, that the Interstate Commerce Commission properly considered the public interest factors of [49 U.S.C.S. § 11344\(b\)\(1\)](#) in approving the original transaction, that its decision to override the carrier's obligations is consistent with the labor-protective requirements of [§ 11347](#), and that the override was necessary to the implementation of the transaction within the meaning of [§ 11341\(a\)](#). Under these assumptions, the court holds that the exemption from all other law in [§ 11341\(a\)](#) includes the obligations imposed by the terms of a collective-bargaining agreement.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Governments > Legislation > Interpretation

Governments > Federal Government > US Congress

#### **HN8** [down] Regulated Industries, Transportation

If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. The contested language in [49 U.S.C.S. § 11341\(a\)](#), exempting carriers from the antitrust laws and all other law, including state and municipal law, is clear, broad, and unqualified.

Governments > Legislation > Interpretation

Transportation Law > Interstate Commerce > General Overview

## [\*\*HN9\*\*](#) Legislation, Interpretation

By itself, the phrase "all other law" indicates no limitation. The circumstance that the phrase "all other law" is in addition to coverage for "the antitrust laws" does not detract from this breadth.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > Legislation > Interpretation

## [\*\*HN10\*\*](#) Antitrust & Trade Law, Exemptions & Immunities

Under the principle of ejusdem generis, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration. The canon does not control, however, when the whole context dictates a different conclusion.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Transportation Law > Interstate Commerce > General Overview

## [\*\*HN11\*\*](#) Regulated Industries, Transportation

In short, the immunity provision in [49 U.S.C.S. § 11341](#) means what it says: A carrier is exempt from all law as necessary to carry out an Interstate Commerce Commission approved transaction.

Transportation Law > Interstate Commerce > General Overview

## [\*\*HN12\*\*](#) Transportation Law, Interstate Commerce

A contract has no legal force apart from the law that acknowledges its binding character. As a result, the exemption in [49 U.S.C.S. § 11341\(a\)](#) from "all other law" effects an override of contractual obligations, as necessary to carry out an approved transaction, by suspending application of the law that makes the contract binding.

Transportation Law > Interstate Commerce > General Overview

## [\*\*HN13\*\*](#) Transportation Law, Interstate Commerce

As the law which gives legal and binding effect to collective agreements, the Railway Labor Act is the law that, under [49 U.S.C.S. § 11341\(a\)](#), is superseded when an Interstate Commerce Commission approved transaction requires abrogation of collective-bargaining obligations.

Business & Corporate Compliance > ... > Negotiable Instruments > Types of Parties > Accommodated & Accommodation Parties

Transportation Law > Interstate Commerce > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

#### [\*\*HN14\*\*](#) [ ] Types of Parties, Accommodated & Accommodation Parties

The Interstate Commerce Act (Act) requires the Interstate Commerce Commission (Commission) to approve consolidations in the public interest. [49 U.S.C.S. § 11343\(a\)\(1\)](#). Recognizing that consolidations in the public interest will result in wholesale dismissals and extensive transfers, involving expense to transferred employees as well as the loss of seniority rights, the Act imposes a number of labor-protecting requirements to ensure that the Commission accommodates the interests of affected parties to the greatest extent possible. [49 U.S.C.S. § 11344\(b\)\(1\)\(D\)](#).

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Consolidation & Merger  
Transportation Law > Interstate Commerce > General Overview

#### [\*\*HN15\*\*](#) [ ] Railroads & Rail Transportation, Consolidation & Merger

[49 U.S.C.S. § 11341\(a\)](#) guarantees that once these interests are accounted for and once the consolidation is approved, obligations imposed by laws such as the Railway Labor Act will not prevent the efficiencies of consolidation from being achieved.

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Consolidation & Merger  
Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements  
Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation  
Labor & Employment Law > Collective Bargaining & Labor Relations > Interpretation of Agreements  
Transportation Law > Interstate Commerce > General Overview

#### [\*\*HN16\*\*](#) [ ] Railroads & Rail Transportation, Consolidation & Merger

The court holds that, as necessary to carry out a transaction approved by the Interstate Commerce Commission, the term "all other law" in [49 U.S.C.S. § 11341\(a\)](#) includes any obstacle imposed by law. In this case, the term "all other law" in [§ 11341\(a\)](#) applies to the substantive and remedial laws respecting enforcement of collective-bargaining agreements.

Transportation Law > Interstate Commerce > General Overview

#### [\*\*HN17\*\*](#) [ ] Transportation Law, Interstate Commerce

The immunity provision does not exempt carriers from all law, but rather from all law necessary to carry out an approved transaction.

## **Lawyers' Edition Display**

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## Decision

[49 USCS 11341\(a\)](#) held to exempt rail carriers from obligations under collective bargaining agreements as necessary to effect consolidations approved by Interstate Commerce Commission.

## Summary

These two, consolidated cases presented the question whether [49 USCS 11341\(a\)](#)--which provides that, where the Interstate Commerce Commission (ICC) has approved a rail carrier consolidation, a carrier in the consolidation "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [the carrier] carry out the transaction"--exempts a carrier in an approved consolidation from legal obligations arising under a collective bargaining agreement. In one case, following approval by the ICC of the consolidation of two rail carriers, the newly consolidated carriers had proposed for reasons of efficiency to transfer certain employees of one carrier to another city. The labor union representing the affected employees contended that (1) the carriers' proposal involved a change in the collective bargaining agreement between the carrier and its employees that was subject to mandatory bargaining under the Railway Labor Act (RLA) ([45 USCS 151 et seq.](#)); and (2) the carriers were required to preserve the affected employees' rights under the collective bargaining agreement and their right to union representation under the RLA. After negotiations failed to resolve these issues, arbitration was sought pursuant to conditions imposed by the ICC generally upon rail carrier mergers to protect the interests of carrier employees. The arbitration committee ruled in the carriers' favor, stating that the proposed transfer of employees was an incident of the ICC-approved merger and that the provisions of the collective bargaining agreement and the RLA could be abrogated as necessary to implement the merger. On appeal, the ICC affirmed the ruling of the arbitration committee, stating that because the employee transfer was incident to the approved merger, it was by virtue of 11341(a) not subject to conflicting laws. In the second case, a carrier formed by an ICC-approved consolidation proposed to close a repair shop and transfer the shop's employees to a similar shop at a different location. The union representing the employees contended that this proposal contravened its collective bargaining agreement. An arbitration committee ruled that (1) the collective bargaining agreement could be superseded to the extent that it impeded an operational change authorized or required by the ICC's approval of the consolidation; and (2) the repair work at the shop the carrier proposed to close could be transferred, because such a transfer was necessary to the original consolidation; but (3) employees protected against transfer by the collective bargaining agreement could not be transferred. On appeal, the ICC affirmed the ruling regarding the transfer of work, and reversed the ruling regarding the transfer of employees, stating that preventing the transfer of employees would effectively prevent implementation of the consolidation ([4 ICC2d 641](#)). On appeal of both cases, the United States Court of Appeals for the District of Columbia Circuit, considering the cases together, reversed and remanded the cases to the ICC, holding that 11341(a) does not authorize the ICC to relieve a party of obligations under a collective bargaining agreement, which obligations impede implementation of an approved consolidation ([279 App DC 239, 880 F2d 562](#)).

On certiorari, the United States Supreme Court reversed and remanded for further proceedings. In an opinion by Kennedy, J., joined by Rehnquist, Ch. J., and White, Blackmun, O'Connor, Scalia, and Souter, JJ., it was held that 11341(a) exempts a carrier in an ICC-approved consolidation from any legal obligations imposed by a collective bargaining agreement to the extent necessary to carry out the consolidation, because (1) the language of 11341(a), exempting carriers from "the antitrust laws and all other law, including State and municipal law," is clear, broad, and unqualified, and includes the Railway Labor Act, which gives legal and binding effect to collective bargaining agreements between rail carriers and their employees; (2) this interpretation of 11341(a) makes sense of the consolidation provisions of the Interstate Commerce Act, which were designed to promote economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure; and (3) this interpretation of 11341(a) will not lead to bizarre results, inasmuch as the immunity provision does not exempt carriers from all law, but rather from all law as necessary to carry out an approved transaction.

Stevens, J., joined by Marshall, J., dissented, expressing the view that the exemption in 11341(a) does not include obligations imposed by private contracts.

## Headnotes

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COURTS §775 > INTERSTATE COMMERCE COMMISSION §39 > LABOR §41 > STATUTES §82 > consolidation of rail carriers -- exemption from other laws -- collective bargaining agreements -- > Headnote:

[LEdHN\[1A\]](#) [ ] [1A] [LEdHN\[1B\]](#) [ ] [1B] [LEdHN\[1C\]](#) [ ] [1C] [LEdHN\[1D\]](#) [ ] [1D] [LEdHN\[1E\]](#) [ ] [1E] [LEdHN\[1F\]](#) [ ] [1F]

[49 USCS 11341\(a\)](#), a part of the Interstate Commerce Act, exempts a rail carrier in a consolidation approved by the Interstate Commerce Commission from any legal obligations imposed by a collective bargaining agreement to the extent necessary to carry out the consolidation, because (1) the language of 11341(a), exempting carriers from "the antitrust laws and all other law, including State and municipal law," is clear, broad, and unqualified, and includes the Railway Labor Act, which gives legal and binding effect to collective bargaining agreements between rail carriers and their employees; (2) the principle of ejusdem generis--which states that when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration, but which does not control when the whole context dictates a different conclusion--does not require a different result, inasmuch as (a) because repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, Congress may have determined that it should make a clear and separate statement to include antitrust laws within the general exemption of 11341(a), (b) the otherwise general term "all other law" includes, but is not limited to, "State and municipal law," showing that "all other law" refers to more than laws related to antitrust, and (c) the fact that "all other law" entails more than "the antitrust laws," but is not limited to "State and municipal law," reinforces the conclusion, inherent in the word "all," that the phrase "all other law" includes federal law other than the antitrust laws; (3) this conclusion is supported by prior case law in which the United States Supreme Court, construing a statute which was the immediate precursor of 11341(a) and which was substantially identical to it, held that the contract rights under state law of minority shareholders--who contended that the terms of an ICC-approved merger diminished the value of their shares as guaranteed by the corporate charter--did not survive the merger agreement found by the ICC to be in the public interest; (4) this interpretation of 11341(a) makes sense of the consolidation provisions of the Interstate Commerce Act, which were designed to promote economy and efficiency in interstate transportation by removing the burdens of excessive expenditure while also requiring the ICC to accommodate to the greatest extent possible the interests of affected carrier employees before approving a consolidation; and (5) this interpretation of 11341(a) will not lead to bizarre results, inasmuch as the immunity provision of the statute does not exempt carriers from all law, but rather from all law as necessary to carry out an approved consolidation. (Stevens and Marshall, JJ., dissented from this holding.)

APPEAL §1662 > mootness -- interpretation of statute -- alternative basis for decision on remand -- > Headnote:

[LEdHN\[2A\]](#) [ ] [2A] [LEdHN\[2B\]](#) [ ] [2B]

On certiorari from a judgment of a United States Court of Appeals which (1) held that [49 USCS 11341\(a\)](#)--which provides that, where the Interstate Commerce Commission (ICC) has approved a rail carrier consolidation, a carrier in the consolidation "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [the carrier] carry out the transaction"--does not exempt a rail carrier in an approved consolidation from obligations imposed by a collective bargaining agreement; (2) reversed rulings by the ICC in two cases stating that under 11341(a), carriers in approved consolidations who proposed to implement the consolidations by taking measures which allegedly violated collective bargaining agreements, were not obligated to honor the collective bargaining agreements or to engage in procedures mandated by the Railway Labor Act (RLA) ([45 USCS 151 et seq.](#)) for the resolution of labor disputes; and (3) remanded the cases for consideration by the ICC (a) whether 11341(a) could operate to override provisions of the RLA, and (b) whether, under "labor-protective" conditions promulgated by the ICC pursuant to [49 USCS 11347](#) and applying to rail carrier consolidations, an arbitration

committee hearing a labor dispute arising from an approved railroad merger may override provisions of a collective bargaining agreement, the United States Supreme Court--where the ICC, on remand from the United States Court of Appeals, has (1) adhered to the Court of Appeals' ruling that 11341(a) does not authorize it to override provisions of a collective bargaining agreement; (2) ruled that 11341(a) authorizes it to foreclose resort to RLA remedies for modification and enforcement of collective bargaining agreements, at least to the extent of its authority under 11347 to impose labor-protective conditions on rail carrier consolidations; (3) remanded its decision to the parties for further negotiation or arbitration; and (4) predicated the analysis in its remand order on the correctness of the Court of Appeals' interpretation of 11341(a)--will not dismiss the case as moot, because (1) the Supreme Court's definitive interpretation of 11341(a) may affect the ICC's remand order; (2) the ICC's compliance with the Court of Appeals' mandate does not affect the correctness of the Court of Appeals' decision; and (3) the alternative basis offered by the ICC for its remand order does not end the controversy between the parties, inasmuch as the parties retain an interest in the validity of the ICC's original order because the Court of Appeals may again disagree with the ICC's interpretation of 11341(a) on review of the ICC's order on remand.

ADMINISTRATIVE LAW §276 > judicial review -- construction of statute -- > Headnote:

[LEdHN\[3\]](#) [3]

When reviewing a federal administrative agency's interpretation of a federal statute, the United States Supreme Court begins with the language of the statute and asks whether Congress has spoken on the subject before it; if the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

CONTRACTS §87 > legal force -- > Headnote:

[LEdHN\[4\]](#) [4]

A contract has no legal force apart from the law that acknowledges its binding character.

## Syllabus

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Once the Interstate Commerce Commission (ICC) has approved a rail carrier consolidation under the conditions set forth in Chapter 113 of the Interstate Commerce Act (Act), [49 U. S. C. § 11301 et seq.](#), a carrier in such a consolidation "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction . . .," [§ 11341\(a\)](#). In these cases, the ICC issued orders exempting parties to approved railway mergers from the provisions of collective-bargaining agreements. The Court of Appeals reversed and remanded, holding that [§ 11341\(a\)](#) [\*\*\*\*2] does not authorize the ICC to relieve a party of collectively bargained obligations that impede implementation of an approved transaction. Reasoning, *inter alia*, that the legislative history demonstrates a congressional intent that [§ 11341\(a\)](#) apply to specific types of positive laws and not to common-law rules of liability, such as those governing contracts, the court declined to decide whether the section could operate to override provisions of the Railway Labor Act (RLA) governing the formation, construction, and enforcement of the collective-bargaining agreements at issue.

*Held:* The [§ 11341\(a\)](#) exemption "from all other law" includes a carrier's legal obligations under a collective-bargaining agreement when necessary to carry out an ICC-approved transaction. The exemption's language, as correctly interpreted by the ICC, is clear, broad, and unqualified, bespeaking an unambiguous congressional intent to include any obstacle imposed by law. That language neither admits of a distinction between positive enactments

and common-law liability rules nor supports the exclusion of contractual obligations. Thus, the exemption effects an override of such obligations by superseding [\*\*\*\*3] the law -- here, the RLA -- which makes the contract binding. Cf. *Schwabacher v. United States*, 334 U.S. 182, 194-195, 200-201. This determination makes sense of the Act's consolidation provisions, which were designed to promote economy and efficiency in interstate transportation by removing the burdens of excessive expenditure. Whereas § 11343(a)(1) requires the ICC to approve consolidations in the public interest, and § 11347 conditions such approval on satisfaction of certain labor-protective conditions, the § 11341(a) exemption guarantees that once employee interests are accounted for and the consolidation is approved, the RLA -- whose major disputes resolution process is virtually interminable -- will not prevent the efficiencies of consolidation from being achieved. Moreover, this reading will not, as the lower court feared, lead to bizarre results, since § 11341(a) does not exempt carriers from all law, but rather from all law necessary to carry out an *approved* transaction. Although it might be true that § 11341(a)'s scope is limited by § 11347, and that the breadth of the exemption is defined by the scope of the approved transaction, [\*\*\*\*4] the conditions of approval and the standard for necessity are not at issue because the lower court did not pass on them and the parties do not challenge them here. Pp. 127-134.

**Counsel:** Jeffrey S. Berlin argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 89-1027 were Mark E. Martin and William P. Stallsmith, Jr. James S. Whitehead, Nicholas S. Yovanovic, and James D. Tomola filed briefs for petitioner in No. 89-1028.

Jeffrey S. Minear argued the cause for the federal respondents in support of petitioners in both cases pursuant to this Court's Rule 12.4. On the briefs were Acting Solicitor General Roberts, Deputy Solicitor General Shapiro, Lawrence S. Robbins, Robert S. Burk, Henri F. Rush, and John J. McCarthy, Jr.

William G. Mahoney argued the cause for the union respondents in both cases. With him on the brief was John O'B. Clarke, Jr. +

**Judges:** Kennedy, J., delivered the opinion of the Court, in which Rehnquist, C.J., and White, Blackmun, O'Connor, Scalia, and [\*\*\*\*5] Souter, JJ., joined. Stevens, J., filed a dissenting opinion, in which Marshall, J., joined, post, p. 134.

## Opinion

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[\*119] [\*\*\*101] [\*\*1158] JUSTICE KENNEDY delivered the opinion of the Court.

**LEdHN/1A** [↑] [1A]The Interstate Commerce Commission has the authority to approve rail carrier consolidations under certain conditions. *49 U. S. C. § 11301 et seq.* A carrier in an approved consolidation "is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction. . . ." § 11341(a). These cases require us to decide whether the carrier's exemption under § 11341(a) "from all other law" extends to its legal obligations under a collective-bargaining agreement. We hold that it does.

I

A

"Prior to 1920, competition was the *desideratum* of our railroad economy." St. Joe *Paper Co. v. Atlantic Coast Line R. Co.*, 347 U.S. 298, 315 (1954). Following a period of Government ownership during World War I, however, "many of the railroads were in very weak condition and their [\*\*\*\*6] continued survival was in jeopardy." *Id.*, at 315. At that time, the Nation made a commitment to railroad carrier consolidation as a means of promoting the health and efficiency of the railroad industry. Beginning with the Transportation Act of 1920, ch. 91, 41 Stat. 456,

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+ Richard T. Conway, Ralph J. Moore, Jr., D. Eugenia Langan, and David P. Lee filed a brief for the National Railway Labor Conference as amicus curiae urging reversal.

"consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy . . . so intimately related to the maintenance of an adequate and efficient rail transportation system that the 'public interest' in the one cannot be dissociated from that in the other." [United States v. Lowden, 308 U.S. 225, 232 \(1939\)](#). See generally St. [\*\*1159] [Joe Paper Co. v. Atlantic Coast Line R. Co., supra, at 315-321](#).

**HN1**[]

Chapter 113 of the Interstate Commerce Act, recodified in 1978 at [49 U. S. C. § 11301 et seq.](#), contains the current statement of this national policy. The Act grants the Interstate Commerce Commission exclusive authority to examine, condition, and approve proposed mergers [\*\*\*\*7] and consolidations of [\*120] transportation carriers within its jurisdiction. [§ 11343\(a\)\(1\)](#). The Act requires the Commission to "approve and authorize" the transactions when they are "consistent with the public interest." [§ 11344\(c\)](#). Among the factors the Commission must consider in making its public interest determination are "the interests of carrier employees affected by the proposed transaction." [§ 11344\(b\)\(1\)\(D\)](#).<sup>1</sup> In authorizing a merger or consolidation, the Commission [\*\*\*102] "may impose conditions governing the transaction." [§ 11344\(c\)](#). Once the Commission approves a transaction, a carrier is "exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let [it] carry out the transaction." [§ 11341\(a\)](#).

[\*\*\*8] **HN3**[]

When a proposed merger involves rail carriers, the Act requires the Commission to impose labor-protective conditions on the transaction to safeguard the interests of adversely affected railroad employees. [§ 11347](#). In *New York Dock Railway -- Control -- Brooklyn Eastern Dist. Terminal*, [360 I. C. C. 60, 84-90](#), aff'd sub nom. *New York Dock Railway v. United States*, [609 F.2d 83 \(CA2 1979\)](#), the Commission announced a comprehensive set of conditions and procedures designed to meet its obligations under [§ 11347](#). Section 2 of the *New York Dock* conditions **HN4**[]

provides that the "rates of pay, rules, working conditions and all collective [\*121] bargaining and other rights, privileges and benefits . . . under applicable laws and/or existing collective bargaining agreements . . . shall be preserved unless changed by future collective bargaining agreements." 360 I. C. C., at 84. Section 4 sets forth negotiation and arbitration procedures for resolution [\*\*\*9] of labor disputes arising from an approved railroad merger. *Id.*, at 85. Under § 4, a merged or consolidated railroad which plans an operational change that may cause dismissal or displacement of any employee must provide the employee and his union 90 days' written notice. *Ibid.* If the carrier and union cannot agree on terms and conditions within 30 days, each party may submit the dispute for an expedited "final, binding and conclusive" determination by a neutral arbitrator. *Ibid.* Finally, the *New York Dock* conditions provide affected employees with up to six years of income protection, as well as reimbursements for moving costs and losses from the sale of a home. See *id.*, at 86-89 (§§ 5-9, 12).

## B

The two cases before us today involve separate ICC orders exempting parties to approved railway mergers from the provisions of collective-bargaining agreements.

1. In No. 89-1027, the Commission approved an application by NWS Enterprises, Inc., to acquire control of two previously separate rail carriers, petitioners Norfolk and Western Railway Company (N&W) and Southern Railway

<sup>1</sup> Section [§ 11344\(b\)\(1\)](#) provides:

"**HN2**[]

In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

"(A) the effect of the proposed transaction on the adequacy of transportation to the public.

"(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

"(C) the total fixed charges that result from the proposed transaction.

"(D) the interest of carrier employees affected by the proposed transaction.

"(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region."

499 U.S. 117, \*121; 111 S. Ct. 1156, \*\*1159; 113 L. Ed. 2d 95, \*\*\*102; 1991 U.S. LEXIS 1709, \*\*\*\*9

Company (Southern). See *Norfolk Southern Corp. -- Control -- Norfolk & W. R. Co. and Southern R. Co., 366 I. C. C. 173* [\*\*1160] (1982). [\*\*\*\*10] In its order approving control, the Commission imposed the standard *New York Dock* labor-protective conditions and noted the possibility that "further displacement [of employees] may arise as additional coordinations occur." 366 I. C. C., at 230-231.

In September 1986, this possibility became a reality. The carriers notified the American Train Dispatchers' Association, the bargaining representative for certain N&W employees, [\*122] that they proposed to consolidate all "power distribution" -- the assignment of locomotives to particular trains and facilities -- for the N&W-Southern operation. To effect the efficiency move, the carriers informed the union that they would transfer work performed at the N&W power distribution center in Roanoke, Virginia, to the Southern [\*\*\*103] center in Atlanta, Georgia. The carriers proposed an implementing agreement in which affected N&W employees would be made management supervisors in Atlanta, and would receive increases in wages and benefits in addition to the relocation expenses and wage protections guaranteed by the *New York Dock* conditions. The union contended that this proposal involved a change in the existing [\*\*\*\*11] collective-bargaining agreement that was subject to mandatory bargaining under the Railway Labor Act (RLA), 44 Stat. 577, as amended, [45 U. S. C. § 151 et seq.](#) The union also maintained that the carriers were required to preserve the affected employees' collective-bargaining rights, as well as their right to union representation under the RLA.

Pursuant to § 4 of the *New York Dock* procedures, the parties negotiated concerning the terms of the implementing agreement, but they failed to resolve their differences. As a result, the carriers invoked the *New York Dock* arbitration procedures. After a hearing, the arbitration committee ruled in the carriers' favor. The committee noted that the transfer of work to Atlanta was an incident of the control transaction approved by the ICC, and that it formed part of the "additional coordinations" the ICC predicted would be necessary to achieve "greater efficiencies." The committee also held it had the authority to abrogate the provisions of the collective-bargaining agreement and of the RLA as necessary to implement the merger. Finally, it held that because the application of the N&W bargaining agreement [\*\*\*\*12] would impede the transfer, the transferred employees did not retain their collective-bargaining rights.

[\*123] The union appealed to the Commission, which affirmed by a divided vote. It explained that "[HNS](#)" it has long been the Commission's view that private collective bargaining agreements and [Railway Labor Act] provisions must give way to the Commission-mandated procedures of section 4 [of the *New York Dock* conditions] when parties are unable to agree on changes in working conditions required to implement a transaction authorized by the Commission." App. to Pet. for Cert. in No. 89-1027, p. 33a. Accordingly, the Commission upheld the arbitration committee's determination that the "compulsory, binding arbitration required by Article I, section 4 of *New York Dock*, took precedence over RLA procedures whether asserted independently or based on existing collective bargaining agreements." *Id.*, at 35a. The Commission also held that because the work transfer was incident to the approved merger, it was "immunized from conflicting laws by [section 11341\(a\)](#)." *Ibid.* Noting that [\*\*\*\*13] "imposition of the collective bargaining agreement would jeopardize the transaction because the work rules it mandates are inconsistent with the carriers' underlying purpose of integrating the power distribution function," the Commission upheld the decision to override the collective-bargaining agreement and RLA provisions. *Id.*, at 37a.

2. In No. 89-1028, the Commission approved an application by CSX Corporation to acquire control of the Chessie System, Inc., and Seaboard Coastline Industries, Inc. CSX Corp.-- Control -- [Chessie System, Inc., and Seaboard Coastline Industries, Inc.,](#) [\*\*104] 363 [\*\*1161] I. C. C. 521 (1980). Chessie was the parent of the Chesapeake and Ohio Railway Company and the Baltimore and Ohio Railway Company; Seaboard was the parent of the Seaboard Coast Line Railroad Company. In approving the control acquisition, the Commission imposed the *New York Dock* conditions and recognized that "additional coordinations may occur that could lead to further employee displacements." 363 I. C. C., at 589.

[\*124] In August 1986, the consolidated carrier notified respondent Brotherhood of Railway Carmen that it planned [\*\*\*\*14] to close Seaboard's heavy freight car repair shop at Waycross, Georgia, and transfer the Waycross employees to Chessie's similar shop in Raceland, Kentucky. The carrier informed the Brotherhood that the proposed transfer would result in a net decrease of jobs at the two shops. Pursuant to *New York Dock*, the carrier and the union negotiated concerning the terms of an agreement to implement the transfer. The sticking

point in the negotiations involved a 1966 collective-bargaining agreement between the union and Seaboard known as the "Orange Book." The Orange Book provided that the carrier would employ each covered employee and maintain each employee's work conditions and benefits for the remainder of the employee's working life. The Brotherhood contended that the Orange Book prevented CSX from moving work or covered employees from Waycross to Raceland.

When negotiations broke down, both the union and the carrier invoked the arbitration procedures under § 4 of *New York Dock*. The arbitration committee ruled for the carrier. It agreed with the union that the Orange Book prohibited the proposed transfer of work and employees. It determined, however, that it could override [\*\*\*\*15] any Orange Book or RLA provision that impeded an operational change authorized or required by the ICC's decision approving the original merger. The committee then held that the carrier could transfer the heavy repair work, which it found necessary to the original control acquisition, but could not transfer employees protected by the Orange Book, which it found would only slightly impair the original control acquisition. Both parties appealed the award to the Commission.

A divided Commission affirmed in part and reversed in part. The Commission agreed the committee possessed authority to override collective-bargaining rights and RLA rights that prevent implementation of a proposed transaction. [\*125] It reasoned, however, that "imposition of an Orange Book employee exception would effectively prevent implementation of the proposed transaction." *CSX Corp. -- Control -- Chessie System, Inc. and Seaboard Coast Line Industries, Inc., 41 U.S. App. D. C. 2d 641, 650 (1988)*. The Commission thus affirmed the arbitration committee's order permitting the transfer of work but reversed the holding that the carriers could not transfer Orange Book employees.

3. The unions appealed [\*\*\*\*16] both cases to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals considered the cases together and reversed and remanded to the Commission. *Brotherhood of Railway Carmen v. ICC, 279 U.S. App. D. C. 239, 880 F. 2d 562 (1989)*. The court held that § 11341(a) does not authorize the Commission to relieve a party of collective-bargaining [\*\*\*105] agreement obligations that impede implementation of an approved transaction. The court stated various grounds for its conclusion. First, because the court did not read the phrase "all other law" in § 11341(a) to include "all legal obstacles," it found "no support in the language of the statute" to apply the statute to obligations imposed by collective-bargaining agreements. *Id., at 244, 880 F. 2d, at 567*. Second, the court analyzed the Transportation Act of 1920, ch. 91, § 407, 41 Stat. 482, which contained a predecessor to § 11341(a), and found that Congress "did not intend, when it enacted the immunity provision, to override contracts." *279 U.S. App. D. C., at 247, 880 F. 2d, at 570*. The court noted that Congress had "focused nearly exclusively [\*\*\*\*17] . . . on specific [\*\*1162] types of laws it intended to eliminate -- all of which were positive enactments, not common law rules of liability, as on a contract." *Ibid.* The court further noted that Congress had often revisited the immunity provision without making it clear that it included contracts or collective-bargaining agreements. *Ibid.* Finally, the court did not defer to the ICC's interpretation of the Act, presumably because it determined that the Commission's interpretation was belied by the contrary "unambiguously [\*126] expressed intent of Congress," *id., at 244, 880 F. 2d, at 567* (quoting *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)*).

In ruling that § 11341(a) did not apply to collective-bargaining agreements, the court "declined to address the question" whether the section could operate to override provisions of the RLA. *Brotherhood of Railway Carmen, supra, at 247-250, 880 F. 2d, at 570-573*. It also declined to consider whether the labor-protective conditions required by § 11347 are exclusive, or whether § 4 of the *New York Dock* conditions [\*\*\*\*18] gives an arbitration committee the right to override provisions of a collective-bargaining agreement. *279 U.S. App. D. C., at 250, 880 F. 2d, at 573*. The court remanded the case to the Commission for a determination on these issues.

After the Court of Appeals denied the carriers' petitions for rehearing, the carriers in the consolidated cases filed petitions for certiorari, which we granted on March 26, 1990. 494 U.S. 1055 (1990).<sup>2</sup> We now reverse.

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<sup>2</sup>On September 9, 1989, the Commission also filed a petition for rehearing, and requested the court to refrain from ruling on the petition until the Commission could issue a comprehensive decision on remand addressing issues that the Court of Appeals left

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[\*127] [\*\*\*106] [LEdHN\[1B\]](#) [↑] [1B]II

Title [49 U. S. C. § 11341\(a\)](#) provides:

"... [HN6](#) [↑] A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. . . ."

We address the narrow question whether the exemption in [§ 11341\(a\)](#) from "all other law" includes a carrier's legal obligations under a collective-bargaining agreement.

[LEdHN\[1C\]](#) [↑] [1C] [LEdHN\[2A\]](#) [↑] [2A] By its terms, the exemption applies only when *necessary* to carry out an *approved* transaction. These predicates, however, are not at issue here, for the Court of Appeals [\*\*1163] did not pass on them and the parties [\*\*\*\*20] do not challenge them. [HNT](#) [↑] For purposes of this decision, we assume, without deciding, that the Commission properly considered the public interest factors of [§ 11344\(b\)\(1\)](#) in approving the original transaction, that its decision to override the carrier's obligations is consistent with the labor-protective requirements of [§ 11347](#), and that the override was necessary to the implementation of the transaction within the meaning of [§ 11341\(a\)](#). Under these [\*128] assumptions, we hold that the exemption from "all other law" in [§ 11341\(a\)](#) includes the obligations imposed by the terms of a collective-bargaining agreement.<sup>3</sup>

open for resolution. On September 29, 1989, the Court of Appeals issued an order stating that the Commission's petition for rehearing would be "deferred pending release of the ICC's decision on remand." App. to Pet. for Cert. in No. 89-1027, p. 54a.

On January 4, 1990, the Commission reopened proceedings in the case remanded to it. On May 21, 1990, two months after we granted the carriers' petitions for certiorari, the Commission issued its remand decision. *CSX Corp. -- Control -- Chessie System, Inc. and Seaboard Coast Line Industries, Inc., 6 I. C. C. 2d 715 (1990)*. In its decision, the Commission adhered to the Court of Appeals' ruling that [§ 11341\(a\)](#) did not authorize it to override provisions of a collective-bargaining agreement. The Commission held, however, that [§ 11341\(a\)](#) authorized it to foreclose resort to RLA remedies for modification and enforcement of collective-bargaining agreements "at least to the extent of [its] authority" to impose labor-protective conditions under [§ 11347](#). *Id.*, at 754. The Commission explained that the [§ 11347](#) limit on its [§ 11341\(a\)](#) authority "reflects the consistency of the overall statutory scheme for dealing with CBA modifications required to implement Commission-approved mergers and consolidations." *Id.*, at 722. The Commission remanded its decision to the parties for further negotiation or arbitration.

On December 4, 1990, the union respondents petitioned the Court of Appeals for review of the Commission's remand decision. The petition raises three issues: (1) whether [§ 11341\(a\)](#) authorizes the ICC to foreclose employee resort to the RLA; (2) whether [§ 11347](#) authorizes the ICC to compel employees to arbitrate changes in collective-bargaining agreements; and (3) whether abrogation of employee contract rights effected a taking in violation of the Due Process and [Just Compensation clauses of the Fifth Amendment](#).

<sup>3</sup> [LEdHN\[2B\]](#) [↑] [2B]

On May 23, 1990, and again on September 19, 1990, the union respondents filed motions to dismiss the case as moot. They argued that in light of the alternative ground for decision offered by the ICC on remand from the Court of Appeals, see n. 2, *supra*, the meaning and scope of [§ 11341\(a\)](#) was no longer material to the dispute. The union respondents reassert their mootness argument in their brief on the merits. Brief for Respondent Unions 18.

We disagree. The Commission predicated the analysis in its remand order on the correctness of the Court of Appeals' interpretation of [§ 11341\(a\)](#). Thus, our definitive interpretation of [§ 11341\(a\)](#) may affect the Commission's remand order. Agency compliance with the Court of Appeals' mandate does not moot the issue of the correctness of the court's decision. See, e. g., *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 791, n. 1 (1985); *Schweiker v. Gray Panthers*, 453 U.S. 34, 42, n. 12 (1981); *Maher v. Roe*, 432 U.S. 464, 468-469, n. 4 (1977). In addition, the alternative basis offered by the Commission on remand does not end the controversy between the parties. The parties retain an interest in the validity of the

[\*\*\*\*21] [LEdHN\[1D\]](#)<sup>↑</sup> [1D][LEdHN\[3\]](#)<sup>↑</sup> [3]As always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us. "[HN8](#)<sup>↑</sup>" If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." [Chevron, 467 U.S., at 842-843.](#) [\*\*\*\*107] The contested language in [§ 11341\(a\)](#), exempting carriers from "the antitrust laws and all other law, including State and municipal law," is clear, broad, and unqualified. It does not admit of the distinction the Court of Appeals drew, based on its analysis of legislative history, between positive enactments and common-law rules of liability. Nor does it support the Court of Appeals' conclusion that Congress did not intend the immunity clause to apply to contractual obligations.

[\*129] [LEdHN\[1E\]](#)<sup>↑</sup> [1E] [\*\*\*\*22] [HN9](#)<sup>↑</sup> By itself, the phrase "all other law" indicates no limitation. The circumstance that the phrase "all other law" is in addition to coverage for "the antitrust laws" does not detract from this breadth. There is a canon of statutory construction which, on first impression, might seem to dictate a different result. [HN10](#)<sup>↑</sup> Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration. See [Arcadia v. Ohio Power Co., 498 U.S. 73, 84-85 \(1990\)](#). The canon does not control, however, when the whole context dictates a different conclusion. Here, there are several reasons the immunity provision cannot be interpreted to apply only to antitrust laws and similar statutes. First, because "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored," [United States v. Philadelphia Nat. Bank, 374 U.S. 321, 350 \(1963\)](#), Congress may have determined that it should make a clear and separate statement to include antitrust laws within the general exemption of [§ 11341\(a\)](#). Second, the otherwise general [\*\*\*\*23] term "all other law" "includes" (but is not limited to) "State and municipal law." This shows that "all other law" refers to more than laws related to antitrust. Also, the fact that "all other law" entails more than "the antitrust laws," but is not limited to "State and municipal law," reinforces the conclusion, inherent in the [\*\*1164] word "all," that the phrase "all other law" includes federal law other than the antitrust laws. [HN11](#)<sup>↑</sup> In short, the immunity provision in [§ 11341](#) means what it says: A carrier is exempt from *all law* as necessary to carry out an ICC-approved transaction.

[LEdHN\[1F\]](#)<sup>↑</sup> [1F][LEdHN\[4\]](#)<sup>↑</sup> [4]The exemption is broad enough to include laws that govern the obligations imposed by contract. "The obligation of a contract is 'the law which binds the parties to perform their agreement.'" [Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 429 \(1934\)](#) (quoting [Sturges v. Crowninshield, 4 Wheat. 122, 197 \(1819\)](#)). [\*\*\*\*24] A contract depends on a regime [\*130] of common and statutory law for its effectiveness and enforcement.

"Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge." [Farmers and Merchants Bank of Monroe v. Federal Reserve Bank of Richmond, 262 U.S. 649, 660 \(1923\)](#).

[HN12](#)<sup>↑</sup> [\*\*\*\*108] A contract has no legal force apart from the law that acknowledges its binding character. As a result, the exemption in [§ 11341\(a\)](#) from "all other law" effects an override of contractual obligations, as necessary to carry out an approved transaction, by suspending application of the law that makes the contract binding.

*Schwabacher v. United States*, 334 U.S. 182 (1948), which construed the immediate precursor of § 11341(a), § 5(11) of the Transportation Act of [\*\*\*\*25] 1940, ch. 722, § 7, 54 Stat. 908-909,<sup>4</sup> supports this conclusion. In *Schwabacher*, minority stockholders in a carrier involved in an ICC-approved merger complained that the terms of the merger diminished the value of their shares as guaranteed by the corporate charter [\*131] and thus "deprived [them] of contract rights under Michigan law. . . ." *334 U.S., at 188*. We explained that the Commission was charged under the Act with passing upon and approving all capital liabilities assumed or discharged by the merged company, and that once the Commission approved a merger in the public interest and on just and reasonable terms, the immunity provision relieved the parties to the merger of "restraints, limitations, and prohibitions of law, Federal, State, or municipal," as necessary to carry out the transaction. *Id., at 194-195, 198*. We noted that before approving the merger, the Commission had a duty "to see that minority interests are protected," and emphasized that any such minority rights were, "as a matter of federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable." *Id., at 201*. [\*\*\*\*26] Once these interests were accounted for, however, "it would be inconsistent to allow state law to apply a liquidation basis [for valuation] to what federal law designates as a basis for continued public service." *Id., at 200*. Relying in part on the immunity provision, we held the contract [\*\*1165] rights protected by state law did not survive the merger agreement found by the Commission to be in the public interest. *Id., at 194-195, 200-201*. Because the Commission had disclaimed jurisdiction to settle the shareholders' complaints, we remanded the case to the Commission to ensure that the terms of the merger were just and reasonable. *Id., at 202*.

[\*\*\*\*27] Just as the obligations imposed by state contract law did not survive the merger at issue in *Schwabacher*, the obligations imposed by the law that gives force to the carriers' collective-bargaining agreements, the [\*\*\*109] RLA, do not survive the merger in this case. The RLA governs the formation, construction, and enforcement of the labor-management contracts in issue here. It requires carriers and employees to make reasonable efforts "to make and maintain" collective-bargaining agreements, *45 U. S. C. § 152* First, and to refrain from making changes in existing agreements except in [\*132] accordance with RLA procedures, *45 U. S. C. §§ 152* Seventh, 156. The Act "extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements." *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239, 242 (1950). *HN13*↑ As the law which gives "legal and binding effect to collective agreements," *Detroit & T. S. L. R. Co. v. United Transportation Union*, 396 U.S. 142, 156 (1969), [\*\*\*\*28] the RLA is the law that, under § 11341(a), is superseded when an ICC-approved transaction requires abrogation of collective-bargaining obligations. See *ICC v. Locomotive Engineers*, 482 U.S. 270, 287 (1987) (Stevens, J., concurring in judgment); *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F. 2d 794, 801 (CA1 1986); *Missouri Pacific R. Co. v. United Transportation Union*, 782 F. 2d 107, 111 (CA8 1986); *Burlington Northern, Inc. v. American Railway Supervisors Assn.*, 503 F. 2d 58, 62-63 (CA7 1974); *Bundy v. Penn Central Co.*, 455 F. 2d 277, 279-280 (CA6 1972); *Nemitz v. Norfolk & Western R. Co.*, 436 F. 2d 841, 845 (CA6), aff'd, 404 U.S. 37 (1971); *Brotherhood of Locomotive Engineers v. Chicago & N. W. R. Co.*, 314 F. 2d 424 (CA8 1963); *Texas & N. O. R. Co. v. Brotherhood of Railroad Trainmen*, 307 F. 2d 151, 161-162 (CA5 1962); *Railway Labor Executives Assn. v. Guilford Transp. Industries, Inc.*, 667 F. Supp. 29, 35 (Me. 1987), aff'd, 843 F. 2d 1383 (CA1 1988). [\*\*\*\*29]

Our determination that § 11341(a) supersedes collective-bargaining obligations via the RLA as necessary to carry out an ICC-approved transaction makes sense of the consolidation provisions of the Act, which were designed to promote "economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure." *Texas v. United States*, 292 U.S. 522, 534-535 (1934). *HN14*↑ The Act requires the Commission to

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<sup>4</sup> Section 5(11) of the Transportation Act of 1940 provided:

"Any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission. . . ."

The recodification of this language in § 11341(a) effected no substantive change. See H. R. Rep. No. 95-1395, pp. 158-160 (1978). See also *ICC v. Locomotive Engineers*, 482 U.S. 270, 299, n. 12 (1987) (Stevens, J., concurring in judgment).

approve consolidations in the public interest. [49 U. S. C. § 11343\(a\)\(1\)](#). Recognizing that consolidations in the public interest will "result in wholesale dismissals and extensive transfers, involving expense to [\*133] transferred employees" as well as "the loss of seniority rights," [United States v. Lowden, 308 U.S. 225, 233 \(1939\)](#), the Act imposes a number of labor-protecting requirements to ensure that the Commission accommodates the interests of affected parties to the greatest extent possible. [49 U. S. C. §§ 11344\(b\)\(1\)\(D\), 11347](#); see also [New York Dock Railway -- Control -- Brooklyn Eastern District Terminal, 360 I. C. C. 60 \(1979\)](#). [\*\*\*\*30] [Section 11341\(a\)](#) guarantees that [HN15](#) once these interests are accounted for and once the consolidation is approved, obligations imposed by laws such as the RLA will not prevent the efficiencies of consolidation from being achieved. If [§ 11341\(a\)](#) did not apply to bargaining [\*\*110] agreements enforceable under the RLA, rail carrier consolidations [\*\*1166] would be difficult, if not impossible, to achieve. The resolution process for major disputes under the RLA would so delay the proposed transfer of operations that any efficiencies the carriers sought would be defeated. See, e. g., [Burlington Northern R. Co. v. Maintenance of Way Employees, 481 U.S. 429, 444 \(1987\)](#) (resolution procedures for major disputes "virtually endless"); [Detroit & T. S. L. R. Co. v. United Transportation Union, 396 U.S. 142, 149 \(1969\)](#) (dispute resolution under RLA involves "an almost interminable process"); [Railway Clerks v. Florida East Coast R. Co., 384 U.S. 238, 246 \(1966\)](#) (RLA procedures are "purposely long and drawn out"). The immunity [\*\*\*\*31] provision of [§ 11341\(a\)](#) is designed to avoid this result.

[HN16](#) We hold that, as necessary to carry out a transaction approved by the Commission, the term "all other law" in [§ 11341\(a\)](#) includes any obstacle imposed by law. In this case, the term "all other law" in [§ 11341\(a\)](#) applies to the substantive and remedial laws respecting enforcement of collective-bargaining agreements. Our construction of the clear statutory command confirms the interpretation of the agency charged with its administration and expert in the field of railroad mergers. We affirm the Commission's interpretation of [§ 11341\(a\)](#), not out of deference in the face of an [\*134] ambiguous statute, but rather because the Commission's interpretation is the correct one.

This reading of [§ 11341\(a\)](#) will not, as the Court of Appeals feared, lead to bizarre results. [Brotherhood of Railway Carmen v. ICC, 279 U.S. App. D. C., at 244, 880 F. 2d, at 567](#). [HN17](#) The immunity provision does not exempt carriers from [\*\*\*\*32] all law, but rather from all law necessary to carry out an approved transaction. We reiterate that neither the conditions of approval, nor the standard for necessity, is before us today. It may be, as the Commission held on remand from the Court of Appeals, that the scope of the immunity provision is limited by [§ 11347](#), which conditions approval of a transaction on satisfaction of certain labor-protective conditions. See n. 2, *supra*. It also might be true that "the breadth of the exemption [in [§ 11341\(a\)](#)] is defined by the scope of the approved transaction. . ." [ICC v. Locomotive Engineers, supra, at 298](#) (Stevens, J., concurring in judgment). We express no view on these matters, as they are not before us here.

The judgment of the Court of Appeals is reversed, and the cases are remanded for proceedings consistent with this opinion.

*It is so ordered.*

**Dissent by:** STEVENS; MARSHALL

## Dissent

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JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

The statutory exemption that the Court construes today had its source in § 407 of the Transportation Act of 1920 (1920 Act). 41 Stat. 482. Its wording was slightly changed in 1940, 54 Stat. 908-909, [\*\*\*\*33] and again in 1978, 92 Stat. 1434. There is, however, no claim that either of those amendments modified the coverage [\*111] of the exemption in any way. It is therefore appropriate to begin with a consideration of the purpose and the text of the 1920 Act.

[\*135] Before the First World War, the railroad industry had been the prime target of antitrust enforcement.<sup>1</sup> In 1920, however, Congress adopted a new national transportation policy that expressly favored the consolidation of railroads. The policy of consolidation embodied in the 1920 Act would obviously [\*1167] have been frustrated by the federal antitrust laws had Congress not chosen to exempt explicitly all approved mergers from these laws. Section 407 of that Act provided, in part:

"The carriers affected by any order made under the foregoing provisions of this section . . . shall be, and they are hereby, relieved from the operation of the 'antitrust laws,' . . . and of all other restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section." 41 Stat. 482.

[\*\*\*\*34]

Both the background and the text of § 407 make it absolutely clear that its primary focus was on federal antitrust laws. Sensibly, however, Congress wrote that section using language broad enough to cover any other federal or state law that might otherwise forbid the consummation of any approved merger or prevent the immediate operation of its properties under a new corporate owner. Not a word in the statute, or in its legislative history, contains any hint that the approval of a [\*\*\*\*35] merger by the Interstate Commerce Commission (ICC) would impair the obligations of valid and otherwise enforceable private contracts.

Given the present plight of our Nation's railroads, it may be wise policy to give the ICC a power akin to, albeit greater [\*136] than, that of a bankruptcy court to approve a trustee's rejection of a debtor's executory private contracts.<sup>2</sup> Through nothing short of a *tour de force*, however, can one find any such power in [49 U. S. C. § 11341](#), or in either of its predecessors. Obviously, consolidated carriers would find it useful to have the ability to disavow disadvantageous long-term leases on obsolete car repair facilities, employment contracts with high salaried executives whose services are no longer needed, as well as collective-bargaining agreements that provide costly job security to a shrinking work force. If Congress had intended to give the ICC such broad ranging power to impair contracts, it would have done so in language much clearer than anything that can be found in the present Act.

[\*\*\*\*36] [\*112] The Court's contrary conclusion rests on its reading of the "plain meaning" of the present statutory text and our decision in [Schwabacher v. United States, 334 U.S. 182 \(1948\)](#). Neither of these reasons is sufficient. Moreover, the Court's reading is inconsistent with other unambiguous provisions in the statute.

I

With or without the *ejusdem generis* canon, I believe that the normal reader would assume that the text of [§ 11341](#) encompasses the antitrust laws, as well as other federal or state laws, that would otherwise prohibit rail carriers from consummating approved mergers, and nothing more. See *ante*, at 128. That text contains no suggestion that whenever a criminal law, tort law, or any regulatory measure impedes the efficient operation of a new merged carrier, the carrier can avoid such a restriction by virtue of the ICC approval of that merger. Nor does the text of [§ 11341](#) contain any suggestion [\*137] that such an approval would impair the obligation of private contracts.<sup>3</sup>

<sup>1</sup> See [United States v. Trans-Missouri Freight Assn., 166 U.S. 290 \(1897\)](#); [United States v. Joint Traffic Assn., 171 U.S. 505 \(1898\)](#); [Northern Securities Co. v. United States, 193 U.S. 197 \(1904\)](#); [United States v. Terminal Railroad Assn. of St. Louis, 224 U.S. 383 \(1912\)](#); [United States v. Union Pacific R. Co., 226 U.S. 61 \(1912\)](#); [United States v. Pacific & Arctic R. & Nav. Co., 228 U.S. 87 \(1913\)](#).

<sup>2</sup> [Section 365 of the Bankruptcy Code, 11 U. S. C. § 365](#), allows a trustee to assume or reject a debtor's executory contracts and unexpired leases subject to the subsequent approval of the bankruptcy court. Collective-bargaining agreements can be rejected only if the additional requirements of [11 U. S. C. § 1113](#) are met.

<sup>3</sup> As Judge D. H. Ginsburg, writing for the Court of Appeals, noted:

"We cannot sustain the ICC's position that this provision empowers it to override a [collective-bargaining agreement (CBA)]. First, and most important, the ICC's position finds no support in the language of the statute. By its terms, [§ 11341\(a\)](#)

Rather, as **[\*\*1168]** both an application of the *ejusdem generis* canon and an examination of the legislative history show, the purpose of the **[\*\*\*\*37]** exemption was to relieve the carriers "from the operation of the antitrust and other restrictive or prohibitory laws." H. R. Conf. Rep. No. 650, 66th Cong., 2d Sess., 64 (1920) (emphasis added).

**[\*\*\*\*38]** The Court speculates that the reason the 1920 Congress explicitly referred to the antitrust laws was simply to avoid the force of the rule that repeals of the antitrust laws by implication are not favored, citing *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 350 (1963). In that case, however, the rule was announced in the context of the industry's argument that federal regulatory approval of a transaction exempted the transaction from the antitrust laws even though the regulatory statute was entirely silent on the subject of exemption. *Ibid.* The authority cited in the *Philadelphia* **[\*138]** decision to support this rule sheds no light on the question whether a statute creating a broad exemption for mergers would naturally be read to include all statutes that otherwise would have prohibited the consummation **[\*\*\*113]** of a merger of large rail carriers.<sup>4</sup>

**[\*\*\*\*39]** Of greater importance, however, is the Court's rather remarkable assumption that an exemption "from 'all other" **[\*139]** law" should be read to encompass the restraints created **[\*\*1169]** by private contract.<sup>5</sup> **[\*\*\*\*40]**

contemplates exemption only from 'the antitrust laws and from all other law' to the extent necessary to carry out the transaction. Nowhere does it say that the ICC may also override contracts, nor has it ever, in any of the various iterations since its initial enactment in 1920, included even a general reference to 'contracts,' much less any specific reference to CBAs. Nor has the ICC explained how we can read the term 'other law,' as it has done, to mean 'all legal obstacles.' *Dispatchers*, J. A. 207. None of the Supreme Court decisions, discussed below, authorizing the ICC to abrogate an 'other law' even suggests that the term means 'all legal obstacles.' The ICC itself, prior to its 1983 decision in *DRGW*, recognized as much. See *Gulf, Mobile & Ohio R. R. Co. - Abandonment*, 282 I. C. C. 311, 335 (1952) ('None of the decisions in the [Supreme Court] cases . . . relates to private contractual rights, but refers [sic] to State laws which prohibit in some way the carrying out of the transaction authorized.')." *Brotherhood of Railway Carmen v. ICC*, 279 U.S. App. D. C. 239, 244, 880 F. 2d 562, 567 (1989).

<sup>4</sup> All but two of the cases that the Court cited in the *Philadelphia* decision to support the rule against implicit repeals of the antitrust statutes arose under a regulatory framework in which there was no mention of exemption. *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 350, n. 28 (1963). See *United States v. Trans-Missouri Freight Assn.*, 166 U.S., at 314-315; *United States v. Joint Traffic Assn.*, 171 U.S. 505 (1898); Northern Securities Co. v. United States, 193 U.S., at 343, 374-376 (plurality and dissenting opinions); *United States v. Pacific & Arctic R. & Nav. Co.*, 228 U.S., at 105, 107; *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 161-162 (1922); *Central Transfer Co. v. Terminal Railway Assn. of St. Louis*, 288 U.S. 469, 474-475 (1933); *Terminal Warehouse Co. v. Pennsylvania R. Co.*, 297 U.S. 500, 513-515 (1936); *United States v. Borden Co.*, 308 U.S. 188, 197-206 (1939); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226-228 (1940); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-457 (1945); *United States Alkali Export Assn., Inc. v. United States*, 325 U.S. 196, 205-206 (1945); *Allen Bradley Co. v. Electrical Workers*, 325 U.S. 797, 809-810 (1945); *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 9 (1958); *United States v. Radio Corp. of America*, 358 U.S. 334 (1959); *California v. FPC*, 369 U.S. 482 (1962); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). The other two cases involve regulations with explicit exemptions from the antitrust laws, but do not support the position taken by the Court in this case. In *Maryland & Virginia Milk Producers Assn., Inc. v. United States*, 362 U.S. 458 (1960), this Court held that § 6 of the Clayton Act's exemption of agricultural cooperatives from the **antitrust law** only protected the formation of those associations; once formed they could not engage in any further conduct that would violate the antitrust laws. In *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963), the Court held that the exemption relieving airlines from the operation of the antitrust laws when certain transactions were approved by the Civil Aeronautics Board did not exempt the airlines from all antitrust violations, but only exempted them from violations stemming from activity explicitly governed by the regulatory scheme.

<sup>5</sup> Again Judge Ginsburg's observation is pertinent:

"Moreover, the ICC's proposed insertion of 'all legal obstacles' into the statutory language would lead to most bizarre results. Under the ICC's reading, it could set to naught, in order to facilitate a merger, a carrier's solemn undertaking, in a bond indenture or a bank loan, to refrain from entering into any such transaction without the consent of its creditors. Cf. *Gulf, Mobile & Ohio*, 282 I. C. C. at 331-35 (declaring itself without power, in an abandonment context, to relieve a carrier from its 'contractual obligations for the payment of rent'). We do not think it likely that Congress would grant the ICC a power with so much potential to destabilize the railroad industry; we are confident, however, that it would not do so without so much as a word to that effect in the statute itself. Never, either in its decisions here under review or in prior cases, has the ICC offered any justification for this most unlikely reading of the Act." *279 U.S. App. D. C., at 244-245, 880 F. 2d, at 567-568.*

*Ante*, at 129-130. Even if the text of the present Act could bear that reading, it is flatly inconsistent with the text of the 1920 Act, which relieved the participating carriers "from the operation of the 'antitrust laws' . . . and of all other restraints or prohibitions by law, State or federal. . . ." 41 Stat. 482. Moreover, given the respect that our legal system has always paid to the enforceability of private contracts -- a respect that is evidenced by express language in the [\*\*\*114] Constitution itself<sup>6</sup> -- there should be a powerful presumption against finding an implied authority to impair contracts in a statute that was enacted to alleviate a legitimate concern about the antitrust laws. Had Congress intended to convey the message the Court finds in [§ 11341](#), it surely would have said expressly that the exemption was from all restraints imposed by law or by private contract.<sup>7</sup>

[\*140] [\*\*\*41] //

In my opinion, the Court's reliance on the decision in [\*Schwabacher v. United States\*, 334 U.S. 182 \(1948\)](#), is misplaced. In that case, the owners of two percent of the outstanding preferred stock of the Pere Marquette Railway brought suit in the United States District Court to set aside an ICC order approving a merger between that corporation and the Chesapeake and Ohio Railway Corporation. In approving the merger, the ICC had found that the market value of plaintiffs' preferred shares ranged, at different times, from \$ 87 to \$ 99 per share, and that the stock that they received in exchange pursuant to the merger agreement would have realized about \$ 90 and \$ 111 on the same dates. Thus, the terms of the merger, as applied to the plaintiffs' class, were just and reasonable. Plaintiffs contended, however, that the exchange value of their shares amounted to \$ 172.50 per share because the merger was a "liquidation" as a matter of Michigan law, and the Pere Marquette Charter provided that in the event of liquidation or dissolution, the preferred shareholders were entitled to receive full payment of par value plus all accrued unpaid dividends.

The ICC order [\*\*\*42] approving the merger did not resolve the Michigan law question. The ICC considered the issue too insignificant to affect the validity of the entire transaction, and left the matter for resolution by negotiation or later litigation. On appeal from the [\*\*1170] District Court's judgment sustaining the ICC order, this Court held that the ICC's finding that the exchange value was just and reasonable foreclosed any other claim that the dissenting shareholders might assert [\*141] concerning the value of their shares. Whatever Michigan law might provide for the preferred shareholders in the event of a winding-up or liquidation could not determine the just and reasonable value of shares in the continuing enterprise. The essence of the Court's holding is set forth in this passage:

"Since the federal law clearly contemplates merger as a step in [\*\*\*115] continuing the enterprise, it follows that what Michigan law might give these dissenters on a winding-up or liquidation is irrelevant, except insofar as it may be reflected in current values for which they are entitled to an equivalent. It would be inconsistent to allow state law to apply a liquidation basis to what federal [\*\*\*43] law designates as a basis for continued public service. . . .

. . .

"We therefore hold that no rights alleged to have been granted to dissenting stockholders by state law provision concerning liquidation survive the merger agreement approved by the requisite number of stockholders and approved by the Commission as just and reasonable. Any such rights are, as a matter of

<sup>6</sup> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." [\*U.S. Const., Art. I, § 10, cl. 1\*](#).

<sup>7</sup> After reviewing the legislative history, Judge Ginsburg concluded:

"From our review of this history, we are confident that Congress did not intend, when it enacted the immunity provision, to override contracts. First, Congress focused nearly exclusively, in the hearings and debates on the 1920 Act, on specific types of laws it intended to eliminate -- all of which were positive enactments, not common law rules of liability, as on a contract. Cf. [\*Association of Flight Attendants v. Delta Air Lines, Inc.\*, 879 F. 2d 906, 917 \(D. C. Cir. 1989\)](#). Indeed, Commissioner Clark, who presented the immunity idea to the House and Senate Commerce Committees in the hearings cited above, did not once suggest, over the course of several days and several hundred pages, that the proposed immunity might relieve a carrier of its obligations under negotiated agreements with third parties." [\*279 U.S. App. D. C., at 247, 880 F. 2d, at 570\*](#).

federal law, accorded recognition in the obligation of the Commission not to approve any plan which is not just and reasonable." *Id., at 200-201.*

It is true that the effect of the *Schwabacher* decision was to extinguish whatever contractual rights the dissenting shareholders possessed as a matter of Michigan law. But the Court did require the ICC, on remand, to consider whatever value the Michigan law claims might have in connection with its final conclusion that the merger plan was "just and reasonable." A fair reading of the entire opinion makes it clear that the holding was based more on the ICC's "complete control of the capital structure to result from a merger," *id., at 195*, than on the exemption at issue in this case. *Schwabacher* cannot fairly be read [\*\*\*\*44] as authorizing carriers to renounce private contracts that limit the benefits achievable through the merger.

### [\*142] III

There is tension between the Court's interpretation of the exemption that is now codified in [49 U. S. C. § 11341\(a\)](#) and the labor-protection conditions set forth in [49 U. S. C. § 11347](#). The latter section requires an ICC order approving a railroad merger to impose conditions that are "no less protective" of the employees than those established pursuant to the Rail Passenger Service Act, 84 Stat. 1337, as amended, [45 U. S. C. § 565](#). One of the conditions established by the Secretary of Labor under the latter Act was essentially the same as § 2 of the *New York Dock* conditions described by the Court, *ante*, at 120-121. As the Court notes, that condition provides that the benefits protected "under applicable laws and/or existing collective bargaining agreements . . . shall be preserved unless changed by future collective bargaining agreements." *Id., at 121* (citation omitted). This provision unambiguously indicates that Congress intended and expected that collective-bargaining [\*\*\*\*45] agreements would survive any ICC approved merger.

As I noted in my separate opinion in [ICC v. Locomotive Engineers, 482 U.S. 270, 298 \(1987\)](#), the statutory immunity provision in [§ 11341](#) is self-executing and becomes effective at the time of the ICC approval. "The breadth of the exemption is defined by the scope of the approved transaction, and no explicit announcement of exemption is required to make the statute applicable." *Ibid.* [\*\*\*116] (footnote omitted). In neither of the cases before the Court today did the ICC approval of the merger purport to modify or terminate any collective-bargaining agreement. The ICC approval orders were entered in 1980 and [\*\*1171] 1982 and contained no mention of either of the proposed transfers of personnel that are now at issue and about which the union was first notified several years after the ICC orders were entered.<sup>8</sup>

[\*\*\*\*46] [\*143] I cannot subscribe to a late-blooming interpretation of a 71-year-old immunity statute that gives the Commission a roving power -- exercisable years after a merger has been approved and consummated -- to impair the obligations of private contracts that may "prevent the efficiencies of consolidation from being achieved." *Ante*, at 133. The Court's decision may represent a "better" policy choice than the one Congress actually made in 1920, cf. *West Virginia University Hospitals, Inc. v. Casey, ante*, at 100-101, but it is neither an accurate reading of the command that Congress issued in 1920, nor is it a just disposition of claims based on valid private contracts.

<sup>8</sup> In the ICC order approving the merger of Chessie System, Inc., and Seaboard Coastline Industries, Inc., the ICC discussed how the coordination of facilities would generate significant cost reductions and improved economic efficiency. *CSX Corp. -- Control -- Chessie System, Inc., and Seaboard Coast Line Industries, Inc., 363 I. C. C. 521, 556 (1980)*. The ICC noted:

"These savings will spring from common-point coordination projects, mechanical and engineering department coordinations, locomotive and car utilization improvements, and internal rerouting efficiencies. Each of these projects is discussed separately below." *Ibid.*

In the discussion that followed, the ICC did discuss plans to expand the car production facilities at Raceland, Kentucky, in order to make cars for a member line that had been buying its cars from an independent manufacturer. The ICC found that the applicants had failed to show that the public would derive any benefit from this plan. There was no discussion of the consolidation of that facility by closing Seaboard's car repair shop in Waycross, Georgia. Nor did the ICC discuss the consolidation of locomotive works in *Norfolk Southern Corp. -- Control -- Norfolk & W. R. Co. and Southern R. Co., 366 I. C. C. 173 (1982)*.

I respectfully dissent.

## References

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[13 Am Jur 2d, Carriers 36](#); [48A Am Jur 2d Labor and Labor Relations 1698](#); Railroads 331-333

[49 USCS 11341\(a\)](#)

RIA Employment Coordinator LR-34,087

L Ed Digest, Interstate Commerce Commission 39; Labor 41

L Ed Index, Carriers; Collective Bargaining; Interstate Commerce Act or Commission, Railroads

Index to Annotations, Carriers; Collective Bargaining; Interstate Commerce Commission; [\*\*\*\*47] Railroads

Annotation References:

Supreme Court's application of the rules of ejusdem generis and noscitur a sociis. *46 L Ed 2d 879*.

When is subsequent business operation bound by existing collective bargaining agreement between labor union and predecessor employer. *88 ALR Fed 89*.

Meaning of "willful" under provision of Railway Labor Act ([45 USCS 152](#)(tenth)) making willful failure or refusal to comply with Act a criminal offense. *49 ALR Fed 611*.

Breach of collective bargaining agreement as unfair labor practice under National Labor Relations Act, as amended ([29 USCS 158](#)). *6 ALR Fed 589*.

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End of Document



## *City of Columbia v. Omni Outdoor Advertising*

Supreme Court of the United States

November 28, 1990, Argued ; April 1, 1991, Decided

No. 89-1671

### **Reporter**

499 U.S. 365 \*; 111 S. Ct. 1344 \*\*; 113 L. Ed. 2d 382 \*\*\*; 1991 U.S. LEXIS 1858 \*\*\*\*; 59 U.S.L.W. 4259; 1991-1 Trade Cas. (CCH) P69,378; 91 Cal. Daily Op. Service 2266; 92 Cal. Daily Op. Service 2366; 91 Daily Journal DAR 3723

CITY OF COLUMBIA et al. v. OMNI OUTDOOR ADVERTISING, INC.

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

**Disposition:** [891 F. 2d 1127](#), reversed and remanded.

## **Core Terms**

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Sherman Act, municipal, billboard, conspiracy, regulation, anticompetitive, economic regulation, exemption, ordinance, antitrust, anti trust law, immunity, private party, sham, government action, zoning, public official, lobbying, restraint of trade, public interest, state-action, invalidating, corruption, purposes, urges, city official, authorization, Advertising, city council, articulated

## **LexisNexis® Headnotes**

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

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Product Promotions

Antitrust & Trade Law > Sherman Act > General Overview

### **[HN1](#)[] Exemptions & Immunities, Parker State Action Doctrine**

The Sherman Act, [15 U.S.C.S. §§ 1](#) and [2](#), do not apply to anticompetitive restraints imposed by the states "as an act of government."

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

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

Parker immunity does not apply directly to local governments, however, that a municipality's restriction of competition may sometimes be an authorized implementation of state policy can be accorded Parker immunity where that is the case.

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

Transportation Law > Bridges & Roads > Billboards

### **HN3** Exemptions & Immunities, Parker State Action Doctrine

In order to prevent Parker from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law. Courts adopt an approach that is similar in principle, though not necessarily in precise application, elsewhere.

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

### **HN4** Exemptions & Immunities, Parker State Action Doctrine

The Parker defense also requires authority to suppress competition, more specifically, "clear articulation of a state policy to authorize anticompetitive conduct" by the municipality in connection with its regulation. It is enough if suppression of competition is the "foreseeable result" of what the statute authorizes.

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

Transportation Law > Bridges & Roads > Billboards

### **HN5** Exemptions & Immunities, Parker State Action Doctrine

A municipal ordinance restricting the size, location, and spacing of billboards, surely a common form of zoning, necessarily protects existing billboards against some competition from newcomers.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rebates

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

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

### **HN6** Antitrust & Trade Law, Sherman Act

The rationale of Parker is that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the states in their governmental capacities as sovereign regulators. The immunity does not necessarily obtain where the state acts not in a regulatory capacity but as a commercial participant in a given market.

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

## **HN7** Exemptions & Immunities, Parker State Action Doctrine

Where the action complained of is that of the state itself, the action is exempt from antitrust liability regardless of the state's motives in taking the action.

Antitrust & Trade Law > Sherman Act > Defenses

Criminal Law & Procedure > ... > Bribery > Commercial Bribery > Elements

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

Criminal Law & Procedure > ... > Crimes Against Persons > Bribery > General Overview

Criminal Law & Procedure > ... > Bribery > Public Officials > General Overview

## **HN8** Sherman Act, Defenses

The approach which would consider Parker inapplicable is only if, in connection with the governmental action in question, bribery or some other violation of state or federal law is established. Such unlawful activity has no necessary relationship to whether the governmental action is in the public interest.

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

Criminal Law & Procedure > ... > Bribery > Public Officials > General Overview

## **HN9** Exemptions & Immunities, Parker State Action Doctrine

When the regulatory body is not a single individual but a state legislature or city council, there is even less reason to believe that violation of the law by bribing a minority of the decisionmakers establishes that the regulation has no valid public purpose.

Antitrust & Trade Law > Sherman Act > Claims

Transportation Law > Rail Transportation > Lands & Rights of Way

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

## **HN10** Sherman Act, Claims

Courts are to reject any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on perceived conspiracies to restrain trade. With the possible market participant exception, any action that qualifies as state action is ipso facto exempt from the operation of the antitrust laws.

[Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview](#)

[Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview](#)

[Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview](#)

[Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties](#)

[Antitrust & Trade Law > Regulated Industries > General Overview](#)

[Antitrust & Trade Law > Sherman Act > General Overview](#)

## **HN11**[] **Exemptions & Immunities, Labor**

The federal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government. This doctrine, like Parker, rests ultimately upon a recognition that the antitrust laws, "tailored as they are for the business world, are not at all appropriate for application in the political arena." That a private party's political motives are selfish is irrelevant: Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.

[Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview](#)

## **HN12**[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The "sham" exception to Noerr encompasses situations in which persons use the governmental process -- as opposed to the outcome of that process -- as an anticompetitive weapon. A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, not one "who genuinely seeks to achieve his governmental result, but does so through improper means."

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## **HN13**[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

If Noerr teaches anything it is that an intent to restrain trade as a result of the government action sought does not foreclose protection.

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## **HN14**[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

A "conspiracy" exception to Noerr must be rejected.

## Lawyers' Edition Display

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### Decision

Federal antitrust laws held inapplicable to actions of (1) city which enacted billboard zoning ordinances, and (2) company which controlled relevant billboard market and which lobbied for ordinances.

### Summary

In 1981, a Georgia corporation began erecting billboards in and around the city of Columbia, South Carolina. In response, a South Carolina corporation--which had been in the billboard business in Columbia since the 1940s, and which controlled more than 95 percent of the relevant market in the Columbia area--met with city officials to seek the enactment of zoning ordinances that would restrict billboard construction. The South Carolina corporation was owned by a family whose members enjoyed close relations with the city's political leaders. In 1982, the city council passed an ordinance which imposed a moratorium period on billboard construction in the city, except as specifically authorized by the council. After this ordinance was invalidated by a state court on federal and state constitutional grounds, the city council passed a new ordinance which restricted the size, location, and spacing of billboards. Two months later, the Georgia corporation filed suit in United States District Court against both the South Carolina corporation and the city. The Georgia corporation alleged that the city's billboard ordinances (1) violated (a) 1 and 2 of the Sherman Act ([15 USCS 1, 2](#)), and (b) South Carolina's unfair trade practices statute; and (2) were the result of an anticompetitive conspiracy between city officials and the South Carolina corporation which stripped both parties of any immunity from the federal antitrust laws which they otherwise might have enjoyed. A jury returned general verdicts against the city and the South Carolina corporation on both the federal and state claims. The city and the South Carolina corporation moved for judgment notwithstanding the verdicts, and the District Court--finding that the activities of both parties were outside the scope of the federal antitrust laws--granted the motion. On appeal, the United States Court of Appeals for the Fourth Circuit (1) reversed the judgment of the District Court, and (2) reinstated the jury verdicts on all counts ([891 F2d 1127](#)).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Scalia, J., joined by Rehnquist, Ch. J., and Blackmun, O'Connor, Kennedy, and Souter, JJ., it was held that (1) the ordinance restricting the size, location, and spacing of billboards was entitled to immunity from the federal antitrust laws, where state statutes (a) authorized the city, through the exercise of its zoning power, to regulate the size, location, and spacing of billboards, and (b) clearly articulated a state policy to authorize the city's anticompetitive conduct in connection with its regulation; (2) there was no "conspiracy" exception to the rule, under [Parker v Brown \(1943\) 317 US 341, 87 L Ed 315, 63 S Ct 307](#), that the Sherman Act did not apply to anticompetitive restraints imposed by the states as an act of government, and any governmental action that qualified as state action--with the possible exception of instances where the state acts not in a regulatory capacity, but as a commercial participant in a given market--was ipso facto exempt from the operation of the federal antitrust laws; (3) the "sham" exception to the rule, under [Eastern R. Presidents Conference v Noerr Motor Freight, Inc. \(1961\) 365 US 127, 5 L Ed 2d 464, 81 S Ct 523](#), that the federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from state governments--which exception applies to situations in which persons use the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon--was inapplicable to the South Carolina corporation under the circumstances; (4) there was no "conspiracy" exception to the Noerr rule; and (5) the Supreme Court would remand the case for further proceedings, so that the Court of Appeals could determine (a) whether there should be a new trial with respect to only the private anticompetitive actions allegedly engaged in by the corporation, and (b) the effect of the Supreme Court's holding on the claim under the South Carolina unfair trade practices statute.

Stevens, J., joined by White and Marshall, JJ., dissenting, (1) agreed that (a) there was no "conspiracy" exception to the Parker rule when a state acted in a nonproprietary capacity, and (b) the "sham" exception to the Noerr rule did not apply to the South Carolina corporation's conduct in the case at hand; but (2) expressed the view that the Court of Appeals' judgment should be affirmed as to both the city and the South Carolina corporation, because (a)

the city's economic regulation of the billboard market pursuant to a general state grant of zoning power was not exempt from antitrust scrutiny, and (b) a private party's agreement with selfishly motivated public officials was sufficient to remove the antitrust immunity that protected private lobbying under the Noerr rule.

## **Headnotes**

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > immunity of municipality -- billboard ordinance -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C]

A municipality's enactment of an ordinance which restricts the size, location, and spacing of billboards is entitled to immunity from the federal antitrust laws, where state statutes (1) authorize the municipality, through the exercise of its zoning power, to regulate the size, location, and spacing of billboards, and (2) clearly articulate a state policy to authorize the municipality's anticompetitive conduct in connection with the municipality's regulation, since an ordinance containing such restrictions necessarily protects existing billboards against some competition from newcomers. (Stevens, White, and Marshall, JJ., dissented from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > state-action exemption -- "conspiracy" exception -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B] [LEdHN\[2C\]](#) [2C]

There is no "conspiracy" exception to the rule that the Sherman Act (*15 USCS 1 et seq.*) does not apply to anticompetitive restraints imposed by the states as an act of government; any governmental action that qualifies as state action--with the possible exception of instances where the state acts not in a regulatory capacity, but as a commercial participant in a given market--is ipso facto exempt from the operation of the federal antitrust laws; while a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it or by declaring that their action is lawful, the Sherman Act cannot be interpreted so as to allow plaintiffs to look behind the actions of state sovereigns in order to base claims on perceived conspiracies to restrain trade. (Stevens, White, and Marshall, JJ., dissented in part from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > exemption for private individuals' interaction with government -- "sham" exception -- > Headnote:

[LEdHN\[3A\]](#) [3A] [LEdHN\[3B\]](#) [3B] [LEdHN\[3C\]](#) [3C]

The "sham" exception to the rule that the federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from state governments--which exception encompasses situations in which persons use the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon--is inapplicable to a corporation in the billboard business which interacted with a municipality's officials for the purpose of delaying a competitor's entry into the market through the enactment of zoning ordinances, because (1) the corporation had set out to disrupt the competitor's business relationships not through the very process of lobbying, or of causing the officials to consider zoning measures, but rather through the ordinances, which were the ultimate product of that lobbying and consideration, (2) the delay in the competitor's entry into the market was not sought to be achieved by only the lobbying process itself, and (3) denial of meaningful access by the competitor to the appropriate administrative and legislative fora of the municipality--although possibly rendering the manner of

499 U.S. 365, \*365; 111 S. Ct. 1344, \*\*1344; 113 L. Ed. 2d 382, \*\*\*382; 1991 U.S. LEXIS 1858, \*\*\*\*1

lobbying improper or even unlawful--does not necessarily render the lobbying process a "sham" for purposes of the Sherman Act ([15 USCS 1 et seq.](#)).

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > exemption for private individuals' interaction with government -- "conspiracy" exception -- > Headnote:

[LEdHN\[4A\]](#) [4A] [LEdHN\[4B\]](#) [4B]

There is no "conspiracy" exception to the rule that the federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from state governments, because (1) it would be impracticable or beyond the scope of the antitrust laws to identify and invalidate lobbying by private individuals that has produced selfishly motivated agreement with public officials, and (2) if a conspiracy is limited to one that involves some element of unlawfulness beyond mere anticompetitive motivation, invalidation of the private individuals' conduct would have nothing to do with the policies of the antitrust laws. (Stevens, White, and Marshall, JJ., dissented from this holding.)

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > municipalities -- immunity -- determining authority under state law -- > Headnote:

[LEdHN\[5\]](#) [5]

For purposes of determining whether a municipality has acted beyond its delegated authority under state law, so as not to be immune from application of the federal antitrust laws, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > municipalities -- immunity -- regulatory authority -- > Headnote:

[LEdHN\[6A\]](#) [6A] [LEdHN\[6B\]](#) [6B]

In order for a municipality to assert its immunity from application of the federal antitrust laws with respect to regulation by the municipality, there must be (1) authority to regulate under state law--although the municipality need not be able to point to a specific, detailed legislative authorization--and (2) authority to suppress competition, which requires clear articulation of a state policy to authorize anticompetitive conduct by the municipality in connection with its regulation; a state statute delegating authority to suppress competition need not explicitly permit the displacement of competition, and it is enough if such suppression is the foreseeable result of what the statute authorizes.

COURTS §95.5 > purpose of governmental action -- constitutional question -- > Headnote:

[LEdHN\[7A\]](#) [7A] [LEdHN\[7B\]](#) [7B]

In cases which involve a challenge to an action taken by governmental officials, the United States Supreme Court will apply a subjective test to determine whether the officials thought that the action was in the public interest only where (1) a constitutional question is presented, and (2) the very nature of the question requires such an inquiry.

499 U.S. 365, \*365; 111 S. Ct. 1344, \*\*1344; 113 L. Ed. 2d 382, \*\*\*382; 1991 U.S. LEXIS 1858, \*\*\*\*1

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > state action -- motive -- > Headnote:  
[LEdHN\[8\]](#) [8]

Where an action complained of is that of the state itself, the action is exempt from antitrust liability regardless of the state's motives in taking the action.

BRIBERY §1 > action in public interest -- > Headnote:  
[LEdHN\[9\]](#) [9]

A mayor is guilty of accepting a bribe even if, in the public interest, the mayor would and should have taken the same action for which the bribe was paid.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > political activities -- > Headnote:  
[LEdHN\[10\]](#) [10]

Insofar as the Sherman Act ([15 USCS 1 et seq.](#)) sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > exemption for private individuals' interaction with government -- > Headnote:  
[LEdHN\[11A\]](#) [11A] [LEdHN\[11B\]](#) [11B]

The federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government with the intent to restrain trade; such laws, tailored as they are for the business world, are not appropriate for application in the political arena, and it is irrelevant that a private party's political motives are selfish; the policing of the legitimate boundaries of procedural and other means used by lobbyists or applicants who seek to have their opponent ignored is not the role of the Sherman Act ([15 USCS 1 et seq.](#)) when such defensive strategies are conducted in the context of a genuine attempt to influence governmental action.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > exemption for private individuals' interaction with government -- "sham" exception -- > Headnote:  
[LEdHN\[12\]](#) [12]

A "sham" exception to the rule that the federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government exists for situations in which persons use the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon, such as where a person files frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license, but simply in order to impose expense and delay; for purposes of this exception, a "sham" situation involves a party

whose activities are not genuinely aimed at procuring favorable government action, but does not involve a party who genuinely seeks to achieve a governmental result through improper means.

APPEAL §1692.2 > remand -- issue not decided -- misconception as to law -- > Headnote:

[LEdHN\[13A\]](#) [13A] [LEdHN\[13B\]](#) [13B]

In light of the United States Supreme Court's holding that a private corporation is entitled to immunity from the federal antitrust laws for its activities relating to the enactment by a municipality of certain billboard ordinances, the United States Supreme Court--upon reversing a Federal Court of Appeals decision which had reinstated a jury's general verdict that the corporation had violated 1 and 2 of the Sherman Act ([15 USCS 1, 2](#)) and a state unfair trade practices statute--will remand the case for further proceedings, so that the Court of Appeals can determine (1) whether there should be a new trial with respect to only the private anticompetitive actions--such as trade libel, the setting of artificially low rates, and inducement to breach of contract--allegedly engaged in by the corporation; and (2) the effect of the Supreme Court's holding on the claim against the corporation under the state unfair trade practices statute, where the Court of Appeals had ruled that (a) the corporation had conspired to restrain competition in violation of federal antitrust law, and (b) such conspiracy was "tantamount" to a violation of the state statute.

APPEAL §1585 > NEW TRIAL §7 > reversal -- error in instructions and verdict -- > Headnote:

[LEdHN\[14\]](#) [14]

On appellate review, a jury's general verdict against a private corporation and in favor of its competitor, based on instructions that erroneously permitted the assessment of liability against the corporation, under the federal antitrust laws, for seeking the enactment by a municipality of certain billboard ordinances, cannot be permitted to stand; however, the competitor will be entitled to a new trial if (1) the evidence was sufficient to sustain a verdict solely on the basis of the corporation's private anticompetitive actions--such as trade libel, the setting of artificially low rates, and inducement to breach of contract--and (2) the theory of liability as to such other actions has been properly preserved.

## Syllabus

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After respondent Omni Outdoor Advertising, Inc., entered the billboard market in petitioner Columbia, South Carolina, petitioner Columbia Outdoor Advertising, Inc. (COA), which controlled more than 95% of the market and enjoyed close relations with city officials, lobbied these officials to enact zoning ordinances restricting billboard construction. After such ordinances were passed, Omni filed suit against petitioners under [§§ 1](#) and [2](#) of the Sherman Act and the State's Unfair Trade Practices Act, alleging, *inter alia*, that the ordinances were the result of an anticompetitive conspiracy that stripped petitioners of any immunity to which they might otherwise be entitled. After Omni obtained a jury verdict on all counts, the District [\*\*\*\*2] Court granted petitioners' motions for judgment notwithstanding the verdict on the ground that their activities were outside the scope of the federal antitrust laws. The Court of Appeals reversed and reinstated the verdict.

*Held:*

1. The city's restriction of billboard construction is immune from federal antitrust liability under [Parker v. Brown, 317 U.S. 341, 352](#) -- which held that principles of federalism and state sovereignty render the Sherman Act inapplicable to anticompetitive restraints imposed by the States "as an act of government" -- and subsequent decisions

according *Parker* immunity to municipal restriction of competition in implementation of state policy, see, e. g., [\*Hallie v. Eau Claire\*, 471 U.S. 34, 38](#). Pp. 370-379.

(a) The Court of Appeals correctly concluded that the city was *prima facie* entitled to *Parker* immunity for its billboard restrictions. Although *Parker* immunity does not apply directly to municipalities or other political subdivisions of the States, it does apply where a municipality's restriction of competition is an authorized implementation of state policy. South Carolina's zoning statutes [\*\*\*\*3] unquestionably authorized the city to regulate the size, location, and spacing of billboards. The additional *Parker* requirement that the city possess clear delegated authority to suppress competition, see, e. g., [\*Hallie, supra, at 40-42\*](#), is also met here, since suppression of competition is at the very least a foreseeable result of zoning regulations. Pp. 370-373.

(b) The Court of Appeals erred, however, in applying a "conspiracy" exception to *Parker*, which is not supported by the language of that case. Such an exception would swallow up the *Parker* rule if "conspiracy" means nothing more than agreement to impose the regulation in question, since it is both inevitable and desirable that public officials agree to do what one or another group of private citizens urges upon them. It would be similarly impractical to limit "conspiracy" to instances of governmental "corruption," or governmental acts "not in the public interest"; virtually all anticompetitive regulation is open to such charges and the risk of unfavorable *ex post facto* judicial assessment would impair the States' ability to regulate their domestic commerce. Nor is it appropriate to limit [\*\*\*\*4] "conspiracy" to instances in which bribery or some other violation of state or federal law has been established, since the exception would then be unrelated to the purposes of the Sherman Act, which condemns trade restraints, not political activity. With the possible exception of the situation in which the State is acting as a market participant, *any* action that qualifies as state action is *ipso facto* exempt from the operation of the antitrust laws. Pp. 374-379.

2. COA is immune from liability for its activities relating to enactment of the ordinances under [\*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.\*, 365 U.S. 127, 141](#), which states a corollary to *Parker*. The federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government. The Court of Appeals erred in applying the "sham" exception to the *Noerr* doctrine. This exception encompasses situations in which persons use the governmental process itself -- as opposed to the *outcome* of that process -- as an anticompetitive weapon. That is not the situation here. [\*California Motor Transport Co. v. Trucking Unlimited\*, 404 U.S. 508, 512](#), [\*\*\*\*5] distinguished. Omni's suggestion that this Court adopt a "conspiracy" exception to *Noerr* immunity is rejected for largely the same reasons that prompt the Court to reject such an exception to *Parker*. Pp. 379-384.

3. The Court of Appeals on remand must determine (if the theory has been properly preserved) whether the evidence was sufficient to sustain a verdict for Omni based solely on its assertions that COA engaged in *private* anticompetitive actions, and whether COA can be held liable to Omni on its state-law claim. P. 384.

**Counsel:** Joel I. Klein argued the cause for petitioners. With him on the briefs were Paul M. Smith, Roy D. Bates, James S. Meggs, David W. Robinson II, and Heyward E. McDonald.

A. Camden Lewis argued the cause for respondent. With him on the brief was Randall M. Chastain. \*

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\* Charles Rothfeld, Benna Ruth Solomon, and Peter J. Kalis filed a brief for the National League of Cities et al. as amici curiae urging reversal.

Steven C. McCracken, Maurice Baskin, and John R. Crews filed a brief for Associated Builders and Contractors, Inc., as amicus curiae urging affirmance.

Eric M. Rubin and Walter E. Diercks filed a brief for the Outdoor Advertising Association of America, Inc., as amicus curiae.

**Judges:** Scalia, J., delivered the opinion of the Court, in which Rehnquist, C.J., and Blackmun, O'Connor, Kennedy, and Souter, JJ., joined. Stevens, J., filed a dissenting opinion, in which White and Marshall, JJ., joined, post, p. 385.

**Opinion by:** SCALIA

## Opinion

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[\*367] [\*389] [\*\*1347] [LEdHN\[1A\]](#) [1A] [LEdHN\[2A\]](#) [2A] [LEdHN\[3A\]](#) [3A] [LEdHN\[4A\]](#) [4A] This case requires us to clarify the application of the Sherman Act to municipal governments and to the citizens who seek action from them.

[\*\*\*390] I

Petitioner Columbia Outdoor Advertising, Inc. (COA), a South Carolina corporation, entered the billboard business in the city of Columbia, South Carolina (also a petitioner here), in the 1940's. By 1981 it controlled more than 95% of what has been conceded to be the relevant market. COA was a local business owned by a family with deep roots in the community, and enjoyed close relations with the city's political leaders. The [\*\*\*7] mayor and other members of the city council were personal friends of COA's majority owner, and the company and its officers occasionally contributed funds and free billboard space to their campaigns. According to respondent Omni Outdoor Advertising, Inc., these beneficences were part of a "longstanding" "secret anticompetitive agreement" whereby "the City and COA would each use their [sic] respective power and resources to protect . . . COA's monopoly position," in return for which "City Council members received advantages made possible by COA's monopoly." Brief for Respondent 12, 16.

[\*368] In 1981, Omni, a Georgia corporation, began erecting billboards in and around the city. COA responded to this competition in several ways. First, it redoubled its own billboard construction efforts and modernized its existing stock. Second -- according to Omni -- it took a number of anticompetitive private actions, such as offering artificially low rates, spreading untrue and malicious rumors about Omni, and attempting to induce Omni's customers to break their contracts. Finally (and this is what gives rise to the issue we address today), COA executives met with city officials [\*\*\*8] to seek the enactment of zoning ordinances that would restrict billboard construction. COA was not alone in urging this course; concerned about the city's recent explosion of billboards, a number of citizens, including writers of articles [\*\*1348] and editorials in local newspapers, advocated restrictions.

In the spring of 1982, the city council passed an ordinance requiring the council's approval for every billboard constructed in downtown Columbia. This was later amended to impose a 180-day moratorium on the construction of billboards throughout the city, except as specifically authorized by the council. A state court invalidated this ordinance on the ground that its conferral of unconstrained discretion upon the city council violated both the South Carolina and Federal Constitutions. The city then requested the State's regional planning authority to conduct a comprehensive analysis of the local billboard situation as a basis for developing a final, constitutionally valid, ordinance. In September 1982, after a series of public hearings and numerous meetings involving city officials, Omni, and COA (in all of which, according to Omni, positions contrary to COA's were not [\*\*\*9] genuinely considered), the city council passed a new ordinance restricting the size, location, and spacing of billboards. These restrictions, particularly those on spacing, obviously benefited COA, which already had its billboards in place; they severely hindered Omni's ability to compete.

[\*369] In November 1982, Omni filed suit against COA and the city in Federal District Court, charging that they had violated [§§ 1](#) and [2](#) of the Sherman Act, 26 Stat. 209, as amended, [\*\*\*391] [15 U. S. C. §§ 1, 2](#),<sup>1</sup> as well as

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<sup>1</sup> [Section 1](#) provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." [15 U. S. C. § 1](#).

South Carolina's Unfair Trade Practices Act, [S. C. Code Ann. § 39-5-140](#) (1976). Omni contended, in particular, that the city's billboard ordinances were the result of an anticompetitive conspiracy between city officials and COA that stripped both parties of any immunity they might otherwise enjoy from the federal antitrust laws. In January 1986, after more than two weeks of trial, a jury returned general verdicts against the city and COA on both the federal and state claims. It awarded damages, before trebling, of \$ 600,000 on the [§ 1](#) Sherman Act claim, and \$ 400,000 on the [§ 2](#) claim.<sup>2</sup> The jury also answered two special interrogatories, finding [\*\*\*\*10] specifically that the city and COA had conspired both to restrain trade and to monopolize the market. Petitioners moved for judgment notwithstanding the verdict, contending among other [\*370] things that their activities were outside the scope of the federal antitrust laws. In November 1988, the District Court granted the motion.

[\*\*\*\*11] A divided panel of the United States Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and reinstated the jury verdict on all counts. [891 F. 2d 1127 \(1989\)](#). We granted certiorari, [496 U.S. 935 \(1990\)](#).

## II

In the landmark case of [Parker v. Brown, 317 U.S. 341 \(1943\)](#), we rejected the contention that a program restricting the marketing of privately produced raisins, adopted pursuant to California's Agricultural Prorate Act, violated [\*\*1349] the Sherman Act. Relying on principles of federalism and state sovereignty, we held that [HN1](#) [↑] the Sherman Act did not apply to anticompetitive restraints imposed by the States "as an act of government." [317 U.S., at 352](#).

Since *Parker* emphasized the role of sovereign *States* in a federal system, it was initially unclear whether the governmental actions of political subdivisions enjoyed similar protection. In recent years, we have held that [HN2](#) [↑] *Parker* immunity [\*\*\*\*12] does not apply directly to local governments, see [Hallie v. Eau Claire, 471 U.S. 34, 38 /\\*\\*\\*3921 \(1985\)](#); [Community Communications Co. v. Boulder, 455 U.S. 40, 50-51 \(1982\)](#); [Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412-413 \(1978\)](#) (plurality opinion). We have recognized, however, that a municipality's restriction of competition may sometimes be an authorized implementation of state policy, and have accorded *Parker* immunity where that is the case.

[LEdHN\[1B\]](#) [↑] [1B][LEdHN\[5\]](#) [↑] [5]The South Carolina statutes under which the city acted in the present case authorize municipalities to regulate the use of land and the construction of buildings and other structures within their boundaries.<sup>3</sup> It is undisputed that, as a matter [\*371] of state law, these statutes authorize the city to regulate the

[Section 2](#) provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." [15 U. S. C. § 2](#).

<sup>2</sup>The monetary damages in this case were assessed entirely against COA, the District Court having ruled that the city was immunized by the Local Government Antitrust Act of 1984, 98 Stat. 2750, as amended, [15 U. S. C. §§ 34-36](#), which exempts local governments from paying damages for violations of the federal antitrust laws. Although enacted in 1984, after the events at issue in this case, the Act specifically provides that it may be applied retroactively if "the defendant establishes and the court determines, in light of all the circumstances . . . that it would be inequitable not to apply this subsection to a pending case." [15 U. S. C. § 35\(b\)](#). The District Court determined that it would be, and the Court of Appeals refused to disturb that judgment. Respondent has not challenged that determination in this Court, and we express no view on the matter.

<sup>3</sup>S. C. Code Ann. § 5-23-10 (1976) ("Building and zoning regulations authorized") provides that "for the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated towns may by ordinance regulate and restrict the height, number of stories and size of buildings and other structures."

Section 5-23-20 ("Division of municipality into districts") provides that "for any or all of such purposes the local legislative body may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this article. Within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land."

size, location, and spacing of billboards. It could be argued, however, that a municipality acts beyond its delegated authority, for *Parker* purposes, whenever the nature of [\*\*\*\*13] its regulation is substantively or even procedurally defective. On such an analysis it could be contended, for example, that the city's regulation in the present case was not "authorized" by S. C. Code Ann. § 5-23-10 (1976), see n. 3, *supra*, if it was not, as that statute requires, adopted "for the purpose of promoting health, safety, morals or the general welfare of the community." As scholarly commentary has noted, such an expansive interpretation of the *Parker*-defense authorization requirement would have unacceptable consequences.

[\*\*\*\*14]

"To be sure, state law 'authorizes' only agency decisions that are substantively and procedurally correct. Errors of fact, law, or judgment by the agency are not 'authorized.' Erroneous acts or decisions are subject to [\*372] reversal by superior tribunals because unauthorized. If the antitrust court demands unqualified 'authority' in this sense, it inevitably becomes the standard reviewer not only of federal agency activity but also of state and local activity whenever it is alleged that the governmental body, though possessing the power to engage in the challenged conduct, has actually exercised its [\*\*\*\*393] power in a manner not authorized by state law. We should not [\*\*1350] lightly assume that *Lafayette*'s authorization requirement dictates transformation of state administrative review into a federal antitrust job. Yet that would be the consequence of making antitrust liability depend on an undiscriminating and mechanical demand for 'authority' in the full administrative law sense." P. Areeda & H. Hovenkamp, *Antitrust Law* P 212.3b, p. 145 (Supp. 1989).

We agree with that assessment, and believe that [\*\*\*\*15] [HN3](#) in order to prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law. We have adopted an approach that is similar in principle, though not necessarily in precise application, elsewhere. See [Stump v. Sparkman, 435 U.S. 349 \(1978\)](#). It suffices for the present to conclude that here no more is needed to establish, for *Parker* purposes, the city's authority to regulate than its unquestioned zoning power over the size, location, and spacing of billboards.

[LEdHN\[1C\]](#) [1C][LEdHN\[6A\]](#) [6A]Besides authority to regulate, however, [HN4](#) the *Parker* defense also requires authority to suppress competition -- more specifically, "clear articulation of a state policy to authorize anticompetitive conduct" by the municipality in [\*\*\*\*16] connection with its regulation. [Hallie, 471 U.S., at 40](#) (internal quotation omitted). We have rejected the contention that this requirement can be met only if the delegating statute explicitly permits the displacement of competition, see [id., at 41-42](#). [\*373] It is enough, we have held, if suppression of competition is the "foreseeable result" of what the statute authorizes, [id., at 42](#). That condition is amply met here. The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants. [HN5](#) A municipal ordinance restricting the size, location, and spacing of billboards (surely a common form of zoning) necessarily protects existing billboards against some competition from newcomers.<sup>4</sup>

Section 6-7-710 ("Grant of power for zoning") provides that "for the purposes of guiding development in accordance with existing and future needs and in order to protect, promote and improve the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare, the governing authorities of municipalities and counties may, in accordance with the conditions and procedures specified in this chapter, regulate the location, height, bulk, number of stories and size of buildings and other structures. . . . The regulations shall . . . be designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers, to promote the public health and the general welfare, to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to protect scenic areas; to facilitate the adequate provision of transportation, water, sewage, schools, parks, and other public requirements."

<sup>4</sup>The dissent contends that, in order successfully to delegate its *Parker* immunity to a municipality, a State must expressly authorize the municipality to engage (1) in specifically "economic regulation," *post*, at 388, (2) of a specific industry, *post*, at 391. These dual specificities are without support in our precedents, for the good reason that they defy rational implementation.

[\*\*\*\*17] [\*374] [\*\*\*394] The Court of Appeals was therefore correct in its conclusion that the city's restriction of billboard construction was *prima facie* entitled to *Parker* immunity. The [\*\*\*1351] Court of Appeals upheld the jury verdict, however, by invoking a "conspiracy" exception to *Parker* that has been recognized by several Courts of Appeals. See, e. g., *Whitworth v. Perkins*, 559 F. 2d 378 (CA5 1977), vacated, 435 U.S. 992, aff'd on rehearing, 576 F. 2d 696 (1978), cert. denied, 440 U.S. 911 (1979). That exception is thought to be supported by two of our statements in *Parker*: "We have no question of the state or its municipality becoming a *participant in a private agreement* or combination by others for restraint of trade, cf. *Union Pacific R. Co. v. United States*, 313 U.S. 450." *Parker*, 317 U.S., at 351-352 (emphasis added). "The state in adopting and enforcing the prorate program made no contract or agreement and *entered into no conspiracy in restraint of trade or to establish monopoly* but, as sovereign, imposed the restraint as an act of government [\*\*\*\*18] which the Sherman Act did not undertake to prohibit." *Id.*, at 352 (emphasis added). *Parker* does not apply, according to the Fourth Circuit, "where politicians or political entities are involved as conspirators" with private actors in the restraint of trade. *891 F. 2d, at 1134*.

LEdHN[2B] [↑] [2B] There is no such conspiracy exception. HN6 [↑] The rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators. The sentences from the opinion quoted above simply clarify that this immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial [\*375] participant in a given market. That is evident from the citation of *Union Pacific R. Co. v. United States*, 313 U.S. 450 (1941), which held unlawful under the Elkins Act certain rebates and concessions [\*\*\*\*19] made by Kansas City, Kansas, in its capacity as the owner and operator of a wholesale produce market that was integrated with railroad facilities. These sentences should not be read to suggest the general proposition that even governmental *regulatory* action may be deemed private -- and therefore subject to antitrust liability -- when it is taken pursuant to a conspiracy with private parties. The impracticality of such a principle is evident if, for purposes of the exception, "conspiracy" [\*\*395] means nothing more than an agreement to impose the regulation in question. Since it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them, such an exception would virtually swallow up the *Parker* rule: All anticompetitive regulation would be vulnerable to a "conspiracy" charge. See Areeda & Hovenkamp, *supra*, P 203.3b, at 34, and n. 1; Elhauge, The Scope of Antitrust Process, 104 Harv. L. Rev. 667, 704-705 (1991).<sup>5</sup>

If, by authority to engage in specifically "economic" regulation, the dissent means authority specifically to regulate competition, we squarely rejected that in *Hallie v. Eau Claire*, 471 U.S. 34 (1985), as discussed in text. Seemingly, however, the dissent means only that the State authorization must specify that sort of regulation whereunder "decisions about prices and output are made not by individual firms, but rather by a public body." *Post*, at 387. But why is not the restriction of billboards in a city a restriction on the "output" of the local billboard industry? It assuredly is -- and that is indeed the very gravamen of Omni's complaint. It seems to us that the dissent's concession that "it is often difficult to differentiate economic regulation from municipal regulation of health, safety, and welfare," *post*, at 393, is a gross understatement. Loose talk about a "regulated industry" may suffice for what the dissent calls "antitrust parlance," *post*, at 387, but it is not a definition upon which the criminal liability of public officials ought to depend.

LEdHN[6B] [↑] [6B]

Under the dissent's second requirement for a valid delegation of *Parker* immunity -- that the authorization to regulate pertain to a specific industry -- the problem with the South Carolina statute is that it used the generic term "structures," instead of conferring its regulatory authority industry-by-industry (presumably "billboards," "movie houses," "mobile homes," "TV antennas," and every other conceivable object of zoning regulation that can be the subject of a relevant "market" for purposes of antitrust analysis). To describe this is to refute it. Our precedents not only fail to suggest, but positively reject, such an approach. "The municipality need not 'be able to point to a specific, detailed legislative authorization' in order to assert a successful *Parker* defense to an antitrust suit." *Hallie*, 471 U.S., at 39 (quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978)).

<sup>5</sup> The dissent is confident that a jury composed of citizens of the vicinage will be able to tell the difference between "independent municipal action and action taken for the sole purpose of carrying out an anticompetitive agreement for the private party." *Post*, at 395-396. No doubt. But those are merely the polar extremes, which like the geographic poles will rarely be seen by jurors of

[\*\*\*\*20] [\*376] [\*\*1352] Omni suggests, however, that "conspiracy" might be limited to instances of governmental "corruption," defined variously as "abandonment of public responsibilities to private interests," Brief for Respondent 42, "corrupt or bad faith decisions," *id., at 44*, and "selfish or corrupt motives," *ibid.* Ultimately, Omni asks us not to define "corruption" at all, but simply to leave that task to the jury: "at bottom, however, it was within the jury's province to determine what constituted corruption of the governmental process in their community." *Id., at 43*. Omni's *amicus* eschews this emphasis on "corruption," instead urging us to define the conspiracy exception as encompassing any governmental act "not in the public interest." Brief for Associated Builders and Contractors, Inc., as *Amicus Curiae* 5.

[\*377] [LEdHN\[7A\]](#) [7A] [LEdHN\[81\]](#) [8] A conspiracy exception narrowed [\*\*\*396] along such vague lines is similarly impractical. Few governmental actions are immune from the charge that they are "not in the public [\*\*\*\*21] interest" or in some sense "corrupt." The California marketing scheme at issue in *Parker* itself, for example, can readily be viewed as the result of a "conspiracy" to put the "private" interest of the State's raisin growers above the "public" interest of the State's consumers. The fact is that virtually all regulation benefits some segments of the society and harms others; and that it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners. *Parker* was not written in ignorance of the reality that determination of "the public interest" in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment, and it was not meant to shift that judgment from elected officials to judges and juries. If the city of Columbia's decision to regulate what one local newspaper called "billboard jungles," Columbia Record, May 21, 1982, p. 14-A, col. 1; App. in No. 88-1388 (CA4), p. 3743, is made subject to *ex post facto* judicial assessment of "the public interest," with personal liability of city officials a possible consequence, we will have gone far [\*\*\*\*22] to "compromise the States' ability to regulate their domestic commerce," [Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 56 \(1985\)](#). The situation would not be better, but arguably even worse, if the courts were to apply a subjective test: not whether the action was in the public interest, but whether the officials involved thought it to be so. This would require the sort of deconstruction of the governmental process and probing of the official "intent" that we have consistently sought to avoid.<sup>6</sup> [HN7](#) "Where the action complained [\*378] of . . . was that of the State itself, the action is exempt from

the vicinage. Ordinarily the allegation will merely be (and the dissent says this is enough) that the municipal action was not prompted "exclusively by a concern for the general public interest," *post*, at 387 (emphasis added). Thus, the real question is whether a jury can tell the difference -- whether *Solomon* can tell the difference -- between municipal-action-not-entirely-independent-because-based-partly-on-agreement-with-private-parties that is *lawful* and municipal-action-not-entirely-independent-because-based-partly-on-agreement-with-private-parties that is *unlawful*. The dissent does not tell us how to put this question coherently, much less how to answer it intelligently. "*Independent* municipal action" is unobjectionable, "action taken for the *sole* purpose of carrying out an anticompetitive agreement for the private party" is unlawful, and everything else (that is, the known world between the two poles) is un-addressed.

The dissent contends, moreover, that "the instructions in this case, fairly read, told the jury that the plaintiff should not prevail unless the ordinance was enacted for the sole purpose of interfering with access to the market." *Post*, at 396, n. 9 (emphasis added). That is not so. The sum and substance of the jury's instructions here was that anticompetitive municipal action is not lawful when taken as part of a conspiracy, and that a conspiracy is "an agreement between two or more persons to violate the law, or to accomplish an otherwise lawful result in an unlawful manner." App. 79. Although the District Court explained that "it is perfectly lawful for any and all persons to petition their government," the court immediately added, "but they may not do so as a part or as the object of a conspiracy." *Ibid.* These instructions, then, are entirely circular: An anticompetitive agreement becomes unlawful if it is part of a conspiracy, and a conspiracy is an agreement to do something unlawful. The District Court's observation, upon which the dissent places so much weight, that "if by the evidence you find that [COA] procured and brought about the passage of ordinances solely for the purpose of hindering, delaying or otherwise interfering with the access of [Omni] to the marketing area involved in this case . . . and thereby conspired, then, of course, their conduct would not be excused under the antitrust laws," *id., at 81*, see *post*, at 387, n. 2, is in no way tantamount to an instruction that this was the *only* theory upon which the jury could find an immunity-destroying "conspiracy."

<sup>6</sup> [LEdHN\[7B\]](#) [7B]

antitrust liability regardless of the State's motives in taking the action." [Hoover v. Ronwin, 466 U.S. 558, 579-580](#) [\*\*1353] (1984). See also [Llewellyn v. Crothers, 765 F. 2d 769, 774 \(CA9 1985\)](#) (Kennedy, J.).

[\*\*\*\*23] [LEdHN\[9\]](#) [9] [LEdHN\[10\]](#) [10] The foregoing approach to establishing a "conspiracy" exception at least seeks (however impractically) to draw the line of impermissible action in a manner relevant to the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest. Another approach is possible, which has the virtue of practicality but the vice of being unrelated to those purposes. That is [HN8](#) [8] the approach which would consider *Parker* inapplicable only if, in connection with the governmental action in question, bribery or some other violation of state or federal law has been established. Such unlawful activity has no necessary relationship to whether the governmental action is in the public interest. A mayor is guilty of accepting a bribe even if he would and [\*\*\*397] should have taken, in the public interest, the same action for which the bribe was [\*\*\*24] paid. (That is frequently the defense asserted to a criminal bribery charge -- and though it is never valid in law, see, e. g., [United States v. Jannotti, 673 F. 2d 578, 601](#) (CA3) (en banc), cert. denied, 457 U.S. 1106 (1982), it is often plausible in fact.) [HN9](#) [9] When, moreover, the regulatory body is not a single individual but a state legislature or city council, there is even less reason to believe that violation of the law (by bribing a minority of the decisionmakers) establishes that the regulation has no valid public purpose. Cf. [Fletcher v. Peck, 6 Cranch 87, 130 \(1810\)](#). To use unlawful political influence as the test of legality of state regulation undoubtedly vindicates (in a rather blunt way) principles of good government. But the statute we are construing is not directed to that end. Congress has passed other laws aimed [\*379] at combating corruption in state and local governments. See, e. g., [18 U. S. C. § 1951](#) (Hobbs Act). "Insofar as [the Sherman Act] sets up a code of ethics at all, [\*\*\*\*25] it is a code that condemns trade restraints, not political activity." [Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 140 \(1961\)](#).

[LEdHN\[2C\]](#) [2C] For these reasons, [HN10](#) [10] we reaffirm our rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on "perceived conspiracies to restrain trade," [Hoover, 466 U.S., at 580](#). We reiterate that, with the possible market participant exception, any action that qualifies as state action is "*ipso facto* . . . exempt from the operation of the antitrust laws," *id. at 568*. This does not mean, of course, that the States may exempt *private* action from the scope of the Sherman Act; we in no way qualify the well-established principle that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." [Parker, 317 U.S., at 351](#) [\*\*\*\*26] (citing [Northern Securities Co. v. United States, 193 U.S. 197, 332, 344-347 \(1904\)](#)). See also [Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384 \(1951\)](#).

### III

[LEdHN\[3B\]](#) [3B] [3B] [LEdHN\[11A\]](#) [11A] [11A] While *Parker* recognized the States' freedom to engage in anticompetitive regulation, it did not purport to immunize from antitrust liability the private parties who urge them to engage in anticompetitive regulation. However, it is obviously peculiar in a democracy, and perhaps in derogation of the constitutional right "to petition the Government for a redress of grievances," [U.S. Const., Amdt. 1](#), to establish a category of lawful state action that citizens are not permitted to urge. Thus, beginning with [Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra](#), we have developed [\*\*1354] a corollary to *Parker*: [HN11](#) [11] The federal antitrust laws also do not regulate the conduct [\*\*\*\*27] of private individuals in seeking [\*380] anticompetitive action from the government. This doctrine, like *Parker*, rests ultimately upon a recognition that the antitrust laws, "tailored as they are" [\*\*\*398] for the business world, are not at all appropriate for application in the political arena." [Noerr, supra, at 141](#). That a private party's political motives are selfish is irrelevant: "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." [Mine Workers v. Pennington, 381 U.S. 657, 670 \(1965\)](#).

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We have proceeded otherwise only in the "very limited and well-defined class of cases where the very nature of the constitutional question requires [this] inquiry." [United States v. O'Brien, 391 U.S. 367, 383, n. 30 \(1968\)](#) (bill of attainder). See also [Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268, n. 18 \(1977\)](#) (race-based motivation).

[LEdHN\[12\]](#) [12] *Noerr* recognized, however, what has come to be known as the "sham" exception to its rule: "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." [365 U.S., at 144](#). The Court of Appeals concluded that the jury in this [\*\*\*\*28] case could have found that COA's activities on behalf of the restrictive billboard ordinances fell within this exception. In our view that was error.

[HN12](#) [12] The "sham" exception to *Noerr* encompasses situations in which persons use the governmental process - - as opposed to the *outcome* of that process -- as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. See [California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 \(1972\)](#). A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, [Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 496, 500, n. 4 \(1988\)](#), not one "who 'genuinely seeks to achieve his governmental result, but does so *through improper means*,'" [id. at 508, n. 10](#) (quoting [Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 827 F. 2d 458, 465, n. 5 \(CA9 1987\)](#)). [\*\*\*\*29]

[\*381] [LEdHN\[3C\]](#) [12] [3C] [LEdHN\[11B\]](#) [11B] Neither of the Court of Appeals' theories for application of the "sham" exception to the facts of the present case is sound. The court reasoned, first, that the jury could have concluded that COA's interaction with city officials "was actually nothing more than an attempt to interfere directly with the business relations [sic] of a competitor." [891 F. 2d, at 1139](#) (quoting *Noerr, supra, at 144*). This analysis relies upon language from *Noerr*, but ignores the import of the critical word "directly." Although COA indisputably set out to disrupt Omni's business relationships, it sought to do so not through the very process of lobbying, or of causing the city council to consider zoning measures, but rather through the ultimate *product* of that lobbying and consideration, viz., the zoning ordinances. The Court of Appeals' second theory was that the jury could have found "that COA's purposes were to delay Omni's entry into the market and even to deny it a meaningful access to the appropriate [\*\*\*\*30] city administrative and legislative fora." [891 F. 2d, at 1139](#). But the purpose of delaying a competitor's entry into the market does not render lobbying activity a "sham," unless (as no evidence suggested was true here) the delay is sought to be [\*\*\*399] achieved only by the lobbying process itself, and not by the governmental action that the lobbying seeks. [HN13](#) [13] "If *Noerr* teaches anything it is that an intent to restrain trade as a *result* of the government action sought . . . does not foreclose protection." Sullivan, Developments in the *Noerr* Doctrine, 56 Antitrust L. J. 361, 362 (1987). As for "denying . . . meaningful access to the appropriate city administrative and legislative fora," that may render the manner of lobbying improper or even unlawful, [\*\*1355] but does not necessarily render it a "sham." We did hold in [California Motor Transport, supra](#), that a conspiracy among private parties to monopolize trade by excluding a competitor from participation in the regulatory process did not enjoy *Noerr* protection. But *California* [\*\*\*\*31] *Motor Transport* involved a context in which the conspirators' participation in the governmental process was itself claimed to be a [\*382] "sham," employed as a means of imposing cost and delay. ("It is alleged that petitioners 'instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases.'" [404 U.S., at 512](#).) The holding of the case is limited to that situation. To extend it to a context in which the regulatory process is being invoked genuinely, and not in a "sham" fashion, would produce precisely that conversion of antitrust law into regulation of the political process that we have sought to avoid. Any lobbyist or applicant, in addition to getting himself heard, seeks by procedural and other means to get his opponent ignored. Policing the legitimate boundaries of such defensive strategies, when they are conducted in the context of a genuine attempt to influence governmental action, is not the role of the Sherman Act. In the present case, of course, any denial to Omni of "meaningful access to the appropriate city administrative and legislative fora" was achieved by COA in the course of an attempt to [\*\*\*\*32] influence governmental action that, far from being a "sham," was if anything more in earnest than it should have been. If the denial was wrongful there may be other remedies, but as for the Sherman Act, the *Noerr* exemption applies.

Omni urges that if, as we have concluded, the "sham" exception is inapplicable, we should use this case to recognize another exception to *Noerr* immunity -- a "conspiracy" exception, which would apply when government officials conspire with a private party to employ government action as a means of stifling competition. We have left open the possibility of such an exception, see, e. g., *Allied Tube, supra, at 502, n. 7*, as have a number of Courts of Appeals. See, e. g., *Oberndorf v. Denver*, 900 F. 2d 1434, 1440 (CA10 1990); *First American Title Co. of South Dakota v. South Dakota Land Title Assn.*, 714 F. 2d 1439, 1446, n. 6 (CA8 1983), cert. denied, 464 U.S. 1042 (1984). At least one Court of Appeals has affirmed the existence of such an exception in dicta, see *Duke & Co. v. Foerster*, 521 F. 2d 1277, 1282 (CA3 1975), and [\*383] the Fifth [\*\*\*\*33] Circuit has adopted it as holding, see *Affiliated Capital Corp. v. Houston*, 735 F. 2d 1555, 1566-1568 (1984) (en banc).

**LEdHN[4B]** [↑] [4B] Giving full consideration to this matter for the first time, we conclude that **HN14** [↑] a "conspiracy" exception to *Noerr* must be rejected. We [\*\*\*400] need not describe our reasons at length, since they are largely the same as those set forth in Part II above for rejecting a "conspiracy" exception to *Parker*. As we have described, *Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States' acts of governing, and the latter the citizens' participation in government. Insofar as the identification of an immunity-destroying "conspiracy" is concerned, *Parker* and *Noerr* generally present two faces of the same coin. The *Noerr*-invalidating conspiracy alleged here is just the *Parker*-invalidating conspiracy viewed from the standpoint of the private-sector [\*\*\*\*34] participants rather than the governmental participants. The same factors which, as we have described above, make it impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by selfishly motivated agreement with private interests likewise make it impracticable or beyond that scope to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials. "It would be unlikely that any effort to influence legislative action could succeed unless one or more members [\*\*1356] of the legislative body became . . . 'co-conspirators'" in some sense with the private party urging such action, *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F. 2d 220, 230 (CA7 1975). And if the invalidating "conspiracy" is limited to one that involves some element of unlawfulness (beyond mere anticompetitive motivation), the invalidation would have nothing to do with the policies of the antitrust laws. In *Noerr* itself, where the private party "deliberately deceived the public and public officials" in its successful lobbying campaign, we said that [\*384] "deception, reprehensible [\*\*\*\*35] as it is, can be of no consequence so far as the Sherman Act is concerned." *365 U.S., at 145*.

#### IV

**LEdHN[13A]** [↑] [13A] **LEdHN[14]** [↑] [14] Under *Parker* and *Noerr*, therefore, both the city and COA are entitled to immunity from the federal antitrust laws for their activities relating to enactment of the ordinances. This determination does not entirely resolve the dispute before us, since other activities are at issue in the case with respect to COA. Omni asserts that COA engaged in private anticompetitive actions such as trade libel, the setting of artificially low rates, and inducement to breach of contract. Thus, although the jury's general verdict against COA cannot be permitted to stand (since it was based on instructions that erroneously permitted liability for seeking the ordinances, see *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962)), if the evidence was sufficient to sustain [\*\*\*\*36] a verdict on the basis of these other actions alone, and if this theory of liability has been properly preserved, Omni would be entitled to a new trial.

**LEdHN[13B]** [↑] [13B] There also remains to be considered the effect of our judgment upon Omni's claim against COA under the South Carolina Unfair Trade Practices Act. The District Court granted judgment notwithstanding the verdict on this claim as well as the Sherman Act claims; the Court of Appeals reversed on the ground [\*\*\*401] that "a finding of conspiracy to restrain competition is tantamount to a finding" that the South Carolina law had been violated, *891 F. 2d, at 1143*. Given our reversal of the "conspiracy" holding, that reasoning is no longer applicable.

We leave these remaining questions for determination by the Court of Appeals on remand. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

Dissent by: STEVENS

## Dissent

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[\*385] Justice Stevens, with whom Justice White and Justice Marshall join, dissenting.

Section 1 of the Sherman Act provides [\*\*\*\*37] in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U. S. C. § 1 (emphasis added). Although we have previously recognized that a completely literal interpretation of the word "every" cannot have been intended by Congress,<sup>1</sup> the Court today carries [\*1357] this recognition to an extreme by deciding that agreements between municipalities, or their officials, and private parties to use the zoning power to confer exclusive privileges in a particular line of commerce are beyond the reach of § 1. History, tradition, and the facts of this case all demonstrate that the Court's attempt to create a "better" and less inclusive Sherman Act, cf. West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 101 (1991), is ill advised.

[\*\*\*\*38] I

As a preface to a consideration of the "state action" and so-called "*Noerr-Pennington*" exemptions to the Sherman Act, it is appropriate to remind the Court that one of the classic common-law examples of a prohibited contract in restraint of trade involved an agreement between a public official and a private party. The public official -- the Queen of England -- had granted one of her [\*\*\*402] subjects a monopoly in the making, importation, and sale of playing cards in order to generate revenues for the crown. A competitor challenged the grant in *The Case of Monopolies*, 11 Co. Rep. 84, 77 Eng. Rep. 1260 (Q. B. 1602), and prevailed. Chief Justice Popham explained on behalf of the bench:

"The Queen was . . . deceived in her grant; for the Queen . . . intended it to be for the weal public, and it will be employed for the private gain of the patentee, and for the prejudice of the weal public; moreover the Queen meant that the abuse should be taken away, which shall never be by this patent, but *potius* the abuse will be increased for the private benefit of the patentee, and therefore . . . this grant is void *jure Regio*." *Id.*, at 87a; [\*\*\*\*39] 77 Eng. Rep., at 1264.

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<sup>1</sup> Construing the statute in the light of the common law concerning contracts in restraint of trade, we have concluded that only unreasonable restraints are prohibited.

"One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that 'every' contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets -- indeed, a competitive economy -- to function effectively.

"Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition. The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served that purpose. . . . [The Rule of Reason] focuses directly on the challenged restraint's impact on competitive conditions." National Society of Professional Engineers v. United States, 435 U.S. 679, 687-688 (1978) (footnotes omitted).

We have also confined the Sherman Act's mandate by holding that the independent actions of the sovereign States and their officials are not covered by the language of the Act. Parker v. Brown, 317 U.S. 341 (1943).

In the case before us today, respondent alleges that the city of Columbia, South Carolina, has entered into a comparable agreement to give respondent a monopoly in the sale of billboard advertising. After a 3-week trial, a jury composed of citizens of the vicinage found that, despite the city fathers' denials, there was indeed such an agreement, presumably motivated in part by past favors in the form of political advertising, in part by friendship, and in part by the expectation of a beneficial future relationship -- and in any case, not [**\*387**] exclusively by a concern for the general public interest.<sup>2</sup> Today the Court acknowledges the anticompetitive consequences of this and similar agreements but decides that they should be exempted from the coverage of the Sherman Act because it fears that enunciating a rule that allows the motivations of public officials to be probed may mean that innocent municipal officials may be harassed with baseless charges. The holding evidences an unfortunate lack of confidence in our judicial system and will foster [**\*\*1358**] the evils the Sherman Act was designed to eradicate.

[**\*\*\*\*40**] II

There is a distinction between economic regulation, on the one hand, and regulation designed to protect the public health, safety, and environment. In antitrust parlance a "regulated industry" is one in which decisions about prices and output are made not by individual firms, but rather by a public body or a collective process subject to governmental approval. Economic regulation of the motor carrier and airline industries was imposed by the Federal Government in the 1930's; the "deregulation" of those industries did not eliminate all the other types of regulation that continue to protect our safety and environmental concerns.

[**\*388**] [**\*\*\*403**] The antitrust laws reflect a basic national policy favoring free markets over regulated markets.<sup>3</sup> In essence, the Sherman Act prohibits private unsupervised regulation of the prices and output of goods in the marketplace. That prohibition is inapplicable to specific industries which Congress has exempted from the antitrust laws and subjected to regulatory supervision over price and output decisions. Moreover, the so-called "state-action" exemption from the Sherman Act reflects the Court's understanding that Congress did [**\*\*\*\*41**] not intend the statute to pre-empt a State's economic regulation of commerce within its own borders.

The contours of the state-action exemption are [**\*\*\*\*42**] relatively well defined in our cases. Ever since our decision in *Olsen v. Smith*, 195 U.S. 332 (1904), which upheld a Texas statute fixing the rates charged by pilots operating in the Port of Galveston, it has been clear that a State's decision to displace competition with economic regulation is not prohibited by the Sherman Act. *Parker v. Brown*, 317 U.S. 341 (1943), the case most frequently identified with the state-action exemption, involved a decision by California to substitute sales quotas and price control -- the purest form of economic regulation -- for competition in the market for California raisins.

<sup>2</sup> The jury returned its verdict pursuant to the following instructions given by the District Court:

"So if by the evidence you find that that person involved in this case procured and brought about the passage of ordinances solely for the purpose of hindering, delaying or otherwise interfering with the access of the Plaintiff to the marketing area involved in this case . . . and thereby conspired, then, of course, their conduct would not be excused under the antitrust laws."

"So once again an entity may engage in . . . legitimate lobbying . . . to procure legislation even if the motive behind the lobbying is anticompetitive."

"If you find Defendants conspired together with the intent to foreclose the Plaintiff from meaningful access to a legitimate decision making process with regard to the ordinances in question, then your verdict would be for the Plaintiff on that issue." App. 81.

<sup>3</sup> "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.' *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 [(1951)]. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain -- quality, service, safety, and durability -- and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad." *National Society of Professional Engineers*, 435 U.S., at 695.

499 U.S. 365, \*388; 111 S. Ct. 1344, \*\*1358; 113 L. Ed. 2d 382, \*\*\*403; 1991 U.S. LEXIS 1858, \*\*\*\*42

In *Olsen*, the State itself had made the relevant pricing decision. In *Parker*, the regulation of the marketing of California's [\*389] 1940 crop of raisins was administered by state officials. Thus, when a state agency, or the State itself, engages in economic regulation, the Sherman Act is inapplicable. [\*Hoover v. Ronwin\*, 466 U.S. 558, 568-569 \(1984\); \*Bates v. State Bar of Arizona\*, 433 U.S. 350, 360 \(1977\)](#).

Underlying the Court's recognition of this state-action exemption [\*\*\*\*43] has been respect for the fundamental principle of federalism. As we stated in [\*Parker\*, 317 U.S., at 351](#): "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

However, this Court recognized long ago that the deference due States within our federal system does not extend fully to conduct undertaken by municipalities. Rather, all sovereign authority "within the geographical [\*\*1359] limits of the United States" resides with "the Government of the United States, or [with] [\*\*\*404] the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these." [\*United States v. Kagama\*, 118 U.S. 375, 379 \(1886\)](#).

Unlike States, municipalities do not constitute bedrocks within our system of federalism. And also [\*\*\*\*44] unlike States, municipalities are more apt to promote their narrow parochial interests "without regard to extraterritorial impact and regional efficiency." [\*Lafayette v. Louisiana Power & Light Co.\*, 435 U.S. 389, 404 \(1978\)](#); see also The Federalist No. 10 (J. Madison) (describing the greater tendency of smaller societies to promote oppressive and narrow interests above the common good). "If municipalities were free to make economic choices counseled solely by their own parochial interests [\*390] and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." [\*Lafayette v. Louisiana Power & Light Co.\*, 435 U.S. at 408](#). Indeed, "in light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, . . . we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach." [\*Id.\*, at 412-413.](#)<sup>4</sup>

[\*\*\*\*45] Nevertheless, insofar as municipalities may serve to implement state policies, we have held that economic regulation administered by a municipality may also be exempt from Sherman Act coverage if it is enacted pursuant to a clearly articulated and affirmatively expressed state directive "to replace competition with regulation." [\*Hoover\*, 466 U.S., at 569](#). However, the mere fact that a municipality acts within its delegated authority is not sufficient to exclude its anticompetitive behavior from the reach of the Sherman Act. [\*391] "Acceptance of such a proposition -- that the general grant of power to enact ordinances necessarily implies state authorization to enact specific [\*\*\*405] anticompetitive ordinances -- would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." [\*Community Communications Co. v. Boulder\*, 455 U.S. 40, 56 \(1982\)](#).

Accordingly, we have held that the critical decision to substitute economic regulation for competition is one that must be made by the State. That decision must be articulated with sufficient clarity to identify the industry in which

<sup>4</sup> In [\*Owen v. City of Independence\*, 445 U.S. 622 \(1980\)](#), this Court recognized that "notwithstanding [42 U. S. C.] § 1983's expansive language and the absence of any express incorporation of common-law immunities, we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.' [\*Pierson v. Ray\*, 386 U.S. 547, 555 \(1967\)](#)."  
[\*Id.\*, at 637](#). Nevertheless, the Court refused to find a firmly established immunity enjoyed by municipal corporations at common law for the torts of their agents. "Where the immunity claimed by the defendant was well established at common law at the time [42 U. S. C.] § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity. But there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify" according them such immunity. [\*Id.\*, at 638](#). See also [\*Will v. Michigan Dept. of State Police\*, 491 U.S. 58, 70 \(1989\)](#) ("States are protected by the [\*Eleventh Amendment\*](#) while municipalities are not . . .").

the State [\*\*\*\*46] intends that economic regulation shall replace competition. The terse statement of the reason why the municipality's actions in *Hallie v. Eau Claire*, 471 U.S. 34 (\*\*1360) (1985), was exempt from the Sherman Act illustrates the point: "They were taken pursuant to a clearly articulated state policy to replace competition in the provision of sewage services with regulation." *Id.*, at 47.<sup>5</sup>

### [\*\*\*\*47] [\*392] III

Today the Court adopts a significant enlargement of the state-action exemption. The South Carolina statutes that confer zoning authority on municipalities in the State do not articulate any state policy to displace competition with economic regulation in any line of commerce or in any specific industry. As the Court notes, the state statutes were expressly adopted to promote the "health, safety, morals or the general welfare of the community," see *ante*, at 370, n. 3. Like Colorado's grant of "home rule" powers to the city of Boulder, they are simply neutral [\*\*\*406] on the question whether the municipality should displace competition with economic regulation in any industry. There is not even an arguable basis for concluding that the State authorized the city of Columbia to enter into exclusive agreements with any person, or to use the zoning power to protect favored citizens from competition.<sup>6</sup> Nevertheless, under the guise of acting [\*393] pursuant to a state legislative grant to regulate health, safety, and welfare, the city of Columbia in this case enacted an ordinance that amounted to economic regulation of the billboard market; as the Court [\*\*\*\*48] recognizes, the ordinance "obviously benefited COA, which already had its billboards in place . . . [and] severely hindered Omni's ability to compete." *Ante*, at 368.

Concededly, it is often difficult to differentiate economic regulation from municipal regulation of health, safety, and welfare. "Social [\*\*1361] and safety regulation have economic impacts, and economic regulation has social and safety effects. [\*\*\*\*49]" D. Hjelmfelt, Antitrust and Regulated Industries 3 (1985). It is nevertheless important to determine when purported general welfare regulation in fact constitutes economic regulation by its purpose and

<sup>5</sup> Contrary to the Court's reading of *Hallie*, our opinion in that case emphasized the industry-specific character of the Wisconsin legislation in explaining why the delegation satisfied the 'clear articulation' requirement. At issue in *Hallie* was the town's independent decision to refuse to provide sewage treatment services to nearby towns -- a decision that had been expressly authorized by the Wisconsin legislation. *471 U.S., at 41*. We wrote:

"Applying the analysis of *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), it is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served." *Id., at 42*.

"Nor do we agree with the Towns' contention that the statutes at issue here are neutral on state policy. The Towns attempt to liken the Wisconsin statutes to the Home Rule Amendment involved in *Boulder*, arguing that the Wisconsin statutes are neutral because they leave the City free to pursue either anticompetitive conduct or free-market competition in the field of sewage services. The analogy to the Home Rule Amendment involved in *Boulder* is inapposite. That Amendment to the Colorado Constitution allocated only the most general authority to municipalities to govern local affairs. We held that it was neutral and did not satisfy the 'clear articulation' component of the state action test. The Amendment simply did not address the regulation of cable television. Under home rule the municipality was to be free to decide every aspect of policy relating to cable television, as well as policy relating to any other field of regulation of local concern. Here, in contrast, the State has specifically authorized Wisconsin cities to provide sewage services and has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects. No reasonable argument can be made that these statutes are neutral in the same way that Colorado's Home Rule Amendment was." *Id., at 43*.

We rejected the argument that the delegation was insufficient because it did not expressly mention the foreseeable anticompetitive consequences of the city of Eau Claire's conduct, but we surely did not hold that the mere fact that incidental anticompetitive consequences are foreseeable is sufficient to immunize otherwise unauthorized restrictive agreements between cities and private parties.

<sup>6</sup> The authority to regulate the "location, height, bulk, number of stories and size of buildings and other structures," see *ante*, at 371, n. 3 (citation omitted), may of course have an indirect effect on the total output in the billboard industry, see *ante*, at 373-374, n. 4, as well as on a number of other industries, but the Court surely misreads our cases when it implies that a general grant of zoning power represents a clearly articulated decision to authorize municipalities to enter into agreements to displace competition in every industry that is affected by zoning regulation.

effect of displacing competition. "An example of economic regulation which is disguised by another stated purpose is the limitation of advertising by lawyers for the stated purpose of protecting the public from incompetent lawyers. Also, economic regulation posing as safety regulation is often encountered in the health care industry." *Id.*, at 3-4.

In this case, the jury found that the city's ordinance -- ostensibly one promoting health, safety, and welfare -- was in fact enacted pursuant to an agreement between city officials and a private party to restrict competition. In my opinion such a finding necessarily leads to the conclusion that the city's ordinance was fundamentally a form of economic regulation of the billboard market rather than a general welfare regulation having incidental anticompetitive effects. Because I believe our cases have wisely held that the decision to embark upon economic regulation is a nondelegable one that must expressly be made by the State [\*\*\*\*50] in the context of a specific industry in order to qualify for state-action immunity, see, e. g., *Olsen v. Smith*, 195 U.S. 332 (1904) (Texas pilotage [\*394] statutes expressly regulated both entry and rates in the Port of Galveston); *Parker v. Brown*, 317 U.S. 341 (1943) (California statute expressly authorized the raisin market regulatory program), I would hold that the city of Columbia's economic regulation of the billboard market pursuant to a general state grant of zoning power is not exempt from antitrust scrutiny.<sup>7</sup>

[\*\*\*\*51] [\*\*\*407] Underlying the Court's reluctance to find the city of Columbia's enactment of the billboard ordinance pursuant to a private agreement to constitute unauthorized economic regulation is the Court's fear that subjecting the motivations and effects of municipal action to antitrust scrutiny will result in public decisions being "made subject to *ex post facto* judicial assessment of 'the public interest.'" *Ante*, at 377. That fear, in turn, rests on the assumption that "it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them." *Ante*, at 375.

The Court's assumption that an agreement between private parties and public officials is an "inevitable" precondition for official action, however, is simply wrong.<sup>8</sup> Indeed, I am [\*395] persuaded that such agreements are the exception rather than the rule, and that they are, and should be, disfavored. The mere fact that an official body adopts a position that is advocated by a private lobbyist is plainly not sufficient to establish an agreement [\*1362] to do so. See *Fisher v. Berkeley*, 475 U.S. 260, 266-267 (1986); [\*\*\*\*52] cf. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954). Nevertheless, in many circumstances, it would seem reasonable to infer -- as the jury did in this case -- that the official action is the product of an agreement intended to elevate particular private interests over the general good.

In this [\*\*\*\*53] case, the city took two separate actions that protected the local monopolist from threatened competition. It first declared a moratorium on any new billboard construction, despite the city attorney's advice that the city had no power to do so. When the moratorium was invalidated in state-court litigation, it was replaced with an apparently valid ordinance that clearly had the effect of creating formidable barriers to entry in the billboard market. Throughout the city's decisionmaking process in enacting the various ordinances, undisputed evidence demonstrated that Columbia Outdoor Advertising, Inc., had met with city officials privately as well as publicly. As the Court of Appeals noted: "Implicit in the jury verdict was a finding that the city was not acting pursuant to the

<sup>7</sup> A number of Courts of Appeals have held that a municipality which exercises its zoning power to further a private agreement to restrain trade is not entitled to state-action immunity. See, e. g., *Westborough Mall, Inc. v. Cape Girardeau*, 693 F. 2d 733, 746 (CA8 1982) ("Even if zoning in general can be characterized as 'state action,' . . . a conspiracy to thwart normal zoning procedures and to directly injure the plaintiffs by illegally depriving them of their property is not in furtherance of any clearly articulated state policy"); *Whitworth v. Perkins*, 559 F. 2d 378, 379 (CA5 1977) ("The mere presence of the zoning ordinance does not necessarily insulate the defendants from antitrust liability where, as here, the plaintiff asserts that the enactment of the ordinance was itself a part of the alleged conspiracy to restrain trade").

<sup>8</sup> No such agreement was involved in *Hallie v. Eau Claire*, 471 U.S. 34 (1985). In that case the plaintiffs challenged independent action -- the determination of the service area of the city's sewage system -- that had been expressly authorized by Wisconsin legislation. The absence of any such agreement provided the basis for our decision in *Fisher v. Berkeley*, 475 U.S. 260, 266-267 (1986) ("The distinction between unilateral and concerted action is critical here. . . . Thus, if the Berkeley Ordinance stabilizes rents without this element of concerted action, the program it establishes cannot run afoul of § 1").

direction or purposes [\*\*\*408] of the South Carolina statutes but conspired solely to further COA's commercial purposes to the detriment of competition in the billboard industry." [891 F. 2d 1127, 1133 \(CA4 1989\)](#).

Judges who are closer to the trial process than we are do not share the Court's fear that juries are not capable of recognizing the difference between independent municipal action [\*\*\*\*54] and action taken for the sole purpose of carrying out an [\*396] anticompetitive agreement for the private party.<sup>9</sup> [\*\*\*\*55] See, e. g., [In re Japanese Electronic Products Antitrust Litigation, 631 F. 2d 1069, 1079 \(CA3 1980\)](#) ("The law presumes that a jury will find facts and reach a verdict by rational means. It does not contemplate scientific precision but does contemplate a resolution of each issue on the basis of a fair and reasonable assessment of the evidence and a fair and reasonable application of the relevant legal rules"). Indeed, the problems inherent in determining whether the actions of municipal officials are the product of an illegal agreement are substantially the same as those arising in cases in which the actions of business executives are subjected to antitrust scrutiny.<sup>10</sup>

[\*397] The difficulty of proving whether an agreement motivated a course of conduct should not in itself intimidate this Court into exempting those illegal agreements that are [\*\*1363] proved by convincing evidence. Rather, the Court [\*\*\*\*56] should, if it must, attempt to deal with these problems of proof as it has in the past -- through heightened evidentiary standards rather than through judicial expansion of exemptions from the Sherman Act. See, e. g., [Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 \(1986\)](#) (allowing summary judgment where a predatory pricing conspiracy in violation of the Sherman Act was founded largely upon circumstantial evidence); [Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 768 \[\\*\\*\\*409\] \(1984\)](#) (holding that a plaintiff in a vertical price-fixing case must produce evidence which "tends to exclude the possibility of independent action").

Unfortunately, the Court's decision today converts what should be nothing more than an anticompetitive agreement undertaken by a municipality that enjoys no special status in our federalist system into a lawful exercise of public decisionmaking. Although the Court correctly applies principles of federalism in refusing to find a "conspiracy exception" to the *Parker* state-action doctrine when a State acts in a nonproprietary capacity, it errs in extending the state-action exemption [\*\*\*\*57] to municipalities that enter into private anticompetitive agreements under the guise of acting pursuant to a general state grant of authority to regulate health, safety, and welfare. Unlike the previous limitations this Court has imposed on Congress' sweeping mandate in § 1, which found support in our common-law traditions or our system of federalism, see n. 1, *supra*, the Court's wholesale exemption of municipal action from antitrust scrutiny amounts to little more than a bold and disturbing act of judicial legislation [\*398] which dramatically curtails the statutory prohibition against "every" contract in restraint of trade.<sup>11</sup>

<sup>9</sup>The instructions in this case, fairly read, told the jury that the plaintiff should not prevail unless the ordinance was enacted for the sole purpose of interfering with access to the market. See n. 2, *supra*. Thus, this case is an example of one of the "polar extremes," see *ante*, at 375, n. 5, that juries -- as well as Solomon -- can readily identify. The mixed motive cases that concern the Court should present no problem if juries are given instructions comparable to those given below. When the Court describes my position as assuming that municipal action that was not prompted "exclusively by a concern for the general public interest" is enough to create antitrust liability, *ibid.*, it simply ignores the requirement that the plaintiff must prove that the municipal action is the product of an anticompetitive agreement with private parties. Contrary to our square holding in [Fisher v. Berkeley, 475 U.S. 260 \(1986\)](#), today the Court seems to assume that municipal action which is not entirely immune from antitrust scrutiny will automatically violate the antitrust laws.

<sup>10</sup>"There are many obstacles to discovering conspiracies, but the most frequent difficulties are three. First, price-fixers and similar miscreants seldom admit their conspiracy or agree in the open. Often, we can infer the agreement only from their behavior. Second, behavior can sometimes be coordinated without any communication or other observable and reprehensible behavior. Third, the causal connection between an observable, controllable act -- such as a solicitation or meeting -- and subsequent parallel action may be obscure." 6 P. Areeda, [Antitrust Law](#) P 1400, at 3-4 (1986).

See also Turner, The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962)(discussing difficulties of condemning parallel anticompetitive action absent explicit agreement among the parties).

<sup>11</sup>As the Court previously has noted:

## [\*\*\*\*58] IV

Just as I am convinced that municipal "lawmaking that has been infected by selfishly motivated agreement with private interests," *ante*, at 383, is not authorized by a grant of zoning authority, and therefore not within the state-action exemption, so am I persuaded that a private party's agreement with selfishly motivated public officials is sufficient to remove the antitrust immunity that protects private lobbying under *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *Mine Workers v. Pennington*, 381 U.S. 657 (1965). Although I agree that the "sham" exception to the *Noerr-Pennington* rule exempting lobbying activities from the antitrust laws does not apply to the private petitioner's conduct in this case for the reasons stated by the Court in Part III of its opinion, I am satisfied that the evidence in the record is sufficient to support the jury's finding that a conspiracy existed between the private party and the municipal officials in this case so as to remove the private petitioner's conduct from the scope [\*\*\*410] of *Noerr-Pennington* antitrust immunity. Accordingly, I would [\*\*\*\*59] affirm [\*399] the judgment of the Court of Appeals as to both the city of [\*\*1364] Columbia and Columbia Outdoor Advertising, Inc.

I respectfully dissent.

## References

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[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 15, 18](#)

24 Federal Procedure, L Ed, Monopolies and Restraints of Trade 54:161.5

12B Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade 48:180

24 Am Jur Trials 1, Defending Antitrust Lawsuits

[15 USCS 1 et seq.](#)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 9, 10

L Ed Index, Conspiracy; Municipal Corporations and Other Political Subdivisions; *Noerr-Pennington* Doctrine; Restraints of Trade, Monopolies, and Unfair Trade Practices; Sherman Act

Index to Annotations, Conspiracy; Municipal Corporations; *Noerr-Pennington* Doctrine; Restraints of Trade and Monopolies; State Action

Annotation References :

Right of petition and assembly under [Federal Constitution's First Amendment](#)--Supreme Court cases. [86 L Ed 2d 758](#).

What constitutes "state action" [\*\*\*\*60] under rule exempting state and local governmental action from antitrust laws--federal cases. [70 L Ed 2d 973](#).

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"In 1972, there were 62,437 different units of local government in this country. Of this number 23,885 were special districts which had a defined goal or goals for the provision of one or several services, while the remaining 38,552 represented the number of counties, municipalities, and townships, most of which have broad authority for general governance subject to limitations in one way or another imposed by the State. These units may, and do, participate in and affect the economic life of this Nation in a great number and variety of ways. When these bodies act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender." [Lafayette v. Louisiana Power & Light Co.](#), 435 U.S. 389, 407-408 (1978) (footnotes omitted).

499 U.S. 365, \*399; 111 S. Ct. 1344, \*\*1364; 113 L. Ed. 2d 382, \*\*\*410; 1991 U.S. LEXIS 1858, \*\*\*\*60

"Sham" exception to application of Noerr-Pennington Doctrine, exempting from federal antitrust laws joint efforts to influence governmental action. 71 ALR Fed 723.

Application of doctrine exempting from federal antitrust laws joint efforts to influence legislative or executive action. 17 ALR Fed 645.

Valid governmental action as conferring immunity or exemption from private liability under the federal antitrust laws. 12 ALR Fed 329.

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## **Summit Health v. Pinhas**

Supreme Court of the United States

November 26, 1990, Argued ; May 28, 1991, Decided

No. 89-1679

**Reporter**

500 U.S. 322 \*; 111 S. Ct. 1842 \*\*; 114 L. Ed. 2d 366 \*\*\*; 1991 U.S. LEXIS 2917 \*\*\*\*; 59 U.S.L.W. 4493; 1991-1 Trade Cas. (CCH) P69,443; 91 Cal. Daily Op. Service 3844; 91 Daily Journal DAR 6166

SUMMIT HEALTH, LTD., et al., PETITIONERS v. SIMON J. PINHAS

**Prior History:** [\*\*\*\*1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

**Disposition:** [894 F. 2d 1024](#), affirmed.

## **Core Terms**

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interstate commerce, conspiracy, Sherman Act, surgeon, eye surgery, commerce, boycott, peer review process, ophthalmological, out-of-state, price-fixing, antitrust, conspired, alleges, prices, nexus, alleged conspiracy, medical staff, present case, defendants', proceedings, termination, privileges, infected, patients, restrain, cases

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > Sherman Act > General Overview

[\*\*HN1\*\*](#) [] **Antitrust & Trade Law, Sherman Act**

See [15 U.S.C.S. § 1](#) (as amended).

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Federal Government > US Congress

[\*\*HN2\*\*](#) [] **Antitrust & Trade Law, Sherman Act**

When Congress passed the Sherman Act, [15 U.S.C.S. § 1](#), it left no area of its constitutional power over commerce unoccupied. Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed.

Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN3\*\*](#) [] Antitrust & Trade Law, Sherman Act

Because the essence of any violation of [15 U.S.C.S. § 1](#) is an illegal agreement itself -- rather than the overt acts performed in furtherance of it -- proper analysis focuses, not upon actual consequences, but rather upon the potential harm that would ensue if the conspiracy were successful.

Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN4\*\*](#) [] Antitrust & Trade Law, Sherman Act

In a civil action under the Sherman Act, [15 U.S.C.S. § 1](#), liability may be established by proof of either an unlawful purpose or an anti-competitive effect.

Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN5\*\*](#) [] Antitrust & Trade Law, Sherman Act

The federal power to protect the free market may be exercised to punish conduct which threatens to impair competition even when no actual harm results.

Antitrust & Trade Law > Sherman Act > General Overview

### [\*\*HN6\*\*](#) [] Antitrust & Trade Law, Sherman Act

The competitive significance of respondent's exclusion from a market must be measured, not just by a particularized evaluation of his own practice, but rather, by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which he has been excluded.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

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

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

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

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

### [\*\*HN7\*\*](#) [] Antitrust Actions, Facilities

The Health Care Quality Improvement Act of 1986, [42 U.S.C.S. § 11101](#), provides for immunity from antitrust, and other, actions if the peer review process proceeds in accordance with [42 U.S.C.S. § 11112](#). According to the House sponsor of the bill, the immunity provisions were restricted so as not to protect illegitimate actions taken under the

guise of furthering the quality of health care. Actions that are really taken for anticompetitive purposes will not be protected under this bill.

## Lawyers' Edition Display

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### Decision

Interstate commerce requirement for jurisdiction under 1 of Sherman Act ([15 USCS 1](#)) held satisfied by allegation of conspiracy to exclude surgeon from local ophthalmological services market.

### Summary

An ophthalmologist who was a member of the staff of a Los Angeles hospital filed a complaint in a Federal District Court, alleging that the hospital, the hospital's corporate owner, the hospital's medical staff, and others had violated 1 of the Sherman Act ([15 USCS 1](#))--which prohibits conspiracies in restraint of interstate commerce--by conspiring to exclude the ophthalmologist, who was a licensed surgeon, from the market for ophthalmological services in Los Angeles because he refused to follow an unnecessarily costly procedure that was required with respect to eye surgery performed at the hospital. The ophthalmologist's complaint alleged that (1) his medical staff privileges had been summarily suspended, and subsequently terminated, as a result of peer-review proceedings that were conducted in an unfair manner by biased decisionmakers, and (2) when the ophthalmologist's action was commenced, preparations were being made for distribution--to all hospitals of which he was a member or to which he might apply--of an adverse report that would preclude him from continued competition in California, if not the United States, thus effectuating a boycott of the ophthalmologist. The District Court dismissed the complaint without leave to amend, but the United States Court of Appeals for the Ninth Circuit reinstated the ophthalmologist's 1 claim ([894 F2d 1024](#)). The Court of Appeals (1) rejected the argument that the Act's jurisdictional requirements had not been satisfied because there was no allegation that interstate commerce would be affected by the ophthalmologist's removal from the hospital's medical staff, and (2) held that as a matter of practical economics, the hospital's peer-review process affected interstate commerce, because the peer-review proceedings affected the entire hospital staff and thus affected the hospital's interstate commerce.

On certiorari, the United States Supreme Court affirmed. In an opinion by Stevens, J., joined by Rehnquist, Ch. J., and White, Marshall, and Blackmun, JJ., it was held that the interstate commerce requirement for jurisdiction under 1 was satisfied by the allegations contained in the ophthalmologist's complaint, because (1) the hospital's owner was engaged in interstate commerce; (2) the hospital was engaged in interstate commerce; (3) ophthalmological services at the hospital were regularly performed for out-of-state patients, generated revenues from out-of-state sources, and were important as part of the entire operation of the hospital; (4) the ophthalmologist did not have to allege, or prove, an actual effect on interstate commerce, since (a) proper analysis focused upon the potential harm from a successful conspiracy, and (b) liability could be established by proof of either an unlawful purpose or an anticompetitive effect; (5) the alleged conspiracy, if successful, would reduce the provision of ophthalmological services in the local market; (6) the competitive significance of the ophthalmologist's exclusion from the market had to be measured by its impact on the ophthalmologist and on other participants and potential participants in the market; (7) the alleged restraint was accomplished by an alleged misuse of a congressionally regulated peer-review process which the ophthalmologist characterized as the gateway that controlled access to the market for the ophthalmologist's services, which gateway was closed to the ophthalmologist, both at the hospital and at other hospitals, and (8) Congress had the power to regulate a peer-review process that controlled access to the local market for ophthalmological surgery.

Scalia, J., joined by O'Connor, Kennedy, and Souter, JJ., dissented, expressing the view that (1) the question before the court was not whether Congress could reach the activity in question, but whether it had done so via the Sherman Act, (2) because a restraint of trade must be gauged according to its effect on competition, not competitors, this question had to be answered by determining whether, in its practical economic consequences, the boycott (a) substantially affected interstate commerce by restricting competition, or (b) interrupted the flow of

interstate commerce, (3) the uncontested facts precluded any inference that the conspiracy had or could have had an effect on competition in the Los Angeles market, and (4) the ophthalmologist's complaint did not suggest that the conspiracy could have even the most trivial effect on interstate commerce.

## **Headnotes**

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COMMERCE §81 > PLEADING §176 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES

§15 > interstate commerce -- conspiracy -- intent of parties -- interference -- hospital's peer-review proceedings -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D]

The interstate commerce requirement for jurisdiction under 1 of Sherman Act ([15 USCS 1](#)), which prohibits conspiracies in restraint of interstate commerce, is satisfied by an ophthalmologist's allegation that a hospital, the hospital's corporate owner, the hospital's medical staff, and others have violated 1 by conspiring to exclude the ophthalmologist, who is a licensed surgeon, from the market for ophthalmological services in the city in which the hospital is located because he refuses to follow an unnecessarily costly procedure that is required with respect to eye surgery performed at the hospital--where the ophthalmologist's complaint alleges that the ophthalmologist's medical staff privileges at the hospital have been summarily suspended, and subsequently terminated, as a result of peer-review proceedings that were conducted in an unfair manner by biased decisionmakers--because (1) the hospital's owner, which owns several general hospitals, is engaged in interstate commerce; (2) the hospital also is engaged in interstate commerce, including purchasing out-of-state medicines and supplies and obtaining revenues from out-of-state insurance companies; (3) ophthalmological services at the hospital are regularly performed for out-of-state patients, generate revenues from out-of-state sources, and are important as part of the entire operation of the hospital; (4) the ophthalmologist need not allege, or prove, an actual effect on interstate commerce to support federal jurisdiction, since (a) given that the essence of any violation of 1 is the illegal agreement itself, proper analysis focuses upon the potential harm that would ensue if the conspiracy were successful, and (b) in a civil action under the Act, liability may be established by proof of either an unlawful purpose or an anticompetitive effect; (5) if the alleged conspiracy is successful, as a matter of practical economics there will be a reduction in the provision of ophthalmological services in the local market; (6) the competitive significance of the ophthalmologist's exclusion from the market must be measured, not just by a particularized evaluation of the ophthalmologist's practice, but rather, by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which the ophthalmologist is excluded; (7) the alleged restraint is accomplished by an alleged misuse of a congressionally regulated peer-review process which the ophthalmologist characterizes as the gateway that controls access to the market for the ophthalmologist's services, which gateway is closed to the ophthalmologist, both at the hospital in question and at other hospitals, by the hospital's adherence to the unnecessarily costly procedure, and (8) Congress has the power to regulate a peer-review process that controls access to the local market for ophthalmological surgery. (Scalia, O'Connor, Kennedy, and Souter, JJ., dissented from this holding.)

APPEAL §1293 > presumptions -- allegations in complaint -- > Headnote:

[LEdHN\[2\]](#) [2]

On certiorari, the United States Supreme Court must assume the truth of the material facts as alleged in a complaint, where a case comes before the court from the granting of a motion to dismiss on the pleadings.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §6 > Sherman Act -- purpose -- construction --> Headnote:

[LEdHN\[3A\]](#) [3A] [LEdHN\[3B\]](#) [3B]

Congress, when it passed the Sherman Act ([15 USCS 1 et seq.](#)), left no area of Congress' constitutional power over commerce unoccupied; in passing the Act, Congress meant to deal comprehensively and effectively with the evils resulting from contracts, combinations, and conspiracies in restraint of trade, and to that end to exercise all the power that Congress possessed.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §22 > interstate commerce -- extent of interference -- indirect interference -- > Headnote:

[LEdHN\[4\]](#) [4]

The interstate commerce requirement for jurisdiction under 1 of Sherman Act ([15 USCS 1](#)), which prohibits conspiracies in restraint of interstate commerce, may be satisfied by a conspiracy to prevent a general hospital which engages in interstate commerce from expanding, even though any actual impact on interstate commerce would be indirect and fortuitous, because (1) no specific purpose to restrain interstate commerce is required for coverage under the Act, and (2) the effect of such a conspiracy on the hospital's purchases of out-of-state medicines and supplies as well as its revenues from out-of-state insurance companies would establish the necessary interstate nexus.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §22 > interstate commerce -- extent of interference -- general hospital -- ophthalmological department -- > Headnote:

[LEdHN\[5\]](#) [5]

For purposes of the interstate commerce requirement for jurisdiction under 1 of Sherman Act ([15 USCS 1](#))--which prohibits conspiracies in restraint of interstate commerce--although a conspiracy to eliminate the entire ophthalmological department of a general hospital which engages in interstate commerce does not involve the full range of activities conducted at the hospital, such a conspiracy, like a conspiracy to destroy the hospital itself, would affect interstate commerce, where it seems clear that ophthalmological services at the hospital are regularly performed for out-of-state patients, generate revenues from out-of-state sources, and are important as part of the entire operation of the hospital.

## Syllabus

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Respondent Pinhas, an ophthalmologist on the staff of petitioner Midway Hospital Medical Center, filed a suit in the District Court, asserting a violation, *inter alia*, of [§ 1](#) of the Sherman Act by Midway and other petitioners, including several doctors. The amended complaint alleged, among other things, that petitioners conspired to exclude Pinhas from the Los Angeles ophthalmological services market when he refused to follow an unnecessarily costly surgical procedure used at Midway; that petitioners initiated peer review proceedings against him which did not conform to congressional requirements and which resulted in the termination of his Midway staff privileges; that at the time he filed suit, petitioners were [\*\*\*\*2] preparing to distribute an adverse report about him based on the peer review proceedings; that the provision of ophthalmological services affects interstate commerce because both physicians and hospitals serve nonresident patients and receive reimbursement from Medicare; and that reports from peer review proceedings are routinely distributed across state lines and affect doctors' employment opportunities

throughout the Nation. The District Court dismissed the amended complaint, but the Court of Appeals reversed, rejecting petitioners' argument that the Act's jurisdictional requirements were not met because there was no allegation that interstate commerce would be affected by Pinhas' removal from Midway's staff. Rather, the court found that Midway's peer review proceedings obviously affected the hospital's interstate commerce because they affected its entire staff, and that Pinhas need not make a particularized showing of the effect on interstate commerce caused by the alleged conspiracy.

*Held:* Pinhas' allegations satisfy the Act's jurisdictional requirements. To be successful, Pinhas need not allege an actual effect on interstate commerce. Because the essence of any § 1 [\*\*\*\*3] violation is the illegal agreement itself, the proper analysis focuses upon the potential harm that would ensue if the conspiracy were successful, not upon actual consequences. And if the conspiracy alleged in the complaint is successful, as a matter of practical economics there will be a reduction in the provision of ophthalmological services in the Los Angeles market. Thus, petitioners erroneously contend that a boycott of a single surgeon, unlike a conspiracy to destroy a hospital department or a hospital, has no effect on interstate commerce because there remains an adequate supply of others to perform services for his patients. This case involves an alleged restraint on the practice of ophthalmological services accomplished by an alleged misuse of a congressionally regulated peer review process, which has been characterized as the gateway controlling access to the market for Pinhas' services. When the competitive significance of respondent's exclusion from the market is measured, not by a particularized evaluation of his practice, but by a general evaluation of the restraint's impact on other participants and potential participants in that market, the restraint is covered by [\*\*\*\*4] the Act. Pp. 328-333.

**Counsel:** J. Mark Waxman argued the cause for petitioners. With him on the briefs was Tami S. Smason.

Lawrence Silver argued the cause for respondent. With him on the brief were Maxwell M. Blecher and Alicia G. Rosenberg.

Deputy Solicitor General Wallace argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Solicitor General Starr, Assistant Attorney General Rill, Deputy Assistant Attorney General Boudin, Lawrence S. Robbins, Robert B. Nicholson, Marion L. Jetton, and James M. Spears.\*

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\* A brief of amici curiae urging affirmance was filed for the State of California et al. by John K. Van de Kamp, Attorney General of California, Andrea S. Ordin, Chief Assistant Attorney General, Sanford N. Gruskin, Assistant Attorney General, Kathleen E. Foote, Deputy Attorney General, Douglas B. Baily, Attorney General of Alaska, Robert K. Corbin, Attorney General of Arizona, Alison J. Butterfield, John Steven Clark, Attorney General of Arkansas, Jeffrey A. Bell, Deputy Attorney General, Duane Woodard, Attorney General of Colorado, Richard Forman, Solicitor General, Clarine Nardi Riddle, Attorney General of Connecticut, Robert M. Langer, Assistant Attorney General, Robert A. Butterworth, Attorney General of Florida, Warren Price III, Attorney General of Hawaii, Robert A. Marks and Ted Gamble Clause, Deputy Attorneys General, Jim Jones, Attorney General of Idaho, Catherine K. Broad, Deputy Attorney General, Neil F. Hartigan, Attorney General of Illinois, Robert Ruiz, Solicitor General, Christine Rosso, Senior Assistant Attorney General, Thomas J. Miller, Attorney General of Iowa, John R. Perkins, Deputy Attorney General, James E. Tierney, Attorney General of Maine, Stephen L. Wessler, Deputy Attorney General, J. Joseph Curran, Jr., Attorney General of Maryland, James M. Shannon, Attorney General of Massachusetts, George K. Weber, Assistant Attorney General, Hubert H. Humphrey III, Attorney General of Minnesota, Stephen P. Kilgriff, Deputy Attorney General, Thomas F. Pursell, Assistant Attorney General, Anthony J. Celebrezze, Jr., Attorney General of Ohio, Doreen C. Johnson, Assistant Attorney General, Ernest D. Preate, Jr., Attorney General of Pennsylvania, Eugene F. Waye, Chief Deputy Attorney General, Carl S. Hisiro, Senior Deputy Attorney General, Jim Mattox, Attorney General of Texas, Mary F. Keller, First Assistant Attorney General, Lou McCreary, Executive Assistant Attorney General, Allene D. Evans, Assistant Attorney General, R. Paul Van Dam, Attorney General of Utah, Sander Mooy, Assistant Attorney General, Mary Sue Terry, Attorney General of Virginia, Kenneth O. Eikenberry, Attorney General of Washington, James M. Beaulaurier and Tina E. Kondo, Assistant Attorneys General, and Roger W. Tompkins, Attorney General of West Virginia.

Briefs of amici curiae were filed for the Arizona Hospital Association et al. by John P. Frank and Andrew S. Gordon; and for Richard A. Bolt by Clark C. Havighurst and Hal K. Litchford.

**Judges:** STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, and BLACKMUN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which O'CONNOR, KENNEDY, and SOUTER, JJ., joined, post, p. 333.

**Opinion by:** STEVENS

## Opinion

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[\*324] [\*\*\*372] [\*\*1844] JUSTICE STEVENS delivered the opinion of the Court.

**LEdHN[1A]** [1A]The question presented is whether the interstate commerce requirement of antitrust jurisdiction is satisfied by allegations that petitioners conspired to exclude respondent, a duly licensed and practicing physician and surgeon, from the market for ophthalmological services in Los Angeles because he refused to follow an unnecessarily costly surgical procedure.

In 1987, respondent Dr. Simon J. Pinhas filed a complaint in District Court alleging that petitioners Summit Health, Ltd. (Summit), Midway Hospital Medical Center (Midway), its medical staff, and others had entered into a conspiracy to drive him out of business "so that other ophthalmologists and eye physicians [including four of the petitioners] will have a greater share of the eye care and ophthalmic [\*\*\*\*6] surgery in Los Angeles." App. 39. Among his allegations was a claim that the conspiracy violated [§ 1](#) of the Sherman Act.<sup>1</sup> [\*\*\*7] The District Court granted defendants' (now petitioners') motion to dismiss the First Amended Complaint (complaint) without leave to amend, App. 315, but the United States Court of Appeals for the Ninth Circuit reinstated the antitrust claim. [894 F.2d 1024 \(1989\)](#).<sup>2</sup> We granted certiorari, [496 U.S. 935 \(1990\)](#), to consider petitioners' contention that the complaint fails to satisfy the jurisdictional requirements of the Sherman Act, as interpreted in [McLain v. Real Estate Bd. of New Orleans, Inc.](#), [444 U.S. 232, 62 L. Ed. 2d 441, 100 S. Ct. 502 \(1980\)](#), because it does [\*\*1845] not describe a factual nexus between the alleged boycott and interstate commerce.

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**LEdHN[2]** [2]Because this case comes before us from the granting of a motion to dismiss on the pleadings, we must assume the truth of the material facts as alleged in the complaint. Respondent, a diplomate of the American Board of Ophthalmology, has earned a national and international reputation as a specialist in corneal eye problems. App. 7. Since October 1981, he has been a member of the staff of Midway in Los Angeles, and because of his special skills, has performed more eye surgical procedures, including cornea transplants and cataract removals, than any other surgeon at the hospital. *Ibid.*<sup>3</sup>

[\*\*\*8] [\*326] Prior to 1986, most eye surgeries [\*\*\*373] in Los Angeles were performed by a primary surgeon with the assistance of a second surgeon. *Id.*, at 8. This practice significantly increased the cost of eye surgery. In

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<sup>1</sup> [Section 1](#) of the Sherman Act, 26 Stat. 209, as amended, provides in relevant part:

**HN1** [1] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." [15 U. S. C. § 1](#).

<sup>2</sup> Although the complaint alleged five claims, only the "Fourth Claim for Relief," the antitrust claim, is before us now.

The complaint also named as a defendant the California Board of Medical Quality Assurance (BMQA). The BMQA, however, was dismissed by stipulation. See [894 F.2d at 1027, n.2](#).

<sup>3</sup> "One of the reasons for his success is the rapidity with which he, as distinguished from his competitors, can perform such surgeries. The speed with which such surgery can be completed benefits the patient because the exposure of cut eye tissue is drastically reduced. Some of Dr. Pinhas' competitors regularly require, on the average, six times the length of surgical time to complete the same procedures as Dr. Pinhas." App. 7.

February of that year, the administrators of the Medicare program announced that they would no longer reimburse physicians for the services of assistants, and most hospitals in southern California abolished the assistant surgeon requirement. Respondent, and certain other ophthalmologists, asked Midway to abandon the requirement, but the medical staff refused to do so. *Ibid.* Respondent explained that because Medicare reimbursement was no longer available, the requirement would cost him about \$ 60,000 per year in payments to competing surgeons for assistance that he did not need. *Id.*, at 9. Although respondent expressed a desire to maintain the preponderance of his practice at Midway, he nevertheless advised the hospital that he would leave if the assistant surgeon requirement were not eliminated. *Ibid.*

Petitioners responded to respondent's request to forgo an assistant in two ways. First, Midway and its corporate parent offered respondent a [\*\*\*\*9] "sham" contract that provided for payments of \$ 36,000 per year (later increased by oral offer to \$ 60,000) for services that he would not be asked to perform. *Ibid.* Second, when respondent refused to sign or return the "sham" contract, petitioners initiated peer review proceedings against him and summarily suspended, and subsequently terminated, his medical staff privileges.<sup>4</sup> *Id.*, at 10. The [\*327] proceedings were conducted in an unfair manner by biased decisionmakers, and ultimately resulted in an order upholding one of seven charges against respondent, and imposing severe restrictions on his practice.<sup>5</sup> When this action was commenced, petitioners were preparing to distribute an adverse report<sup>6</sup> about respondent that would "preclude him from continued [\*\*1846] competition in the market place, not only at defendant Midway Hospital [but also] . . . in California, if not the United States." *Id.*, at 40. The defendants allegedly planned to disseminate the report "to all hospitals which Dr. Pinhas is a member [sic], and to all hospitals to which he may apply so as to secure similar actions by those hospitals, thus effectuating a boycott of Dr. Pinhas. [\*\*\*\*10] " *Ibid.*

[\*\*\*\*11] The complaint alleges that petitioner Summit owns and operates 19 hospitals, including Midway, and 49 other health care facilities in California, [\*\*\*374] six other States, and Saudi Arabia. *Id.*, at 3. Summit, Midway, and each of the four ophthalmic surgeons named as individual defendants, as well as respondent, are all allegedly engaged in interstate commerce. The provision of ophthalmological services affects interstate commerce because both physicians and hospitals serve nonresident patients and receive reimbursement through Medicare payments. Reports concerning peer review proceedings are routinely distributed across [\*328] state lines and affect doctors' employment opportunities throughout the Nation.

In the Court of Appeals, petitioners defended the District Court's dismissal of the complaint on the ground that there was no allegation that interstate commerce would be affected by respondent's removal from the Midway medical staff. The Court of Appeals rejected this argument because "as a matter of practical economics" the hospital's "peer review process in general" obviously affected interstate commerce. [894 F.2d at 1032](#) (citation omitted). The [\*\*\*\*12] court added:

"Pinhas need not, as appellees apparently believe, make the more particularized showing of the effect on interstate commerce caused by the alleged conspiracy to keep him from working. [[McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. at 242-243](#)]. He need only prove that peer-review proceedings have an effect on interstate commerce, a fact that can hardly be disputed. The proceedings affect the entire staff at Midway and

<sup>4</sup> Respondent was notified, by a letter dated April 13, 1987, that such actions were the result of a "Medical Staff review of [his] medical records, with consideration as to the questions raised regarding: indications for surgery; appropriateness of surgical procedures in light of patient's medical condition; adequacy of documentation in medical records; and ongoing pattern of identified problems." *Id.*, at 93.

<sup>5</sup> After the Governing Board of Midway affirmed the decision of the peer review committee, but imposed even more stringent conditions on respondent than the committee had imposed, respondent filed a petition for writ of mandate, pursuant to [Cal. Civ. Proc. Code Ann. § 1094.5](#) (West Supp. 1991). [894 F.2d 1024, 1027 \(CA9 1989\)](#). On May 17, 1989, the Superior Court of California denied respondent's request for further relief. App. to Pet. for Cert. A30-A35.

<sup>6</sup> Petitioners had already distributed the report, a Business and Professions Code 805 Report, to Cedars-Sinai Medical Center in Los Angeles, which then denied respondent medical staff privileges there. App. to Brief for Respondent a-3. Cedars-Sinai, like Midway, had refused to abolish the assistant surgeon requirement. App. 8.

500 U.S. 322, \*328; 111 S. Ct. 1842, \*\*1846; 114 L. Ed. 2d 366, \*\*\*374; 1991 U.S. LEXIS 2917, \*\*\*\*12

thus affect the hospital's interstate commerce. Appellees' contention that Pinhas failed to allege a nexus with interstate commerce because the absence of Pinhas's services will not drastically affect the interstate commerce of Midway therefore misses the mark and must be rejected." *Ibid.*

II

[LEdHN\[3A\]](#) [↑] [3A]Congress enacted the Sherman Act in 1890.<sup>7</sup> During the past century, as the dimensions and complexity of our economy have grown, the federal power over commerce, and the concomitant coverage of the Sherman Act, have experienced [\*329] similar expansion.<sup>8</sup> This history has been recounted before,<sup>9</sup> and we need not reiterate it today. [\*\*\*13]<sup>10</sup>

[\*\*\*14]

[\*\*\*375] [\*\*1847] [LEdHN\[1B\]](#) [↑] [1B][LEdHN\[4\]](#) [↑] [4]We therefore begin by noting certain propositions that are undisputed in this case. Petitioner Summit, the parent of Midway as well as of several other general hospitals, is unquestionably engaged in interstate commerce. Moreover, although Midway's primary activity is the provision of health care services in a local market, it also engages in interstate commerce. A conspiracy to prevent Midway from expanding would be covered by the Sherman Act, even though any actual impact on interstate commerce would be "indirect" and "fortuitous." *Hospital Building Co. v. Rex Hospital Trustees*, 425 U.S. 738, 744, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976). No specific purpose to restrain interstate commerce is required. *Id.*, at 745. As a "matter of practical economics," *ibid.*, the effect of such a conspiracy on the hospital's "purchases of out-of-state medicines and supplies as well as its revenues from out-of-state insurance companies," *id.*, at 744, [\*\*\*15] would establish the necessary interstate nexus.

[LEdHN\[1C\]](#) [↑] [1C][LEdHN\[5\]](#) [↑] [5]This case does not involve the full range of activities conducted at a general hospital. Rather, this case involves the provision of ophthalmological services. It seems clear, however, that these services are regularly performed for out-of-state [\*330] patients and generate revenues from out-of-state sources; their importance as part of the entire operation of the hospital is evident from the allegations of the complaint. A conspiracy to eliminate the entire ophthalmological department of the hospital, like a conspiracy to destroy the hospital itself, would unquestionably affect interstate commerce. Petitioners contend, however, that a boycott of a

<sup>7</sup> Act of July 2, 1890, ch. 647, § 1, 26 Stat. 209. The floor debates on the Sherman Act reveal, in Senator Sherman's words, an intent to "g[o] as far as the Constitution permits Congress to go . . ." 20 Cong. Rec. 1167 (1889). For views of the enacting Congress toward the Sherman Act, see 21 Cong. Rec. 2456 (1890); see also *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 555-560, 88 L. Ed. 1440, 64 S. Ct. 1162 (1944); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493, n.15, 84 L. Ed. 1311, 60 S. Ct. 982 (1940).

<sup>8</sup>The Court's decisions have long "permitted the reach of the Sherman Act to expand along with expanding notions of congressional power. See *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. [186,] 201-202 [(1974)]." *Hospital Building Co. v. Rex Hospital Trustees*, 425 U.S. 738, 743, n.2, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976).

<sup>9</sup> See, e. g., *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 229-235, 92 L. Ed. 1328, 68 S. Ct. 996 (1948).

<sup>10</sup> [LEdHN\[3B\]](#) [↑] [3B]

It is firmly settled that [HN2](#) [↑] when Congress passed the Sherman Act, it "left no area of its constitutional power [over commerce] unoccupied." *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 298, 89 L. Ed. 951, 65 S. Ct. 661 (1945). Congress "meant to deal comprehensively and effectively with the evils resulting from contracts, combinations and conspiracies in restraint of trade, and to that end to exercise all the power it possessed." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 435, 76 L. Ed. 1204, 52 S. Ct. 607 (1932).

500 U.S. 322, \*330; 111 S. Ct. 1842, \*\*1847; 114 L. Ed. 2d 366, \*\*\*375; 1991 U.S. LEXIS 2917, \*\*\*\*15

single surgeon has no such obvious effect because the complaint does not deny the existence of an adequate supply of other surgeons to perform all of the services that respondent's current and future patients may ever require. Petitioners argue that respondent's complaint is insufficient because there is no factual nexus between [\*\*\*\*16] the restraint on this one surgeon's practice and interstate commerce.

[\[EdHN1D\]](#) [1D] There are two flaws in petitioners' argument. First, [HN3](#) because the essence of any violation of [§ 1](#) is the illegal agreement itself -- rather than the overt acts performed in furtherance of it, see [United States v. Kissel, 218 U.S. 601, 54 L. Ed. 1168, 31 S. Ct. 124 \(1910\)](#) -- proper analysis focuses, not upon actual consequences, but rather upon the potential harm that would ensue if the conspiracy were successful. As we explained in [McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 62 L. Ed. 2d 441, 100 S. Ct. 502 \(1980\)](#):

"If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases. See [American Tobacco Co. v. United States, 328 U.S. 781, 811, 90 L. Ed. 1575, 66 S. Ct. 1125 \(1946\)](#); [\*\*\*\*17] [United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 225, n.59, 84 L. Ed. 1129, 60 S. Ct. 811 \(1940\)](#). A violation may still be found in such circumstances because [HN4](#) in a civil action under the Sherman Act, liability may be established by proof of either an unlawful purpose or an anti-competitive effect. [United States v. United States Gypsum Co., 438 U.S. 422, 436, n.13, 57 L. Ed. 2d 854, 98 S. Ct. 2864 \(1978\)](#); see [United States v. Container Corp., 393 U.S. 333, 337, 21 L. Ed. 2d 526, 89 S. Ct. 510 \(1969\)](#); [United States v. National Assn. of Real Estate Boards, 339 U.S. 485, 489, 94 L. Ed. 1007, 70 S. Ct. 711 \(1950\)](#); [United States v. Socony-Vacuum Oil Co., supra, at 224-225, n.59.](#) [Id., at 243.](#)

[\*\*1848] Thus, respondent need not allege, or prove, an actual effect on interstate commerce to support federal jurisdiction.<sup>11</sup>

[\*\*\*\*18] Second, if the conspiracy alleged in the complaint is successful, "'as a matter of practical economics'" there will be a reduction in the provision of ophthalmological services in the Los Angeles market. [McLain, 444 U.S. at 246](#) (quoting [Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. at 745](#)). In cases involving horizontal agreements to fix prices or allocate territories within a single State, we have based jurisdiction on a general conclusion that the defendants' agreement "almost surely" had a marketwide impact and therefore an effect on interstate commerce, [Burke v. Ford, 389 U.S. 320, 322, 19 L. Ed. 2d 554, 88 S. Ct. 443 \(1967\)](#) (*per curiam*), or that the agreement "necessarily affected" the volume of residential sales and therefore the demand for financing and title insurance provided by out-of-state concerns. [McLain, 444 U.S. at 246](#). In the latter case, we explained:

"To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners [\*\*\*\*19] need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful." [Id., at 242-243.](#)

[\*332] Although plaintiffs in *McLain* were consumers of the conspirators' real estate brokerage services, and plaintiff in this case is a competing surgeon whose complaint identifies only himself as the victim of the alleged boycott, the same analysis applies. For if a violation of the Sherman Act occurred, the case is necessarily more significant than the fate of "just one merchant whose business is so small that his destruction makes little difference to the economy." [Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213, 3 L. Ed. 2d 741, 79 S. Ct. 705 \(1959\)](#) (footnote omitted). The case involves [\*\*\*\*377] an alleged restraint on the practice of ophthalmological services. The restraint was accomplished by an alleged misuse of a congressionally regulated peer review process,<sup>12</sup> which respondent characterizes as the gateway that controls access to the market for his services. The

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<sup>11</sup> Cf. [United States v. Staszczuk, 517 F.2d 53, 60, n.17](#) (CA7) (en banc) ("[HN5](#) The federal power to protect the free market may be exercised to punish conduct which threatens to impair competition even when no actual harm results"), cert. denied, [423 U.S. 837, 46 L. Ed. 2d 56, 96 S. Ct. 65 \(1975\)](#).

gateway [\*\*\*\*20] was closed to respondent, both at Midway and at other hospitals, because petitioners insisted upon adhering to an unnecessarily costly procedure. [HN7](#)<sup>12</sup> The competitive significance of respondent's exclusion from the market must be measured, not just by a particularized evaluation of his own practice, but rather, by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which he has been excluded.

[\*\*\*\*21] We have no doubt concerning the power of Congress to regulate a peer review process controlling access to the [\*333] market for ophthalmological surgery in Los Angeles. Thus, respondent's claim that members of the peer review committee conspired with [\*\*1849] others to abuse that process and thereby deny respondent access to the market for ophthalmological services provided by general hospitals in Los Angeles has a sufficient nexus with interstate commerce to support federal jurisdiction.

The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

**Dissent by:** SCALIA

## Dissent

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JUSTICE SCALIA, with whom JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE SOUTER join, dissenting.

The Court treats this case as involving no more than a conspiracy among eye surgeons at Midway Hospital to eliminate one of their competitors. That alone, it concludes, restrains trade or commerce among the several States within the meaning of the Sherman Act. In my judgment, the conspiracy alleged by the complaint, fairly viewed, involved somewhat more than that; but even so falls far short of what is required for Sherman Act jurisdiction. I respectfully dissent.

I

The Court has "no doubt concerning [\*\*\*\*22] the power of Congress to regulate a peer review process controlling access to the market for ophthalmological surgery in Los Angeles," and concludes that "respondent's claim . . . has a sufficient nexus with interstate commerce to support federal jurisdiction." *Ante*, at 332 and this page. I agree with all that. Unfortunately, however, the question before us is not whether Congress *could* reach the activity before us here if it wanted to, but whether it *has done so* via the Sherman Act. That enactment [\*\*\*378] does not prohibit all conspiracies using instrumentalities of commerce that Congress could regulate. Nor does it prohibit all conspiracies that have sufficient constitutional "nexus" to interstate commerce to be regulated. It prohibits only those conspiracies that are "in restraint of trade or commerce [\*334] among the several States." [15 U. S. C. § 1](#). This language commands a judicial inquiry into the nature and potential effect of each particular restraint. "The jurisdictional inquiry under general prohibitions like . . . [§ 1](#) of the Sherman Act, turning as it does on the circumstances presented in each case and requiring a particularized [\*\*\*\*23] judicial determination, differs significantly from that required when Congress itself has defined the specific persons and activities that affect

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<sup>12</sup> See Health Care Quality Improvement Act of 1986, 100 Stat. 3784, [42 U. S. C. § 11101 et seq.](#) [HN7](#)<sup>12</sup> The statute provides for immunity from antitrust, and other, actions if the peer review process proceeds in accordance with [§ 11112](#). Respondent alleges that the process did not conform with the requirements set forth in [§ 11112](#), such as adequate notice, representation by an attorney, access to a transcript of the proceedings, and the right to cross-examine witnesses. According to the House sponsor of the bill, "the immunity provisions [were] restricted so as not to protect illegitimate actions taken under the guise of furthering the quality of health care. Actions . . . that are really taken for anticompetitive purposes will not be protected under this bill." 132 Cong. Rec. 30766 (1986) (remarks of Rep. Waxman).

500 U.S. 322, \*334; 111 S. Ct. 1842, \*\*1849; 114 L. Ed. 2d 366, \*\*\*378; 1991 U.S. LEXIS 2917, \*\*\*\*23

commerce and therefore require federal regulation." [Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 197, n.12, 42 L. Ed. 2d 378, 95 S. Ct. 392 \(1974\)](#).

Until 1980, the nature of this jurisdictional inquiry (with respect to alleged restraints not targeted at the very flow of interstate commerce) was clear: The question was whether the restraint at issue, if successful, would have a substantial effect on interstate commercial activity. See [Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. 738, 741, 744, 48 L. Ed. 2d 338, 96 S. Ct. 1848 \(1976\)](#); [Burke v. Ford, 389 U.S. 320, 321-322, 19 L. Ed. 2d 554, 88 S. Ct. 443 \(1967\) \(per curiam\)](#); [Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 237, 92 L. Ed. 1328, 68 S. Ct. 996 \(1948\)](#). See Note, The Interstate Commerce Test for Jurisdiction in Sherman Act Cases and Its Substantive Applications, 15 Ga. L. Rev. 714, 716-717 (1981). As I shall discuss in due course, that [\*\*\*\*24] criterion would have called for reversal in the present case. See [United States v. Oregon State Medical Society, 343 U.S. 326, 96 L. Ed. 978, 72 S. Ct. 690 \(1952\)](#).

Unfortunately, in 1980, the Court seemed to abandon this approach. [McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 62 L. Ed. 2d 441, 100 S. Ct. 502 \(1980\)](#), appeared to shift the focus of the inquiry away from the effects of the restraint itself, asking instead whether the "[defendants'] activities which allegedly have been *infected* by a price-fixing conspiracy . . . have a not insubstantial effect on the interstate commerce involved." [Id. at 246](#) (emphasis added). The result in *McLain* would [\*\*1850] have been the same under the prior test, since the subject of the suit was an alleged massive conspiracy by all realtors in the Greater New Orleans area, involving price [\*335] fixing, suppression of market information, and other anticompetitive practices. The Court's resort to the more expansive "infected activity" test was prompted by the belief that focusing upon the effects of the restraint itself would require plaintiffs to [\*\*\*\*25] prove their case at the jurisdictional stage. See [id. at 243](#). That belief was in error, since the prior approach had simply assumed, rather than required proof of, the success of the conspiracy.

Thus, as a dictum based upon a misconception, the "infected activities" approach was introduced into [antitrust law](#). It was not received with enthusiasm. Most courts simply finessed the language of *McLain* and said that nothing had changed, *i. e.*, that the ultimate question was still whether the unlawful conduct *itself*, [\*\*\*379] if successful, would have a substantial effect on interstate commerce. See, *e. g.*, [Cordova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank N. A., 649 F.2d 36, 45 \(CA1 1981\)](#); [Furlong v. Long Island College Hospital, 710 F.2d 922, 925-926 \(CA2 1983\)](#); [Sarin v. Samaritan Health Center, 813 F.2d 755, 758-759 \(CA6 1987\)](#); [Seglin v. Esau, 769 F.2d 1274, 1280 \(CA7 1985\)](#); [Hayden v. Bracy, 744 F.2d 1338, 1343, n.2 \(CA8 1984\)](#); [Crane v. Intermountain Health Care, Inc., 637 F.2d 715, 724 \(CA10 1980\)](#) (en banc); [\*\*\*\*26] see also [Thompson v. Wise General Hospital, 707 F. Supp. 849, 854-856 \(WD Va. 1989\)](#), aff'd, 896 F.2d 547 (CA4 1990). Others, however, took *McLain* at face value -- and of course immediately fell into disagreement over the proper application of the new test. With respect to a restraint like the one at issue here, for example, how does one decide which "activities of the defendants" are "infected"? Are they all the activities of the hospital, [Weiss v. York Hospital, 745 F.2d 786, 824-825, and n.66 \(CA3 1984\)](#)? Only the activities of the eye surgery department, see [Mitchell v. Frank R. Howard Memorial Hospital, 853 F.2d 762, 764, n.1 \(CA9 1988\)](#)? The entire practice of eye surgeons who use the hospital, [EI Shahawy v. Harrison, 778 F.2d 636, 641 \[\\*336\] \(CA11 1985\)](#)? Or, as the Ninth Circuit apparently found in this case, the peer review process itself?

Today the Court could have cleared up the confusion created by *McLain*, refocused the inquiry along the lines marked out by our previous cases (and still adhered to by most Circuits), and reversed the judgment below. Instead, it [\*\*\*\*27] compounds the confusion by rejecting the two competing interpretations of *McLain* and adding yet a third candidate to the field, one that no court or commentator has ever suggested, let alone endorsed. To determine Sherman Act jurisdiction it looks *neither* to the effect on commerce of the restraint, *nor* to the effect on commerce of the defendants' infected activity, but rather, it seems, to the effect on commerce of the activity from which the plaintiff has been excluded. As I understand the Court's opinion, the test of Sherman Act jurisdiction is whether the entire line of commerce from which Dr. Pinhas has been excluded affects interstate commerce. Since excluding him from eye surgery at Midway Hospital effectively excluded him from the entire Los Angeles market for eye surgery (because no other Los Angeles hospital would accord him practice privileges after Midway rejected

him), the jurisdictional question is simply whether that market affects interstate commerce, which of course it does.\* This analysis tells us nothing about the substantiality of the impact on interstate commerce generated by the particular conduct at issue here.

[\*\*\*\*28] Determining the "market" for a product or service, meaning the scope of other products or services against which it must [\*\*1851] compete, is of course necessary for many purposes of antitrust analysis. But today's opinion does not identify a relevant "market" in *that* sense. It declares Los Angeles to be the pertinent "market" only because that is the [\*\*\*380] entire scope of Dr. Pinhas' exclusion from practice. If the scope of [\*337] his exclusion had been national, it would have declared the entire United States to be the "market," though it is quite unlikely that all eye surgeons in the United States are in competition. I cannot understand why "market" in the Court's peculiar sense has any bearing upon this restraint's impact on interstate commerce, and hence upon Sherman Act jurisdiction. The Court does not even attempt to provide an explanation.

The Court's focus on the Los Angeles market would make some sense if Midway was attempting to monopolize that market, or conspiring with all (or even most) of the hospitals in Los Angeles to fix prices there, cf. [McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 62 L. Ed. 2d 441, 100 S. Ct. 502 \(1980\)](#). [\*\*\*\*29] But the complaint does not mention § 2 of the Sherman Act, and Dr. Pinhas does not allege a conspiracy to affect eye surgery in the Los Angeles market. He merely alleges a conspiracy to exclude *him* from that market by a sort of group boycott. Since group boycotts are *per se* violations (not because they necessarily affect competition in the relevant market, but because they deprive at least some consumers of a preferred supplier, see R. Bork, *The Antitrust Paradox* 331-332 (1978)), Dr. Pinhas need not prove an effect on competition in the Los Angeles area to prevail, *if the Sherman Act applies*. But the question before us today is *whether* the Act *does* apply, and that must be answered by determining whether, in its practical economic consequences, the boycott substantially affects interstate commerce by restricting competition or, as in [Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213, 3 L. Ed. 2d 741, 79 S. Ct. 705 \(1959\)](#), interrupts the *flow* of interstate commerce. The Court never comes to grips with that issue. Instead, because a group boycott, like a price-fixing scheme, would be (if the Sherman Act applies) a *per se* [\*\*\*\*30] violation, the Court concludes that "the same analysis applies" to this exclusion of a single competitor from the Los Angeles market as was applied in *McLain* to the fixing of prices by all realtors in the Greater New Orleans market. See *ante*, at 331-332. It [\*338] seems to me obvious that the two situations are not remotely comparable. The economic effects of a price-fixing scheme are felt throughout the market in which the prices are fixed; the economic effects of "black-balling" a single supplier are felt not throughout the market from which he is *theoretically* excluded, but, at most, within the subportion of that market in which he was, or could be, doing business. If, for example, the alleged conspirators in the present case had decided to effectuate the ultimate exclusion of Dr. Pinhas, *i. e.*, to have him killed, it would be absurd to think that the *world market* in eye surgery would thereby be affected. It is undoubtedly true, in the present case, that Dr. Pinhas has been affected throughout the Los Angeles area; but it is rudimentary that the effect of a restraint of trade must be gauged according to its effect on "competition, not competitors," [\*\*\*\*31] "[Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 \(1962\)](#) (emphasis in original). See also, e. g., [Associated General Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 539, n.40, 74 L. Ed. 2d 723, 103 S. Ct. 897](#) [\*\*381] (1983); [Fishman v. Estate of Wirtz, 807 F.2d 520, 564-568 \(CA7 1986\)](#) (Easterbrook, J., dissenting in part). The Court's suggestion that competition in the entire Los Angeles market was affected by this one surgeon's exclusion from that market simply ignores the "practical economics" of the matter.

## II

In any case, it does not seem to me that a correct analysis of this case would treat it as [\*\*1852] involving a conspiracy to boycott a single physician. Such boycotts rarely exist in a vacuum; they are usually the means of enforcing compliance with larger anticompetitive schemes. H. Hovenkamp, *Economics and Federal Antitrust Law* 275-276 (1985); R. Posner, *Antitrust Law* 207 (1976). Cf. [Radovich v. National Football League, 352 U.S. 445,](#)

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\* Even so, I might note, it is improper for the Court to dispense with the necessary allegations to that effect. See [McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 242, 62 L. Ed. 2d 441, 100 S. Ct. 502 \(1980\)](#).

[448-449, 1 L. Ed. 2d 456, 77 S. Ct. 390 \(1957\)](#) (describing blacklisting pursuant to conspiracy to monopolize [\*\*\*\*32] professional football). Charitably read, respondent's complaint alleges just such a scheme, namely, a scheme to fix prices for some of the eye [\*339] surgery performed at Midway Hospital. Instead of simply agreeing to a supercompetitive price, Midway's eye surgeons have, contrary to prevailing Los Angeles practice, allegedly "padded" the cost of certain varieties of eye surgery by requiring a useless second surgeon to be present. The so-called "sham contract" was an attempt to compensate the hyperproductive Dr. Pinhas for his participation in the scheme and the concomitant reduction in his output. When that failed, the conspirators eliminated him as a competitor by terminating his medical staff privileges through the peer review process. That termination was not the totality of the conspiracy, but merely the means used to enforce it -- just as, in [Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#), the elimination of the price-cutting Spray-Rite as a distributor of Monsanto's products (via termination and a boycott) was merely the means of enforcing the alleged price-fixing conspiracy between Monsanto and its [\*\*\*\*33] other distributors. This case, like *Monsanto*, involves a "termination . . . pursuant to a conspiracy . . . to set . . . prices," *id.* at 757-758 (emphasis added), and for purposes of determining Sherman Act jurisdiction, what counts is the impact of that entire price-fixing conspiracy.

Even when the conspiracy is viewed in this broader fashion, however, the scope of the market affected by it has nothing to do with the scope of Dr. Pinhas' exclusion from practice. If this had been a naked price-fixing conspiracy, instead of the more subtle one that it is, no one would contend that it affected prices throughout Los Angeles. Pursuant to standard antitrust analysis, the agreement itself would define the extent of the market. The market would be eye surgery at Midway (not "eye surgery in the city where Midway is located"), since the very existence of the agreement implies power over price in that defined market. [FTC v. Superior Court Trial Lawyers Assn., 493 U.S. 411, 435, n.18, 107 L. Ed. 2d 851, 110 S. Ct. 768 \(1990\)](#) (citing R. Bork, *The Antitrust Paradox* 269 (1978)). It is irrational to use a different analysis, and to assume [\*340] [\*\*\*\*34] the affected market to be all of Los Angeles, simply because this more subtle price-fixing conspiracy led (incidentally) to the [\*\*\*382] exclusion of Dr. Pinhas not only from Midway but from all hospitals throughout the city.

There is simply no basis for assuming that this alleged conspiracy's market power -- and its consequent effect upon *competition*, as opposed to its effect upon *Dr. Pinhas* -- extended throughout Los Angeles. It has not been alleged that the conspirators have perverted the peer review process in hospitals throughout the city; nor that the peer review process at Midway is the "gateway" to the Los Angeles market in the sense of being the only way (or even one of the few ways) to gain entry. To the contrary, it is acknowledged that every hospital in Los Angeles has its own peer review process, and the complaint itself asserts that, well before the offer of the "sham contract," "nearly all" those hospitals had abolished the featherbedding practice that is the object of this conspiracy. These uncontested facts reveal the truly local nature of the restraint and preclude any inference that the conspiracy at issue here had (or could have) an effect on [\*\*\*\*35] competition in the Los Angeles market. Cf. [Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 31, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#); [Northern Pacific R. Co. v. United](#) [\*\*1853] [States, 356 U.S. 1, 6-7, 2 L. Ed. 2d 545, 78 S. Ct. 514 \(1958\)](#). Any allegations to the contrary (and there are none) would have to be dismissed as inconsistent with simple economics. See [Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 593-595, 89 L. Ed. 2d 538, 106 S. Ct. 1348 \(1986\)](#).

### III

In my view, the present case should be decided by applying to the price-fixing conspiracy at Midway Hospital the workable jurisdictional test that our cases had established before *McLain* confused things. On that basis, I would reverse the Court of Appeals' judgment that respondent had stated a Sherman Act claim.

[\*341] The complaint does not begin to suggest that the conspiracy at Midway could have even the most trivial effect on interstate commerce. Cf. [Crane v. Intermountain Health Care, Inc., 637 F.2d at 725](#). It literally alleges nothing more than that Dr. Pinhas, the defendant [\*\*\*\*36] physicians, Midway Hospital, and Summit Health, Ltd., are "engaged in interstate commerce." Contrary to the Court's (undocumented) suggestion, *ante*, at 327 and 329-330, there is no allegation that *any* out-of-state patients call upon the hospital for eye surgery (or anything else) -- let alone a sufficient number that overcharging them would create a "substantial" effect on commerce among the several States. Respondent does not allege that out-of-state insurance companies or the Federal Government pays

for the overcharges, cf. [\*Goldfarb v. Virginia State Bar, 421 U.S. 773, 783, 44 L. Ed. 2d 572, 95 S. Ct. 2004 \(1975\)\*](#); indeed, it appears on the face of the complaint that the Federal Government has stopped reimbursing featherbedded operations. He does not allege that eye surgery involves the use of implements or equipment purchased out of state, or that the restraint at issue here could have any appreciable effect on such purchases, cf. [\*Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. at 741, 744\*](#). Quite simply, the complaint is entirely devoid of any attempt to show a connection between the challenged [\*\*\*383] restraint [\*\*\*\*37] and "commerce among the several States." Because "it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce," [\*McLain, 444 U.S. at 242\*](#), I would dismiss the complaint out of hand.

In point of fact, such a dismissal seems compelled by our decision in [\*United States v. Oregon State Medical Society, 343 U.S. 326, 96 L. Ed. 978, 72 S. Ct. 690 \(1952\)\*](#). There, the state medical society, eight county medical services, and eight individual physicians conspired to restrain the business of providing prepaid medical care by, *inter alia*, allocating territories to be served by doctor-sponsored plans. The District Court found that the [\*342] conspiracy did not restrain interstate commerce. On direct appeal, the United States argued that the interstate activities of the private associations sufficed to show the requisite interstate effect. The Court rejected this argument, holding that, in order to prevail, the Government had to show that the *restraint itself* (the allocation of territories), had a substantial adverse effect on interstate [\*\*\*\*38] commerce. Such an effect had not been proven, the Court observed, because the activities of the doctor-sponsored plans were "wholly intrastate," [\*id. at 338\*](#). It did not matter that the plans had made a few payments to out-of-state patients. Those payments were "few, sporadic, and incidental." [\*Id. at 339\*](#). A straightforward application of this same rationale compels reversal in the present case.

\* \* \*

If it is true, as the complaint alleges, that one hospital will ordinarily not accord privileges to a doctor who has failed the peer review process elsewhere, it may well be that Dr. Pinhas has been the victim of a business tort affecting him throughout Los Angeles -- [\*\*1854] or perhaps even nationwide. Cf. [\*Hayden v. Bracy, 744 F.2d at 1343-1345\*](#) (various torts, in addition to Sherman Act violation, alleged to have arisen out of negative peer review). But the Sherman Act "does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce," [\*Hunt v. Crumboch, 325 U.S. 821, 826, 89 L. Ed. 1954, 65 S. Ct. 1545 \(1945\)\*](#), unless those torts restrain commerce "among [\*\*\*39] the several States." The short of the matter is that Dr. Pinhas may well have a legitimate grievance, but it is not one redressed by the Sherman Act.

Disputes over the denial of hospital practice privileges are common, and most of the Circuits to which they have been presented as federal antitrust claims have rejected them on jurisdictional grounds. [\*Furlong v. Long Island College Hospital, 710 F.2d at 925-926\*](#); [\*Thompson v. Wise General Hospital, 707 F. Supp. at 854-856\*](#); [\*Seglin v. Esau, 769 F.2d at 1283-1284\*](#); [\*343] [\*Hayden v. Bracy, 744 F.2d at 1342-1343\*](#). At least two other Circuits would reach that result on the particular complaint before us here. [\*Cordova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank N. A., 649 F.2d at 45\*](#); [\*Crane v. Intermountain Health Care, Inc., 637 F.2d at 725\*](#). I think it is a mistake to overturn this view. Federal courts are an attractive forum, and the treble damages [\*\*\*384] of the Clayton Act an attractive remedy. We have today made them available for routine business torts, needlessly destroying a sensible [\*\*\*\*40] statutory allocation of federal-state responsibility and contributing to the trivialization of the federal courts.

I respectfully dissent.

## References

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[\*40 Am Jur 2d, Hospitals and Asylums 10, 11; 54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 7, 33, 81\*](#)

500 U.S. 322, \*343; 111 S. Ct. 1842, \*\*1854; 114 L. Ed. 2d 366, \*\*\*384; 1991 U.S. LEXIS 2917, \*\*\*\*40

12 Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade 48:197, 48:198

13A Am Jur PI & Pr Forms (Rev), Hospitals, Forms 21-23; 18 Am Jur PI & Pr Forms (Rev), Monopolies, Restraints of Trade and Unfair Trade Practices, Forms 17, 31

1 Am Jur Proof of Facts 2d 65, Denial of Hospital Staff Privileges

24 Am Jur Trials 1, Defending Antitrust Lawsuits

[15 USCS 1](#)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 22, 28

L Ed Index, Hospitals and Asylums; Physicians and Surgeons; Restraints of Trade ,Monopolies, and Unfair Trade Practices

Index to Annotations, Hospitals; Physicians and Surgeons; Restraints of Trade and Monopolies

Annotation References:

[\*\*\*\*41] Denial by hospital of staff privileges or referrals to physician or other health care practitioner as violation of Sherman Act ([15 USCS 1 et seq.](#)). 89 ALR Fed 419.

Opposition to construction of new hospital or expansion of existing hospital's facilities as violation of Sherman Act ([15 USCS 1 et seq.](#)). 88 ALR Fed 478.

"Learned profession" exemption in federal antitrust laws ([15 USCS 1 et seq.](#)). 39 ALR Fed 774.

Business units or persons within single, commonly owned enterprise as conspiring with each other in violation of 1 or 3 of Sherman Act ([15 USCS 1, 3](#)). 20 ALR Fed 682.

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## *Eastman Kodak Co. v. Image Tech. Servs.*

Supreme Court of the United States

December 10, 1991, Argued ; June 8, 1992, Decided

No. 90-1029

### **Reporter**

504 U.S. 451 \*; 112 S. Ct. 2072 \*\*; 119 L. Ed. 2d 265 \*\*\*; 1992 U.S. LEXIS 3405 \*\*\*\*; 60 U.S.L.W. 4465; 1992-1 Trade Cas. (CCH) P69,839; 92 Cal. Daily Op. Service 4823; 92 Daily Journal DAR 7688; 6 Fla. L. Weekly Fed. S 331

EASTMAN KODAK COMPANY, PETITIONER v. IMAGE TECHNICAL SERVICES, INC., ET AL.

**Prior History:** [\*\*\*\*1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

**Disposition:** [903 F.2d 612](#), affirmed.

## **Core Terms**

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prices, market power, consumers, customers, aftermarket, manufacturer, markets, summary judgment, machines, costs, interbrand, sales, anti trust law, purchasers, micrographic, products, seller, per se rule, tying arrangement, antitrust, monopoly, respondents', competitors, brand, leverage, repair, tie, single-brand, derivative, court of appeals

## **LexisNexis® Headnotes**

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

### **[HN1](#)[] Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > General Overview

### **[HN2](#)[] Tying Arrangements, Clayton Act**

A tying arrangement violates [15 U.S.C.S. § 1](#) if the seller has "appreciable economic power" in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market.

Antitrust & Trade Law > Sherman Act > General Overview

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

### [HN3](#) Antitrust & Trade Law, Sherman Act

Market power is the power to force a purchaser to do something that he would not do in a competitive market; it has been defined as the ability of a single seller to raise price and restrict output. The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market.

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

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

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

### [HN4](#) Standards of Review, De Novo Review

On summary judgment an appellate court may examine the record de novo without relying on the lower courts' understanding.

Evidence > Inferences & Presumptions > General Overview

### [HN5](#) Evidence, Inferences & Presumptions

Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in **antitrust law**.

Antitrust & Trade Law > Sherman Act > General Overview

### [HN6](#) Antitrust & Trade Law, Sherman Act

In the context of [15 U.S.C.S. § 1](#), power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if a seller exploits his dominant position in one market to expand his empire into the next.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Willfulness

Antitrust & Trade Law > Sherman Act > General Overview

### [HN7](#) Scope, Monopolization Offenses

The offense of monopoly under [15 U.S.C.S. § 2](#) has two elements: the possession of monopoly power in the relevant market; and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > Sherman Act > General Overview

Trademark Law > ... > Infringement Actions > Summary Judgment > Standards

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Trademark Law > ... > Infringement Actions > Summary Judgment > General Overview

#### [HN8](#) [] Antitrust & Trade Law, Sherman Act

Monopoly power under [15 U.S.C.S. § 2](#) requires, of course, something greater than market power under [15 U.S.C.S. § 1](#).

Antitrust & Trade Law > Sherman Act > General Overview

#### [HN9](#) [] Antitrust & Trade Law, Sherman Act

A market is composed of products that have reasonable interchangeability. In some instances one brand of a product can constitute a separate market.

Antitrust & Trade Law > Sherman Act > General Overview

#### [HN10](#) [] Antitrust & Trade Law, Sherman Act

In the context of [15 U.S.C.S. § 2](#), as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal.

## **Lawyers' Edition Display**

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### **Decision**

Photocopier manufacturer held not entitled to summary judgment dismissing federal antitrust claims as to (1) tying arrangement between parts and service, and (2) monopolization of sale of service.

### **Summary**

A company which manufactured and sold photocopiers and micrographic equipment also sold service and noncompatible replacement parts for such equipment. In the early 1980's, a number of independent service organizations (ISOs) began servicing the company's equipment. In 1985 and 1986, the company allegedly adopted a policy under which the company supposedly (1) sold parts only to buyers of the company's equipment who either used the company's service or repaired their own equipment; and (2) limited access to other sources of parts by the ISOs by forbidding entities which manufactured parts for the company to sell such parts to anyone other than the company, pressuring other entities not to sell the company's parts to the ISOs, and taking steps to restrict the availability of used equipment. In 1987, the ISOs filed an action in the United States District Court for the Northern

District of California against the company. The ISOs, proffering evidence that the company controlled nearly 100 percent of the parts market and 80 to 95 percent of the service market, alleged that the company had unlawfully (1) tied the sale of service for the company's equipment to the sale of parts, in violation of 1 of the Sherman Act ([15 USCS 1](#)); and (2) monopolized and attempted to monopolize the sale of service for the company's equipment, in violation of 2 of the Sherman Act ([15 USCS 2](#)). The company moved for summary judgment on both claims, and the District Court granted the company's motion. On appeal, the United States Court of Appeals for the Ninth Circuit, reversing, expressed the view that (1) the ISOs had presented sufficient evidence, for summary judgment purposes, to disprove the company's contention that its parts policy was justified; (2) with respect to the 1 claim, (a) there were disputed issues of fact whether service and parts were distinct markets, and whether a tying arrangement existed, and (b) the ISOs had presented evidence from which a trier of fact could conclude that the company had sufficient economic power in the parts market to restrain competition in the service market; and (3) with respect to the 2 claim, sufficient evidence existed to support a finding that the company's implementation of its parts policy involved a specific intent to monopolize ([903 F2d 612](#)).

On certiorari, the United States Supreme Court affirmed. In an opinion by Blackmun, J., joined by Rehnquist, Ch. J., and White, Stevens, Kennedy, and Souter, JJ., it was held that the company had not met the requirements of [Rule 56\(c\) of the Federal Rules of Civil Procedure](#) with respect to the company's motion for summary judgment as to either Sherman Act claim, because (1) as to the 1 claim, (a) the company did not dispute that its arrangement affected a substantial volume of interstate commerce in the parts market, (b) a reasonable trier of fact could find that the company's service and parts were two distinct products, (c) evidence of the company's policy on parts sales, along with allegations by the ISOs that the company's control over the parts market had excluded competition and boosted service prices, were sufficient to entitle the ISOs to a trial on their claim that the company had power in the parts market to force unwanted purchases of the company's service, and (d) notwithstanding the existence of competition in the equipment market, the company had failed to meet its burden of demonstrating that the inference of market power in the service and parts markets was unreasonable; and (2) as to the 2 claim, (a) the ISOs' evidence with respect to the company's control of the parts and service markets--which evidence indicated the company's possession of monopoly power--was sufficient to survive summary judgment, (b) the relevant market from the perspective of an owner of the company's equipment was composed of only those companies that serviced such equipment, and (c) none of the company's asserted business justifications for its exclusionary action was sufficient to entitle the company to a judgment as a matter of law.

Scalia, J., joined by O'Connor and Thomas, JJ., dissenting, expressed the view that (1) neither logic nor experience suggested, let alone compelled, application of the per se prohibition against tying arrangements under 1, and the monopolization doctrine under 2, to a seller's behavior in its single-brand aftermarkets, where--as it had to be assumed in the case at hand--the seller was without power at the interbrand level; (2) although the aftermarket tie alleged in the case at hand could have instead been evaluated under the rule of reason, the case's disposition did not require such examination, where the ISOs apparently had waived their rule-of-reason claim in the District Court, and, accordingly, the Court of Appeals' judgment on the 1 claim ought to have been reversed outright; and (3) an antitrust defendant which lacked the relevant market power sufficient to permit invocation of the per se prohibition against tying under 1 all the more lacked the monopoly power that warranted heightened scrutiny under 2 of such defendant's allegedly exclusionary behavior.

## Headnotes

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EVIDENCE §343.5 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §42 > SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §5 > summary judgment -- tying arrangement by equipment seller -- service and parts -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D] [LEdHN\[1E\]](#) [1E] [LEdHN\[1F\]](#) [1F] [LEdHN\[1G\]](#) [1G] [LEdHN\[1H\]](#) [1H] [LEdHN\[1I\]](#) [1I] [LEdHN\[1J\]](#) [1J] [LEdHN\[1K\]](#) [1K]

A company which manufactures and sells photocopiers and micrographic equipment, and which also sells service and noncompatible replacement parts for its equipment, has not met the requirements of [Rule 56\(c\) of the Federal Rules of Civil Procedure](#) with respect to the company's motion for summary judgment on a claim by independent service organizations (ISOs), which had begun servicing the company's equipment, that the company--by allegedly adopting a policy under which the company supposedly (1) sold parts only to buyers of the company's equipment who either used the company's service or repaired their own equipment, and (2) limited access to other sources of parts by the ISOs by forbidding entities which manufactured parts for the company to sell such parts to anyone other than the company, pressuring other entities not to sell the company's parts to the ISOs, and taking steps to restrict the availability of used equipment--unlawfully tied the sale of service for the company's equipment to the sale of its parts, in violation of 1 of the Sherman Act ([15 USCS 1](#)), where (1) the company does not dispute that its arrangement affects a substantial volume of interstate commerce in the parts market; (2) a reasonable trier of fact could find that the company's service and parts are two distinct products, because (a) evidence in the record indicates that service and parts had been sold separately in the past and still were sold separately to self-service equipment owners, and that the company sold parts to third parties only if the third parties agreed not to buy service from the ISOs, (b) enough doubt is cast on the company's claim of a unified market that such claim should be resolved by the trier of fact, and (c) as a factual matter, some consumers would purchase service without parts and some consumers would purchase parts without service; (3) evidence of the company's policy on parts sales, along with allegations by the ISOs that the company's control over the parts market has excluded competition and boosted service prices, are sufficient to entitle the ISOs to a trial on their claim that the company has more than sufficient power in the parts market to force unwanted purchases of the company's service; and (4) notwithstanding the existence of competition in the photocopier and micrographic equipment market, the company has failed to meet its burden of demonstrating that the inference of its market power in the service and parts markets is unreasonable, because it is reasonable to infer that the company (a) has power in those markets to raise prices and drive out competition, and (b) chose to gain immediate profits by exerting such market power where locked-in customers, high information costs, and discriminatory pricing limited--and perhaps eliminated--any long-term loss. (Scalia, O'Connor, and Thomas, JJ., dissented from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §42 > SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §5 > summary judgment -- monopoly by equipment seller -- sale of service -- > Headnote: [LEdHN\[2A\]](#) [ ] [2A] [LEdHN\[2B\]](#) [ ] [2B] [LEdHN\[2C\]](#) [ ] [2C] [LEdHN\[2D\]](#) [ ] [2D] [LEdHN\[2E\]](#) [ ] [2E] [LEdHN\[2F\]](#) [ ] [2F]

A company which manufactures and sells photocopiers and micrographic equipment, and which also sells service and noncompatible replacement parts for its equipment, has not met the requirements of [Rule 56\(c\) of the Federal Rules of Civil Procedure](#) with respect to the company's motion for summary judgment on a claim by independent service organizations (ISOs), which had begun servicing the company's equipment, that the company--by allegedly adopting a policy under which the company supposedly (1) sold parts only to buyers of the company's equipment who either used the company's service or repaired their own equipment, and (2) limited access to other sources of parts by the ISOs by forbidding entities which manufactured parts for the company to sell such parts to anyone other than the company, pressuring other entities not to sell the company's parts to the ISOs, and taking steps to restrict the availability of used equipment--unlawfully monopolized and attempted to monopolize the sale of service with respect to such equipment, in violation of 2 of the Sherman Act ([15 USCS 2](#)), where (1) the ISOs' evidence that the company controls nearly 100 percent of the parts market and 80 to 95 percent of the service market, with no readily available substitutes--and hence that the company possesses monopoly power--is sufficient to survive summary judgment; (2) the relevant market from the perspective of an owner of the company's equipment is composed of only those companies that service such equipment; and (3) none of the company's asserted business justifications for its exclusionary action--to provide quality service, to control inventory costs, and to prevent free riding on the company's capital investment--are sufficient to prove that the company is entitled to a judgment as a matter of law. (Scalia, O'Connor, and Thomas, JJ., dissented from this holding.)

SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §5 > determination -- > Headnote:

[LEdHN\[3\]](#) [3]

On a motion for summary judgment, the evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in such party's favor; for purposes of deciding such motion, the nonmoving party's version of any disputed issue is presumed correct.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30.6 > tying arrangement -- elements --

> Headnote:

[LEdHN\[4\]](#) [4]

A tying arrangement--that is, an agreement by a party to sell one product but only on the condition that the buyer also purchases a different, or tied, product, or at least agrees not to purchase that product from any other supplier-- violates 1 of the Sherman Act ([15 USCS 1](#)) if (1) the seller has appreciable economic power in the tying product market, and (2) the arrangement affects a substantial volume of commerce in the tied market.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §42 > tying arrangement -- service and parts --

> Headnote:

[LEdHN\[5\]](#) [5]

For service and parts to be considered two distinct products for purposes of determining whether a firm selling such service and parts has engaged in an unlawful tying arrangement prohibited by 1 of the Sherman Act ([15 USCS 1](#)), there must be sufficient consumer demand so that it is efficient for the firm to provide service separately from parts.

EVIDENCE §343.5 > presumption -- restraint of trade -- tying arrangement -- > Headnote:

[LEdHN\[6\]](#) [6]

For purposes of determining whether a firm selling service and parts has engaged in an unlawful tying arrangement prohibited by 1 of the Sherman Act ([15 USCS 1](#)), the United States Supreme Court is unwilling to make the assumption that there cannot be separate markets for service and parts. (Scalia, O'Connor, and Thomas, JJ., dissented in part from this holding.)

SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §5 > determination -- assertion not in record -- > Headnote:

[LEdHN\[7A\]](#) [7A] [LEdHN\[7B\]](#) [7B]

The factual assertion that parts and service are not separate products--for purposes of determining, under [Rule 56\(c\) of the Federal Rules of Civil Procedure](#), whether a firm selling parts and service has engaged in an unlawful tying arrangement prohibited by 1 of the Sherman Act ([15 USCS 1](#))--does not entitle the firm to summary judgment

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on the issue whether parts and service are distinct markets where the record does not support such assertion. (Scalia, O'Connor, and Thomas, JJ., dissented in part from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §42 > refusal to deal -- service -- > Headnote:  
[LEdHN\[8A\]](#) [8A] [LEdHN\[8B\]](#) [8B]

With respect to a company which manufactures and sells photocopiers and micrographic equipment, and which also sells service and noncompatible replacement parts for its equipment, the company's sale of parts to third parties on condition that the third parties buy service from the company is not a unilateral refusal to deal which, as such, would not violate the federal antitrust laws.

EVIDENCE §343.5 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30.6 > tying arrangement -- inference -- > Headnote:

[LEdHN\[9\]](#) [9]

A necessary feature of an unlawful tying arrangement prohibited by 1 of the Sherman Act ([15 USCS 1](#)) is appreciable economic power in the tying market; market power is the power to force a purchaser to do something that the purchaser would not do in a competitive market; the existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30.6 > tying arrangement -- forced purchase -- > Headnote:

[LEdHN\[10A\]](#) [10A] [LEdHN\[10B\]](#) [10B]

For purposes of 1 of the Sherman Act ([15 USCS 1](#)), the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms; when such forcing is present, competition on the merits in the market for the tied item is restrained and 1 is violated.

APPEAL §1477 > review of record -- antitrust -- > Headnote:

[LEdHN\[11A\]](#) [11A] [LEdHN\[11B\]](#) [11B]

On certiorari to review a Federal District Court's grant of summary judgment in a civil antitrust case, the United States Supreme Court may review the record de novo without relying on the lower courts' understanding.

APPEAL §1092 > certiorari -- waiver of objection -- > Headnote:

[LEdHN\[12A\]](#) [12A] [LEdHN\[12B\]](#) [12B]

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On certiorari to review a Federal Court of Appeals decision, the United States Supreme Court will decide the questions presented in a certiorari petition--including the question whether a company which manufactured and sold photocopiers and micrographic equipment, and which also sold service and noncompatible replacement parts for its equipment, was entitled to summary judgment on a claim that the company had unlawfully tied the sale of service for such equipment to the sale of parts, in violation of 1 of the Sherman Act ([15 USCS 1](#))--based on the same premise as stated by the Court of Appeals that competition exists in the equipment market, where the claimants failed to bring their objections to such premise to the attention of the Supreme Court in their opposition to the petition for certiorari.

EVIDENCE §343.5 > presumption -- antitrust -- > Headnote:

[LEdHN\[13\]](#) [13]

Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in federal **antitrust law**.

SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §4 > antitrust -- opposition -- determination -- > Headnote:

[LEdHN\[14\]](#) [14]

In order for a federal antitrust case in which a motion for summary judgment has been filed to reach the jury, the nonmoving party's inferences need only be reasonable; however, if an antitrust plaintiff's theory is economically senseless, no reasonable jury could find in the plaintiff's favor, and summary judgment should be granted.

EVIDENCE §343.5 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §18 > relevant market -- market power -- > Headnote:

[LEdHN\[15A\]](#) [15A] [LEdHN\[15B\]](#) [15B]

Defining the relevant market generally determines the result of a federal antitrust case, because market power is often inferred from market share.

SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §5 > restraint of trade -- question of fact -- > Headnote:

[LEdHN\[16\]](#) [16]

For purposes of determining, under *Rule 56(c) of the Federal Rules of Civil Procedure*, whether a company which manufactures and sells photocopiers and micrographic equipment, and which also sells service and noncompatible replacement parts for its equipment, is entitled to summary judgment on a claim that the company unlawfully tied the sale of service for the company's equipment to the sale of its parts, in violation of 1 of the Sherman Act ([15 USCS 1](#)), it is a question of fact whether the company's competitors in the equipment markets would provide the necessary information to satisfy customer information needs with respect to the lifecycle costs of the company's equipment. (Scalia, O'Connor, and Thomas, JJ., dissented in part from this holding.)

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EVIDENCE §343.5 > presumption -- restraint of trade -- purchasing decision -- > Headnote:

[LEdHN\[17\]](#) [17]

For purposes of determining whether a company which manufactures and sells photocopiers and micrographic equipment, and which also sells service and noncompatible replacement parts for its equipment, is entitled to summary judgment on a claim that the company unlawfully tied the sale of service for the company's equipment to the sale of its parts, in violation of 1 of the Sherman Act ([15 USCS 1](#)), it makes little sense to assume, in the absence of any evidentiary support, that equipment-purchasing decisions are based on an accurate assessment of the total cost of equipment, service, and parts over the lifetime of the equipment.

EVIDENCE §343.5 > SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §5 > restraint of trade -- question of fact -- presumption -- > Headnote:

[LEdHN\[18\]](#) [18]

For purposes of determining, under [Rule 56\(c\) of the Federal Rules of Civil Procedure](#), whether a company which manufactures and sells photocopiers and micrographic equipment, and which also sells service and noncompatible replacement parts for its equipment, is entitled to summary judgment on a claim that the company unlawfully tied the sale of service for the company's equipment to the sale of its parts, in violation of 1 of the Sherman Act ([15 USCS 1](#)), there is a question of fact whether the costs of obtaining pricing information and the costs of switching to a different product foil the assumption that the equipment and service markets act as pure complements to one another.

EVIDENCE §343.5 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30.6 > presumption -- tying arrangement -- market power -- > Headnote:

[LEdHN\[19\]](#) [19]

A company which manufactures and sells photocopiers and micrographic equipment, and which also sells service and noncompatible replacement parts for its equipment, is not entitled to a legal presumption on the company's lack of market power, for purposes of determining whether the company should be granted summary judgment on a claim that the company unlawfully tied the sale of service for the company's equipment to the sale of its parts, in violation of 1 of the Sherman Act ([15 USCS 1](#)), where there is a significant risk of deterring procompetitive conduct, in that the company's alleged conduct--higher service prices and market foreclosure--is facially anticompetitive and exactly the harm that antitrust laws aim to prevent.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §32 > marketing options -- service -- equipment -- > Headnote:

[LEdHN\[20\]](#) [20]

The offering by a firm of various marketing options, including bundling of support and maintenance service with the sale of equipment, does not run afoul of the federal antitrust laws.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §42 > tying arrangement -- sale of service by manufacturer -- patents -- copyright -- > Headnote:

[LEdHN\[21A\]](#) [↓] [21A] [LEdHN\[21B\]](#) [↓] [21B]

There is no support for the view that per se immunity from 1 of the Sherman Act ([15 USCS 1](#)), which prohibits unlawful tying arrangements, should be granted to manufacturers competing in the service market in either (1) the United States Supreme Court's jurisprudence, since the Supreme Court has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if a seller exploits its dominant position in one market to expand the seller's empire into a derivative aftermarket; or (2) the record in the case, where the record--for purposes of determining whether a manufacturer selling service and parts for its photocopiers and micrographic equipment has engaged in an unlawful tying arrangement prohibited by 1 by unlawfully tying the sale of service to the sale of parts--supports the theory that the manufacturer is able to exploit some customers who in the absence of the tie would be protected from increases in parts prices by knowledgeable customers. (Scalia, O'Connor, and Thomas, JJ., dissented in part from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > monopoly -- elements -- > Headnote:

[LEdHN\[22A\]](#) [↓] [22A] [LEdHN\[22B\]](#) [↓] [22B]

The offense of monopoly under 2 of the Sherman Act ([15 USCS 2](#)) has two elements: (1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of such power--as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident--to foreclose competition, to gain a competitive advantage, or to destroy a competitor.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §18 > monopoly -- market power --

> Headnote:

[LEdHN\[23\]](#) [↓] [23]

Monopoly power, for purposes of determining whether there has been a violation of 2 of the Sherman Act ([15 USCS 2](#)), requires something greater than market power for purposes of determining whether there has been a violation of 1 of the Sherman Act ([15 USCS 1](#)).

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §19 > relevant market -- commercial realities --> Headnote:

[LEdHN\[24\]](#) [↓] [24]

For purposes of determining whether there has been a violation of the Sherman Act ([15 USCS 1 et seq.](#)), a single brand of a product or service can constitute a separate relevant market; the proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers.

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RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30.6 > refusal to deal -- > Headnote:

[LEdHN\[25A\]](#) [ ] [25A] [LEdHN\[25B\]](#) [ ] [25B]

As a general matter, for purposes of determining whether there has been a violation of 2 of the Sherman Act ([15 USCS 2](#)), a firm can refuse to deal with its competitors; however, such a right is not absolute, and it exists only if there are legitimate competitive reasons for the refusal.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §17 > monopoly -- business reasons --

> Headnote:

[LEdHN\[26\]](#) [ ] [26]

A firm's liability on a claim of monopoly under 2 of the Sherman Act ([15 USCS 2](#)) turns on whether valid business reasons can explain the firm's exclusionary actions.

SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §5 > monopoly -- determination -- quality justification --

> Headnote:

[LEdHN\[27\]](#) [ ] [27]

With respect to a claim by independent service organizations (ISOs) that a company which manufactures and sells photocopiers and micrographic equipment, and which also sells service and noncompatible replacement parts for its equipment, unlawfully monopolized and attempted to monopolize the sale of service with respect to such equipment, in violation of 2 of the Sherman Act ([15 USCS 2](#)), the ISOs have presented evidence from which a reasonable trier of fact could conclude--so as to defeat the company's motion for summary judgment under [Rule 56\(c\) of the Federal Rules of Civil Procedure](#)--that the company's justification based on the provision of quality service is pretextual, because (1) evidence indicates that the ISOs provide quality service and are preferred by some owners of the company's equipment; and (2) the company's quality justification appears to be inconsistent with the company's (a) thesis that consumers are knowledgeable to "lifecycle price" the total cost of equipment, service, and parts, and (b) policy of allowing self-service by equipment owners.

SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §5 > monopoly -- determination -- inventory cost justification --

> Headnote:

[LEdHN\[28\]](#) [ ] [28]

With respect to a claim by independent service organizations (ISOs) that a company which manufactures and sells photocopiers and micrographic equipment, and which also sells service and noncompatible replacement parts for its equipment, unlawfully monopolized and attempted to monopolize the sale of service with respect to such equipment, in violation of 2 of the Sherman Act ([15 USCS 2](#)), the ISOs have presented a triable issue of fact--so as to defeat the company's motion for summary judgment under [Rule 56\(c\) of the Federal Rules of Civil Procedure](#)--on the company's asserted justification based on controlling inventory costs, because (1) the inventory of parts needed to repair the company's equipment turns only on breakdown rates, which should be the same whether the company or the ISOs perform the repair; and (2) such justification fails to explain evidence that the company forced independent equipment manufacturers, equipment owners, and parts brokers not to sell parts to ISOs, which actions would have no effect on the company's inventory costs.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > entry barriers -- prohibition -- > Headnote: [LEdHN\[29\]](#) [29]

One of the evils proscribed by the federal antitrust laws is the creation of entry barriers to potential competitors by requiring them to enter two markets simultaneously.

## Syllabus

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After respondent independent service organizations (ISO's) began servicing copying and micrographic equipment manufactured by petitioner Eastman Kodak Co., Kodak adopted policies to limit the availability to ISO's of replacement parts for its equipment and to make it more difficult for ISO's to compete with it in servicing such equipment. Respondents then filed this action, alleging, *inter alia*, that Kodak had unlawfully tied the sale of service for its machines to the sale of parts, in violation of [§ 1](#) of the Sherman Act, and had unlawfully monopolized and attempted to monopolize the sale of service and parts for such machines, in violation of [§ 2](#) of that Act. The District Court granted summary judgment for Kodak, but the Court of Appeals reversed. [\*\*\*\*2] Among other things, the appellate court found that respondents had presented sufficient evidence to raise a genuine issue concerning Kodak's market power in the service and parts markets, and rejected Kodak's contention that lack of market power in service and parts must be assumed when such power is absent in the equipment market.

*Held:*

1. Kodak has not met the requirements of [Federal Rule of Civil Procedure 56\(c\)](#) for an award of summary judgment on the [§ 1](#) claim. Pp. 461-479.

(a) A tying arrangement -- *i. e.*, an agreement by a party to sell one product on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier -- violates [§ 1](#) only if the seller has appreciable economic power in the tying product market. Pp. 461-462.

(b) Respondents have presented sufficient evidence of a tying arrangement to defeat a summary judgment motion. A reasonable trier of fact could find, first, that service and parts are two distinct products in light of evidence indicating that each has been, and continues in some circumstances to be, sold separately, and, second, that Kodak [\*\*\*\*3] has tied the sale of the two products in light of evidence indicating that it would sell parts to third parties only if they agreed not to buy service from ISO's. Pp. 462-463.

(c) For purposes of determining appreciable economic power in the tying market, this Court's precedents have defined market power as the power to force a purchaser to do something that he would not do in a competitive market, and have ordinarily inferred the existence of such power from the seller's possession of a predominant share of the market. P. 464.

(d) Respondents would be entitled under such precedents to a trial on their claim that Kodak has sufficient power in the parts market to force unwanted purchases of the tied service market, based on evidence indicating that Kodak has control over the availability of parts and that such control has excluded service competition, boosted service prices, and forced unwilling consumption of Kodak service. Pp. 464-465.

(e) Kodak has not satisfied its substantial burden of showing that, despite such evidence, an inference of market power is unreasonable. Kodak's theory that its lack of market power in the primary equipment market precludes -- as a matter [\*\*\*\*4] of law -- the possibility of market power in the derivative aftermarkets rests on the factual assumption that if it raised its parts or service prices above competitive levels, potential customers would simply stop buying its equipment. Kodak's theory does not accurately describe actual market behavior, since there is no

evidence or assertion that its equipment sales dropped after it raised its service prices. Respondents offer a forceful reason for this discrepancy: the existence of significant information and switching costs that could create a less responsive connection between aftermarket prices and equipment sales. It is plausible to infer from respondents' evidence that Kodak chose to gain immediate profits by exerting market power where locked-in customers, high information costs, and discriminatory pricing limited, and perhaps eliminated, any long-term loss. Pp. 465-478.

(f) Nor is this Court persuaded by Kodak's contention that it is entitled to a legal presumption on the lack of market power because there is a significant risk of deterring procompetitive conduct. Because Kodak's service and parts policy is not one that appears always, or almost always, to enhance competition, [\*\*\*\*5] the balance tips against summary judgment. Pp. 478-479.

2. Respondents have presented genuine issues for trial as to whether Kodak has monopolized, or attempted to monopolize, the service and parts markets in violation of §2. Pp. 480-486.

(a) Respondents' evidence that Kodak controls nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes, is sufficient to survive summary judgment on the first element of the monopoly offense, the possession of monopoly power. Kodak's contention that, as a matter of law, a single brand of a product or service can never be a relevant market contravenes cases of this Court indicating that one brand of a product can constitute a separate market in some instances. The proper market definition in this case can be determined only after a factual inquiry into the commercial realities faced by Kodak equipment owners. Pp. 481-482.

(b) As to the second element of a §2 claim, the willful use of monopoly power, respondents have presented evidence that Kodak took exclusionary action to maintain its parts monopoly and used its control over parts to strengthen its monopoly share of the service [\*\*\*\*6] market. Thus, liability turns on whether valid business reasons can explain Kodak's actions. However, none of its asserted business justifications -- a commitment to quality service, a need to control inventory costs, and a desire to prevent ISO's from free-riding on its capital investment -- are sufficient to prove that it is entitled to a judgment as a matter of law. Pp. 482-486.

**Counsel:** Donn P. Pickett argued the cause for petitioner. With him on the briefs were Daniel M. Wall, Alfred C. Pfeiffer, Jr., and Jonathan W. Romeyn.

Assistant Attorney General Rill argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Solicitor General Starr, Deputy Solicitor General Wallace, Christopher J. Wright, Catherine G. O'Sullivan, and Robert B. Nicholson.

James A. Hennefer argued the cause for respondents. With him on the brief were A. Kirk McKenzie, Douglas E. Rosenthal, Jonathan M. Jacobson, and Elinor R. Hoffmann. \*

\* Briefs of amici curiae urging reversal were filed for the Computer and Business Equipment Manufacturers Association by Simon Lazarus III; for Digital Equipment Corp. et al. by Kurt W. Melchior, Robert A. Skitol, James A. Meyers, Marcia Howe Adams, Ivor Cary Armistead III, Ronald A. Stern, Stephen Wasinger, James W. Olson, Carter G. Phillips, Ralph I. Miller, and Florinda J. Lascone; for the Motor Vehicle Manufacturers Association of the United States, Inc., by Thomas B. Leary, William H. Crabtree, and Charles H. Lockwood II; and for the National Electrical Manufacturers Association by James S. Dittmar and James L. Messenger.

Briefs of amici curiae urging affirmance were filed for the State of Ohio et al. by Lee Fisher, Attorney General of Ohio, Simon Karas, and Elizabeth H. Watts and Marc B. Bandman, Assistant Attorneys General, James H. Evans, Attorney General of Alabama, and Marc Givhan, Assistant Attorney General, Charles E. Cole, Attorney General of Alaska, and James Forbes, Assistant Attorney General, Grant Woods, Attorney General of Arizona, and Jeri K. Auther, Assistant Attorney General, Winston Bryant, Attorney General of Arkansas, and Royce Griffin, Deputy Attorney General, Daniel E. Lungren, Attorney General of California, Roderick E. Walston, Chief Assistant Attorney General, Sanford N. Gruskin, Assistant Attorney General, and Kathleen E. Foote, Deputy Attorney General, Richard Blumenthal, Attorney General of Connecticut, and Robert M. Langer, Assistant Attorney General, Robert A. Butterworth, Attorney General of Florida, and Jerome W. Hoffman, Assistant Attorney General, Warren Price III, Attorney General of Hawaii, Robert A. Marks, Supervising Deputy Attorney General, and Ted Clause, Deputy Attorney General, Larry EchoHawk, Attorney General of Idaho, Roland W. Burris, Attorney General of Illinois, Rosalyn Kaplan,

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**Judges:** BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, KENNEDY, and SOUTER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which O'CONNOR and THOMAS, JJ., joined, post, p. 486.

**Opinion by:** BLACKMUN

## Opinion

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[\*454] [\*276] [\*\*2076] JUSTICE BLACKMUN delivered the opinion of the Court.

LEdHN[1A] [1A] LEdHN[2A] [2A] This is yet another case that concerns the standard for summary judgment in an antitrust controversy. The [\*455] principal issue here is whether a defendant's lack of market power in the primary equipment market precludes -- as a matter of law -- the possibility of market power in derivative aftermarkets.

Petitioner Eastman Kodak Company manufactures and sells photocopiers and micrographic equipment. Kodak also sells service and replacement parts for its equipment. Respondents [\*277] are 18 independent service organizations (ISO's) that in the early 1980's began servicing Kodak copying and micrographic equipment. Kodak subsequently adopted policies to limit the availability [\*\*\*\*8] of parts to ISO's and to make it more difficult for ISO's to compete with Kodak in servicing Kodak equipment.

[\*456] Respondents instituted this action in the United States District Court for the Northern District of California, alleging that Kodak's policies were unlawful under both § 1 and § 2 of the Sherman Act, 26 Stat. 209, as amended,

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Solicitor General, and Christine Rosso, Senior Assistant Attorney General, Bonnie J. Campbell, Attorney General of Iowa, and John R. Perkins, Deputy Attorney General, Robert T. Stephan, Attorney General of Kansas, and Mary Ann Heckman, Assistant Attorney General, Frederic J. Cowan, Attorney General of Kentucky, and James M. Ringo, Assistant Attorney General, William J. Guste, Jr., Attorney General of Louisiana, and Anne F. Benoit, Assistant Attorney General, Michael E. Carpenter, Attorney General of Maine, and Stephen L. Wessler, Deputy Attorney General, J. Joseph Curran, Jr., Attorney General of Maryland, and Robert N. McDonald and Ellen S. Cooper, Assistant Attorneys General, Scott Harshbarger, Attorney General of Massachusetts, and George K. Weber, Assistant Attorney General, Frank J. Kelley, Attorney General of Michigan, Hubert H. Humphrey III, Attorney General of Minnesota, Thomas F. Pursell, Deputy Attorney General, and James P. Spencer and Susan C. Gretz, Special Assistant Attorneys General, Frankie Sue Del Pappa, Attorney General of Nevada, and Rob Kirkman, Deputy Attorney General, Robert J. Del Tufo, Attorney General of New Jersey, and Laurel A. Price, Deputy Attorney General, Robert Abrams, Attorney General of New York, O. Peter Sherwood, Solicitor General, and George W. Sampson, Assistant Attorney General, Lacy H. Thornburg, Attorney General of North Carolina, James C. Gulick, Special Deputy Attorney General, and K. D. Sturgis, Assistant Attorney General, Dan Morales, Attorney General of Texas, Will Pryor, First Assistant Attorney General, Mary F. Keller, Deputy Attorney General, and Mark Tobey, Assistant Attorney General, R. Paul Van Dam, Attorney General of Utah, and Arthur M. Strong, Assistant Attorney General, Jeffrey L. Amestoy, Attorney General of Vermont, and Geoff Yudien, Assistant Attorney General, Kenneth O. Eikenberry, Attorney General of Washington, and Carol A. Smith, Assistant Attorney General, and Mario J. Palumbo, Attorney General of West Virginia, and Donna S. Quesenberry, Assistant Attorney General; for the Automotive Warehouse Distributors Association et al. by Donald A. Randall, Louis R. Marchese, Robert J. Verdisco, and Basil J. Mezines; for Bell Atlantic Business Systems Services, Inc., by Richard G. Taranto, Joel I. Klein, and John M. Kelleher; for Grumman Corporation by Patrick O. Killian; for the National Association of State Purchasing Officials et al. by Richard D. Monkman; for the National Office Machine Dealers Association et al. by Mark P. Cohen; for the National Retail Federation by Michael J. Altier; for Public Citizen by Alan B. Morrison; for State Farm Mutual Automobile Insurance Co. et al. by Melvin Spaeth, James F. Fitzpatrick, and Melvin C. Garbow.

Briefs of amici curiae were filed for the California State Electronics Association et al. by Richard I. Fine; for Computer Service Network International by Ronald S. Katz; and for the National Electronics Sales and Service Dealers Association by Ronald S. Katz.

15 U. S. C. §§ 1 and 2 (1988 ed., Supp. II). After truncated discovery, the District Court granted summary judgment for Kodak. The Court of Appeals for the Ninth Circuit reversed. The appellate court found that respondents had presented sufficient evidence to raise a genuine issue concerning Kodak's market power in the service and parts markets. It rejected Kodak's contention that lack of market power in service and parts must be assumed when such power is absent in the equipment market. Because of the importance of the issue, we granted certiorari. 501 U.S. 1216 (1991).

I

A

LEdHN[3]↑ [3]Because this case comes to us on petitioner Kodak's motion for summary judgment, ["\*\*2077"] "the evidence of [respondents] is to be believed, and [\*\*\*\*9] all justifiable inferences are to be drawn in [their] favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Mindful that respondents' version of any disputed issue of fact thus is presumed correct, we begin with the factual basis of respondents' claims. See Arizona v. Maricopa County Medical Society, 457 U.S. 332, 339, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982).

Kodak manufactures and sells complex business machines -- as relevant here, high-volume photocopiers and micrographic equipment.<sup>1</sup> Kodak equipment is unique; micrographic [\*457] software programs that operate on Kodak machines, for example, are not compatible with competitors' machines. See App. 424-425, 487-489, 537. Kodak parts are not compatible with other manufacturers' equipment, and vice versa. See id., at 432, 413-415. Kodak equipment, although expensive when new, has little resale value. See id., at 358-359, 424-425, 427-428, 467, 505-506, 519-521. [\*\*\*\*10]

Kodak provides service and parts for its machines to its customers. It produces some of the parts itself; the rest are made to order for Kodak by independent original-equipment manufacturers (OEM's). See id., at 429, 465, 490, 496. Kodak does not sell a complete system of original [\*\*\*278] equipment, lifetime service, and lifetime parts for a single price. Instead, Kodak provides service after [\*\*\*\*11] the initial warranty period either through annual service contracts, which include all necessary parts, or on a per-call basis. See id., at 98-99; Brief for Petitioner 3. It charges, through negotiations and bidding, different prices for equipment, service, and parts for different customers. See App. 420-421, 536. Kodak provides 80% to 95% of the service for Kodak machines. See id., at 430.

Beginning in the early 1980's, ISO's began repairing and servicing Kodak equipment. They also sold parts and reconditioned and sold used Kodak equipment. Their customers were federal, state, and local government agencies, banks, insurance companies, industrial enterprises, and providers of specialized copy and microfilming services. See id., at 417, 419-421, 492-493, 499, 516, 539. ISO's provide service at a price substantially lower than Kodak does. See id., at 414, 451, 453-454, 469, 474-475, 488, 493, 536-537; Lodging 133. Some customers found that the ISO service was of higher quality. See App. 425-426, 537-538.

[\*458] Some ISO customers purchase their own parts and hire ISO's only for service. See Lodging 144-147. Others choose ISO's to supply both service and parts. [\*\*\*\*12] See id., at 133. ISO's keep an inventory of parts, purchased from Kodak or other sources, primarily the OEM's.<sup>2</sup> See App. 99, 415-416, 490.

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<sup>1</sup> Kodak's micrographic equipment includes four different product areas. The first is capture products such as microfilmers and electronic scanners, which compact an image and capture it on microfilm. The second is equipment such as microfilm viewers and viewer/printers. This equipment is used to retrieve the images. The third is Computer Output Microform (COM) recorders, which are data-processing peripherals that record computer-generated data onto microfilm. The fourth is Computer Assisted Retrieval (CAR) systems, which utilize computers to locate and retrieve micrographic images. See App. 156-158.

<sup>2</sup> In addition to the OEM's, other sources of Kodak parts include (1) brokers who would buy parts from Kodak, or strip used Kodak equipment to obtain the useful parts and resell them, (2) customers who buy parts from Kodak and make them available to ISO's, and (3) used equipment to be stripped for parts. See id., at 419, 517; Brief for Petitioner 38.

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In 1985 and 1986, Kodak implemented a policy of selling replacement parts for micrographic and copying machines only to buyers of Kodak equipment who use Kodak service or repair their own machines. See Brief for Petitioner 6; App. 91-92, 98-100, 140-141, 171-172, 190, 442-447, 455-456, 483-484.

[\*\*2078] As part of the same policy, Kodak sought to limit ISO access to other sources of Kodak parts. Kodak and the OEM's agreed that the OEM's would not sell parts that fit Kodak equipment to anyone other than Kodak. See [\*\*\*13] [id., at 417, 428-429, 447, 468, 474, 496](#). Kodak also pressured Kodak equipment owners and independent parts distributors not to sell Kodak parts to ISO's. See [id., at 419-420, 428-429, 483-484, 517-518, 589-590](#). In addition, Kodak took steps to restrict the availability of used machines. See [id., at 427-428, 465-466, 510-511, 520](#).

Kodak intended, through these policies, to make it more difficult for ISO's to sell service for Kodak machines. See [id., at 106-107, 171, 516](#). It succeeded. ISO's were unable to obtain parts from reliable sources, see [id., at 429, 468, 496](#), and many were forced out of business, while others lost substantial revenue. See [id., at 422, 458-459, 464, 468, 475-477, 482-484, 495-496, 501, 521](#). Customers were forced to switch to Kodak service even though they preferred ISO service. See [id., at 420-422](#).

#### [\*459] B

In 1987, the ISO's filed the present [\*\*279] action in the District Court, alleging, *inter alia*, that Kodak had unlawfully tied the sale of service for Kodak machines to the sale of parts, in violation of [§ 1](#) of the Sherman Act, and had unlawfully monopolized and attempted to monopolize the sale of service for [\*\*\*\*14] Kodak machines, in violation of [§ 2](#) of that Act.<sup>3</sup>

Kodak filed a motion for summary judgment before respondents had initiated [\*\*\*\*15] discovery. The District Court permitted respondents to file one set of interrogatories and one set of requests for production of documents and to take six depositions. Without a hearing, the District Court granted summary judgment in favor of Kodak. App. to Pet. for Cert. 29B.

As to the [§ 1](#) claim, the court found that respondents had provided no evidence of a tying arrangement between Kodak equipment and service or parts. See [id., at 32B-33B](#). The court, however, did not address respondents' [§ 1](#) claim that is at issue here. Respondents allege a tying arrangement not between Kodak *equipment* and service, but between Kodak *parts* and service. As to the [§ 2](#) claim, the District Court concluded that although Kodak had a "natural monopoly over the market for parts it sells under its name," a unilateral refusal to sell those parts to ISO's did not violate [§ 2](#).

[\*460] The Court of Appeals for the Ninth Circuit, by a divided vote, reversed. [903 F.2d 612 \(1990\)](#). With respect to the [§ 1](#) claim, the court first found that whether service and parts were distinct markets and whether a tying arrangement existed between them were disputed issues of fact. [Id., at 615-616](#). [\*\*\*\*16] Having found that a tying arrangement might exist, the Court of Appeals considered a question not decided by the District Court: Was there "an issue of material fact as to whether Kodak has sufficient economic power in the tying product market [parts] to restrain competition appreciably in the tied product market [service]." [Id., at 616](#). The court agreed with Kodak that competition in the equipment market might prevent Kodak from possessing power in the parts market, but refused

<sup>3</sup> [Section 1](#) of the Sherman Act states in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." [15 U. S. C. § 1 \(1988 ed., Supp. II\)](#).

[Section 2](#) of the Sherman Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$ 10,000,000 if a corporation, or, if any other person, \$ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." [15 U. S. C. § 2 \(1988 ed., Supp. II\)](#).

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to uphold the District Court's grant of summary judgment "on this theoretical basis" because [\*\*2079] "market imperfections can keep economic theories about how consumers will act from mirroring reality." *Id., at 617*. Noting that the District Court had not considered the market power issue, and that the record was not fully developed through discovery, the court declined to require respondents to conduct market analysis or to pinpoint specific imperfections in order to [\*\*\*280] withstand summary judgment.<sup>4</sup> "It is enough that [respondents] have presented evidence of actual events from which a reasonable trier of fact could conclude that . . . competition in [\*\*\*17] the [equipment] market does not, in reality, curb Kodak's power in the parts market." *Ibid.*

[\*461] The court then considered the three business justifications Kodak proffered for its restrictive parts policy: (1) to guard against inadequate service, (2) to lower inventory costs, and (3) to prevent ISO's from free-riding on Kodak's investment in the copier and micrographic industry. The court concluded that the trier of fact might find the product quality and inventory [\*\*\*18] reasons to be pretextual and that there was a less restrictive alternative for achieving Kodak's quality-related goals. *Id., at 618-619*. The court also found Kodak's third justification, preventing ISO's from profiting on Kodak's investments in the equipment markets, legally insufficient. *Id., at 619*.

As to the § 2 claim, the Court of Appeals concluded that sufficient evidence existed to support a finding that Kodak's implementation of its parts policy was "anticompetitive" and "exclusionary" and "involved a specific intent to monopolize." *Id., at 620*. It held that the ISO's had come forward with sufficient evidence, for summary judgment purposes, to disprove Kodak's business justifications. *Ibid.*

The dissent in the Court of Appeals, with respect to the § 1 claim, accepted Kodak's argument that evidence of competition in the equipment market "necessarily precludes power in the derivative market." *Id., at 622* (emphasis in original). With respect to the § 2 monopolization claim, the dissent concluded that, entirely apart from market power considerations, Kodak was entitled to summary judgment on the [\*\*\*19] basis of its first business justification because it had "submitted extensive and undisputed evidence of a marketing strategy based on high-quality service." *Id., at 623*.

## II

**LEdHN[4]** [4] **HN1** A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5-6, 2 L. Ed. 2d 545, 78 S. Ct. 514 [\*4621] (1958). **HN2** Such an arrangement violates § 1 of the Sherman Act if the seller has "appreciable economic power" in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 503, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969).

[\*\*\*20] **LEdHN[1B]** [1B] Kodak did not dispute that its arrangement affects a substantial [\*\*\*281] volume of interstate commerce. It, however, did challenge whether its activities constituted a "tying arrangement" and whether Kodak exercised "appreciable economic power" in the tying market. We consider these issues in turn.

### A

For respondents to defeat a motion for summary judgment on their claim of a tying [\*\*2080] arrangement, a reasonable trier of fact must be able to find, first, that service and parts are two distinct products, and, second, that Kodak has tied the sale of the two products.

<sup>4</sup> Specifically, the Court of Appeals explained that the District Court had denied the request for further discovery made by respondents in their opposition to Kodak's summary judgment motion: "For example, [respondents] requested to depose two ISO customers who allegedly would not sign accurate statements concerning Kodak's market power in the parts market. Not finding it necessary to reach the market power issue in its decision, the district court, of course, had no reason to grant this request." *903 F.2d at 617, n. 4*.

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[LEdHN\[1C\]](#) [1C] [LEdHN\[5\]](#) [5] For service and parts to be considered two distinct products, there must be sufficient consumer demand so that it is efficient for a firm to provide service separately from parts. [Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 21-22, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#). Evidence in the record indicates that service and parts have been sold separately in [\*\*\*\*21] the past and still are sold separately to self-service equipment owners.<sup>5</sup> Indeed, the development of the entire high-technology service industry is evidence of the efficiency of a separate market for service.<sup>6</sup>

[\*463] [LEdHN\[6\]](#) [6] Kodak insists that because there [\*\*\*\*22] is no demand for parts separate from service, there cannot be separate markets for service and parts. Brief for Petitioner 15, n. 3. By that logic, we would be forced to conclude that there can never be separate markets, for example, for cameras and film, computers and software, or automobiles and tires. That is an assumption we are unwilling to make. "We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices." [Jefferson Parish, 466 U.S. at 19, n. 30](#).

[LEdHN\[1D\]](#) [1D] [LEdHN\[7A\]](#) [7A] Kodak's assertion also appears to be incorrect as a factual matter. At least some consumers would purchase service without parts, because some service does not require parts, and some consumers, those who self-service for example, would purchase parts without service.<sup>7</sup> Enough doubt is cast on Kodak's claim of a unified market that it should be resolved by the trier of fact.

[\*\*\*\*23] [LEdHN\[1E\]](#) [1E] [LEdHN\[8A\]](#) [8A] Finally, respondents have presented sufficient evidence of a tie between service and parts. The record indicates that Kodak would sell [\*\*\*282] parts to third parties only if they agreed not to buy service from ISO's.<sup>8</sup>

[\*464] B

[LEdHN\[9\]](#) [9] [LEdHN\[10A\]](#) [10A] [\*\*\*\*24] Having found sufficient evidence of a tying arrangement, we consider the other necessary feature of an illegal tying arrangement: appreciable economic power in the tying market. [HN3](#) Market power is the power "to force a purchaser to do something that he would not do in a competitive market." [Jefferson Parish, 466 U.S. at 14](#).<sup>9</sup> It has been defined as "the ability of [\*\*2081] a single

<sup>5</sup> The Court of Appeals found: "Kodak's policy of allowing customers to purchase parts on condition that they agree to service their own machines suggests that the demand for parts can be separated from the demand for service." [Id., at 616](#).

<sup>6</sup> Amicus briefs filed by various service organizations attest to the magnitude of the service business. See, e. g., Brief for Computer Service Network International as *Amicus Curiae*; Brief for National Electronics Sales and Service Dealers Association as *Amicus Curiae*; Brief for California State Electronics Association et al. as *Amici Curiae*; Brief for National Office Machine Dealers et al. as *Amici Curiae*.

<sup>7</sup> [LEdHN\[7B\]](#) [7B]

The dissent suggests that parts and service are not separate products for tying purposes because all service may involve installation of parts. *Post*, at 494-495, n. 2. Because the record does not support this factual assertion, under the approach of both the Court and the concurrence in [Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 \(1984\)](#), Kodak is not entitled to summary judgment on whether parts and service are distinct markets.

<sup>8</sup> [LEdHN\[8B\]](#) [8B]

In a footnote, Kodak contends that this practice is only a unilateral refusal to deal, which does not violate the antitrust laws. See Brief for Petitioner 15, n. 4. Assuming, *arguendo*, that Kodak's refusal to sell parts to any company providing service can be characterized as a unilateral refusal to deal, its alleged sale of parts to third parties on condition that they buy service from Kodak is not. See [903 F.2d at 619](#).

<sup>9</sup> [\*\*\*\*25] [LEdHN\[10B\]](#) [10B]

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seller to raise price and restrict output." [Fortner, 394 U.S. at 503](#); [United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 \(1956\)](#). The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market. [Jefferson Parish, 466 U.S. at 17](#); [United States v. Grinnell Corp., 384 U.S. 563, 571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 \(1966\)](#); [Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 611-613, 97 L. Ed. 1277, 73 S. Ct. 872 \(1953\)](#).

I

[LEdHN\[1F\]](#) [1F] Respondents contend that Kodak has more than sufficient power in the parts market to force unwanted purchases of the tied market, service. Respondents provide evidence that certain parts are available exclusively through Kodak. Respondents also assert that Kodak has control over the availability of parts it does not manufacture. According to respondents' evidence, Kodak [\*\*\*\*26] has prohibited independent manufacturers from selling Kodak parts to ISO's, pressured Kodak equipment owners and independent parts distributors to deny ISO's the purchase of Kodak parts, and taken steps to restrict the availability of used machines.

[\*465] Respondents also allege that Kodak's control over the parts market has excluded service competition, boosted service prices, and forced unwilling consumption of Kodak service. Respondents offer evidence that consumers have switched to Kodak service even though they preferred ISO service, that Kodak service was of higher price and lower quality than the preferred ISO service, and that ISO's were driven out of business by Kodak's policies. Under our prior precedents, this evidence would be sufficient to entitle respondents to a trial on their claim of market power.

2

[LEdHN\[1G\]](#) [1G] [LEdHN\[11A\]](#) [11A] [LEdHN\[12A\]](#) [12A] Kodak counters that even if it concedes monopoly share [\*\*\*283] of the relevant parts market, it cannot actually exercise [\*\*\*\*27] the necessary market power for a Sherman Act violation. This is so, according to Kodak, because competition exists in the equipment market.<sup>10</sup> Kodak argues that it could not have [\*466] the ability to raise prices of service and parts above the level that would be charged in a competitive market because any increase in profits from a higher price in the

"The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." [Jefferson Parish, 466 U.S. at 12](#).

<sup>10</sup> In their brief and at oral argument, respondents argued that Kodak's market share figures for high-volume copy machines, CAR systems, and micrographic-capture equipment demonstrate Kodak's market power in the equipment market. Brief for Respondents 16-18, 32-33; Tr. of Oral Arg. 28-31.

In the Court of Appeals, however, respondents did not contest Kodak's assertion that its market shares indicated a competitive equipment market. The Court of Appeals believed that respondents "do not dispute Kodak's assertion that it lacks market power in the [equipment] markets." [903 F.2d at 616, n. 3](#). Nor did respondents question Kodak's asserted lack of market power in their brief in opposition to the petition for certiorari, although they acknowledged that Kodak's entire case rested on its understanding that respondents were not disputing the existence of competition in the equipment market. Brief in Opposition 8.

[LEdHN\[11B\]](#) [11B] [LEdHN\[12B\]](#) [12B] Recognizing that [HN4](#) [1] on summary judgment we may examine the record *de novo* without relying on the lower courts' understanding, [United States v. Diebold, Inc., 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 \(1962\)](#), respondents now ask us to decline to reach the merits of the questions presented in the petition, and instead to affirm the Ninth Circuit's judgment based on the factual dispute over market power in the equipment market. We decline respondents' invitation. We stated in [Oklahoma City v. Tuttle, 471 U.S. 808, 816, 85 L. Ed. 2d 791, 105 S. Ct. 2427 \(1985\)](#): "Our decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions presented in the petition." Because respondents failed to bring their objections to the premise underlying the questions presented to our attention in their opposition to the petition for certiorari, we decide those questions based on the same premise as the Court of Appeals, namely, that competition exists in the equipment market.

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aftermarkets at least would be offset by a corresponding loss in profits from lower equipment sales [\*\*2082] as consumers began purchasing equipment with more attractive service costs.

[\*\*\*\*28] Kodak does not present any actual data on the equipment, service, or parts markets. Instead, it urges the adoption of a substantive legal rule that "equipment competition precludes any finding of monopoly power in derivative aftermarkets." Brief for Petitioner 33. Kodak argues that such a rule would satisfy its burden as the moving party of showing "that there is no genuine issue as to any material fact" on the market power issue.<sup>11</sup> See [Fed. Rule Civ. Proc. 56\(c\)](#).

[\*\*\*\*29] [LEdHN\[13\]](#) [↑] [13][HN5](#) [↑] Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally [\*\*284] disfavored [\*467] in [antitrust law](#). This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the "particular facts disclosed by the record." [Maple Flooring Manufacturers Assn. v. United States](#), 268 U.S. 563, 579, 45 S. Ct. 578, 69 L. Ed. 1093 (1925); [Du Pont](#), 351 U.S. at 395, n. 22; [Continental T. V., Inc. v. GTE Sylvania Inc.](#), 433 U.S. 36, 70, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977) (WHITE, J., concurring in judgment).<sup>12</sup> [\*\*\*\*30] In determining the existence of market power, and specifically the "responsiveness of the sales of one product to price changes of the other," [Du Pont](#), 351 U.S. at 400; see also [id.](#), at 394-395, and 400-401, this Court has examined closely the economic reality of the market at issue.<sup>13</sup>

Kodak contends that there is no need to examine the facts when the issue is market power in the aftermarkets. A legal presumption against a finding of market power is warranted in this situation, according to Kodak, because the existence of market power in the service and parts markets absent power in the equipment market "simply makes no economic sense," and the absence of a legal presumption would deter procompetitive [\*\*\*\*31] behavior. [Matsushita](#), 475 U.S. at 587; [id.](#), at 594-595.

Kodak analogizes this case to [Matsushita](#), where a group of American corporations that manufactured or sold consumer electronic products alleged that their 21 Japanese counterparts were engaging in a 20-year conspiracy to price [\*468] below cost in the United States in the hope of expanding their market [\*\*2083] share sometime in the future. After several years of detailed discovery, the defendants moved for summary judgment. [Id.](#), at 577-582. Because the defendants had every incentive not to engage in the alleged conduct which required them to sustain losses for decades with no foreseeable profits, the Court found an "absence of any rational motive to conspire." [Id.](#), at 597. In that context, the Court determined that the plaintiffs' theory of predatory pricing made no practical sense,

<sup>11</sup> Kodak argues that such a rule would be *per se*, with no opportunity for respondents to rebut the conclusion that market power is lacking in the parts market. See Brief for Petitioner 30-31 ("There is nothing that respondents could prove that would overcome Kodak's conceded lack of market power"); [id.](#), at 30 (discovery is "pointless" once the "dispositive fact" of lack of market power in the equipment market is conceded); [id.](#), at 22 (Kodak's lack of market power in the equipment market "dooms any attempt to extract monopoly profits" even in an allegedly imperfect market); [id.](#), at 25 (it is "impossible" for Kodak to make more total profit by overcharging its existing customers for service).

As an apparent second-best alternative, Kodak suggests elsewhere in its brief that the rule would permit a defendant to meet its summary judgment burden under [Federal Rule of Civil Procedure 56\(c\)](#); the burden would then shift to the plaintiffs to "prove . . . that there is specific reason to believe that normal economic reasoning does not apply." Brief for Petitioner 30. This is the United States' position. See Brief for United States as *Amicus Curiae* 10-11.

<sup>12</sup> See generally [Business Electronics Corp. v. Sharp Electronics Corp.](#), 485 U.S. 717, 723-726, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988); [FTC v. Indiana Federation of Dentists](#), 476 U.S. 447, 458-459, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986); [National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.](#), 468 U.S. 85, 100-104, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984); [Continental T. V., Inc. v. GTE Sylvania Inc.](#), 433 U.S. at 59.

<sup>13</sup> See, e. g., [Jefferson Parish](#), 466 U.S. at 26-29; [United States v. Connecticut National Bank](#), 418 U.S. 656, 661-666, 41 L. Ed. 2d 1016, 94 S. Ct. 2788 (1974); [United States v. Grinnell Corp.](#), 384 U.S. 563, 571-576, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966); [International Boxing Club of New York, Inc. v. United States](#), 358 U.S. 242, 250-251, 3 L. Ed. 2d 270, 79 S. Ct. 245 (1959); see also [Jefferson Parish](#), 466 U.S. at 37, n. 6 (O'CONNOR, J., concurring) (citing cases and describing the careful consideration the Court gives to the particular facts when determining market power).

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was "speculative," and was not "reasonable." *Id.*, at 588, 590, 593, 595, 597. Accordingly, the Court held that a reasonable jury could not return a verdict for the plaintiffs and that summary judgment would be appropriate against them unless they [\*\*\*\*32] came forward with more persuasive evidence to support their [\*\*\*285] theory. *Id.*, at 587-588, 595-598.

**LEdHN[14]** [14]The Court's requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision.<sup>14</sup> If the plaintiff's theory is economically [\*469] senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

[\*\*\*\*33] **LEdHN[1H]** [1H]Kodak, then, bears a substantial burden in showing that it is entitled to summary judgment. It must show that despite evidence of increased prices and excluded competition, an inference of market power is unreasonable. To determine whether Kodak has met that burden, we must unravel the factual assumptions underlying its proposed rule that lack of power in the equipment market necessarily precludes power in the aftermarkets.

**LEdHN[15A]** [15A]The extent to which one market prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product in response to a price change in another, *i.e.*, the "cross-elasticity of demand." See *Du Pont*, 351 U.S. at 400; P. Areeda & L. Kaplow, Antitrust Analysis P342(c) (4th ed. 1988).<sup>15</sup> [\*\*\*\*35] Kodak's [\*470] [\*\*\*286] proposed rule rests [\*\*2084] on a factual assumption about the cross-elasticity of demand in the equipment and aftermarkets: "If Kodak raised its parts or service prices above competitive levels, potential [\*\*\*\*34] customers would simply stop buying Kodak equipment. Perhaps Kodak would be able to increase short term profits through such a strategy, but at a devastating cost to its long term interests."<sup>16</sup> Brief for Petitioner 12. Kodak argues that the Court should accept, as a matter of law, this

<sup>14</sup> See, e. g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) ("Summary judgment will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party"); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984) (to survive summary judgment there must be evidence that "reasonably tends to prove" plaintiff's theory); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-289, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968) (defendant meets his burden under *Rule 56(c)* when he "conclusively show[s] that the facts upon which [the plaintiff] relied to support his allegation were not susceptible of the interpretation which he sought to give them"); *Eastman Kodak Co. of New York v. Southern Photo Materials Co.*, 273 U.S. 359, 375, 71 L. Ed. 684, 47 S. Ct. 400 (1927). See also *H. L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1012 (CA2 1989) ("Only reasonable inferences can be drawn from the evidence in favor of the nonmoving party") (emphasis in original); *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1339 (CA3 1987) (*Matsushita* directs us "to consider whether the inference of conspiracy is reasonable"); *Instructional Systems Development Corp. v. Aetna Casualty & Surety Co.*, 817 F.2d 639, 646 (CA10 1987) (summary judgment not appropriate under *Matsushita* when defendants "could reasonably have been economically motivated").

<sup>15</sup> What constrains the defendant's ability to raise prices in the service market is "the elasticity of demand faced by the defendant -- the degree to which its sales fall . . . as its price rises." Areeda & Kaplow P342(c), p. 576.

**LEdHN[15B]** [15B]Courts usually have considered the relationship between price in one market and demand in another in defining the relevant market. Because market power is often inferred from market share, market definition generally determines the result of the case. Pitofsky, New Definitions of Relevant Market and the Assault on Antitrust, 90 Colum. L. Rev. 1805, 1806-1813 (1990). Kodak chose to focus on market power directly rather than arguing that the relationship between equipment and service and parts is such that the three should be included in the same market definition. Whether considered in the conceptual category of "market definition" or "market power," the ultimate inquiry is the same -- whether competition in the equipment market will significantly restrain power in the service and parts markets.

<sup>16</sup> The United States as *amicus curiae* in support of Kodak echoes this argument: "The ISOs' claims are implausible because Kodak lacks market power in the markets for its copier and micrographic equipment. Buyers of such equipment regard an

"basic economic reality," *id., at 24*, that competition in the equipment market necessarily prevents market power in the aftermarkets.<sup>17</sup>

Even if Kodak could not raise the price of service and parts one cent without [\*\*\*\*36] losing equipment sales, that fact would not disprove market power in the aftermarkets. The sales of even a monopolist are reduced when it sells goods at a monopoly price, but the higher price more than compensates for the loss in sales. Areeda & Kaplow PP112 and 340(a). Kodak's claim that charging more for service and parts would be "a short-run game," Brief for Petitioner 26, is based on the false dichotomy that there are only two prices [\*471] that can be charged -- a competitive price or a ruinous one. But there could easily be a middle, optimum price at which the increased revenues from the higher priced sales of service and parts would more than compensate for the lower revenues from lost equipment sales. The fact that the equipment market imposes a restraint on prices in the after-markets by no means disproves the existence of power in those markets. See Areeda & Kaplow P340(b) ("The existence of significant substitution in the event of *further* price increases or even at the *current* price does not tell us whether the defendant *already* exercises significant market power") (emphasis in original). Thus, contrary to Kodak's assertion, there is no immutable physical [\*\*\*\*37] law -- no "basic economic reality" -- insisting that competition in the equipment market cannot coexist with market power in the aftermarkets.

We next consider the more narrowly drawn question: Does Kodak's theory describe actual market behavior so accurately that respondents' assertion of Kodak market power in the aftermarkets, if not impossible, is at least unreasonable?<sup>18</sup> Cf. *Matsushita Electric Industrial Co. v. Zenith Radio* [\*2085] Corp., 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

[\*\*\*\*38] [\*472] [\*\*\*287] To review Kodak's theory, it contends that higher service prices will lead to a disastrous drop in equipment sales. Presumably, the theory's corollary is to the effect that low service prices lead to a dramatic increase in equipment sales. According to the theory, one would have expected Kodak to take advantage of lower priced ISO service as an opportunity to expand equipment sales. Instead, Kodak adopted a restrictive sales policy consciously designed to eliminate the lower priced ISO service, an act that would be expected to devastate either Kodak's equipment sales or Kodak's faith in its theory. Yet, according to the record, it has done neither. Service prices have risen for Kodak customers, but there is no evidence or assertion that Kodak equipment sales have dropped.

Kodak and the United States attempt to reconcile Kodak's theory with the contrary actual results by describing a "marketing strategy of spreading over time the total cost to the buyer of Kodak equipment." Brief for United States as *Amicus Curiae* 18; see also Brief for Petitioner 18. In other words, Kodak could charge subcompetitive prices for

increase in the price of parts or service as an increase in the price of the equipment, and sellers recognize that the revenues from sales of parts and service are attributable to sales of the equipment. In such circumstances, it is not apparent how an equipment manufacturer such as Kodak could exercise power in the aftermarkets for parts and service." Brief for United States as *Amicus Curiae* 8.

<sup>17</sup> It is clearly true, as the United States claims, that Kodak "cannot set service or parts prices without regard to the impact on the market for equipment." *Id., at 20*. The fact that the cross-elasticity of demand is not zero proves nothing; the disputed issue is how much of an impact an increase in parts and service prices has on equipment sales and on Kodak's profits.

<sup>18</sup> Although Kodak repeatedly relies on *Continental T. V.* as support for its factual assertion that the equipment market will prevent exploitation of the service and parts markets, the case is inapposite. In *Continental T. V.*, the Court found that a manufacturer's policy restricting the number of retailers that were permitted to sell its product could have a procompetitive effect. See *433 U.S. at 55*. The Court also noted that any negative effect of exploitation of the intrabrand market (the competition between retailers of the same product) would be checked by competition in the interbrand market (competition over the same generic product) because consumers would substitute a different brand of the same product. Unlike *Continental T. V.*, this case does not concern vertical relationships between parties on different levels of the same distribution chain. In the relevant market, service, Kodak and the ISO's are direct competitors; their relationship is horizontal. The interbrand competition at issue here is competition over the provision of service. Despite petitioner's best effort, repeating the mantra "interbrand competition" does not transform this case into one over an agreement the manufacturer has with its dealers that would fall under the rubric of *Continental T. V.*

equipment and make up the difference with [\*\*\*39] supracompetitive prices for service, resulting in an overall competitive price. This pricing strategy would provide an explanation for the theory's descriptive failings -- if Kodak in fact had adopted it. But Kodak never has asserted that it prices its equipment or parts subcompetitively and recoups its profits through service. Instead, it claims that it prices its equipment comparably to its competitors and intends that both its equipment sales and service divisions be profitable. See App. 159-161, 170, 178, 188. Moreover, this hypothetical pricing strategy is inconsistent with Kodak's policy toward its self-service customers. If Kodak were underpricing its equipment, hoping to lock in customers and recover its losses in the service [\*473] market, it could not afford to sell customers parts without service. In sum, Kodak's theory does not explain the actual market behavior revealed in the record.

Respondents offer a forceful reason why Kodak's theory, although perhaps intuitively appealing, may not accurately explain the behavior of the primary and derivative markets for complex durable goods: the existence of significant information and switching costs. These costs could create [\*\*\*40] a less responsive connection between service and parts prices and equipment sales.

For the service-market price to [\*\*\*288] affect equipment demand, consumers must inform themselves of the total cost of the "package" -- equipment, service, and parts -- at the time of purchase; that is, consumers must engage in accurate lifecycle pricing.<sup>19</sup> [\*\*\*41] Life-cycle pricing of complex, durable equipment is difficult and costly. In order to arrive at an accurate price, a consumer must acquire a substantial amount of raw data and undertake sophisticated analysis. The necessary information would include data on price, quality, and availability of products needed to operate, upgrade, or enhance the initial equipment, as well as service and repair costs, including estimates of breakdown frequency, nature of repairs, price of service and parts, length of "downtime," and losses incurred from downtime.<sup>20</sup>

[\*\*2086] Much of this information is difficult -- some of it impossible -- to acquire at the time of purchase. During the life of a product, companies may change the service and parts prices, and develop products with more advanced features, a [\*474] decreased need for repair, or new warranties. In addition, the information is likely to be customer specific; lifecycle costs will vary from customer to customer with the type of equipment, degrees of equipment use, and costs of downtime.

LEdHN[16] [16]Kodak acknowledges the cost of information, but suggests, again without evidentiary support, that customer information needs will be satisfied by competitors in the equipment markets. [\*\*\*42] Brief for Petitioner 26, n. 11. It is a question of fact, however, whether competitors would provide the necessary information. A competitor in the equipment market may not have reliable information about the lifecycle costs of complex equipment it does not service or the needs of customers it does not serve. Even if competitors had the relevant information, it is not clear that their interests would be advanced by providing such information to consumers. See 2 P. Areeda & D. Turner, Antitrust Law P404b1 (1978).<sup>21</sup>

<sup>19</sup> See Craswell, Tying Requirements in Competitive Markets: The Consumer Protection Issues, 62 B. U. L. Rev. 661, 676 (1982); Beales, Craswell, & Salop, The Efficient Regulation of Consumer Information, 24 J. Law & Econ. 491, 509-511 (1981); Jefferson Parish, 466 U.S. at 15.

<sup>20</sup> In addition, of course, in order to price accurately the equipment, a consumer would need initial purchase information such as prices, features, quality, and available warranties for different machinery with different capabilities, and residual value information such as the longevity of product use and its potential resale or trade-in value.

<sup>21</sup> To inform consumers about Kodak, the competitor must be willing to forgo the opportunity to reap supracompetitive prices in its own service and parts markets. The competitor may anticipate that charging lower service and parts prices and informing consumers about Kodak in the hopes of gaining future equipment sales will cause Kodak to lower the price on its service and parts, canceling any gains in equipment sales to the competitor and leaving both worse off. Thus, in an equipment market with relatively few sellers, competitors may find it more profitable to adopt Kodak's service and parts policy than to inform the consumers. See 2 Areeda & Turner, Antitrust Law P404b1; App. 177 (Kodak, Xerox, and IBM together have nearly 100% of relevant market).

[\*\*\*\*43] Moreover, even if consumers were capable of acquiring and processing the complex body of information, they may choose not to do so. Acquiring [\*\*\*289] the information is expensive. If the costs of service are small relative to the equipment price, or if consumers are more concerned about equipment capabilities than service costs, they may not find it cost efficient to [\*475] compile the information. Similarly, some consumers, such as the Federal Government, have purchasing systems that make it difficult to consider the complete cost of the "package" at the time of purchase. State and local governments often treat service as an operating expense and equipment as a capital expense, delegating each to a different department. These governmental entities do not lifecycle price, but rather choose the lowest price in each market. See Brief for National Association of State Purchasing Officials et al. as *Amici Curiae*; Brief for State of Ohio et al. as *Amici Curiae*; App. 429-430.

As Kodak notes, there likely will be some large-volume, sophisticated purchasers who will undertake the comparative studies and insist, in return for their patronage, that Kodak charge them competitive [\*\*\*\*44] lifecycle prices. Kodak contends that these knowledgeable customers will hold down the package price for all other customers. Brief for Petitioner 23, n. 9. There are reasons, however, to doubt that sophisticated purchasers will ensure that competitive prices are charged to unsophisticated purchasers, too. As an initial matter, if the number of sophisticated customers is relatively small, the amount of profits to be gained by suprareactive pricing in the service market could make it profitable to let the knowledgeable consumers take their business elsewhere. More importantly, if a company is able to price discriminate between sophisticated and unsophisticated consumers, the sophisticated will be unable to prevent the exploitation of [\*\*2087] the uninformed. A seller could easily price discriminate by varying the equipment/parts/service package, developing different warranties, or offering price discounts on different components.

LEdHN[17] [17] Given the potentially high cost of information and the possibility that a seller may be able to price discriminate between knowledgeable and unsophisticated consumers, [\*\*\*45] it makes little sense to assume, in the absence of any evidentiary support, that equipment-purchasing decisions are based [\*476] on an accurate assessment of the total cost of equipment, service, and parts over the lifetime of the machine.<sup>22</sup>

Indeed, respondents have presented evidence that Kodak practices price discrimination by selling parts to customers who service their own equipment, but refusing to sell parts to customers who hire third-party service companies. Companies that have their own service staff are likely to be highvolume users, the same companies for whom it is most likely to be economically worthwhile to acquire the complex information needed for comparative [\*\*\*46] lifecycle pricing.

A second factor undermining Kodak's claim that suprareactive prices in the service market lead to ruinous losses in equipment sales is [\*\*\*290] the cost to current owners of switching to a different product. See Areeda & Turner P519a.<sup>23</sup> If the cost of switching is high, consumers who already have purchased the equipment, and are thus "locked in," will tolerate some level of service-price increases before changing equipment brands. Under this scenario, a seller profitably could maintain suprareactive prices in the aftermarket if the switching costs were high relative to the increase in service prices, and the number of locked-in customers were high relative to the number of new purchasers.

Moreover, if the seller can price discriminate between its locked-in customers and potential new customers, this strategy [\*\*\*47] is even more likely to prove profitable. The seller could simply charge new customers below-

Even in a market with many sellers, any one competitor may not have sufficient incentive to inform consumers because the increased patronage attributable to the corrected consumer beliefs will be shared among other competitors. Beales, Craswell, & Salop, 24 J. Law & Econ., at 503-504, 506.

<sup>22</sup> See Salop & Stiglitz, Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion, 44 Rev. Econ. Studies 493 (1977); Salop, Information and Market Structure -- Information and Monopolistic Competition, 66 Am. Econ. Rev. 240 (1976); Stigler, The Economics of Information, 69 J. Pol. Econ. 213 (1961).

<sup>23</sup> A firm can exact leverage whenever other equipment is not a ready substitute. F. Scherer & D. Ross, Industrial Market Structure and Economic Performance 16-17 (3d ed. 1990).

marginal cost on the equipment and recoup the charges in service, or offer packages [\*477] with lifetime warranties or long-term service agreements that are not available to locked-in customers.

Respondents have offered evidence that the heavy initial outlay for Kodak equipment, combined with the required support material that works only with Kodak equipment, makes switching costs very high for existing Kodak customers. And Kodak's own evidence confirms that it varies the package price of equipment/parts/service for different customers.

[LEdHN\[18\]](#) [18] In sum, there is a question of fact whether information costs and switching costs foil the simple assumption that the equipment and service markets act as pure complements to one another.<sup>24</sup>

[\*\*\*\*48] [LEdHN\[11\]](#) [11] We conclude, then, that Kodak has failed to demonstrate that respondents' inference of market power in the service and parts markets is unreasonable, and that, consequently, Kodak is entitled to summary judgment. It [\*\*2088] is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition in the aftermarkets, since respondents offer direct evidence that Kodak did so.<sup>25</sup> It is also plausible, as discussed above, to infer that Kodak chose to gain immediate profits by exerting that market power where locked-in customers, high information costs, and discriminatory pricing limited and perhaps eliminated any longterm [\*478] loss. Viewing the evidence in the light most favorable to respondents, their allegations of market power "make . . . economic sense." Cf. [Matsushita, 475 U.S. at 587](#).

[\*\*\*\*49] [\*\*\*291] [LEdHN\[19\]](#) [19] Nor are we persuaded by Kodak's contention that it is entitled to a legal presumption on the lack of market power because, as in *Matsushita*, there is a significant risk of deterring procompetitive conduct. Plaintiffs in *Matsushita* attempted to prove the antitrust conspiracy "through evidence of rebates and other price-cutting activities." [Id., at 594](#). Because cutting prices to increase business is "the very essence of competition," the Court was concerned that mistaken inferences would be "especially costly" and would "chill the very conduct the antitrust laws are designed to protect." *Ibid.* See also [Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 763, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\)](#) (permitting inference of concerted action would "deter or penalize perfectly legitimate conduct"). But the facts in this case are just the opposite. The alleged conduct -- higher service prices and market foreclosure -- is facially anticompetitive and exactly the harm that antitrust laws aim to prevent. In this situation, *Matsushita* does not create [\*\*\*\*50] any presumption in favor of summary judgment for the defendant.

[LEdHN\[20\]](#) [20] Kodak contends that, despite the appearance of anticompetitiveness, its behavior actually favors competition because its ability to pursue innovative marketing plans will allow it to compete more effectively in the equipment market. Brief for Petitioner 40-41. A pricing strategy based on lower equipment prices and higher aftermarket prices could enhance equipment sales by making it easier for the buyer to finance the initial purchase.<sup>26</sup> It is undisputed that competition is enhanced when a firm is able to offer various marketing options, including bundling of support and maintenance service with the sale of equipment. Nor do such actions [\*479] run afoul of

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<sup>24</sup> The dissent disagrees based on its hypothetical case of a tie between equipment and service. "The only thing lacking" to bring this case within the hypothetical case, states the dissent, "is concrete evidence that the restrictive parts policy was . . . generally known." *Post*, at 492. But the dissent's "only thing lacking" is the crucial thing lacking -- evidence. Whether a tie between parts and service should be treated identically to a tie between equipment and service, as the dissent and Kodak argue, depends on whether the equipment market prevents the exertion of market power in the parts market. Far from being "anomalous," *post*, at 492-493, requiring Kodak to provide evidence on this factual question is completely consistent with our prior precedent. See, e.g., n. 13, *supra*.

<sup>25</sup> Cf. [Instructional Systems, 817 F.2d at 646](#) (finding the conspiracy reasonable under *Matsushita* because its goals were in fact achieved).

<sup>26</sup> It bears repeating that in this case Kodak has never claimed that it is in fact pursuing such a pricing strategy.

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the antitrust laws.<sup>27</sup> [\*\*\*\*51] But the procompetitive effect of the specific conduct challenged here, eliminating all consumer parts and service options, is far less clear.<sup>28</sup>

We need not decide whether Kodak's behavior has any procompetitive effects and, if so, whether they outweigh the anticompetitive effects. We note only that Kodak's service and parts policy is simply not one that appears always or almost always to enhance competition, and therefore to warrant a legal presumption without any evidence of its actual economic impact. In this case, when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished, the balance tips against summary judgment. [\*\*\*292] [\*\*2089] Cf. *Matsushita, 475 U.S. at 594-595*.

[LEdHN\[1J\]](#) [↑] [1J] [LEdHN\[21A\]](#) [↑] [21A] For the foregoing [\*\*\*\*52] reasons, we hold that Kodak has not met the requirements of *Federal Rule of Civil Procedure 56(c)*. We therefore affirm the denial of summary judgment on respondents' [§ 1](#) claim.<sup>29</sup>

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<sup>27</sup> See *Jefferson Parish, 466 U.S. at 12* ("Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively -- conduct that is entirely consistent with the Sherman Act"). See also Yates & DiResta, Software Support and Hardware Maintenance Practices: Tying Considerations, *The Computer Lawyer*, Vol. 8, No. 6, p. 17 (1991) (describing various service and parts policies that enhance quality and sales but do not violate the antitrust laws).

<sup>28</sup> Two of the largest consumers of service and parts contend that they are worse off when the equipment manufacturer also controls service and parts. See Brief for State Farm Mutual Automobile Insurance Co. et al. as *Amici Curiae*; Brief for State of Ohio et al. as *Amici Curiae*.

<sup>29</sup> [LEdHN\[21B\]](#) [↑] [21B]

The dissent urges a radical departure in this Court's **antitrust law**. It argues that because Kodak has only an "inherent" monopoly in parts for its equipment, post, at 489-490, the antitrust laws do not apply to its efforts to expand that power into other markets. The dissent's proposal to grant *per se* immunity to manufacturers competing in the service market would exempt a vast and growing sector of the economy from antitrust laws. Leaving aside the question whether the Court has the authority to make such a policy decision, there is no support for it in our jurisprudence or the evidence in this case.

Even assuming, despite the absence of any proof from the dissent, that all manufacturers possess some inherent market power in the parts market, it is not clear why that should immunize them from the antitrust laws in another market. The Court has held many times that [HN6](#) [↑] power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if "a seller exploits his dominant position in one market to expand his empire into the next." *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 611, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*; see, e. g., *Northern Pacific R. Co. v. United States, 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*; *United States v. Paramount Pictures, Inc., 334 U.S. 131, 92 L. Ed. 1260, 68 S. Ct. 915 (1948)*; *Leitch Mfg. Co. v. Barber Co., 302 U.S. 458, 463, 82 L. Ed. 371, 58 S. Ct. 288 (1938)*. Moreover, on the occasions when the Court has considered tying in derivative aftermarkets by manufacturers, it has not adopted any exception to the usual antitrust analysis, treating derivative aftermarkets as it has every other separate market. See *International Salt Co. v. United States, 332 U.S. 392, 92 L. Ed. 20, 68 S. Ct. 12 (1947)*; *International Business Machines Corp. v. United States, 298 U.S. 131, 80 L. Ed. 1085, 56 S. Ct. 701 (1936)*; *United Shoe Machinery Corp. v. United States, 258 U.S. 451, 66 L. Ed. 708, 42 S. Ct. 363 (1922)*. Our past decisions are reason enough to reject the dissent's proposal. See *Patterson v. McLean Credit Union, 491 U.S. 164, 172-173, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989)* ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done").

Nor does the record in this case support the dissent's proposed exemption for aftermarkets. The dissent urges its exemption because the tie here "does not permit the manufacturer to project power over a class of consumers distinct from that which it is already able to exploit (and fully) without the inconvenience of the tie." Post, at 498. Beyond the dissent's obvious difficulty in explaining why Kodak would adopt this expensive tying policy if it could achieve the same profits more conveniently through some other means, respondents offer an alternative theory, supported by the record, that suggests Kodak is able to exploit some customers who in the absence of the tie would be protected from increases in parts prices by knowledgeable customers. See *supra, at 475-476*.

[\*\*\*\*53] [\*480] III

[LEdHN\[22A\]](#) [↑] [22A] Respondents also claim that they have presented genuine issues for trial as to whether Kodak has monopolized, or attempted [\*481] to monopolize, the service and parts markets in violation of § 2 of the Sherman Act. [HN7](#) [↑] "The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development [\*\*\*293] as a consequence of a superior product, business acumen, or historic accident." [United States v. Grinnell Corp., 384 U.S. at 570-571](#).

A

[LEdHN\[2B\]](#) [↑] [2B] [LEdHN\[23\]](#) [↑] [23] The existence of the first element, possession of monopoly power, is easily resolved. As has been noted, respondents have presented a triable claim that service and parts are separate markets, and that Kodak [\*\*2090] [\*\*\*\*54] has the "power to control prices or exclude competition" in service and parts. [Du Pont, 351 U.S. at 391](#). [HN8](#) [↑] Monopoly power under § 2 requires, of course, something greater than market power under § 1. See [Fortner, 394 U.S. at 502](#). Respondents' evidence that Kodak controls nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes, is, however, sufficient to survive summary judgment under the more stringent monopoly standard of § 2. See [National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85, 112, 82 L. Ed. 2d 70, 104 S. Ct. 2948 \(1984\)](#). Cf. [United States v. Grinnell Corp., 384 U.S. at 571](#) (87% of the market is a monopoly); [American Tobacco Co. v. United States, 328 U.S. 781, 797, 90 L. Ed. 1575, 66 S. Ct. 1125 \(1946\)](#) (over two-thirds of the market is a monopoly).

[LEdHN\[2C\]](#) [↑] [2C] [LEdHN\[24\]](#) [↑] [24] [\*\*\*\*55] Kodak also contends that, as a matter of law, a single brand of a product or service can never be a relevant market under the Sherman Act. We disagree. The relevant market [\*482] for antitrust purposes is determined by the choices available to Kodak equipment owners. See [Jefferson Parish, 466 U.S. at 19](#). Because service and parts for Kodak equipment are not interchangeable with other manufacturers' service and parts, the relevant market from the Kodak equipment owner's perspective is composed of only those companies that service Kodak machines. See [Du Pont, 351 U.S. at 404](#) [HN9](#) [↑] ("The market is composed of products that have reasonable interchangeability").<sup>30</sup> This Court's prior cases support the proposition that in some instances one brand of a product can constitute a separate market. See [National Collegiate Athletic Assn., 468 U.S. at 101-102, 111-112](#); [International Boxing Club of New York, Inc. v. United States, 358 U.S. 242, 249-252, 3 L. Ed. 2d 270, 79 S. Ct. 245 \(1959\)](#); [International Business Machines Corp. v. United States, 298 U.S. 131, 80 L. Ed. 1085, 56 S. Ct. 701 \(1936\)](#). [\*\*\*\*56]<sup>31</sup> The [\*\*\*294] proper market definition in this case can be determined only after a factual inquiry into the "commercial realities" faced by consumers. [United States v. Grinnell Corp., 384 U.S. at 572](#).

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At bottom, whatever the ultimate merits of the dissent's theory, at this point it is mere conjecture. Neither Kodak nor the dissent have provided any evidence refuting respondents' theory of forced unwanted purchases at higher prices and price discrimination. While it may be, as the dissent predicts, that the equipment market will prevent any harms to consumers in the aftermarkets, the dissent never makes plain why the Court should accept that theory on faith rather than requiring the usual evidence needed to win a summary judgment motion.

<sup>30</sup> Kodak erroneously contends that this Court in *Du Pont* rejected the notion that a relevant market could be limited to one brand. Brief for Petitioner 33. The Court simply held in *Du Pont* that one brand does not necessarily constitute a relevant market if substitutes are available. [351 U.S. at 393](#). See also [Boxing Club, 358 U.S. at 249-250](#). Here respondents contend there are no substitutes.

<sup>31</sup> Other courts have limited the market to parts for a particular brand of equipment. See, e. g., [International Logistics Group, Ltd. v. Chrysler Corp., 884 F.2d 904, 905, 908 \(CA6 1989\)](#) (parts for Chrysler cars is the relevant market), cert. denied, [494 U.S. 1066, 108 L. Ed. 2d 784, 110 S. Ct. 1783 \(1990\)](#); [Dimidowich v. Bell & Howell, 803 F.2d 1473, 1480-1481, n. 3 \(CA9 1986\)](#), modified, [810 F.2d 1517 \(1987\)](#) (service for Bell & Howell equipment is the relevant market); [In re General Motors Corp., 99 F. T. C. 464, 554, 584 \(1982\)](#) (crash parts for General Motors cars is the relevant market); [Heattransfer Corp. v. Volkswagenwerk A.G., 553 F.2d 964 \(CA5 1977\)](#) (air conditioners for Volkswagens is the relevant market), cert. denied, [434 U.S. 1087, 55 L. Ed. 2d 792, 98 S. Ct. 1282 \(1978\)](#).

[\*\*\*\*57] B

[LEdHN\[22B\]](#) [↑] [22B] [LEdHN\[25A\]](#) [↑] [25A] The second element of a § 2 claim is the use of monopoly power "to foreclose competition, to gain a competitive advantage, [\*483] or to destroy a competitor." [United States v. Griffith, 334 U.S. 100, 107, 92 L. Ed. 1236, 68 S. Ct. 941 \(1948\)](#). If Kodak adopted its parts and service policies as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated § 2. [Grinnell Corp., 384 U.S. at 570-571; United States v. Aluminum Co. of America, 148 F.2d 416, 432 \(CA2 1945\); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 600-605, 86 L. Ed. 1\\*\\*2091\] 2d 467, 105 S. Ct. 2847 \(1985\)](#).<sup>32</sup>

[\*\*\*\*58] [LEdHN\[2D\]](#) [↑] [2D] [LEdHN\[26\]](#) [↑] [26] As recounted at length above, respondents have presented evidence that Kodak took exclusionary action to maintain its parts monopoly and used its control over parts to strengthen its monopoly share of the Kodak service market. Liability turns, then, on whether "valid business reasons" can explain Kodak's actions. [Id., at 605; United States v. Aluminum Co. of America, 148 F.2d at 432](#). Kodak contends that it has three valid business justifications for its actions: "(1) to promote interbrand equipment competition by allowing Kodak to stress the quality of its service; (2) to improve asset management by reducing Kodak's inventory costs; and (3) to prevent ISOs from free-riding on Kodak's capital investment in equipment, parts and service." Brief for Petitioner 6. Factual questions exist, however, about the validity and sufficiency of each claimed justification, making summary judgment inappropriate.

[LEdHN\[27\]](#) [↑] [27] Kodak [\*\*\*\*59] first asserts that by preventing customers from using ISO's, "it [can] best maintain high quality service for its sophisticated equipment" and avoid being "blamed for an equipment malfunction, even if the problem is the result of improper diagnosis, maintenance or repair by an ISO." [Id., at 6-7](#). Respondents have offered evidence that ISO's provide quality service and are preferred by some Kodak equipment owners. This is sufficient to raise a genuine issue of [\*484] fact. See [International Business Machines Corp. v. United States, 298 U.S. at 139-140](#) (rejecting IBM's claim that it had to control the cards used in its machines to avoid "injury to the reputation of the machines and the good will of" IBM in the absence of proof that other companies could not make quality cards); [International \\*\\*\\*295 Salt Co. v. United States, 332 U.S. 392, 397-398, 92 L. Ed. 2d 20, 68 S. Ct. 12 \(1947\)](#) (rejecting International Salt's claim that it had to control the supply of salt to protect its leased machines in the absence of proof that competitors could not supply salt of equal quality).

Moreover, there are other reasons to question Kodak's [\*\*\*\*60] proffered motive of commitment to quality service; its quality justification appears inconsistent with its thesis that consumers are knowledgeable enough to lifecycle price, and its self-service policy. Kodak claims the exclusive-service contract is warranted because customers would otherwise blame Kodak equipment for breakdowns resulting from inferior ISO service. Thus, Kodak simultaneously claims that its customers are sophisticated enough to make complex and subtle lifecycle-pricing decisions, and yet too obtuse to distinguish which breakdowns are due to bad equipment and which are due to bad service. Kodak has failed to offer any reason why informational sophistication should be present in one circumstance and absent in the other. In addition, because self-service customers are just as likely as others to blame Kodak equipment for breakdowns resulting from (their own) inferior service, Kodak's willingness to allow self-service casts doubt on its quality claim. In sum, we agree with the Court of Appeals that respondents "have presented evidence from which a reasonable trier of fact could conclude that Kodak's first reason is pretextual." [903 F.2d at 618](#).

[\*\*\*\*61] [LEdHN\[28\]](#) [↑] [28] There is also a triable issue of fact on Kodak's second justification -- controlling inventory costs. As respondents argue, Kodak's actions appear inconsistent with any need to control inventory costs. Presumably, the inventory of parts [\*485] needed to repair Kodak machines turns only on breakdown rates, and those rates should be the same whether Kodak or ISO's perform the repair. More importantly, the justification

<sup>32</sup> [LEdHN\[25B\]](#) [↑] [25B]

It is true that [HN10](#) [↑] as a general matter a firm can refuse to deal with its competitors. But such a right is not absolute; it exists only if there are legitimate competitive reasons for the refusal. See [Aspen Skiing Co., 472 U.S. at 602-605](#).

fails to [\*\*2092] explain respondents' evidence that Kodak forced OEM's, equipment owners, and parts brokers not to sell parts to ISO's, actions that would have no effect on Kodak's inventory costs.

[LEdHN\[29\]](#) [29] Nor does Kodak's final justification entitle it to summary judgment on respondents' § 2 claim. Kodak claims that its policies prevent ISO's from "exploiting the investment Kodak has made in product development, manufacturing and equipment sales in order to take away Kodak's service revenues." Brief for Petitioner 7-8. Kodak does not dispute that respondents invest substantially in the service market, with training of [\*\*\*\*62] repair workers and investment in parts inventory. Instead, according to Kodak, the ISO's are free-riding because they have failed to enter the equipment and parts markets. This understanding of free-riding has no support in our case law.<sup>33</sup> To the contrary, as the [\*\*\*296] Court of Appeals noted, one of the evils proscribed by the antitrust laws is the creation of entry barriers to potential competitors by requiring them to enter two markets simultaneously. *Jefferson Parish, 466 U.S. at 14; Fortner, 394 U.S. at 509*.

[\*\*\*\*63] [LEdHN\[2E\]](#) [2E] None of Kodak's asserted business justifications, then, are sufficient to prove that Kodak is "entitled to a judgment as [\*486] a matter of law" on respondents' § 2 claim. *Fed. Rule Civ. Proc. 56(c)*.

#### IV

[LEdHN\[1K\]](#) [1K] [LEdHN\[2F\]](#) [2F] In the end, of course, Kodak's arguments may prove to be correct. It may be that its parts, service, and equipment are components of one unified market, or that the equipment market does discipline the aftermarkets so that all three are priced competitively overall, or that any anticompetitive effects of Kodak's behavior are outweighed by its competitive effects. But we cannot reach these conclusions as a matter of law on a record this sparse. Accordingly, the judgment of the Court of Appeals denying summary judgment is affirmed.

*It is so ordered.*

**Dissent by:** SCALIA

## Dissent

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JUSTICE SCALIA, with whom JUSTICE O'CONNOR and JUSTICE THOMAS join, dissenting.

This is not, as the Court describes it, just "another case that concerns the standard [\*\*\*\*64] for summary judgment in an antitrust controversy." *Ante*, at 454. Rather, the case presents a very narrow -- but extremely important -- question of substantive antitrust law: whether, for purposes of applying our *per se* rule condemning "ties," and for purposes of applying our exacting rules governing the behavior of would-be monopolists, a manufacturer's conceded lack of power in the interbrand market for its equipment is somehow consistent with its possession of "market," or even "monopoly," power in wholly derivative aftermarkets for that equipment. In my view, the Court supplies an erroneous answer to this question, and I dissent.

I

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<sup>33</sup> Kodak claims that both *Continental T. V.* and *Monsanto* support its free-rider argument. Neither is applicable. In both *Continental T. V.*, [433 U.S. at 55](#), and *Monsanto*, [465 U.S. at 762-763](#), the Court accepted free-riding as a justification because without restrictions a manufacturer would not be able to induce competent and aggressive retailers to make the kind of investment of capital and labor necessary to distribute the product. In *Continental T. V.* the relevant market level was retail sale of televisions and in *Monsanto* retail sales of herbicides. Some retailers were investing in those markets; others were not, relying, instead, on the investment of the other retailers. To be applicable to this case, the ISO's would have to be relying on Kodak's investment in the service market; that, however, is not Kodak's argument.

504 U.S. 451, \*486; 112 S. Ct. 2072, \*\*2092; 119 L. Ed. 2d 265, \*\*\*296; 1992 U.S. LEXIS 3405, \*\*\*\*64

*Per se* rules of antitrust illegality are reserved for those situations where logic and experience show that the risk of injury to competition from the defendant's behavior is so pronounced that it is needless and wasteful to conduct the usual judicial inquiry into the balance between the behavior's procompetitive [\*487] benefits and its anticompetitive [\*\*2093] costs. See, e. g., *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 350-351, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982). "The character of the [\*\*\*\*65] restraint produced by [behavior to which a *per se* rule applies] is considered a sufficient basis for presuming unreasonableness without the necessity of any analysis of the market [\*\*\*297] context in which the [behavior] may be found." *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 9, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984). The *per se* rule against tying is just such a rule: Where the conditions precedent to application of the rule are met, i. e., where the tying arrangement is backed up by the defendant's market power in the "tying" product, the arrangement is adjudged in violation of § 1 of the Sherman Act, 15 U. S. C. § 1 (1988 ed., Supp. II), without any inquiry into the practice's actual effect on competition and consumer welfare. But see *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545, 560 (ED Pa. 1960), aff'd, 365 U.S. 567, 5 L. Ed. 2d 806, 81 S. Ct. 755 (1961) (*per curiam*) (accepting affirmative defense to *per se* tying allegation).

Despite intense criticism of the tying doctrine in academic circles, see, e. g., R. Bork, *The Antitrust Paradox* 365-381 (1978), the stated rationale for our *per se* rule has varied little over the years. When the defendant has genuine "market power" in the tying product -- the power to raise price by reducing output -- the tie potentially enables him to extend that power into a second distinct market, enhancing barriers to entry in each. In addition:

"Tying arrangements may be used to evade price control in the tying product through clandestine transfer of the profit to the tied product; they may be used as a counting device to effect price discrimination; and they may be used to force a full line of products on the customer so as to extract more easily from him a monopoly return on one unique product in the line." *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 513-514, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969) (*Fortner I*) (WHITE, J., dissenting) (footnotes omitted).

[\*488] For these reasons, as we explained in *Jefferson Parish*, "the law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition [\*\*\*\*67] in the market for a tied product, on the other." [466 U.S. at 14](#).

Our § 2 monopolization doctrines are similarly directed to discrete situations in which a defendant's possession of substantial market power, combined with his exclusionary or anticompetitive behavior, threatens to defeat or forestall the corrective forces of competition and thereby sustain or extend the defendant's agglomeration of power. See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966). Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws -- or that might even be viewed as procompetitive -- can take on exclusionary connotations when practiced by a monopolist. 3 P. Areeda & D. Turner, *Antitrust Law* P813, pp. 300-302 (1978) (hereinafter 3 Areeda & Turner).

The concerns, however, that have led the courts to heightened scrutiny both of the "exclusionary conduct" practiced by a monopolist and of tying arrangements subject to *per se* prohibition, are completely without force when the participants lack market [\*\*\*\*68] power. As to the former, [\*298] "the [very] definition of exclusionary conduct," as practiced by a monopolist, is "predicated on the existence of substantial market power." *Id.*, P813, at 301; see, e. g., *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177-178, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965) (fraudulent patent procurement); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 75, 55 L. Ed. 619, 31 S. Ct. 502 (1911) (acquisition of competitors); 3 Areeda & Turner P724, at 195-197 (vertical integration). And with respect [\*\*2094] to tying, we have recognized that bundling arrangements not coerced by the heavy hand of market power can serve the procompetitive functions of facilitating new entry into certain [\*489] markets, see, e. g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 330, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962), permitting "clandestine price cutting in products which otherwise would have no price competition at all because of fear of retaliation from the few other producers dealing in the market," *Fortner I*, *supra*, at 514, n. 9 [\*\*\*\*69] (WHITE, J., dissenting), assuring quality control, see, e. g., *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 306, 93 L. Ed. 1371, 69 S. Ct. 1051 (1949), and, where "the tied and tying products are functionally related, . . .

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reducing costs through economies of joint production and distribution." *Fortner I, supra, at 514, n. 9* (WHITE, J., dissenting). "Accordingly, we have [only] condemned tying arrangements [under the *per se* rule] when the seller has some special ability -- usually called 'market power' -- to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish, supra, at 13-14*.

The Court today finds in the typical manufacturer's inherent power over its own brand of equipment -- over the sale of distinctive repair parts for that equipment, for example -- the sort of "monopoly power" sufficient to bring the sledgehammer of § 2 into play. And, not surprisingly in light of that insight, it readily labels single-brand power over aftermarket products "market power" sufficient to permit an antitrust plaintiff to invoke the *per se* rule against tying. In my opinion, [\*\*\*\*70] this makes no economic sense. The holding that market power can be found on the present record causes these venerable rules of selective proscription to extend well beyond the point where the reasoning that supports them leaves off. Moreover, because the sort of power condemned by the Court today is possessed by every manufacturer of durable goods with distinctive parts, the Court's opinion threatens to release a torrent of litigation and a flood of commercial intimidation that will do much more harm than good to enforcement of the antitrust laws and to genuine competition. I shall explain, in Parts II and III, respectively, how neither logic nor experience suggests, let alone compels, application [\*490] of the *per se* tying prohibition and monopolization doctrine to a seller's behavior in its single-brand aftermarkets, when that seller is without power at the interbrand level.

## II

On appeal in the Ninth Circuit, respondents, having waived their "rule of reason" claim, were limited to arguing that the record, construed [\*\*\*299] in the light most favorable to them, *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*, [\*\*\*\*71] supported application of the *per se* tying prohibition to Kodak's restrictive parts and service policy. See *903 F.2d 612, 615, n. 1 (1990)*. As the Court observes, in order to survive Kodak's motion for summary judgment on this claim, respondents bore the burden of proffering evidence on which a reasonable trier of fact could conclude that Kodak possesses power in the market for the alleged "tying" product. See *ante*, at 464; *Jefferson Parish, 466 U.S. at 13-14*.

## A

We must assume, for purposes of deciding this case, that petitioner is without market, much less monopoly, power in the interbrand markets for its micrographic and photocopying equipment. See *ante*, at 465-466, n. 10; *Oklahoma City v. Tuttle, 471 U.S. 808, 816, 85 L. Ed. 2d 791, 105 S. Ct. 2427 (1985)*. In the District Court, respondents did, in fact, include in their complaint an allegation which posited the interbrand equipment markets as the relevant markets; in particular, [\*\*2095] they alleged a § 1 "tie" of micrographic and photocopying equipment to the parts and service for those machines. App. 22-23. Though this allegation was apparently abandoned [\*\*\*\*72] in pursuit of §§ 1 and 2 claims focused exclusively on the parts and service aftermarkets (about which more later), I think it helpful to analyze how that claim would have fared under the *per se* rule.

Had Kodak -- from the date of its entry into the micrographic and photocopying equipment markets -- included a lifetime parts and service warranty with all original equipment, [\*491] or required consumers to purchase a lifetime parts and service contract with each machine, that bundling of equipment, parts, and service would no doubt constitute a tie under the tests enunciated in *Jefferson Parish, supra*. Nevertheless, it would be immune from *per se* scrutiny under the antitrust laws because the tying product would be *equipment*, a market in which (we assume) Kodak has no power to influence price or quantity. See *id., at 13-14; United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 620, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977)* (*Fortner II*); *Northern Pacific R. Co. v. United States, 356 U.S. 1, 6-7, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. The same result would obtain, I think, [\*\*\*\*73] had Kodak -- from the date of its market entry -- consistently pursued an announced policy of limiting parts sales in the manner alleged in this case, so that customers bought with the knowledge that aftermarket support could be obtained only from Kodak. The foreclosure of respondents from the business of servicing Kodak's micrographic and photocopying machines in these illustrations would be undeniably complete -- as complete as the foreclosure described in respondents' complaint. Nonetheless, we would inquire no further than to ask whether Kodak's *market power* in the equipment market effectively forced consumers to purchase Kodak micrographic or

photocopying machines [\*\*\*300] subject to the company's restrictive aftermarket practices. If not, that would end the case insofar as the *per se* rule was concerned. See *Jefferson Parish, supra, at 13-14*; 9 P. Areeda, *Antitrust Law* P1709c5, pp. 101-102 (1991); Klein & Saft, The Law and Economics of Franchise Tying Contracts, 28 J. Law & Econ. 345, 356 (1985). The evils against which the tying prohibition is directed would simply not be presented. Interbrand competition would render Kodak powerless [\*\*\*\*74] to gain economic power over an additional class of consumers, to price discriminate by charging each customer a "system" price equal to the system's economic value to that customer, or to raise barriers to entry in the interbrand equipment markets. See 3 Areeda & Turner P829d, at 331-332.

[\*492] I have described these illustrations as hypothetical, but in fact they are not far removed from this case. The record below is consistent -- in large part -- with just this sort of bundling of equipment on the one hand, with parts and service on the other. The restrictive parts policy, with respect to micrographic equipment at least, was not even alleged to be anything but prospective. See App. 17. As respondents summarized their factual proffer below:

"Under this policy, Kodak cut off parts on new products to Kodak micrographics [independent service organizations] ISOs. The effect of this, of course, was that as customers of Kodak micrographics ISOs obtained new equipment, the ISOs were unable to service the equipment for that customer, and, service for these customers was lost by the Kodak ISOs. Additionally, as equipment became obsolete, and the equipment population became [\*\*\*\*75] all "new equipment" (post April 1985 models), Kodak micrographics ISOs would be able to service no equipment at all." *Id.*, at 360.

As to Kodak copiers, Kodak's restrictive parts policy had a broader foundation: Considered in the light most favorable to respondents, see *Anderson, supra, at 255*, the record suggests that, [\*2096] from its inception, the policy was applied to new and existing copier customers alike. But at least all post-1985 purchasers of micrographic equipment, like all post-1985 purchasers of new Kodak copiers, could have been aware of Kodak's parts practices. The only thing lacking to bring all of these purchasers (accounting for the vast bulk of the commerce at issue here) squarely within the hypotheticals we have described is concrete evidence that the restrictive parts policy was announced or generally known. Thus, under the Court's approach the existence *vel non* of such evidence is determinative of the legal standard (the *per se* rule versus the rule of reason) under which the alleged tie is examined. In my judgment, this makes no sense. It is [\*493] quite simply anomalous that a manufacturer functioning [\*\*\*\*76] in a competitive equipment market should be exempt from the *per se* rule when it bundles equipment with parts and service, but not when it bundles parts with service. This vast difference in the treatment of what will ordinarily be economically similar phenomena is alone enough to call today's decision into question.

## B

In the Court of Appeals, respondents [\*\*\*301] sought to sidestep the impediment posed by interbrand competition to their invocation of the *per se* tying rule by zeroing in on the parts and service "aftermarkets" for Kodak equipment. By alleging a tie of *parts* to service, rather than of *equipment* to parts and service, they identified a tying product in which Kodak unquestionably held a near-monopoly share: the parts uniquely associated with Kodak's brand of machines. See *Jefferson Parish, 466 U.S. at 17*. The Court today holds that such a facial showing of market share in a single-brand aftermarket is sufficient to invoke the *per se* rule. The existence of even vibrant interbrand competition is no defense. See *ante*, at 470-471.

I find this a curious form of market power on which to premise the application of a *per se* proscription. [\*\*\*\*77] It is enjoyed by virtually every manufacturer of durable goods requiring aftermarket support with unique, or relatively unique, goods. See P. Areeda & H. Hovenkamp, *Antitrust Law* P525.1, p. 563 (Supp. 1991). "Such reasoning makes every maker of unique parts for its own product a holder of market power *no matter how unimportant its product might be in the market.*" *Ibid.* (emphasis added).<sup>1</sup> [\*\*\*\*79] Under [\*494] the Court's analysis, the *per se*

<sup>1</sup> That there exist innumerable parts and service firms in such industries as the automobile industry, see Brief for Automotive Warehouse Distributors Association et al. as *Amici Curiae* 2-3, does not detract from this point. The question whether power to control an aftermarket exists is quite distinct from the question whether the power has been exercised. Manufacturers in some

504 U.S. 451, \*494; 112 S. Ct. 2072, \*\*2096; 119 L. Ed. 2d 265, \*\*\*301; 1992 U.S. LEXIS 3405, \*\*\*\*79

rule may now be applied to single-brand ties effected by the most insignificant players in fully competitive interbrand markets, as long as the arrangement forecloses aftermarket competitors from more than a *de minimis* amount of business, *Fortner I, 394 U.S. at 501*. This seems to me quite wrong. A tying arrangement "forced" through the exercise of such power no more implicates the leveraging and price discrimination concerns behind the *per se* tying prohibition than does a tie of the foremarket **[\*\*2097]** brand to its aftermarket derivatives, which -- as I have explained -- would not be subject to *per se* condemnation.<sup>2</sup> As implemented, the Kodak **[\*\*\*302]** arrangement challenged **[\*495]** in this case may **[\*\*\*\*78]** have implicated truth-in-advertising or other consumer protection concerns, but those concerns do not alone suggest an antitrust prohibition. See, e. g., *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468 (CA3 1992) (en banc).

**[\*\*\*\*80]** In the absence of interbrand power, a seller's predominant or monopoly share of its single-brand derivative markets does not connote the power to raise derivative market prices *generally* by reducing quantity. As Kodak and its principal *amicus*, the United States, point out, a rational consumer considering the purchase of Kodak equipment will inevitably factor into his purchasing decision the expected cost of aftermarket support. "Both the price of the equipment and the price of parts and service over the life of the equipment are expenditures that are necessary to obtain copying and micrographic services." Brief for United States as *Amicus Curiae* 13. If Kodak set generally supracompetitive prices for either spare parts or repair services without making an off-setting reduction in the price of its machines, rational consumers would simply turn to Kodak's competitors for photo-copying and micrographic systems. See, e. g., *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 796-798 (CA1 1988). True, there are -- as the Court notes, see *ante*, at 474-475 -- the occasional irrational consumers that consider only the hardware cost at the time **[\*\*\*\*81]** of purchase (a category that regrettably includes the Federal Government, whose "purchasing system," we are told, assigns foremarket purchases and aftermarket purchases to different entities). But **[\*496]** we have never before premised the application of antitrust doctrine on the lowest common denominator of consumer.

The Court attempts to counter this theoretical point with a theory of its own. It says that there are "information costs" -- the costs and inconvenience to the consumer of acquiring and processing life-cycle pricing data for Kodak machines -- that "could create a less responsive connection between service and parts prices and equipment sales." *Ante*, at 473. But this truism about the functioning of markets for sophisticated equipment cannot create "market power" of concern to the antitrust laws where otherwise there is none. "Information costs," or, more accurately, gaps in the availability and quality of consumer information, pervade real-world markets; and because consumers generally make do with "rough cut" judgments about price in such circumstances, in virtually any market

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markets have no doubt determined that exclusionary intrabrand conduct works to their disadvantage at the competitive interbrand level, but this in no way refutes the self-evident reality that control over unique replacement parts for single-branded goods is ordinarily available to such manufacturers for the taking. It confounds sound analysis to suggest, as respondents do, see Brief for Respondents 5, 37, that the asserted fact that Kodak manufactures only 10% of its replacement parts, and purchases the rest from original equipment manufacturers, casts doubt on Kodak's possession of an inherent advantage in the aftermarket. It does no such thing, any more than Kodak's contracting with others for the manufacture of all constituent parts included in its original equipment would alone suggest that Kodak lacks power in the *interbrand* micrographic and photocopying equipment markets. The suggestion implicit in respondents' analysis -- that if a seller chooses to contract for the manufacture of its branded merchandise, it must permit the contractors to compete in the sale of that merchandise -- is plainly unprecedented.

<sup>2</sup> Even with interbrand power, I may observe, it is unlikely that Kodak could have incrementally exploited its position through the tie of parts to service alleged here. Most of the "service" at issue is inherently associated with the parts, *i. e.*, that service involved in incorporating the parts into Kodak equipment, and the two items tend to be demanded by customers in fixed proportions (one part with one unit of service necessary to install the part). When that situation obtains, "no revenue can be derived from setting a higher price for the tied product which could not have been made by setting the optimum price for the tying product." P. Areeda & L. Kaplow, Antitrust Analysis P426(a), p. 706 (4th ed. 1988) (quoting Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L. J. 19 (1957)). These observations strongly suggest that Kodak parts and the service involved in installing them should not be treated as distinct products for antitrust tying purposes. See *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 39, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984) (O'CONNOR, J., concurring in judgment) ("For products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately *without also purchasing the tying product*") (emphasis in original) (footnote omitted); Ross, The Single Product Issue in Antitrust Tying: A Functional Approach, 23 Emory L. J. 963, 1009-1010 (1974).

there are zones within which otherwise [\*\*\*303] competitive suppliers may overprice [\*\*\*\*82] their products without losing appreciable market share. We have never suggested that the principal players in a market with such commonplace informational deficiencies (and, thus, bands of apparent consumer pricing indifference) exercise market power in any sense relevant [\*\*2098] to the antitrust laws. "While [such] factors may generate 'market power' in some abstract sense, they do not generate the kind of market power that justifies condemnation of tying." *Jefferson Parish, 466 U.S. at 27*; see, e. g., *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., supra*.

Respondents suggest that, even if the existence of inter-brand competition prevents Kodak from raising prices *generally* in its single-brand aftermarkets, there remain certain consumers who are necessarily subject to abusive Kodak pricing behavior by reason of their being "locked in" to their investments in Kodak machines. The Court agrees; indeed, it goes further by suggesting that even a *general* policy of supracompetitive aftermarket prices might be profitable over the long run because of the "lock-in" phenomenon. "[A] [\*497] seller profitably could maintain [\*\*\*\*83] supracompetitive prices in the aftermarket," the Court explains, "if the switching costs were high relative to the increase in service prices, and the number of locked-in customers were high relative to the number of new purchasers." *Ante*, at 476. In speculating about this latter possibility, the Court is essentially repudiating the assumption on which we are bound to decide this case, viz., Kodak's lack of any power whatsoever in the interbrand market. If Kodak's *general* increase in aftermarket prices were to bring the total "system" price above competitive levels in the interbrand market, Kodak would be wholly unable to make further foremarket sales -- and would find itself exploiting an ever-dwindling aftermarket, as those Kodak micrographic and photocopying machines already in circulation passed into disuse.

The Court's narrower point, however, is undeniably true. There will be consumers who, because of their capital investment in Kodak equipment, "will tolerate some level of service-price increases before changing equipment brands," *ibid.*; this is *necessarily* true for "every maker of unique parts for its own product." Areeda & Hovenkamp, *Antitrust Law* P525.1b, [\*\*\*84] at 563. But this "circumstantial" leverage created by consumer investment regularly crops up in smoothly functioning, even perfectly competitive, markets, and in most -- if not all -- of its manifestations, it is of no concern to the antitrust laws. The leverage held by the manufacturer of a malfunctioning refrigerator (which is measured by the consumer's reluctance to walk away from his initial investment in that device) is no different in kind or degree from the leverage held by the swimming pool contractor when he discovers a 5-ton boulder in his customer's backyard and demands an additional sum of money to remove it; or the leverage held by an airplane manufacturer over an airline that has "standardized" its fleet around the manufacturer's models; or the leverage held by a drill press manufacturer whose customers have built their production lines around the [\*498] manufacturer's [\*\*\*304] particular style of drill press; or the leverage held by an insurance company over its independent sales force that has invested in company-specific paraphernalia; or the leverage held by a mobile home park owner over his tenants, who are unable to transfer their homes to a different park [\*\*\*85] except at great expense, see generally *Yee v. Escondido, 503 U.S. 519, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992)*. Leverage, in the form of *circumstantial* power, plays a role in each of these relationships; but in none of them is the leverage attributable to the dominant party's *market* power in any relevant sense. Though that power can plainly work to the injury of certain consumers, it produces only "a brief perturbation in competitive conditions -- not the sort of thing the antitrust laws do or should worry about." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 228, 236 (CA7 1988)* (Posner, J., dissenting).

The Court correctly observes that the antitrust laws do not permit even a *natural* monopolist to project its monopoly power into another market, *i. e.*, to "exploit his [\*\*2099] dominant position in one market to expand his empire into the next." *Ante*, at 480, n. 29 (quoting *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 611, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*). However, when a manufacturer uses its control over single-branded parts to acquire influence in single-branded [\*\*\*86] service, the monopoly "leverage" is almost invariably of no practical consequence, because of perfect identity between the consumers in each of the subject aftermarkets (those who need replacement parts for Kodak equipment and those who need servicing of Kodak equipment). When that condition exists, the tie does not permit the manufacturer to project power over a class of consumers distinct from that which it is already able to exploit (and fully) without the inconvenience of the tie. Cf., e. g., Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L. J. 19, 21-27 (1957).

We have never before accepted the thesis the Court today embraces: that a seller's inherent control over the unique [\*499] parts for its own brand amounts to "market power" of a character sufficient to permit invocation of the *per se* rule against tying. As the Court observes, *ante*, at 479-481, n. 29, we have applied the *per se* rule to manufacturer ties of *foremarket* equipment to aftermarket derivatives -- but only when the manufacturer's monopoly power in the equipment, coupled with the use of derivative sales as "counting devices" to measure the intensity of customer [\*\*\*\*87] equipment usage, enabled the manufacturer to engage in price discrimination, and thereby more fully exploit its interbrand power. See [\*International Salt Co. v. United States\*, 332 U.S. 392, 92 L. Ed. 2d, 68 S. Ct. 12 \(1947\)](#); [\*International Business Machines Corp. v. United States\*, 298 U.S. 131, 80 L. Ed. 1085, 56 S. Ct. 701 \(1936\)](#); [\*United Shoe Machinery Corp. v. United States\*, 258 U.S. 451, 66 L. Ed. 708, 42 S. Ct. 363 \(1922\)](#). That sort of enduring opportunity to engage in price discrimination is unavailable to a manufacturer -- like Kodak -- that lacks power at the inter-brand level. A tie between two aftermarket derivatives does next to nothing to improve a competitive manufacturer's [\*\*\*305] ability to extract monopoly rents from its consumers.<sup>3</sup>

[\*\*\*\*88] [\*500] [\*\*2100] Nor has any court of appeals (save for the Ninth Circuit panel below) recognized single-branded aftermarket power as a basis for invoking the *per se* tying prohibition. See [\*Virtual Maintenance, Inc. v. Prime Computer, Inc.\*, 957 F.2d 1318, 1328 \(CA6 1992\)](#) ("Defining the market by customer demand *after* the customer has chosen a single supplier fails to take into account that the supplier . . . must compete with other similar suppliers to be designated the [\*501] sole source in the first place"); [\*Grappone, Inc. v. Subaru of New England, Inc.\*, 858 F.2d at 798](#) ("We do not see how such dealer investment [in facilities to sell Subaru products] . . . could easily translate into Subaru market power of a kind that, through tying, could ultimately lead to higher than competitive prices for consumers"); *A. I.* [\*\*\*306] [\*Root Co. v. Computer/Dynamics, Inc.\*, 806 F.2d 673, 675-677, and n. 3 \(CA6 1986\)](#) (competition at "small business computer" level precluded assertion of computer

<sup>3</sup>The Court insists that the record in this case suggests otherwise, *i. e.*, that a tie between parts and service somehow does enable Kodak to increase overall monopoly profits. See *ante*, at 479-481, n. 29. Although the Court does not identify the record evidence on which it relies, the suggestion, apparently, is that such a tie facilitates price discrimination between sophisticated, "high-volume" users of Kodak equipment and their unsophisticated counterparts. The sophisticated users (who, the Court presumes, invariably self-service their equipment) are permitted to buy Kodak parts without also purchasing supracompetitively priced Kodak service, while the unsophisticated are -- through the imposition of the tie -- compelled to buy both. See *ante*, at 475-476.

While superficially appealing, at bottom this explanation lacks coherence. Whether they self-service their equipment or not, rational foremarket consumers (those consumers who are not yet "locked in" to Kodak hardware) will be driven to Kodak's competitors if the price of Kodak equipment, together with the expected cost of aftermarket support, exceeds competitive levels. This will be true no matter how Kodak distributes the total system price among equipment, parts, and service. See [\*supra\*, at 495](#). Thus, as to these consumers, Kodak's lack of interbrand power wholly prevents it from employing a tie between parts and service as a vehicle for price discrimination. Nor does a tie between parts and service offer Kodak incremental exploitative power over those consumers -- sophisticated or not -- who have the supposed misfortune of being "locked in" to Kodak equipment. If Kodak desired to exploit its circumstantial power over this wretched class by pressing them up to the point where the cost to each consumer of switching equipment brands barely exceeded the cost of retaining Kodak equipment and remaining subject to Kodak's abusive practices, it could plainly do so without the inconvenience of a tie, through supracompetitive parts pricing alone. Since the locked-in *sophisticated* parts purchaser is as helpless as the locked-in *unsophisticated* one, I see nothing to be gained by price discrimination in favor of the former. If such price discrimination were desired, however, it would not have to be accomplished indirectly, through a tie of parts to service. [\*Section 2\(a\)\*](#) of the Robinson-Patman Act, [\*15 U. S. C. § 13\(a\)\*](#), would prevent giving lower parts prices to the sophisticated customers only "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ." *Ibid.*; see, *e. g.*, [\*Falls City Industries, Inc. v. Vanco Beverage, Inc.\*, 460 U.S. 428, 434-435, 75 L. Ed. 2d 174, 103 S. Ct. 1282 \(1983\)](#). That prohibited effect often occurs when price-discriminated goods are sold for resale (*i. e.*, to purchasers who are necessarily in competition with one another). *E. g.*, [\*FTC v. Morton Salt Co.\*, 334 U.S. 37, 47, 92 L. Ed. 1196, 68 S. Ct. 822 \(1948\)](#); see P. Areeda & L. Kaplow, Antitrust Analysis P600, p. 923 (1988) ("Secondary-line injury arises [under the Robinson-Patman Act] when a powerful firm buying supplies at favorable prices thereby gains a decisive advantage over its competitors that are forced to pay higher prices for their supplies"). It rarely occurs where, as would be the case here, the price-discriminated goods are sold to various businesses for consumption.

504 U.S. 451, \*501; 112 S. Ct. 2072, \*\*2100; 119 L. Ed. 2d 265, \*\*\*306; 1992 U.S. LEXIS 3405, \*\*\*\*88

manufacturer's power over software designed for use only with manufacturer's brand of computer); [General Business Systems v. North American Philips Corp., 699 F.2d 965, 977 \(CA9 1983\)](#) [\*\*\*\*89] ("To have attempted to impose significant pressure to buy [aftermarket hardware] by use of the tying service only would have hastened the date on which Philips surrendered to its competitors in the small business computer market"). See also *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d at 233 (law-of-the-case doctrine compelled finding of market power in replacement parts for single-brand engine).

We have recognized in closely related contexts that the deterrent effect of *interbrand* competition on the exploitation of *intrabrand* market power should make courts exceedingly reluctant to apply rules of *per se* illegality to intra-brand restraints. For instance, we have refused to apply a rule of *per se* illegality to vertical nonprice restraints "because of their potential for a simultaneous reduction of intra-brand competition and stimulation of interbrand competition," [Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51-52, 53 L. Ed. 2d 568, 97 S. Ct. 2549 \(1977\)](#), the latter of which we described as "the primary concern of **antitrust law**," *id.*, at 52, n. 19. We noted, for instance, [\*\*\*\*90] that "new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer," and that "established manufacturers can use them [\*502] to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products." *Id.*, at 55. See also [Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 726, 99 L. Ed. 2d 808, 108 S. Ct. 1515 \(1988\)](#). The same assumptions, in my opinion, should govern our analysis of ties alleged to have been "forced" solely through *intrabrand* market power. In the absence of *interbrand* power, a manufacturer's bundling of aftermarket products may serve a multitude of legitimate purposes: It may facilitate manufacturer efforts to ensure that the equipment remains operable and thus protect the seller's business reputation, see [United States v. \[\\*\\*2101\] Jerrold Electronics Corp., 187 F. Supp. at 560](#); it may create [\*\*\*\*91] the conditions for implicit consumer financing of the acquisition cost of the tying equipment through supracompetitively-priced aftermarket purchases, see, e. g., A. Oxenfeldt, Industrial Pricing and Market Practices 378 (1951); and it may, through the resultant manufacturer control of aftermarket activity, "yield valuable information about component or design weaknesses that will materially contribute to product improvement," 3 Areeda & Turner P733c, at 258-259; see also *id.*, P829d, at 331-332. Because the *interbrand* market will generally punish intra-brand restraints that consumers do not find in their interest, we should not -- under the guise of a *per se* rule -- condemn [\*\*\*307] such potentially procompetitive arrangements simply because of the antitrust defendant's inherent power over the unique parts for its own brand.

I would instead evaluate the aftermarket tie alleged in this case under the rule of reason, where the tie's *actual* anticompetitive effect in the tied product market, together with its potential economic benefits, can be fully captured in the analysis, see, e. g., [Jefferson Parish, 466 U.S. at 41](#) (O'CONNOR, J., concurring in [\*\*\*\*92] judgment). Disposition of this case does not require such an examination, however, as respondents apparently waived any rule-of-reason claim they [\*503] may have had in the District Court. I would thus reverse the Ninth Circuit's judgment on the tying claim outright.

### III

These considerations apply equally to respondents' § 2 claims. An antitrust defendant lacking relevant "market power" sufficient to permit invocation of the *per se* prohibition against tying a *fortiori* lacks the monopoly power that warrants heightened scrutiny of his allegedly exclusionary behavior. Without even so much as asking whether the purposes of § 2 are implicated here, the Court points to Kodak's control of "100% of the parts market and 80% to 95% of the service market," markets with "no readily available substitutes," *ante*, at 481, and finds that the proffer of such statistics is sufficient to fend off summary judgment. But this showing could easily be made, as I have explained, with respect to virtually any manufacturer of differentiated products requiring aftermarket support. By permitting antitrust plaintiffs to invoke § 2 simply upon the unexceptional demonstration that a manufacturer [\*\*\*\*93] controls the supplies of its single-branded merchandise, the Court transforms § 2 from a specialized mechanism for responding to extraordinary agglomerations (or threatened agglomerations) of economic power to an all-purpose remedy against run-of-the-mill business torts.

In my view, if the interbrand market is vibrant, it is simply not necessary to enlist § 2's machinery to police a seller's intrabrand restraints. In such circumstances, the interbrand market functions as an infinitely more efficient and more precise corrective to such behavior, rewarding the seller whose intrabrand restraints enhance consumer welfare while punishing the seller whose control of the aftermarkets is viewed unfavorably by interbrand consumers. See *Business Electronics Corp., supra, at 725*; *Continental T. V., Inc., supra, at 52, n. 19, 54*. Because this case comes to us on the assumption [\*504] that Kodak is without such interbrand power, I believe we are compelled to reverse the judgment of the Court of Appeals. I respectfully dissent.

## References

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[54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices \[\\*\\*\\*\\*94\]](#) 34-42, 59-64, 284, 409

24 Federal Procedure, L Ed, Monopolies and Restraints of Trade 54:254, 54:255; 28 Federal Procedure, L Ed, Pleadings and Motions 62:624

12B Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade 48:213, 48:215, 48:231, 48:272

5 Am Jur Trials 105, Summary Judgment Practice; 24 Am Jur Trials 1, Defending Antitrust Lawsuits

[15 USCS 1, 2](#); USCS Court Rules, [Federal Rules of Civil Procedure, Rule 56\(c\)](#)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 30, 42, 43; Summary Judgment and Judgment on Pleadings 5

L Ed Index, Restraints of Trade, Monopolies, and Unfair Trade Practices; Rules of Civil Procedure; Sherman Act; Tying Arrangements

Index to Annotations, Civil Procedure Rules; Restraints of Trade and Monopolies; Services; Summary Judgment; Tying Arrangements

Annotation References:

What constitutes "sufficient economic power" to make tying arrangement unlawful restraint of trade violative of 1 of Sherman Act ([15 USCS 1](#))-- Supreme Court cases. [51 L Ed 2d 826](#).

What issues will the Supreme Court [\*\*\*\*95] consider, though not, or not properly, raised by the parties. [42 L Ed 2d 946](#).

What constitutes separate and distinct products or services for purposes of determining whether tying arrangement violates 1 of Sherman Act ([15 USCS 1](#)) or 3 of Clayton Act ([15 USCS 14](#)). 46 ALR Fed 516 .

Refusals to deal as violations of the federal antitrust laws ([15 USCS 1, 2, 13](#)). 41 ALR Fed 175.

Comment note.--What constitutes "attempt to monopolize" within meaning of 2 of Sherman Act ([15 USCS 2](#)). 27 ALR Fed 762.



## **FTC v. Ticor Title Ins. Co.**

Supreme Court of the United States

January 13, 1992, Argued ; June 12, 1992, Decided

No. 91-72

### **Reporter**

504 U.S. 621 \*; 112 S. Ct. 2169 \*\*; 119 L. Ed. 2d 410 \*\*\*; 1992 U.S. LEXIS 3544 \*\*\*\*; 60 U.S.L.W. 4515; 1992-1 Trade Cas. (CCH) P69,847; 92 Cal. Daily Op. Service 4915; 92 Daily Journal DAR 8322; 6 Fla. L. Weekly Fed. S 365

FEDERAL TRADE COMMISSION, PETITIONER v. TICOR TITLE INSURANCE COMPANY, ET AL.

**Prior History:** [\*\*\*\*1] On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

**Disposition:** [922 F.2d 1122](#), reversed and remanded.

### **Core Terms**

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supervision, immunity, regulation, rates, rating bureau, state-action, antitrust, prices, title insurance, articulated, antitrust liability, anti trust law, state official, private party, anticompetitive, state policy, filings, anticompetitive conduct, price fixing, insured, rate increase, title search, respondents', insurance company, regulatory scheme, percent, Sherman Act, price-fixing, flexibility, undertaken

### **LexisNexis® Headnotes**

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

Antitrust & Trade Law > Exemptions & Immunities > General Overview

#### **[HN1](#) [↓] Exemptions & Immunities, Parker State Action Doctrine**

A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the state has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the state provides active supervision of anticompetitive conduct undertaken by private actors.

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

#### **[HN2](#) [↓] Exemptions & Immunities, Parker State Action Doctrine**

Federal antitrust laws are subject to supersession by state regulatory programs. The court's decision is grounded in principles of federalism.

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

### [\*\*HN3\*\*](#) Exemptions & Immunities, Parker State Action Doctrine

A two-part test applies to instances where private parties participate in a price-fixing regime, to determine whether the restraint of trade is immune under the "state action" doctrine. First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the state itself.

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

### [\*\*HN4\*\*](#) Exemptions & Immunities, Parker State Action Doctrine

While a state may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details. Actual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law. Immunity is conferred out of respect for ongoing regulation by the state, not out of respect for the economics of price restraint.

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

### [\*\*HN5\*\*](#) Exemptions & Immunities, Parker State Action Doctrine

The active supervision requirement of the "state action doctrine" providing immunity to private parties engaging in a restraint of trade mandates that the state exercise ultimate control over the challenged anticompetitive conduct. The mere presence of some state involvement or monitoring does not suffice. State officials must have and exercise power to review particular anticompetitive acts of private parties and to deny approval of those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

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

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

### [\*\*HN6\*\*](#) Exemptions & Immunities, Parker State Action Doctrine

State-action immunity is disfavored.

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

Constitutional Law > Supremacy Clause > General Overview

Copyright Law > Constitutional Copyright Protections > Federal & State Law Interrelationships > General Overview

### [\*\*HN7\*\*](#) Exemptions & Immunities, Parker State Action Doctrine

Federalism serves to assign political responsibility, not to obscure it. Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends. For States which do choose to displace the free market with regulation, insistence on real compliance with both parts of the Midcal test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.

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

## **HN8** Exemptions & Immunities, Parker State Action Doctrine

Where prices or rates are set as an initial matter by private parties, subject only to a veto if a state chooses to exercise it, a party claiming state action immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or rate-setting scheme.

## **Lawyers' Edition Display**

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### **Decision**

Supervision by states of title-search ratesetting held not sufficiently active to give title insurance companies state-action immunity from federal antitrust liability.

### **Summary**

Under the state-action doctrine established by United States Supreme Court precedents, a state law or regulatory scheme can be the basis for immunity from the federal antitrust laws if the state (1) has articulated a clear and affirmative policy to allow anticompetitive conduct, and (2) provides active supervision of anticompetitive conduct undertaken by private actors. The Federal Trade Commission (FTC) filed an administrative complaint against various title insurance companies and charged the companies with violating 5(a)(1) of the Federal Trade Commission Act ([15 USCS 45\(a\)\(1\)](#)) in Arizona, Connecticut, Montana, and Wisconsin, by engaging in horizontal price fixing, through privately organized rating bureaus, of their fees for title searches, examinations, and settlements. In considering the companies' defense that their rate-fixing activities were entitled to state-action immunity, an Administrative Law Judge (ALJ) found, in part, that (1) in each of the four states, the rating bureau was licensed by the state and authorized to establish joint rates for its members, which rates would become effective unless the state rejected them within a specified period; and (2) although this system provided a theoretical mechanism for substantive state review, rate filings in the four states had in fact been subject to only minimal scrutiny by state regulators. The FTC conceded that the affirmative-policy test for state-action immunity had been met in all four states, and the ALJ concluded that the active-supervision test had been met in Arizona and Montana, but not in Connecticut or Wisconsin. On review, the FTC (1) held that none of the four states had conducted active supervision, so that the companies were not entitled to immunity in any of those states; and (2) found antitrust violations in those states ([112 FTC 112](#)). However, the FTC's order was vacated by the United States Court of Appeals for the Third Circuit, which (1) held that the existence of a state regulatory program, if staffed, funded, and empowered by law, satisfies the requirement of active supervision; and (2) concluded that the companies' conduct was entitled to state-action immunity in all four states ([922 F2d 1122](#)). The Supreme Court granted certiorari to consider the questions (1) whether the Court of Appeals was correct in its statement of law and in its application of law to fact--as to which question the parties confined their briefing to the regulatory regimes of Montana and Wisconsin--and (2) whether the Court of Appeals exceeded its authority in departing from the factual findings made by the ALJ and adopted by the FTC--as to which question the parties focussed their briefing on the regulatory regimes of *Arizona and Connecticut* (*502 US 807, 116 L Ed 2d 25, 112 S Ct 47*).

On certiorari, the Supreme Court reversed the judgment of the Court of Appeals as to the first question, and remanded for further proceedings as to the second question. In an opinion by Kennedy, J., joined by White,

Blackmun, Stevens, Scalia, and Souter, JJ., it was held that (1) both elements of the above state-action immunity test must be complied with, and not only the "clear articulation" requirement; (2) in order to satisfy the "active supervision" requirement, parties claiming state-action immunity where prices or rates are set as an initial matter by private parties, subject only to a veto if the state chooses to exercise it, must show that state officials have undertaken the necessary steps to determine the specifics of the price fixing or ratesetting scheme, and the mere potential for state supervision is not an adequate substitute for a decision by the state; (3) under this standard, there was no "active supervision" by state officials in Montana and Wisconsin, and the actions of the companies in those states were therefore not immune from antitrust liability, where (a) in both states, the applicable regulatory schemes allowed rates filed by the rating bureaus with state agencies to become effective unless they were rejected by state officials within a specified time, and (b) the potential for state supervision under this "negative option" rule was not realized in fact, as (i) rate filings in those states were at most checked for mathematical accuracy, while some were unchecked altogether, (ii) a rate filing became effective in Montana despite the failure of the rating bureau to provide additional information requested by state officials, and (iii) in Wisconsin, additional information requested by state officials was provided after a lapse of 7 years, during which time the rate filing remained in effect; and (4) the case would be remanded to give the Court of Appeals an opportunity to re-examine its determinations with respect to Arizona and Connecticut.

Scalia, J., concurred, expressing the view that, while the Supreme Court's standard of "active supervision" would be a source of uncertainty and litigation, these consequences were acceptable because (1) the standard was compelled by the "active supervision" doctrine, which had not been challenged in the case at hand; and (2) the antitrust exemption for state-programmed private collusion was dubious in the first place.

Rehnquist, Ch. J., joined by O'Connor and Thomas, JJ., dissented, expressing the view that (1) the Court of Appeals followed the correct standard in applying the "active supervision" requirement; and (2) the different conclusion reached by the Court of Appeals by reviewing the facts in light of this standard did not constitute a rejection of the FTC's factual findings.

O'Connor, J., joined by Thomas, J., dissented, expressing the view that (1) the practical effect of the majority's interpretation of the "active supervision" requirement would be to diminish states' regulatory flexibility by eliminating "negative option" regulatory schemes such as those of the states in question; (2) liability under the antitrust laws should not depend on how enthusiastically state officials carried out their statutory duties, a circumstance over which regulated entities had no control; and (3) the majority's opinion offered no guidance as to what level of supervision would suffice.

## **Headnotes**

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > state-action immunity -- > Headnote:  
[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D]

A state law or regulatory scheme cannot be the basis for antitrust immunity unless (1) the state has articulated a clear and affirmative policy to allow the anticompetitive conduct, and (2) the state provides active supervision of anticompetitive conduct undertaken by private actors; thus, while a state may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the state and implemented in specific details; both elements of the above test must be complied with, and not only the "clear articulation" requirement, as (1) both elements are directed at insuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy, (2) meeting the clear articulation requirement (a) shows little more than that the state has not acted through inadvertence, and (b) cannot alone insure that particular anticompetitive conduct has been approved by the state, and (3) sole reliance on the clear articulation requirement will not allow the regulatory flexibility that states deem necessary, as states' freedom of

504 U.S. 621, \*621; 112 S. Ct. 2169, \*\*2169; 119 L. Ed. 2d 410, \*\*\*410; 1992 U.S. LEXIS 3544, \*\*\*\*1

action will be impeded if they risk triggering state-action immunity whenever they enter the realm of economic regulation.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §37 > state-action immunity -- price fixing -- title examination rates -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B]

Parties claiming state-action immunity from the federal antitrust laws where prices or rates are set as an initial matter by private parties, and remain in effect unless the state chooses to exercise a veto, must show that state officials have undertaken the necessary steps to determine the specifics of the price fixing or ratesetting scheme, and the mere potential for state supervision is not an adequate substitute for a decision by the state; under this standard, there is no "active supervision" by state officials, as would be required for the application of state-action immunity, with respect to alleged horizontal price fixing in two states by title insurance companies which set uniform rates for title searches, examinations, and settlements through privately established rating bureaus, where (1) in both states, the applicable regulatory schemes allow rates filed by the rating bureaus with state agencies to become effective unless they are rejected by state officials within a specified time, and (2) the potential for state supervision under this "negative option" rule was not realized in fact, as (a) rate filings in those states were at most checked for mathematical accuracy, while some were unchecked altogether, (b) in one state a rate filing became effective despite the failure of the rating bureau to provide additional information requested by state officials, and (c) in the other state, additional information requested by state officials was provided after a lapse of 7 years, during which time the rate filing remained in effect; therefore, a Federal Court of Appeals errs in vacating, on state-action immunity grounds, a Federal Trade Commission order which found that the companies' conduct in the two states violated 5(a)(1) of the Federal Trade Commission Act ([15 USCS 45\(a\)\(1\)](#)). (Rehnquist, Ch. J., and O'Connor and Thomas, JJ., dissented from this holding.)

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > state-action immunity -- active supervision -- price fixing -- > Headnote:

[LEdHN\[3\]](#) [3]

Under the doctrine of state-action immunity from the federal antitrust laws, the purpose of the inquiry into whether the state has actively supervised the anticompetitive conduct undertaken by private actors as to setting of rates or prices is not to determine whether the state has met some normative standard, such as efficiency, in its regulatory practices, but to determine whether the state has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties; the question is not how well state regulation works, but whether the anticompetitive scheme is the state's own. (Rehnquist, Ch. J., and O'Connor and Thomas, JJ., dissented in part from this holding.)

APPEAL §1339.5 > review of Federal Court of Appeals -- certiorari -- > Headnote:

[LEdHN\[4\]](#) [4]

The United States Supreme Court--in reviewing on certiorari a Federal Court of Appeals decision which (1) ruled that title insurance companies engaging in horizontal price fixing, through privately organized rating bureaus, of their fees for title searches, examinations, and settlements, were entitled to state-action immunity from the federal

antitrust laws in certain states, and therefore (2) vacated a Federal Trade Commission (FTC) order holding that the companies' conduct violated 5(a)(1) of the Federal Trade Commission Act (FTCA) ([15 USCS 45\(a\)\(1\)](#))--need not determine whether state-action immunity applies to FTC action under 5 of the FTCA, where the FTC, though it has argued at other times that state-action immunity does not apply in such cases, has not asserted any superior pre-emption authority in the instant matter.

APPEAL §1692.3 > remand -- error of law -- > Headnote:

[LEdHN\[5\]](#) [5]

The United States Supreme Court--in reviewing on certiorari a Federal Court of Appeals' judgment vacating a Federal Trade Commission (FTC) order which found that title insurance companies had violated 5(a)(1) of the Federal Trade Commission Act ([15 USCS 45\(a\)\(1\)](#)) in Arizona, Connecticut, Montana, and Wisconsin by setting fees for title searches, examinations, and settlements through privately established rating bureaus, as the Court of Appeals ruled that the companies were entitled to state-action immunity from federal antitrust liability in those states because the bureaus' rate filings were subject to veto by state officials--will remand the case to the Court of Appeals for re-examination of its determinations with respect to Arizona and Connecticut, where (1) the Supreme Court granted certiorari to consider the questions (a) whether the Court of Appeals was correct in its statement of law and in its application of law to fact, as to which question the parties confined their briefing to the regulatory regimes of Montana and Wisconsin, and (b) whether the Court of Appeals exceeded its authority in departing from the factual findings made by the Administrative Law Judge and adopted by the FTC as to the extent of state supervision, as to which the parties focussed on the regulatory regimes of Connecticut and Arizona; and (2) the Supreme Court held that (a) the Court of Appeals erred in its interpretation of the active-supervision element of the state-action immunity doctrine, and (b) the acts of the companies in Montana and Wisconsin were not immune from antitrust liability. (Rehnquist, Ch. J., and O'Connor and Thomas, JJ., dissented from this holding.)

## Syllabus

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Petitioner Federal Trade Commission filed an administrative complaint charging respondent title insurance companies with horizontal price fixing in setting fees for title searches and examinations in violation of § 5(a)(1) of the Federal Trade Commission Act. In each of the four States at issue -- Connecticut, Wisconsin, Arizona, and Montana -- uniform rates were established by a rating bureau licensed by the State and authorized to establish joint rates for its members. Rate filings were made to the state insurance office and became effective unless the State rejected them within a specified period. The Administrative Law Judge held, *inter alia*, that the rates had been fixed in all four States, but that, in Wisconsin and Montana, respondents' anticompetitive [\*\*\*\*2] activities were entitled to state-action immunity, as contemplated in [Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307](#), and its progeny. Under this doctrine, a state law or regulatory scheme can be the basis for antitrust immunity if the State (1) has articulated a clear and affirmative policy to allow the anticompetitive conduct and (2) provides active supervision of anticompetitive conduct undertaken by private actors. [California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 63 L. Ed. 2d 233, 100 S. Ct. 937](#). The Commission, which conceded that the first part of the test was met, held on review that none of the States had conducted sufficient supervision to warrant immunity. The Court of Appeals reversed, holding that the existence of a state regulatory program, if staffed, funded, and empowered by law, satisfied the active supervision requirement. Thus, it concluded, respondents' conduct in all the States was entitled to state-action immunity.

*Held:*

1. State-action immunity is not available under the regulatory schemes in Montana and Wisconsin. Pp. 632-640.

(a) Principles of federalism [\*\*\*\*3] require that federal antitrust laws be subject to supersession by state regulatory programs. [Parker, supra, at 350-352](#); [Midcal, supra](#); [Patrick v. Burget, 486 U.S. 94, 100 L. Ed. 2d 83, 108 S. Ct. 1658](#). *Midcal's* two-part test confirms that States may not confer antitrust immunity on private persons by fiat. Actual state involvement is the precondition for immunity, which is conferred out of respect for the State's ongoing regulation, not the economics of price restraint. The purpose of the active supervision inquiry is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention. Although this immunity doctrine was developed in actions brought under the Sherman Act, the issue whether it applies to Commission action under the Federal Trade Commission Act need not be determined, since the Commission does not assert any superior preemption authority here. Pp. 632-635.

(b) Wisconsin, Montana, and 34 other States correctly contend that a broad interpretation of state-action immunity would [\*\*\*\*4] not serve their best interests. The doctrine would impede, rather than advance, the States' freedom of action if it required them to act in the shadow of such immunity whenever they entered the realm of economic regulation. Insistence on real compliance with both parts of the *Midcal* test serves to make clear that the States are responsible for only the price fixing they have sanctioned and undertaken to control. Respondents' contention that such concerns are better addressed by the first part of the *Midcal* test misapprehends the close relation between *Midcal's* two elements, which are both directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy. A clear policy statement ensures only that the State did not act through inadvertence, not that the State approved the anticompetitive conduct. Sole reliance on the clear articulation requirement would not allow the States sufficient regulatory flexibility. Pp. 635-637.

(c) Where prices or rates are initially set by private parties, subject to veto only if the State chooses, the party claiming the immunity must show that state officials have undertaken the necessary [\*\*\*\*5] steps to determine the specifics of the price-fixing or ratesetting scheme. The mere potential for state supervision is not an adequate substitute for the State's decision. Thus, the standard relied on by the Court of Appeals in this case is insufficient to establish the requisite level of active supervision. The Commission's findings of fact demonstrate that the potential for state supervision was not realized in either Wisconsin or Montana. While most rate filings were checked for mathematical accuracy, some were unchecked altogether. Moreover, one rate filing became effective in Montana despite the rating bureau's failure to provide requested information, and additional information was provided in Wisconsin after seven years, during which time another rate filing remained in effect. Absent active supervision, there can be no state-action immunity for what were otherwise private price-fixing arrangements. And state judicial review cannot fill the void. See [Patrick, supra, at 103-105](#). This Court's decision in [Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 85 L. Ed. 2d 36, 105 S. Ct. 1721](#), which involved a similar [\*\*\*\*6] negative option regime, is not to the contrary, since it involved the question whether the first part of the *Midcal* test was met. This case involves horizontal price fixing under a vague *imprimatur* in form and agency inaction in fact, and it should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision. Pp. 637-640.

2. The Court of Appeals should have the opportunity to reexamine its determinations with respect to Connecticut and Arizona in order to address whether it accorded proper deference to the Commission's factual findings as to the extent of state supervision in those States. P. 640.

**Counsel:** Deputy Solicitor General Wallace argued the cause for petitioner. With him on the briefs were Solicitor General Starr, Assistant Attorney General Rill, Robert A. Long, Jr., James M. Spears, Jay C. Shaffer, Ernest J. Isenstadt, Michael E. Antalics, and Ann Malester.

John C. Christie, Jr., argued the cause for respondents. With him on the brief were Patrick J. Roach, John F. Graybeal, and David M. Foster.\*

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\* A brief of amici curiae urging reversal was filed for the State of Wisconsin et al. by James E. Doyle, Attorney General of Wisconsin, and Kevin J. O'Connor, Assistant Attorney General, J. Joseph Curran, Jr., Attorney General of Maryland, and Robert N. McDonald and Ellen S. Cooper, Assistant Attorneys General, James H. Evans, Attorney General of Alabama, Charles E. Cole, Attorney General of Alaska, and James Forbes, Assistant Attorney General, Grant Woods, Attorney General of Arizona,

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**Judges:** KENNEDY, J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, SCALIA, and SOUTER, JJ., joined. SCALIA, J., filed a concurring opinion, post, p. 640. REHNQUIST, C. J., filed a dissenting opinion, in which O'CONNOR and THOMAS, JJ., joined, post, p. 641. O'CONNOR, J., filed a dissenting opinion, in which THOMAS, J., joined, post, p. 646.

**Opinion by:** KENNEDY

## Opinion

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[\*624] [\*\*\*417] [\*\*2172] JUSTICE KENNEDY delivered the opinion of the Court.

LEdHN[1A] [↑] [1A] LEdHN[2A] [↑] [2A] The Federal Trade Commission filed an administrative complaint against six of the Nation's largest title insurance [\*625] companies, alleging horizontal price fixing in their fees for title searches and title examinations. One company settled by consent decree, while five other firms continue to contest the matter. The Commission charged the title companies with violating § 5(a)(1) of the Federal Trade Commission

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and Jeri K. Auther, Assistant Attorney General, Winston Bryant, Attorney General of Arkansas, and Royce Griffin, Deputy Attorney General, Charles M. Oberly III, Attorney General of Delaware, Robert A. Butterworth, Attorney General of Florida, Larry EchoHawk, Attorney General of Idaho, and Brett T. DeLange, Deputy Attorney General, Bonnie J. Campbell, Attorney General of Iowa, and John R. Perkins, Deputy Attorney General, Frederic J. Cowan, Attorney General of Kentucky, and James M. Ringo, Assistant Attorney General, William J. Guste, Jr., Attorney General of Louisiana, and Jesse James Marks and Anne F. Benoit, Assistant Attorneys General, Michael E. Carpenter, Attorney General of Maine, and Stephen L. Wessler, Deputy Attorney General, Scott Harshbarger, Attorney General of Massachusetts, and George K. Weber and Thomas M. Alpert, Assistant Attorneys General, Frank J. Kelley, Attorney General of Michigan, Hubert H. Humphrey III, Attorney General of Minnesota, Mike Moore, Attorney General of Mississippi, Marc Racicot, Attorney General of Montana, Frankie Sue Del Papa, Attorney General of Nevada, John P. Arnold, Attorney General of New Hampshire, Charles T. Putnam, Senior Assistant Attorney General, and Walter L. Maroney, Assistant Attorney General, Robert J. Del Tufo, Attorney General of New Jersey, and Laurel A. Price, Deputy Attorney General, Robert Abrams, Attorney General of New York, Jerry Boone, Solicitor General, and George W. Sampson and Richard Schwartz, Assistant Attorneys General, Lacy H. Thornburg, Attorney General of North Carolina, James C. Gulick, Special Deputy Attorney General, and K. D. Sturgis, Assistant Attorney General, Nicholas J. Spaeth, Attorney General of North Dakota, and David W. Huey, Assistant Attorney General, Lee Fisher, Attorney General of Ohio, and Marc B. Bandman, Assistant Attorney General, Susan B. Loving, Attorney General of Oklahoma, and Jane F. Wheeler, Assistant Attorney General, Ernest D. Prete, Jr., Attorney General of Pennsylvania, Thomas L. Welch, Chief Deputy Attorney General, and Carl S. Hisiro, Assistant Chief Deputy Attorney General, James E. O'Neil, Attorney General of Rhode Island, and Edmund F. Murray, Jr., Special Assistant Attorney General, Charles W. Burson, Attorney General of Tennessee, John Knox Walkup, Solicitor General, and Perry A. Craft, Deputy Attorney General, Dan Morales, Attorney General of Texas, Will Pryor, First Assistant Attorney General, Mary F. Keller, Deputy Attorney General, and Mark Tobey, Assistant Attorney General, R. Paul Van Dam, Attorney General of Utah, Jeffrey L. Amestoy, Attorney General of Vermont, and Geoffrey A. Yudien, Assistant Attorney General, Mary Sue Terry, Attorney General of Virginia, Kenneth O. Eikenberry, Attorney General of Washington, and Carol A. Smith, Assistant Attorney General, Mario J. Palumbo, Attorney General of West Virginia, and Donald L. Darling, Deputy Attorney General, and Joseph B. Meyer, Attorney General of Wyoming.

Briefs of amici curiae urging affirmance were filed for the State of California et al. by Daniel E. Lungren, Attorney General of California, Roderick E. Walston, Chief Assistant Attorney General, and Thomas F. Gede, Special Assistant Attorney General, Gale A. Norton, Attorney General of Colorado, Don Stenberg, Attorney General of Nebraska, and Mark W. Barnett, Attorney General of South Dakota; for the American Insurance Association et al. by John E. Nolan, Craig A. Berrington, James H. Bradner, Jr., Theresa L. Sorota, and Patrick J. McNally; for Hartford Fire Insurance Co. et al. by Stephen M. Shapiro, Mark I. Levy, Andrew J. Pincus, and Roy T. Englert, Jr.; and for the National Council on Compensation Insurance by Jerome A. Hochberg and Mark E. Solomons.

Briefs of amici curiae were filed for the American Land Title Association by Philip H. Rudolph and James R. Maher; and for the Pennsylvania Electric Association by Jeffrey H. Howard.

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Act, 38 Stat. 719, [15 U. S. C. § 45\(a\)\(1\)](#), which prohibits "unfair methods of competition in or affecting commerce." One [\*\*\*\*8] of the principal defenses the companies assert is state-action immunity from antitrust prosecution, as contemplated in the line of cases beginning with [Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 \(1943\)](#). The Commission rejected this defense, [In re Ticor Title Ins. Co., 112 F.T.C. 344 \(1989\)](#), and the firms sought review in [\[\\*\\*2173\]](#) the United States Court of Appeals for the Third Circuit. Ruling that state-action immunity was available under the state regulatory schemes in question, the Court of Appeals reversed. [922 F.2d 1122 \(1991\)](#). We granted certiorari. [502 U.S. 806 \(1991\)](#).

I

Title insurance is the business of insuring the record title of real property for persons with some interest in the estate, including owners, occupiers, and lenders. A title insurance policy insures against certain losses or damages sustained by reason of a defect in title not shown on the policy or title report to which it refers. Before issuing a title insurance [\*626] policy, the insurance company or one of its agents performs a title search and examination. The search produces a chronological list of the public [\*\*\*\*9] documents in the chain of title to the real property. The examination is a critical analysis or interpretation of the condition of title revealed by the documents disclosed through this search.

The title search and examination are major components of the insurance company's services. There are certain variances from State to State and from policy to policy, but a brief summary of the functions performed by the title companies can be given. The insurance companies exclude [\*\*\*418] from coverage defects uncovered during the search; that is, the insurers conduct searches in order to inform the insured and to reduce their own liability by identifying and excluding known risks. The insured is protected from some losses resulting from title defects not discoverable from a search of the public records, such as forgery, missing heirs, previous marriages, impersonation, or confusion in names. They are protected also against errors or mistakes in the search and examination. Negligence need not be proved in order to recover. Title insurance also includes the obligation to defend in the event that an insured is sued by reason of some defect within the scope of the policy's guarantee.

The [\*\*\*\*10] title insurance industry earned \$ 1.35 billion in gross revenues in 1982, and respondents accounted for 57 percent of that amount. Four of respondents are the nation's largest title insurance companies: Ticor Title Insurance Co., with 16.5 percent of the market; Chicago Title Insurance Co., with 12.8 percent; Lawyers Title Insurance Co., with 12 percent; and SAFECO Title Insurance Co. (now operating under the name Security Union Title Insurance Co.), with 10.3 percent. Stewart Title Guarantee Co., with 5.4 percent of the market, is the country's eighth largest title insurer, with a strong position in the West and Southwest. App. to Pet. for Cert. 145a.

[\*627] The Commission issued an administrative complaint in 1985. Horizontal price fixing was alleged in these terms:

"Respondents have agreed on the prices to be charged for title search and examination services or settlement services through rating bureaus in various states. Examples of states in which one or more of the respondents have fixed prices with other respondents or other competitors for all or part of their search and examination services or settlement services are Arizona, Connecticut, Idaho, Louisiana, [\*\*\*\*11] Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Wisconsin and Wyoming." [112 F.T.C. at 346](#).

The Commission did not challenge the insurers' practice of setting uniform rates for insurance against the risk of loss from defective titles, but only the practice of setting uniform rates for the title search, examination, and settlement, aspects of the business which, the Commission alleges, do not involve insurance.

Before the Administrative Law Judge (ALJ), respondents defended against liability on three related grounds. First, they maintained that the challenged conduct is exempt from antitrust scrutiny under the McCarran-Ferguson Act, 59 Stat. 34, [15 U. S. C. § 1012\(b\)](#), which confers antitrust immunity [\[\\*\\*2174\]](#) over the "business of insurance" to the extent regulated by state law. Second, they argued that their collective ratemaking activities are exempt under the *Noerr-Pennington* doctrine, which places certain "joint efforts to influence public officials" beyond the reach of the antitrust laws. [Mine Workers v. Pennington, 381 U.S. 657, 670, 14 L. Ed. 2d 626, 85 S. Ct. 1585 \(1965\)](#); [Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136, 5 L. Ed. 2d 464, 81 S. Ct. 523](#)

(1961). [\*\*\*\*12] Third, respondents contended their activities are entitled to state-action immunity, which permits anticompetitive conduct if authorized [\*\*\*419] and supervised by state officials. See California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 [**\*6281**] (1980); Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943). App. to Pet. for Cert. 218a. As to one State, Ohio, respondents contended that the rates for title search, examination, and settlement had not been set by a rating bureau.

Title insurance company rates and practices in 13 States were the subject of the initial complaint. Before the matter was decided by the ALJ, the Commission declined to pursue its complaint with regard to fees in five of these States: Louisiana, New Mexico, New York, Oregon, and Wyoming. Upon the recommendation of the ALJ, the Commission did not pursue its complaint with regard to fees in two additional States, Idaho and Ohio. This left six States in which the Commission found antitrust violations, but in two of these States, New Jersey and Pennsylvania, the Commission conceded the issue on [\*\*\*\*13] which certiorari was sought here, so the regulatory regimes in these two States are not before us. Four States remain in which violations were alleged: Connecticut, Wisconsin, Arizona, and Montana.

The ALJ held that the rates for search and examination services had been fixed in these four States. For reasons we need not pause to examine, the ALJ rejected the McCarran-Ferguson and *Noerr-Pennington* defenses. The ALJ then turned his attention to the question of state-action immunity. A summary of the ALJ's extensive findings on this point is necessary for a full understanding of the decisions reached at each level of the proceedings in the case.

Rating bureaus are private entities organized by title insurance companies to establish uniform rates for their members. The ALJ found no evidence that the collective setting of title insurance rates through rating bureaus is a way of pooling risk information. Indeed, he found no evidence that any title insurer sets rates according to actuarial loss experience. Instead, the ALJ found that the usual practice is for rating bureaus to set rates according to profitability studies that focus on the costs of conducting searches and examinations. [\*\*\*\*14] Uniform rates are set notwithstanding differences in [**\*629**] efficiencies and costs among individual members. App. to Pet. for Cert. 183a-184a.

The ALJ described the regulatory regimes for title insurance rates in the four States still at issue. In each one, the title insurance rating bureau was licensed by the State and authorized to establish joint rates for its members. Each of the four States used what has come to be called a "negative option" system to approve rate filings by the bureaus. Under a negative option system, the rating bureau filed rates for title searches and title examinations with the state insurance office. The rates became effective unless the State rejected them within a specified period, such as 30 days. Although the negative option system provided a theoretical mechanism for substantive review, the ALJ determined, after making detailed findings regarding the operation of each regulatory regime, that the rate filings were subject to minimal scrutiny by state regulators.

In Connecticut the State Insurance Department has the authority to audit the rating bureau and hold hearings regarding rates, but it has [\*\*\*420] not done so. The Connecticut rating [\*\*\*\*15] bureau filed only two major rate increases, in 1966 and in 1981. The circumstances [\*\*2175] behind the 1966 rate increase are somewhat obscure. The ALJ found that the Insurance Department asked the rating bureau to submit additional information justifying the increase, and later approved the rate increase although there is no evidence the additional information was provided. In 1981 the Connecticut rating bureau filed for a 20 percent rate increase. The factual background for this rate increase is better developed though the testimony was somewhat inconsistent. A state insurance official testified that he reviewed the rate increase with care and discussed various components of the increase with the rating bureau. The same official testified, however, that he lacked the authority to question certain expense data he considered quite high. Id. at 189a-195a.

[\*630] In Wisconsin the State Insurance Commissioner is required to examine the rating bureau at regular intervals and authorized to reject rates through a process of hearings. Neither has been done. The Wisconsin rating bureau made major rate filings in 1971, 1981, and 1982. The 1971 rate filing was approved in 1971 [\*\*\*\*16] although supporting justification, which had been requested by the State Insurance Commissioner, was not provided until 1978. The 1981 rate filing requested an 11 percent rate increase. The increase was approved after

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the office of the Insurance Commissioner checked the supporting data for accuracy. No one in the agency inquired into insurer expenses, though an official testified that substantive scrutiny would not be possible without that inquiry. The 1982 rate increase received but a cursory reading at the office of the Insurance Commissioner. The supporting materials were not checked for accuracy, though in the absence of an objection by the agency, the rate increase went into effect. [\*Id.\*](#) [at 196](#)a-200a.

In Arizona the Insurance Director was required to examine the rating bureau at least once every five years. It was not done. In 1980 the State Insurance Department announced a comprehensive investigation of the rating bureau. It was not conducted. The rating bureau spent most of its time justifying its escrow rates. Following conclusion in 1981 of a federal civil suit challenging the joint fixing of escrow rates, the rating bureau went out of business without having made any [\*\*\*\*17] major rate filings, though it had proposed minor rate adjustments. [\*Id.\*](#) [at 200](#)a-205a.

In Montana the rating bureau made its only major rate filing in 1983. In connection with it, a representative of the rating bureau met with officials of the State Insurance Department. He was told that the filed rates could go into immediate effect though further profit data would have to be provided. The ALJ found no evidence that the additional data were furnished. [\*Id.\*](#) [at 211](#)a-214a.

[\*631] To complete the background, the ALJ observed that none of the rating bureaus are now active. The respondents abandoned them between 1981 and 1985 in response to numerous private treble-damages suits, so by the time the Commission filed its formal complaint in 1985, the rating bureaus had been dismantled. [\*Id.\*](#) [at 195](#)a, 200a, 205a, 208a. The ALJ held that the case is not moot, though, because nothing would preclude respondents from resuming the conduct challenged by the Commission. [\*Id.\*](#), at 246a-247a. See [\*United States v. W. T. Grant Co., 345 U.S. 629, 632-633, 97 L. Ed. 1303, 73 S. Ct. 894 \(1953\)\*](#).

[LEdHN\[1B\]](#) [↑] [1B] [\*\*\*\*18] These factual determinations established, the ALJ addressed the two-part test that must be satisfied for state-action immunity under the antitrust laws, the test we set out in [\*California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 \(1980\)\*](#). HN1 [↑] A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the State provides active supervision of anticompetitive conduct undertaken by private actors. [\*Id.\*](#) [at 105](#). The Commission having conceded that the first part of the test was satisfied in the four States still at issue, the immunity question, beginning with the hearings before the ALJ [\*\*2176] and in all later proceedings, has turned upon the proper interpretation and application of *Midcal's* active supervision requirement. The ALJ found the active supervision test was met in Arizona and Montana but not in Connecticut or Wisconsin. App. to Pet. for Cert. 248a.

On review of the ALJ's decision, the Commission held that none of the four States had conducted [\*\*\*\*19] sufficient supervision, so that the title companies were not entitled to immunity in any of those jurisdictions. [\*Id.\*](#) [at 47](#)a. The Court of Appeals for the Third Circuit disagreed with the Commission, adopting the approach of the First Circuit in [\*New England Motor Rate Bureau, Inc. v. FTC, 908 F.2d 1064 \(1990\)\*](#), which [\*632] had held that the existence of a state regulatory program, if staffed, funded, and empowered by law, satisfied the requirement of active supervision. [\*Id.\*](#) [at 1071](#). Under this standard, the Court of Appeals for the Third Circuit ruled that the active state supervision requirement was met in all four States and held that the respondents' conduct was entitled to state-action immunity in each of them. [922 F.2d at 1140](#).

We granted certiorari to consider two questions: First, whether the Third Circuit was correct in its statement of the law and in its application of law to fact, and second, whether the Third Circuit exceeded its authority by departing from the factual findings entered by the ALJ and adopted by the Commission. Before this Court, the parties have confined their briefing on the first of these [\*\*\*\*20] questions to the regulatory regimes of Wisconsin and Montana, and focused on the regulatory regimes of Connecticut and Arizona in briefing on the second question. We now reverse the Court of Appeals under the first question and remand for further proceedings under the second.

504 U.S. 621, \*632; 112 S. Ct. 2169, \*\*2176; 119 L. Ed. 2d 410, \*\*\*421; 1992 U.S. LEXIS 3544, \*\*\*\*20

The preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom. [United States v. Topco Associates, Inc., 405 U.S. 596, 610, 31 L. Ed. 2d 515, 92 S. Ct. 1126 \(1972\)](#). A national policy of such a pervasive and fundamental character is an essential part of the economic and legal system within which the separate States administer their own laws for the protection and advancement of their people. Continued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional [\*\*\*422] regulations and controls. Against this background, in [Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 \(1943\)](#), we upheld a state-supervised, market sharing scheme against a Sherman Act challenge. We announced the [\*\*\*\*21] doctrine that [HN2](#) federal antitrust laws are subject to supersession by state regulatory [\*633] programs. Our decision was grounded in principles of federalism. [Id., at 350-352.](#)

[LEdHN\[1C\]](#) [1C]The principle of freedom of action for the States, adopted to foster and preserve the federal system, explains the later evolution and application of the *Parker* doctrine in our decisions in [Midcal, supra](#), and [Patrick v. Burget, 486 U.S. 94, 100 L. Ed. 2d 83, 108 S. Ct. 1658 \(1988\)](#). In *Midcal* we invalidated a California statute forbidding licensees in the wine trade to sell below prices set by the producer. There we announced [HN3](#) the two-part test applicable to instances where private parties participate in a price-fixing regime. "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." [445 U.S. at 105](#) (internal quotation marks omitted). [\*\*\*\*22] *Midcal* confirms that [HN4](#) while a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details. Actual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law. Immunity is conferred out of [\*\*2177] respect for ongoing regulation by the State, not out of respect for the economics of price restraint. In *Midcal* we found that the intent to restrain prices was expressed with sufficient precision so that the first part of the test was met, but that the absence of state participation in the mechanics of the price posting was so apparent that the requirement of active supervision had not been met. *Ibid.*

The rationale was further elaborated in *Patrick v. Burget*. In *Patrick* it had been alleged that private physicians participated in the State's peer review system in order to injure or destroy competition by denying hospital privileges to a physician who had begun a competing clinic. We referred to the purpose of [\*\*\*\*23] preserving the State's own administrative [\*634] policies, as distinct from allowing private parties to foreclose competition, in the following passage:

"The active supervision requirement stems from the recognition that where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. . . . The requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. To accomplish this purpose, [HN5](#) the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct . . . . The mere presence of some state involvement or monitoring does not suffice . . . . The active supervision prong of the *Midcal* test requires that state [\*\*\*423] officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that [\*\*\*\*24] fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." [486 U.S. at 100-101](#) (internal quotation marks and citations omitted).

Because the particular anticompetitive conduct at issue in *Patrick* had not been supervised by governmental actors, we decided that the actions of the peer review committee were not entitled to state-action immunity. [Id., at 106.](#)

[LEdHN\[3\]](#) [3]Our decisions make clear that the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the

504 U.S. 621, \*634; 112 S. Ct. 2169, \*\*2177; 119 L. Ed. 2d 410, \*\*\*423; 1992 U.S. LEXIS 3544, \*\*\*\*24

rates or prices have been established as a product of deliberate state intervention, not [\*635] simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played [\*\*\*\*25] a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.

LEdHN[4] [4]Although the point bears but brief mention, we observe that our prior cases considered state-action immunity against actions brought under the Sherman Act, and this case arises under the Federal Trade Commission Act. The Commission has argued at other times that state-action immunity does not apply to Commission action under § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45. See U.S. Bureau of Consumer Protection, Staff Report to the Federal Trade Commission on Prescription Drug Price Disclosures, Chs. VI(B) and (C) (1975); see also Note, *The State Action Exemption and Antitrust Enforcement under the Federal Trade Commission Act*, 89 Harv. L. Rev. 715 (1976). A leading treatise has expressed its skepticism of this view. See 1 P. Areeda & D. Turner, *Antitrust Law* P218 (1978). We need not determine whether the antitrust statutes can be distinguished on this basis, because the Commission [\*\*\*\*26] does not assert any [\*\*2178] superior pre-emption authority in the instant matter. We apply our prior cases to the one before us.

LEdHN[1D] [1D]Respondents contend that principles of federalism justify a broad interpretation of state-action immunity, but there is a powerful refutation of their viewpoint in the briefs that were filed in this case. The State of Wisconsin, joined by Montana and 34 other States, has filed a brief as *amici curiae* on the precise point. These States deny that respondents' broad immunity rule would serve the States' best interests. We are in agreement with the *amici* submission.

If the States must act in the shadow of state-action immunity whenever they enter the realm of economic regulation, then our doctrine will impede their freedom of action, not advance it. The fact of the matter is that the States regulate [\*636] [\*\*\*424] their economies in many ways not inconsistent with the antitrust laws. For example, Oregon may provide for peer review by its physicians without approving anticompetitive conduct by them. See Patrick, 486 U.S. at 105. Or Michigan [\*\*\*\*27] may regulate its public utilities without authorizing monopolization in the market for electric light bulbs. See Cantor v. Detroit Edison Co., 428 U.S. 579, 596, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976). So we have held that HN6 [1] state-action immunity is disfavored, much as are repeals by implication. Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 398-399, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978). By adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws, we increase the States' regulatory flexibility.

States must accept political responsibility for actions they intend to undertake. It is quite a different matter, however, for federal law to compel a result that the States do not intend but for which they are held to account. HN7 [1] Federalism serves to assign political responsibility, not to obscure it. Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more [\*\*\*\*28] limited ends. For States which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.

Respondents contend that these concerns are better addressed by the requirement that the States articulate a clear policy to displace the antitrust laws with their own forms of economic regulation. This contention misapprehends the close relation between *Midcal*'s two elements. Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy. See Patrick, supra, at 100. In the usual case, *Midcal*'s requirement that the State articulate a clear policy shows little more than that the State has not acted through inadvertence; [\*637] it cannot alone ensure, as required by our precedents, that particular anticompetitive conduct has been approved by the State. It seems plain, moreover, in light of the *amici curiae* brief to which we have referred, that sole reliance on the requirement of clear articulation will not [\*\*\*\*29] allow the regulatory flexibility that these States deem necessary. For States whose object it is to benefit their citizens through regulation, a broad doctrine of state-action immunity may serve as nothing more than an attractive nuisance in the economic sphere. To oppose these pressures, sole reliance on the requirement of clear articulation could become a rather meaningless formal constraint.

## III

In the case before us, the Court of Appeals relied upon a formulation of the active supervision requirement articulated by the First Circuit:

"Where . . . [\*\*2179] the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of [\*\*\*425] state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established." [922 F.2d at 1136](#), quoting [New England Motor Rate Bureau, Inc. v. FTC, 908 F.2d at 1071](#).

Based on this standard, the Third Circuit ruled that the active supervision requirement [\*\*\*30] was met in all four States, and held that the respondents' conduct was entitled to state-action immunity from antitrust liability. [922 F.2d at 1140](#).

[LEdHN\[2B\]](#) [↑] [2B]While in theory the standard articulated by the First Circuit might be applied in a manner consistent with our precedents, it seems to us insufficient to establish the requisite level of active supervision. The criteria set forth by the First Circuit may have some relevance as the beginning [★638] point of the active state supervision inquiry, but the analysis cannot end there. [HN8](#) [↑] Where prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme. The mere potential for state supervision is not an adequate substitute for a decision by the State. Under these standards, we must conclude that there was no active supervision [\*\*\*31] in either Wisconsin or Montana.

Respondents point out that in Wisconsin and Montana the rating bureaus filed rates with state agencies and that in both States the so-called negative option rule prevailed. The rates became effective unless they were rejected within a set time. It is said that as a matter of law in those States inaction signified substantive approval. This proposition cannot be reconciled, however, with the detailed findings, entered by the ALJ and adopted by the Commission, which demonstrate that the potential for state supervision was not realized in fact. The ALJ found, and the Commission agreed, that at most the rate filings were checked for mathematical accuracy. Some were unchecked altogether. In Montana, a rate filing became effective despite the failure of the rating bureau to provide additional requested information. In Wisconsin, additional information was provided after a lapse of seven years, during which time the rate filing remained in effect. These findings are fatal to respondents' attempts to portray the state regulatory regimes as providing the necessary component of active supervision. The findings demonstrate that, whatever the potential for state [\*\*\*32] regulatory review in Wisconsin and Montana, active state supervision did not occur. In the absence of active supervision in fact, there can be no state-action immunity for what were otherwise private price-fixing arrangements. And as in *Patrick*, the availability of state judicial review could not fill the void. Because of the state agencies' limited role and [★639] participation, state judicial review was likewise limited. See [Patrick, 486 U.S. at 103-105](#).

Our decision in [Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 85 L. Ed. 2d 36, 105 S. Ct. 1721 \(1985\)](#), though it too involved a negative option [\*\*\*426] regime, is not to the contrary. The question there was whether the first part of the *Midcal* test was met, the Government's contention being that a pricing policy is not an articulated one unless the practice is compelled. We rejected that assertion and undertook no real examination of the active supervision aspect of the case, for the Government conceded that the second part of the test had been met. [Id., at 62, 66](#). The concession was against the background of a District Court [\*\*\*33] determination that, although submitted rates could go into effect without further state activity, [\*\*2180] the State had ordered and held ratemaking hearings on a consistent basis, using the industry submissions as the beginning point. See [United States v. Southern Motor Carriers Rate Conference, Inc., 467 F. Supp. 471, 476-477 \(ND Ga. 1979\)](#). In the case before us, of course, the Commission concedes the first part of the *Midcal* requirement and litigates the second; and there is no finding of substantial state participation in the ratesetting scheme.

This case involves horizontal price fixing under a vague *imprimatur* in form and agency inaction in fact. No antitrust offense is more pernicious than price fixing. [FTC v. Superior Court Trial Lawyers Assn., 493 U.S. 411, 434, n. 16,](#)

107 L. Ed. 2d 851, 110 S. Ct. 768 (1990). In this context, we decline to formulate a rule that would lead to a finding of active state supervision where in fact there was none. Our decision should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision. We do not [\*\*\*\*34] imply that some particular form of state or local regulation is required to achieve ends other than the establishment of uniform prices. Cf. Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991) (city billboard zoning ordinance entitled to state-action immunity). We do [\*640] not have before us a case in which governmental actors made unilateral decisions without participation by private actors. Cf. Fisher v. Berkeley, 475 U.S. 260, 89 L. Ed. 2d 206, 106 S. Ct. 1045 (1986) (private actors not liable without private action). And we do not here call into question a regulatory regime in which sampling techniques or a specified rate of return allow state regulators to provide comprehensive supervision without complete control, or in which there was an infrequent lapse of state supervision. Cf. 324 Liquor Corp. v. Duffy, 479 U.S. 335, 344, n. 6, 93 L. Ed. 2d 667, 107 S. Ct. 720 (1987) (a statute specifying the margin between wholesale and retail prices may satisfy the active supervision requirement). In the circumstances of this case, however, we conclude that the acts [\*\*\*\*35] of respondents in the States of Montana and Wisconsin are not immune from antitrust liability.

#### IV

LEdHN[5] [5]In granting certiorari we undertook to review the further contention by the Commission that the Court of Appeals was incorrect in disregarding the Commission's findings as to the extent of state supervision. The parties have focused their briefing on this question on the regulatory schemes of Connecticut and Arizona. We think the Court of Appeals should have the opportunity to reexamine its determinations with [\*\*\*427] respect to these latter two States in light of the views we have expressed.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

**Concur by:** SCALIA

### Concur

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JUSTICE SCALIA, concurring.

The Court's standard is in my view faithful to what our cases have said about "active supervision." On the other hand, I think THE CHIEF JUSTICE and JUSTICE O'CONNOR are correct that this standard will be a fertile source of uncertainty and (hence) litigation, and will produce total abandonment [\*641] of some state [\*\*\*\*36] programs because private individuals will not take the chance of participating in them. That is true, moreover, not just in the "negative option" context, but even in a context such as that involved in Patrick v. Burget, 486 U.S. 94, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988): Private physicians invited to participate in a state-supervised hospital peer review system may not know until after their participation has occurred (and indeed until after their trial has been completed) whether the State's supervision will be "active" enough.

I am willing to accept these consequences because I see no alternative within the constraints [\*\*2181] of our "active supervision" doctrine, which has not been challenged here; and because I am skeptical about the Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943), exemption for state-programmed private collusion in the first place.

**Dissent by:** REHNQUIST; O'CONNOR

### Dissent

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504 U.S. 621, \*641; 112 S. Ct. 2169, \*\*2181; 119 L. Ed. 2d 410, \*\*\*427; 1992 U.S. LEXIS 3544, \*\*\*\*36

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR and JUSTICE THOMAS join, dissenting.

The Court holds today that to satisfy the "active supervision" requirement of state-action immunity from antitrust liability, private parties [\*\*\*\*37] acting pursuant to a regulatory scheme enacted by a state legislature must prove that "the State has played a substantial role in determining the specifics of the economic policy." *Ante*, at 635. Because this standard is neither supported by our prior precedent nor sound as a matter of policy, I dissent.

Immunity from antitrust liability under the state-action doctrine was first established in *Parker v. Brown*, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943). As noted by the majority, in *Parker* we relied on principles of federalism in concluding that the Sherman Act did not apply to state officials administering a regulatory program enacted by the state legislature. We concluded that state action is exempt from antitrust liability, because in the Sherman Act Congress evidences no intent to "restrain state action or official action directed by a state." *Id.*, I\*6421 at 351.<sup>1</sup> "The *Parker* decision was premised on the assumption [\*\*\*428] that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56, 85 L. Ed. 2d 36, 105 S. Ct. 1721 (1985) [\*\*\*\*38] (footnote omitted).

We developed our present analysis for state-action immunity for private actors in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980). We held in *Midcal* that our prior precedent had granted state-action immunity from antitrust liability to conduct by private actors where a program was "clearly articulated and affirmatively [\*\*\*\*39] expressed as state policy [and] the policy [was] actively supervised by the State itself." *Id.*, at 105 (internal quotation marks and citation omitted). In *Midcal*, we found the active supervision requirement was not met because under the California statute at issue, which required liquor retailers to charge a certain percentage above a price "posted" by area wholesalers, "the State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers." *Id.*, at 100. We noted that the state-action defense does not allow the States to authorize what is nothing more than private price fixing. *Id.*, at 105.

In each instance since *Midcal* in which we have concluded that the active supervision requirement for state-action immunity was not met, the state regulators lacked authority, under state law, to review or reject the rates or action taken [\*643] by the private actors facing antitrust liability.<sup>2</sup> Our most recent formulation of the "active supervision" requirement [\*\*2182] was announced in *Patrick v. Burget*, 486 U.S. 94, 100 L. Ed. 2d 83, 108 S. Ct. 1658 (1988), [\*\*\*\*40] where we concluded that to satisfy the "active supervision" requirement, "state officials [must] have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id.*, at 101. Until today, therefore, we have never had occasion to determine whether a state regulatory program which gave state officials authority -- "power" -- to review and regulate prices or conduct, might still fail to meet the requirement for active state supervision because the State's regulation was not sufficiently detailed or rigorous.

[\*\*\*\*41] Addressing this question, the Court of Appeals in this case used the following analysis:

<sup>1</sup> The Court states that "continued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls," *ante*, at 632. However, in *Parker*, we held that the Sherman Act simply does not apply to conduct regulated by the State. The enforcement of the national antitrust policy, as embodied in the antitrust laws, may grant individuals more freedom to compete in our free market system, but it does not implicate the freedom of the States in deciding whether to regulate.

<sup>2</sup> In 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 93 L. Ed. 2d 667, 107 S. Ct. 720 (1987), we held that a New York statute failed to shelter private actors from antitrust liability because the state legislation required retailers to charge 112% of the price "posted" by wholesalers. The New York statute, like the California statute at issue in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980), gave no power to the state agency to review or establish the reasonableness of the price schedules "posted" by the wholesalers. 324 *Liquor, supra, at 345*.

504 U.S. 621, \*643; 112 S. Ct. 2169, \*\*2182; 119 L. Ed. 2d 410, \*\*\*428; 1992 U.S. LEXIS 3544, \*\*\*\*41

"Where, as here, the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the [\*\*\*429] private actors carry out the state's policy and not simply their own policy, more need not be established." [922 F.2d 1122, 1136 \(CA3 1991\)](#), quoting [New England Motor Rate Bureau, Inc. v. FTC, 908 F.2d 1064, 1071 \(CA1 1990\)](#).

The Court likens this test to doing away all together with the active supervision requirement for immunity based on state action. But the test used by the Court of Appeals is [\*644] much more closely attuned to our "have and exercise power" formulation in *Patrick v. Burget* than is the rule adopted by the Court today. The Court simply does not say just how active a State's regulators must be before the "active supervision" requirement will be satisfied. The only guidance it gives is that the inquiry [\*\*\*\*42] should be one akin to causation in a negligence case; does the State play "a substantial role in determining the specifics of the economic policy." *Ante*, at 635. Any other formulation, we are told, will remove the active supervision requirement altogether as a practical matter.

I do not believe this to be the case.<sup>3</sup> In the States at issue here, the particular conduct was approved by a state agency. The agency manifested this approval by raising no objection to a required rate filing by the entity subject to regulation. This is quite consistent with our statement that the active supervision requirement serves mainly an "evidentiary function" as "one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." [Hallie v. Eau Claire, 471 U.S. 34, 46, 85 L. Ed. 2d 24, 105 S. Ct. 1713 \(1985\)](#).

[\*\*\*\*43] The Court insists that its newly required "active supervision" will "increase the States' regulatory flexibility." *Ante*, at 636. But if private actors who participate, through a joint rate filing, in a State's "negative option" regulatory scheme may be liable for treble damages if they cannot prove that the State approved the specifics of a filing, the Court makes it highly unlikely that private actors will choose to participate in such a joint filing. This in turn lessens the States' regulatory flexibility, because as we have noted before, joint rate filings can improve the regulatory process by ensuring that the state agency has fewer filings to consider, allowing more resources to be expended on each filing. [\*645] [Southern Motor Carriers Rate Conference, Inc. v. United States, supra, at 51](#). The view advanced by the Court of Appeals does not sanction price fixing in areas regulated by a State "not inconsistent with the antitrust laws." *Ante*, at 636. A State must establish, staff, and fund a program to approve [\*\*2183] jointly set rates or prices in order for any activity undertaken by private individuals under that program to be immune [\*\*\*\*44] under the antitrust laws.<sup>4</sup>

[\*\*\*430] The Court rejects the test adopted by the Court of Appeals, stating that it cannot be the end of the inquiry. Instead, the party seeking immunity must "show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme." *Ante*, at 638. [\*\*\*\*45]<sup>5</sup> Such an inquiry necessarily puts the federal court in the position of determining the efficacy of a particular State's regulatory scheme, in order to determine whether the State has met the "requisite level of active supervision." *Ante*, at 637. The Court maintains that the proper state-action inquiry does not determine whether a State has met some "normative standard" in its regulatory practices. *Ante*, at 634. But the Court's focus on the actions taken by state regulators, *i. e.*, the way the State regulates, necessarily requires a judgment as to whether the State is sufficiently active -- surely a normative judgment.

<sup>3</sup>The state regulatory programs in [Midcal, supra](#), [Patrick v. Burget, 486 U.S. 94, 100 L. Ed. 2d 83, 108 S. Ct. 1658 \(1988\)](#), and [324 Liquor, supra](#), would all fail to provide immunity for lack of active supervision under the test adopted by the Court of Appeals.

<sup>4</sup>In neither of the examples cited by the majority as instances of state regulation not intended to authorize anticompetitive conduct would application of a less detailed active supervision test change the result. In [Patrick v. Burget, supra](#), we concluded there was no immunity because the State did not have the authority to review the anticompetitive action undertaken by the peer review committee; in [Cantor v. Detroit Edison Co., 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 \(1976\)](#), it is unlikely that the clear articulation requirement under our current jurisprudence would be met with respect to the market for light bulbs.

<sup>5</sup>It is not clear, from the Court's formulation, whether this is a separate test applicable only to negative option regulatory schemes, or whether it applies more generally to issues of immunity under the state-action doctrine.

[\*646] The Court of Appeals found -- properly, in my view -- that while the States at issue here did not regulate respondents' rates with the vigor petitioner [\*\*\*\*46] would have liked, the States' supervision of respondents' conduct was active enough so as to provide for immunity from antitrust liability. The Court of Appeals, having concluded that the Federal Trade Commission applied an incorrect legal standard, reviewed the facts found by the Commission in light of the correct standard and reached a different conclusion. This does not constitute a rejection of the Commission's factual findings.

I would therefore affirm the judgment below.

JUSTICE O'CONNOR, with whom JUSTICE THOMAS joins, dissenting.

Notwithstanding its assertions to the contrary, the Court has diminished the States' regulatory flexibility by creating an impossible situation for those subject to state regulation. Even when a State has a "clearly articulated policy" authorizing anticompetitive behavior -- which the Federal Trade Commission concedes was the case here -- and even when the State establishes a system to supervise the implementation of that policy, the majority holds that a federal court may later find that the State's supervision was not sufficiently "substantial" in its "specifics" to insulate the anticompetitive behavior from antitrust liability. *Ante*, at [\*\*\*\*47] 635. Given the threat of treble damages, regulated entities that have the option of heeding the State's anticompetitive policy would be foolhardy to do so; those that are compelled to comply are less fortunate. The practical effect of today's decision will likely be to eliminate so-called "negative option" regulation from the universe of schemes available to a [\*\*\*431] State that seeks to regulate without exposing certain conduct to federal antitrust liability.

The Court does not dispute that each of the States at issue in this case *could have* supervised respondents' joint ratemaking; rather, it argues that "the potential for state supervision" [\*647] was not realized in fact." *Ante*, at 638. Such an after-the-fact evaluation of a State's exercise of its supervisory [\*\*2184] powers is extremely unfair to regulated parties. Liability under the antitrust laws should not turn on how enthusiastically a state official carried out his or her statutory duties. The regulated entity has no control over the regulator, and very likely will have no idea as to the degree of scrutiny that its filings may receive. Thus, a party could engage in exactly the same conduct in two [\*\*\*48] States, each of which had exactly the same policy of allowing anticompetitive behavior and exactly the same regulatory structure, and discover afterward that its actions in one State were immune from antitrust prosecution, but that its actions in the other resulted in treble-damages liability.

Moreover, even if a regulated entity could assure itself that the State will undertake to actively supervise its rate filings, the majority does not offer any guidance as to what level of supervision will suffice. It declares only that the State must "play a substantial role in determining the specifics of the economic policy." *Ante*, at 635. That standard is not only ambiguous, but also runs the risk of being counterproductive. The more reasonable a filed rate, the less likely that a State will have to play any role other than simply reviewing the rate for compliance with statutory criteria. Such a vague and retrospective standard, combined with the threat of treble damages if that standard is not satisfied, makes "negative option" regulation an unattractive option for both States and the parties they regulate.

Finally, it is important to remember that antitrust actions can be brought [\*\*\*\*49] by private parties as well as by government prosecutors. The resources of state regulators are strained enough without adding the extra burden of asking them to serve as witnesses in civil litigation and respond to allegations that they did not do their job.

For these reasons, as well as those given by THE CHIEF JUSTICE, I dissent.

## References

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Applicability of "state action" doctrine granting immunity from federal antitrust laws for activities of, or directed by, state governments--Supreme Court cases

[43 Am Jur 2d, Insurance 18, 525-527; 54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 15, 18, 45; 55 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 778](#)

24 Am Jur Trials 1, Defending Antitrust Lawsuits

15 USCS 45(a)(1)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 9, 37

L Ed Index, Restraints of Trade, Monopolies, and Unfair Trade Practices; State Action; Title Insurance

Index to Annotations, Restraints of Trade and Monopolies: State Action; Title Examination; Title Insurance

Annotation **[\*\*\*\*50]** References :

What issues will the Supreme Court consider, though not, or not properly, raised by the parties. [42 L Ed 2d 946](#).

Valid governmental action as conferring immunity or exemption from private liability under the federal antitrust laws.  
12 ALR Fed 329.

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## Spectrum Sports v. McQuillan

Supreme Court of the United States

November 10, 1992, Argued ; January 25, 1993, Decided

No. 91-10

### **Reporter**

506 U.S. 447 \*; 113 S. Ct. 884 \*\*; 122 L. Ed. 2d 247 \*\*\*; 1993 U.S. LEXIS 1013 \*\*\*\*; 61 U.S.L.W. 4123; 1993-1 Trade Cas. (CCH) P70,096; 93 Cal. Daily Op. Service 529; 93 Daily Journal DAR 1069; 6 Fla. L. Weekly Fed. S 899

SPECTRUM SPORTS, INC., ET AL., PETITIONERS v. SHIRLEY McQUILLAN, ET VIR, DBA SORBOTURF ENTERPRISES

**Prior History:** [\*\*\*\*1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

**Disposition:** 907 F.2d 154, reversed and remanded.

## **Core Terms**

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monopolize, sorbothane, relevant market, probability, Sherman Act, attempt to monopolize, distributor, products, specific intent, equestrian, athletic, unfair, predatory conduct, violations, decisions, courts, cases

## **LexisNexis® Headnotes**

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

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

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

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

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

**HN1** [down arrow] **Bad Faith, Fraud & Nonuse, Fraud**

A plaintiff charging attempted monopolization must prove a dangerous probability of actual monopolization, which has generally required a definition of the relevant market and examination of market power.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

## **HN2** [↓] Attempts to Monopolize, Elements

To establish monopolization or attempt to monopolize under the Sherman Act, [15 U.S.C.S. § 2](#), it would be necessary to appraise the exclusionary power of an illegal patent claim in terms of the relevant market for the product involved.

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

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

## **HN3** [↓] Monopolies & Monopolization, Actual Monopolization

The conduct of a single firm, governed by the Sherman Act, [15 U.S.C.S. § 2](#), is unlawful only when it threatens actual monopolization.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

## **HN4** [↓] Regulated Practices, Market Definition

It is generally required that to demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. In order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market.

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

## **[HN5](#) [down] Regulated Practices, Market Definition**

The concern that the Sherman Act, [15 U.S.C.S. § 2](#), might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in "unfair" or "predatory" tactics. Such conduct may be sufficient to prove the necessary intent to monopolize, which is something more than an intent to compete vigorously, but demonstrating the dangerous probability of monopolization in an attempt case also requires inquiry into the relevant product and geographic market and the defendant's economic power in that market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

## **[HN6](#) [down] Attempts to Monopolize, Elements**

A defendant is not liable for attempted monopolization under the Sherman Act, [15 U.S.C.S. § 2](#), absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize.

## **Lawyers' Edition Display**

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### **Decision**

Finding of liability for attempted monopolization under 2 of Sherman Act ([15 USCS 2](#)) held improper absent proof of dangerous probability of monopolizing relevant market.

### **Summary**

From 1981 to 1983, a husband and wife were the southwestern United States distributors of products made with sorbothane, a patented elastic polymer, under a regional distributorship arrangement with the manufacturer of the products. The manufacturer gradually shifted away from the southwestern distributors the right to distribute various types of sorbothane products, and ultimately the manufacturer informed the southwestern distributors that their sorbothane orders would no longer be accepted. The national distributorship of one type of sorbothane product was thereupon transferred to a company that was co-owned by the son of the manufacturer's president. The southwestern distributors' business failed, and they filed suit in Federal District Court against the son's company and others for alleged violations of, among other things, 2 of the Sherman Act ([15 USCS 2](#)), which makes it a felony for a person to monopolize, or attempt to monopolize, or combine or conspire to monopolize any part of interstate commerce. The District Court's jury instructions stated that if it were shown that the defendants had engaged in predatory conduct, the jury would be permitted to infer two of the elements of attempted monopolization--specific intent and dangerous probability of success--from such conduct, without any proof of the relevant market or of the defendants' market power. The jury returned a verdict in which the defendants were found to have violated 2 by "monopolizing, attempting to monopolize, and/or conspiring to monopolize." The United States Court of Appeals for the Ninth Circuit, affirming on appeal, held that (1) the verdict would stand if the evidence supported any one of the three possible violations of 2; and (2) a case of attempted monopolization had been established, in that (a) there was sufficient evidence from which the jury could conclude that the defendants had engaged in unfair or predatory

conduct, (b) based on such evidence, the jury properly inferred specific intent and the dangerous probability of success, and (c) it was therefore not necessary to provide proof of the relevant market or of the defendants' market power.

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by White, J., expressing the unanimous view of the court, it was held that (1) persons may not properly be held liable for attempted monopolization under 2 absent proof of (a) a dangerous probability that such persons would monopolize a particular market, and (b) specific intent to monopolize; (2) although predatory or unfair conduct might be sufficient to prove the necessary intent to monopolize, demonstrating the dangerous probability of monopolization in an attempt case requires inquiry into the relevant product and geographic market and the alleged offender's economic power in that market; and (3) the District Court and Court of Appeals had misconstrued 2 in permitting the defendants to be held liable for attempted monopolization without any proof of the relevant market or of a realistic probability that the defendants could achieve monopoly power in that market.

## **Headnotes**

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §15 > attempted monopolization -- intent -- power in relevant market -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D]

Persons may not properly be held liable for attempted monopolization under 2 of the Sherman Act ([15 USCS 2](#)) absent proof of (1) a dangerous probability that such persons would monopolize a particular market, and (2) specific intent to monopolize; although predatory or unfair conduct may be sufficient to prove the necessary intent to monopolize, demonstrating the dangerous probability of monopolization in an attempt case requires inquiry into the relevant product and geographic market and the alleged offender's economic power in that market; the notion that proof of unfair or predatory conduct alone--without proof of the relevant market or of the alleged offender's market power--is sufficient to make out the offense of attempted monopolization is contrary to the purpose and policy of the Sherman Act, since the courts' concern that 2 might be wrongly applied so as to further anticompetitive ends is not met by inquiring only whether the alleged offender has engaged in unfair or predatory tactics; thus, it is improper to permit liability to be imposed upon an alleged offender for attempted monopolization without any proof of the relevant market or of a realistic probability that the alleged offender could achieve monopoly power in that market.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §27 > amount of trade affected -- > Headnote:

[LEdHN\[2\]](#) [2]

Section 2 of the Sherman Act ([15 USCS 2](#)), which prohibits attempts to monopolize any part of commerce, forbids attempts to monopolize any appreciable segment of interstate sales of the relevant product.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §18 > power in relevant market -- > Headnote:

[LEdHN\[3\]](#) [3]

A charge of monopolization under 2 of the Sherman Act ([15 USCS 2](#)) requires proof of the alleged monopolizer's market power in a relevant market.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §6 > purpose of Sherman Act -- > Headnote:  
[LEdHN\[4\]](#) [4]

The purpose of the Sherman Act ([15 USCS 1 et seq.](#)) is not to protect businesses from the working of the market, but rather to protect the public from the failure of the market; the Act directs itself not against conduct that is competitive, even severely so, but rather against conduct that unfairly tends to destroy competition itself; the Act does so not out of solicitude for private concerns, but out of concern for the public interest.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > acts prohibited -- > Headnote:  
[LEdHN\[5\]](#) [5]

Section 2 of the Sherman Act ([15 USCS 2](#))--which makes it a felony for a person to monopolize, attempt to monopolize, or combine or conspire to monopolize any part of interstate commerce--makes the conduct of a single firm unlawful only when the firm actually monopolizes or dangerously threatens to do so.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §15 > intent -- > Headnote:  
[LEdHN\[6\]](#) [6]

For purposes of 2 of the Sherman Act ([15 USCS 2](#)), intent to monopolize is something more than an intent to compete vigorously.

APPEAL §1692.3 > remand -- misconception as to law -- attempt to monopolize -- > Headnote:  
[LEdHN\[7\]](#) [7]

On certiorari to review a United States Court of Appeals decision which affirmed a Federal District Court's holding that the defendants violated 2 of the Sherman Act ([15 USCS 2](#)), the United States Supreme Court will reverse the Court of Appeals' judgment and remand the case for further proceedings, where (1) the defendants were charged under 2 withmonopolization, attempted monopolization, and conspiracy to monopolize; (2) the District Court's trial instructions misconstrued 2 as to the elements of attempted monopolization; (3) the jury returned a verdict in which the defendants were found to have violated 2 by "monopolizing, attempting to monopolize, and/or conspiring to monopolize"; (4) the verdict did not negate the possibility that the 2 verdict rested on the attempt-to-monopolize ground alone; and (5) the Court of Appeals' affirmance of the District Court's judgment rested solely on the legally erroneous conclusion that the defendants had attempted to monopolize.

## Syllabus

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Shortly after the manufacturer of sorbothane -- a patented elastic polymer with shock-absorbing characteristics -- informed respondents, distributors of medical, athletic, and equestrian products made with sorbothane, that it would no longer sell them the polymer, petitioner Spectrum Sports, Inc., became the national distributor of sorbothane

athletic products. Respondents' business failed, and they filed suit in the District Court against petitioners and others, seeking damages for alleged violations of, *inter alia*, § 2 of the Sherman Act, which makes it an offense for any person to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several [\*\*\*\*2] States." A jury found that the defendants violated § 2 by, in the words of the verdict sheet, "monopolizing, attempting to monopolize, and/or conspiring to monopolize." The Court of Appeals affirmed, noting that, although the jury had not specified which of the three possible § 2 violations had occurred, the verdict stood because the evidence established a case of attempted monopolization. Relying on its earlier rulings in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, and its progeny, the court held that the jury could have inferred two of the elements of that offense -- a specific intent to achieve monopoly power and a dangerous probability of monopolization of a relevant market -- from evidence showing the defendants' unfair or predatory conduct, without any proof of relevant market or the defendants' market power, and that the jury was properly instructed that it could make such inferences.

**Held:** Petitioners may not be liable for attempted monopolization under § 2 absent proof of a dangerous probability that they would monopolize a relevant market and specific intent to monopolize. The conduct of a single firm, governed by § 2, is unlawful "only [\*\*\*\*3] when it threatens actual monopolization." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767, 81 L. Ed. 2d 628, 104 S. Ct. 2731. Consistent with this approach, Courts of Appeals other than the court below have generally required a plaintiff in an attempted monopolization case to prove that (1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. Unfair or predatory conduct may be sufficient to prove the necessary intent to monopolize. However, intent alone is insufficient to establish the dangerous probability of success, *Swift & Co. v. United States*, 196 U.S. 375, 402, 49 L. Ed. 518, 25 S. Ct. 276, which requires inquiry into the relevant product and geographic market and the defendant's economic power in that market. There is little if any support in the statute or case law for Lessig's contrary interpretation of § 2. Moreover, Lessig and its progeny are inconsistent with the Sherman Act's purpose of protecting the public from the failure of the market. The law directs itself only against conduct that [\*\*\*\*4] unfairly tends to destroy competition, and, thus, courts have been careful to avoid constructions of § 2 which might chill competition rather than foster it. The concern that § 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in "unfair" or "predatory" tactics. Since the jury's instructions and the Court of Appeals' affirmance both misconstrued § 2, and since the jury's verdict did not negate the possibility that it rested on the attempt to monopolize ground alone, the case is remanded for further proceedings. Pp. 454-460.

**Counsel:** James D. Vail argued the cause and filed briefs for petitioners.

Robert A. Long, Jr., argued the cause for the United States as amicus curiae in support of petitioners. With him on the brief were Solicitor General Starr, Acting Assistant Attorney General James, Deputy Solicitor General Wallace, and Catherine G. O'Sullivan.

Jeffrey M. Shohet argued the cause for respondents. With him on the brief was Marcelle E. Mihaila.

**Judges:** WHITE, J., delivered the opinion for a unanimous Court.

**Opinion by:** WHITE

## Opinion

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[\*448] [\*\*\*252] [\*\*886] JUSTICE WHITE delivered the opinion [\*\*\*\*5] of the Court.

LEdHN[1A] [1A] Section 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 2, makes it an offense for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States. . ." The [\*\*887] jury in this case returned a verdict finding that petitioners had monopolized, attempted to monopolize, and/or conspired to monopolize. The District Court entered a judgment ruling [\*449] that petitioners had violated § 2, and the Court of

Appeals affirmed on the ground that petitioners had attempted to monopolize. The issue we have before us is whether the District Court and the Court of Appeals correctly defined the elements of that offense.

I

Sorbothane is a patented elastic polymer whose shockabsorbing characteristics make it useful in a variety of medical, athletic, and equestrian products. BTR, Inc. (BTR), owns the patent rights to sorbothane, and its wholly owned subsidiaries manufacture the product in the United States and Britain. Hamilton-Kent Manufacturing [\*\*\*\*6] Company (Hamilton-Kent) and Sorbothane, Inc. (S. I.), were at all relevant times owned by BTR. S. I. was formed in 1982 to take over Hamilton-Kent's sorbothane business.<sup>1</sup> App. to Pet. for Cert. A3. Respondents [\*\*253] Shirley and Larry McQuillan, doing business as Sorboturf Enterprises, were regional distributors of sorbothane products from 1981 to 1983. Petitioner Spectrum Sports, Inc. (Spectrum), was also a distributor of sorbothane products. Petitioner Kenneth B. Leighton, Jr., is a co-owner of Spectrum. *Ibid.* Kenneth Leighton, Jr., is the son of Kenneth Leighton, Sr., the president of Hamilton-Kent and S. I. at all relevant times.

In 1980, respondents Shirley and Larry McQuillan signed a letter of intent with Hamilton-Kent, which then owned all manufacturing and distribution rights to sorbothane. The letter of intent granted the McQuillans exclusive rights to purchase sorbothane for use in equestrian products. Respondents were designing [\*\*\*\*7] a horseshoe pad using sorbothane.

In 1981, Hamilton-Kent decided to establish five regional distributorships for sorbothane. Respondents were selected to be distributors of all sorbothane products, including medical products and shoe inserts, in the Southwest. Spectrum [\*450] was selected as distributor for another region. *Id.*, at A4-A5.

In January 1982, Hamilton-Kent shifted responsibility for selling medical products from five regional distributors to a single national distributor. In April 1982, Hamilton-Kent told respondents that it wanted them to relinquish their athletic shoe distributorship as a condition for retaining the right to develop and distribute equestrian products. As of May 1982, BTR had moved the sorbothane business from Hamilton-Kent to S. I. *Id.*, at A6. In May, the marketing manager of S. I. again made clear that respondents had to sell their athletic distributorship to keep their equestrian distribution rights. At a meeting scheduled to discuss the sale of respondents' athletic distributorship to petitioner Leighton, Jr., Leighton, Jr., informed Shirley McQuillan that if she did not come to agreement with him she would be "looking for work."<sup>2</sup> [\*\*\*\*8] *Id.*, at A6. Respondents refused to sell and continued to distribute athletic shoe inserts.

In the fall of 1982, Leighton, Sr., informed respondents that another concern had been appointed as the national equestrian distributor, and that they were "no longer involved in equestrian products." *Id.*, at A7. In January 1983, S. I. began marketing through a national distributor a sorbothane horseshoe pad allegedly indistinguishable from the one designed by respondents. *Ibid.* In August 1983, S. I. informed respondents that it would no longer accept their orders. *Ibid.* Spectrum thereupon became national distributor of sorbothane athletic shoe inserts. Pet. for Cert. 6. Respondents sought to obtain sorbothane from the BTR's British subsidiary, but were informed by that subsidiary that it would not sell sorbothane in the United States. Respondents' business failed. App. to Pet. for Cert. A8.

Respondents sued [\*\*888] petitioners seeking damages for alleged violations of [§§ 1 and 2](#) of the Sherman Act, [15 U.S.C. §§ 1](#) [\*451] and [2, 2 § 3](#) of the Clayton Act, 38 Stat. 731, [\*\*254] [15 U.S.C. § 14](#), the Racketeer Influenced [\*\*\*\*9] and Corrupt Organizations Act (RICO), [18 U.S.C. § 1962](#), and two provisions of California business law. Respondents also alleged fraud, breach of oral contract, interference with prospective business advantage, bad-faith denial of the existence of an oral contract, and conversion.

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<sup>1</sup> Sorbothane, Inc., was formerly called Sorbo, Inc. App. 67.

<sup>2</sup> Two violations of [§ 1](#) were alleged, resale price maintenance and division of territories. Attempted monopolization, monopolization, and conspiracy to monopolize were charged under [§ 2](#). All in all, four alleged violations of federal law and seven alleged violations of state law were sent to the jury.

The case was tried to a jury, which returned a verdict against one or more of the defendants on each of the 11 alleged violations on which it was to return a verdict. All of the defendants were found to have violated § 2 by, in the words of the verdict sheet, "monopolizing, attempting to monopolize, and/or conspiring to monopolize." App. 410. Petitioners were also found to have violated civil RICO and the California [\*\*\*\*10] unfair practices law, but not § 1 of the Sherman Act. The jury awarded \$ 1,743,000 in compensatory damages on each of the violations found to have occurred.<sup>3</sup> This amount was trebled under § 4 of the Clayton Act. The District Court also awarded nearly \$ 1 million in attorney's fees and denied motions for judgment notwithstanding the verdict and for a new trial.

[\*\*\*\*11] [\*452] The Court of Appeals for the Ninth Circuit affirmed the judgment in an unpublished opinion. Judgt. order reported at 907 F.2d 154 (1990). The court expressly ruled that the trial court had properly instructed the jury on the Sherman Act claims and found that the evidence supported the liability verdicts as well as the damages awards on these claims. The court then affirmed the judgment of the District Court, finding it unnecessary to rule on challenges to other violations found by the jury. App. to Pet. for Cert. A28. On the § 2 issue that petitioners present here, the Court of Appeals, noting that the jury had found that petitioners had violated § 2 without specifying whether they had monopolized, attempted to monopolize, or conspired to monopolize, held that the verdict would stand if the evidence supported any one of the three possible violations of § 2. *Id.*, at A15. The court went on to conclude that a case of attempted monopolization had been established.<sup>4</sup> The court rejected petitioners' argument that attempted [\*\*255] monopolization had not been established because respondents had failed to prove that petitioners had a specific intent [\*\*\*\*12] to monopolize [\*\*889] a relevant market. The court also held that in order to show that respondents' [\*453] attempt to monopolize was likely to succeed it was not necessary to present evidence of the relevant market or of the defendants' market power. In so doing, the Ninth Circuit relied on *Lessig v. Tidewater Oil Co., 327 F.2d 459* (CA9), cert. denied, 377 U.S. 993, 12 L. Ed. 2d 1046, 84 S. Ct. 1920 (1964), and its progeny. App. to Pet. for Cert. A18-A19. The Court of Appeals noted that these cases, in dealing with attempt to monopolize claims, had ruled that "if evidence of unfair or predatory conduct is presented, it may satisfy both the specific intent and dangerous probability elements of the offense, without any proof of relevant market or the defendant's marketpower [sic]." *Id.*, at A19. If, however, there is insufficient evidence of unfair or predatory conduct, there must be a showing of "relevant market or the defendant's marketpower [sic]." *Ibid.* The court went on to find:

"There is sufficient evidence from which the jury could conclude that the S. I. Group and Spectrum Group engaged in unfair or predatory conduct [\*\*\*\*13] and thus inferred that they had the specific intent and the dangerous probability of success and, therefore, McQuillan did not have to prove relevant market or the defendant's marketing power." *Id.*, at A21.

<sup>3</sup> The special verdict form advised the jury as follows:

"The following pages identify the name of each defendant and the claims for which plaintiffs contend that the defendant is liable. If you find that any of the defendants are liable on any of the claims, you may award damages to the plaintiffs against those defendants. Should you decide to award damages, please assess damages for each defendant and each claim separately and without regard to whether you have already awarded the same damages on another claim or against another defendant. The court will insure that there is no double recovery. The verdict will not be totaled." App. 416.

<sup>4</sup> The District Court's jury instructions were transcribed as follows:

"In order to win on the claim of attempted monopoly, the Plaintiff must prove each of the following elements by a preponderance of the evidence: first, that the Defendants had a specific intent to achieve monopoly power in the relevant market; second, that the Defendants engaged in exclusionary or restrictive conduct in furtherance of its specific intent; third, that there was a dangerous probability that Defendants could sooner or later achieve [their] goal of monopoly power in the relevant market; fourth, that the Defendants' conduct occurred in or affected interstate commerce; and, fifth, that the Plaintiff was injured in the business or property by the Defendants' exclusionary or restrictive conduct.

....

"If the Plaintiff has shown that the Defendant engaged in predatory conduct, you may infer from that evidence the specific intent and the dangerous probability element of the offense without any proof of the relevant market or the Defendants' marketing [sic] power." *Id.*, at 251-252. See also App. to Pet. for Cert. A16, A20.

506 U.S. 447, \*453; 113 S. Ct. 884, \*\*889; 122 L. Ed. 2d 247, \*\*\*255; 1993 U.S. LEXIS 1013, \*\*\*\*13

[\*\*\*\*14] The decision below, and the *Lessig* line of decisions on which it relies, conflicts with holdings of courts in other Circuits. Every other Court of Appeals has indicated that proving an attempt to monopolize requires proof of a dangerous probability of monopolization of a relevant market.<sup>5</sup> [\*\*\*\*15] We [\*454] granted certiorari, 503 U.S. 958 (1992), to resolve this conflict among the Circuits.<sup>6</sup> We reverse.

## II

While § 1 of the Sherman Act forbids [\*\*\*256] contracts or conspiracies in restraint of trade or commerce, § 2 addresses the actions of single firms that monopolize or attempt to monopolize, as well as conspiracies and combinations to monopolize. Section 2 does not define the elements of the offense of attempted monopolization. Nor is there much guidance to be had in the scant legislative history of that provision, which was added late in the legislative process. See 1 E. Kintner, Legislative History of the Federal Antitrust Laws and Related Statutes 23-25 (1978); 3 P. Areeda & D. Turner, Antitrust Law P617, pp. 39-41 (1978). The legislative history does indicate that much of the interpretation of the necessarily broad principles [\*\*\*\*16] of the Act was to be left for the courts in particular cases. See, e. g., 21 Cong. Rec. 2460 (1890) (statement of Sen. Sherman). See also 1 [\*\*\*890] Kintner, *supra*, at 19; 3 Areeda & Turner, *supra*, P617, at 40.

This Court first addressed the meaning of attempt to monopolize under § 2 in *Swift & Co. v. United States*, 196 U.S. 375, 49 L. Ed. 518, 25 S. Ct. 276 (1905). The Court's opinion, written by Justice Holmes, contained the following passage:

[\*455] "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent -- for instance, the monopoly -- but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth v. Peaslee*, 177 Mass. 267, 272 [59 N.E. 55, 56 (1901)]. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." *Id.* at 396.

The Court [\*\*\*\*17] went on to explain, however, that not every act done with intent to produce an unlawful result constitutes an attempt. "It is a question of proximity and degree." *Id.* at 402. *Swift* thus indicated that intent is necessary, but alone is not sufficient, to establish the dangerous probability of success that is the object of § 2's prohibition of attempts.<sup>7</sup>

<sup>5</sup> See, e.g., *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 851 (CA1 1985), cert. denied, 475 U.S. 1016, 89 L. Ed. 2d 312, 106 S. Ct. 1198 (1986); *Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 570 (CA2 1990); *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1079 (CA3 1978); *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 926, 931 (CA4 1990); *C. A. T. Industrial Disposal, Inc. v. Browning-Ferris Industries, Inc.*, 884 F.2d 209, 210 (CA5 1989); *Arthur S. Langenderfer, Inc. v. S. E. Johnson Co.*, 917 F.2d 1413, 1431-1432 (CA6 1990), cert. denied, 502 U.S. 899, 116 L. Ed. 2d 226, 112 S. Ct. 274 (1991); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1413-1416 (CA7 1989); *General Industries Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 804 (CA8 1987); *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 885 F.2d 683, 693 (CA10 1989), cert. denied, 498 U.S. 972, 112 L. Ed. 2d 424, 111 S. Ct. 441 (1990); *Key Enterprises of Delaware, Inc. v. Venice Hospital*, 919 F.2d 1550, 1565 (CA11 1990); *Neumann v. Reinforced Earth Co.*, 252 U.S. App. D.C. 11, 15-16, 786 F.2d 424, 428-429, cert. denied, 479 U.S. 851, 93 L. Ed. 2d 116, 107 S. Ct. 181 (1986); *Abbott Laboratories v. Brennan*, 952 F.2d 1346, 1354 (CA Fed. 1991), cert. denied, 505 U.S. 1205, 120 L. Ed. 2d 870, 112 S. Ct. 2993 (1992).

<sup>6</sup> Our grant of certiorari was limited to the first question presented in the petition: "Whether a manufacturer's distributor expressly absolved of violating Section 1 of the Sherman Act can, without any evidence of market power or specific intent, be found liable for attempting to monopolize solely by virtue of a unique Ninth Circuit rule?" Pet. for Cert. i.

<sup>7</sup> Justice Holmes confirmed that this was his interpretation of *Swift* in *Hyde v. United States*, 225 U.S. 347, 56 L. Ed. 1114, 32 S. Ct. 793 (1912). In dissenting in that case on other grounds, the Justice, citing *Swift*, stated that an attempt may be found where the danger of harm is very great; however, "combination, intention and overt act may all be present without amounting to a criminal attempt. . . . There must be dangerous proximity to success." 225 U.S. at 387-388.

506 U.S. 447, \*455; 113 S. Ct. 884, \*\*890; 122 L. Ed. 2d 247, \*\*\*256; 1993 U.S. LEXIS 1013, \*\*\*\*17

The Court's decisions since *Swift* have reflected the view that [\*\*\*\*18] [HN1](#)[<sup>↑</sup>] the plaintiff charging attempted monopolization must prove a dangerous probability of actual monopolization, which has generally required a definition of the relevant market and examination of market power. In [Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.](#), 382 U.S. 172, 177, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965), we found that enforcement of a fraudulently obtained patent claim could violate the Sherman Act. We stated that, [HN2](#)[<sup>↑</sup>] to establish monopolization or attempt to monopolize under [§ 2](#) of the Sherman Act, it would [\*456] be necessary to [\*\*\*257] appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. *Ibid.* The reason was that "without a definition of that market there is no way to measure [the defendant's] ability to lessen or destroy competition." *Ibid.*

Similarly, this Court reaffirmed in [Copperweld Corp. v. Independence Tube Corp.](#), 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984), that "Congress authorized Sherman Act scrutiny of single firms [\*\*\*19] only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur." *Id.*, at 768. Thus, [HN3](#)[<sup>↑</sup>] the conduct of a single firm, governed by [§ 2](#), "is unlawful only when it threatens actual monopolization." *Id.*, at 767. See also [Lorain Journal Co. v. United States](#), 342 U.S. 143, 154, 96 L. Ed. 162, 72 S. Ct. 181 (1951); [United States v. Griffith](#), 334 U.S. 100, 105-106, 92 L. Ed. 1236, 68 S. Ct. 941 (1948); [American Tobacco Co. v. United States](#), 328 U.S. 781, 785, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946).

The Courts of Appeals other than the Ninth Circuit have followed this approach. Consistent with our cases, [HN4](#)[<sup>↑</sup>] it is generally required that to demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) [\*\*\*\*20] a specific intent to monopolize and (3) a dangerous [\*\*891] probability of achieving monopoly power. See 3 Areeda & Turner, *supra*, P820, at 312. In order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market.<sup>8</sup>

[\*457] [LEdHN\[1B\]](#)[<sup>↑</sup>] [1B]Notwithstanding the array of authority contrary to *Lessig* [\*\*\*\*21], the Court of Appeals in this case reaffirmed its prior holdings; indeed, it did not mention either this Court's decisions discussed above or the many decisions of other Courts of Appeals reaching contrary results. Respondents urge us to affirm the decision below. We are not at all inclined, however, to embrace *Lessig*'s interpretation of [§ 2](#), for there is little, if any, support for it in the statute or the case law, and the notion that proof of unfair or predatory conduct alone is sufficient to make out the offense of attempted monopolization is contrary to the purpose and policy of the Sherman Act.

[LEdHN\[2\]](#)[<sup>↑</sup>] [2][LEdHN\[3\]](#)[<sup>↑</sup>] [3]The *Lessig* opinion claimed support from the language of [§ 2](#), which prohibits attempts to monopolize "any part" of commerce, and therefore forbids attempts to monopolize any appreciable segment of interstate sales of the relevant product. See [United States v. Yellow Cab Co.](#), 332 U.S. 218, 226, 91 L. Ed. 2010, 67 S. Ct. 1560 (1947). The "any part" clause, however, applies to charges of monopolization as [\*\*\*\*22] well as to attempts to monopolize, and it is beyond [\*\*\*258] doubt that the former requires proof of market power in a relevant market. [United States v. Grinnell Corp.](#), 384 U.S. 563, 570-571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966); [United States v. E. I. du Pont de Nemours & Co.](#), 351 U.S. 377, 404, 100 L. Ed. 1264, 76 S. Ct. 994 (1956).<sup>9</sup>

In support of its determination that an inference of dangerous probability was permissible from a showing of intent, the *Lessig* opinion cited, and added emphasis to, this Court's reference in its opinion in *Swift* to "intent and [\*\*\*\*23]

<sup>8</sup>See, e. g., [Arthur S. Langenderfer, Inc. v. S. E. Johnson Co.](#), 917 F.2d at 1431-1432; [Twin Laboratories, Inc. v. Weider Health & Fitness](#), 900 F.2d at 570; [Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America](#), 885 F.2d at 693; [Indiana Grocery, Inc. v. Super Valu Stores, Inc.](#), 864 F.2d at 1413-1416; [General Industries Corp. v. Hartz Mountain Corp.](#), 810 F.2d at 804.

<sup>9</sup>*Lessig* cited [United States v. Yellow Cab Co.](#), 332 U.S. at 226, in support of its interpretation, but *Yellow Cab* relied on the "any part" language to support the proposition that it is immaterial how large an amount of interstate trade is affected, or how important that part of commerce is in relation to the entire amount of that type of commerce in the Nation.

the consequent dangerous probability."<sup>10</sup> [327 F.2d at 474, n. 46](#), quoting [196 U.S. at 396](#). But any question whether dangerous [\*458] probability of success requires proof of more than intent alone should have been removed by the subsequent passage in *Swift* which stated that "not every act that may be done with intent to produce an unlawful result . . . constitutes an attempt. It is a question of proximity and degree." [Id., at 402](#).

The Lessig court also relied on a footnote in [Du Pont & Co., supra, at 395, n. 23](#), for the proposition that when the charge is attempt to monopolize, the relevant market is "not in issue." That footnote, which appeared in analysis of the relevant market issue in *Du Pont*, rejected the Government's reliance on several cases, noting that "the scope of the market was not in issue" in [Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 75 L. Ed. 544, 51 S. Ct. 248 \(1931\)](#). That reference merely reflected the fact that, in *Story Parchment*, which was not an attempt to monopolize case, the parties did not challenge the definition of the market [\*\*\*\*24] adopted by the lower courts. Nor was *Du Pont* itself concerned with the issue in this case.

[LEdHN\[1C\]](#) [↑] [1C] [LEdHN\[4\]](#) [↑] [4] [LEdHN\[5\]](#) [↑] [5] [LEdHN\[6\]](#) [↑] [6] It is also our view that Lessig and later Ninth Circuit decisions refining and applying it are inconsistent with the policy of the Sherman Act. The purpose of the Act is [\*892] not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest. See, e. g., [Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 \(1977\)](#); [Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 116-117, 93 L. Ed. 2d 427, 107 S. Ct. 484 \(1986\)](#); [\*\*\*\*25] [Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 \(1962\)](#). Thus, this Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it. It is sometimes [\*459] difficult to distinguish robust competition from conduct with long-term anticompetitive effects; moreover, single-firm activity is unlike concerted activity covered by § 1, which "inherently is fraught with anticompetitive risk." [Copperweld, 467 U.S. at 767-769](#). [\*\*\*259] For these reasons, § 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so. [Id., at 767](#). [HN5](#) [↑] The concern that § 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in "unfair" or "predatory" tactics. Such conduct may be sufficient to prove the necessary intent to monopolize, which is something more than an intent to compete vigorously, but demonstrating the dangerous probability [\*\*\*\*26] of monopolization in an attempt case also requires inquiry into the relevant product and geographic market and the defendant's economic power in that market.

### III

[LEdHN\[1D\]](#) [↑] [1D] [LEdHN\[7\]](#) [↑] [7] We hold that [HN6](#) [↑] petitioners may not be liable for attempted monopolization under § 2 of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize. In this case, the trial instructions allowed the jury to infer specific intent and dangerous probability of success from the defendants' predatory conduct, without any proof of the relevant market or of a realistic probability that the defendants could achieve monopoly power in that market. In this respect, the instructions misconstrued § 2, as did the Court of Appeals in affirming the judgment of the District Court. Since the affirmance of the § 2 judgment against petitioners rested solely on the legally erroneous conclusion that petitioners had attempted [\*\*\*\*27] to monopolize in violation of § 2 and since the jury's verdict did not negate the possibility that the § 2 verdict rested on the attempt to monopolize ground alone, the judgment [\*460] of the Court of Appeals is reversed, [Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19, 29-30, 8 L. Ed. 2d 305, 82 S. Ct. 1130 \(1962\)](#), and the case is remanded for further proceedings consistent with this opinion.

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So ordered.

## References

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<sup>10</sup> Respondents conceded in their brief that the case should be remanded to the Court of Appeals if we found error in the instruction on attempt to monopolize. Brief for Respondents 45-46.

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 35- 39, 43

24 Federal Procedure, L Ed, Monopolies and Restraints of Trade 54:338

12B Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade 194, 195, 214, 215, 217, 218, 231

18 Am Jur PI & Pr Forms (Rev), Monopolies, [\*\*\*\*28] Restraints of Trade, and Unfair Trade Practices, Form 18

12A Am Jur Legal Forms 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 178:81

24 Am Jur Trials 1, Defending Antitrust Lawsuits

15 USCS 2

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 15, 18, 19

L Ed Index, Attempts; Restraints of Trade, Monopolies, and Unfair Trade Practices

ALR Index, Attempt; Restraints of Trade and Monopolies

Annotation References:

Determining relevant market in suit where franchisee charges franchisor with monopolization, or attempt to monopolize, market in violation of 2 of Sherman Act (15 USCS 2). 56 ALR Fed 406.

Comment Note--What constitutes "attempt to monopolize," within meaning of 2 of Sherman Act (15 USCS 2). 27 ALR Fed 762.

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## Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.

Supreme Court of the United States

November 2, 1992, Argued ; May 3, 1993, Decided

No. 91-1043

### **Reporter**

508 U.S. 49 \*; 113 S. Ct. 1920 \*\*; 123 L. Ed. 2d 611 \*\*\*; 1993 U.S. LEXIS 3121 \*\*\*\*; 26 U.S.P.Q.2D (BNA) 1641; 61 U.S.L.W. 4450; Copy. L. Rep. (CCH) P27,089; 1993-1 Trade Cas. (CCH) P70,207; 93 Cal. Daily Op. Service 3198; 93 Daily Journal DAR 5465; 7 Fla. L. Weekly Fed. S 223

PROFESSIONAL REAL ESTATE INVESTORS, INC., ET AL., PETITIONERS v. COLUMBIA PICTURES INDUSTRIES, INC., ET AL.

**Prior History:** [\*\*\*\*1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

**Disposition:** [944 F. 2d 1525](#), affirmed.

## **Core Terms**

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sham, lawsuit, probable cause, antitrust, competitor, immunity, baseless, sham exception, anticompetitive, genuine, merits, cases, summary judgment, infringement, motivation, objectively reasonable, government action, videodiscs, courts, copyright infringement, realistically, motion picture, Sherman Act, proceedings, repetitive, subjective intent, judicial process, anti trust law, collateral, discovery

## **LexisNexis® Headnotes**

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

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

### [\*\*HN1\*\*](#) **[]** **Exemptions & Immunities, Noerr-Pennington Doctrine**

Under the "sham" exception to the doctrine of antitrust immunity, as that doctrine applies in the litigation context, activity "ostensibly directed toward influencing governmental action" does not qualify for Noerr immunity if it is a mere sham to cover an attempt to interfere directly with the business relationships of a competitor.

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

### [\*\*HN2\*\*](#) **[]** **Exemptions & Immunities, Noerr-Pennington Doctrine**

Litigation cannot be deprived of Noerr immunity as a sham unless the litigation is objectively baseless.

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

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

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Penalties

Copyright Law > ... > Civil Infringement Actions > Summary Judgment > General Overview

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

### **HN3** [down] **Conspiracy to Monopolize, Sherman Act**

Section 1 of the Sherman Act prohibits every contract, combination or conspiracy, in restraint of trade or commerce among the several States. [15 U.S.C. § 1](#). Section 2 punishes every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States. [15 U.S.C. § 2](#).

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

Antitrust & Trade Law > Sherman Act > General Overview

### **HN4** [down] **Scope, Exemptions**

Those who petition government for redress are generally immune from antitrust liability. The Supreme Court first recognized in Noerr that the Sherman Act does not prohibit persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

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

**HN5** Scope, Exemptions

Immunity is withheld from "sham" activities under Noerr where application of the Sherman Act would be justified when the petitioning activity, ostensibly directed toward influencing governmental action, is a mere sham to cover an attempt to interfere directly with the business relationships of a competitor.

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

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

The Noerr doctrine is extended to the approach of citizens to administrative agencies and to courts.

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

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

An objectively reasonable effort to litigate cannot be sham under the Noerr doctrine regardless of subjective intent.

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

**HN8** Exemptions & Immunities, Noerr-Pennington Doctrine

That a sham depends on the existence of anticompetitive intent, however, does not transform the sham inquiry into a purely subjective investigation.

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

**HN9** Exemptions & Immunities, Noerr-Pennington Doctrine

Recourse to agencies and courts should not be condemned as sham until a reviewing court has discerned and drawn the difficult line separating objectively reasonable claims from a pattern of baseless, repetitive claims which leads the factfinder to conclude that the administrative and judicial processes have been abused. The Supreme Court's recognition of a sham in California Motor Transport signifies that the institution of legal proceedings "without probable cause" will give rise to a sham if such activity effectively bars competitors from meaningful access to adjudicatory tribunals and so usurps the decisionmaking process.

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

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

**HN10** Exemptions & Immunities, Noerr-Pennington Doctrine

The legality of objectively reasonable petitioning "directed toward obtaining governmental action" is not at all affected by any anticompetitive purpose the actor may have had.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

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

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

## **HN11**[] **Higher Education & Professional Associations, Colleges & Universities**

Neither Noerr immunity nor its sham exception turns on subjective intent alone.

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

## **HN12**[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The United States Supreme Court has a two-part definition of "sham" litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under Noerr, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under the second part of the definition of sham, the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor, through the use of the governmental process -- as opposed to the outcome of that process -- as an anticompetitive weapon. This two-tiered process requires the plaintiff to disprove the challenged lawsuit's legal viability before the court will entertain evidence of the suit's economic viability.

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

Evidence > Inferences & Presumptions > General Overview

## **HN13**[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Even a plaintiff who defeats the defendant's claim to Noerr immunity by demonstrating both the objective and the subjective components of a sham must still prove a substantive antitrust violation. Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim.

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

## **HN14**[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham. On the other hand, when the antitrust defendant has lost the underlying litigation, a court must resist the understandable temptation to engage in post hoc reasoning by concluding that an ultimately unsuccessful action must have been unreasonable or without foundation. The court must remember that even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

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

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

### **HN15** [ ] Exemptions & Immunities, Noerr-Pennington Doctrine

The word "genuine" has both objective and subjective connotations. On one hand, "genuine" means actually having the reputed or apparent qualities or character. "Genuine" in this sense governs [Fed. R. Civ. P. 56](#), under which a "genuine issue" is one that properly can be resolved only by a finder of fact because it may reasonably be resolved in favor of either party. On the other hand, "genuine" also means sincerely and honestly felt or experienced. To be sham, therefore, litigation must fail to be "genuine" in both senses of the word.

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

Torts > ... > Elements > Lack of Probable Cause > Determinations of Probable Cause

### **HN16** [ ] Exemptions & Immunities, Noerr-Pennington Doctrine

The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation. The notion of probable cause, as understood and applied in the common-law tort of wrongful civil proceedings, requires the plaintiff to prove that the defendant lacked probable cause to institute an unsuccessful civil lawsuit and that the defendant pressed the action for an improper, malicious purpose. Probable cause to institute civil proceedings requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication. Because the absence of probable cause is an essential element of the tort, the existence of probable cause is an absolute defense.

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

### **HN17** [ ] Exemptions & Immunities, Noerr-Pennington Doctrine

When a court has found that an antitrust defendant claiming Noerr immunity had probable cause to sue, that finding compels the conclusion that a reasonable litigant in the defendant's position could realistically expect success on the merits of the challenged lawsuit. Therefore, a proper probable-cause determination irrefutably demonstrates that an antitrust plaintiff has not proved the objective prong of the sham exception and that the defendant is accordingly entitled to Noerr immunity.

## **Lawyers' Edition Display**

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### **Decision**

Copyright infringement action held not to be "sham," within exception to antitrust exemption for efforts to influence government action, where copyright holders had probable cause for suit.

### **Summary**

Several motion picture studios, alleging that the operators of a resort hotel had infringed the studios' copyrights in various films by renting videodiscs to guests for viewing in hotel rooms, filed an action against the operators in the United States District Court for the Central District of California. The operators filed a counterclaim charging the studios with violations of 1 and 2 of the Sherman Act ([15 USCS 1, 2](#)), based in part on the allegation that the

studios' copyright action was a mere sham which cloaked underlying acts of monopolization and conspiracy to restrain trade. The District Court entered summary judgment in favor of the operators on the studios' copyright claim ([228 USPQ 743](#)), and the United States Court of Appeals for the Ninth Circuit affirmed ([866 F2d 278](#)). On remand, the District Court granted the studios' motion for summary judgment on the operators' antitrust counterclaim, on the grounds that (1) the studios had clearly sought and expected a favorable judgment on the copyright claim and had had probable cause to bring such an action; and (2) the copyright action therefore was not a "sham" and was entitled to antitrust immunity under the "Noerr-Pennington" doctrine as a legitimate effort to influence governmental action ([1990-1 CCH Trade Cases 68,971](#)). The Court of Appeals, affirming, (1) characterized "sham" litigation as involving either misrepresentations in the adjudicatory process or the pursuit of a pattern of baseless, repetitive claims instituted without probable cause and regardless of the merits; and (2) noted that the operators had neither alleged that the copyright action involved misrepresentations nor challenged the District Court's finding of probable cause, but had argued only that the action was a sham because the studios had not honestly believed the action to be meritorious ([944 F2d 1525](#)).

On certiorari, the United States Supreme Court affirmed. In an opinion by Thomas, J., joined by Rehnquist, Ch. J., and White, Blackmun, Scalia, Kennedy, and Souter, JJ., it was held that (1) regardless of the subjective intent of a litigant, an objectively reasonable effort to litigate cannot be a "sham" for purposes of the Noerr-Pennington doctrine; (2) in order for litigation to be a "sham," (a) the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits, and (b) only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation to determine whether the lawsuit conceals an attempt to interfere directly with the business relationships of a competitor; (3) the existence of probable cause to institute legal proceedings--as understood and applied in the common-law tort of wrongful civil proceedings--precludes a finding that an antitrust defendant has engaged in sham litigation; and (4) in the case at hand, even though the studios' copyright action was unsuccessful, the studios had had probable cause to bring such an action because the law was then unclear as to whether the operators' videodisc rental activities intruded on the studios' copyrights.

Souter, J., concurred, expressing the view that the court's opinion was not intended to transplant every substantive nuance and procedural quirk of the common-law tort of wrongful civil proceedings into federal **antitrust law**, but used "probable cause" merely as shorthand for a reasonable litigant's realistic expectation of success on the merits.

Stevens, J., joined by O'Connor, J., concurred in the judgment, expressing the view that (1) the court correctly held that an objectively reasonable effort to litigate cannot be a "sham" regardless of subjective intent; but (2) the court's opinion was unnecessarily broad, as there might be lawsuits (a) in which a reasonable litigant could realistically expect some form of success on the merits, but (b) which would be objectively unreasonable and thus would be shams.

## **Headnotes**

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > immunity -- Noerr-Pennington doctrine -- sham exception -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D] [LEdHN\[1E\]](#) [1E]

Regardless of the subjective intent of a litigant, an objectively reasonable effort to litigate cannot be a "sham" for purposes of the Noerr-Pennington doctrine--(1) the Noerr-Pennington doctrine providing that efforts to influence governmental actions qualify for antitrust immunity, and (2) the sham exception providing that activity that is ostensibly directed toward influencing governmental action, but is a mere sham to cover an attempt to interfere directly with the business relationships of a competitor, does not qualify for antitrust immunity; the legality of objectively reasonable petitioning directed toward obtaining governmental action is not affected by any anticompetitive purpose the actor may have had; in order for litigation to be a "sham," (1) the lawsuit must be

objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits, and (2) only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation to determine whether the lawsuit conceals an attempt to interfere directly with the business relationships of a competitor; the existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation, as a finding of probable cause compels the conclusion that a reasonable litigant could realistically expect success on the merits of the challenged lawsuit and irrefutably demonstrates that the antitrust plaintiff has not proved the objective prong of the sham exception. (Stevens and O'Connor, JJ., dissented in part from this holding.)

COPYRIGHT AND LITERARY PROPERTY §3 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §5 > antitrust immunity -- Noerr-Pennington doctrine -- sham exception -- motion pictures -- > Headnote:

[LEdHN\[2A\]](#) [2A] [LEdHN\[2B\]](#) [2B] [LEdHN\[2C\]](#) [2C] [LEdHN\[2D\]](#) [2D] [LEdHN\[2E\]](#) [2E]

Summary judgment is properly issued in favor of motion picture studios with regard to a counterclaim by the operators of a resort hotel, who allege that the studios violated 1 and 2 of the Sherman Act ([15 USCS 2, 2](#)) by bringing a copyright infringement action against the operators for renting videodiscs of copyrighted movies to hotel guests for in-room viewing, because (1) the studios' antitrust immunity cannot be pierced, under the "sham" exception to the Noerr-Pennington doctrine of antitrust immunity as to efforts to influence governmental action, in the absence of proof that the copyright action was objectively baseless or frivolous; (2) even though the copyright action was unsuccessful, the studios had had probable cause to bring such an action, given that (a) under [17 USCS 106\(4\)](#), the studios enjoyed the exclusive right to perform their copyrighted movies publicly, (b) the studios acquired this statutory right for motion pictures, as original audiovisual works of authorship fixed in a tangible medium of expression under [17 USCS 102\(a\)\(6\)](#), regardless of whether they intended any monopolistic or predatory use, and (c) at the time a Federal District Court entered summary judgment for the operators on the copyright infringement claim, the law was unclear as to whether the operators' videodisc rental activities intruded on the studios' copyrights; and (3) the existence of probable cause eliminates any genuine issue of material fact for purposes of [Rule 56\(c\) of the Federal Rules of Civil Procedure](#).

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > immunity -- > Headnote:

[LEdHN\[3\]](#) [3]

Those who petition government for redress are generally immune from antitrust liability.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > immunity -- sham exception --

> Headnote:

[LEdHN\[4\]](#) [4]

The institution of legal proceedings without probable cause will give rise to a "sham," for purposes of the "sham" exception to the Noerr-Pennington doctrine of antitrust immunity as to efforts to influence governmental action, if such activity effectively bars competitors from meaningful access to adjudicatory tribunals and so usurps the decisionmaking process.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > immunity -- sham exception --

> Headnote:

[LEdHN\[5A\]](#) [5A] [LEdHN\[5B\]](#) [5B]

A winning lawsuit is by definition a reasonable effort at petitioning for redress and is therefore not a "sham," for purposes of the "sham" exception to the Noerr-Pennington doctrine of antitrust immunity as to efforts to influence governmental action; however, an ultimately unsuccessful lawsuit is not necessarily unreasonable or without foundation for purposes of the "sham" exception.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > immunity -- sham exception --

> Headnote:

[LEdHN\[6\]](#) [6]

In a private action under the federal antitrust laws, a plaintiff who defeats a claim of antitrust immunity with respect to an allegedly anticompetitive lawsuit by the defendant, by demonstrating both the objective and the subjective components of the "sham" exception to the Noerr-Pennington doctrine of antitrust immunity as to efforts to influence governmental action, must still prove a substantive antitrust violation, because proof of a sham merely deprives the defendant of immunity and does not relieve the plaintiff of the obligation to establish all other elements of the antitrust claim.

MALICIOUS PROSECUTION §1 > probable cause -- > Headnote:

[LEdHN\[7A\]](#) [7A] [LEdHN\[7B\]](#) [7B]

The notion of probable cause, as understood and applied in the common-law tort of wrongful civil proceedings--frequently called "malicious prosecution," which, strictly speaking, governs the malicious pursuit of criminal proceedings without probable cause--requires the plaintiff to prove that the defendant lacked probable cause to institute an unsuccessful civil lawsuit and that the defendant pressed the action for an improper, malicious purpose; because the absence of probable cause is an essential element of the tort, the existence of probable cause is an absolute defense; probable cause to institute civil proceedings requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication, and a showing of malice alone will neither entitle the plaintiff in a wrongful civil proceedings action to prevail nor permit the factfinder to infer the absence of probable cause; the threshold for showing probable cause is no higher in the civil context than in the criminal context.

TRIAL §92 > question of law or fact -- probable cause -- > Headnote:

[LEdHN\[8\]](#) [8]

For purposes of determining whether there was probable cause to institute a legal proceeding, a court may decide probable cause as a matter of law where there is no dispute over the predicate facts of the legal proceeding.

DEPOSITIONS AND DISCOVERY §29 > antitrust actions -- > Headnote:

LEdHN[9] [9]

A Federal Court of Appeals--in reviewing a Federal District Court's granting of summary judgment in favor of motion picture studios with regard to a counterclaim by operators of a resort hotel, who allege that the studios violated 1 and 2 of the Sherman Act ([15 USCS 1, 2](#)) by bringing a copyright infringement action against the operators for renting videodiscs of copyrighted movies to hotel guests for in-room viewing--properly refuses the operators' request for further discovery on the economic circumstances of the underlying copyright litigation, which request was also refused by the District Court, because (1) the studios' antitrust immunity cannot be pierced, under the "sham" exception to the Noerr-Pennington doctrine of antitrust immunity as to efforts to influence governmental action, in the absence of proof that the copyright action was objectively baseless or frivolous; and (2) the District Court thus had no occasion to inquire whether (a) the studios were indifferent to the outcome on the merits of the copyright suit, (b) any damages for infringement would be too low to justify the studios' investment in the suit, or (c) the studios had decided to sue primarily for the benefit of collateral injuries inflicted through the use of legal process.

## Syllabus

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Although those who petition government for redress are generally immune from antitrust liability, [\*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523\*](#), such immunity is withheld when petitioning activity "ostensibly directed toward influencing governmental action, is a mere sham to cover . . . an attempt to interfere directly" with a competitor's business relationships, [\*id., at 144\*](#). Petitioner resort hotel operators (collectively, PRE) rented videodiscs to guests for use with videodisc players located in each guest's room and sought to develop a market for the sale of such players to other hotels. Respondent major motion picture studios (collectively, Columbia), [\[\\*\\*\\*\\*2\]](#) which held copyrights to the motion pictures recorded on PRE's videodiscs and licensed the transmission of those motion pictures to hotel rooms, sued PRE for alleged copyright infringement. PRE counterclaimed, alleging that Columbia's copyright action was a mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade in violation of [§§ 1](#) and [2](#) of the Sherman Act. The District Court granted summary judgment to PRE on the copyright claim, and the Court of Appeals affirmed. On remand, the District Court granted Columbia's motion for summary judgment on PRE's antitrust claims. Because Columbia had probable cause to bring the infringement action, the court reasoned, the action was no sham and was entitled to *Noerr* immunity. The District Court also denied PRE's request for further discovery on Columbia's intent in bringing its action. The Court of Appeals affirmed. Noting that PRE's sole argument was that the lawsuit was a sham because Columbia did not honestly believe its infringement claim was meritorious, the court found that the existence of probable cause precluded the application of the sham exception as a matter of law and rendered irrelevant any [\[\\*\\*\\*\\*3\]](#) evidence of Columbia's subjective intent in bringing suit.

*Held:*

1. Litigation cannot be deprived of immunity as a sham unless it is objectively baseless. This Court's decisions establish that the legality of objectively reasonable petitioning "directed toward obtaining governmental action" is "not at all affected by any anticompetitive purpose [the actor] may have had." [\*Id., at 140\*](#). Thus, neither *Noerr* immunity nor its sham exception turns on subjective intent alone. See, e.g., [\*Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 503, 100 L. Ed. 2d 497, 108 S. Ct. 1931\*](#). Rather, to be a "sham," litigation must meet a two-part definition. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of the definition a court should focus on whether the baseless suit conceals "an attempt to interfere directly" with a competitor's business relationships, [\*Noerr, supra, at 144\*](#), through the "use [\[\\*\\*\\*\\*4\]](#) [of] the governmental process -- as opposed to the *outcome* of that process -- as an anticompetitive weapon," [\*Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380, 113 L. Ed. 2d 382, 111 S. Ct. 1344\*](#). This two-tiered process requires a plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability. Pp. 55-61.

2. Because PRE failed to establish the objective prong of *Noerr*'s sham exception, summary judgment was properly granted to Columbia. A finding that an antitrust defendant claiming *Noerr* immunity had probable cause to sue compels the conclusion that a reasonable litigant in the defendant's position could realistically expect success on the merits of the challenged lawsuit. Here, the lower courts correctly found probable cause for Columbia's suit. Since there was no dispute over the predicate facts of the underlying legal proceedings -- Columbia had the exclusive right to show its copyrighted motion pictures publicly -- the court could decide probable cause as a matter of law. A court could reasonably conclude that Columbia's action was an objectively [\*\*\*\*5] plausible effort to enforce rights, since, at the time the District Court entered summary judgment, there was no clear copyright law on videodisc rental activities; since Columbia might have won its copyright suit in two other Circuits; and since Columbia would have been entitled to press a novel claim, even in the absence of supporting authority, if a similarly situated reasonable litigant could have perceived some likelihood of success. Pp. 62-65.

3. The Court of Appeals properly refused PRE's request for further discovery on the economic circumstances of the underlying copyright litigation, because such matters were rendered irrelevant by the objective legal reasonableness of Columbia's infringement suit. Pp. 65-66.

**Counsel:** Patrick J. Coyne argued the cause for petitioners. With him on the briefs was James R. Loftis III.

Andrew J. Pincus argued the cause for respondents. With him on the brief were Richard J. Favretto, Roy T. Englert, Jr., and Stephen A. Kroft.\*

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**Judges:** THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, SCALIA, KENNEDY, and SOUTER, JJ., joined. SOUTER, J., filed a concurring opinion, post, p. 66. STEVENS, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, post, p. 67.

**Opinion by:** THOMAS

## Opinion

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[1642] [\*51] [\*\*618] [\*\*1923] JUSTICE THOMAS delivered the opinion of the Court.

LEdHN[1A] [↑] [1A] LEdHN[2A] [↑] [2A] This case requires us to define the "sham" exception to the doctrine of antitrust immunity first identified in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961), as that doctrine applies in the litigation context. HN1 [↑] Under the sham exception, activity "ostensibly directed toward influencing governmental action" does not qualify for *Noerr* immunity if it "is a mere sham to cover . . . an attempt to interfere directly with the business relationships [\*\*\*\*7] of a competitor." *Id.*, at 144. We hold that HN2 [↑] litigation cannot be deprived of immunity as a sham unless the litigation is objectively baseless. The Court of Appeals for the Ninth Circuit refused to characterize as sham a lawsuit that the antitrust defendant admittedly had probable cause to institute. We affirm.

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Petitioners Professional Real Estate Investors, Inc., and Kenneth F. Irwin (collectively, PRE) operated La Mancha Private Club and Villas, a resort hotel in Palm Springs, California. Having installed videodisc players in the resort's

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\* Solicitor General Starr, Acting Assistant Attorney General James, Deputy Solicitor General Wallace, Michael R. Dreeben, Catherine G. O'Sullivan, and James M. Spears filed a brief for the United States as *amicus curiae* urging affirmance.

hotel rooms and assembled a library of more than 200 motion picture titles, PRE rented videodiscs to guests for in-room [\*52] viewing. PRE also sought to develop a market for the sale of videodisc players to other hotels wishing to offer in-room viewing of prerecorded material. Respondents, Columbia Pictures Industries, Inc., and seven other major motion picture studios (collectively, Columbia), held copyrights to the motion pictures recorded on the videodiscs that PRE purchased. Columbia also licensed the transmission of copyrighted [\*\*\*8] motion pictures to hotel rooms through a wired cable system called Spectradyne. PRE therefore competed with Columbia not only for the viewing market at La Mancha but also for the broader market for in-room entertainment services in hotels.

[1643] In 1983, Columbia sued PRE for alleged copyright infringement through the rental of videodiscs for viewing in hotel rooms. PRE [\*\*1924] counterclaimed, charging Columbia with violations of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1-2,<sup>1</sup> and various state-law infractions. In particular, PRE alleged that Columbia's copyright action was a mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade.

[\*\*\*9] The parties filed cross-motions for summary judgment on Columbia's copyright claim and postponed further discovery on PRE's antitrust counterclaims. Columbia did not dispute that PRE could freely sell or lease lawfully purchased videodiscs under the Copyright Act's "first sale" doctrine, see 17 U.S.C. § 109(a), [\*\*\*619] and PRE conceded that the playing of videodiscs constituted "performance" of motion pictures, see 17 U.S.C. § 101 (1988 ed. and Supp. III). As a result, summary judgment depended solely on whether rental of videodiscs for in-room viewing infringed Columbia's exclusive right to [\*53] "perform the copyrighted work[s] publicly." § 106(4). Ruling that such rental did not constitute public performance, the District Court entered summary judgment for PRE. 228 U.S.P.Q. (BNA) 743 (CD Cal. 1986). The Court of Appeals affirmed on the grounds that a hotel room was not a "public place" and that PRE did not "transmit or otherwise communicate" Columbia's motion pictures. 866 F.2d 278 (CA9 1989). See 17 U.S.C. § 101 (1988 ed. and Supp. III).

On remand, Columbia sought [\*\*\*10] summary judgment on PRE's antitrust claims, arguing that the original copyright infringement action was no sham and was therefore entitled to immunity under Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra. Reasoning that the infringement action "was clearly a legitimate effort and therefore not a sham," 1990-1 Trade Cases P 68,971, p. 63,242 (CD Cal. 1990), the District Court granted the motion:

"It was clear from the manner in which the case was presented that [Columbia was] seeking and expecting a favorable judgment. Although I decided against [Columbia], the case was far from easy to resolve, and it was evident from the opinion affirming my order that the Court of Appeals had trouble with it as well. I find that there was probable cause for bringing the action, regardless of whether the issue was considered a question of fact or of law." *Id.*, at 63,243.

The court then denied PRE's request for further discovery on Columbia's intent in bringing the copyright action and dismissed PRE's state-law counterclaims without prejudice.

The Court of Appeals affirmed. 944 F.2d 1525 (CA9 1991). [\*\*\*11] After rejecting PRE's other allegations of anticompetitive conduct, see id., at 1528-1529,<sup>2</sup> the court focused on [\*54] PRE's contention that the copyright

<sup>1</sup> HN3 [↑] Section 1 of the Sherman Act prohibits "every contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. Section 2 punishes "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."

<sup>2</sup> The Court of Appeals held that Columbia's alleged refusal to grant copyright licenses was not "separate and distinct" from the prosecution of its infringement suit. 944 F.2d at 1528. The court also held that PRE had failed to establish how it could have suffered antitrust injury from Columbia's other allegedly anticompetitive acts. Id., at 1529. Thus, whatever antitrust injury Columbia inflicted must have stemmed from the attempted enforcement of copyrights, and we do not consider whether Columbia could have made a valid claim of immunity for anticompetitive conduct independent of petitioning activity. Cf. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707-708, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962).

action was indeed sham and that Columbia could not claim *Noerr* immunity. The Court of Appeals characterized "sham" litigation as one of two types of "abuse of . . . judicial processes": either "misrepresentations . . . in the adjudicatory process" or the pursuit of "a pattern of baseless, repetitive claims" instituted "without probable cause, and regardless [\*\*1925] of the merits." [944 F.2d at 1529](#) (quoting *California Motor Transport Co. v. Trucking Unlimited*, [404 U.S. 508, 513, 512, 30 L. Ed. 2d 642, 92 S. Ct. 609 \(1972\)](#)). PRE neither "allege[d] that the [copyright] lawsuit involved misrepresentations" nor "challenge[d] the district court's [\*\*\*620] finding that the infringement action was brought with probable cause, i.e., that the suit was not baseless." [944 F.2d at 1530](#). Rather, PRE opposed summary judgment solely by arguing that "the copyright infringement lawsuit [was] a sham because [Columbia] did not honestly believe that [\*\*\*\*12] the infringement claim was meritorious." *Ibid.*

The Court of Appeals rejected PRE's contention that "subjective intent in bringing the suit was a question of fact precluding entry of summary judgment." *Ibid.* Instead, the court [\*\*\*13] reasoned that the existence of probable cause "preclude[d] the application of the sham exception as a matter of law" [1644] because "a suit brought with probable cause does not fall within the sham exception to the *Noerr-Pennington* doctrine." [944 F.2d at 1531, 1532](#). Finally, the court observed that PRE's failure to show that "the copyright infringement action was baseless" rendered irrelevant any "evidence of [Columbia's] subjective intent." [Id. at 1533](#). It accordingly rejected PRE's request for further discovery on Columbia's intent.

[\*55] The Courts of Appeals have defined "sham" in inconsistent and contradictory ways.<sup>3</sup> We once observed that "sham" might become "no more than a label courts could apply to activity they deem unworthy of antitrust immunity." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, [486 U.S. 492, 508, n.10, 100 L. Ed. 2d 497, 108 S. Ct. 1931 \(1988\)](#). The array of definitions adopted by lower courts demonstrates that this observation was prescient.

[\*\*\*14] //

PRE contends that "the Ninth Circuit erred in holding that an antitrust plaintiff must, as a threshold prerequisite [\*56] . . . , establish that a sham lawsuit is baseless as a matter of law." Brief for Petitioners 14. It invites us to adopt an approach under [\*\*\*621] which either "indifference to . . . outcome," *ibid.*, or failure to prove that a petition for redress of grievances "would . . . have been brought but for [a] predatory motive," Tr. of Oral Arg. 10, would expose a defendant to antitrust liability [\*\*1926] under the sham exception. We decline PRE's invitation.

[LEdHN\[3\]](#) [↑] [3]HN4[↑] Those who petition government for redress are generally immune from antitrust liability. We first recognized in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, [365 U.S. 127, 5 L. Ed.](#)

<sup>3</sup> Several Courts of Appeals demand that an alleged sham be proved legally unreasonable. See *McGuire Oil Co. v. Mapco, Inc.*, [958 F.2d 1552, 1560, and n.12 \(CA11 1992\)](#); *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, [700 F.2d 785, 809-812 \(CA2 1983\)](#), cert. denied, [464 U.S. 1073, 79 L. Ed. 2d 220, 104 S. Ct. 984 \(1984\)](#); *Hydro-Tech Corp. v. Sundstrand Corp.*, [673 F.2d 1171, 1177 \(CA10 1982\)](#); *Federal Prescription Service, Inc. v. American Pharmaceutical Assn.*, [214 U.S. App. D.C. 76, 85, 89, 663 F.2d 253, 262, 266 \(1981\)](#), cert. denied, [455 U.S. 928, 71 L. Ed. 2d 472, 102 S. Ct. 1293 \(1982\)](#). Still other courts have held that successful litigation by definition cannot be sham. See, e.g., *Eden Hannon & Co. v. Sumitomo Trust & Banking Co.*, [914 F.2d 556, 564-565 \(CA4 1990\)](#), cert. denied, [499 U.S. 947, 113 L. Ed. 2d 467, 111 S. Ct. 1414 \(1991\)](#); *South Dakota v. Kansas City Southern Industries, Inc.*, [880 F.2d 40, 54 \(CA8 1989\)](#), cert. denied *sub nom.* *South Dakota v. Kansas City Southern R. Co.*, [493 U.S. 1023, 107 L. Ed. 2d 745, 110 S. Ct. 726 \(1990\)](#); *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, [749 F.2d 154, 161 \(CA3 1984\)](#).

Other Courts of Appeals would regard some meritorious litigation as sham. The Sixth Circuit treats "genuine [legal] substance" as raising merely "a *rebuttable* presumption" of immunity. *Westmac, Inc. v. Smith*, [797 F.2d 313, 318 \(1986\)](#) (emphasis added), cert. denied, [479 U.S. 1035, 93 L. Ed. 2d 838, 107 S. Ct. 885 \(1987\)](#). The Seventh Circuit denies immunity for the pursuit of valid claims if "the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation." *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, [694 F.2d 466, 472 \(1982\)](#), cert. denied, [461 U.S. 958, 77 L. Ed. 2d 1317, 103 S. Ct. 2430 \(1983\)](#). Finally, in the Fifth Circuit, "success on the merits does not . . . preclude" proof of a sham if the litigation was not "significantly motivated by a genuine desire for judicial relief." *In re Burlington Northern, Inc.*, [822 F.2d 518, 528 \(1987\)](#), cert. denied *sub nom.* *Union Pacific R. Co. v. Energy Transportation Systems, Inc.*, [484 U.S. 1007, 98 L. Ed. 2d 652, 108 S. Ct. 701 \(1988\)](#).

2d 464, 81 S. Ct. 523 (1961), that "the Sherman Act does not prohibit . . . persons from associating together in an attempt to persuade the legislature or the executive to take particular action with [\*\*\*\*15] respect to a law that would produce a restraint or a monopoly." Id., at 136. Accord, Mine Workers v. Pennington, 381 U.S. 657, 669, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965). In light of the government's "power to act in [its] representative capacity" and "to take actions . . . that operate to restrain trade," we reasoned that the Sherman Act does not punish "political activity" through which "the people . . . freely inform the government of their wishes." Noerr, 365 U.S. at 137. Nor did we "impute to Congress an intent to invade" the First Amendment right to petition. 365 U.S. at 138.

*Noerr*, however, withheld HN5[<sup>↑</sup>] immunity from "sham" activities because "application of the Sherman Act would be justified" when petitioning activity, "ostensibly directed toward influencing governmental action, is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor." Id., at 144. In *Noerr* itself, we found that a publicity campaign by railroads seeking legislation [\*\*\*\*16] harmful to truckers was no sham in that the "effort to influence legislation" was "not only genuine but also highly successful." *Ibid.*

LEdHN[1B][<sup>↑</sup>] [1B] In California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972), we elaborated on *Noerr* in two relevant [\*57] respects. First, we extended HN6[<sup>↑</sup>] *Noerr* to "the approach of citizens . . . to administrative agencies . . . and to courts." 404 U.S. at 510. Second, we held that the complaint showed a sham not entitled to immunity when it contained allegations that one group of highway carriers "sought to bar . . . competitors from meaningful access to adjudicatory [1645] tribunals and so to usurp that decisionmaking process" by "institut[ing] . . . proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases." Id., at 512 (internal quotation marks omitted). We left unresolved the question presented by this case -- whether litigation may [\*\*\*\*17] be sham merely because a subjective expectation of success does not motivate the litigant. We now answer this question in the negative and hold that HN7[<sup>↑</sup>] an objectively reasonable effort to litigate cannot be sham regardless of subjective intent.<sup>4</sup>

[\*\*\*\*18] [\*\*\*622] Our original formulation of antitrust petitioning immunity required that unprotected activity lack objective reasonableness. *Noerr* rejected the contention that an attempt "to influence the passage and enforcement of laws" might lose immunity merely because the lobbyists' "sole purpose . . . was to destroy [their] competitors." 365 U.S. at 138. Nor were we persuaded by a showing that a publicity campaign "was intended to and did in fact injure [competitors] in their relationships with the public and with their customers," since such "direct injury" was merely "an incidental effect of the . . . campaign to influence governmental action." Id., at 143. [\*58] We reasoned that "the right of the people to [\*\*1927] inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so." Id., at 139. In short, "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." Pennington, 381 U.S. at 670.

LEdHN[4][<sup>↑</sup>] [4] [\*\*\*\*19] Nothing in *California Motor Transport* retreated from these principles. Indeed, we recognized that HN9[<sup>↑</sup>] recourse to agencies and courts should not be condemned as sham until a reviewing court has "discern[ed] and draw[n]" the "difficult line" separating objectively reasonable claims from "a pattern of baseless, repetitive claims . . . which leads the factfinder to conclude that the administrative and judicial processes have been abused." 404 U.S. at 513. Our recognition of a sham in that case signifies that the institution of legal proceedings "without probable cause" will give rise to a sham if such activity effectively "bar[s] . . . competitors from meaningful access to adjudicatory tribunals and so . . . usurp[s] the decisionmaking process." Id., at 512.

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<sup>4</sup> *California Motor Transport* did refer to the antitrust defendants' "purpose to deprive . . . competitors of meaningful access to the . . . courts." 404 U.S. at 512. See also id., at 515 (noting a "purpose to eliminate . . . a competitor by denying him free and meaningful access to the agencies and courts"); id., at 518 (Stewart, J., concurring in judgment) (agreeing that the antitrust laws could punish acts intended "to discourage and ultimately to prevent [a competitor] from invoking" administrative and judicial process). HN8[<sup>↑</sup>] That a sham depends on the existence of anticompetitive intent, however, does not transform the sham inquiry into a purely subjective investigation.

[LEdHN\[1C\]](#) [1C] Since *California Motor Transport*, we have consistently assumed that the sham exception contains an indispensable objective component. We have described a sham as "evidenced by repetitive lawsuits carrying the [\*\*\*\*20] hallmark of *insubstantial* claims." [Otter Tail Power Co. v. United States](#), 410 U.S. 366, 380, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973) (emphasis added). We regard as sham "private action that is not genuinely aimed at procuring favorable government action," as opposed to "a valid effort to influence government action." [Allied Tube & Conduit Corp. v. Indian Head, Inc.](#), 486 U.S. at 500, n.4. And we have explicitly observed that a successful "effort to influence governmental action . . . certainly cannot be characterized as a sham." [Id.](#), at 502. See also [Vendo Co. v. Lektro-Vend Corp.](#), 433 U.S. 623, 645, 53 L. Ed. 2d 1009, 97 S. Ct. 2881 (1977) (BLACKMUN, J., concurring [\*\*\*623] in result) (describing a successful lawsuit as a "genuine attempt to use the . . . adjudicative process legitimately" [\*59] rather than "a pattern of baseless, repetitive claims"). Whether applying *Noerr* as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham. See, [\*\*\*\*21] e.g., [FTC v. Superior Court Trial Lawyers Assn.](#), 493 U.S. 411, 424, 107 L. Ed. 2d 851, 110 S. Ct. 768 (1990); [NAACP v. Claiborne Hardware Co.](#), 458 U.S. 886, 913-914, 73 L. Ed. 2d 1215, 102 S. Ct. 3409 (1982). Cf. [Vendo, supra](#), at 635-636, n.6, 639, n.9 (plurality opinion of REHNQUIST, J.); [id.](#), at 644, n., 645 (BLACKMUN, J., concurring in result). Indeed, by analogy to *Noerr*'s sham exception, we held that even an "improperly motivated" lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is "baseless." [Bill Johnson's Restaurants, Inc. v. NLRB](#), 461 U.S. 731, 743-744, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983). Our decisions therefore establish that [HN10](#) the legality of objectively reasonable petitioning "directed toward obtaining governmental action" is "not at all affected by any anticompetitive purpose [the actor] may have had." [Noerr](#), 365 U.S. at 140, quoted in [Pennington, supra](#), at 669. [\*\*\*\*22]

Our most recent applications of *Noerr* immunity further demonstrate that [HN11](#) neither [1646] *Noerr* immunity nor its sham exception turns on subjective intent alone. In [Allied Tube, supra](#), at 503, and [FTC v. Trial Lawyers, supra](#), at 424, 427, and n.11, we refused to let antitrust defendants immunize otherwise unlawful restraints of trade by pleading a subjective intent to [\*\*1928] seek favorable legislation or to influence governmental action. Cf. [National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.](#), 468 U.S. 85, 101, n.23, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984) ("Good motives will not validate an otherwise anticompetitive practice"). In [Columbia v. Omni Outdoor Advertising, Inc.](#), 499 U.S. 365, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991), we similarly held that challenges to allegedly sham petitioning activity must be resolved according to objective criteria. We dispelled the notion that an antitrust plaintiff could prove a sham merely by showing that its competitor's "purposes were to [\*\*\*\*23] delay [the [\*60] plaintiff's] entry into the market and even to deny it a meaningful access to the appropriate . . . administrative and legislative fora." [Id.](#), at 381 (internal quotation marks omitted). We reasoned that such inimical intent "may render the manner of lobbying improper or even unlawful, but does not necessarily render it a 'sham.'" *Ibid.* Accord, [id.](#), at 398 (STEVENS, J., dissenting).

In sum, fidelity to precedent compels us to reject a purely subjective definition of "sham." The sham exception so construed would undermine, if not vitiate, *Noerr*. And despite whatever "superficial certainty" it might provide, a subjective standard would utterly fail to supply "real 'intelligible guidance.'" [Allied Tube, supra](#), at 508, n.10.

### [\*\*\*624] III

[LEdHN\[1D\]](#) [1D] [LEdHN\[5A\]](#) [5A] [LEdHN\[6\]](#) [6] [HN12](#) We now outline a two-part definition [\*\*\*\*24] of "sham" litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail.<sup>5</sup> Only if challenged litigation is objectively meritless may a court examine the litigant's

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<sup>5</sup> [HN14](#) A winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham. On the other hand, when the antitrust defendant has lost the underlying litigation, a court must "resist the understandable temptation to engage in *post hoc* reasoning by concluding" that an ultimately unsuccessful "action must have been unreasonable or without foundation." [Christiansburg Garment Co. v. EEOC](#), 434 U.S. 412, 421-422, 54 L. Ed. 2d 648, 98 S. Ct. 694 (1978). Accord,

subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere [<sup>\*61</sup>] directly with the business relationships of a competitor," Noerr, supra, at 144 (emphasis added), through the "use [of] the governmental process -- as opposed to the outcome of that process -- as an anticompetitive weapon," Omni, 499 U.S. at 380 (emphasis in original). This two-tiered process requires the plaintiff to disprove the challenged lawsuit's *legal* viability before the court will entertain evidence of the suit's *economic* viability. Of course, [\*\*\*25] HN13[<sup>↑</sup>] even a plaintiff who defeats the defendant's claim to *Noerr* immunity by demonstrating both the objective and the subjective components of a sham must still prove a substantive antitrust violation. Proof of a sham merely deprives the defendant of immunity; it does not relieve the plaintiff of the obligation to establish all other elements of his claim.

#### LEdHN[5B][<sup>↑</sup>] [5B]

[\*\*\*\*26] Some of the apparent confusion over the meaning of "sham" may stem from our use of the word "genuine" to denote the opposite of "sham." See Omni, supra, at 382; Allied Tube, 486 U.S. at 500, n.4; Noerr, supra, at 144; Vendo Co. v. Lektro-Vend Corp., supra, at 645 (BLACKMUN, J., concurring in result). HN15[<sup>↑</sup>] The word "genuine" has both objective and subjective connotations. On [\*\*1929] one hand, "genuine" means "actually having the reputed or apparent qualities or character." Webster's Third New International Dictionary 948 (1986). "Genuine" in this sense governs Federal Rule of Civil Procedure 56, under which a "genuine issue" is one "that properly can be resolved only by a finder of fact because [it] may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (emphasis added). On the other hand, "genuine" also means "sincerely and honestly felt or experienced." Webster's Dictionary, *supra*, at 948. [\*\*\*\*27] To be sham, therefore, litigation must fail to be [\*\*\*625] "genuine" in both senses of the word.<sup>6</sup>

[1647] [\*\*\*\*28] [\*62] IV

LEdHN[2B][<sup>↑</sup>] [2B] We conclude that the Court of Appeals properly affirmed summary judgment for Columbia on PRE's antitrust counterclaim. Under the objective prong of the sham exception, the Court of Appeals correctly held that sham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief. See 944 F.2d at 1529.

LEdHN[1E][<sup>↑</sup>] [1E] LEdHN[7A][<sup>↑</sup>] [7A] HN16[<sup>↑</sup>] The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation. The notion of probable cause, as understood and applied in the common-law tort of wrongful civil proceedings,<sup>7</sup> requires the plaintiff to prove that the defendant lacked probable cause to institute an unsuccessful civil lawsuit and that the defendant pressed the action for an improper, malicious purpose. [\*\*\*\*29] Stewart v. Sonneborn, 98 U.S. 187, 194, 25 L. Ed. 116 (1879); Wyatt

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Hughes v. Rowe, 449 U.S. 5, 14-15, 66 L. Ed. 2d 163, 101 S. Ct. 173 (1980) (per curiam). The court must remember that "even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." Christiansburg, supra, at 422.

<sup>6</sup> In surveying the "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations," we have noted that "unethical conduct in the setting of the adjudicatory process often results in sanctions" and that "misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." California Motor Transport, 404 U.S. at 512-513. We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations. Cf. Fed. Rule Civ. Proc. 60(b)(3) (allowing a federal court to "relieve a party . . . from a final judgment" for "fraud . . . , misrepresentation, or other misconduct of an adverse party"); Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 176-177, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965); id., at 179-180 (Harlan, J., concurring).

<sup>7</sup> This tort is frequently called "malicious prosecution," which (strictly speaking) governs the malicious pursuit of *criminal* proceedings without probable cause. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Torts § 120, p. 892 (5th ed. 1984). The threshold for showing probable cause is no higher in the civil context than in the criminal. See Restatement (Second) of Torts § 674, Comment e, pp. 454-455 (1977).

v. Cole, 504 U.S. 158, 176, 118 L. Ed. 2d 504, 112 S. Ct. 1827 (1992) (REHNQUIST, C. J., dissenting); T. Cooley, Law of Torts \*181. Cf. Wheeler v. Nesbitt, 65 U.S. 544, 549-550, 16 L. Ed. 765 (1861) (related tort for malicious prosecution of criminal charges). Probable cause to institute civil proceedings requires no more than a "reasonable belief that there is a chance that [a] claim [\*63] may be held valid upon adjudication" (internal quotation marks omitted). Hubbard v. Beatty & Hyde, Inc., 343 Mass. 258, 262, 178 N.E.2d 485, 488 (1961); Restatement (Second) of Torts § 675, Comment e, pp. 454-455 (1977). Because the absence of probable cause is an essential element of the tort, the existence of probable cause is an absolute defense. See Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co., 120 U.S. 141, 149, 30 L. Ed. 614, 7 S. Ct. 472 (1887); Wheeler, supra, at 551; Liberty Loan Corp. of Gadsden v. Mizell, 410 So. 2d 45, 48 (Ala. 1982). [\*\*\*\*30] Just as evidence of anticompetitive intent cannot affect the objective prong of *Noerr*'s sham exception, a showing of malice alone will neither entitle the wrongful civil proceedings plaintiff to prevail nor permit the factfinder to infer the absence of probable cause. Stewart, supra, at 194; Wheeler, supra, at 551; 2 C. [\*\*1930] Addison, Law [\*\*\*626] of Torts § 1, P 853, pp. 67-68 (1876); T. Cooley, *supra*, at \*184. HN17[] When a court has found that an antitrust defendant claiming *Noerr* immunity had probable cause to sue, that finding compels the conclusion that a reasonable litigant in the defendant's position could realistically expect success on the merits of the challenged lawsuit. Under our decision today, therefore, a proper probable-cause determination irrefutably demonstrates that an antitrust plaintiff has not proved the objective prong of the sham exception and that the defendant is accordingly entitled to *Noerr* immunity.

LEdHN[7B][] [7B]

[\*\*\*\*31] LEdHN[2C][] [2C]LEdHN[8][] [8]The District Court and the Court of Appeals correctly found that Columbia had probable cause to sue PRE for copyright infringement. Where, as here, there is no dispute over the predicate facts of the underlying legal proceeding, a court may decide probable cause as a matter of law. Crescent, supra, at 149; Stewart, supra, at 194; Nelson v. Miller, 227 Kan. 271, 277, 607 P.2d 438, 444 (1980); Stone v. Crocker, 41 Mass. 81, 84-85 (1831); J. Bishop, *Commentaries on Non-Contract Law* § 240, p. 96 (1889). See also Director General of Railroads v. Kastenbaum, 263 U.S. 25, 28, 68 L. Ed. 146, 44 S. Ct. 52 (1923) ("The question is not whether [the defendant] thought the facts to [\*64] constitute probable cause, but whether the court thinks they did"). Columbia enjoyed the "exclusive right . . . to perform [its] copyrighted" motion pictures "publicly." 17 U.S.C. § 106(4). Regardless of whether it intended [\*\*\*\*32] any monopolistic or predatory use, Columbia acquired this statutory right for motion pictures as "original" audiovisual "works of authorship fixed" in a "tangible medium of expression." § 102(a)(6). Indeed, to condition a copyright upon a demonstrated lack of anticompetitive intent would upset the notion of copyright as a "limited grant" of "monopoly privileges" intended simultaneously "to motivate the creative activity of authors" and "to give the public appropriate access to their work product." Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984).

LEdHN[2D][] [2D]When the District Court entered summary judgment for PRE on Columbia's copyright claim in 1986, it was by no means [1648] clear whether PRE's videodisc rental activities intruded on Columbia's copyrights. At that time, the Third Circuit and a District Court within the Third Circuit had held that the rental of video cassettes for viewing in on-site, private screening rooms infringed on the copyright owner's right of public performance. Columbia Pictures Industries, Inc. v. Redd Horne, Inc., 749 F.2d 154 (1984); [\*\*\*\*33] Columbia Pictures Industries, Inc. v. Aveco, Inc., 612 F. Supp. 315 (MD Pa. 1985), aff'd, 800 F.2d 59 (1986). Although the District Court and the Ninth Circuit distinguished these decisions by reasoning that hotel rooms offered a degree of privacy more akin to the home than to a video rental store, see 228 U.S.P.Q. (BNA) at 746, 866 F.2d 278, 280-281, copyright scholars criticized both the reasoning and the outcome of the Ninth Circuit's decision, see 1 P. Goldstein, *Copyright: Principles, Law and Practice* § 5.7.2.2, pp. 616-619 (1989); 2 M. Nimmer & D. Nimmer, Nimmer on Copyright § 8.14[C][3], pp. 8-168 to 8-173 (1992). The Seventh Circuit expressly "decline[d] to follow" the Ninth Circuit and adopted instead [\*\*\*627] the Third Circuit's definition of a "public place." Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1020, cert. denied, 502 U.S. 861 (1991). In light of the unsettled condition of the law, Columbia plainly had probable cause to sue.

Any reasonable copyright owner in Columbia's position could have believed that it had some chance of winning [\*\*\*\*34] an infringement suit against PRE. Even though it did not survive PRE's motion for summary judgment, Columbia's copyright action was arguably "warranted by existing law" or at the very least was based on an objectively "good faith argument for the extension, modification, or [\*\*1931] reversal of existing law." [Fed. Rule Civ. Proc. 11](#). By the time the Ninth Circuit had reviewed all claims in this litigation, it became apparent that Columbia might have won its copyright suit in either the Third or the Seventh Circuit. Even in the absence of supporting authority, Columbia would have been entitled to press a novel copyright claim as long as a similarly situated reasonable litigant could have perceived some likelihood of success. A court could reasonably conclude that Columbia's infringement action was an objectively plausible effort to enforce rights. Accordingly, we conclude that PRE failed to establish the objective prong of *Noerr*'s sham exception.

[LEdHN\[2E\]](#) [2E] [LEdHN\[9\]](#) [9]Finally, the Court of Appeals properly refused PRE's request for further [\*\*\*\*35] discovery on the economic circumstances of the underlying copyright litigation. As we have held, PRE could not pierce Columbia's *Noerr* immunity without proof that Columbia's infringement action was objectively baseless or frivolous. Thus, the District Court had no occasion to inquire whether Columbia was indifferent to the outcome on the merits of the copyright suit, whether any damages for infringement would be too low to justify Columbia's investment in the suit, or whether Columbia had decided to sue primarily for the benefit of collateral injuries inflicted through the use of legal process. Contra, [Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 472 \(CA7 1982\)](#), cert. denied, 461 U.S. 958, 77 L. Ed. 2d 1317, 103 S. Ct. 2430 (1983). Such matters concern Columbia's [\*66] economic motivations in bringing suit, which were rendered irrelevant by the objective legal reasonableness of the litigation. The existence of probable cause eliminated any "genuine issue as to any material fact," [Fed. Rule Civ. Proc. 56\(c\)](#), and summary judgment properly issued.

We affirm the judgment of the Court of Appeals.

*So ordered.*

**Concur by:** [\*\*\*\*36] SOUTER; STEVENS

## Concur

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JUSTICE SOUTER, concurring.

The Court holds today that a person cannot incur antitrust liability merely by bringing a lawsuit as long as the suit is not "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Ante*, at 60. The Court assumes that the District Court and the Court of Appeals were finding this very test satisfied when they concluded that Columbia's suit against PRE for copyright infringement was supported by "probable [\*\*\*628] cause," a standard which, as the Court explains it in this case, requires a "reasonable belief that there is a chance that [a] claim may be held valid upon adjudication." *Ante*, at 62-63 (internal quotation marks omitted). I agree that this term, so defined, is rightly read as expressing the same test that the Court announces today; the expectation of a reasonable litigant can be dubbed a "reasonable belief," and realistic expectation of success on the merits can be paraphrased as "a chance of being held valid upon adjudication."

Having established this identity of meaning, however, the Court proceeds to discuss the particular facts [\*\*\*\*37] of this case, not in terms of its own formulation of objective baselessness, but in terms of "probable cause." Up to a point, this is understandable; the Court of Appeals used the term "probable cause" to represent objective reasonableness, and it [1649] seems natural to use the same term when reviewing that court's conclusions. Yet as the Court acknowledges, *ante*, at 63, since there is no dispute over the facts underlying the suit [\*67] at issue here, the question whether that suit was objectively baseless is purely one of law, which we are obliged to consider *de novo*. There is therefore no need to frame the question in the Court of Appeals's terms. Accordingly, I would prefer to put the question in our own terms, and to conclude simply that, on the undisputed facts and the law as it stood when Columbia filed its suit, a reasonable litigant could realistically have expected success on the merits.

My preference stems from a concern that other courts could read today's opinion as [\*\*1932] transplanting every substantive nuance and procedural quirk of the common-law tort of wrongful civil proceedings into federal **antitrust law**. I do not understand the Court to mean anything [\*\*\*\*38] of the sort, however, any more than I understand its citation of Rule 11 of the Federal Rules of Civil Procedure, see *ante*, at 65, to signal the importation of every jot and tittle of the law of attorney sanctions. Rather, I take the Court's use of the term "probable cause" merely as shorthand for a reasonable litigant's realistic expectation of success on the merits, and on that understanding, I join the Court's opinion.

JUSTICE STEVENS, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

While I agree with the Court's disposition of this case and with its holding that "an objectively reasonable effort to litigate cannot be sham regardless of subjective intent," *ante*, at 57, I write separately to disassociate myself from some of the unnecessarily broad dicta in the Court's opinion. Specifically, I disagree with the Court's equation of "objectively baseless" with the answer to the question whether any "reasonable litigant could realistically expect success on the merits." <sup>1</sup> [\*\*\*\*40] There might [\*\*\*\*629] well be lawsuits that fit the latter definition [\*68] but can be shown to be objectively *unreasonable*, and thus shams. It might not be objectively reasonable [\*\*\*\*39] to bring a lawsuit just because some form of success on the merits -- no matter how insignificant -- could be expected.<sup>2</sup> With that possibility in mind, the Court should avoid an unnecessarily broad holding that it might regret when confronted with a more complicated case.

As the Court recently explained, a "sham" is the use of "the governmental process -- as opposed to the *outcome* of that process -- as an anticompetitive weapon." Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380, 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991). The distinction between abusing the judicial process to restrain competition and prosecuting a lawsuit that, if successful, will restrain competition must guide any court's decision whether a particular filing, or series of filings, is a sham. The label "sham" is appropriately applied to a case, or series of cases, in which the plaintiff is indifferent to the outcome of the litigation itself, but has nevertheless [\*\*\*\*41] sought to impose a collateral harm on the defendant by, for example, impairing his credit, abusing the discovery process, or interfering with his access to governmental agencies. It might also apply to a plaintiff who had some reason to expect success on the merits but because of its tremendous cost would not bother to achieve that result without the benefit of collateral injuries [\*69] imposed on its competitor by the legal process alone. Litigation filed or pursued for such collateral purposes is fundamentally different from a case in which the relief sought in the litigation itself would give the plaintiff a competitive advantage or, perhaps, exclude a potential competitor from entering a market with a product that either infringes the plaintiff's patent or copyright or violates an exclusive franchise granted by a governmental body.

[\*\*1933] The case before us today is in the latter, obviously legitimate, category. There was no unethical or other improper use of the judicial system; instead, respondents invoked the federal court's jurisdiction to determine [1650] whether they could lawfully restrain competition with petitioners. The relief they sought in their original action, [\*\*\*\*42] if granted, would have had the anticompetitive consequences authorized by federal copyright law. Given that the original copyright infringement action was objectively reasonable -- and the District Court, the Court of Appeals, and this Court all agree that it was -- neither the respondents' own measure of their chances of success

<sup>1</sup> *Ante*, at 60. See also *ante*, at 62: "Sham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief"; *ante*, at 60: "If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized under *Noerr* . . . ." But see *ante*, at 62: "The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation." And see *ante*, at 65: "Columbia's copyright action was arguably 'warranted by existing law'" under the standards of Federal Rule of Civil Procedure 11. These varied restatements of the Court's new test make it unclear whether it is willing to affirm the Court of Appeals by any of these standards individually, or by all of them together.

<sup>2</sup> The Court's recent decision in Farrar v. Hobby, 506 U.S. 103, 121 L. Ed. 2d 494, 113 S. Ct. 566 (1992) makes me wonder whether "10 years of litigation and two trips to the Court of Appeals" to recover "one dollar from one defendant," id., at 116 (O'CONNOR, J., concurring), would qualify as a reasonable expectation of "favorable relief" under today's opinion.

nor an alleged goal of harming petitioners provides a sufficient basis for treating it as a [\*\*\*630] sham. We may presume that every litigant intends harm to his adversary; moreover, uncertainty about the possible resolution of unsettled questions of law is characteristic of the adversary process. Access to the courts is far too precious a right for us to infer wrongdoing from nothing more than using the judicial process to seek a competitive advantage in a doubtful case. Thus, the Court's disposition of this case is unquestionably correct.

I am persuaded, however, that all, or virtually all, of the Courts of Appeals that have reviewed similar claims (involving a single action seeking to enforce a property right) would have reached the same conclusion. To an unnecessary degree, therefore, the Court has set up a straw man to justify its elaboration of [\*\*\*\*43] a two-part test describing all potential shams. Of the 10 cases cited by the Court as evidence of [\*70] widespread confusion about the scope of the "sham" exception to the doctrine of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961), and *Mine Workers v. Pennington*, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965), see *ante*, at 55, n.3, 5 share three important characteristics with this case: The alleged injury to competition was defined by the prayer for relief in the antitrust defendant's original action; there was no unethical conduct or collateral harm "external to the litigation or to the result reached in the litigation";<sup>3</sup> [\*\*\*\*44] and there had been no series of repetitive claims. Each of those courts concluded, as this Court does today, that allegations of subjective anticompetitive motivation do not make an otherwise reasonable lawsuit a sham.<sup>4</sup>

In each of the five other cases cited by the Court, the plaintiff alleged antitrust violations more [\*\*\*\*45] extensive than the filing of a single anticompetitive lawsuit. In three of those cases the core of the alleged antitrust violation lay in the act of petitioning the government for relief: One involved the repetitive filing of baseless administrative claims,<sup>5</sup> [\*\*\*\*47] another involved [\*71] extensive evidence [\*\*1934] of anticompetitive motivation [\*\*\*631] behind the lawsuit that followed an elaborate and unsuccessful lobbying effort,<sup>6</sup> [\*\*\*\*48] and in the [1651] third a

<sup>3</sup> *Omni Resource Development Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1414 (CA9 1984) (Kennedy, J.).

<sup>4</sup> See *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552 (CA11 1992) (unsuccessful action to enjoin alleged violations of Alabama's Motor Fuel Marketing Act not a sham); *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171 (CA10 1982) (unsuccessful action alleging misappropriation of trade secrets not a sham); *Eden Hannon & Co. v. Sumitomo Trust & Banking Co.*, 914 F.2d 556 (CA4 1990) (successful action imposing constructive trust on profits derived from breach of nondisclosure agreement not a sham); *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (CA3 1984) (successful copyright infringement not a sham); *South Dakota v. Kansas City Southern Industries, Inc.*, 880 F.2d 40 (CA8 1989) (successful action to enjoin breach of contract not a sham; the court was careful to point out, however, that success does not "categorically preclude a finding of sham." *Id.*, at 54, n.30).

<sup>5</sup> *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785 (CA2 1983), cert. denied, 464 U.S. 1073, 79 L. Ed. 2d 220, 104 S. Ct. 984 (1984). The Second Circuit found that AT&T's continued filing of administrative tariffs long after those claims had become objectively unreasonable supported a jury's sham finding. AT&T's anticompetitive actions were in fact so far removed from the act of petitioning the government for relief that Chief Judge Oakes and Judge Meskill also held, in reliance on *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962), and *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976) (plurality opinion), that tariff filings with the Federal Communications Commission were acts of private commercial activity in the marketplace rather than requests for governmental action, and thus were not even arguably protected by the *Noerr-Pennington* doctrine. *Litton Systems*, 700 F.2d at 806-809.

<sup>6</sup> *Westmac, Inc. v. Smith*, 797 F.2d 313 (CA6 1986), cert. denied, 479 U.S. 1035, 93 L. Ed. 2d 838, 107 S. Ct. 885 (1987). Although the Sixth Circuit did hold that the genuine substance of an anticompetitive lawsuit creates a rebuttable presumption of objective reasonableness, given the facts of that case -- in which the antitrust plaintiff had presented strong evidence that the defendants' lawsuit, which followed a long and unsuccessful lobbying effort, had been motivated solely for the anticompetitive harm the judicial process would inflict on it -- that modest reservation was probably wise. Evidence of anticompetitive animus in *Westmac* was in fact so great that Chief Judge Merritt thought that the plaintiff *had* successfully rebutted the presumptive reasonableness of defendants' lawsuit. The delay from the defendants' combined lobbying and litigation attack had allegedly sent the plaintiff into bankruptcy, and memos from one defendant to its attorney had stated, "'If this [lobbying activity] doesn't succeed, start a lawsuit -- bonds won't sell,'" 797 F.2d at 318, and (in a statement repeated to a codefendant), "'if nothing else,

collateral lawsuit was only one of the many ways in which the antitrust defendant had allegedly tried to put the plaintiff out of business.<sup>7</sup> In each [\*72] of these cases the court showed appropriate deference to our opinions in *Noerr* and *Pennington*, in which we held that the act of petitioning the government (usually in the form of lobbying) deserves especially broad protection from antitrust liability. The Court can point to nothing in these three opinions that would require a different result here. The two remaining cases -- in which the Courts of Appeals did state that a successful lawsuit could be a sham -- did not involve lobbying, but did contain much broader and more complicated allegations than petitioners [\*\*\*\*46] presented below.<sup>8</sup> Like the three opinions described above, these decisions should not be expected to offer guidance, nor be blamed for spawning confusion, in a case alleging that the filing of a single lawsuit violated the Sherman Act.

[\*\*\*49] [\*\*\*632] Even in this Court, more complicated cases, in which, for example, the alleged competitive injury has involved something more than the threat of an adverse outcome in a single [\*73] lawsuit, have produced less definite rules. Repetitive filings, some of which are [\*\*1935] successful and some unsuccessful, may support an inference that the process is being misused. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972). In such a case, a rule that a single meritorious action can never constitute a sham cannot be dispositive. Moreover, a simple rule may be hard to apply when there is evidence that the judicial process has been used as part of a larger program to control a market and to interfere with a potential competitor's financing without any interest in the outcome of the lawsuit itself, see *Otter Tail Power Co. v. United States*, 410 U.S. 366, 379, n.9, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973); *Westmac, Inc. v. Smith*, 797 F.2d 313, 322 (CA6 1986) (Merritt, C. J., dissenting). It is in more complex cases that courts have required a more sophisticated [\*\*\*50] analysis -- one going beyond a mere evaluation of the merits of a single claim.

In one such case Judge Posner made the following observations about the subtle distinction between suing a competitor to get damages and filing a lawsuit only in the hope that the expense and burden of defending it will make the defendant abandon its competitive behavior:

"But we are not prepared to rule that the difficulty of distinguishing lawful from unlawful purpose in litigation between competitors is so acute that such litigation can never be considered an actionable restraint of trade, provided it has some, though perhaps only threadbare, basis in law. Many claims not wholly groundless would never be sued on for their own sake; the stakes, discounted by the probability of winning, would be too low to repay the investment in litigation. Suppose a monopolist brought a tort action against its single, tiny competitor; the action had a colorable basis in law; but in fact the monopolist would never have brought the suit -- its chances of winning, or the damages it could hope to get if it did win, were too small compared to what it would

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we'll delay sale of the bonds," *id.*, at 322 (Merritt, C. J., dissenting) (emphasis omitted). In any event, the Sixth Circuit rule -- to the extent that it would apply in a case as simple as this one -- would result in the same conclusion we reach here.

<sup>7</sup> *Federal Prescription Service, Inc. v. American Pharmaceutical Assn.*, 214 U.S. App. D.C. 76, 663 F.2d 253 (1981), cert. denied, 455 U.S. 928, 71 L. Ed. 2d 472, 102 S. Ct. 1293 (1982). In that case, the antitrust plaintiff alleged a 2-decade long conspiracy to lobby, boycott, and sue it (in state licensing boards, state legislatures, the marketplace, and both state and federal courts) out of existence. In spite of those allegations, the Court of Appeals found that the defendant's actions, which primarily consisted in lobbying for the abolition of plaintiff's mail-order prescription business, were immune under *Noerr-Pennington*.

<sup>8</sup> In *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466 (1982) (Posner, J.), cert. denied, 461 U.S. 958, 77 L. Ed. 2d 1317, 103 S. Ct. 2430 (1983), the antitrust defendant's alleged violations of several provisions of the Sherman and Clayton Acts included much more than the filing of a single lawsuit; they encompassed a broad scheme of monopolizing the entire relevant market by: purchasing patents; threatening to file many other, patently groundless lawsuits; acquiring a competitor; dividing markets; and filing a fraudulent patent application. In *In re Burlington Northern, Inc.*, 822 F.2d 518 (CA5 1987), cert. denied, 484 U.S. 1007 (1988), the plaintiffs alleged, and produced evidence to support their theory, that the defendant had filed suit solely to cause them a delay of crippling expense, and the defendants had either brought or unsuccessfully defended a succession of related lawsuits involving plaintiff's right to compete. In both of these cases the Courts of Appeals ably attempted to balance strict enforcement of the antitrust laws with possible abuses of the judicial process. That they permitted some reliance on subjective motivation -- as even we have done in cases alleging abuse of judicial process, see *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513-518, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972) -- is neither surprising nor relevant in a case involving no such allegations.

have to spend on the litigation -- except that it wanted to [\*\*\*\*51] [\*74] use pretrial discovery to discover its competitor's trade secrets; or hoped that the competitor would be required to make public disclosure of its potential liability [1652] in the suit and that this disclosure would increase the interest rate that the competitor had to pay for bank financing; or just wanted to impose heavy legal costs on the competitor in the hope of deterring entry by other firms. In these examples the plaintiff wants to hurt a competitor not by getting a judgment against him, which would be a proper objective, but just by the maintenance of the suit, regardless of its outcome. See [\*City of Gainesville v. Florida Power & Light Co., 488 F. Supp. 1258, 1265-66 \(S.D. Fla. 1980\).\*](#)

"Some students of **antitrust law** would regard all of our examples of anticompetitive litigation as fanciful, and in all the evidentiary problems of disentangling real from professed motives would be acute. Concern with the evidentiary problems may explain why [\*\*\*633] some courts hold that a single lawsuit cannot provide a basis for an antitrust claim (see Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington* [\*\*\*\*52] *Doctrine*, 45 U. Chi. L. Rev. 80, 109-10 (1977)) -- an issue we need not face here since three improper lawsuits are alleged, and it can make no difference that they were not all against Grip-Pak. Still, we think it is premature to hold that litigation, unless malicious in the tort sense, can never be actionable under the antitrust laws. The existence of a tort of abuse of process shows that it has long been thought that litigation could be used for improper purposes even when there is probable cause for the litigation; and if the improper purpose is to use litigation as a tool for suppressing competition in its antitrust sense, see, e.g., [\*Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Cos., 682 F.2d 660, 663-64 \(7th Cir. 1982\)\*](#), it becomes a matter of antitrust concern. This is [\*75] not to say that litigation is actionable under the antitrust laws merely because [\*\*1936] the plaintiff is trying to get a monopoly. He is entitled to pursue such a goal through lawful means, including litigation against competitors. The line is crossed when his purpose is not to win a favorable judgment against a competitor but to harass him, [\*\*\*\*53] and deter others, by the process itself -- regardless of outcome -- of litigating. The difficulty of determining the true purpose is great but no more so than in many other areas of **antitrust law**." [\*Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 472 \(1982\).\*](#)

It is important to remember that the distinction between "sham" litigation and genuine litigation is not always, or only, the difference between lawful and unlawful conduct; objectively reasonable lawsuits may still break the law. For example, a manufacturer's successful action enforcing resale price maintenance agreements,<sup>9</sup> restrictive provisions in a license to use a patent or a trademark,<sup>10</sup> or an equipment lease,<sup>11</sup> may evidence, or even constitute, violations of the antitrust laws. On the other hand, just because a sham lawsuit has grievously harmed a competitor does not necessarily mean that it has violated the Sherman Act. See [\*Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 455-459, 122 L. Ed. 2d 247, 113 S. Ct. 884 \(1993\)\*](#). The rare plaintiff who successfully proves a sham must still satisfy the exacting elements of an antitrust demand. See *ante*, at 61. [\*\*\*\*54]

In sum, in this case I agree with the Court's explanation of why respondents' copyright infringement action was not "objectively baseless," and why allegations of improper subjective [\*76] motivation do not make such a lawsuit a "sham." I would not, however, use this easy case as a [\*\*\*634] vehicle for [\*\*\*\*55] announcing a rule that may govern the decision of difficult cases, some of which may involve abuse of the judicial process. Accordingly, I concur in the Court's judgment but not in its opinion.

## References

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<sup>9</sup> [\*Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 \(1911\); Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384, 95 L. Ed. 1035, 71 S. Ct. 745 \(1951\).\*](#)

<sup>10</sup> [\*Timken Roller Bearing Co. v. United States, 341 U.S. 593, 95 L. Ed. 1199, 71 S. Ct. 971 \(1951\); Farbenfabriken Bayer A. G. v. Sterling Drug, Inc., 307 F.2d 207 \(CA3 1962\).\*](#)

<sup>11</sup> [\*International Salt Co. v. United States, 332 U.S. 392, 92 L. Ed. 20, 68 S. Ct. 12 \(1947\); United Shoe Machinery Corp. v. United States, 258 U.S. 451, 66 L. Ed. 708, 42 S. Ct. 363 \(1922\).\*](#)

Noerr-Pennington doctrine, exempting from federal antitrust laws joint efforts to influence governmental action-- Supreme Court cases

[52 Am Jur 2d, Malicious Prosecution 50- 55; 54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 108](#)

9 Am Jur Trials 293, Copyright Infringement Litigation; 24 Am Jur Trials 1, Defending Antitrust Lawsuits

[15 USCS 1, 2](#)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 9.5

L Ed Index, Malicious Prosecution; Noerr-Pennington Doctrine; Probable Cause; Restraints of Trade, Monopolies, and Unfair Trade Practices; Sham

ALR Index, Farce, Mockery, and Sham; Malicious Prosecution; Noerr-Pennington Doctrine; Probable Cause; Restraints of Trade and Monopolies

Annotation References :

"Sham" exception to application of Noerr-Pennington doctrine, exempting from federal antitrust laws joint [\*\*\*\*56] efforts to influence governmental action. 71 ALR Fed 723.

Application of doctrine exempting from federal antitrust laws joint efforts to influence legislative or executive action. 17 ALR Fed 645.

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End of Document



## **Brooke Group v. Brown & Williamson Tobacco Corp.**

Supreme Court of the United States

March 29, 1993, Argued ; June 21, 1993, Decided

No. 92-466

### **Reporter**

509 U.S. 209 \*; 113 S. Ct. 2578 \*\*; 125 L. Ed. 2d 168 \*\*\*; 1993 U.S. LEXIS 4245 \*\*\*\*; 61 U.S.L.W. 4699; 1993-1 Trade Cas. (CCH) P70,277; 93 Cal. Daily Op. Service 4562; 93 Daily Journal DAR 7770; 7 Fla. L. Weekly Fed. S 469

BROOKE GROUP LTD., PETITIONER v. BROWN & WILLIAMSON TOBACCO CORPORATION

**Prior History:** [\*\*\*\*1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

**Disposition:** [964 F.2d 335](#), affirmed.

## **Core Terms**

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prices, cigarettes, generic, segment, branded, black and white, list price, predatory, consumer, supracompetitive, coordination, recoupment, rebates, losses, wholesalers, predation, oligopoly, oligopolistic, Robinson-Patman Act, profits, volume, anti trust law, discounts, tacit, firms, price discrimination, below-cost, competitor, output, injure

## **LexisNexis® Headnotes**

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Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

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

### **HN1 Price Discrimination, Competitive Injuries**

See [15 U.S.C.S. § 13\(a\)](#).

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

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

### **HN2 Price Discrimination, Competitive Injuries**

Although price discrimination within the meaning of [15 U.S.C.S. § 13\(a\)](#) is merely a price difference, the statute as a practical matter could not, and does not, ban all price differences charged to different purchasers of commodities of like grade and quality.

509 U.S. 209, \*209; 113 S. Ct. 2578, \*\*2578; 125 L. Ed. 2d 168, \*\*\*168; 1993 U.S. LEXIS 4245, \*\*\*\*1

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

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

Antitrust & Trade Law > Robinson-Patman Act > Defenses

### **HN3** **Robinson-Patman Act, Claims**

By its terms, the Robinson-Patman Act, [15 U.S.C.S. § 13\(a\)](#), condemns price discrimination only to the extent that it threatens to injure competition.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

### **HN4** **Robinson-Patman Act, Claims**

The Robinson-Patman Act, [15 U.S.C.S. § 13\(a\)](#), should be construed consistently with broader policies of the antitrust laws.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

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

### **HN5** **Robinson-Patman Act, Claims**

Primary-line competitive injury under the Robinson-Patman Act, [15 U.S.C.S. § 13\(a\)](#), is of the same general character as the injury inflicted by predatory pricing schemes actionable under [§ 2](#) of the Sherman Act.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

### **HN6** **Robinson-Patman Act, Claims**

A plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

#### **HN7** **Price Discrimination, Competitive Injuries**

Above-cost prices that are below general market levels or the costs of a firm's competitors do not inflict injury to competition cognizable under the antitrust laws.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

#### **HN8** **Price Discrimination, Competitive Injuries**

A prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.

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

Torts > Business Torts > Unfair Business Practices > Elements

Torts > Business Torts > Unfair Business Practices > Remedies

#### **HN9** **Regulated Practices, Trade Practices & Unfair Competition**

Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

#### **HN10** **Price Discrimination, Competitive Injuries**

Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

#### **HN11** **Price Discrimination, Competitive Injuries**

Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market. If market circumstances or deficiencies in proof would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supracompetitive pricing, the plaintiff's case has failed.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Governments > Legislation > Interpretation

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

## **HN12** [blue icon] **Robinson-Patman Act, Claims**

The normal rule of statutory construction is that identical words used in different parts of the same act are intended to have the same meaning.

Civil Procedure > US Supreme Court Review > General Overview

## **HN13** [blue icon] **Civil Procedure, US Supreme Court Review**

It is not customary for the United States Supreme Court to review the sufficiency of the evidence, but it will do so when the issue is properly before it and the benefits of providing guidance concerning the proper application of a legal standard and avoiding the systemic costs associated with further proceedings justify the required expenditure of judicial resources.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

## **HN14** [blue icon] **Price Discrimination, Competitive Injuries**

The success of any predatory scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

## **HN15** [blue icon] **Price Discrimination, Competitive Injuries**

Because relying on tacit coordination among oligopolists as a means of recouping losses from predatory pricing is highly speculative, competent evidence is necessary to allow a reasonable inference that it poses an authentic threat to competition.

Evidence > ... > Testimony > Expert Witnesses > General Overview

## **HN16** [blue icon] **Testimony, Expert Witnesses**

When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.

## **Lawyers' Edition Display**

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### **Decision**

Evidence presented in action against cigarette manufacturer held insufficient as matter of law to sustain claim of price discrimination injuring competition in violation of Robinson-Patman Act.

### **Summary**

The plaintiff, a cigarette manufacturer which was one of six firms which dominated the cigarette manufacturing industry, increased its declining share of the market by introducing a line of unbranded "black and white" generic cigarettes at a list price about 30 percent below those of branded cigarettes, as to which there had been no significant price competition. A large part of the plaintiff's market gains came at the expense of the defendant, another cigarette manufacturer, which responded by introducing its own black and whites and other discounted cigarettes, beating the first manufacturer's prices and volume discounts and by giving wholesalers larger rebates than the plaintiff gave, both initially and throughout an ensuing rebate war. The plaintiff, alleging trademark infringement and unfair competition, filed suit against the defendant in the United States District Court for the Middle District of North Carolina. The complaint was later amended to allege that the defendant's rebates to wholesalers violated 2(a) of the Clayton Act as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), because the rebates were integral to a supposed scheme of predatory price discrimination. The plaintiff's theory of competitive injury was that (1) the defendant entered the generic market with list prices matching the plaintiff's but with massive discriminatory rebates directed at the plaintiff's biggest wholesalers, (2) the net price paid by wholesalers for the defendant's generic cigarettes would drop below the defendant's cost, (3) the plaintiff would suffer losses trying to defend its market share and wholesale customer base by matching the defendant's rebates, (4) to avoid further losses, the plaintiff would raise its list prices on generics or acquiesce in price leadership by the defendant, (5) higher list prices to consumers would shrink the percentage gap in retail price between generic and branded cigarettes, and (6) this narrowing of the gap would make generics less appealing to consumers, thus slowing the growth of the economy cigarette market and reducing loss of sales of branded cigarettes and their associated supracompetitive prices. A jury returned a verdict in favor of the plaintiff on the price discrimination claim; but the District Court, after reviewing the record, ruled that the defendant was entitled to judgment notwithstanding the verdict, partly because (1) no slowing of the growth rate of generics, and thus no injury to competition, was possible unless there had been tacit coordination of prices among the various manufacturers in the economy cigarette market, and (2) a reasonable jury could only have found that there was no such coordination ([748 F Supp 344](#)). The United States Court of Appeals for the Fourth Circuit affirmed ([964 F2d 335](#)).

On certiorari, the United States Supreme Court affirmed. In an opinion by Kennedy, J., joined by Rehnquist, Ch. J., and O'Connor, Scalia, Souter, and Thomas, JJ., it was held that the defendant was entitled to judgment as a matter of law--even though the record contained sufficient evidence from which a reasonable jury could conclude that the defendant envisioned or intended the anticompetitive course of events alleged by the plaintiff, that the net prices charged to wholesalers by the defendant for generic cigarettes were below the defendant's cost for a period of 18 months, and that this imposed losses on the plaintiff which the plaintiff was unwilling to sustain--because the evidence was inadequate to show that the defendant had a reasonable prospect of recovering its losses from below-cost pricing through slowing the growth of generics and producing sustained supracompetitive pricing in the generic market, as the evidence neither (1) supported a reasonable inference that the defendant and the other cigarette manufacturers actually elevated prices for generic cigarettes above a competitive level, nor (2) demonstrated that the alleged scheme was likely to have brought about tacit coordination and oligopoly pricing in the generic cigarette market.

Stevens, J., joined by White and Blackmun, JJ., dissented, expressing the view that the evidence presented was sufficient to support a finding that the defendant's price discrimination plan, in which the defendant invested millions of dollars for the purpose of achieving an admittedly anticompetitive result, had a reasonable possibility of injuring competition.

### **Headnotes**

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509 U.S. 209, \*209; 113 S. Ct. 2578, \*\*2578; 125 L. Ed. 2d 168, \*\*\*168; 1993 U.S. LEXIS 4245, \*\*\*\*1

JUDGMENT §314.5 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §38 > pricing -- rebates to wholesalers -- judgment notwithstanding verdict -- > Headnote:

[LEdHN\[1A\]](#) [1A] [LEdHN\[1B\]](#) [1B] [LEdHN\[1C\]](#) [1C] [LEdHN\[1D\]](#) [1D] [LEdHN\[1E\]](#) [1E] [LEdHN\[1F\]](#) [1F]

A defendant cigarette manufacturer is entitled to judgment as a matter of law, notwithstanding a jury verdict in favor of the plaintiff, in an action by a competing cigarette manufacturer alleging that the defendant violated the price discrimination provisions of 2(a) of the Clayton Act as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), because no adequate basis for a finding of liability is provided by the alleged oligopolistic price coordination scheme--whereby (1) the defendant would enter the generic segment of the cigarette market, previously dominated by the plaintiff cigarette manufacturer, with list prices matching the plaintiff's but with massive discriminatory volume rebates directed at the plaintiff's biggest wholesalers, (2) the net price charged to wholesalers by the defendant for generic cigarettes would drop below the defendant's cost, (3) the plaintiff would suffer losses trying to defend its market share and wholesale customer base by matching the defendant's rebates, (4) to avoid further losses, the plaintiff would raise its list prices on generics or acquiesce in price leadership by the defendant, (5) higher list prices to consumers would shrink the percentage gap in retail price between generic and branded cigarettes, and (6) this narrowing of the gap would make generics less appealing to consumers, thus slowing the growth of the economy cigarette market and reducing loss of sales of branded cigarettes and their associated supracompetitive prices--where, although the record contains sufficient evidence from which a reasonable jury could conclude that the defendant envisioned or intended this anticompetitive course of events, that the net prices charged to wholesalers by the defendant for generic cigarettes were below the defendant's cost for a period of 18 months, and that this imposed losses on the plaintiff which the plaintiff was unwilling to sustain, the evidence is inadequate to show that the defendant manufacturer had a reasonable prospect of recovering its losses from below-cost pricing through slowing the growth of generics and producing sustained supracompetitive pricing in the generic market, as the evidence neither (1) supports a reasonable inference that the defendant and other cigarette manufacturers actually elevated prices for generic cigarettes above a competitive level, nor (2) demonstrates that the alleged scheme was likely to have brought about tacit coordination and oligopoly pricing in the generic cigarette market. (Stevens, White, and Blackmun, JJ., dissented from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.3 > price discrimination -- purpose of statute -- > Headnote:

[LEdHN\[2\]](#) [2]

The provision of 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, condemning price discrimination ([15 USCS 13\(a\)](#)) is not intended to outlaw price differences that result from or further the forces of competition; thus, the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.5 > price discrimination -- anticompetitive effect -- > Headnote:

[LEdHN\[3A\]](#) [3A] [LEdHN\[3B\]](#) [3B]

Primary-line competitive injury, as required under the price discrimination provisions of 2(a) of the Clayton Act as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), is of the same general character as the injury inflicted by predatory pricing schemes actionable under 2 of the Sherman Act ([15 USCS 2](#)); there are differences between the two statutes, as, for example, the Sherman Act provision condemns predatory pricing when it poses a dangerous possibility of actual monopolization, whereas the Robinson-Patman Act requires only that there be a reasonable

possibility of substantial injury to competition before that Act's protections are triggered; however, the essence of the claim under either statute is the same, namely that a business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market; thus, under either statute, two prerequisites to recovery remain the same, requiring a plaintiff seeking to establish competitive injury resulting from a rival's low prices to prove that (1) the prices complained of are below an appropriate measure of the rival's costs, and (2) the rival has a reasonable prospect--or, under the Sherman Act, a dangerous probability--of recouping the rival's investment in below-cost prices.

APPEAL §1317 > agreement of parties -- > Headnote:

[LEdHN\[4A\]](#) [4A] [LEdHN\[4B\]](#) [4B]

The United States Supreme Court--in reviewing on certiorari lower court decisions in a case involving alleged violations by a cigarette manufacturer, with respect to the generic cigarette market, of the price discrimination provisions of 2(a) of the Clayton Act as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#))--will not resolve a conflict among the lower courts over the appropriate measure of cost to be used in determining whether prices complained of under 2(a) are below cost, where the parties in the case at hand agree that the relevant measure of cost is average variable cost.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §6 > purpose -- acts prohibited -- > Headnote:

[LEdHN\[5\]](#) [5]

The federal antitrust laws are intended for the protection of competition, not competitors; even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws, which do not create a federal law of unfair competition or purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.5 > price discrimination -- competitive harm -- recoupment -- > Headnote:

[LEdHN\[6\]](#) [6]

In order for recoupment to occur--for purposes of the rule that there is no competitive injury actionable either as price discrimination under 2(a) of the Clayton Act as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), or as predatory pricing under 2 of the Sherman Act ([15 USCS 2](#)), unless the competitor has a reasonable prospect or a dangerous probability of recouping its investment in below-cost prices--(1) below-cost pricing must be capable, as a threshold matter, of producing the intended effect on the rivals of the firm accused of such conduct, whether that effect is driving the rivals from the market or causing them to raise their prices to supracompetitive levels within a disciplined oligopoly, and (2) if circumstances indicate that below-cost pricing could likely produce its intended effect on the target, then the further question arises whether such pricing would likely injure competition in the relevant market; with respect to the first factor, determining the likelihood of recoupment requires an understanding of the extent and duration of the alleged predation, the relative financial strength of the predator and of its intended victim, and their respective incentives and will, the inquiry being whether, given the aggregate losses caused by the below-cost pricing, the intended target would likely succumb; with respect to the second factor, the plaintiff is required to demonstrate a likelihood that the alleged predatory scheme would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the

509 U.S. 209, \*209; 113 S. Ct. 2578, \*\*2578; 125 L. Ed. 2d 168, \*\*\*168; 1993 U.S. LEXIS 4245, \*\*\*\*1

money invested in the predation, and determining whether recoupment is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market; if market circumstances or deficiencies in proof would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supracompetitive pricing, then the plaintiff's case has failed, and in certain situations--such as where the market is highly diffuse and competitive, new entry is easy, or the defendant lacks adequate excess capacity to absorb the market shares of rivals and cannot quickly create or purchase new capacity--summary disposition of the case is appropriate.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §37 > price control -- tacit collusion --

> Headnote:

[LEdHN\[7\]](#) [7]

It is not in itself unlawful for firms in a concentrated market to effectively share monopoly power through a process variously known as tacit collusion, oligopolistic price coordination, or conscious parallelism, whereby such firms set their prices at a supracompetitive, profit-maximizing level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.

RERAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.5 > predatory pricing -- competitive harm --

> Headnote:

[LEdHN\[8A\]](#) [8A] [LEdHN\[8B\]](#) [8B]

The interdependent pricing of an oligopoly may provide a means for achieving recoupment, and so may form the basis of a primary-line injury claim for purposes of the price discrimination provisions of 2(a) of the Clayton Act as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), as a predatory pricing scheme designed to preserve or create a stable oligopoly, if successful, can injure consumers in the same way, and to the same extent, as a predatory pricing scheme designed to bring about a monopoly; however unlikely that possibility might be as a general matter, when the realities of the market and the record facts of a case indicate that the possibility has occurred and was likely to have succeeded, theory will not stand in the way of liability; there is no per se rule of nonliability for predatory price discrimination when recoupment is alleged to take place through supracompetitive oligopoly pricing.

STATUTES §170 > identical words -- > Headnote:

[LEdHN\[9\]](#) [9]

It is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.

APPEAL §1323 > sufficiency of evidence -- > Headnote:

[LEdHN\[10\]](#) [10]

Although it is not customary for the United States Supreme Court, on certiorari, to review the sufficiency of the evidence in a case, the court will do so when the issue is properly before the court and the benefits of providing guidance concerning the proper application of a legal standard and avoiding the systemic costs associated with further proceedings justify the required expenditure of judicial resources.

EVIDENCE §343.5 > inference -- antitrust -- restricted output -- > Headnote:

[LEdHN\[11\]](#) [Download] [11]

The record evidence--in a case involving alleged violations by the defendant, a cigarette manufacturer, with respect to the generic cigarette market, of the price discrimination provisions of 2(a) of the Clayton Act as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#))--does not permit a reasonable inference that the total industry output of generic cigarettes would have been greater but for the defendant's entry into the generic market, and thus that such entry resulted in the restriction of output which would be essential to supracompetitive pricing, where (1) the rate at which generic cigarettes were increasing their share of the overall cigarette market did not slow following the defendant's entry into the generic market, and in fact the average rate of growth doubled; (2) there is no concrete evidence that the generics' growth rate would have been even greater but for the defendant's alleged predatory price discrimination; (3) the output of generics expanded more robustly following the defendant's entry into the generic market than the defendant had previously estimated would occur if the defendant did not enter the generic market; and (4) an observation by the defendant that its entry appeared to have slowed the generic market's growth rate was made at a time when it is claimed that the defendant was selling its generics below cost and before any anticompetitive contraction in output is alleged to have occurred.

EVIDENCE §343.5 > inference -- antitrust -- supracompetitive prices -- > Headnote:

[LEdHN\[12\]](#) [Download] [12]

A reasonable jury--being presented, in a case involving alleged price discrimination in the generic cigarette market in violation of 2(a) of the Clayton Act as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), with evidence that the list prices on all types of cigarettes rose to a significant degree during the period in question, that these price increases outpaced increases in costs, taxes, and promotional expenditures, and that the list prices of generic cigarettes rose at a faster rate than the prices of branded cigarettes, thus narrowing the list price differential between the two cigarette types--cannot draw an inference that the defendant cigarette manufacturer succeeded in bringing about oligopolistic price coordination and supracompetitive prices in the generic cigarette category sufficient to slow the category's growth, preserve supracompetitive branded profits, and recoup the manufacturer's losses from alleged predatory price discrimination, where (1) there is undisputed evidence that list prices were not the actual prices paid by consumers during the period in question, and it would be unreasonable--especially in an oligopoly setting such as the cigarette industry in which price competition is most likely to take place through less observable and less regulable means than list prices--to draw conclusions about the existence of tacit coordination or supracompetitive pricing from data that reflects only list prices, and (2) the list price data as to generic and full-price branded cigarettes ignores the effect of the introduction, during the period in question, of "subgeneric" cigarettes discounted 50 percent or more from the list prices of normal branded cigarettes, expanding rather than narrowing the differential between highest and lowest cigarette prices; even if a reasonable jury could conclude that the cumulative discounts attributable to subgenerics and various consumer promotions did not cancel out the full effect of the increases in list prices, and that actual prices to consumers rose, rising prices do not themselves permit an inference of a collusive market dynamic, since when output is expanding at the same time prices are increasing, as in the case at hand, rising prices are equally consistent with growing product demand; under these conditions, a jury may not infer competitive injury from price and output data absent some evidence tending to prove that output

was restricted or prices were above a competitive level. (Stevens, White, and Blackmun, JJ., dissented from this holding.)

EVIDENCE §343.5 > inference -- antitrust -- denial -- > Headnote:

[LEdHN\[13\]](#) [13]

An inference of supracompetitive pricing is particularly anomalous, in a case involving alleged price discrimination in the generic cigarette market in violation of 2(a) of the Clayton Act as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), where the very party alleged to have been coerced into pricing through oligopolistic coordination has denied that such coordination existed, as the officers and directors of the plaintiff cigarette manufacturer consistently denied that they or other firms in the industry priced their cigarettes through tacit collusion or reaped supracompetitive profits; an explanation that the officers and directors are businessmen who do not ascribe the same meanings to terms like "competitive" and "collusion" that an economist would is entitled to little, if any, weight where the officers and directors--having made such statements in pretrial depositions, and thereafter having claimed that they were confused by opposing counsel's questions and had not meant to contradict the testimony of the manufacturer's expert economic witness, repeated their denials as to collusion and profits at trial after having consulted extensively with the expert witness and having had adequate time to familiarize themselves with the relevant concepts.

EVIDENCE §979 > sufficiency -- restraint of trade -- > Headnote:

[LEdHN\[14\]](#) [14]

A reasonable jury--being presented, in a case involving alleged price discrimination in the generic cigarette market in violation of 2(a) of the Clayton Act as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), with evidence of a pricing structure whereby the defendant cigarette manufacturer maintained existing list prices while offering substantial rebates to wholesalers--cannot conclude that this pricing structure eliminated or rendered insignificant the risk that other firms in the cigarette industry might misunderstand the defendant manufacturer's entry into the generic cigarette market, supposedly intended to stifle competition and to produce oligopolistic price coordination, as a competitive move, since the likelihood that the manufacturer's rivals would have regarded the pricing structure as an important signal that the manufacturer did not intend to attract additional smokers to the generic cigarette market is low given that other firms, including the plaintiff competing manufacturer which was the purported target of the defendant manufacturer's predatory pricing, had been using similar rebates.

EVIDENCE §343.5 > inference -- sufficiency -- antitrust -- > Headnote:

[LEdHN\[15\]](#) [15]

Although some of a defendant cigarette manufacturer's corporate planning documents--introduced in evidence in a case involving alleged price discrimination in the generic cigarette market in violation of 2(a) of the Clayton Act as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#))--speak of a desire to slow the growth of that market, no objective evidence of the manufacturer's conduct permits a reasonable inference that the manufacturer had any real prospect of achieving such a slowdown through anticompetitive means, where (1) the manufacturer, in introducing a line of generic cigarettes, offered them to 1,000 wholesalers who had never before purchased generic cigarettes, (2) the unprecedentedly large volume rebates which the manufacturer offered to wholesalers provided substantial incentives for wholesalers to place large orders and so created strong pressure for wholesalers to sell

more generic cigarettes, (3) many wholesalers stimulated demand by passing portions of the rebates on to consumers, and (4) the manufacturer provided further direct stimulus by spending \$ 10 million placing discount stickers on cartons of generic cigarettes to reduce prices to the ultimate consumer; in the light of these facts, it is not reasonable to conclude that the manufacturer threatened in a serious way to restrict output, raise prices above a competitive level, and artificially slow the growth of the economy cigarette market.

EVIDENCE §874 > sufficiency -- expert testimony -- > Headnote:

[LEdHN/16](#) [  ] [16]

When an expert opinion is not supported by sufficient facts to validate the opinion in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, the opinion cannot support a jury's verdict.

EVIDENCE §979 > sufficiency -- antitrust -- expert testimony -- > Headnote:

[LEdHN/17](#) [  ] [17]

In an antitrust case, expert opinion evidence has little probative value in comparison with the economic factors that may dictate a particular conclusion; specifically, in a case involving alleged price discrimination in the generic cigarette market in violation of 2(a) of the Clayton Act as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)), an expert economic witness' opinion that the defendant cigarette manufacturer had a reasonable prospect of recouping its predatory losses cannot sustain a jury verdict in favor of the plaintiff competing manufacturer, where the evidence on which the expert's opinion was based amely (1) the fact that the defendant's pricing structure maintained existing list prices while offering substantial rebates to wholesalers, (2) corporate documents showing an intent to shrink the price differential between generic and branded cigarettes, and (3) evidence that the defendant had reduced its net prices to wholesalers for generic cigarettes below the defendant's cost--is insufficient as a matter of law to support a finding, for purposes of the Robinson-Patman Act, of primary-line injury to competition.

EVIDENCE §147 > presumption -- knowledge of law and facts -- > Headnote:

[LEdHN/18](#) [  ] [18]

A reasonable jury in an antitrust case is presumed to know and understand the law, the facts of the case, and the realities of the market.

## Syllabus

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Cigarette manufacturing is a concentrated industry dominated by only six firms, including the two parties here. In 1980, petitioner (hereinafter Liggett) pioneered the economy segment of the market by developing a line of generic cigarettes offered at a list price roughly 30% lower than that of branded cigarettes. By 1984, generics had captured 4% of the market, at the expense of branded cigarettes, and respondent Brown & Williamson entered the economy segment, beating Liggett's net price. Liggett responded in kind, precipitating a price war, which ended, according to Liggett, with Brown & Williamson selling its generics at a loss. Liggett filed this suit, alleging, *inter alia*, that volume

rebates by Brown & Williamson to wholesalers amounted to [\*\*\*\*2] price discrimination that had a reasonable possibility of injuring competition in violation of [§ 2\(a\)](#) of the Clayton Act, as amended by the Robinson-Patman Act. Liggett claimed that the rebates were integral to a predatory pricing scheme, in which Brown & Williamson set below-cost prices to pressure Liggett to raise list prices on its generics, thus restraining the economy segment's growth and preserving Brown & Williamson's supracompetitive profits on branded cigarettes. After a jury returned a verdict in favor of Liggett, the District Court held that Brown & Williamson was entitled to judgment as a matter of law. Among other things, it found a lack of injury to competition because there had been no slowing of the generics' growth rate and no tacit coordination of prices in the economy segment by the various manufacturers. In affirming, the Court of Appeals held that the dynamic of conscious parallelism among oligopolists could not produce competitive injury in a predatory pricing setting.

*Held:* Brown & Williamson is entitled to judgment as a matter of law. Pp. 219-243.

(a) The Robinson-Patman Act, by its terms, condemns price discrimination only to the extent that [\*\*\*\*3] it threatens to injure competition. A claim of primary-line competitive injury under the Act, the type alleged here, is of the same general character as a predatory pricing claim under [§ 2](#) of the Sherman Act: A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market. [\*Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 18 L. Ed. 2d 406, 87 S. Ct. 1326\*](#), distinguished. Accordingly, two prerequisites to recovery are also the same. A plaintiff must prove (1) that the prices complained of are below an appropriate measure of its rival's costs and (2) that the competitor had a reasonable prospect of recouping its investment in below-cost prices. Without recoupment, even if predatory pricing causes the target painful losses, it produces lower aggregate prices in the market, and consumer welfare is enhanced. For recoupment to occur, the pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals. This requires an understanding of the extent and duration of the alleged predation, the relative financial [\*\*\*\*4] strength of the predator and its intended victim, and their respective incentives and will. The inquiry is whether, given the aggregate losses caused by the below-cost pricing, the intended target would likely succumb. If so, then there is the further question whether the below-cost pricing would likely injure competition in the relevant market. The plaintiff must demonstrate that there is a likelihood that the scheme alleged would cause a rise in prices above a competitive level sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it. Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition. The determination requires an estimate of the alleged predation's cost and a close analysis of both the scheme alleged and the relevant market's structure and conditions. Although not easy to establish, these prerequisites are essential components of real market injury. Pp. 219-227.

(b) An oligopoly's interdependent pricing may provide a means for achieving recoupment and thus may form the basis of a primary-line injury claim. Predatory pricing schemes, in [\*\*\*\*5] general, are implausible, see [\*Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 588-590, 89 L. Ed. 2d 538, 106 S. Ct. 1348\*](#), and are even more improbable when they require coordinated action among several firms, *id.*, at 590. They are least likely to occur where, as alleged here, the cooperation among firms is tacit, since effective tacit coordination is difficult to achieve; since there is a high likelihood that any attempt by one oligopolist to discipline a rival by cutting prices will produce an outbreak of competition; and since a predator's present losses fall on it alone, while the later supracompetitive profits must be shared with every other oligopolist in proportion to its market share, including the intended victim. Nonetheless, the Robinson-Patman Act suggests no exclusion from coverage when primary-line injury occurs in an oligopoly setting, and this Court declines to create a *per se* rule of nonliability. In order for all of the Act's words to carry adequate meaning, competitive injury under the Act must extend beyond the monopoly setting. Pp. 227-230.

(c) The record in this case demonstrates that the [\*\*\*\*6] scheme Liggett alleged, when judged against the market's realities, does not provide an adequate basis for a finding of liability. While a reasonable jury could conclude that Brown & Williamson envisioned or intended an anticompetitive course of events and that the price of its generics was below its costs for 18 months, the evidence is inadequate to show that in pursuing this scheme, it had a reasonable prospect of recovering its losses from below-cost pricing through slowing the growth of generics. No

inference of recoupment is sustainable on this record, because no evidence suggests that Brown & Williamson was likely to obtain the power to raise the prices for generic cigarettes above a competitive level, which is an indispensable aspect of Liggett's own proffered theory. The output and price information does not indicate that oligopolistic price coordination in fact produced supracompetitive prices in the generic segment. Nor does the evidence about the market and Brown & Williamson's conduct indicate that the alleged scheme was likely to have brought about tacit coordination and oligopoly pricing in that segment. Pp. 230-243.

**Counsel:** Phillip Areeda argued the cause for petitioner. [\*\*\*\*7] With him on the briefs were Charles Fried, Jean E. Sharpe, Josiah S. Murray III, James W. Dobbins, Garret G. Rasmussen, and C. Allen Foster.

Robert H. Bork argued the cause for respondent. With him on the brief were Griffin B. Bell, Frederick M. Rowe, Michael L. Robinson, Abbott B. Lipsky, Jr., and Veronica G. Kayne.\*

**Judges:** KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE and BLACKMUN, JJ., joined, post, p. 243.

**Opinion by:** KENNEDY

## Opinion

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[\*212] [\*179] [\*\*2582] JUSTICE KENNEDY delivered the opinion of the Court.

LEdHN/1A [↑] [1A] [\*\*\*\*8] This case stems from a market struggle that erupted in the domestic cigarette industry in the mid-1980's. Petitioner Brooke Group Ltd., whom we, like the parties to the case, refer to as Liggett because of its former corporate name, charges that to counter its innovative development of generic cigarettes, respondent Brown & Williamson Tobacco Corporation introduced its own line of generic cigarettes in an unlawful effort to stifle price competition in the economy segment of the national cigarette market. Liggett contends that Brown & Williamson cut prices on generic cigarettes below cost and offered discriminatory volume rebates to wholesalers to force Liggett to raise its own generic cigarette prices and introduce oligopoly pricing in the economy segment. We hold that Brown & Williamson is entitled to judgment as a matter of law.

I

In 1980, Liggett pioneered the development of the economy segment of the national cigarette market by introducing a line of "black and white" generic cigarettes. The economy segment of the market, sometimes called the generic segment, is characterized by its bargain prices and comprises a variety of different products: black and whites, which are true [\*\*\*\*9] generics sold in plain white packages with simple black lettering describing their contents; private label generics, which carry the trade dress of a specific purchaser, usually a retail chain; branded generics, which carry a brand name but which, like black and whites and private label generics, are sold at a deep discount and with little or no advertising; and "Value-25s," packages of 25 cigarettes that are sold to the consumer some 12.5% below the cost of a normal 20-cigarette pack. By 1984, when Brown & Williamson entered the generic segment and set in motion the series of events giving rise to this suit, Liggett's black and whites represented 97% of the generic segment, which in turn accounted for a little [\*213] more than 4% of domestic cigarette sales. Prior to Liggett's introduction of black and whites in 1980, sales of generic cigarettes amounted to less than 1% of the domestic cigarette market.

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\* Briefs of amici curiae urging affirmance were filed for Atlantic Richfield Co. by Ronald C. Redcay, Matthew T. Heartney, Otis Pratt Pearsall, Philip H. Curtis, Francis X. McCormack, Donald A. Bright, and Edward E. Clark; and for ITT Corp. by John H. Schafer and Edwin A. Kilburn.

Briefs of amici curiae were filed for the Business Roundtable by Thomas B. Leary; and for the Grocery Manufacturers of America, Inc., by Terry Calvani, W. Todd Miller, and C. Douglas Floyd.

Because of the procedural posture [\*\*\*180] of this case, we view the evidence in the light most favorable to Liggett. The parties are in basic agreement, however, regarding the central, historical facts. Cigarette manufacturing has long been one of America's most concentrated [\*\*\*\*10] industries, see F. Scherer & D. Ross, *Industrial Market Structure and Economic Performance* 250 (3d ed. 1990) (hereinafter Scherer & Ross); App. 495-498, and for decades, production has been dominated by six firms: R. J. Reynolds, Philip Morris, American Brands, Lorillard, and the two litigants involved here, Liggett and Brown & Williamson. R.J. Reynolds and Philip Morris, the two industry leaders, enjoyed respective market shares of about 28% and 40% at the time of trial. Brown & Williamson ran a [\*\*2583] distant third, its market share never exceeding 12% at any time relevant to this dispute. Liggett's share of the market was even less, from a low of just over 2% in 1980 to a high of just over 5% in 1984.

The cigarette industry also has long been one of America's most profitable, in part because for many years there was no significant price competition among the rival firms. See Scherer & Ross 250-251; R. Tennant, *American Cigarette Industry* 86-87 (1950); App. 128, 500-509, 531. List prices for cigarettes increased in lockstep, twice a year, for a number of years, irrespective of the rate of inflation, changes in the costs of production, or shifts in consumer demand. Substantial [\*\*\*\*11] evidence suggests that in recent decades, the industry reaped the benefits of prices above a competitive level, though not through unlawful conduct of the type that once characterized the industry. See Tennant, *supra*, at 275, 342; App. 389-392, 514-519, 658-659; cf. *American Tobacco Co. v. United States*, 328 U.S. 781, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946); *United States* [\*214] v. *American Tobacco Co.*, 221 U.S. 106, 55 L. Ed. 663, 31 S. Ct. 632 (1911); Scherer & Ross 451.

By 1980, however, broad market trends were working against the industry. Overall demand for cigarettes in the United States was declining, and no immediate prospect of recovery existed. As industry volume shrank, all firms developed substantial excess capacity. This decline in demand, coupled with the effects of nonprice competition, had a severe negative impact on Liggett. Once a major force in the industry, with market shares in excess of 20%, Liggett's market share had declined by 1980 to a little over 2%. With this meager share of the market, Liggett was on the verge of going out of business.

At the urging of a distributor, Liggett took an unusual step to [\*\*\*\*12] revive its prospects: It developed a line of black and white generic cigarettes. When introduced in 1980, black and whites were offered to consumers at a list price roughly 30% lower than the list price of full-priced, branded cigarettes. They were also promoted at the wholesale level by means of rebates that increased with the volume of cigarettes ordered. Black and white cigarettes thus represented a new marketing category. The category's principal competitive characteristic was low price. Liggett's black and whites were an immediate and considerable success, growing from a fraction of a percent of the market at their introduction to over 4% of the total cigarette market by early 1984.

As the market for Liggett's generic [\*\*\*181] cigarettes expanded, the other cigarette companies found themselves unable to ignore the economy segment. In general, the growth of generics came at the expense of the other firms' profitable sales of branded cigarettes. Brown & Williamson was hardest hit, because many of Brown & Williamson's brands were favored by consumers who were sensitive to changes in cigarette prices. Although Brown & Williamson sold only 11.4% of the market's branded cigarettes, [\*\*\*\*13] 20% of the converts to [\*215] Liggett's black and whites had switched from a Brown & Williamson brand. Losing volume and profits in its branded products, Brown & Williamson determined to enter the generic segment of the cigarette market. In July 1983, Brown & Williamson had begun selling Value-25s, and in the spring of 1984, it introduced its own black and white cigarette.

Brown & Williamson was neither the first nor the only cigarette company to recognize the threat posed by Liggett's black and whites and to respond in the economy segment. R.J. Reynolds had also introduced a Value-25 in 1983. And before Brown & Williamson introduced its own black and whites, R.J. Reynolds had repriced its "Doral" branded cigarette at generic levels. To compete with Liggett's black and whites, R.J. Reynolds dropped its list price on Doral about 30% and used volume rebates to wholesalers as an incentive to spur orders. Doral was the first competition at Liggett's price level.

[\*\*2584] Brown & Williamson's entry was an even graver threat to Liggett's dominance of the generic category. Unlike R. J. Reynolds' Doral, Brown & Williamson's product was also a black and white and so would be in [\*\*\*\*14] direct competition with Liggett's product at the wholesale level and on the retail shelf. Because Liggett's and Brown

& Williamson's black and whites were more or less fungible, wholesalers had little incentive to carry more than one line. And unlike R. J. Reynolds, Brown & Williamson not only matched Liggett's prices but beat them. At the retail level, the suggested list price of Brown & Williamson's black and whites was the same as Liggett's, but Brown & Williamson's volume discounts to wholesalers were larger. Brown & Williamson's rebate structure also encompassed a greater number of volume categories than Liggett's, with the highest categories carrying special rebates for orders of very substantial size. Brown & Williamson marketed its black and whites to Liggett's existing distributors as well as to its own full list of [\*216] buyers, which included a thousand wholesalers who had not yet carried any generic products.

Liggett responded to Brown & Williamson's introduction of black and whites in two ways. First, Liggett increased its own wholesale rebates. This precipitated a price war at the wholesale level, in which Liggett five times attempted to beat the rebates offered [\*\*\*\*15] by Brown & Williamson. At the end of each round, Brown & Williamson maintained a real advantage over Liggett's prices. Although it is undisputed that Brown & Williamson's original net price for its black and whites was above its costs, Liggett contends that by the end of the rebate war, Brown & Williamson was selling its black and whites at a loss. This rebate war occurred before Brown & Williamson [\*\*\*182] had sold a single black and white cigarette.

Liggett's second response was to file a lawsuit. Two weeks after Brown & Williamson announced its entry into the generic segment, again before Brown & Williamson had sold any generic cigarettes, Liggett filed a complaint in the United States District Court for the Middle District of North Carolina alleging trademark infringement and unfair competition. Liggett later amended its complaint to add an antitrust claim under § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13(a), which alleged illegal price discrimination between Brown & Williamson's full-priced branded cigarettes and its low-priced generics. See Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 1989-1 Trade Cas. (CCH) P 68,583, p. 61,099 (MDNC 1988). [\*\*\*\*16] These claims were either dismissed on summary judgment, see *ibid.*, or rejected by the jury. They were not appealed.

Liggett also amended its complaint to add a second Robinson-Patman Act claim, which is the subject of the present controversy. Liggett alleged that Brown & Williamson's volume rebates to wholesalers amounted to price discrimination that had a reasonable possibility of injuring competition, [\*217] in violation of § 2(a). Liggett claimed that Brown & Williamson's discriminatory volume rebates were integral to a scheme of predatory pricing, in which Brown & Williamson reduced its net prices for generic cigarettes below average variable costs. According to Liggett, these below-cost prices were not promotional but were intended to pressure it to raise its list prices on generic cigarettes, so that the percentage price difference between generic and branded cigarettes would narrow. Liggett explained that it would have been unable to reduce its wholesale rebates without losing substantial market share to Brown & Williamson; its only choice, if it wished to avoid prolonged losses on its principal product line, was to raise retail prices. The resulting reduction in [\*\*\*\*17] the list price gap, it was said, would restrain the growth of the economy segment and preserve Brown & Williamson's supracompetitive profits on its branded cigarettes.

[\*\*2585] The trial began in the fall of 1989. By that time, all six cigarette companies had entered the economy segment. The economy segment was the fastest growing segment of the cigarette market, having increased from about 4% of the market in 1984, when the rebate war in generics began, to about 15% in 1989. Black and white generics had declined as a force in the economy segment as consumer interest shifted toward branded generics, but Liggett's overall volume had increased steadily to 9 billion generic cigarettes sold. Overall, the 2.8 billion generic cigarettes sold in 1981 had become 80 billion by 1989.

The consumer price of generics had increased along with output. For a year, the list prices for generic cigarettes established at the end of the rebate war remained stable. But in June 1985, Liggett raised its list price, and the other firms followed several months later. The precise effect of the list price increase is difficult to assess, because all of the cigarette firms offered a variety of discounts, [\*\*\*\*18] coupons, and other promotions directly to consumers on both [\*\*\*183] generic and [\*218] branded cigarettes. Nonetheless, at least some portion of the list price increase was reflected in a higher net price to the consumer.

In December 1985, Brown & Williamson attempted to increase its list prices, but retracted the announced increase when the other firms adhered to their existing prices. Thus, after Liggett's June 1985 increase, list prices on

generics did not change again until the summer of 1986, when a pattern of twice yearly increases in tandem with the full-priced branded cigarettes was established. The dollar amount of these increases was the same for generic and full-priced cigarettes, which resulted in a greater percentage price increase in the less expensive generic cigarettes and a narrowing of the percentage gap between the list price of branded and black and white cigarettes, from approximately 38% at the time Brown & Williamson entered the segment to approximately 27% at the time of trial. Also by the time of trial, five of the six manufacturers, including Liggett, had introduced so-called "subgenerics," a category of branded generic cigarettes that sold at a [\*\*\*\*19] discount of 50% or more off the list price of full-priced branded cigarettes.

After a 115-day trial involving almost 3,000 exhibits and over a score of witnesses, the jury returned a verdict in favor of Liggett, finding on the special verdict form that Brown & Williamson had engaged in price discrimination that had a reasonable possibility of injuring competition in the domestic cigarette market as a whole. The jury awarded Liggett \$ 49.6 million in damages, which the District Court trebled to \$ 148.8 million. After reviewing the record, however, the District Court held that Brown & Williamson was entitled to judgment as a matter of law on three separate grounds: lack of injury to competition, lack of antitrust injury to Liggett, and lack of a causal link between the discriminatory rebates and Liggett's alleged injury. *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 748 F. Supp. 344 (MDNC 1990)*. With respect to the first issue, which is the [\*219] only one before us, the District Court found that no slowing of the growth rate of generics, and thus no injury to competition, was possible unless there had been tacit coordination of prices in the [\*\*\*\*20] economy segment of the cigarette market by the various manufacturers. *Id., at 354-355*. The District Court held that a reasonable jury could come to but one conclusion about the existence of such coordination among the firms contending for shares of the economy segment: it did not exist, and Brown & Williamson therefore had no reasonable possibility of limiting the growth of the segment. *Id., at 356-358*.

The United States Court of Appeals for the Fourth Circuit affirmed. *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 964 F.2d 335 (1992)*. The Court of Appeals held that the dynamic of conscious parallelism among oligopolists could not produce competitive injury in a predatory pricing setting, which necessarily involves a price cut by one of the oligopolists. *Id., at 342*. In the [\*\*2586] Court of Appeals' view, "to rely on the characteristics of an oligopoly to assure recoupment of losses from a predatory pricing scheme after one oligopolist has made a competitive move is . . . economically irrational." *Ibid.*

We granted certiorari, 506 U.S. 984 (1992), and now affirm.

II

A

[\*\*\*\*21] [LEdHN\[2\]](#) [↑] [2]Price discrimination is made unlawful by [§ 2\(a\)](#) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, which provides:

[HN1](#) [↑] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent [\*220] competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." [15 U.S.C. § 13\(a\)](#).

Although we have reiterated that [HN2](#) [↑] "a price discrimination within the meaning of [this] provision is merely a price difference," *Texaco Inc. v. Hasbrouck, 496 U.S. 543, 558, 110 L. Ed. 2d 492, 110 S. Ct. 2535 (1990)* [\*\*\*\*22] (quoting *FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549, 4 L. Ed. 2d 1385, 80 S. Ct. 1267 (1960)*), the statute as a practical matter could not, and does not, ban all price differences charged to "different purchasers of commodities of like grade and quality." Instead, the statute contains a number of important limitations, one of which is central to evaluating Liggett's claim: [HN3](#) [↑] By its terms, the Robinson-Patman Act condemns price discrimination only to

the extent that it threatens to injure competition. The availability of statutory defenses permitting price discrimination when it is based on differences in costs, [§ 13\(a\)](#), "changing conditions affecting the market for or the marketability of the goods concerned," *ibid.*, or conduct undertaken "in good faith to meet an equally low price of a competitor," [§ 13\(b\)](#); [Standard Oil Co. v. FTC, 340 U.S. 231, 250, 95 L. Ed. 239, 71 S. Ct. 240 \(1951\)](#), confirms that Congress did not intend to outlaw price differences that result from or further the forces of competition. Thus, [\*\*\*\*23] [HN4](#)<sup>↑</sup> "the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws." [Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69, 80, n. 13, 59 L. Ed. 2d 153, 99 S. Ct. 925 \(1979\)](#). See also [Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 63, 74, 97 L. Ed. 1454, 73 S. Ct. 1017 \(1953\)](#).

Liggett contends that Brown & Williamson's discriminatory volume rebates to wholesalers threatened substantial competitive injury by furthering a predatory pricing scheme designed to purge competition from the economy segment of the cigarette market. This type of injury, which harms direct competitors of the discriminating seller, is known as primary-line injury. See [FTC v. Anheuser-Busch, Inc., supra, at 538](#). We last addressed primary-line injury over 25 years ago, in [Utah Pie Co. v. Continental Baking Co., \[\\*221\] 386 U.S. 685, 18 L. Ed. 2d 406, 87 S. Ct. 1326 \(1967\)](#). In *Utah Pie*, we reviewed the sufficiency of the evidence supporting jury verdicts against three national pie companies that had engaged in a variety of [\*\*\*185] [\*\*\*24] predatory practices in the market for frozen pies in Salt Lake City, with the intent to drive a local pie manufacturer out of business. We reversed the Court of Appeals and held that the evidence presented was adequate to permit a jury to find a likelihood of injury to competition. [Id., at 703](#).

[LEdHN\[3A\]](#)<sup>↑</sup> [3A] *Utah Pie* has often been interpreted to permit liability for primary-line price discrimination on a mere showing that the defendant intended to harm competition or produced a declining price structure. The case [\*\*2587] has been criticized on the ground that such low standards of competitive injury are at odds with the antitrust laws' traditional concern for consumer welfare and price competition. See Bowman, *Restraint of Trade* by the Supreme Court: The Utah Pie Case, 77 Yale L. J. 70 (1967); R. Posner, [Antitrust Law: An Economic Perspective](#) 193-194 (1976); L. Sullivan, *Antitrust* 687 (1977); 3 P. Areeda & D. Turner, [Antitrust Law](#) P720c (1978) (hereinafter Areeda & Turner); R. Bork, *The Antitrust Paradox* 386-387 (1978); H. Hovenkamp, *Economics and Federal Antitrust Law* 188-189 (1985). [\*\*\*25] We do not regard the *Utah Pie* case itself as having the full significance attributed to it by its detractors. *Utah Pie* was an early judicial inquiry in this area and did not purport to set forth explicit, general standards for establishing a violation of the Robinson-Patman Act. As the law has been explored since *Utah Pie*, it has become evident that [HN5](#)<sup>↑</sup> primary-line competitive injury under the Robinson-Patman Act is of the same general character as the injury inflicted by predatory pricing schemes actionable under [§ 2](#) of the Sherman Act. See, e.g., [Henry v. Chloride, Inc., 809 F.2d 1334, 1345 \(CA8 1987\)](#); [D. E. Rogers Associates, Inc. v. Gardner-Denver Co., 718 F.2d 1431, 1439 \(CA6 1983\)](#), cert. denied, 467 U.S. 1242, 82 L. Ed. 2d 822, 104 S. Ct. 3513 (1984); [William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1041 \(CA9 1981\)](#), cert. denied, 459 U.S. 825, 74 L. Ed. 2d 61, 103 S. Ct. 57, 103 S. Ct. 58 (1982); [\*222] [Malcolm v. Marathon Oil Co., 642 F.2d 845, 853, n. 16](#) [\*\*\*26] (CA5), cert. denied, 454 U.S. 1125, 71 L. Ed. 2d 113, 102 S. Ct. 975 (1981); [Pacific Engineering & Production Co. of Nevada v. Kerr-McGee Corp., 551 F.2d 790, 798](#) (CA10), cert. denied, 434 U.S. 879, 54 L. Ed. 2d 160, 98 S. Ct. 234 (1977); [International Telephone & Telegraph Corp., 104 F.T.C. 280, 401-402 \(1984\)](#); Hovenkamp, *supra*, at 189; 3 Areeda & Turner P720c; P. Areeda & H. Hovenkamp, [Antitrust Law](#) P720c (Supp. 1992) (hereinafter Areeda & Hovenkamp). There are, to be sure, differences between the two statutes. For example, we interpret [§ 2](#) of the Sherman Act to condemn predatory pricing when it poses "a dangerous probability of actual monopolization," [Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 455, 122 L. Ed. 2d 247, 113 S. Ct. 884 \(1993\)](#), whereas the Robinson-Patman Act requires only that there be "a reasonable possibility" of substantial injury to competition before its protections are triggered, [Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 434, 75 L. Ed. 2d 174, 103 S. Ct. 1282 \(1983\)](#). But whatever additional flexibility the Robinson-Patman [\*\*\*27] Act standard may imply, the essence of the claim under either statute is the same: A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise [\*\*\*186] control over prices in the relevant market.

[LEdHN\[3B\]](#)<sup>↑</sup> [3B] [LEdHN\[4A\]](#)<sup>↑</sup> [4A] Accordingly, whether the claim alleges predatory pricing under [§ 2](#) of the Sherman Act or primary-line price discrimination under the Robinson-Patman Act, two prerequisites to recovery

remain the same. First, [HN6](#)<sup>1</sup> a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs.<sup>1</sup> See, e.g., [Cargill, Inc. v. Monfort of Colorado, Inc.](#), 479 U.S. 104, 117, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986); [Matsushita Elec. Industrial Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 585, n. 8, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); [\*\*\*\*28] [Utah Pie](#), 386 U.S. at 698, 701, 702-703, n. 14; [In re E. I. DuPont de Nemours & Co.](#), 96 F.T.C. 653, 749 (1980). Cf. [United States v. National Dairy Products Corp.](#), 372 U.S. 29, 9 L. Ed. 2d 561, 83 S. Ct. 594 (1963) (holding that below-cost prices may constitute "unreasonably" [\*\*2588] low" prices for purposes of § 3 of the Robinson-Patman Act, [15 U.S.C. § 13a](#)). Although *Cargill* and *Matsushita* reserved as a formal matter the question "whether recovery should ever be available . . . when the pricing in question is above some measure of incremental cost," [Cargill, supra, at 117-118, n. 12](#) (quoting [Matsushita, supra, at 585, n. 9](#)), the reasoning in both opinions suggests that only below-cost prices should suffice, and we have rejected elsewhere the notion that [HN7](#)<sup>1</sup> above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws. See [Atlantic Richfield Co. v. USA Petroleum Co.](#), 495 U.S. 328, 340, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990). [\*\*\*\*29] "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. . . . We have adhered to this principle regardless of the type of antitrust claim involved." *Ibid.* As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting. See Areeda & Hovenkamp PP714.2, 714.3. "To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result." [Cargill, supra, at 116](#).

#### [LEdHN\[4B\]](#)<sup>1</sup> [4B]

[\*\*\*\*30] Even in an oligopolistic market, when a firm drops its prices to a competitive level to demonstrate to a maverick the unprofitability of straying from the group, it would be [\*224] illogical to condemn the price cut: The antitrust laws then would be an obstacle to the chain of events most [\*\*\*187] conducive to a breakdown of oligopoly pricing and the onset of competition. Even if the ultimate effect of the cut is to induce or reestablish supracompetitive pricing, discouraging a price cut and forcing firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy. Cf. Areeda & Hovenkamp PP714.2d, 714.2f; Areeda & Turner, Predatory Pricing and Related Practices under [Section 2](#) of the Sherman Act, 88 Harv. L. Rev. 697, 708-709 (1975); Posner, [Antitrust Law](#): An Economic Perspective, at 195, n. 39.

[HN8](#)<sup>1</sup> The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under [§ 1](#)<sup>\*\*\*\*31</sup> 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices. See [Matsushita, supra, at 589](#); [Cargill, supra, at 119, n. 15](#). "For the investment to be rational, the [predator] must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered." [Matsushita, supra, at 588-589](#). Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers.

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<sup>1</sup> Because the parties in this case agree that the relevant measure of cost is average variable cost, however, we again decline to resolve the conflict among the lower courts over the appropriate measure of cost. See [Cargill, Inc. v. Monfort of Colorado, Inc.](#), 479 U.S. 104, 117-118, n. 12, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986); [Matsushita Elec. Industrial Co. v. Zenith Radio Corp.](#), 475 U.S. 574, 585, n. 8, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

509 U.S. 209, \*224; 113 S. Ct. 2578, \*\*2588; 125 L. Ed. 2d 168, \*\*\*187; 1993 U.S. LEXIS 4245, \*\*\*\*31

LEdHN[5] [5] That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for "the protection of competition, not competitors." Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (\*\*2589) (1962). [\*\*\*\*32] Earlier this Term, we held in the Sherman Act § 2 context [\*225] that it was not enough to inquire "whether the defendant has engaged in 'unfair' or 'predatory' tactics"; rather, we insisted that the plaintiff prove "a dangerous probability that [the defendant] would monopolize a particular market." Spectrum Sports, 506 U.S. at 459. Hn9 Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." Hunt v. Crumboch, 325 U.S. 821, 826, 89 L. Ed. 1954, 65 S. Ct. 1545 (1945).

LEdHN[6] [6] For recoupment to occur, below-cost pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals, whether driving them from the market, or, as was alleged to be the goal here, causing them to raise their prices to supracompetitive levels within a disciplined oligopoly. This requires an understanding of [\*\*\*\*33] the extent and duration of the alleged predation, the relative financial strength of the predator and its intended victim, and their respective incentives and will. See 3 Areeda & Turner P711b. The inquiry is whether, given the aggregate losses [\*\*\*188] caused by the below-cost pricing, the intended target would likely succumb.

If circumstances indicate that below-cost pricing could likely produce its intended effect on the target, there is still the further question whether it would likely injure competition in the relevant market. The plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it. As we have observed on a prior occasion, "in order to recoup their losses, [predators] must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess [\*226] profits what they earlier gave up in below-cost prices." Matsushita, 475 U.S. at 590-591.

[\*\*\*\*34] HN10 Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition. HN11 Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market. Cf., e.g., Elzinga & Mills, Testing for Predation: Is Recoupment Feasible?, 34 Antitrust Bull. 869 (1989) (constructing one possible model for evaluating recoupment). If market circumstances or deficiencies in proof would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supracompetitive pricing, the plaintiff's case has failed. In certain situations -- for example, where the market is highly diffuse and competitive, or where new entry is easy, or the defendant lacks adequate excess capacity to absorb the market shares of his rivals and cannot quickly create or purchase new capacity -- summary disposition of the case [\*\*\*\*35] is appropriate. See, e.g., Cargill, 479 U.S. at 119-120, n. 15.

These prerequisites to recovery are not easy to establish, but they are not artificial obstacles to recovery; rather, they are essential components of real market injury. As we have said in the Sherman Act context, "predatory pricing schemes are rarely tried, and even more rarely successful," Matsushita, supra, at 589, and the costs of an erroneous finding of liability are high. "The mechanism by which a firm engages in predatory pricing -- lowering prices -- is the same mechanism by which a firm stimulates competition; because 'cutting prices in order to increase business often is the very essence of competition . . . [:] mistaken inferences . . . are especially costly, [\*\*2590] because they chill the very conduct the antitrust laws are designed to protect." Cargill, supra, at 122, n. 17 (quoting Matsushita, supra, at 594). It would be ironic indeed if the standards for predatory pricing liability [\*227] were so low that antitrust suits themselves became a tool for keeping prices high.

B

LEdHN[7] [7] [\*\*\*\*36] Liggett does not allege that Brown & Williamson sought to drive [\*\*\*189] it from the market but that Brown & Williamson sought to preserve supracompetitive profits on branded cigarettes by pressuring Liggett to raise its generic cigarette prices through a process of tacit collusion with the other cigarette

509 U.S. 209, \*227; 113 S. Ct. 2578, \*\*2590; 125 L. Ed. 2d 168, \*\*\*189; 1993 U.S. LEXIS 4245, \*\*\*\*36

companies. Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, suprareactive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions. See 2 Areeda & Turner P404; Scherer & Ross 199-208.

In *Matsushita*, we remarked upon the general implausibility of predatory pricing. See [475 U.S. at 588-590](#). *Matsushita* observed that such schemes are even more improbable when they require coordinated action among several firms. *Id., at 590*. *Matsushita* involved an allegation of an express conspiracy to engage in predatory pricing. The Court noted that in addition to the usual [\*\*\*\*37] difficulties that face a single firm attempting to recoup predatory losses, other problems render a conspiracy "incalculably more difficult to execute." *Ibid.* In order to succeed, the conspirators must agree on how to allocate present losses and future gains among the firms involved, and each firm must resist powerful incentives to cheat on whatever agreement is reached. *Ibid.*

However unlikely predatory pricing by multiple firms may be when they conspire, it is even less likely when, as here, there is no express coordination. Firms that seek to recoup predatory losses through the conscious parallelism of oligopoly must rely on uncertain and ambiguous signals to achieve concerted action. The signals are subject to misinterpretation and are a blunt and imprecise means of ensuring smooth [\*228] cooperation, especially in the context of changing or unprecedented market circumstances. This anticompetitive minuet is most difficult to compose and to perform, even for a disciplined oligopoly.

From one standpoint, recoupment through oligopolistic price coordination could be thought more feasible than recoupment through monopoly: In the oligopoly setting, the victim itself has [\*\*\*\*38] an economic incentive to acquiesce in the scheme. If forced to choose between cutting prices and sustaining losses, maintaining prices and losing market share, or raising prices and enjoying a share of suprareactive profits, a firm may yield to the last alternative. Yet on the whole, tacit cooperation among oligopolists must be considered the least likely means of recouping predatory losses. In addition to the difficulty of achieving effective tacit coordination and the high likelihood that any attempt to discipline will produce an outbreak of competition, the predator's present losses in a case like this fall on it alone, while the later suprareactive profits must be shared with every other oligopolist in proportion to its market share, including the intended victim. In this case, for example, Brown & Williamson, with its 11-12% share of the cigarette market, would have had to generate around \$ 9 in suprareactive profits for each \$ 1 invested in predation; the remaining [\*\*\*190] \$ 8 would belong to its competitors, who had taken no risk.

Liggett suggests that these considerations led the Court of Appeals to rule out its theory of recovery as a matter of law. Although [\*\*\*\*39] [\*\*2591] the proper interpretation of the Court of Appeals' opinion is not free from doubt, there is some indication that it held as a matter of law that the Robinson-Patman Act does not reach a primary-line injury claim in which tacit coordination among oligopolists provides the alleged basis for recoupment. The Court of Appeals' opinion does not contain the traditional apparatus of fact review; rather, it focuses on theoretical and legal arguments. The final paragraph appears to state the holding: Brown & Williamson [\*229] may not be held liable because oligopoly pricing does not "provide an economically rational basis" for recouping predatory losses. [964 F.2d at 342](#).

[LEdHN\[8A\]](#) [↑] [8A] To the extent that the Court of Appeals may have held that the interdependent pricing of an oligopoly may never provide a means for achieving recoupment and so may not form the basis of a primary-line injury claim, we disagree. A predatory pricing scheme designed to preserve or create a stable oligopoly, if successful, can injure consumers in the same way, and to the same extent, as one designed to bring about [\*\*\*\*40] a monopoly. However unlikely that possibility may be as a general matter, when the realities of the market and the record facts indicate that it has occurred and was likely to have succeeded, theory will not stand in the way of liability. See [Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 466-467, 119 L. Ed. 2d 265, 112 S. Ct. 2072 \(1992\)](#).

[LEdHN\[8B\]](#) [↑] [8B][LEdHN\[9\]](#) [↑] [9]The Robinson-Patman Act, which amended § 2 of the original Clayton Act, suggests no exclusion from coverage when primary-line injury occurs in an oligopoly setting. Unlike the provisions of the Sherman Act, which speak only of various forms of express agreement and monopoly, see [15 U.S. C. §§ 1, 2](#), the Robinson-Patman Act is phrased in broader, disjunctive terms, prohibiting price discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly," [15 U.S. C. § 13\(a\)](#). For all the words of the Act to carry adequate meaning, competitive injury under [\*\*\*\*41] the Act must extend beyond the monopoly setting. Cf. [Reiter v. Sonotone Corp., 442 U.S. 330, 339, 60 L. Ed. 2d 931, 99 S. Ct. 2326 \(1979\)](#) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise"). The language referring to a substantial lessening of competition was part of the original Clayton Act § 2, see Act of Oct. 15, 1914, ch. 322, 38 Stat. 730, and the same phrasing appears in § 7 of that Act. In the § 7 context, it has long been settled that excessive concentration, and the oligopolistic price coordination [\*230] it portends, may be the injury to competition the Act prohibits. See, e.g., [United States v. Philadelphia Nat. Bank, 374 U.S. 321, 10 L. Ed. 2d 915, 83 S. Ct. 1715 \(1963\)](#). We adhere to [HN12](#) [↑] "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." [Sullivan v. Stroop, 496 U.S. 478, 484, 110 L. Ed. 2d 438, 110 S. Ct. 2499 \(1990\)](#) [\*\*\*\*42] (internal quotation marks omitted). See also [J. Truett Payne Co. v. \[\\*\\*191\] Chrysler Motors Corp., 451 U.S. 557, 562, 68 L. Ed. 2d 442, 101 S. Ct. 1923 \(1981\)](#) (evaluating the competitive injury requirement of Robinson-Patman Act § 2(a) in light of analogous interpretations of Clayton Act § 7). We decline to create a *per se* rule of nonliability for predatory price discrimination when recoupment is alleged to take place through supracompetitive oligopoly pricing. Cf. [Cargill, 479 U.S. at 121](#).

### III

[LEdHN\[1B\]](#) [↑] [1B][LEdHN\[10\]](#) [↑] [10]Although Liggett's theory of liability, as an abstract matter, is within the reach of the statute, we agree with the Court of Appeals and the District Court that Liggett was not entitled to submit its case to the jury. [HN13](#) [↑] It is not customary for this Court to review the sufficiency of the evidence, but we will do so when the issue is properly before us and the benefits of providing guidance [\*\*\*\*43] [\*\*2592] concerning the proper application of a legal standard and avoiding the systemic costs associated with further proceedings justify the required expenditure of judicial resources. See, e.g., [Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605-611, 86 L. Ed. 2d 467, 105 S. Ct. 2847 \(1985\); Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 765-768, 79 L. Ed. 2d 775, 104 S. Ct. 1464 \(1984\); United States v. Pabst Brewing Co., 384 U.S. 546, 550-552, 16 L. Ed. 2d 765, 86 S. Ct. 1665 \(1966\)](#). The record in this case demonstrates that the anticompetitive scheme Liggett alleged, when judged against the realities of the market, does not provide an adequate basis for a finding of liability.

### A

[LEdHN\[1C\]](#) [↑] [1C]Liggett's theory of competitive injury through oligopolistic price coordination depends upon a complex chain of cause [\*231] and effect: Brown & Williamson would enter the generic segment with list prices matching Liggett's but with massive, discriminatory volume rebates directed at Liggett's biggest wholesalers; as a result, [\*\*\*\*44] the net price of Brown & Williamson's generics would be below its costs; Liggett would suffer losses trying to defend its market share and wholesale customer base by matching Brown & Williamson's rebates; to avoid further losses, Liggett would raise its list prices on generics or acquiesce in price leadership by Brown & Williamson; higher list prices to consumers would shrink the percentage gap in retail price between generic and branded cigarettes; and this narrowing of the gap would make generics less appealing to the consumer, thus slowing the growth of the economy segment and reducing cannibalization of branded sales and their associated supracompetitive profits.

Although Brown & Williamson's entry into the generic segment could be regarded as procompetitive in intent as well as effect, the record contains sufficient evidence from which a reasonable jury could conclude that Brown & Williamson envisioned or intended this anticompetitive course of events. See, e.g., App. 57-58, 67-68, 89-91, 99, 112-114, 200, 241, 253, 257, 262-263, 279-280, 469-470, 664-666. There is also sufficient evidence in the record

from which a reasonable jury could conclude that for a period of approximately [\*\*\*\*45] 18 months, Brown & Williamson's prices on its generic cigarettes were below its costs, see [\*id.\*, at 338-339, 651, 740](#), and that this below-cost pricing imposed losses on Liggett [\*\*\*192] that Liggett was unwilling to sustain, given its corporate parent's effort to locate a buyer for the company, see [\*id.\*, at 74, 92, 200, 253, 596-597](#). Liggett has failed to demonstrate competitive injury as a matter of law, however, because its proof is flawed in a critical respect: The evidence is inadequate to show that in pursuing this scheme, Brown & Williamson had a reasonable prospect of recovering its losses from below-cost pricing through slowing the growth of generics. As we have noted, [\*\*HN14\*\*](#)<sup>1</sup> "the success of any predatory [\*232] scheme depends on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." [\*Matsushita\*, 475 U.S. at 589](#) (emphasis omitted).

No inference of recoupment is sustainable on this record, because no evidence suggests that Brown & Williamson -- whatever its intent in introducing black and whites [\*\*\*\*46] may have been -- was likely to obtain the power to raise the prices for generic cigarettes above a competitive level. Recoupment through supracompetitive pricing in the economy segment of the cigarette market is an indispensable aspect of Liggett's own proffered theory, because a slowing of growth in the economy segment, even if it results from an increase in generic prices, is not itself anticompetitive. Only if those higher prices are a product of nonmarket forces has competition suffered. If prices rise in response to an excess of demand over supply, or segment growth slows as patterns of consumer preference become stable, the market is [\*\*2593] functioning in a competitive manner. Consumers are not injured from the perspective of the antitrust laws by the price increases; they are in fact causing them. Thus, the linchpin of the predatory scheme alleged by Liggett is Brown & Williamson's ability, with the other oligopolists, to raise prices above a competitive level in the generic segment of the market. [\*\*HN15\*\*](#)<sup>1</sup> Because relying on tacit coordination among oligopolists as a means of recouping [\*\*\*\*47] losses from predatory pricing is "highly speculative," Areeda & Hovenkamp P711.2c, at 647, competent evidence is necessary to allow a reasonable inference that it poses an authentic threat to competition. The evidence in this case is insufficient to demonstrate the danger of Brown & Williamson's alleged scheme.

## B

Based on Liggett's theory of the case and the record it created, there are two means by which one might infer that [\*233] Brown & Williamson had a reasonable prospect of producing sustained supracompetitive pricing in the generic segment adequate to recoup its predatory losses: first, if generic output or price information indicates that oligopolistic price coordination in fact produced supracompetitive prices in the generic segment; or second, if evidence about the market and Brown & Williamson's conduct indicate that the alleged scheme was likely to have brought about tacit coordination and oligopoly pricing in the generic segment, even if it did not actually do so.

1

[\*\*LEdHN\[1D\]\*\*](#)<sup>1</sup> [1D][\*\*LEdHN\[11\]\*\*](#)<sup>1</sup> [11]In this case, the price and output data [\*\*\*\*48] do not support a reasonable inference that Brown & Williamson and the other cigarette companies [\*\*\*193] elevated prices above a competitive level for generic cigarettes. Supracompetitive pricing entails a restriction in output. See [\*National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.\*, 468 U.S. 85, 104-108, 82 L. Ed. 2d 70, 104 S. Ct. 2948 \(1984\)](#); [\*Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.\*, 441 U.S. 1, 19-20, 60 L. Ed. 2d 1, 99 S. Ct. 1551 \(1979\)](#); P. Samuelson & W. Nordhaus, Economics 516 (12th ed. 1985); Sullivan, Antitrust, at 32; Bork, The Antitrust Paradox, at 178-179; 2 Areeda & Turner P403a; Easterbrook, The Limits of Antitrust, [\*63 Texas L. Rev. 1, 20, 31 \(1984\)\*](#). In the present setting, in which output expanded at a rapid rate following Brown & Williamson's alleged predation, output in the generic segment can only have been restricted in the sense that it expanded at a slower rate than it would have absent Brown & Williamson's intervention. Such a counterfactual proposition is difficult to prove in the best of circumstances; here, the record evidence does not permit a reasonable [\*\*\*\*49] inference that output would have been greater without Brown & Williamson's entry into the generic segment.

Following Brown & Williamson's entry, the rate at which generic cigarettes were capturing market share did not slow; indeed, the average rate of growth doubled. During the [\*234] four years from 1980 to 1984 in which Liggett was alone in the generic segment, the segment gained market share at an average rate of 1% of the overall market

per year, from 0.4% in 1980 to slightly more than 4% of the cigarette market in 1984. In the next five years, following the alleged predation, the generic segment expanded from 4% to more than 15% of the domestic cigarette market, or greater than 2% per year.

While this evidence tends to show that Brown & Williamson's participation in the economy segment did not restrict output, it is not dispositive. One could speculate, for example, that the rate of segment growth would have tripled, instead of doubled, without Brown & Williamson's alleged predation. But there is no concrete evidence of this. Indeed, the only industry projection in the record estimating what the segment's growth would have been without Brown & Williamson's entry supports [\*\*\*\*50] the opposite inference. In 1984, Brown & Williamson forecast in an [\*\*2594] important planning document that the economy segment would account for 10% of the total cigarette market by 1988 if it did not enter the segment. App. 133, 135. In fact, in 1988, after what Liggett alleges was a sustained and dangerous anticompetitive campaign by Brown & Williamson, the generic segment accounted for over 12% of the total market. *Id., at 354-356*. Thus the segment's output expanded more robustly than Brown & Williamson had estimated it would had Brown & Williamson never entered.

Brown & Williamson did note in 1985, a year after introducing its black and whites, that its presence within the generic segment "appears to have resulted in . . . a slowing in the segment's growth rate." *Id., at 257*. But this statement was made in early 1985, when Liggett itself contends the below-cost pricing was still in effect and before any anticompetitive contraction in output is alleged to have occurred.

[\*235] Whatever it may [\*\*\*194] mean,<sup>2</sup> this statement has little value in evaluating the competitive implications of Brown & Williamson's later conduct, which was alleged to provide [\*\*\*51] the basis for recouping predatory losses.

LEdHN[12] [12]In arguing that Brown & Williamson was able to exert market power and raise generic prices above a competitive level in the generic category through tacit price coordination with the other cigarette manufacturers, Liggett places its principal reliance on direct evidence of price behavior. This evidence demonstrates that the list prices on all cigarettes, generic and branded alike, rose to a significant degree during the late 1980's. *Id., at 325*. From 1986 to 1989, list prices on both generic and branded cigarettes increased twice a year by similar amounts. Liggett's economic expert testified that these price increases outpaced increases in costs, taxes, [\*\*\*\*52] and promotional expenditures. *Id., at 525*. The list prices of generics, moreover, rose at a faster rate than the prices of branded cigarettes, thus narrowing the list price differential between branded and generic products. *Id., at 325*. Liggett argues that this would permit a reasonable jury to find that Brown & Williamson succeeded in bringing about oligopolistic price coordination and supracompetitive prices in the generic category sufficient to slow its growth, thereby preserving supracompetitive branded profits and recouping its predatory losses.

A reasonable jury, however, could not have drawn the inferences Liggett proposes. All of Liggett's data are based upon the list prices of various categories of cigarettes. Yet the jury had before it undisputed evidence that during the period in question, list prices were not the actual prices paid by consumers. 100 Tr. 227-229. As the market became unsettled [\*236] in the mid-1980's, the cigarette companies invested substantial sums in promotional schemes, including coupons, stickers, and giveaways, that reduced the actual cost of cigarettes to consumers below list prices. 33 Tr. 206-209, 51 Tr. 130. This promotional activity [\*\*\*53] accelerated as the decade progressed. App. 509, 672. Many wholesalers also passed portions of their volume rebates on to the consumer, which had the effect of further undermining the significance of the retail list prices. *Id., at 672, 687-692, 761-763*. Especially in an oligopoly setting, in which price competition is most likely to take place through less observable and less regulable means than list prices, it would be unreasonable to draw conclusions about the existence of tacit coordination or supracompetitive pricing from data that reflect only list prices.

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<sup>2</sup>This statement could well have referred to the rate at which the segment was growing relative to prior years' generic volume; this "internal" rate of growth would inevitably slow as the base volume against which it was measured grew.

Even on its own terms, the list price data relied upon by Liggett to demonstrate a narrowing of the price differential between generic and full-priced branded cigarettes could not support the conclusion that supracompetitive pricing had been introduced into the generic segment. Liggett's gap data ignore the effect of "subgeneric" cigarettes, which [\*\*2595] were priced at discounts of 50% or more from the list prices of normal branded cigarettes. See, e.g., *id.*, [at 682-686](#). Liggett itself, while [\*\*\*195] supposedly under the sway of oligopoly power, pioneered this development in 1988 with the introduction of [\*\*\*\*54] its "Pyramid" brand. *Id.*, [at 326](#). By the time of trial, five of the six major manufacturers offered a cigarette in this category at a discount from the full list price of at least 50%. *Id.*, [at 685-686](#); 147 Tr. 107. Thus, the price difference between the highest priced branded cigarette and the lowest price cigarettes in the economy segment, instead of narrowing over the course of the period of alleged predation as Liggett would argue, grew to a substantial extent. In June 1984, before Brown & Williamson entered the generic segment, a consumer could obtain a carton of black and white generic cigarettes from Liggett at a 38% discount from the list price of a leading brand; after the conduct Liggett [\*237] complains of, consumers could obtain a branded generic from Liggett for 52% off the list price of a leading brand. See App. 325-326, 685.

It may be that a reasonable jury could conclude that the cumulative discounts attributable to subgenerics and the various consumer promotions did not cancel out the full effect of the increases in list prices, see [id. at 508-509](#), and that actual prices to the consumer did indeed rise, but rising prices do not themselves permit [\*\*\*\*55] an inference of a collusive market dynamic. Even in a concentrated market, the occurrence of a price increase does not in itself permit a rational inference of conscious parallelism or supracompetitive pricing. Where, as here, output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand. Under these conditions, a jury may not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level. Cf. [Monsanto, 465 U.S. at 763](#).

[LEdHN\[13\]](#) [13]Quite apart from the absence of any evidence of that sort, an inference of supracompetitive pricing would be particularly anomalous in this case, as the very party alleged to have been coerced into pricing through oligopolistic coordination denied that such coordination existed: Liggett's own officers and directors consistently denied that they or other firms in the industry priced their cigarettes through tacit collusion or reaped supracompetitive profits. App. 394-399, 623-631; 11 Tr. 170-174, 64 Tr. 51-56. Liggett [\*\*\*\*56] seeks to explain away this testimony by arguing that its officers and directors are businesspeople who do not ascribe the same meaning to words like "competitive" and "collusion" that an economist would. This explanation is entitled to little, if any, weight. As the District Court found:

"This argument was considered at the summary judgment stage since these executives gave basically the same testimony at their depositions. The court allowed [\*238] the case to go to trial in part because the Liggett executives were not economists and in part because of affidavits from the Liggett executives stating that they were confused by the questions asked by B[rown] & Williamson lawyers and did not mean to contradict the testimony of [their economic expert] Burnett. However, at trial, despite having consulted extensively with Burnett and having had adequate time to familiarize themselves with concepts [\*\*\*196] such as tacit collusion, oligopoly, and monopoly profits, these Liggett executives again contradicted Burnett's theory." [748 F. Supp. at 356](#).

2

[LEdHN\[1E\]](#) [1E]Not only does the evidence [\*\*\*\*57] fail to show actual supracompetitive pricing in the generic segment, it also does not demonstrate its likelihood. At the time Brown & Williamson entered the generic segment, the cigarette industry as a whole faced declining demand and possessed substantial excess capacity. App. 82-84. These circumstances tend to [\*\*2596] break down patterns of oligopoly pricing and produce price competition. See Scherer & Ross 294, 315; 2 Areeda & Turner P404b2, at 275-276; 6 P. Areeda, *Antitrust Law* P1430e, p. 181 (1986). The only means by which Brown & Williamson is alleged to have established oligopoly pricing in the face of these unusual competitive pressures is through tacit price coordination with the other cigarette firms.

Yet the situation facing the cigarette companies in the 1980's would have made such tacit coordination unmanageable. Tacit coordination is facilitated by a stable market environment, fungible products, and a small number of variables upon which the firms seeking to coordinate their pricing may focus. See generally Scherer & Ross 215-315; 6 P. Areeda, *supra*, PP1428-1430. Uncertainty is an oligopoly's greatest enemy. By 1984, however, the cigarette market was in an [\*\*\*\*58] obvious state of flux. The introduction of generic cigarettes in 1980 represented the first serious price competition [\*239] in the cigarette market since the 1930's. See Scherer & Ross 250-251; App. 128. This development was bound to unsettle previous expectations and patterns of market conduct and to reduce the cigarette firms' ability to predict each other's behavior.

The larger number of product types and pricing variables also decreased the probability of effective parallel pricing. When Brown & Williamson entered the economy segment in 1984, the segment included Value-25s, black and whites, and branded generics. With respect to each product, the net price in the market was determined not only by list prices, but also by a wide variety of discounts and promotions to consumers and by rebates to wholesalers. In order to coordinate in an effective manner and eliminate price competition, the cigarette companies would have been required, without communicating, to establish parallel practices with respect to each of these variables, many of which, like consumer stickers or coupons, were difficult to monitor. Liggett has not even alleged parallel behavior with respect to these [\*\*\*\*59] other variables, and the inherent limitations of tacit collusion suggest that such multivariable coordination is improbable. See R. Dorfman, *The Price System* 99-100, and n. 10 (1964); Scherer & Ross 279.

In addition, R. J. Reynolds had incentives that, in some respects, ran counter to those of the other cigarette companies. It is implausible that without a shared interest in retarding the growth of the economy segment, Brown & Williamson and its fellow oligopolists could have engaged in parallel pricing and raised generic prices above a competitive level. "Coordination will not be possible when any significant firm [\*\*\*197] chooses, for any reason, to 'go it alone.'" 2 Areeda & Turner P404b2, at 276. It is undisputed -- indeed it was conceded by Liggett's expert -- that R. J. Reynolds acted without regard to the supposed benefits of oligopolistic coordination when it repriced Doral at generic levels in the spring of 1984 and that the natural and probable consequence [\*240] of its entry into the generic segment was procompetitive. 55 Tr. 15-16; 51 Tr. 128. Indeed, Reynolds' apparent objective in entering the segment was to capture a significant amount of volume in order to [\*\*\*\*60] regain its number one sales position in the cigarette industry from Philip Morris. App. 75, 130, 209-211. There is no evidence that R. J. Reynolds accomplished this goal during the period relevant to this case, or that its commitment to achieving that goal changed. Indeed, R. J. Reynolds refused to follow Brown & Williamson's attempt to raise generic prices in June 1985. The jury thus had before it undisputed evidence that contradicts the suggestion that the major cigarette companies shared a goal of limiting the growth of the economy segment; one of the industry's two major players concededly entered the segment to expand volume and compete.

Even if all the cigarette companies were willing to participate in a scheme to restrain the growth of the generic segment, they [\*2597] would not have been able to coordinate their actions and raise prices above a competitive level unless they understood that Brown & Williamson's entry into the segment was not a genuine effort to compete with Liggett. If even one other firm misinterpreted Brown & Williamson's entry as an effort to expand share, a chain reaction of competitive responses would almost certainly have resulted, and oligopoly [\*\*\*61] discipline would have broken down, perhaps irretrievably. "Once the trust among rivals breaks down, it is as hard to put back together again as was Humpty-Dumpty, and non-collusive behavior is likely to take over." Samuelson & Nordhaus, *Economics*, at 534.

LEdHN[14] [14]Liggett argues that the means by which Brown & Williamson signaled its anticompetitive intent to its rivals was through its pricing structure. According to Liggett, maintaining existing list prices while offering substantial rebates to wholesalers was a signal to the other cigarette firms that Brown & Williamson did not intend to attract additional smokers to the generic segment by its entry. But a reasonable [\*241] jury could not conclude that this pricing structure eliminated or rendered insignificant the risk that the other firms might misunderstand Brown & Williamson's entry as a competitive move. The likelihood that Brown & Williamson's rivals would have regarded its pricing structure as an important signal is low, given that Liggett itself, the purported target of the predation, was already using similar rebates, as was R. J. Reynolds in [\*\*\*\*62] marketing its Doral branded

generic. A Reynolds executive responsible for Doral testified that given its and Liggett's use of wholesaler rebates, Brown & Williamson could not have competed effectively without them. App. 756. And despite extensive discovery of the corporate records of R. J. Reynolds and Philip Morris, no documents appeared that indicated any awareness of Brown & Williamson's supposed signal by its principal rivals. Without effective signaling, it is [\*\*\*198] difficult to see how the alleged predation could have had a reasonable chance of success through oligopoly pricing.

LEdHN[15] [15] Finally, although some of Brown & Williamson's corporate planning documents speak of a desire to slow the growth of the segment, no objective evidence of its conduct permits a reasonable inference that it had any real prospect of doing so through anticompetitive means. It is undisputed that when Brown & Williamson introduced its generic cigarettes, it offered them to a thousand wholesalers who had never before purchased generic cigarettes. Record, Plaintiff's Exh. No. 4079; 87 Tr. 191; 88 Tr. 143-147. The inevitable [\*\*\*\*63] effect of this marketing effort was to expand the segment, as the new wholesalers recruited retail outlets to carry generic cigarettes. Even with respect to wholesalers already carrying generics, Brown & Williamson's unprecedented volume rebates had a similar expansionary effect. Unlike many branded cigarettes, generics came with no sales guarantee to the wholesaler; any unsold stock represented pure loss to the wholesaler. By providing substantial incentives for wholesalers to place large orders, Brown & Williamson created [\*242] strong pressure for them to sell more generic cigarettes. In addition, as we have already observed, see supra, at 236, many wholesalers passed portions of the rebates about which Liggett complains on to consumers, thus dropping the retail price of generics and further stimulating demand. Brown & Williamson provided a further, direct stimulus, through some \$ 10 million it spent during the period of alleged predation placing discount stickers on its generic cartons to reduce prices to the ultimate consumer. 70 Tr. 246. In light of these uncontested facts about Brown & Williamson's conduct, it is not reasonable to conclude that Brown & Williamson threatened [\*\*\*64] in a serious way to restrict output, raise prices above a competitive level, and artificially slow the growth of the economy segment of the national cigarette market.

LEdHN[16] [16] LEdHN[17] [17] To be sure, Liggett's economic expert explained Liggett's theory of predatory [\*\*2598] price discrimination and testified that he believed it created a reasonable possibility that Brown & Williamson could injure competition in the United States cigarette market as a whole. App. 600-614. But this does not alter our analysis. HN16 [18] When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict. Cf. J. Truett Payne Co., Inc., 451 U.S. at 564-565 (referring to expert economic testimony not based on "documentary evidence as to the effect of the discrimination on retail prices" as "weak" at best). [\*\*\*65] Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them. As we observed in *Matsushita*, "expert opinion evidence . . . has little probative value in comparison with the economic factors" that may dictate a particular conclusion. 475 U.S. at 594, n. 19. Here, Liggett's expert based his opinion that Brown & Williamson had a reasonable prospect of recouping its predatory losses on three factors: Brown & Williamson's [\*\*\*199] black and white pricing structure, corporate [\*243] documents showing an intent to shrink the price differential between generic and branded cigarettes, and evidence of below-cost pricing. App. 601-602. Because, as we have explained, this evidence is insufficient as a matter of law to support a finding of primary-line injury under the Robinson-Patman Act, the expert testimony cannot sustain the jury's verdict.

#### IV

LEdHN[1F] [1F] LEdHN[18] [18] We understand that the chain of reasoning by which we have concluded that Brown & Williamson is entitled to judgment as a [\*\*\*66] matter of law is demanding. But a reasonable jury is presumed to know and understand the law, the facts of the case, and the realities of the market. We hold that the evidence cannot support a finding that Brown & Williamson's alleged scheme was likely to result in oligopolistic price coordination and sustained supracompetitive pricing in the generic segment of the national cigarette market. Without this, Brown & Williamson had no reasonable prospect of recouping its predatory losses and could not inflict the injury to competition the antitrust laws prohibit. The judgment of the Court of Appeals is

*Affirmed.*

**Dissent by:** STEVENS

## Dissent

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JUSTICE STEVENS, with whom JUSTICE WHITE and JUSTICE BLACKMUN join, dissenting.

For a period of 18 months in 1984 and 1985, respondent Brown & Williamson Tobacco Corporation (B&W) waged a price war against petitioner, known then as Liggett & Myers (Liggett). Liggett filed suit claiming that B&W's pricing practices violated the Robinson-Patman Act.<sup>1</sup> After a 115-day [\*244] trial, the jury agreed, and awarded Liggett substantial damages. The Court of Appeals, however, found that Liggett could not succeed on its claim, because B&W, as an independent [\*\*\*\*67] actor controlling only 12% of the national cigarette market, could not injure competition. *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*, 964 F.2d 335, 340-342 (CA4 1992).

Today, the Court properly rejects that holding. See *ante*, at 229-230. Instead of remanding the case to the Court of Appeals to resolve the other issues raised by the parties, however, the Court goes on to review portions of the [\*\*\*\*68] voluminous trial record, and comes to the conclusion that the evidence does not support the jury's finding that B&W's price discrimination "had a reasonable [\*\*2599] possibility of injuring competition."<sup>2</sup> [\*\*\*200] In my opinion the evidence is plainly sufficient to support that finding.

[\*\*\*\*69] [\*245] I

The fact that a price war may not have accomplished its purpose as quickly or as completely as originally intended does not immunize conduct that was illegal when it occurred. A proper understanding of this case therefore requires a brief description of the situation before the war began in July 1984; the events that occurred during the period between July 1984 and the end of 1985; and, finally, the facts bearing on the predictability of competitive harm during or at the end of that period.<sup>3</sup>

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<sup>1</sup> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ." [15 U.S. C. § 13\(a\)](#).

<sup>2</sup> The jury gave an affirmative answer to the following special issue:

"1. Did Brown & Williamson engage in price discrimination that had a reasonable possibility of injuring competition in the cigarette market as a whole in the United States?" App. 27.

The jury made its finding after being instructed that "injury to competition" means "the injury to consumer welfare which results when a competitor is able to raise and to maintain prices in a market or well-defined submarket above competitive levels. In order to injure competition in the cigarette market as a whole, Brown & Williamson must be able to create a real possibility of both driving out rivals by loss-creating price cutting and then holding on to that advantage to recoup losses by raising and maintaining prices at higher than competitive levels.

"You must remember that the Robinson-Patman Act was designed to protect competition rather than just competitors and, therefore, injury to competition does not mean injury to a competitor. Liggett & Myers can not satisfy this element simply by showing that they were injured by Brown & Williamson's conduct. To satisfy this element, Liggett & Myers must show, by a preponderance of the evidence, that Brown & Williamson's conduct had a reasonable possibility of injuring competition in the cigarette market and not just a reasonable possibility of injuring a competitor in the cigarette market." [Id. at 829-830](#).

<sup>3</sup> As the majority notes, the procedural posture of this case requires that we view the evidence in the light most favorable to Liggett. *Ante*, at 213. On review of a judgment notwithstanding the verdict, the party against whom the judgment is entered "must be given the benefit of every legitimate inference that can be drawn from the evidence." See C. Wright & A. Miller, *Federal Practice and Procedure* § 2528, pp. 563-564 (1971).

### *Background*

B&W is the third largest firm in a highly concentrated [\*\*\*\*70] industry. *Ante*, at 213. For decades, the industry has been marked by the same kind of supracompetitive pricing that is characteristic of the textbook monopoly.<sup>4</sup> Without the necessity of actual agreement among the six major manufacturers, "prices for cigarettes increased in lockstep, twice a year, for a number of years, irrespective of the rate of inflation, changes in the costs of production, or shifts in consumer demand." *Ibid.* Notwithstanding the controversy over the health effects of smoking and the increase in the federal excise tax, profit margins improved "handsomely" during the period between 1972 and 1983.<sup>5</sup>

[\*\*\*\*71] [\*246] [\*\*\*201] The early 1980's brought two new developments to the cigarette market. First, in 1980, when its share of the market had declined to 2.3%, Liggett introduced a new line of generic cigarettes in plain black and white [\*\*2600] packages, offered at an effective price of approximately 30% less than branded cigarettes. *Ante*, at 214. A B&W memorandum described this action as "the first time that a [cigarette] manufacturer has used pricing as a strategic marketing weapon in the U.S. since the depression era." App. 128. This novel tactic proved successful; by 1984, Liggett's black and whites represented about 4% of the total market and generated substantial profits. The next development came in 1984, when R.J. Reynolds (RJR), the second largest company in the industry, "repositioned" one of its established brands, Doral, by selling it at discount prices comparable to Liggett's black and whites. App. 117-118; *ante*, at 215.

B&W executives prepared a number of internal memoranda planning responses to these two market developments. See App. 120, 127, 157, 166. With respect to RJR, B&W decided to "follo[w] precisely the pathway" of that company, *id. I\*\*\*\*721 , at 121*, reasoning that "introduction of a branded generic by B&W now appears to be feasible as RJR has the clout and sales force coverage to maintain the price on branded generics," *id., at 145*. Accordingly, B&W planned to introduce a new "branded generic" of its own, known as Hallmark, to be sold at the same prices as *RJR's Doral*. *Id., at 124, 142-144*.

[\*247] B&W took a more aggressive approach to Liggett's black and whites. It decided to launch its own line of black and white cigarettes with the "same style array" and list price as Liggett's, but with "superior discounts/allowances." *Id., at 124*. B&W estimated that its own black and whites would generate a "trading profit" of \$ 5.1 million for the second half of 1984 and \$ 43.6 million for 1985. *Id., at 125*. At the same time, however, B&W, anticipating "competitive counterattacks," was "prepared to redistribute this entire amount in the form of additional trade allowances." *Ibid.* B&W's competitive stance was confined to Liggett; the memorandum outlining B&W's plans made no reference to the possibility of countermoves by RJR, or to the use of B&W's trading profits to increase allowances on any product other [\*\*\*\*73] than black and whites.

This "dual approach" was designed to "provide B&W more influence to manage up the prices of branded generics to improve profitability," *id., at 123*, and also the opportunity to participate in the economy market, with a view toward "managing down generic volume," *id., at 109*. Notwithstanding its ultimate aim to "limit generic segment growth," *id., at 113*, B&W estimated an aggregate potential trading profit on black and whites of \$ 342 million for

<sup>4</sup> When the Court states that "substantial evidence suggests that in recent decades, the industry reaped the benefits of prices above a competitive level," *ante*, at 213, I assume it accepts the proposition that a reasonable jury could find abnormally high prices characteristic of this industry.

<sup>5</sup> An internal B&W memorandum, dated May 15, 1984, states in part:

"Manufacturer's price increases generally were below the rate of inflation but margins improved handsomely due to favorable leaf prices and cost reductions associated with automation. For example, Brown & Williamson's variable margin increased from \$ 2.91/M in 1972 to \$ 8.78/M in 1981, an increase of over 200%. In 1982, the industry became much more aggressive on the pricing front, fueled by a 100% increase in the Federal Excise Tax. Brown & Williamson's variable margin increased from \$ 10.78/M in 1982 and [sic] to \$ 12.61/M in 1983."

"The impact of these pricing activities on the smoking public was dramatic. The weighted average retail price of a pack of cigarettes increased 56% between 1980 and 1983 (from \$.63 to \$.98)." App. 127.

1984 to 1988, [\*id.\*, at 146](#). Though B&W recognized that it might be required to use "some or all of this potential trading profit" to maintain its market position, it also believed that it would recoup its losses as the segment became "more profitable, [\\*\\*\\*202](#) particularly as it approaches maturity." *Ibid.*

B&W began to implement its plan even before it made its first shipment of black and whites in July 1984, with a series of price announcements in June of that year. When B&W announced its first volume discount schedule for distributors, Liggett responded by increasing its own discounts. Though Liggett's discounts remained lower than B&W's, B&W responded in turn by increasing its rebates still [\\*\\*\\*\\*74](#) further. After four or five moves and countermoves, the dust settled [\\*248](#) with B&W's net prices to distributors lower than Liggett's.<sup>6</sup> B&W's deep discounts not only forfeited all of its \$ 48.7 million in projected trading profits for the next 18 months, but actually resulted in sales below B&W's average variable cost. [\*Id.\*, at 338-339](#).

[\\*\\*2601](#) Assessing the pre-July 1984 evidence tending to prove that B&W was motivated by anticompetitive intent, the District Court observed that the documentary evidence was "more voluminous and detailed than any other reported case. This evidence not only indicates [\\*\\*\\*\\*75](#) B&W wanted to injure Liggett, it also details an extensive plan to slow the growth of the generic cigarette segment." [Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 748 F. Supp. 344, 354 \(MDNC 1990\)](#).

#### *The 18-Month Price War*

The volume rebates offered by B&W to its wholesalers during the 18-month period from July 1984 to December 1985 unquestionably constituted price discrimination covered by [§ 2\(a\)](#) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, [15 U.S.C. § 13\(a\)](#).<sup>7</sup> [\\*\\*\\*\\*76](#) Nor were the discounts justified by any statutory or affirmative defense: They were not cost justified,<sup>8</sup> App. 525, were [\\*249](#) not good-faith efforts to meet the equally low price of a competitor,<sup>9</sup> and were not mere introductory or promotional discounts, 91 Tr. 42.

The rebate program was intended to harm Liggett and in fact caused it [\\*\\*\\*203](#) serious injury.<sup>10</sup> The jury found that Liggett had suffered actual damages of \$ 49.6 million, App. 28, an amount [\\*\\*\\*\\*77](#) close to, but slightly larger than, the \$ 48.7 million trading profit B&W had indicated it would forgo in order to discipline Liggett. See [supra, at](#)

<sup>6</sup> On June 4, 1984, B&W announced a maximum rebate of \$ 0.30 per carton for purchases of over 8,000 cases per quarter; a week later, Liggett announced a rebate of \$ 0.20 on comparable volumes. On June 21, B&W increased its rebate to \$ 0.50, and a day later, Liggett went to \$ 0.43. After three more increases, B&W settled at \$ 0.80 per carton, while Liggett remained at \$ 0.73. See App. 327, 420-421.

<sup>7</sup> That quantity discounts are covered by the Act, and prohibited when they have the requisite effect on competition, has been firmly established since our decision in [FTC v. Morton Salt Co., 334 U.S. 37, 42-44, 92 L. Ed. 1196, 68 S. Ct. 822 \(1948\)](#).

<sup>8</sup> "Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." [§ 13\(a\)](#).

<sup>9</sup> "Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." [§ 13\(b\)](#).

The jury gave a negative answer to the following special issue:

"3. Did Brown & Williamson engage in price discrimination in good faith with the intention to meet, but not beat, the equally low net prices of Liggett Group, Inc.?" App. 27-28.

<sup>10</sup> By offering its largest discounts to Liggett's 14 largest customers, App. 168-169, 174, B&W not only put its "money where the volume is," [id., at 402](#), but also applied maximum pressure to Liggett at a lesser cost to itself than would have resulted from a nondiscriminatory price cut.

247. To inflict this injury, B&W sustained a substantial loss. During the full 18-month period, B&W's revenues ran consistently below its total variable costs, with an average deficiency of approximately \$ 0.30 per carton and a total loss on B&W black and whites of almost \$ 15 million. App. 338-339. That B&W executives were willing to accept losses of this magnitude during the entire 18 months is powerful evidence of their belief that prices ultimately could be "managed up" to a level that would allow B&W to recoup its investment.

#### *The Aftermath*

At the end of 1985, [\*\*\*\*78] the list price of branded cigarettes was \$ 33.15 per carton, and the list price of black and whites, \$ 19.75 per carton. App. 325. Over the next four years, the list price on both branded and black and white cigarettes [\*250] increased twice a year, by identical amounts. The June 1989 increases brought the price of branded cigarettes to \$ 46.15 per carton, and the price of black and whites to \$ 33.75 -- an amount even higher than the price for branded cigarettes when the war ended in December 1985. *Ibid.*<sup>11</sup> Because the rate of increase was higher on [\*\*2602] black and whites than on brandeds, the price differential between the two types of cigarettes narrowed, *ibid.*, from roughly 40% in 1985 to 27% in 1989. See [964 F.2d at 338](#).

[\*\*\*\*79] The expert economist employed by Liggett testified that the post-1985 price increases were unwarranted by increases in manufacturing or other costs, taxes, or promotional expenditures. App. 525. To be sure, some portion of the volume rebates granted distributors was passed on to consumers in the form of promotional activity, so that consumers did not feel the full brunt of the price increases. Nevertheless, the record amply supports the conclusion that the post-1985 price increases in list prices produced higher consumer prices, as well as higher profits for the manufacturers.<sup>12</sup>

[\*\*\*\*80] The legal question presented by [\*\*\*204] this evidence is whether the facts as they existed during and at the close of the 18-month period, and all reasonable inferences to be drawn from [\*251] those facts, see n. 3, *supra*, justified the finding by the jury that B&W's discriminatory pricing campaign "had a reasonable possibility of injuring competition," see [supra, at 244](#), and n. 2.

II

The Sherman Act, 26 Stat. 209, enacted in 1890, the Clayton Act, 38 Stat. 730, enacted in 1914, and the Robinson-Patman Act, which amended the Clayton Act in 1936, all serve the purpose of protecting competition. Because they have a common goal, the statutes are similar in many respects. All three prohibit the predatory practice of deliberately selling below cost to discipline a competitor, either to drive the competitor out of business or to raise prices to a level that will enable the predator to recover its losses and, in the long run, earn additional profits. Sales below cost and anticompetitive intent are elements of the violation of all three statutes. Neither of those elements, however, is at issue in this case. See *ante*, at 231 (record contains sufficient evidence of anticompetitive [\*\*\*\*81] intent and below-cost pricing).

<sup>11</sup> It is also true that these same years, other major manufacturers entered the generic market and expanded their generic sales. *Ante*, at 217. Their entry is entirely consistent with the possibility that lockstep increases in the price of generics brought them to a level that was supra-competitive, through lower than that charged on branded cigarettes.

<sup>12</sup> "Q Does this mean that the price increases, which you testified are happening twice a year, are used up in these consumer promotions?

"A Not by any stretch of the imagination. Although there has been an increase in the use of this type of promotional activity over the last four or five years, the increase in that promotional activity has been far outstripped by the list price increases. The prices go up by a lot; the promotional activity, indeed, does go up. But the promotional activity has not gone up by anywhere near the magnitude of the list price increases. Further, those price increases are not warranted by increasing costs, since the manufacturing costs of making cigarettes have remained roughly constant over the last five years." App. 509.

509 U.S. 209, \*251; 113 S. Ct. 2578, \*\*2602; 125 L. Ed. 2d 168, \*\*\*204; 1993 U.S. LEXIS 4245, \*\*\*\*81

The statutes do differ significantly with respect to one element of the violation, the competitive consequences of predatory conduct. Even here, however, the three statutes have one thing in common: Not one of them requires proof that a predatory plan has actually succeeded in accomplishing its objective. [Section 1](#) of the Sherman Act requires proof of a conspiracy. It is the joint plan to restrain trade, however, and not its success, that is prohibited by [§ 1](#). [Nash v. United States, 229 U.S. 373, 378, 57 L. Ed. 1232, 33 S. Ct. 780 \(1913\)](#). [Section 2](#) of the Sherman Act applies to independent conduct, and may be violated when there is a "dangerous probability" that an attempt to achieve monopoly power will succeed. [Swift & Co. v. United States, 196 U.S. 375, 396, 49 L. Ed. 518, 25 S. Ct. 276 \(1905\)](#). The Clayton Act goes beyond the "dangerous probability" standard to cover price discrimination "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." [§ 2](#), 38 Stat. 730.

[\*252] The element of competitive injury as defined [\*\*\*\*82] in the Robinson-Patman Act is broader still.<sup>13</sup> See S. Rep. No. 1502, 74th Cong., 2d Sess., 4 (1936) (Act substantially [\*\*2603] broadens similar clause of Clayton Act).<sup>14</sup> The Robinson-Patman Act was designed to [\*\*\*205] reach discriminations "in their incipiency, before the harm to competition is effected. It is enough that they 'may' have the prescribed effect." [Corn Products Refining Co. v. FTC, 324 U.S. 726, 738, 89 L. Ed. 1320, 65 S. Ct. 961 \(1945\)](#) (internal quotation marks omitted). Or, as the Report of the Senate Judiciary Committee on the proposed Act explained, "to catch the weed in the seed will keep it from coming to flower." S. Rep. No. 1502, at 4.

[\*\*\*\*83] Accordingly, our leading case concerning discriminatory volume rebates described the scope of the Act as follows:

[\*253] "There are specific findings that such injuries had resulted from respondent's discounts, although the statute does not require the Commission to find that injury has actually resulted. The statute requires no more than that the effect of the prohibited price discriminations 'may be substantially to lessen competition . . . or to injure, destroy, or prevent competition.' After a careful consideration of this provision of the Robinson-Patman Act, we have said that 'the statute does not require that the discrimination must in fact have harmed competition, but only that there is a reasonable possibility that they "may" have such an effect.' *Corn Products Refining Co. v. Federal Trade Comm'n, 324 U.S. 726, 742, 65 S. Ct. 961, 89 L. Ed. 1320.*" [FTC v. Morton Salt Co., 334 U.S. 37, 46, 68 S. Ct. 822, 92 L. Ed. 1196 \(1948\)](#).

See also [Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 435, 75 L. Ed. 2d 174, 103 S. Ct. 1282 \(1983\)](#) ("In keeping with the Robinson-Patman [\*\*\*\*84] Act's prophylactic purpose, [§ 2\(a\)](#) does not require that the discriminations must in fact have harmed competition" (internal quotation marks omitted)).

In this case, then, Liggett need not show any actual harm to competition, but only the reasonable possibility that such harm would flow from B&W's conduct. The evidence presented supports the conclusion that B&W's price war

<sup>13</sup> See text of statute, n. 1, *supra*.

<sup>14</sup> One of the purposes of broadening the Clayton Act's competitive injury language in the Robinson-Patman Act was to provide more effective protection against predatory price cutting. As the Attorney General's National Committee to Study the Antitrust Laws explained in its 1955 report:

"In some circumstances, to be sure, injury to even a single competitor should bring the Act into play. Predatory price cutting designed to eliminate a smaller business rival, for example, is a practice which inevitably frustrates competition by excluding competitors from the market or deliberately impairing their competitive strength. The invalidation of such deliberate price slashes for the purpose of destroying even a single competitor, moreover, accords distinct recognition to the narrower tests of 'injury' added to the price discrimination provisions of the Clayton Act through the 1936 Robinson-Patman amendments. The discrimination provisions in the original Clayton Act were feared by the legislators as inadequate to check the victimization of individual businessmen by predatory price cuts that nevertheless created no *general* impairment of competitive conditions in a wider market. To reach such destructive price cuts endangering the survival of smaller rivals of a powerful seller was an express objective of the liberalizing amendments in the 'injury' clause of the Robinson-Patman Act." Report of the Attorney General's National Committee to Study the Antitrust Laws 165-166 (1955) (footnotes omitted).

was intended to discipline Liggett for its unprecedeted use of price competition in an industry that had enjoyed handsome supracompetitive profits for about half a century. The evidence also demonstrates that B&W executives were confident enough in the feasibility of their plan that they were willing to invest millions of company dollars in its outcome. And all of this, of course, must be viewed against a back-ground of supracompetitive, parallel pricing, in which "prices for cigarettes increased in lockstep, twice a year . . . irrespective of the rate of inflation, changes in the cost of production, or shifts in consumer demand," *ante*, at 213, bringing with them dramatic increases in profit margins, see n. 5, *supra*. In this context, it is surely fair to infer that B&W's disciplinary [\*254] program [\*\*\*\*85] had a reasonable prospect of persuading Liggett to forgo its maverick price [\*\*\*206] reductions and return to parallel [\*\*2604] pricing policies, and thus to restore the same kind of supracompetitive pricing that had characterized the industry in the past. When the facts are viewed in the light most favorable to Liggett, I think it clear that there is sufficient evidence in the record that the "reasonable possibility" of competitive injury required by the statute actually existed.

### III

After 115 days of trial, during which it considered 2,884 exhibits, 85 deposition excerpts, and testimony from 23 live witnesses, the jury deliberated for nine days and then returned a verdict finding that B&W engaged in price discrimination with a "reasonable possibility of injuring competition." 748 F. Supp. at 348, n. 4; n. 2, *supra*. The Court's contrary conclusion rests on a hodgepodge of legal, factual, and economic propositions that are insufficient, alone or together, to overcome the jury's assessment of the evidence.

First, as a matter of law, the Court reminds us that the Robinson-Patman Act is concerned with consumer welfare and competition, as opposed to protecting [\*\*\*\*86] individual competitors from harm; "the antitrust laws were passed for the protection of competition, not competitors. " See *ante*, at 224 (internal quotations marks and emphasis omitted). For that reason, predatory price cutting is not unlawful unless the predator has a reasonable prospect of recouping his investment from supracompetitive profits. *Ibid.* The jury, of course, was so instructed, see n. 2, *supra*, and no one questions that proposition here.

As a matter of fact, the Court emphasizes the growth in the generic segment following B&W's entry. As the Court notes, generics' expansion to over 12% of the total market by 1988 exceeds B&W's own forecast that the segment would grow to only about 10%, assuming no entry by B&W. *Ante*, at 234. What these figures do not do, however, is answer the [\*255] relevant question: whether the prices of generic cigarettes during the late 1980's were competitive or supracompetitive.

On this point, there is ample, uncontradicted evidence that the list prices on generic cigarettes, as well as the prices on branded cigarettes, rose regularly and significantly during the late 1980's, in a fashion remarkably similar to the price [\*\*\*\*87] change patterns that characterized the industry in the 1970's when supracompetitive, oligopolistic pricing admittedly prevailed. See supra, at 245; *ante*, at 213. Given its knowledge of the industry's history of parallel pricing, I think the jury plainly was entitled to draw an inference that these increased prices were supracompetitive.

The Court responds to this evidence dismissively, suggesting that list prices have no bearing on the question because promotional activities of the cigarette manufacturers may have offset such price increases. *Ante*, at 235-236. That response is insufficient for three reasons. First, the promotions to which the majority refers related primarily to branded cigarettes; accordingly, while they narrowed the differential between branded prices and black and white prices, they did not reduce the consumer price of [\*\*\*207] black and whites. See 33 Tr. 208-210. Second, the Court's speculation is inconsistent with record evidence that the semiannual list price increases were not offset by consumer promotions. See n. 12, *supra*. See also *ante*, at 218 ("at least some portion of the list price increase was reflected in a higher net price [\*\*\*\*88] to the consumer"). Finally, to the extent there is a dispute regarding the effect of promotional activities on consumer prices for generics, the jury presumably resolved that

dispute in Liggett's favor, and the Court's contrary speculation is an insufficient basis for setting aside that verdict.  
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[\*\*\*\*89] [\*256] [\*\*2605] As a matter of economics, the Court reminds us that price cutting is generally procompetitive, and hence a "boon to consumers." *Ante*, at 224. This is true, however, only so long as reduced prices do not fall below cost, as the cases cited by the majority make clear.<sup>16</sup> [\*\*\*\*90] When a predator deliberately engages in below-cost pricing targeted at a particular competitor over a sustained period of time, then price cutting raises a credible inference that harm to competition [\*257] is likely to ensue.<sup>17</sup> None of our cases disputes that proposition.

[\*\*\*\*91] Also as a matter of economics, the [\*\*\*208] Court insists that a predatory pricing program in an oligopoly is unlikely to succeed absent actual conspiracy. Though it has rejected a somewhat stronger version of this proposition as a rule of decision, see *ante*, at 229-230, the Court comes back to the same economic theory, relying on the supposition that an "anticompetitive minuet is most difficult to compose and to perform, even for a disciplined oligopoly," *ante*, at 228. See *ante*, at 238-243 (implausibility of tacit coordination among cigarette oligopolists in 1980's). I would suppose, however, that the professional performers who had danced the minuet for 40 to 50 years would be better able to predict whether their favorite partners would follow them in the future than would an outsider, who might not know the difference between Haydn and Mozart.<sup>18</sup> In any event, the jury was [\*258]

<sup>15</sup> In finding an absence of actual supracOMPETITIVE pricing, the Court also relies on the testimony of Liggett executives, who stated that industry prices were fair. Illustrative is the following exchange:

"Q I want to know -- yes or no -- sir, whether or not you say that the price you charged for branded cigarettes, which is the same price you say everybody else charged, was a fair and equitable price for that product to the American consumer.

"A It's what the industry set, and based on that it's a fair price." App. 396.

The problem with this testimony, and testimony like it, is that it relates to the period before the price war, as well as after, see *id.* at 392, when there is no real dispute but that prices were supracOMPETITIVE. ("The profits in the cigarette industry are the best of any industry I've been associated with, very much so." *Ibid.*) Some of the testimony cited by the Court, for instance, is that of an outside director who served only from 1977 or 1978 until 1980, see 64 Tr. 51-56, cited *ante*, at 237; his belief in the competitiveness of his industry must be viewed against the "substantial evidence suggesting that in recent decades, the industry reaped the benefits of prices above a competitive level" to which the majority itself refers, *ante*, at 213.

The jury was, of course, entitled to discount the probative force of testimony from executives to the effect that there was no collusion among tobacco manufacturers, App. 397-398, and that they had appeared before a congressional committee to vouch for the competitive nature of their industry, *id.* at 623-631. The jury was also free to give greater weight to the documentary evidence presented, the inferences to be drawn therefrom, and the testimony of experts who agreed with the textbook characterization of the industry. See App. 640-645; R. Tennant, *American Cigarette Industry* 342 (1950).

<sup>16</sup> In *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339-340, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990), for example, we noted that low prices benefit consumers "so long as they are above predatory levels." In *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 118, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986), we recognized that price cutting of a predatory nature is "inimical" to competition, and limited our approving comments to pricing that is "above some measure of incremental costs." *Id.* at 117-118, and n. 12 (internal quotation marks omitted).

<sup>17</sup> *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696-698, 18 L. Ed. 2d 406, 87 S. Ct. 1326, and n. 12, 386 U.S. 685, 18 L. Ed. 2d 406, 87 S. Ct. 1326 (1967). See also *Lamar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 596 (CA8 1987) (threat to competition may be shown by predatory intent, combined with injury to competitor), cert. denied, 484 U.S. 1010, 98 L. Ed. 2d 658, 108 S. Ct. 707 (1988); *Double H Plastics, Inc. v. Sonoco Products Co.*, 732 F.2d 351, 354 (CA3) (threat to competition may be shown by evidence of predatory intent, in form of below-cost pricing), cert. denied, 469 U.S. 900, 83 L. Ed. 2d 212, 105 S. Ct. 275 (1984); *D.E. Rogers Associates, Inc. v. Gardner-Denver Co.*, 718 F.2d 1431, 1439 (CA6 1983) (anticompetitive effect may be proven inferentially from anticompetitive intent), cert. denied, 467 U.S. 1242, 82 L. Ed. 2d 822, 104 S. Ct. 3513 (1984). See generally *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918) (in determining whether rule violates *antitrust law*, "knowledge of intent may help the court to interpret facts and to predict consequences").

surely entitled to **[\*\*2606]** infer that at the time of the price war itself, B&W reasonably believed that it could signal its intentions to its fellow oligopolists, see App. 61, assuring their continued cooperation.

**[\*\*\*\*92]** Perhaps the Court's most significant error is the assumption that seems to pervade much of the final sections of its opinion: that Liggett had the burden of proving either the actuality of supracompetitive pricing, or the actuality of tacit collusion. See *ante*, at 233-237 (finding absence of actual supracompetitive pricing), 238-243 (finding absence of evidence suggesting actual coordination). In my opinion, the jury was entitled to infer from the succession of price increases after 1985 -- when the prices for branded and generic cigarettes increased every six months from \$ 33.15 and \$ 19.75, respectively, to \$ 46.15 and \$ 33.75 -- that B&W's below-cost pricing actually produced supracompetitive prices, with the help of tacit collusion among the players. See *supra, at 255*. But even if that were not so clear, the jury would surely be entitled to infer that B&W's predatory plan, in which it invested millions of dollars for the purpose of achieving an admittedly anticompetitive result, carried a "reasonable possibility" of injuring competition.

Accordingly, I respectfully dissent.

## References

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[54 Am Jur 2d, Monopolies, Restraints of Trade, \[\\*\\*\\*\\*93\] and Unfair Trade Practices 105, 153-159, 188](#)

24 Federal Procedure, L Ed, Monopolies and Restraints of Trade 54:248, 54:256

12 Am Jur Proof of Facts 345, Tobacco Hazards and Legal Liability

24 Am Jur Trials 1, Defending Antitrust Lawsuits

### [15 USCS 13\(a\)](#)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 36.5, 38, 41.5

L Ed Index, Price Control or Discrimination; Restraints of Trade, Monopolies, and Unfair Trade Practices; Robinson-Patman Act; Tobacco and Tobacco Products

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Annotation References:

Robinson-Patman Act as construed by Supreme Court. [2 L Ed 2d 1737](#).

Proof of injury to competition as jurisdictional requirement under 2(a) of the Clayton Act as amended by the Robinson-Patman Act ([15 USCS 13\(a\)](#)). 47 ALR Fed 846.

Discounts permissible under Robinson-Patman Amendment to Clayton Act. **[\*\*\*\*94]** 1 ALR2d 276.

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<sup>18</sup> Judge Easterbrook has made the same point:

"Wisdom lags far behind the market

.... "Lawyers know less about the business than the people they represent .... The judge knows even less about the business than the lawyers." Easterbrook, The Limits of Antitrust, [63 Texas L. Rev. 1, 5 \(1984\)](#).